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Common Living, Inc. v. Kratz

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| Common Living, Inc. v Kratz |
| 2022 NY Slip Op 31347(U) |
| April 6, 2022 |
| Supreme Court, Kings County |
| Docket Number: Index No. 515533/2020 |
| Judge: Carl J. Landicino |
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| This opinion is uncorrected and not selected for official publication. |

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of April, 2022.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

-----X
COMMON LIVING, INC.,
Plaintiff,

Index No. 515533/2020

-against-

DECISION AND ORDER
ON DEFAULT

JAMIE KRATZ,
Defendant.

Motion Sequence #3, #4

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion

| | |
|---|----------|
| <u>Papers Numbered (NYSCEF)</u> | |
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed | 28-51, |
| Opposing Affidavits (Affirmations)..... | |
| Affidavits (Affirmations) of Service..... | 15, 101, |
| Hardship Affidavit..... | 27 |

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FILED
KINGS COUNTY CLERK

After a review of the papers and upon default of the Defendant, the Court finds as follows:

This matter was initiated by the Plaintiff, Common Living, Inc. (hereinafter the "Plaintiff") seeking ejectment of Defendant Jamie Kratz (hereinafter the "Defendant") and other causes of action related to her use and occupancy of and alleged damages to the entire third floor of a residential building located at 1162 Pacific Street, Brooklyn New York (hereinafter the "Premises"). The Plaintiff does not purport to be the owner of the subject premises but represents that it entered into a lease agreement (hereinafter referred to as the "Master Lease") with the owner of the Premises, non-party Pacific Street Owner, LLC. Upon obtaining its leasehold interest, the Plaintiff apparently leased the third floor of the Premises to several non-parties, including non-party Casanova Valentine, who thereafter purportedly assigned his sublease to

the Defendant. The Plaintiff contends that the Defendant has not paid any rent or use and occupancy during the entirety of her occupancy and that she has engaged in nuisance activity that has endangered the health and safety of other occupants in the building. The Plaintiff also contends that any assignment the Defendant may have received has expired as the sub-lease between the Plaintiff and the sublease holders expired on July 31, 2020.

The Plaintiff now moves (motions sequence #3) for an order pursuant to CPLR 3215, directing the entry on default of a judgment of possession of the Premises against the Defendant, together with a writ of assistance and the right to execute the writ of assistance forthwith. The Plaintiff also moves (motion sequence #4) by Order to Show Cause for an order:

1) enjoining and restraining Defendant Jamie Kratz “from continuing to conduct nuisance behavior such as propping open the Building front door without permission to allow unauthorized visitors into the Building; breaking locks into other parts of the Building; breaking into and otherwise entering without permission the apartments of other tenants in the Building; covering up Building security cameras; throwing garbage and lit cigarettes down the stairs and out the window at other tenants, occupants and Building Staff; accessing the roof with guests without permission and causing garbage on the roof to accumulate and block building drains; bringing an unauthorized dog into the Building and allowing the dog to urinate and defecate all over the common areas of the Building; threatening, swearing-at, and otherwise harassing other tenants, occupants, and Building staff in the Building; and any other such behavior that disturbs, frightens, or threatens the health and welfare of the other tenants, occupants and staff of the building; 2) enjoining and restraining Defendant Jamie Kratz “and any other co-occupants from any acts that create an unreasonable risk to the health, safety or welfare of Tenants, Occupants, and Management Staff of the Building”; 3) “[a]ccelerating the Court's consideration of Plaintiff's May 28, 2021 Motion for a Default Judgment awarding Plaintiff possession of the Third Floor Apartment (the "Premises") in the Building, together with forthwith issuance and execution of a writ of assistance to remove Defendant Jamie Kratz from the Premises.”

On November 15, 2021, this Court issued a Decision and Order that granted that aspect of motion sequence #4 that sought to accelerate the Court's consideration of Plaintiff's May 28, 2021 Motion for a Default Judgment. This Decision and Order also provided that “in as much as the Hon. Katherine A.

Levine, J.S.C. issued a temporary restraining order in relation to the instant Order to Show Cause on September 10, 2021, that restraining order will continue, pending further order of the Court.”

