2020-10-05

Food First HDFC Inc. v. Turner

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART Q

----------X

FOOD FIRST HDFC INC.,

Petitioner,

Index No. 78894/2019

-against-

YOLANDA TURNER,

DECISION/ORDER

Respondents.

----------X

Present: Hon. Jack Stoller
Judge, Housing Court

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

Pages	numbered
Order To Show Cause and Supplemental Affirmation Annexed	1, 2
Affirmation In Opposition	3
Affirmation In Reply	4

Upon the foregoing papers, the Decision and Order on this motion are as follows:

Food First HDFC Inc., the petitioner in this proceeding ("Petitioner"), commenced this summary proceeding against Yolanda Turner, the respondent in this proceeding ("Respondent"), seeking a money judgment and possession of 327-329 Franklin Avenue, Apt. 3D, Brooklyn, New York ("the subject premises") on the ground of nonpayment of rent. Respondent interposed an answer with defenses and counterclaims of breach of the warranty of habitability, rent-impairing violations, and harassment. Respondent now moves for summary judgment regarding her defense concerning rent-impairing violations and for alternative relief.

The record on this motion practice shows no dispute as to the following material facts: Respondent and Petitioner are in a landlord/tenant relationship with one another according to a lease with a monthly rent of $1,048.29. Petitioner commenced this proceeding in September of 2019 by the filing and service of a notice of petition and petition seeking a judgment for the

monthly rent of $1,048.29 for four months from June through September of 2019, for a total of $4,193.16. After Respondent answered while pro se, Respondent retained counsel who successfully moved to amend her answer to include, *inter alia*, a defense pursuant to MDL §302-a. Contemporaneous with the filing and service of the motion, Respondent deposited $4,193.16 with the Court. A subsequent lease commenced on February 1, 2020 with a monthly rent of $1,074.46.

Respondent annexed to her motion records of Housing Maintenance Code violations that the Department of Housing Preservation and Development of the City of New York ("HPD") placed on the subject premises. The records show that HPD sent Petitioner notices of violations, one sent June 3, 2019 for an illegal fastening at a bulkhead door and another sent on July 31, 2019 for a leak in the roof, both of which were certified corrected on July 9, 2020 ("the Violations"). HPD records designated the Violations as rent-impairing violations, noted by an asterisk. See Fed. Home Loan Mortg. Corp. v. Quezada, 1994 N.Y.L.J. LEXIS 9377, *3-5 (Civ. Ct. N.Y. Co.).

If HPD's official records show that an owner of a multiple dwelling does not remove a rent-impairing violation within six months after the notice of the violation, and if a tenant of "any premises in such multiple dwelling" pleads such a defense in a nonpayment proceeding and deposits with the clerk of the Court the amount of rent the owner demands in its petition, then the owner may not recover any rent after the expiration of the six months so long as the violation remains uncorrected. MDL §§302-a(3)(a), 302-a(3)(c). As Respondent has fulfilled every condition to the letter of the statute, Respondent proves, as a prima facie matter, that Petitioner may not collect rent from her from six months after the notice of the first violation until Petitioner corrects the Violations. 50 Manhattan Ave. LLC v. Powell, 2018 N.Y.L.J. LEXIS

777, *5-6 (Civ. Ct. N.Y. Co.), Worley v. 151 W. Realty Co., 1995 N.Y.L.J. LEXIS 9783, *4 (Civ. Ct. N.Y. Co.).

Petitioner raises a number of arguments against Respondent's entitlement to summary judgment on this record. Petitioner points out that Respondent did not support her motion with an affidavit. While true, this bears no relevance to the determination Respondent calls upon the Court to make. Respondent only supports her motion with an affirmation of her attorney but, while of no probative value itself, an affirmation of an attorney is an appropriate vehicle by which to submit admissible evidence. Zuckerman v. New York, 49 N.Y.2d 557, 563 (1980), Monaghan v. Cole, 171 A.D.3d 558, 559 (1st Dept. 2019), Gihon, LLC v. 501 Second St., LLC, 103 A.D.3d 840 (2nd Dept. 2013). Not only are the Violations from HPD that Respondent submits in support of her motion admissible, they are presumptive proof of the conditions therein. MDL §328(3). See Antillean Holding Co. v. Lindley, 76 Misc.2d 1044, 1047-48 (Civ. Ct. N.Y. Co. 1973)(denying a motion for leave to obtain discovery because rent-impairing violations are a matter of record). The only other proof that Respondent needs to satisfy the elements of her defense is the petition, which Respondent annexes to the motion and which the Court can take judicial notice of, and the receipt showing the deposit with the Court of the amount demanded in the petition, which an affirmation is sufficient to authenticate. Accordingly, Respondent's submissions suffice.

Petitioner argues that an absence of an affidavit of Respondent herself means that Respondent has not proven that the Violations are a "fire hazard or a serious threat to the life, health and safety of the occupants thereof," as MDL §302-a(2)(a) defines a rent-impairing violation. This argument relies upon a misreading of the statute. A tenant of a multiple dwelling does not make the determination that a violation is a fire hazard or a serious threat, HPD does, by

promulgating a list of violations deemed to be rent-impairing by their nature. MDL §302-a(2)(b). See Worley, supra, 1995 N.Y.L.J. LEXIS at 9783 ("the obvious remedial purpose of [MDL §302-a] is to encourage owners to promptly correct *violations which [HPD] considers serious enough to be rent impairing*, with rent forfeiture as a penalty if owner fails to comply with their order")(emphasis added). "The Legislature, in recognizing the expertise of [HPD] over the administration of housing standards, has provided [HPD] with discretion to determine what type of violations should be deemed rent impairing." Fed. Home Loan Mortg. Corp., supra, 1994 N.Y.L.J. LEXIS at 9377. An affidavit of a tenant laying a factual predicate for the rent-impairing qualities of a violation would bear no probative value, as HPD, and not the Court, determines whether a violation is rent-impairing. Id.

