2021-03-01

Schwesinger v. Perlis

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Schwesinger v Perlis
2021 NY Slip Op 21043
Decided on March 1, 2021
Civil Court Of The City Of New York, New York County
Stoller, J.
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Decided on March 1, 2021

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

Eric Schwesinger, Petitioner,

against

Donald Perlis and Songhee Debarbieri, Respondents.

L & T 67376/18

For Petitioner: Matthew Brett

For Respondent: Jesse Gribben

Jack Stoller, J.

Eric Schwesinger, the Petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Donald Perlis ("Respondent"), a respondent in this proceeding, and Songhee Debarbieri, ("Co-Respondent"), another respondent in this proceeding

(collectively, "Respondents"), seeking possession of 110 Duane Street ("the Building"), Apartment 5R, New York, New York, ("the subject premises"), on the ground, *inter alia*, that Respondents have been committing a nuisance. After trial, the Court awarded Petitioner a judgment of possession ("the Prior Judgment"). The Court held a hearing on February 5, 2021 and February 9, 2021 as to whether the nuisance has continued and calendared the matter to February 23, 2021 for submission of post-hearing memoranda.

Background

The Court rendered the Prior Judgment by an order dated December 14, 2020 on a finding that Petitioner met his burden of proving that Respondents had committed a nuisance, broadly based upon the following factfinding, quoting from the order itself:

> Respondents undisputedly caused two leaks serious enough to warrant claims filed with insurance companies, one of which exceeded $15,000, underscoring the significance of the damage caused. Aside from the leaks that Respondents caused, Respondents did not rebut the evidence of their communication to another resident of the Building that they did not report leaks to Petitioner. Respondents caused unreasonable delays in access needed to repair the leaks. For the leak that occurred in the fall of 2016, Petitioner first notified Respondents on September 26, 2016, and could not get the work done until November 28, 2016, during which time Respondents resisted Petitioner's entreaties, restricted Petitioner's scope of work, and would not let workers in while Respondents were away for periods of time. Similarly, when Petitioner was attempting to repair [*2]conditions in the subject premises in May and June of 2018, Respondents attached unreasonable conditions to access, such as time constraints and demands concerning the identities of the workers. Co-Respondent literally constructed a barrier of chairs in the subject premises to limit Petitioner's inspection of the subject premises.

In addition to a judgment for possession, Petitioner had sought a judgment for legal fees and for market use and occupancy. Upon the Court's rendering of the Prior Judgment, the Court restored the matter for a conference on those issues, to be held at a time to be determined by consultation with counsel for the parties.

Before the parties were able to conference the matter, on December 28, 2020, the Governor signed into law the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, L. 2020, c. 381 ("the Act"). The Chief Administrative Judge of the Office of Court Administration then promulgated Administrative Order 340/20 which implements

aspects of the Act.[FN1] The Act, *inter alia*, stays all summary proceedings for a specified time period but does not apply the stay to tenants who "persistently and unreasonably engag[e] in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others ." The Act at Part A, §9. If, as in this matter, the Court had awarded a judgment against a tenant before the effective date of the Act on the basis of nuisance conduct ("a judgment of nuisance"), the Court "shall hold a hearing to determine whether the tenant is continuing to persist in engaging in unreasonable behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others," *Id*. at §9(2), in order to determine if the stay should remain in effect. The hearing that the Court held was pursuant to this section of the Act.

Hearing

Petitioner testified that gas service, relating to cooking gas, heat, and hot water, has been turned off in the Building; that he has had long-term problems dating back to August of 2019 gaining access to the subject premises relating to the restoration of gas lines; that these problems delayed the restoration of gas to the Building; that a restoration of gas requires the approval of the New York City Department of Buildings ("DOB") and Consolidated Edison, who examine every appliance to assure that it is code-compliant before approving a restoration of gas; that he was led to understand that it was improper to speak to Respondents; that Respondent wanted appliances to stay in the same place; that this first became an issue in October of 2019; that Respondents imposed conditions for a relocation of their appliances, made false allegations, and asked plumbers what they were doing and how they were doing their jobs; that he asked Respondent to stop interfering; that he sent plumbers to the subject premises who were harangued and prevented from doing their job, in part by Respondents' videorecording of them; that Respondents had installed unauthorized flammable shelving above a stove which has been preventing gas from being turned on; that the shelves were removed around Thanksgiving of 2020; that Respondent said "heil Hitler" to Petitioner; and that after December 28, 2020 he had workers in the subject premises to prepare it for construction, entailing a temporary relocation of an appliance.

