2021-11-03

Reid v. 590 Maple Ventures LLC

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

Petitioner, Index No. 300288/2021

- against -

DECISION/ORDER

590 MAPLE VENTURES LLC,

Respondent.
---------- 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
Notice Of Motion and Supplemental Affidavit and Affirmation	1, 2, 3
Affirmation and Affidavit In Opposition	4, 5
Order To Show Cause and Supplemental Affirmation and Affidavit	6, 7, 8
Affirmation In Opposition	9

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

Tracey Reid, the petitioner in this proceeding ("Petitioner"), commenced this proceeding against 590 Maple Ventures LLC and Pierre Hurley ("Respondents"), and the Department of Housing Preservation and Development of the City of New York ("HPD"), seeking an order to correct violations in 590 Maple Street, Apartment 1, Brooklyn, New York ("the subject premises"). After trial, the Court entered into an order dated August 6, 2021 ("the Order") directing Respondents to correct violations in the subject premises to effectuate the lifting of a vacate order on or before October 5, 2021. Respondents now move for an order extending the time by which they can correct the violations. Petitioner moves for contempt and civil penalties.

The Court resolves both of these motions by this order.

The Order found that a fire struck the subject premises in October of 2020 and that HPD placed a vacate order[1] on the subject premises on November 10, 2020 that prohibited anyone from occupying the subject premises due to fire damage, a lack of electricity, a lack of gas service, and broken windows and plywood. HPD also placed "C" violations for fire damage on October 23, 2020. No party disputes that Respondents have not obeyed the Order nor that the violations and the vacate order remain uncorrected as of this writing.

Respondents' motion for an extension

Respondents assert that they cannot afford to correct violations because their tenants other than Petitioner have not paid their rent. Even though Respondents do not claim that Petitioner had not paid her rent, they argue that their lack of financial resources releases them from an obligation to correct violations on a theory of defenses to performance of a contract. However, Respondents' duty to repair is not contractual but statutory, MDL §78(1), to advance a policy of promoting health and safety. N.Y.C. Admin. Code §27-2005.

Even if Respondents' financial situation does not relieve them of their obligation to repair the subject premises, Respondents argue that widespread nonpayment of rent in their building occasioned by the COVID-19 pandemic warrants an extension of their time to repair. Respondents' documentation of this factual assertion suffers from several shortcomings, however. To start with, most of the factual detail supporting Respondents' position comes from

[1] HPD has the power to order any dwelling which is unfit for human habitation to be vacated. N.Y.C. Admin. Code §27-2139, N.Y. City Charter §1802.

Respondents' counsel's affirmation, which has no probative value. Thelen LLP v. Omni Contr. Co., Inc., 79 A.D.3d 605, 606 (1st Dept. 2010), *leave to appeal denied*, 17 N.Y.3d 718 (2011). Respondents also supply an affidavit of a managing agent ("the Managing Agent"), but his allegations of nonpayment of rent are bare and conclusory, bereft of any detail about how many apartments are in the building in which the subject premises is located ("the Building"), what the rental amounts are, and what the arrears are. Underscoring the unreliability of the managing agent's affidavit is his averment that Respondents have not collected "any" rent, which is inconsistent with Respondent's counsel's affirmation in reply that Petitioner was one of the only tenants who paid her rent prior to the fire in October of 2020.

In their reply submission, Respondents purport to submit rent breakdowns for other tenants in the Building. The function of reply papers is to address arguments made in opposition to the position taken by a movant, not to permit the movant to introduce new arguments in support of, or new grounds for the motion. Stang LLC v. Hudson Square Hotel, LLC, 158 A.D.3d 446, 447 (1st Dept. 2018), All State Flooring Distribs., L.P. v. MD Floors, LLC, 131 A.D.3d 834, 836 (1st Dept. 2015). But even assuming *arguendo* that the Court were to consider the rent breakdowns supplied on reply, the rent breakdowns are not in admissible form, insofar as no affiant with personal knowledge of Respondents' business establishes a foundation for them. But even assuming *arguendo* that the Court would consider the content of the rent breakdowns, the records are not reliable. The rent breakdowns contain no running balances or apartment numbers and some of them do not even contain last names of the tenants. One tenant is only identified as "Andre." One tenant is only identified as "Chuckie," which seems to be duplicative of another rent breakdown with identical amounts for a tenant named "Charles Grant."