The Defendant has not appeared to oppose this motion other than to file a Tenant’s Declaration of Hardship During the Covid-19 Pandemic (NYSCEF Document No. 27 filed on May 27, 2021). The Plaintiff contends that the Defendant is not a tenant or otherwise a lawful occupant of the Premises and that the hardship declaration does not otherwise apply as the allegations against the Defendant involve nuisance activity that has constituted a threat to the health and safety of the other occupants of the Premises.

The Plaintiff argues that the Defendant’s Hardship Declaration (NYSCEF Doc. 27) did not stay the proceeding and that the Defendant was not covered by the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (“CEEFPFA”) (L 2020, Ch 381), and the Administrative Orders implementing its provisions. See *Kalikow Fam. P’ship, L.P. v. Doe*, 72 Misc. 3d 1172, 152 N.Y.S.3d 283, 285 [N.Y. Civ. Ct. 2021]. However, pursuant to the Administrative Order of the Chief Administrative Judge of the Courts, the eviction moratorium ended on January 15, 2022, and Hardship Declarations previously submitted to the courts will no longer automatically stay eviction proceedings but may be used in conjunction with an affirmative defense. See AO 34/22. Accordingly, since the Defendant has not otherwise answered or appeared in this proceeding, the Hardship Declaration is not being treated as opposition nor does it support a stay of this application.

Turning to the merits of the Plaintiff’s application for a preliminary injunction as it relates to the Defendant, the Court finds that this application is granted upon default and upon the affidavits provided by the Plaintiff. “To be entitled to a preliminary injunction, the movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant’s favor.” *Ruiz v. Meloney*, 26 AD3d 485, 485–86, 810 N.Y.S.2d 216, 217 [2d

Dept 2006]. “The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual.” *Ying Fung Moy v. Hoho Umeki*, 10 AD3d 604, 604, 781 N.Y.S.2d 684, 686 [2d Dept 2004]. However, “[c]onclusive proof is not required, and a court may exercise its discretion in granting a preliminary injunction even where questions of fact exist.” *Vanderbilt Brookland, LLC v. Vanderbilt Myrtle, Inc.*, 147 AD3d 1104, 1106, 48 N.Y.S.3d 251, 254 [2d Dept 2017]. In the instant matter, the Plaintiff has established a likelihood of success on the merits (by default) and that there are health and safety concerns related to the Defendant’s behavior that impact both the issue of irreparable injury and the equities favoring the Plaintiff. The affidavit of Nicholas Thypin-Bermeo, member of non-party Pacific, LLC, supports the Plaintiff’s application in as much as he states that he has witnessed the Defendant’s behavior. Accordingly, the Plaintiff’s application for a preliminary injunction (motion sequence #4) as detailed herein is granted. In accordance with CPLR 6312(b) the Plaintiff shall post a bond in the sum of \$2,500.00 within 30 days entry of this decision and order.

The Court also finds that the Plaintiff’s motion for a default judgment is granted to the extent that this Court will seek a referral to a referee to conduct a hearing regarding the Plaintiff’s entitlement to damages relating to the Defendant’s use and occupancy. “On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party’s default in answering or appearing.” *Atl. Cas. Ins. Co. v. RJNJ Servs., Inc.*, 89 AD3d 649, 651, 932 N.Y.S.2d 109, 111 [2d Dept 2011]; *see also U.S. Bank Nat. Ass’n v. Wolnerman*, 135 A.D.3d 850, 850, 24 N.Y.S.3d 343, 344 [2d Dept 2016]. The Plaintiff has filed proof of service of the summons and complaint (NYSCEF Document No. 15) and has provided affidavits from Jesse Strauss, Senior Legal Director of Plaintiff, and Nicholas Thypin-Bermeo, member of non-party Pacific, LLC, the owner of the property. These affidavits, in conjunction with the Defendant’s failure to appear or otherwise oppose the instant motion satisfy the

requirements set forth by CPLR 3215. See *Todd v. Green*, 122 A.D.3d 831, 832, 997 N.Y.S.2d 155, 156 [2d Dept 2014]. As it relates to the instant motion, the Defendant has been served with notice of this proceeding and an opportunity to be heard on numerous occasions. The Plaintiff also filed (NYSCEF Document No. 101) an “[a]ffirmation of Service by Certified Mail and of the Inability to Serve by Personal Delivery” on December 22, 2021 and indicates service upon the Defendant at the Nassau County Correctional Facility.