Petitioner testified that in January of 2021 they had better opportunities for access; that [*3]plumbers and engineers requested a removal appliances and a cleaning of the area; that they went in to address site preparation; that he had to remove a boiler and work on piping;

that they had to temporarily remove the dryer; that in doing so they turned off water spigots so they wouldn't create a flood while disconnecting the washing machine; and that they tested water in the bathroom sink, the toilet and the shower.

Petitioner testified that Respondent sent him an email about eleven hours later, after the super had left the Building. Petitioner introduced the email into evidence, which says that Respondent cannot flush the toilet. Petitioner introduced into evidence an email he sent Respondent in response on the same date offering to bring Respondent bottled water. Petitioner testified that he inspected and found Respondents' claim about the water to be inaccurate, as water in the bathroom sink, toilet, and shower were all functioning. Petitioner introduced into evidence an email that he sent Respondent at about this time, stating, *inter alia*:

> "[w]e found the water in the bathroom sink, shower, and toilet to be functioning properly. Cold water had been shut off accidentally from the kitchen sink, but water still came from the hot spigot (although still cold). We have capped the bathroom connections (instead of relying on spigots), and restored water to the kitchen cold tap. It is now functioning normally."

Petitioner testified that even though Respondents had not cooperated with him in restoring the gas service, they still make demands and references to litigation regarding the gas service.

Petitioner lives in an apartment on the same floor as the subject premises. Petitioner introduced into evidence recordings from a security camera posted in the hallway between Petitioner's apartment and the subject premises which depicted a large number of guests, most without masks on, going to and from the subject premises on November 5, 2020. Petitioner testified that his father-in-law frequents that hallway and has terminal cancer and is therefore at risk for COVID-19 infection. Petitioner introduced into evidence a recording from the security camera dated December 20, 2020 depicting an apparent guest of Respondents' spitting on Petitioner's door.

Petitioner testified on cross examination that the Building does not have a central boiler that provides hot water or heat to any apartment there; that, since May of 2019, there has not been gas service at the subject premises, partly because of the shelving issue, and partly because the stove and the boiler have to be brought up to code; that he provided Respondents with four or five electric heaters which are the current source of heat in the subject premises;

that he does not know if there is hot water in the subject premises now; that, since May of 2019, he has been in the subject premises regarding the gas issue probably six to eight times; that he was not in the subject premises for a week or two before his testimony; that the shelving has been removed; that Respondents ignored a request for access to address heat in November of 2020; that Respondents have not sued him; that DOB has placed violations regarding the gas; that in November of 2019 his own gas was restored; that there are three apartments in the Building whose violations were never corrected; that these apartments do not have gas service; that the occupants of two of those apartments elected to turn off their gas entirely; and that Respondents are the only occupants in the Building who still want gas service and do not have it yet.

Respondents introduced into evidence an email that Petitioner sent Respondent on January 6, 2021 asking for access and a reply from Respondent acknowledging the request. Petitioner testified on cross-examination that he did not have an issue with Respondent's email. [*4]Petitioner testified on cross-examination that he thinks he may have had access on January 8, 2021 to prepare the site; that the old boiler is in a corner in the bathroom next to the wall where pipes need to be removed; that one appliance was removed and put into the basement in preparation for having the boiler removed and pipes fit into the outdoor cabinet; that dimensions for another boiler were wrong; and that plumbers built lead pipes to go into a boiler that they ordered.

Respondents introduced into evidence an email Petitioner sent Respondent on January 27, 2021 requesting access and a response from Respondent Petitioner testified on cross examination that access was granted without a problem When asked on cross examination whether Respondents put up an impediment to access from December 28, 2020 to the date of the hearing, Petitioner testified that access has been substantially better than in the past but that he would have to look at his notes on that question Petitioner testified later on cross examination that Respondents had not denied him access in 2021

Petitioner testified on redirect examination that his apartment had gas restored because everything in his apartment was already up to code, as opposed to the appliances in the subject premises, because that the subject premises is farther from the intake pipes, because there was a micro leak in that stream, and because of access issues

Petitioner introduced into evidence an email that Respondent's counsel sent on November 18, 2019 asking to resolve the issue without resorting to litigation. Petitioner

testified on redirect examination that the mention of potential litigation disturbed him; that he had access issues through December of 2020; and that access issues were only partially resolved in January of 2021.

The parties stipulated that Respondents denied a request for access on March 17, 2020. Petitioner testified on redirect examination that Respondent's counsel repeatedly asked for plans that he already supplied to Respondent's counsel.

