2020-11-20

350 Cabrini Owners Corp. v. Merkel

SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT

November 2020 Term

Cooper, J.P., Higgitt, McShan, JJ.

350 Cabrini Owners Corp.,
Petitioner-Landlord-Appellant,

NY County Clerk's No. 570147/20

- against -

Judd Merkel and Catherine Somple,
Respondents-Tenants-Respondents.

Calendar No. 20-151

Landlord, as limited by its brief, appeals from those portions of an order of the Civil Court of the City of New York, New York County (Clifton A. Nembhard, J.), dated April 5, 2019, which granted tenants' motion for discovery and denied landlord's cross motion to dismiss tenants' first through fifth affirmative defenses, first and third counterclaims and for summary judgment on the petition in a holdover summary proceeding.

Per Curiam.

Order (Clifton A. Nembhard, J.), dated April 5, 2019, modified to the extent of dismissing tenants' second, third and fourth affirmative defenses; as modified, order affirmed, with $10 costs.

Landlord commenced this holdover proceeding alleging that tenants breached their proprietary lease by failing to complete alterations to their apartment in accordance with the terms of the parties' alteration agreement. Insofar as relevant, the alteration agreement required tenants to install a fire-rated door in the masonry fire wall that separated the

bedroom of tenants' juvenile daughter from the rest of the premises. Tenants interposed an answer alleging, inter alia, that the parties entered into the alteration agreement based upon a mutual mistake that a fire-rated door was legally required inside of the apartment premises. According to tenants, such a door is not legally required and, if installed, would require a second means of egress from the bedroom.

We agree with so much of Civil Court's order that denied landlord's motion for summary judgment of possession and to dismiss tenants' first (mutual mistake) and fifth (breach of lease) affirmative defenses. The record, including the affidavit of tenants' architect and the Department of Buildings Construction Code Determination Form, both of which indicate that a fire-rated door is not required on an interior bedroom door within a dwelling unit, raises triable issues of fact as to whether, at the time the alteration agreement was entered into, the parties operated under the mistaken belief that a self-closing, fire-rated door was legally required (*see 115-117 Nassau St., LLC v Nassau Beekman, LLC*, 168 AD3d 493 [2019]).

However, landlord's motion to dismiss should have been granted with respect to tenants' second, third and fourth affirmative defenses. The second affirmative defense (fraud in the inducement), should have been dismissed. Tenants' claim that landlord "knew or should have known that the representations made to [tenants] concerning the need for a fire rated door in the premises were untrue," is conclusory and unsupported by any factual details, and thus insufficient to state a claim for fraud with the required particularity (*see*

CPLR 3016[b]).

Tenants' third affirmative defense, which alleges that the petition fails to state that a Notice to Cure was served, should have been dismissed. The petition incorporated by reference the Notice of Termination, which itself incorporated the Notice to Cure, and both were attached to the petition.

Tenants' fourth affirmative defense alleging a lack of authority should have also been dismissed. The predicate notices were signed by the president of the cooperative corporation, and landlord's property manager submitted an affidavit stating that the cooperative's board of directors had previously determined that tenants were in default of the alteration agreement and the lease. In opposition, tenants offered no evidence demonstrating that, in these circumstances, the president of the board acted outside the scope of his authority.

We have examined landlord's remaining contention and find it to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur

November 20, 2020