2022-03-01

Tezca v. Chery

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2022 NY Slip Op 30530(U)
March 1, 2022
Civil Court of the City of New York, Kings County
Docket Number: Index No. 305012/2021
Judge: Jack Stoller

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART Q
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JUAN TEZCA,

Petitioner,

Index No. 305012/2021

-against-

MARIE CHERY, et al.,

DECISION/ORDER

Respondent.
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Present: Hon. Jack Stoller
Judge, Housing Court

Juan Tezca, the petitioner in this proceeding ("Petitioner"), commenced this proceeding against Marie Chery, Marie Carmen Chery as Trustee for the Marie Chery Revocable Living Trust ("Respondent") and the Department of Housing Preservation and Development of the City of New York ("HPD"), seeking relief on a cause of action for harassment and an order to correct violations at 183 South Second Street, Apt. 1, Brooklyn, New York ("the subject premises"). Respondents interposed an answer The Court held a trial of this matter on February 8, 2022 and adjourned the matter for post-trial submissions to February 18, 2022.

The trial record

Petitioner submitted into evidence violations that HPD placed the subject premises. Petitioner submitted into evidence a violation issued by the New York City Department of Buildings ("DOB") that found that another apartment in the building in which the subject premises is located ("the Building") had been illegally converted into residential space and ordering the vacatur of residential occupants ("the Vacate Order"). Petitioner submitted into evidence a decision dated June 7, 2018 ("the Order") that the Court rendered in a prior summary proceeding that Petitioner commenced seeking possession of the subject premises, Marie Chery

as Trustee v. Wick, Index # L/T 69508/2015 (Civ. Ct. Kings Co.). The Order found, *inter alia*, that there were six residential units in the Building, that the Building had been constructed before 1974, and that Petitioner had not proven a purported substantial rehabilitation exemption from Rent Stabilization. Petitioner submitted into evidence a holdover petition dated July 6, 2021, captioned at 183S2ST, LLC v. Tezca, Index # 306278/2021 (Civ. Ct. Kings Co.)("the holdover proceeding"), predicated by a notice of termination that alleged in essence that the Vacate Order applied to the subject premises. The holdover petition alleged that the subject premises was not subject to the Rent Stabilization Law because the Building had less than six units. Petitioner submitted into evidence a notice of discontinuance of the holdover proceeding pursuant to CPLR §3217 dated November 4, 2021. Petitioner submitted into evidence a motion dated August 27, 2021 that Respondent made in this proceeding seeking, *inter alia*, to amend Respondent's pleading to include a counterclaim for a final judgment of possession against Petitioner, also on the ostensible ground that the Vacate Order applied to the subject premises. The Court took judicial notice that Respondent withdrew this motion.

The Court took judicial notice that the Court issued an order to correct dated November 8, 2021 ("the Order To Correct").

Petitioner testified that he has lived in the subject premises for nineteen years; that the subject premises is located between the first floor and the basement; that there is another apartment on that floor; that the subject premises is at the front of the Building; and that he signed a lease. Petitioner submitted his lease into evidence. Petitioner testified that he lives with his wife and his four children.

Petitioner testified that the subject premises has two exits; that one exit goes to the main street and another exit goes to the top of the Building; that in October of 2021 workers started

working on the back part of the floor that the subject premises is on; that the workers removed kitchen and bathroom fixtures and garbage from the apartment next to him; that he heard noise at the emergency exit, which was being blocked; and that they were blocking the emergency door. Petitioner submitted into evidence a photograph of a door with a wall behind it ("the Obstruction"). Petitioner testified that the exit was blocked for about two to three days; that he observed that an employee of the owner named "Nick" who had done previous work in the subject premises did that work; that he spoke to the owner's employees; that the worker asked Petitioner why Petitioner kept living in the subject premises and said that Petitioner should be out; that the conditions in the subject premises are bad; that they have not made repairs; and that there have been a lot of leaks in the subject premises.

Petitioner submitted into evidence a photograph of leak damage on the ceiling in a room in the subject premises. Petitioner testified that the ceiling has looked like that for a long time, maybe three years; that the ceiling only leaks when it rains; that the ceiling has leaked about three or four times in the last few months; that under the leak is his son's bed; that there is an opening near the tub and the tiles in the bathroom are falling down; that when it rains the water does not drain; that previously when it rained the water would go away; that there was water loss so a year ago the City came and fixed that and they covered up the drainage; and that water enters the subject premises. Petitioner submitted into evidence a photograph of a ceiling in the back area with a piece of paper duct-taped to it. Petitioner testified that he put the paper there because that is where cockroaches came in and that he has had this problem for two years.