Petitioner introduced into evidence emails that Petitioner had sent Respondent on January 15, 2021 and January 25, 2021 offering to pay for expenses that Respondents had incurred for doing laundry out of the subject premises resulting from the removal of the washing machine and dryer from the subject premises

Petitioner then rested Respondents then moved for a directed verdict pursuant to CPLR §4401

Discussion: Directed verdict

As a threshold matter, Petitioner argues that CPLR §4401 does not apply to this hearing because the statute permits a party to move for a "judgment" based on a purported entitlement to a "judgment" and that any outcome of this hearing would not be a "judgment," particularly insofar as the Court has already rendered a judgment in this matter and the hearing concerns an exception to a post judgment statutory stay However, the use of the word "judgment" in the CPLR encompasses both a final judgment and an interlocutory judgment CPLR §105(k) An interlocutory judgment, of necessity, does not completely determine the rights of the parties *Buffalo Elec Co v State*, 14 NY2d 453, 458 (1964)

Moreover, Petitioner's narrow read of CPLR §4401 ill-fits the language of the statute that permits a party to move for a directed verdict with respect to, *inter alia*, an "issue." Awarding a directed verdict on an "issue" means that the Court can make a finding that does not determine an action. For example, the Court can grant a motion for a directed verdict pursuant to CPLR §4401 on an issue of liability before rendering a determination regarding damages. *See, e.g.,* *[*5]Tweedy v Bonnie Castle Yacht Basin, Inc.*, 73 AD3d 1455 (4th Dept. 2010), Baker v. Shepard, 276 AD2d 873, 874-75 (3rd Dept. 2000).

Petitioner also argues that the Act entitles him to a "hearing" and that a directed verdict would deprive him of that. However, a litigant may obtain a directed verdict at a trial. The distinction between a trial and a hearing for this purpose bears no discernible significance. Furthermore, Part A, §9(4) of the Act places the burden on a landlord to establish a tenant's persistent engagement in proscribed conduct. The hearing is Petitioner's opportunity to do so. Respondents did not move for a directed verdict until Petitioner rested. A directed verdict therefore would not detract from Petitioner's entitlement to a hearing.

Discussion: Must Petitioner prove proscribed conduct on or after December 28, 2020?

Section 3 of the Act, entitled "Legislative intent," states that the pandemic currently raging throughout New York and the world poses a unique and historic threat to public health. Section 3 of the Act goes on to say that the Legislature intends to "avoid as many evictions as possible" for people experiencing pandemic-related hardships or who have difficulty moving. Given this express statement of the Legislature, the Court construes the Act's exceptions to stays on summary proceedings to be restrictive. *Matter of Sedacca v Mangano*, 18 NY3d 609, 615 (2012)(in matters of statutory interpretation, legislative intent is the "great and controlling principle").

With this backdrop, the Court considers the mandate of Part A, §9(2) of the Act that a vacatur of the statutory stay requires a showing that a tenant "*is continuing to persist* in [proscribed conduct]" (emphasis added). The Court must construe a statute so as to give effect to every word therein to the extent possible, *Matter of Mestecky v City of NY*, 30 NY3d 239, 243 (2017), starting with the Legislature's use of the word "is," as in a landlord may proceed against a tenant who "is" engaging in proscribed conduct. Such usage demonstrates an intention to apply the exception to conduct occurring concurrent with December 28, 2020, the effective date of the statute ("Subsequent Conduct"), illustrated by the following counter-example: if, instead of an exception for a tenant who "is persist[ing]" in proscribed conduct, the Legislature were to hypothetically permit a holdover to proceed against a tenant who "has been" persisting in proscribed conduct, such a use of the present perfect tense would have indicated an intention to cover conduct that began in the past and continues to the present. *See, e.g., Matter of Florio*, 26 Misc 3d 1048, 1050 (Sur. Ct. Nassau Co. 2009). The drafters' choice of the word "is," in the present tense, then, constitutes a grammatical choice entitled to just as much effect as the choice of an individual word. *See, e.g., People v Duggins*, 3 NY3d

522, 532 (2004)(attaching significance to the Legislature's use of the present tense in construing a section of the Penal Law).

