2020-04-28

Loran LP v. Cruz

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART D

----------X Index No. L&T 021642/19

Loran, L.P, Motion Seq. No. 1 & 2

Petitioner,

-against- **DECISION/ORDER**

JOSEPH CRUZ,

Respondent.

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HON. STEVEN WEISSMAN:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of motion/cross-motion and affidavits annexed . . . . . :	1 & 2
Order to Show Cause and affidavits annexed. . . . . :	
Answering affidavits. . . . . :	3
Replying affidavits . . . . . :	4
Exhibits. . . . . :	
Stipulations. . . . . :	
Other_____ :	

Petitioner was represented by: Horing, Welikson & Rosen, P.C.
Jeffrey M. Hulbert, Esq.

Respondent was represented by: Mobilization for Justice, Inc.,
Emilio Paesano, Esq.

Petitioner commenced this summary nonpayment proceeding seeking rent arrears totaling $15,552.30, at a monthly rent of $2,367.60 for a period through April 2019, for the premises Apartment 2D, located at 1505 Macombs Road, Bronx, New York, 10452. The petition indicates that for a period through January 2019, Respondent was charged a preferential rent of $1,430.00. Respondent answered by counsel alleging improper rent demand as a first affirmative defense, and improper service of the rent demand, failure to state a cause of action for failure to file a

'proper' registration statement with the DHCR as a second affirmative defense and first counterclaim, breach of the warranty of habitability as a third affirmative defense and second counterclaim, and Respondent's entitlement to the placement of a "C" violation for harassment, an Order to Correct directing Petitioner to stop harassing Respondent, and for civil penalties to be levied against Petitioner, alleging Petitioner has harassed Respondent by depriving Respondent of essential services and repeatedly refusing to correct immediately hazardous conditions. The proceeding first appeared on the court's calendar on May 13, 2019, and the proceeding was adjourned to June 25, 2019, by a two attorney stipulation, for motion practice. On June 25, 2019, the proceeding was again adjourned by stipulation for opposition and reply. On July 16, 2019, the proceeding was adjourned on the court's file for reply to August 1, 2019. On that date, argument was heard on motion sequence 1, and the parties also entered into a stipulation arranging for access to correct all outstanding violations to the subject premises. The court reserved decision on the motion, and while that decision was pending, Petitioner moved for use and occupancy. Argument was heard on October 3, 2019, on the motion for use and occupancy, and the court reserved decision on motion sequence 2.

Respondent moved for an order pursuant to CPLR 3212, 3211(a) (7), 3013, and RPAPL 711(2) and 741 granting summary judgment dismissing the petition for failure to state a cause of action, alleging the lease upon which this nonpayment proceeding is based is in violation of Respondent's rights under the Rent Stabilization Laws; restoring the proceeding for trial regarding Respondent's counterclaims; and, granting Respondent such further relief as the court deems just and proper. Petitioner opposes alleging Respondent's motion does not provide a sufficient factual and/or legal basis upon which the relief requested can be granted as Petitioner has stated a viable cause of action and a triable issue of fact exists. Petitioner also argues that it properly preserved the legal regulated rent, and that the legal regulated rent should not be vitiated due to the presence of an on-time discount provision.

Respondent moved into the premises subject to Rent Stabilization in September 2014, as a co-tenant with a friend, Stephen Fristed. The initial lease was for a term of one year and fifteen days, at a monthly rent of $2,094.37, and indicated that $1,300.00 was paid as security. There was also a rider to the lease signed by Respondent, Mr. Fristed, and an agent of Petitioner which

stated, “It is understood and agreed that the tenant will receive a $794.37 monthly credit provided the monthly rent is paid on or before the first of each month. If the monthly rent is not received by landlord on or before the first of the month, then tenant is to pay the full monthly rent and is subject to conditions set forth in paragraph three (3) pertaining to late payments. (Tenant will be subject to a late fee of 5% of sum due for all rent received after fifth of the month.) This provision is only for this lease term and shall expire on September 30, 2015.”