Petitioner testified on cross-examination that he does not know who the owner is; that he knows the representative of the owner was "her son" named "Max"; that he met Max when Max gave Petitioner the lease for the subject premises; that he complained to Max about the

conditions in the subject premises; that he has not complained to Max in a long time because Max has not come to the Building; that he started this case because Respondent did not want to make repairs in the subject premises; that repairs have been made since he started this case; that he did not restore this case to say that repairs were not done; that he complained to HPD about conditions in the subject premises; that he took the photograph of the Obstruction on October 8, 2021; that the door looked different before October 8, 2021 because the wall was not blocked; that he was at home when he took the photograph; that he did not see workers in the act of installing the Obstruction; that he saw the back of one of the workers; that he did not know the worker that he saw; that they were blocking the door with tools that he was unfamiliar with; that he did not speak to the worker he saw on that day; that he did not ask why they were there; that he just took the photograph of the door, inside and out; that the door was blocked for two or three days; that he removed the Obstruction with his hands; that the City covered up the drain; that he does not remember when that happened; that Respondent did not cover the drain; that he took the photograph of the ceiling about four months before his testimony; that the ceiling does not look like it does in the photograph in evidence because Respondent made repairs; that the leaks continue, so water goes toward a light fixture; and that Respondent has not fixed a hole in the backroom, although Respondent fixed the leak damage.

Petitioner testified on redirect examination that a leak in basement continues; that the violation for mold has been corrected; and that the violations for roaches and mice have not been corrected.

Respondent submitted into evidence a list of complaints at HPD.

Ferdo Shkreli ("the Property Manager") testified that he has been the Property Manager since 2013 or 2014; that he is familiar with the subject premises; that Petitioner lives in the

subject premises; that he knows Petitioner; that for a while Petitioner was responsible for cleaning and taking out the trash for which Petitioner received a rent credit; that he spoke with Petitioner over the phone and in person; that he last spoke to Petitioner in the context of the last case, in 2018; that he gave Petitioner a substantial deduction on Petitioner's rent; that Petitioner made the payment and then did not continue with that agreement; that he was not aware of conditions in the subject premises; that Petitioner did not complain to him about conditions in the subject premises; that Petitioner started this case because of a blockage of the exit door; that he does not know why Petitioner started this case; that he had sent a construction company to the Building; that Petitioner does not accept his phone calls for access; that repairs were corrected; that he was made aware that the City put cement over the drainage; that he has tried contacting Petitioner by calling him regularly about rent and repairs; and that Petitioner does not pick up his calls.

The Property Manager testified that he was in the Building on October 8; that he did not install the Obstruction; that he had a construction company in the Building on October 8 cleaning up the vacated unit; that he did not instruct anyone to construct the Obstruction; that he does not know who constructed the Obstruction; that he does not know if the Obstruction is still there; that he knew about the Obstruction through his attorney; that he came to learn about a vacate order; that he understood that he had to commence holdover proceedings to vacate the apartments to comply with the law; that he asked his attorney to commence the holdover proceeding; and that he only knows about repairs needed because of what Petitioner testified to today.

The Property Manager testified on cross-examination that he was last in the subject premises over four years before his testimony; that he is the contact for repairs in the Building;

that he commenced cases against tenants of the Building in 2018; that those cases lasted a few years; that he is aware of the Order; that he understood that the Order said that he proved his prima facie case; that his client did not have the money to appeal the Order; that he does not understand the Order to exempt the apartments in the Building from Rent Stabilization; that the I-card says that the Building only has three families; that an architect retained by Respondent illegally built three more apartments in 1993; that Naser Krasniqi is the owner of the construction company who was at the Building on October 8, 2021; that Mike Gonzalez is the owner's right-hand man; that he does not remember the other two workers' names; that he was in the Building on October 8 because the Vacate Order directed that he remove a kitchen; that he had to close something that led into a waste line; that no drywall work was done; that he does not remember what time he arrived at the Building; that he spent about two hours there; and that he has been to the Building about three weeks before his testimony.

