2021-12-03

Matter of Bordeau

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART B
----------X
In the Matter of the Application of

CHRISTINE BORDEAU and ANGELA HAYES, 1499 Apt 2D, LIMA BULLEN-SAMUEL, 1495 Apt BA, LOUISE CONSTANT, 1499 Apt 1F, HEYWARD FULTON, 1499 Apt 1C, MATTHEW HANKEY, 1495 Apt 2H, MYRTLE HAYWOOD, 1495 Apt 1A, BEVERLY JOHNSON, 1499 Apt 2E, KEISHA KENNEDY, 1499 Apt 2F, NISHA SHUCKLA LATOUCHE, 1495 Apt 1H, HAROLD MARK, 1499 Apt. 2C, BERNICIA NARAYAN, 1495 Apt BB, PHILIP NELSON, 1495 Apt BC, DAWNETTE CAMERON SIMILCAR, 1499 Apt BF, and MARLENE SOLOMON, 1495 Apt. 1B,

Tenant-Petitioners,

Index No. HP # 302002/2020

DECISION/ORDER

For a Judgement, Pursuant to Article 7A of the Real Property Actions and Proceedings Law, appointing a court-designated administrator for the premises known as:

1495-1499 E. 46th Street, Brooklyn, New York 11234
Block: 07826 Lot: 0020 (Kings County)
----------X

Present:
JULIE POLEY
Judge, Housing Court

Recitation, as required by CPLR 2219(a):

Notice of Motion and Affidavits Annexed.....1
Order to Show Cause and Affidavits Annexed.....0
Answering Affidavits.....2
Replying Affidavits.....3
Exhibits.....4
Stipulations.....0
Other.....0

This is a 7-A proceeding in which Petitioners seek the appointment of a court-designated administrator for the premises located at 1495-1499 E. 46th Street, Brooklyn, New York 11234 ("premises"). There are fifteen (15) Tenant-Petitioners from fourteen (14) separate apartments in

the premises. The Petition further alleges that the certificate of occupancy for the premises is for a total of 16 apartments, with eight (8) units at 1495 E. 46th Street and eight (8) units at 1499 E. 46th Street, however, upon information and belief, there are actually twenty-two (22) total units, twenty (20) of which are occupied and two (2) of which are vacant. The the potentially six (6) "illegal" units in the premises form the basis of Department of Housing Preservation and Development's ("HPD") motion to dismiss this 7-A proceeding.

Tenant-Petitioners allege that since at least May of 2019, conditions dangerous to life, health, and safety have existed in their apartments and in common areas of the premises for more than five (5) days and that the premises are severely neglected. A detailed list of repairs is attached to the Petition as Schedule A. To further demonstrate the longstanding issue of repairs, Petitioner alleges that 1495 E. 46th Street has been enrolled in HPD's Alternative Enforcement Program ("AEP") since February 4, 2020, that HPD filed a comprehensive HP action concerning the premises in Index No. HP #3111/19, and that Tenant-Petitioners Christine Bordeau and Angela Hayes also started a HP case under Index No. HP #6220/19[1]. HPD violation reports for the premises are attached to the Petition as Schedule C and Scheduled D. To pay for repairs, Petitioner attached a rent roll for the fourteen (14) apartments occupied by Tenant-Petitioners as Scheduled B to the Petition, however, Petitioner acknowledges that rent proceeds may not be sufficient to fund repairs and a loan may be necessary.

The question over who, if anyone, is exercising control over the premises was raised in the Petition and was also brought to the court's attention during conferences. According to the most recent HPD Building Registration, which expired on November 1, 2020, Toju Realty Corp

[1] For Index No. HP #6220/19, HPD filed a motion for leave to reargue before the Hon. Judge Michael Weisberg concerning the court's Decision/Order dated April 16, 2021, which remains pending. The Law Office of Marc Scolnick is the attorney of record for Toju Realty Corporation in Index No. HP #6220/19. HPD's comprehensive case in Index No. HP #3111/19 was scheduled for inquest on March 11, 2020 and withdrawn on that date.

is the corporate owner, with Edwin Gbenebitse as Head Officer and Jackie Jackson as Managing Agent, all with a service address of 123 Dekalb Avenue, Brooklyn, NY 11217. Per ACRIS, on January 2, 2020, Toju Realty Corporation sold the premises to 1495-99 East 46 Street Corporation, which shares the same service address of 123 Dekalb Avenue, Brooklyn, NY 11217. During conferences, Marc Scolnick, from the Law Office of Marc Scolnick P.C., 84-03 Cuthbert Road, Suite 1B, Kew Gardens, NY 11415, informed the court that Edwin Gbenebitse exercised control over the premises, that Edwin Gbenebitse passed away leaving a wife and four minor children, and that his law office is representing the late Edwin Gbenebitse's wife in Nassau County Surrogate's Court.