Mr. Cruz and Mr. Fristed signed a one year renewal lease that commenced on October 1, 2015, at a legal rent of $2,094.37, that again listed a security deposit of $1,300.00. Mr. Fristed vacated the apartment, and Mr. Cruz was offered and signed a vacancy lease that commenced on February 1, 2017. That lease included a vacancy increase though Mr. Cruz was a tenant on the lease from the inception of the tenancy, bringing the rent to $2,303.81 (a ten percent increase). This lease also included a similar rider as the one attached to the initial lease, granting a monthly on-time discount of $903.81, solely for the lease term expiring January 31, 2018. Mr. Cruz signed a one year renewal lease that commenced on February 1, 2018, at a monthly rent of $2,332.61, listing a current security deposit of $1,400.00. This lease made no mention of a preferential rent, however, the annual registration Petitioner filed with the DHCR, annexed as Exhibit D to Respondent’s motion, lists a preferential rent of $1,430.00 for the lease term. A fire occurred in a neighboring apartment on September 6, 2018, which Respondent alleges made his apartment uninhabitable. Respondent also alleges that though some repairs have been made to his apartment, many violations still exist, and annexed to his motion as Exhibit C is a violation report from HPD. He further contends that he has not renewed his current lease which expired on January 31, 2019, and does not intend to do so until he is offered one in compliance with the Rent Stabilization Code, and is also withholding rent, since the expiration of his lease.

On-time discount provisions in leases have been struck down both by the courts, and the DHCR. The court found in the leading case *Park Haven, LLC v. Robinson*, 45 Misc. 3d 129(A), (AT 2nd Dept. 2014), that the “lease’s rent ‘discount’ scheme provides for an increase that is, in fact, nothing more than an unconscionable late charge and penalty, in that the increase is excessive and grossly disproportionate to any damages that could be sustained as a result of tenant’s failure to pay rent on time.” In *Diversified Equities, LLC v. Russell*, 50 Misc. 3d 140(A),

31 N.Y.S. 3d 920 (AT 2nd Dept. 2016), the court found the rent concession rider provided for, in effect, a 13% monthly late charge, which is "excessive and grossly disproportionate to any damages that could be sustained as a result of tenant's failure to pay rent on time, and thus, the collectible rent is the discounted rent set forth in the lease and the rider," citing *Park Haven v. Robinson*, supra, *Lal Little Italy MGMT. Co. v. Aldrete*, NYLJ 1202737081842 (Civ Ct Bronx Co. 2015). Courts have found excessive late charges shall not be enforced, as in *Sandra's Jewel Box Inc. v. 401 Hotel L.P.*, 273 A.D. 2d 1, 708 N.Y.S. 2d 113 (AD 1st Dept. 2000), where the late charge provision of the lease, which awarded a 365% per annum penalty, though not technically interest, was held to be "unreasonable and confiscatory in nature and therefore unenforceable when examined in the light of the public policy expressed in Penal Law 190.40, which makes an interest charge of more than 25% per annum a criminal offense" citing *943 Lexington Ave. v. Niarchos*, 83 Misc. 2d 803.

Similarly, the DHCR has also held that on-time discount schemes are unenforceable. In the *Matter of 1560 GC LLC*, Admin. Review Docket No. GX610015RO, decided May 20, 2019, the agency upheld the decision of the Rent Administrator, as it correctly relied upon revised Agency Fact Sheet 40 (reflecting the preferential rent section of the RSC regarding the allowance of no more than a 5% late fee in a rent stabilized apartment), and does not permit an on-time discount. The agency held that the amount the tenant paid was the legal regulated rent and not a preferential rent. "Indeed, the purported higher legal regulated rents in the vacancy lease and subsequent renewal leases were intrinsically tied to the illegal on-time discount clauses in the leases, were akin to improper late fees and therefore themselves invalid. *As such, it would not have been proper to simply void and sever the on-time discount clause while keeping the higher rent*." Emphasis added.