Petitioner points out that Part A, §9(5) of the Act permits a holdover to proceed if a landlord proved that a tenant "engaged" in proscribed conduct. The use of the past tense in this section of the Act could just reflect that the Court would adduce a landlord's proof at a date after the effective date of the Act, such that Subsequent Conduct would still pre-date a finding after a hearing. But assuming *arguendo* that the Legislature's use of the past tense in Part A, §9(5) of the Act created an ambiguity, the Legislature notably didn't stop with the word "is" in Part A, §9(2) of the Act. It also used the words "continuing" and "persist," both of which evince an intent to look to conduct that is ongoing. Conduct that is ongoing would by necessity post-date the enactment of the Act. Thus, the combination of the words "is," "continuing," and "persist" demonstrate that requiring a showing of Subsequent Conduct honors the Legislature's express [*6]intent to limit evictions to the greatest extent possible. In other words, cases may only proceed where a problematic nature of a tenant's continued occupancy outweighs the public health consequences of continuing with an eviction proceeding during a pandemic.

Petitioner argues on a number of grounds that the Court must consider conduct before December 28, 2020 ("Prior Conduct") including, *inter alia*, the extent that proscribed conduct is continuing in nature. Petitioner makes a reasonable point and, indeed, Petitioner introduced evidence of Prior Conduct into the record after the Court had initially sustained Respondent's objection to that evidence. However, the admission of evidence of Prior Conduct does not resolve the question of whether Petitioner must also prove Subsequent Conduct.

Petitioner argues that the Court's consideration of Prior Conduct can potentially relieve him from having to prove any Subsequent Conduct, raising the hypothetical specter of a very serious nuisance. For example, Petitioner posits that a tenant adjudicated to be a nuisance for starting fires and who starts a fire on December 27, 2020 and not one day thereafter still poses enough of a threat to warrant a vacatur of the statutory stay. Petitioner's argument, however, proves too much. That is, it is an argument against the very kind of post-judgment hearing that Part A, §9(2) of the Act contemplates. After all, a tenant who started fires up to the date of a judgment of nuisance that issued before December 28, 2020 and not afterward would pose just as much of a threat as Petitioner's hypothetical tenant, but the Act requires a hearing anyway. The Court does not deny that Petitioner points out a possible downside of the statute.

But Petitioner's argument does not ask where the Court should draw the line so much as argue against the concept of line-drawing in the first place.

Petitioner argues that the Act is a remedial statute and that the Court should give retroactive effect to the Act as such, the effect of which would be to permit a vacatur of the stay on evidence of Prior Conduct. Statues are remedial statutes if they correct imperfections in prior law by giving relief to an aggrieved party. *Asman v Ambach*, 64 NY2d 989, 991 (1985). While Petitioner correctly points out that strictly prospective applications of statutes do not apply to remedial statutes, *Cady v Cty. of Broome*, 87 AD2d 964, 964-65 (3rd Dept.), *leave to appeal denied*, 57 NY2d 602 (1982), this proposition does not apply to remedial statutes that create rights and remedies where none previously existed. *Jacobus v Colgate*, 217 NY 235, 240 (1916), *State of NY v Daicel Chem. Indus., Ltd.*, 42 AD3d 301, 302 (1st Dept. 2007). As no statutory stay on summary proceedings to protect against the public health consequences of pandemics existed before the Act, principles of statutory construction do not warrant a retroactive application of an exception to the stay.

Accordingly, Petitioner can only prove an entitlement to vacate the statutory stay if Petitioner can prove that Respondents engaged in proscribed conduct on or after December 28, 2020, even when taking into consideration prior conduct.

Discussion: Did Petitioner prove proscribed conduct on or after December 28, 2020?

While Petitioner did prove some disturbing acts that had occurred before December 28, 2020 — Respondents hosting guests without masks in the common hallway of the Building, a guest of Respondents' appearing to spit at Petitioner's door, Respondent's offensive use of the epithet "heil Hitler," and a denial of access — Petitioner did not prove that any of these acts occurred on or after December 28, 2020. Petitioner himself testified on cross-examination that Respondent had not denied him access on or after December 28, 2020. The email communications in evidence between the parties that post-dated December 28, 2020 were civil and unremarkable.

On Respondent's motion for a directed verdict, the Court must afford Petitioner every inference which may properly be drawn from the facts presented and must consider the facts in a light most favorable to Petitioner. *Szczerbiak v Pilat*, 90 NY2d 553, 556 (1997), *Lemus v NY B Realty Corp.*, 186 AD3d 1351, 1351-52 (2nd Dept. 2020), *KBL, LLP v Cmty.*

Counseling & Mediation Servs., 123 AD3d 488, 489 (1st Dept. 2014). Affording Petitioner that deference, the Court presumes the truth of the only two instances of potentially offending Subsequent Conduct Petitioner set forth on his case, the first being that Respondent untruthfully complained about a lack of water in the subject premises in an email in January of 2021.