Petitioner also opposes Respondent's motion on the basis that the Violations are in the common areas of the building in which the subject premises is located ("the Building"), not the subject premises itself. This argument also flies in the face of the statutory language itself, which states that if a condition constituting a rent-impairing violation "exists in the part of a multiple dwelling used in common by the residents or in the part under the control of the owner thereof, the violation shall be deemed to exist in the respective premises of each resident of the multiple dwelling." MDL §302-a(3)(a). Despite this statutory language, Petitioner argues that Notre Dame Leasing, LLC v. Rosario, 2 N.Y.3d 459, 464 (2004), supports its argument about the applicability of the remedies of MDL §302-a to a rent-impairing violation in a common area. This argument misapprehends the holding of Notre Dame Leasing, LLC, supra, which interpreted Social Services Law §143-b, a statute which protects from eviction for nonpayment of rent public assistance recipients when the applicable agency withholds direct-vendor payments of shelter allowances to landlords of buildings with violations. While the Court in

Notre Dame Leasing, LLC, supra, indeed found fault with an application of Social Services Law §143-b to situations where the agency did not withhold a shelter allowance and where the violations were not in the apartment of the affected resident, the Court in fact noted in dicta that MDL §302-a afforded a remedy to tenants "to withhold or abate rent for deficient conditions that, while outside their individual apartments, impair their occupancy and enjoyment of the building generally." Notre Dame Leasing, LLC, supra, 2 N.Y.3d at 467.

Petitioner also opposes the motion on the basis that Respondent has denied Petitioner access to complete repairs which, if true, would preclude a rent-impairing violation defense. MDL §302-a(3)(b)(iv). However, as noted above, the Violations are in the common area of the Building, which not only HPD memorializes but which Petitioner's own chairperson confirms in his affidavit in opposition. Assuming *arguendo* that Respondent denied access to the subject premises at some point, Petitioner does not raise an issue of material fact about access to a violation that is not in the subject premises. In the same vein, Petitioner argues that Respondent did not aver that she did not stop Petitioner from repairing the Violations. However, a tenant claiming a rent-impairing violation does not need to plead anything relating to access. Worley, supra, 1995 N.Y.L.J. LEXIS at 9783. The statute instead requires that such a tenant plead the facts "under subparagraph a." MDL §302-a(3)(c). The provisions regarding denial of access appear in subparagraph b of MDL §302-a(3). As a more general matter, denial of access is in the nature of an affirmative defense to habitability-related causes of action. See, e.g., NYCHA Coney Island Houses v. Ramos, 41 Misc.3d 702, 713 (Civ. Ct. Kings Co. 2013). Respondent therefore need not plead or prove what is really Petitioner's affirmative defense as an element of her own cause of action. Compare U.S. Bank Nat'l Ass'n v. Herman, 174 A.D.3d 831, 832 (2nd

Dept. 2019)(a plaintiff in a foreclosure action need not plead standing, as lack of standing is an affirmative defense).

Petitioner also opposes the motion on the basis that Respondent has not paid rent. However, Respondent cannot assert a defense of rent-impairing violations to recover any rent she would have voluntarily paid Petitioner. MDL §302-a(3)(d). Withholding rent therefore comprises an element of the very defense Respondent asserts, not a ground to deny it.

Accordingly, Respondent is entitled to summary judgment on her defense pursuant to MDL §302-a. According to the facts Respondent has demonstrated by this motion, the statute precludes Petitioner from recovery of rent "for the period that such violation remains uncorrected after the expiration of said six months …." MDL §302-a(3)(a). Words mean the same thing even when used in different statutes if the statutes concern the same subject matter. Benesowitz v. Metro. Life Ins. Co., 8 N.Y.3d 661, 668 (2007). The statutory use of the word "period" in relation to landlord/tenant relationships speaks of the relevant time interval for payment of rent in terms of months. RPL §232-c ("if the landlord shall accept rent for any *period* subsequent to the expiration of such term … the tenancy created … shall be a tenancy from month to month commencing on the first day after the expiration of such term")(emphasis added). If a landlord does not correct a rent-impairing violation within six months of its issuance, then, the "period … after the expiration of said six months" referred to in MDL §302-a(3)(a) means the month following the expiration of the six-month period. Similarly, if the "period" that a rent-impairing violation "remains uncorrected" ends in the middle of a month, the "period" in which a landlord may not recover rent includes the entirety of that month.

Six months after the issuance of the Violations in this matter fell in December of 2019. Petitioner therefore may not recover rent starting in January of 2020. The Violations remained

uncorrected until July of 2020, so the first month that Petitioner may therefore receive rent is August of 2020. Respondent's rent for January of 2020 was $1,048.29 and from February through July of 2020 was $1,074.46. Respondent's aggregate rent liability from January through July of 2020 was $7,495.05. Respondent is entitled to a credit of this amount which, when set off against the amount demanded in the petition of $4,193.16, leaves a credit of $3,301.89. As the credit is greater than the judgment amount demanded in the petition, the Court dismisses the petition.

After dismissal of the petition, what remains of the proceeding is Respondent's counterclaims. At oral argument of this motion, Respondent indicated that it made sense to revisit the question of the course of this proceeding in the event the Court dismissed the petition. The Court therefore holds in abeyance the balance of Respondent's motion pending a conference of this matter which the Court will calendar virtually with the parties.

The Court further directs the clerk of the Court to release to Respondent the $4,193.16 that Respondent had deposited with the Court on December 19, 2019, which was memorialized as transaction #3490.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
October 5, 2020

_____

HON. JACK STOLLER
J.H.C.