The Property Manager testified on redirect examination that he brought the holdover proceeding because he believes that the Building is legally a three-unit building, not a six-unit building; that the vacated apartment had a blocked means of egress; and that he never instructed anyone to build the Obstruction.

Discussion

The New York City Housing Maintenance Code defines "harassment" as any act or omission by or on behalf of an owner that causes or is intended to cause any tenant to vacate or surrender rights and if a tenant does not vacate or surrender rights, includes a use of force or threats, N.Y.C. Admin. Code §27-2004(a)(48)(a), repeated failures to correct "B" and "C" violations, N.Y.C. Admin. Code §27-2004(a)(48)(b-2), repeated commencement of baseless court proceedings, N.Y.C. Admin. Code §27-2004(a)(48)(d), or other repeated acts or omissions

of such significance as to substantially interfere with or disturb the comfort, reposes, peace, or quiet of any tenant, N.Y.C. Admin. Code §27-2004(a)(48)(g), proof of which give rise to a rebuttable presumption that the landlord intended to cause the tenant to vacate or surrender rights.

Petitioner argues that Respondent has harassed him through repeated failures to correct violations. However, Petitioner did not rebut the proposition that he did not give Respondent notice of violations and Petitioner testified that Respondent corrected violations pursuant to the Order to Correct. Instructively, a tenant cannot obtain a rent abatement when the tenant does not give a landlord notice of the conditions, Matter of Moskowitz v. Jorden, 27 A.D.3d 305, 306 (1st Dept.), *appeal dismissed*, 7 N.Y.3d 783 (2006), 1050 Tenants Corp. v. Lapidus, 16 Misc.3d 70, 72 (App. Term 1st Dept. 2007), Windemere Chateau, Inc. v. Hirsch, 22 Misc.3d 1108(A)(Civ. Ct. N.Y. Co. 2008). To the extent that Respondent did not correct violations, the Court cannot find that such a failure alone harassed Petitioner when Petitioner testified that he did not give Respondent notice of the conditions. Garcia v. Adams, 71 Misc.3d 1205(A)(Civ. Ct. Kings Co. 2021).

Petitioner argues that Respondent's pursuit of a judgment of possession against Petitioner on the ground that the Vacate Order applies to the subject premises amounts to harassment. As the Vacate Order plainly orders the evacuation of the "rear" of the basement level, and not the subject premises, which is in the front of the basement level of the Building, Respondent's (eventually abandoned) pleas for judgments against Petitioner on that ground were without merit, both Respondent's commencement of the holdover proceeding and Respondent's motion to amend its pleading in this matter to include a counterclaim for possession against Petitioner. The Housing Maintenance Code defines harassment, in part, as repeated commencement of baseless

or frivolous court proceedings. N.Y.C. Admin. Code §27-2004(a)(48)(d). The Legislature enacted the harassment statute in part to prevent landlords from "forcing tenants out." Prometheus Realty Corp. v. City of N.Y., 80 A.D.3d 206, 213 (1st Dept. 2010), Aguaiza v. Vantage Props., LLC, 69 A.D.3d 422, 423 (1st Dept. 2010). In light of this legislative purpose, Respondent's pursuit of a judgment of possession by a motion to interpose a baseless counterclaim in an extant proceeding amounts to harassment just as much as the commencement of a separate proceeding. Respondent's commencement of such proceedings in two separate matters without basis in fact indeed shows repeated baseless court proceedings.

Respondent's commencement of such Court proceedings lends context to the fact dispute between the parties over the provenance of the Obstruction. Respondent, in closing, challenges Petitioner's credibility regarding the Obstruction. The photograph in evidence, however, corroborates Petitioner's testimony as to the existence of the Obstruction. The Property Manager denied knowledge of the Obstruction, raising the question of how the Obstruction came to be. Although the Property Manager testified that he was at the Building, he also testified that he had not been to the subject premises in four years. The Property Manager therefore did not have the requisite personal knowledge to rebut Petitioner's testimony and photograph regarding the Obstruction. Any possible alternative source of the Obstruction other than Respondent's construction of the Obstruction strains credibility. Moreover, Respondent's pursuit of two causes of action for possession against Petitioner on the inaccurate ground that a vacate order for inadequate egress applied to him is consistent with Respondent taking action to deny a means of egress from the subject premises. In evaluating testimony the Court should not discard common sense. People v. Garafolo, 44 A.D.2d 86, 88 (2nd Dept. 1974). Common sense and the lessons of human experience should not be strangers to the decision-making process. People v. Jones, 19