On April 27, 2021, HPD filed a motion to dismiss this proceeding pursuant to CPLR § 3211(a)(1) and (a)(7) for failure to state a cause of action and for defenses founded upon documentary evidence, or in the alternative, granting summary judgment and dismissing this proceeding pursuant to CPLR § 3212 and/or CPLR § 409(b). HPD argues that the court should dismiss this proceeding because the appointment of a 7-A administrator would be futile and legally impossible. The crux of HPD's argument centers around the six (6) "illegal" units in the premises. HPD argues that there is documentary evidence of "illegal" units in the premises, and that it is legally impossible for the court to issue an order in compliance with RPAPL § 778(1). HPD argues that the court is obligated by RPAPL § 778(1) to authorize the 7-A administrator to collect rents, but is forbidden by MDL § 325, MDL § 302(1)(b) and MDL § 301 from ordering any person to collect rent from unlawful dwelling units. HPD also argues that Petitioner-Tenants fail to state a claim because the Petition does not meet the statutory requirements of RPAPL § 772(3) to indicate how work will be completed or provide a cost estimate. Petitioner-Tenants oppose the motion in its entirety.

The court adjourned HPD's motion and this proceeding several times, including June 23, 2021, July 21, 2021 and August 27, 2021, to provide interested parties an opportunity to appear, however, to date, a notice of appearance has not been filed for anyone claiming control over the premises and the Law Office of Marc Scolnick P.C. has only appeared as a friend of the court to provide information. On October 4, 2021, this Court heard oral argument and reserved decision.

In reviewing HPD's motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, "the Court must afford the pleadings a liberal construction, accept all facts as alleged in the pleadings to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. However, bare legal conclusions are not presumed to be true, nor are they accorded every favorable inference." (*Breytman v. Olinville Realty, LLC*, 54 A.D. 3d 703, 703-704 [App. Term, 2nd Dept 2008]; *see also, Leon v. Martinez*, 84 N.Y.2d 83 [1994]). A motion to dismiss pursuant to CPLR § 3211(a)(1) may be granted "only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law." (*Cavaliere v. 1515 Broadway Fee Owner*, LLC, 150 A.D.3d 1190, 1191 [2nd Dep't 2017]; *citing, Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

To obtain summary judgment, the moving party has the burden of establishing its cause of action or defense sufficiently to justify judgment in its favor as a matter of law. (*See*, CPLR § 3212(b); *Friends of Animals, Inc. V. Associated Fur Mfrs. Inc.*,390 N.E.2d 298 [1979]). If there is any doubt as to the existence of a triable issue, summary judgment should not be granted. (*Glick & Dolleck, Inc. V. Tri-Pk Export Corp.*, 239 N.E.2d 725 [1968]). As summary judgment is a drastic remedy, "the facts must be viewed in the light most favorable to the non-moving

party." (*Vega v. Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented." (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *citing, Di Menna & Sons v. City of New York*, 301 NY 118 [1950]).

The proponent of summary judgment is required to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material fact." (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only upon making of this showing does the burden then "shift to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Id.*)

The central issue presented is whether "illegal" units in the premises require dismissal of this 7-A proceeding. HPD contends the presence of "illegal" units render the appointment of a 7-A administrator a legal impossibility. A corollary argument is that "illegal" units render the appointment of a 7-A administrator an exercise in futility, warranting dismissal.

The court looks to the plain language of the statute for guidance. Concerning the appointment of a 7-A administrator, RPAPL § 778(1) provides in pertinent part that:

> "The court is authorized and empowered, in implementation of a judgment rendered pursuant to section seven hundred seventy-six or seven hundred seventy-seven of this article, to appoint a person other than the owner, a mortgagee or lienor, to receive and administer the rent moneys or security deposited with such owner, mortgagee or lienor, *subject to the court's discretion*. The court may appoint the commissioner of the department of the city of New York charged with enforcement of the housing maintenance code of such city or the commissioner's designee as such administrator, provided that the commissioner or the commissioner's designee shall consent, in writing, to such appointment. Any administrator is authorized and empowered *in accordance with the direction of the court*, to order the necessary materials, labor and services to remove or remedy the conditions specified in the judgment, and to make disbursements in payments thereof; and to demand, collect and received the rents from the tenants; *and to institute all necessary legal proceedings including, but not limited to, summary proceedings for the removal of any tenant or tenants*; and to rent or lease for terms not

> exceeding three years any part of said premises, however, the court may direct the administrator to rent or lease commercial parts of said premises for terms that the court may approve (emphasis added) ..."

