2021-11-23

GME Realty LLC v. Rodriguez

CIVIL COURT OF THE CITY OF NEW YORK

COUNTY OF RICHMOND

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GME REALTY LLC,

Petitioner, Index No. 52192/19

-against-

DECISION/ORDER

Remy Smith, J.H.C.

J. FRED RODRIGUEZ,

Respondent.

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Hon. Remy Smith

Recitation, as required by CPLR 2219(a), of the papers considered in the review of petitioner's request for a judgment of possession after submission of memoranda of law *in lieu* of hearing:

Papers:	Numbered
Petitioner's Memorandum of Law and supporting papers.	1
Respondent's Memorandum of Law in Opposition and supporting papers	2
Petitioner's Memorandum of Law in Reply	3

Petitioner successfully moved to restore this matter to the calendar for appropriate relief after respondent allegedly breached the parties' two-attorney probationary stipulation of settlement dated December 6, 2019 ("Stipulation").

Petitioner commenced this Holdover case seeking possession of 273 St. Marks Place, Apt. #1A, Staten Island, New York ("premises") after expiration of a Notice of Termination dated April 8, 2019 alleging that respondent failed to cure various lease violations as set forth in the Notice to Cure dated March 19, 2019, specifically that he "created and/or caused a health and fire hazard by virtue of garbage, debris and other unsanitary conditions in [his] apartment," that

said conditions contributed to a severe roach infestation and noxious odor problem that disturbed another tenant, that he failed to keep the apartment clean and otherwise maintaining a severe hoarding condition therein, and refused access to the petitioner's exterminator. As per Stipulation, respondent admitted these allegations and agreed to cure same. Petitioner reserved the right to inspect said cure and move to restore the matter for appropriate relief, including but not limited to a judgment of possession, in the event of breach.

The COVID-19 pandemic-related near-cessation of court operations contributed to a delay in restoration, as discussed in detail in this court's July 15, 2021 Decision/Order restoring the case for a hearing, but the matter was ultimately restored for said purpose. After a court visit to the premises and scheduling conferences, counsel agreed to submit Memoranda of Law in support of their respective positions, to wit, that respondent's breach warrants a judgment of possession against the argument that respondent cured same, *inter alia*. The court permitted the submissions and makes the conclusions at law given the circumstances presented.

It is undisputed that respondent has enjoyed a 28 year rent-stabilized tenancy at the premises. It is also undisputed that the respondent has breached the Stipulation in failure to cure clutter conditions at the premises during the probationary period. It is again undisputed that the respondent completely emptied the premises after the court's September 2021 visit. The court notes actions were taken well after the cure period, and also that completely emptying the space is not a permanent solution in the event that respondent continues the tenancy. In other words, such cure was late, improbable to maintain, and impedes somewhat this court's ability to determine whether and how respondent can continue to comply with the Stipulation dated if the court extends same. All of these factors must be analyzed with the guidance of decisional law in order to reach the correct and just conclusion.

Petitioner argues, and relies on a glut of appellate case law in support, that the "appropriate relief" set forth in the Stipulation requires entry of a final judgment of possession in its favor against respondent with issuance of a warrant of eviction with no stay on execution for cure. Petitioner points to the undisputed fact that respondent admitted to the breach of lease allegations in the Stipulation and also failed to cure same in the period allotted thereby. He argues that the court lacks discretion to order a cure and, even if such discretion existed, the exercise of same to grant additional time to cure is inappropriate and unwarranted by the facts of this case.

Respondent argues that an extension of probation is warranted by the circumstances of this case specifically that respondent is a long-term rent-stabilized tenant with Senior Citizen Rent Increase Exemption ("SCRIE") as well as that the COVID-19 pandemic caused significant impediments to many life events, including but not limited to de-cluttering apartment, as well as heightened health concerns impeding the ability to obtain assistance with this task[1]. Respondent also finds support in an abundance of case law that supports the proposition that is an appropriate, at least not improper, exercise of discretion to enlarge the probationary period on the Stipulation and deny petitioner's request for a judgment of possession at this stage. He argues that this remedy falls under "appropriate relief" under the Stipulation and is applicable in both breach of lease and nuisance holdovers, the former of which supplies the basis of this proceeding.