Misc.3d 1143(A)(S. Ct. N.Y. Co. 2008). "The dictum '*essentialia non sunt multiplicanda praeter necessitatem*' (known as 'Occam's Razor') should be applied – that the simplest of competing theories be preferred to the more complex and subtle." Swierupski v. Korn, 69 A.D.2d 632, 638 (2nd Dept. 1979). Common sense tells the Court that no other person or entity other than one acting at Respondent's direction could have constructed the Obstruction.

Tenants who prove harassment may obtain placement of housing maintenance code violations, an injunction restraining a landlord from engaging in such conduct, civil penalties payable to the New York City Commissioner of Finance, N.Y.C. Admin. Code §27-2115(m)(2), compensatory damages, punitive damages, and attorneys' fees. N.Y.C. Admin. Code §27-2115(o). Petitioner seeks all of this relief. Having found that Respondents have harassed Petitioner as defined by the statute, the Court will direct HPD to place a violation and enjoin Respondent from future harassment.

The civil penalties awarded shall be payable to HPD and shall not be less than $2,000 nor more than $10,000. N.Y.C. Admin. Code §27-2115(m)(2). As the record shows that Respondent did repairs upon being notified of them, the Court awards civil penalties of $2,500.

Compensatory damages cannot be contingent or speculative, but ascertainable to a degree of reasonable certainty. E.J. Brooks Co. v. Cambridge Sec. Seals, 31 N.Y.3d 441, 448-49 (2018). Petitioner did not prove compensatory damages as such. In the absence of such proof, the Court can award Petitioner compensatory damages of $1,000.00. N.Y.C. Admin. Code §27-2115(o).

Punitive damages are assessed by way of punishment to the wrongdoer and example to others. Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y., 10 N.Y.3d 187, 193-94 (2008). While no rigid formula fixes punitive damages, they should bear some reasonable

relation to the harm done and the flagrancy of the conduct causing it. Id. When a landlord engaged in harassment to a somewhat greater degree, i.e., changing locks and discarding personal property, a Court awarded punitive damages in the amount of $5,000. Caban v. Silver, 2019 N.Y.L.J. LEXIS 458, *17 (Civ. Ct. Kings Co.). A long-term course of egregious conduct warrants an award of $4,500. Guang Y. Leung v. Zi Chang Realty Corp., 2022 N.Y. Slip Op. 50034(U)(App. Term 1st Dept.). Petitioner's commencement of a holdover proceeding and motion in this proceeding did not rise to such a level. While Petitioner's construction of the Obstruction was an extreme and, frankly, bizarre action, it was short-lived, such that a lighter penalty is warranted. The Court therefore awards punitive damages of $1,500.00.

Petitioner is entitled to attorneys' fees in this matter and the Court will contact the parties for a conference.

Accordingly, it is

ORDERED that the Court dismisses so much of the petition as seeks harassment on the basis of violations of the New York City Housing Maintenance Code, without prejudice to any remedies the Order to Correct entitles Petitioner to and Respondent's defenses thereto, and it is further

ORDERED that the Court makes a finding that Respondents have engaged in harassment of Petitioner by the commencement of baseless proceedings and by the construction of the Obstruction, and it is further

ORDERED that HPD place a "C" violation for harassment on the subject premises, upon service of a copy of this order together with notice of entry by any party on HPD, and it is further

ORDERED that the Court directs Respondents to cease all harassment against Petitioner, and it is further

ORDERED that the Court awards Petitioner a judgment in the amount of $2,500 as against Respondent, consisting of $1,000 in compensatory damages and $1,500 in punitive damages, and it is further

ORDERED that the Court awards HPD civil penalties against Respondents in the amount of $2,500.00, to be enforced as against the Building, at Block 2407, Lot 41 of the borough of Brooklyn, and it is further

ORDERED that the Court grants Petitioner's motion for attorneys' fees and the Court will contact the parties for a conference to ascertain if a hearing is needed.

This constitutes an order of this Court.

Dated: Brooklyn, New York
March 1, 2022

HON. JACK STOLLER
J.H.C.