What is more, “[n]o statute abrogates the common-law rule that notice is unnecessary to maintain an ejectment action against a tenant who wrongfully holds over after expiration of a fixed and definite term.” *Alleyne v. Townsley*, 110 AD2d 674, 675, 487 N.Y.S.2d 600, 601 [2d Dept 1996]. The Defendant in this proceeding occupied the premises pursuant to an assignment that has since expired. See *Noamex, Inc. v. Domsey Worldwide, Ltd.*, 192 AD3d 817, 818, 144 N.Y.S.3d 77, 79 [2d Dept 2021]; *Sheila Properties, Inc. v. A Real Good Plumber, Inc.*, 74 AD3d 779, 780, 904 N.Y.S.2d 709, 710 [2d Dept 2010]. The Court finds that a notice to quit was not a necessary predicate for the instant ejectment action given the fact that the fixed term set by the assignment involving the tenant expired and no rent was accepted after the term expired such that a month-to-month tenancy was created pursuant to RPL 232-a. See *Kosa v. Legg*, 12 Misc. 3d 369, 371, 816 N.Y.S.2d 840, 842 [Supreme Court, Kings County 2006].

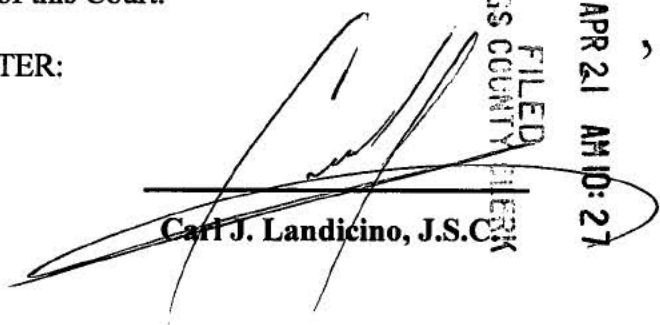
Accordingly, the Plaintiff shall settle an order and writ of assistance on notice, together with a copy of this Decision and Order, as it relates to possession of the premises, and the remainder of the application is granted on default as provided for herein. The Court, by separate Order dated an even date herewith has requested a referral of this matter for a hearing to an available Referee to hear and report on the issue of damages related to the Defendant’s use and occupancy and other related damages the Defendant may be responsible for pursuant to R.P.A.P.L §651.

Based upon the foregoing, it is hereby ORDERED as follows:

Plaintiff's motions (motion sequence #3 and #4) are granted on default. The Plaintiff shall settle an Order and Judgment on notice relating to possession of the premises as against the Defendant, together with a writ of assistance and the right to execute the writ of assistance and a copy of this Decision and Order by personal service, within forty five (45) days of entry of this Order. In accordance with CPLR 6312(b) the Plaintiff shall post a bond in the sum of \$2,500.00 within 30 days entry of this decision and order. The Court, by separate Order dated an even date herewith has sought referral of this matter for a hearing on damages for the Defendant's use and occupancy to an available Referee to hear and report on the issue of damages that the Defendant may be liable for pursuant to R.P.A.P.L §651. The Court also grants the Plaintiff's application for a preliminary injunction as provided herein, in that the Defendant is hereby enjoined from continuing to conduct nuisance behavior such as propping open the Building front door without permission to allow unauthorized visitors into the Building; breaking locks into other parts of the Building; breaking into and otherwise entering without permission the apartments of other tenants in the Building; covering up Building security cameras; throwing garbage and lit cigarettes down the stairs and out the window at other tenants, occupants and Building Staff; accessing the roof with guests without permission and causing garbage on the roof to accumulate and block building drains; bringing an unauthorized dog into the Building and allowing the dog to urinate and defecate all over the common areas of the Building; threatening, swearing-at, and otherwise harassing other tenants, occupants, and Building staff in the Building; and any other such behavior that disturbs, frightens, or threatens the health and welfare the other tenants, occupants and staff of the building.

This constitutes the Decision and Order of this Court.

ENTER:


Carl J. Landicino, J.S.C.
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