Assuming *arguendo* that the breakdowns for "Chuckie" and "Charles Grant" are for the same apartment, Respondents supply rent breakdowns for four apartments, without providing information about how many apartments are in the Building.[2]

The Managing Agent avers that the onset of the COVID-19 pandemic has not only prevented landlords from evicting tenants, but also from "seeking rent …." The Managing Agent's statement is incorrect as a matter of law. In response to the COVID-19 pandemic, the Legislature has enacted the COVID-19 Emergency Rental Assistance Program, according to which landlords as well as tenants can apply for a grant covering rent arrears. L. 2021, c. 56, part BB, § 6(3), L. 2021, c. 56, part BB, § 6(5). If the Managing Agent is referring to restrictions on evictions, those apply only to those tenants who interpose a document called a "hardship declaration," L. 2021, c. 417, Part C, Subpart A, §4, the validity of which landlords may challenge. L. 2021, c. 417, Part C, Subpart A, §10. And no provision of law prevents a landlord from pursuing a plenary judgment against a tenant for nonpayment of rent during the pandemic. To the extent that collection of a money judgment presents challenges, such challenges adhere to judgments obtained in summary proceedings as well.

All of the above problems with Respondents' arguments, of course, assume *arguendo* that a rent roll constitutes the universe of resources available to a landlord to discharge its statutory duty to maintain real property. It does not. Significantly, Respondents say nothing about the availability of insurance, a conspicuous omission that causes the Court draws an adverse

[2] Petitioner's lease, which is an exhibit in the motion practice, shows that the subject premises is subject to the Rent Stabilization Law, which compels the conclusion that the Building has at least six units. 9 N.Y.C.R.R. §2520.11(d).

inference that Respondents lack adequate, if any, insurance.[3] Respondents' argument, if it prevailed, would perversely reward owners who irresponsibly neglect to adequately insure their properties, with all sorts of undesirable policy consequences to follow. Compare Bing Chung Chan v. 60 Eldridge Corp., 129 Misc.2d 787, 791 (Civ. Ct. N.Y. Co. 1985)(declining to consider the availability of insurance in a determination of an economic infeasibility defense in an HP proceeding on the ground that doing so would encourage underinsurance).

Respondents also omit any reference to any ability to finance the cost of repairs. One of the exhibits indicates that the cost of restoring the subject premises to habitability is approximately $21,000. Assuming *arguendo* that the subject premises has six units,[4] Respondents' failure to explain why an owner of a six-unit building in New York City is unable to finance $21,000, whether by a secured loan or a line of credit or some other mechanism renders wholly unsatisfactory Respondents' profferred rationale for failing to obey the Order.

Finally, Respondents' counsel's statement that Petitioner does not have the standing to pursue this case is untimely and incorrect as a matter of fact and law. The Court has already made a finding after a full trial that Petitioner is a tenant of record of the subject premises, which is law of the case. Be that as it may, Respondents themselves annex to their motion a lease showing that *Petitioner is a rent-stabilized tenant of the subject premises*. Assuming *arguendo* the truth of Respondents' allegation that Petitioner has improperly failed to execute a lease renewal, then Respondents have a remedy, 9 N.Y.C.R.R. §2524.3(f), but in the interim a rent-

[3] While it is not mentioned in the papers, on oral argument of this motion, in response to the Court's question, Respondents' counsel allowed for the possibility that Respondents may have allowed for their insurance to lapse.