The DHCR found petitioner's claim of a higher legal regulated rent in *Matter of the Administrative Appeal of 133 W. 145 LLC*, Administrative Review Docket No. GS410052RO, to be without merit and *found the base rent is that which was in actual effect being "charged and paid ("collected") as of the base date, and found the rent was not 'preferential' as a preferential rent may neither be cancelled during the lease period nor overridden based on late payment*." (Emphasis added.) The DHCR upheld setting the lower collected amount as the base rent for

calculation of the lawful rent, and cited *Shikha Akter v. Zara Realty Holding Corp.*, (Sup. Ct. Queens Co., Index No. 111664/16), 9/26/17, and *Kings Park 8809 LLC v. DHCR*, (Sup. Ct. N.Y. Co., Index No. 11593/17), *wherein courts in both the First and Second Departments upheld agency determinations to strike the on-time discount provisions, and set the legal regulated rent as the rent charged*. A similar decision was reached in *Matter of the Administrative Appeal of 166 Street LLC*, Administrative Review Docket No. GP110041RO, wherein the agency rejected petitioner's argument that the Administrator's rationale for vitiating the preserved legal regulated rent had no legal basis and found the Rent Administrator properly relied upon Fact Sheet 40, and correctly found the lower collectible rent to be the legal regulated rent on the base date, given the improper on-time discount clause in the base date lease. In *Prospect Partners LLC*, Admin. Rev. Docket No. FM210060RO, the Commissioner found the Rent Administrator properly invalidated the discounted rent clauses in the leases citing *Park Haven v. Robinson*, supra, and *Shikha Akter v. Zara Realty Holding Corp.*, supra, and did not interpret the case law as prohibiting such clauses only if they were unconscionable. The Commissioner ruled in *Hillside Park 168 LLC*, Admin. Rev. Docket No. Fo110034RO, that the Rent Administrator was correct in relying on revised Fact Sheet 40, and correctly found the lower rent charged to be the legal regulated rent and not a preferential rent, as the agency policy allows no more than a 5% late fee in a rent stabilized apartment, and does not permit an on-time discount.

Petitioner opposes Respondent's motion alleging it has stated a viable cause of action and Respondent is not entitled to summary judgment as a triable issue of fact exists. Petitioner argues that it only ever charged and Respondent only paid amounts lower than the amounts listed as the legal rent on the leases, and it concedes the vacancy lease given to Respondent after vacature of Respondent's co-tenant was in error. It alleges that it preserved the legal regulated rent and attempted to withdraw the preferential rent in the renewal lease offered for the period commencing February 1, 2019, which Respondent failed to sign and mail to Petitioner. Petitioner argues that there is no statutory provision in either the Rent Stabilization Law (RSL) or the Rent Stabilization Code (RSC) that allows the legal regulated rent to be vitiated by the presence of an on-time discount in a rent stabilized lease where the legal regulated rent has been properly preserved. In support of its position, Petitioner cites Section 2521.2 of the RSC which refers to

preferential rents, as well as the decision in *Zara Realty Holding Corp. v. DHCR*, index number 5223/17, (Sup Ct Queens Co.), the Article 78 proceeding of a DHCR decision cited by Respondent, *Matter of Zara Realty Holding Corp.*, Admin. Rev. Docket No. EU1100062RO, decided March 24, 2017. In the *Zara Realty* administrative decision, the DHCR relied on Fact Sheets 40 and 44 prohibiting on-time discount provisions in leases and found when such a provision is included in a rent stabilized lease, the lower on-time rent becomes the legal regulated rent. In the Article 78 proceeding decided on June 15, 2018, the Hon. Thomas D. Raffaele held, "DHCR's determination that the discount rent is not a preferential rent and that the legal regulated rent is to be rescinded and replaced by the discounted rent is arbitrary and capricious and lacks a rational basis in the law and the record." The court held the owner may offer the lease renewal without the discounted rent provision and referred the matter back to DHCR for proper calculation of the legal regulated rent. Justice Raffaele found the DHCR was correct in finding provisions resulting in excess of a 5% late fee for mandatory electronic payment, for ending the discounted or preferential rent prior to the end of a term or tenancy as stated by the lease are illegal and unenforceable, but found, "the leap from that point to abolish as illegal any offer of preferential rent with proper enforceable terms based on on-time payment is not rationally based." The court found Respondent's reliance on *Diversified Equities*, supra, to be misplaced, and found that the court in *Diversified Equities* "did not decide that the collectible rent was to become the legal regulated rent beyond the duration of either the renewal lease term, or the duration of the lease, or beyond. As DHCR is very well aware, its own calculation charts distinguish collectible rent from legal regulated rent in that collectible rent reflects temporary charges, adjustments, and freezes." The court found the owner was not seeking to enforce any of the provisions that had been previously declared illegal, but was "merely seeking to restore the lease, upon renewal, to the legal regulated rent as was mutually agreed between the tenant and owner and in compliance with statute (RSC 2521.2.[a])."

