2020-12-03

327 Van Brunt St. LLC v. Davis

327 Van Brunt St. LLC v Davis
2020 NY Slip Op 33869(U)
November 20, 2020
Supreme Court, Kings County
Docket Number: 516494/2020
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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327 VAN BRUNT STREET LLC,

Plaintiff,

-against-

WARREN DAVIS and ELIZABETH WEINERT,

Defendants.

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DECISION/ORDER

Index No.: 516494/2020

Motion Seq. No.: 2

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of plaintiff's motion for a preliminary injunction

Papers	**NYSCEF Doc.**
Order to Show Cause, Affirmation and Exhibits Annexed	33, 28-32
Answering Affirmation and Exhibits Annexed	35-45
Reply Affirmation	46-47

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

Plaintiff is the owner of the building located at 327 Van Brunt Street, Brooklyn, NY. It is a storefront with two apartments above. Defendants are the tenants of the first-floor apartment. They moved in on or about June 1, 2015. There is no written lease. One was apparently circulated but never signed by either side. Therefore, both sides agree that it is a month-to-month tenancy.

Plaintiff commenced this action on September 3, 2020. Service of the complaint was accepted by defendants' attorney in a stipulation (E-File Doc. 26) which also granted defendants more time to answer the complaint. The complaint has four claimed causes of action: injunction; consequential damages; money judgment for unpaid rent;

and attorney's fees. None of these is actually a cause of action. There is no cause of action for possession of the apartment, or, for that matter, of the rear yard. This motion is addressed to the first (ostensible) cause of action. It seeks, in effect, summary judgment on the first cause of action.

The order to show cause asks for an order "directing defendants to remove all of their personal property from the rear yard at 327 Van Brunt Street, Brooklyn, NY." The first cause of action in the complaint states "Plaintiff has leased the store, including basement and rear yard, to a commercial tenant for use as a café, including the retail sale of food. The commercial store tenant is refusing to take physical possession of the store premises until all of the items of personal property in the rear yard are removed. All of said personal property belongs to defendants. Defendants have refused to remove their personal property from the rear yard. Plaintiff will suffer irreparable harm unless it obtains injunctive relief from the Court directing defendants to remove their personal property from the rear yard." The court notes that the complaint does not ask for a declaratory judgment that the rear yard is not part of the defendants' leased premises, nor does it allege that such is the case. It can only be interpreted to mean that the rear yard is messy, and unsightly, and needs to be made neat and clean. Although that is apparently not what the plaintiff intends to be saying.

In opposition, defendants' attorney states "As is plainly established in the Davis Aff., the Defendants were at all times relevant hereto vested with a leasehold estate in the backyard of the subject building, on consent of the Plaintiff Landlord. These facts are confirmed by extensive written evidence annexed to the Davis Aff. as Ex.'s C and D thereto." Mr. Davis' affidavit states, in pertinent part "when my family came to occupy

the Unit, it was always understood that our tenancy included the use of the backyard of the Building. This fact is demonstrated by an email between my wife and the Landlord's principal, dated August 8, 2017, through which we reported to the Landlord that we were "99% finished with the backyard", attaching pictures of the same. A copy of this email has been annexed hereto as Ex. C. The reference to a 99% completion of the backyard in this email related to my efforts to rehabilitate the backyard for my family's use (from a former state of decay), with consent of the Landlord. I personally financed these improvements, and personally performed substantively all related labors. At no point did Landlord ever object to my efforts, or related use of the backyard. The photographs included with Ex. C evidence these efforts, and the product thereof. . . . The reason the use (and related improvement of the backyard) was of such constant exchange between the Landlord and I was that use of the backyard was an essential element of my agreement to lease the Unit from the Landlord. This use of the backyard is all the more relevant in the current pandemic environment, given that my wife and I are the parents of a newborn son (roughly nine months old). Access to the backyard is, as a result, more essential now more than ever. We are unwilling to introduce our infant child to public outdoor spaces for recreation for obvious reasons. Accordingly, we rely on our use of the backyard in order to provide our son a safe space for outdoor play."

Plaintiff's principal provides an affidavit (Doc 28) which states "It took me over a year to find a new store tenant, and now that tenant is threatening to walk away from the lease because the defendants refuse to remove their property from the rear yard. Nothing in the lease agreement between plaintiff and tenants gives tenants any rights to the use of the rear yard."

Oral argument was held virtually on November 20, 2020. It could not be clarified whether the new commercial tenant intended to use the backyard for customers to dine, or if the issue was just one of the unsightliness of the backyard. In fact, it is not clear that there is a view of the backyard from the rear wall of the ground floor space. There is no exit door from the commercial space to the yard on the ground floor, but there is a doorway with a few steps up from the basement, which could not be used by customers. In order for the commercial tenant to use the rear yard for customers to sit and eat, not only would approval need to be obtained from the NYC Department of Buildings, by way of a "Letter of No Objection," but a doorway would need to be constructed from the ground floor to the backyard. The court tried playing "devil's advocate" and also endeavored to find out if this matter could somehow be resolved. It seems it cannot. The landlord's attorney indicated he drafted the commercial lease for the proposed commercial tenant but had never been to the premises and did not know what the commercial tenant intended to do with the rear yard. The court asked if they just wanted to use part of it to store things, or for employees to go to have a smoke, or for tables and chairs for dining, and he said he did not know. The commercial lease, (E-File Doc. 43) does give the commercial tenant exclusive possession of the rear yard, however. It seems to have been fully executed. The landlord, which is, according to her affidavit, one woman who lives in California, seems to have leased the backyard to both the residential tenant, who currently occupies it, and to the prospective commercial tenant, who has not yet taken occupancy. This is a good example of why written leases are preferable to oral ones. Another is the fact that plaintiff cannot under any circumstances recover attorney's fees from defendants, as there is no written and

signed lease provision that requires that the losing party pay the counsel fees of the prevailing party.

The court finds that the plaintiff here seeks an order from the court to permit it to wrongfully evict the defendants from the rear year, actionable conduct without the requested order, but the complaint does not ask the court to determine the respective rights of the parties to the rear yard at the premises, nor does the complaint seek possession of the apartment at the premises or even the rear yard of the premises. While defendants have not moved to dismiss the complaint, the eleven affirmative defenses in their answer make it abundantly clear that the complaint fails to state a cause of action for which relief can be granted, other than perhaps a money judgment for a few months of rent arrears, although the words "breach of contract" are not stated.

The motion for an order that the defendants remove all of their property from the rear yard can no more be granted than a motion for an order that requires the defendants to change the color of their curtains, or one that requires the tenants to clean their windows once a month. Once rented, a property owner cannot dictate the décor, or whether there is a bar-b-que grill in a yard or children's toys. Unless the tenant's conduct rises to the level of a nuisance, such as with a hoarder who creates a fire hazard, or an animal lover who adopts so many animals that unpleasant odors permeate the public areas, the landlord cannot use this court as a "work around" to avoid the tenant protection laws which are in place in New York City. As long as the tenant pays the rent, even a month to month tenancy must be properly terminated on notice, and a proper proceeding brought for a judgment of possession, then, if the

premises are not vacated, a warrant of eviction. Nothing herein is intended to interpret the current temporary laws in effect due to the Covid-19 pandemic.

Accordingly, the motion is denied.

This shall constitute the decision and order of the court.

Dated: November 20, 2020

ENTER:

Hon. Debra Silber, J.S.C.