stabilized tenant maintains her status as such a tenant even upon the expiration of the lease. NYSANDY12 CBP7 LLC v. Negron, 64 Misc.3d 1238(A)(Civ. Ct. Bronx Co. 2019), *citing* 9 N.Y.C.R.R. §2523.5(d), FAV 45 LLC v. McBain, 42 Misc.3d 1231(A) (Civ. Ct. N.Y. Co. 2014). Furthermore, an occupant need not be a tenant in order to maintain an HP proceeding, only be a "lawful occupant." N.Y.C. Admin. Code §27-2115(h)(1). Thus, even assuming *arguendo* that Petitioner failed to renew her lease, rendering her a tenant at will or a tenant at sufferance, that would have no effect on her standing to bring this proceeding. Dep't of Hous. Pres. & Dev. v. Vabre, 2021 N.Y. Slip Op. 32021(U)(Civ. Ct. Kings Co.).

Accordingly, the Court denies Respondents' motion to extend the time to comply with the Order. Respondents therefore remain out of compliance with the Court's order and the Court considers Petitioner's motion for contempt and civil penalties.

Petitioner's motion for contempt

Civil contempt requires a determination that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect; that the contemnor disobeyed that order; that the contemnor knew of the Court's order, El-Dehdan v. El-Dehdan, 26 N.Y.3d 19, 29 (2015), Matter of First Am. Title Ins. Co. v. Cohen, 163 A.D.3d 814, 816 (2nd Dept. 2018); and the disobedience defeats, impairs, impedes, or prejudices the rights or remedies of a party. El-Dehdan, supra, 26 N.Y.3d at 35, Bd. of Dirs. of Windsor Owners Corp. v. Platt, 148 A.D.3d 645, 646 (1st Dept.), *leave to appeal dismissed*, 30 N.Y.3d 986 (2017).

The Order in effect clearly and unequivocally directed Respondents to correct the

[4] See Footnote 2.

violations in the subject premises so as to effectuate a lifting of the vacate order. The record on this motion practice leaves no dispute that Respondents did not obey the Order; indeed, they moved in this very motion practice to extend the time to comply with the Order because they claim that they are unable to do so. That motion moreover demonstrates that Respondents know and have known about the Order. As a matter of law, a landlord's failure to correct violations necessarily prejudices a tenant, Brown v. 315 E. 69 St. Owners Corp., 11 Misc.3d 1069(A)(Civ. Ct. N.Y. Co. 2006), *citing* Various Tenants of 446-448 W. 167th St. v. N.Y.C. Dep't of Hous. Pres. & Dev., 153 Misc.2d 221, 222 (App. Term 1st Dept. 1992), and in this matter Petitioner proves, and Respondents do not dispute, that the vacate order has effectively rendered her and her minor son homeless. When the record on motion practice shows no fact dispute as to the elements of contempt, the Court may make a finding of contempt without a hearing. Martin v. Martin, 163 A.D.3d 1139, 1141 (3rd Dept. 2018), Hush v. Taylor, 121 A.D.3d 1363, 1365 (3rd Dept. 2014), Speirs v. Leffer, 246 A.D.2d 590, 590-91 (2nd Dept. 1998). As a prima facie matter, then, Petitioner has shown the elements of civil contempt.[5]

Petitioner also moves to hold Respondents in criminal contempt. The standard for criminal contempt parallels that of civil contempt, except the movant need not prove prejudice, Matter of Department of Envtl. Protection of City of N.Y. v. Department of Envtl. Conservation of State of N.Y., 70 N.Y.2d 233 (1987), and must demonstrate beyond a reasonable doubt that the alleged contemnor willfully disobeyed a court order. People v Metropolitan, 231 A.D.2d 445

[5] Judiciary Law §753(A)(3) does not require a showing of willfulness as an element of civil contempt. El-Dehdan, supra, 26 N.Y.3d at 34, Bd. of Dirs. of Windsor Owners Corp., supra, 148 A.D.3d at 646.