Petitioner also cites, *Matter of One Ninety Sixth St LLC v. DHCR*, Index No. 5070/18, (Sup. Ct. Queens Co.) decided April 4, 2019, wherein Justice Ulysses B. Leverett heard re-argument of a decision of then retired Justice Raffaele dated October 1, 2018. Judge Leverett held, "the Court here does not find that there is precedent that an on time rent provision will

operate to vitiate a properly preserved higher legal regulated rent." The court found the on-time rent provision "though determined to be illegal during the lease term, did not negate proof of fact that the legal regulated rents were set forth in the base date lease and in subsequent lease renewals." The court also cited the decision of Justice Raffaele in *Zara Realty Holding Corp. v. DHCR*, supra, in its finding that DHCR Fact Sheet 40 did not provide for the disallowance of the right to collect the legal regulated rent at the end of the lease term.

However, in *Kings Park 8809 LLC v. NYC DHCR*, supra, decided July 27, 2018, after the Article 78 decision in *Zara Realty Holding Corp. v. DHCR*, Justice Raffaele appeared to change his position. The court found DHCR's current policy has been to find on-time discount provisions in leases illegal citing *Diversified Equities v. Russell*, supra. The court noted that DHCR acknowledges that the agency's views on on-time discounts have been evolving and cites Fact Sheet 40, "The law does not require for an agency to adhere to its previously made decisions when clarifications in the law and regulations have since nullified their basis (*Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y. 2d 516 [1985])." The court found it was rational for the Rent Administrator to disregard the leases in their entirety and set the legal regulated rent as the amount charged on the base date, four years prior to the filing of the complaint, plus lawful increases.

It is clear from the case law cited by both parties and Petitioner's own admission, that the on-time rent provision in the lease is illegal and therefore unenforceable. The petition sought rent in the amount of $2,367.60 for the months of February, March and April, 2019, as well as $1,430.00 as a preferential rent per month for the months of September 2018 through January 2019, and a rent balance in the amount of $1,299.50 for August 2018. Petitioner concedes that the rent sought in the rent demand and petition was incorrect. Assuming Petitioner could prove apartment improvements at trial, it alleges it should have offered Respondent a renewal lease commencing October 1, 2018, at a corrected rent of $2,152.26. If it cannot prove apartment improvements that allegedly occurred prior to Respondent taking possession, Petitioner alleges the legal regulated rent should be $1,981.08. Petitioner argues that it never charged, nor did Respondent ever pay the legal regulated rent, and contends that its error in registering the 2017 rent as a vacancy lease is correctable and would result in no prejudice to Respondent. It is

Respondent's position that he does not intend to renew his lease until he is offered a renewal lease that complies with the RSC, which by his calculations would set the legal regulated rent at $1,316.25.

Summary judgment is a drastic remedy, and should not be granted lightly. As the Court of Appeals stated in *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 (CANY, 1980), at 562:

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212[b]), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212[b]). Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form." (Citations omitted.) The Court continued: "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Citations omitted.) See also *North Central Mechanical, Inc. v. Hunt Construction Group, Inc.*, 43 A.D. 3d 1396, 843 N.Y.S. 2d 894 (AD, 4th Dept., 2007); *Ochoa v. Walton Management, LLC* 19 Misc. 3d 1131(A), 2008 WL 1991486 (NY Sup, 2008).

The Supreme Court in *Ochoa v. Walton Management, LLC*, supra, succinctly stated the requirements for opposing a motion for summary judgment. There, the Court said:

"Once movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (citing *Zuckerman*, supra). The burden... always remains ... with the movant ... 'if the evidence ... is evenly balanced, the party that bears the burden must lose' (citations omitted,

emphasis added). It is worth noting ... that while the movant's burden ... is absolute, the opponent's burden is not. ... to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue ... The rule ... to defeating ... summary judgment ... is more flexible, ... the opposing party, ... contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. ... [G]enerally, the opponent ... seeking to have a court consider inadmissible evidence must proffer an excuse for proffering the inadmissible evidence in inadmissible form. ... [T]he Court's function ... is issue finding and not issue determination. ... summary judgment ... should never be granted when there is any doubt as to the existence of a triable issue of fact. When the existence ... is even debatable, summary judgment should be denied. (Citations omitted.)