[1]It is undisputed that respondent is a long-term rent stabilized tenant with SCRIE rent; petitioner does contest this court's acceptance of factual allegations concerning respondent's particular COVID-19 related issues. While the court agrees that those issues are not properly on the record and are not considered as such, the court appreciates the general effect COVID-19 pandemic to the extent that the accessibility of many ordinary services was extremely limited for at least 6 months after March 2020. It is undisputed that there is no medical evidence in the record to support any conclusion that respondent was physically affected by COVID-19 was more or less susceptible to harm and therefore does not consider these representations.

The court considers the facts and the decisional law with an eye toward reverence for counsel's ability to chart his or her own respective course. In this case, the Stipulation provides that the petitioner may restore the matter to the calendar for "appropriate relief: which may or may not include a judgment of possession." The court must determine whether to view this term as expansive, and, if so, it is an appropriate exercise of discretion to extend the probationary period without yet granting petitioner's request for entry of a final judgment of possession at this time. The court's position is that it is.

Respondent admitted the allegations in the Stipulation. There is no inquiry as to whether he breached the lease or that he failed to timely cure; the pertinent question is, then, do the facts, case law, parties' own stipulation require and extension of the probationary period or eviction of the respondent? The court finds that the former is the appropriate relief under the circumstances and extends the probationary period through and including May 31, 2023. The court also orders that respondent shall grant no more than 2 monthly inspections by the landlord, but that same may be unannounced but within reasonable hours (all week except for Sunday and between 10:00 a.m. and 6:00 p.m.). To the extent that petitioner believes that respondent has breached this Order or the Stipulation, of which the remaining terms remain in full force and effect unless otherwise altered by this Decision/Order, it shall seek to restore the matter for a final judgment of possession in its favor. This is "appropriate relief" as contemplated by counsel in that it preserves the tenancy in light of respondent's willingness and ability to cure the breach but also provides a means by which petitioner can seek remedy in the event that such willingness is insufficient to maintain a state of cure or ability is unsuccessful.

Each party relies on abundant and clear case law, however this court finds respondent's submissions more persuasive as applied to the facts at bar. To support his position that a final

judgment of possession against respondent is appropriate, petitioner cites cases that do not quite reflect the facts in this proceeding or the legal analysis that those facts beg. The court in Hotel Cameron v. Purcell, 35 A.D.3d 153 (1st Dep't 2006), for example, essentially held that the Appellate Term should not have disturbed the lower court's finding that respondent, in threatening the doorman and commercial tenant with physical violence, breached the probationary stipulation. It did not, however, substitute its own interpretation of the facts and therefore stands for the principle that the lower court maintains discretion to arrive at the appropriate conclusion and the Appellate Division did not comment on what that conclusion must be.

Similarly, in Frank v. Park Summit, 175 A.D.2d 33 (1st Dep't 1991), the respondent was allowing her nephew to reside at the premises; he had a history of diagnosed schizophrenia and the record revealed that the consistently engaged in violent behavior. In Rockaway One Co. v. Califf, 194 Misc. 3d 191 (2d Dep't 2002), the record showed a pattern of continuity and recurrence of objectionable conduct that began long before the termination of the tenancy, continued through the probationary period and was unabated throughout the time of trial. The instant case does not involve any allegations of violence and it is undisputed that the respondent has emptied the apartment.[2] See also Gazivoda v. Sherman, 18 Misc.3d 138(A)(Sup.Ct. App. Term 2008), wherein the tenant failed to remedy the conditions at all.

To support his position that cure is neither appropriate nor required in this proceeding, petitioner relies on cases that also fail to reflect the circumstances presented here. In Cabrini v. O'Brien, 71 A.D.3d 486 (1st Dep't 2010), the trial court found that there was a roach and rodent

[2]Whether this condition will last or proves to be, after respondent moves back in, a meaningful and sustainable cure is the subject of further discussion in this Decision and can be addressed throughout the remaining probationary period.

infestation as well as faulty wiring in respondent's apartment and that he caused clutter, offensive odors, and refused access to the landlord, thus committing a nuisance as well as breaching his lease. The court denied the application for a post-trial cure because it found that the conditions were unlikely to be abated. This record does not reflect the same circumstance.