(1st Dept. 1996), Bayamon Steel Processors v. Platt, 191 A.D.2d 249 (1st Dept 1993), Willer v. Dachenhausen, 83 A.D.2d 924 (1st Dept. 1981). A knowing failure to comply with a court order gives rise to an inference of willfulness which may be rebutted with evidence of good cause for noncompliance. Matter of Figueroa-Rolon v. Torres, 121 A.D.3d 684 (2nd Dept. 2014), *leave to appeal dismissed*, 24 N.Y.3d 1096, 1097 (2015), Dalessio v. Kressler, 6 A.D.3d 57, 66 (2nd Dept. 2004).

Given that Respondents do not raise any issue of fact that they knew of the Order and did not comply with it, no hearing is necessary in order for Petitioner to prove civil and criminal contempt as a prima facie matter. Respondents' affirmative defenses to contempt are all that remain. Respondent's potential inability to comply with the order can constitute an occasion for the Court to deny a contempt motion, but that shall be determined at a hearing. Lueker v. Lueker, 166 A.D.3d 603, 604 (2nd Dept. 2018), Matter of Savas v. Bruen, 139 A.D.3d 736, 737 (2nd Dept. 2016), Lundgren v. Lundgren, 127 A.D.3d 938, 940-41 (2nd Dept. 2015), Edelstein v. Edelstein, 110 A.D.3d 567, 568 (1st Dept. 2013), In re Waterfront Comm'n, 245 A.D.2d 63, 65 (1st Dept. 1997), Penn-Dixie Indus., Inc. v. Castle, 77 A.D.2d 844 (1st Dept. 1980), Singer v. Singer, 52 A.D.2d 774, 774 (1st Dept. 1976). While such a defense entitles Respondents to a hearing, Gomes v. Gomes, 106 A.D.3d 868, 869-70 (2nd Dept. 2013), Respondents bear the burden of proving such an inability. In re Hildreth, 28 A.D.2d 290, 294 (1st Dept. 1967).

Discussion: civil penalties

Petitioner moves for an order awarding civil penalties. Given that the Court has already entered into an order to correct and there is no dispute that Respondents have not corrected the violations, Petitioner shows a prima facie entitlement to an award of civil penalties.

In mitigation or remission (but not a defense) of civil penalties, an owner may show, *inter alia*, that they began to correct the violation promptly upon receipt of the notice of violation, but that its full correction could not be completed within the time provided because of, *inter alia*, an inability to obtain necessary funds. N.Y.C. Admin. Code §27-2116(b)(2)(i). While there is an extent that Respondents' submission falls short of this provision – the papers do not show that Respondents "began to correct" any violation – Respondents' submissions raise enough of an issue of fact as to lack of funds to warrant their opportunity to prove such a defense to civil penalties at a hearing.

Accordingly, it is

ORDERED that the Court denied Respondents' motion to extend their time to comply with the Order, and it is further

ORDERED that the Court grants Petitioner's motion for contempt solely to the extent of finding that Petitioner has demonstrated, as a prima facie matter, that Respondents are in civil and criminal contempt and the Court shall set the contempt motion for a hearing on Respondents' defenses to contempt, which Respondents bear the burden of proving, and it is further

ORDERED that the Court grants Petitioner's motion for civil penalties solely to the extent of finding that Petitioner has demonstrated, as a prima facie matter, that Respondents are liable for civil penalties and the Court shall set the motion for a hearing on Respondents' defenses to civil penalties, to be held at the same time as the contempt hearing, where Respondents bear the burden of proving, and it is further

ORDERED that the Court will calendar the hearing at a date to be determined with the parties, and it is further

ORDERED that the Court denies Petitioner's motion for a second order to correct on the ground that it would be duplicative of the Order.

This constitutes the decision and order of the Court.

Dated: Brooklyn, New York
November 3, 2021

HON. JACK STOLLER
J.H.C.