To be repetitive, in order to prevail on his motion, Petitioner must show that Respondents are "engaging in unreasonable behavior that substantially infringes on the use and enjoyment of other tenants or occupants [sic.] or cause[] a substantial safety hazard to others." The Act, Part A at §9(2). Petitioner conceded both in his testimony and in the contemporaneous email in the record that he sent Respondent that, around the time that Respondent complained about a lack of water, Petitioner indeed did have occasion to shut off the water in the subject premises, although for reasonable grounds and Petitioner restored water service. However, in light of this concession, Respondent's complaint about a lack of water does not infringe on Petitioner's use or enjoyment of his own apartment, much less "substantially" infringe on it, nor occasion a safety hazard.

The second instance of conduct that Petitioner presents is more long-term in nature. Petitioner posits that Respondents have in the past complained, sometimes by counsel, about their lack of heat, hot water and cooking gas to the point of mentioning litigation against Petitioner at the same time that Respondents have denied Petitioner access reasonable enough to remediate that problem. For the purposes of the directed verdict motion, the Court assumes that this evidence is true and draws the inference that the residual stress of this conduct continued past December 28, 2020. *Szczerbiak*, *supra*, 90 NY2d at 556. As Petitioner has testified that Respondents are the only occupants of the Building that want water services restored to their home that do not have it, any denial of access only hurts Respondents, not infringe on the use or enjoyment of any other tenant or occupant of the Building. Such conduct, if true, does not cause a safety hazard either.

The question that remains is whether the stress that Petitioner has experienced as a result of Respondents' conduct substantially infringes on the use and enjoyment of Petitioner's apartment. The Court cannot evaluate this contention without considering the context of this extensively-litigated matter. The trial of this matter took place over the course of ten dates from January 7, 2019 to September 25, 2020, covering the time period in which Petitioner now asserts that Respondents denied access to restore gas service. Petitioner proved at trial

that Respondents imposed literal and figurative obstacles to access but, significantly, to address leaks that negatively affected other apartments in the Building—not for a denial of access for a restoration of gas service. If the issues surrounding an injury to Petitioner over the restoration of gas service to the subject premises dated back to August of 2019, as Petitioner testified at the hearing, then the Court's restriction of the finding of nuisance to another, unrelated context operates as law the case, barring Petitioner's nuisance cause of action regarding restoration of gas service through the date of the Prior Judgment.

Accordingly, Petitioner has not proven that Respondents have engaged in acts proscribed by the Act on or after December 28, 2020. The Court takes judicial notice that Respondents have filed a hardship declaration with the Court pursuant to Part A, §6 of the Act. As Petitioner [*7]did not satisfy the requirement of the Act and as Respondents filed a hardship declaration, this matter is stayed by statute through May 1, 2021. *Id.*

Discussion: the Constitutionality of the Act

Petitioner argues that the Act unconstitutionally infringes upon the judiciary's exercise of its prerogative to, *inter alia*, control its calendar.

When the constitutionality of a New York State statute "is involved" in an action in which the State is not a party, the Attorney General shall be notified. CPLR §1012(b)(1). With no indication in the record that Petitioner served the Attorney General, Petitioner has not properly placed his Constitutional challenge to the Act before the Court. *McGee v Korman*, 70 NY2d 225, 231-32 (1987), *Matter of Fuchs v Itzkowitz*, 120 AD3d 682, 683 (2nd Dept.), *leave to appeal denied*, 23 NY3d 1045 (2014), *97-101 Realty, LLC v Sanchez*, 66 Misc 3d 30 (App. Term 2nd Dept. 2019), *Fried v Lopez*, 66 Misc 3d 1210(A)(Civ. Ct. Kings Co. 2020).

Normally, on a failure to notify the Attorney General, the Court would direct service upon the Attorney General, Executive Law §71(1), and the Civil Court could hear the constitutional challenge in the context of the Civil Court litigation. *Buck v Civil Court of NY*, 88 AD2d 597 (2nd Dept. 1982). However, as noted above, this matter is now stayed as per the Act. The Court therefore will not direct a notification of the Attorney General at this time. The Court notes that its forbearance does not preclude Petitioner's constitutional challenge, as a declaratory action in Supreme Court can be an appropriate forum for such a challenge. *Cass v State*, 58 NY2d 460, 463 (1983).

The Court grants Respondents' motion for a directed verdict and this matter is stayed through May 1, 2021.

This constitutes the decision and order of this Court.

Dated: March 1, 2021

New York, New York

HON JACK STOLLER

J.H.C.

Footnotes

Footnote 1: The statute and administrative order can be found here http://nycourts.gov/whatsnew/pdf/AO-340-20.pdf

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