In another inapposite case, Zipper v. Haroldon Ct., 39 A.D.3d 325 (1st Dep't 2007), the Appellate Division did substitute its judgment of the facts, reversing the trial court's denial of the condominium's request for eviction based on occupant's nuisance, in light of "all the credible testimony regarding the odors that emanated from [occupant's] apartment indicated that they were not of the unavoidable variety, but of a type caused by matter that should not be kept in an apartment, such as rotting food . . . [and that] . . . t[]he testimony of [occupant's] witnesses, who denied the presence of any such odors, was refuted by the disinterested testimony of two fire-fighters, regarding their unannounced visit to the apartment just one month before trial. Their testimony corroborated plaintiff's claims of ongoing noxious odors by confirming that on that visit the apartment emanated shockingly foul odors." The Appellate Division further found that the "credible testimony clearly [established] the claimed ongoing, recurring presence of an unacceptable level of odor constituting a nuisance and warranting eviction" and that the trial court's implied conclusion that the "stench noticed by the fire-fighters coincidentally happened to be present on the day of their visit and was a rare event . . . strains credulity." The facts at bar bear no similarity either in procedural posture or substance.

Respondent cites to cases that present fact patterns reflective of those at bar; their respective suggestions of a cure period are persuasive. For example, the Appellate Division in Matter of Prospect Union Assoc. v. DeJesus, 167 A.D.3d 540 (1st Dep't 2018) modified the lower court in reversing its denial of the tenant's application for a stay of eviction because the

lower court "failed to consider whether, with ongoing supportive services and suitable monitoring, tenants can continue to live in an orderly existence in the apartment without affecting or harming neighbors . ." and disagreed with its denial of the stay based on untimely cure. Instead, the Appellate Division remanded the matter to the lower court for a hearing on respondent's application for a permanent stay of eviction. The facts at bar also involve an untimely cure and intervention of respondent's counsel and supportive services.

In Matter of Strata Realty Corp. v. Peña, 166 A.D.3d 401 (1st Dep't 2018), the lower court, after trial, granted the landlord a judgment of possession based on nuisance and denied the tenant's application for a further stay of eviction. The Appellate Term affirmed. The Appellate Division modified the Appellate Term's order by granting a 90-day stay of eviction, finding that "[a]lthough respondent has had many opportunities to cure, in light of her advanced age, long term occupancy and disability, the hardship eviction would case . . . and her stated willingness to comply with court orders and grant petitioner access to her apartment . . . pursuant to the principles of equity, that she should be afforded another opportunity to do so." Similarly, the appellate term in Trump Vill.Sec. 3 v. Birnbaum, 2002 N.Y.Slip.Op. 50646(U) (Sup.Ct. App. Term 2002) modified and extended the trial court's 5-day stay to a permanent stay of eviction on a motion to restore because the respondent cured the alleged breach prior to entry of final judgment.

This court finds that application of the most relevant case law addressing fact patterns bearing the closest resemblance to those at bar requires extension of the probationary period for Mr. Rodriguez to maintain the cure and allow petitioner the opportunity to access and inspect the apartment to ensure compliance. This is the remedy the court finds appropriate under the circumstances and upon the specific language of Stipulation allowing for the court to determine

"appropriate relief". The court does, however, take into account that respondent's cure, to wit, emptying the entire apartment, is not a realistic or permanent cure when he resumes his occupancy[3]. The court, based on the submissions as well as case law discussed above, provides respondent with this opportunity to maintain the cure because he has shown willingness and ability to do so and he has engaged the help of an attorney, Adult Protective Services, his family, and community organizations to help him de-clutter the apartment.[4]

As stated above, the court extends the probationary period under the Stipulation through and including May 31, 2023. The court also orders that respondent shall grant no more than 2 monthly inspections by the landlord, but that same may be unannounced but within reasonable hours (all week except for Sunday and between 10:00 a.m. and 6:00 p.m.). To the extent that petitioner believes that respondent has breached this Order or the Stipulation, of which the remaining terms remain in full force and effect unless otherwise altered by this Decision/Order, it shall seek to restore the matter for a final judgment of possession in its favor.

The court does not consider respondent's request for a reasonable accommodation as improperly interposed and without basis in proof.

The foregoing is the Decision/Order of this court.

Dated: Staten Island, New York
November 23, 2021

BY: _____
Remy Smith, J.H.C.

[3]Respondent has relocated while petitioner performs work to correct conditions and parties, by counsel, have been engaging in discussions concerning progress of the work and respondent's ability to resume occupancy.
[4]Although the court did not engage in fact-finding on this particular submission, as the parties agreed that respondent had breached the Stipulation, it is undisputed that respondent has been working with third parties and did indeed empty the apartment at one point prior to these submissions.