Therefore, the plain language of the statute provides that a 7-A administrator will "receive and administer the rent moneys ... *subject to the court's discretion*" and the administrator is "authorized and empowered *in accordance with the direction of the court* ... to demand, collect and receive the rents from the tenants ... (emphasis added)." (*See*, RPAPL § 778(1)). As such, if a 7-A administrator is appointed, that administrator serves at the direction of the court, and the court can be mindful of not providing instructions that would cause the administrator to act in manner that would contravene the MDL. In the case at bar, assuming there are "illegal" units, which appears to be the case, in appointing a 7-A administrator the court could direct that the administrator only demand and collect rent from legal units in the premises. By providing those instruction to the 7-A administrator, which the court is entitled to do by statute, the 7-A administrator would not be forced to collect rent from "illegal" units and the dilemma posed by HPD would be rendered moot.

The corollary issue of futility can also be rendered moot by the same logic, although the court acknowledges there are circumstances where it would obviously be futile to appoint a 7-A administrator due to the presence of "illegal" units, such as where all units are "illegal" or a building-wide vacate order renders a 7-A administrator unable to collect any rent. However, here, there are at least fourteen (14) legal apartments in the premises that could pay rent to a 7-A administrator, so a genuine issue of material fact exists as to whether a 7-A administrator could operate the building using those rent proceeds. (*See*, Petition, Schedule B).

Furthermore, the mere presence of "illegal" units, in and of itself, is not grounds for automatic dismissal of this proceeding because the statute contemplates such a circumstance and

provide recourse. In particular, the statute explicitly states that, "Any administrator is authorized and empowered in accordance with the direction of the court ... *to institute all necessary legal proceedings including, but not limited to, summary proceedings for the removal of any tenant or tenants* ... (emphasis added)." (*See*, RPAPL § 778(1)). As such, the court could authorize and empower a 7-A administrator to institute all necessary legal proceedings to lift a vacate order at the premises or commence a summary proceeding for the removal of any tenant in an "illegal" unit.

Concerning Tenant-Petitioner's compliance with the pleading requirements contained in RPAPL § 772(3), the court again looks to the plain language of the statute for guidance. RPAPL § 772(3) requires the petition, "Allege a brief description of the nature of the work required to remove or remedy the condition and an estimate as to the cost thereof *except that if the petitioners shall be tenants occupying the dwelling, the petition may allege the conditions complained of in which event such description shall not be required to be made by anyone not a party to the petition.* (emphasis added)." Here, Tenant-Petitioners are allegedly tenants occupying the dwelling and are specifically exempted from the cost estimate requirement HPD relies on for dismissal. (*See*, *In re Serban*, 2018 NYLJ Lexis 1174 [Civ Ct, Hous Part, Kings County 2018]; *citing, Maresca v. 167 Bleeker, Inc.*, 121 Misc.2d 846, 847 [Civ Ct, Hous Part, New York County 1983] ["Although the statutory phrasing is inartful, it is expected that tenants would not have the competence to provide estimates of correction and cost and they are clearly excepted from a requirement that any other person provide a description of the conditions at issue. The amended language leads to the single conclusion that if the petition is brought by tenants a 'cost out' need not be provided."]).

Therefore, for the reasons stated, HPD's motion to dismiss and motion for summary judgment is denied. Tenant-Petitioners in this proceeding are entitled to chart their own course and have their day in court. Testimony and cross-examination elicited at trial will afford the court the opportunity to make determinations concerning these factual disputes, and if a 7-A administrator is appointed, the court will have the opportunity to provide that administrator with direction concerning the issues HPD raised in its motion. Accordingly, this proceeding is transferred to Part X for trial.

This constitutes the Decision/Order of this court, which shall be uploaded to NYSCEF.

Dated: December 3, 2021
Brooklyn, New York

Julie Poley JHC
Honorable Julie Poley