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[*1]

Glebow Realty Assoc. v Dietrich
2020 NY Slip Op 51172(U)
Decided on October 7, 2020
Civil Court Of The City Of New York, New York County
Kraus, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on October 7, 2020

Civil Court of the City of New York, New York County

<p>Glebow Realty Associates,, Petitioner-Landlord</p> <p>against</p> <p>Martina Dietrich, Respondent-Tenant, "JOHN DOE", "JANE DOE" and "XYZ CORP." Respondents-Undertenants</p>

L & T 63617/19

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Sabrina B. Kraus, J.

BACKGROUND

Petitioner commenced this summary holdover proceeding seeking to recover possession of the Second Floor Front Loft a/k/a Apartment 1C at 166 Allen Street a/k/a 161 Orchard Street, New York, New York 10002 (Subject Premises), based on the allegation that Respondent's lease [*2] had expired and that the Subject Premises is a commercial property.

Respondent appeared by counsel and filed an answer asserting four affirmative defenses, including that: respondent has resided in the Subject Premises, from the inception of her tenancy, with petitioner's knowledge and consent; and that the building contains six or more residential units and is governed by rent stabilization.

On September 23, 2019, respondent moved for summary judgment and dismissal of the petition. The motion was denied by the court (Kim, J), pursuant to a decision and order which held that there was an issue of fact as to whether petitioner was aware of respondent's residential use of the Subject Premises and acquiesced thereto.

On February 5 and 6, 2020, in response to pending motions regarding discovery and use and occupancy, this Court held a hearing on the central issue in dispute, namely whether petitioner knew of and acquiesced in respondent's residential use of the Subject Premises.

Pursuant to a decision and order dated February 10, 2020 (Hearing Decision), the Court held that respondent established by a preponderance of credible evidence that petitioner knew of and acquiesced to respondent's residing in the Subject Premises, and therefore the proceeding should have been commenced in Housing Court rather than Part 52. The court dismissed the proceeding, without prejudice to commencement of a summary proceeding in Housing Court.

THE PENDING MOTIONS

On March 26, 2020, respondent moved for attorneys' fees, and petitioner cross-moved for an order correcting certain items with respect to the Hearing Decision.

On October 6, 2020, the motions were referred to this court for determination. The court heard oral argument and reserved decision.

The motions are consolidated herein for disposition.

PETITIONER'S CROSS-MOTION IS GRANTED ON CONSENT

In its cross-motion, petitioner seeks to make certain corrections to the Hearing Decision. These requests are not opposed by respondent.

First, the Hearing Decision is dated February 10, 2020, but was entered and stamped by the clerk with a date of February 11, 2019. Clearly, this was a clerical error and the date of entry of the Hearing Decision should be February 11, 2020, not February 11, 2019. As such the court deems the Hearing Decision entered as of February 11, 2020.

On page three of Hearing Decision, the court wrote "the parties executed a renewal lease dated April 4, 2018, for a one year term, from June 1, 2018 through May 31, 2019, at a monthly rent of \$8,485.00." The rental amount was actually \$3,485.00. The Hearing Decision is deemed amended to reflect the correct amount (*see ex 1-c*).

Finally, although not addressed in the cross-motion, the parties herein stipulated at oral argument that the third paragraph under findings of fact shall read as follows "The certificate of occupancy for the building provides for storage in the cellar, stores on the first floor, a store and apartments on the second floor, and apartments on the 3rd through fifth floors (Ex6)."

RESPONDENT'S MOTION FOR ATTORNEYS' FEES IS DENIED AS PREMATURE

Respondent moves for attorneys' fees pursuant to RPAPL § 234, arguing that the court's dismissal without prejudice entitles respondent to fees as the prevailing party. The Court disagrees. RPL § 234 provides in pertinent part:

Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the [*3] result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant.

.Y. Real Prop. Law § 234 (McKinney).

In discussing the statute, the Appellate Division, Second Department has held "
(a)lthough the statute provides that such an award may be made in appropriate circumstances if there is 'a successful defenses of any action or summary proceeding commenced by the

landlord against the tenant arising out of the lease', it is clear that the Legislature intended such an award to be based on the ultimate outcome of the controversy ... (*Elkins v Cinera Realty, Inc.* 61 AD2d 828)."

In *Freeman Street Properties, LLC v Coirola* 17 Misc 3d 137(A) the Appellate Term, First Department held that where a court had dismissed a holdover action brought in Part 52, based on the finding that the landlord knew of an acquiesced in the residential use of the premises it was premature to award the tenant attorneys' fees.

Similarly in this action, petitioner states that it intends to commence a new holdover proceeding against respondent in Housing Court. At oral argument counsel indicated that Petitioner's delay in doing so is in large part due to the pandemic and attendant delays with summary proceedings. As such, respondent's motion for attorneys' fees is denied as premature, pending the outcome of a new holdover proceeding to be commenced in Housing Court. The ultimate outcome of the dispute has yet to be determined. In the event Petitioner fails to commence a new holdover proceeding, within four months of the date of this decision, respondent may renew its motion.

This constitutes the decision and order of this court.

Dated New York, New York

October 7, 2020

Hon. Sabrina B. Kraus, JCC

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