Even under the prior Civil Court Act, the rule was the same. As it was stated by the Court of Appeals in *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 (CANY, 1957): "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is 'arguable'; 'issue-finding, rather than issue-determination, is the key to the procedure'". (Citations omitted.)

There is no question that the amount demanded and sought in the petition was incorrect. By Petitioner's own account, the amount demanded was inaccurate. Though the demand need not be the exact amount due, it must be a good faith estimate of the amount owed. "A proper demand for rent must fairly afford the tenant, at least, actual notice of the alleged amount due and of the period for which such claim is made. At a minimum, the landlord or his agent should clearly inform the tenant of the particular period for which a rent payment is allegedly in default and of the approximate good faith sum of rent assuredly due for each such period." *542 Holding Corp. v. Prince Fashions, Inc.*, 46 A.D. 3d 309, 848 N.Y.S. 2d 31 (AD 1st Dept. 2007), quoting *Schwartz v. Weiss-Newell*, 87 Misc. 2d 558, 386 N.Y.S. 2d 191 (Civ Ct NY Co. 1976). The failure to serve a demand apprising the tenant of a good faith estimate of the amount due renders the notice defective and, "predicate notices may not be amended and a defective predicate notice would require dismissal of the proceeding." *JDM Wash. St. LLC v. 90 Wash. Rest. Assoc. LLC*,

2012 NY Slip Op 22158 citing *Dendy v. McAlpine*, 27 Misc. 3d 138(A) (AT 2nd Dept. 2010), and *Chinatown Apts. v. Chu Cho Lam*, 51 N.Y. 2d 786 (AD 1st Dept. 1980). Though the Court is not inclined to set the legal regulated rent and refers the parties to the DHCR for such relief, it is persuaded by the above case law finding the legal regulated rent to be the lower rent amount paid plus the applicable increases when an unenforceable on-time discount clause is a term in the lease. By this account, the rent demand is far from a good faith approximation of the rent due. Further, it is clear that the rent for the premises was not properly registered, and as per Section 2525.1 of the RSC, " it shall be unlawful, regardless of any contract, lease or other obligation heretofore or hereafter entered into for any person to demand or receive any rent for any housing accommodation in excess of the legal regulated rent...," and Section 26-517 "requires an owner to file an annual registration which is 'proper' and which sets forth the current rent for the unit, and bars an owner for collecting any increase, if no such registration is filed, until a proper registration is filed." *156 E. 37th St. LLC v. Negron*, 43 Misc. 3d 1221(A), 992 N.Y.S. 2d 159 (Civ Ct NY Co. 2014). The court in *Negron* found the Petitioner failed to establish its prima facie case by failing to produce a valid rent registration for the amount claimed for the relevant time frame and dismissed the proceeding without prejudice. Despite the instant Petitioner's contention that it inadvertently charged a vacancy increase and may need more time to prove improvements at trial, the Court is constrained to find both the demand and petition to be improper, as well as the amount listed on the rent registration for the premises. As the amount demanded and sought is not the legal regulated rent, was not a properly registered rent, and was not a good faith approximation of the rent due, Petitioner cannot establish its prima facie case.

Accordingly, the proceeding is dismissed without prejudice and the parties are referred to the DHCR for the purpose of setting the legal regulated rent for the premises. The Petitioner's cross motion for use and occupancy is denied and the proceeding is restored to the Court's calendar on June 15, 2020 (or such other date as the Court directs) at 9:30 a.m., Part D, Room 550, for trial on Respondent's counterclaims.

This is the decision and order of the Court. Copies are being emailed to both sides and hard copies will be mailed to both sides once the Courts resume scheduling.

Dated: Bronx, New York
April 28, 2020

STEVEN WEISSMAN, JHC