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Zev Ger Inc. v. Garcia

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART T

-----X

ZEV GER INC.,

Petitioner,

Index No.: 301235-22

-against-

DECISION/ORDER

MARCO GARCIA,

Motion Seq.: 001

Respondent(s)

-----X

Present:

Hon. ELIZABETH DONOGHUE
Judge, Housing Court

Recitation, as required by the CPLR § 2219(a), of the papers considered in the review of this motion to dismiss:

PAPERS	NUMBERED
Notice of Motion & Affidavits Annexed.....	<u>11 - 13</u>
Notice of Cross-Motion & Affidavits Annexed	<u> </u>
Answering Affidavits	<u>17 - 18</u>
Replying Affidavits.....	<u>35</u>
Exhibits	<u>14- 16, 19 - 34</u>
Memorandum of law.....	<u> </u>

Upon the foregoing cited papers, the decision and order of this motion is as follows:

In this nonpayment proceeding, petitioner, Zev Ger, Inc. (“Petitioner”) seeks to rental arrears from Marco Garcia (“Respondent”) for the premises located at 739 Dekalb avenue, Apt 4F, Brooklyn, New York 11216 (“Premises”). Petitioner commenced this proceeding by service of a Notice of Petition and Petition dated January 25, 2022, after the expiration of a Fourteen Day Notice dated December 15, 2021. Respondent filed a *pro se* answer on February 17, 2022. On March 8, 2022, Respondent appeared by counsel, and filed an Amended Answer. Respondent’s Amended Answer asserts three (3) affirmative defenses, including the lack of certificate of

occupancy for the subject building pursuant to Multiple Dwelling Law (“MDL”) § 302, and three (3) counterclaims.

Respondent now moves to dismiss the instant proceeding, pursuant to CPLR § 3212, on the grounds that Petitioner is barred from collecting rent as the subject building lacks a certificate of occupancy. Petitioner objects and avers the delay in the issuance of the certificate of occupancy was as a result of the concerted efforts to deny the Petitioner and the Department of Buildings (“DOB”) access to inspect the property and issue a certificate of occupancy by Respondent and other tenants in the building and that a final certificate of occupancy was issued for the building on December 17, 2021. Petitioner further argues that Respondent’s motion should be denied as no deposit of the rent amount sought in the petition was made with the clerk’s office when the motion was filed.

The standard for summary judgment is clearly articulated in CPLR §3212(b) which provides that “the motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” The function of summary judgment is issue finding, not issue determination. *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957). Summary judgment should be granted when the moving party makes a *prima facie* showing of entitlement to judgment as a matter of law, giving sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). The failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad*, 64 N.Y.2d at 853.

Generally, in the Second Department, an owner cannot recover rent or use and occupancy for the period in which no certificate of occupancy had been issued. *Jalinos v. Ramkalup*, 255

A.D.2d 293, 294 (2d Dep't 1998). However, equitable relief is available to landlords when a tenant is blocking a landlord from obtaining a certificate of occupancy. See *Chatsworth 72nd St. Corp. v. Rigai*, 71 Misc.2d 647 (Civ. Ct. N.Y. Co. 1972), affirmed 35 N.Y.2d 984 (1975); see c.f. *Caldwell v. American Package Co., Inc.*, 57 A.D.3d 15, 24-25 (2d Dep't 2008). Here, as evidenced by the February 4, 2020 DOB violation, it is undisputed that there was no certificate of occupancy for the Premises for a period in which Petitioner now seeks rental arrears. Further it is undisputed that Petitioner commenced an action in Supreme Court under index number 507127/2021, for which the Hon. Loren Baily-Schiffman issued an order on May 25, 2021, specifically requiring Respondent to provide access for Petitioner to complete electric work. However, it remains an issue of fact whether Respondent's failure to provide access to the Petitioner to the Premises as alleged in the Supreme Court action between the parties, rises to level of interference in Petitioner obtaining a certificate of occupancy contemplated by the courts in *Chatsworth* and *Caldwell*.

The court notes that Petitioner also opposed Respondent's motion based upon his failure to deposit with the clerk's office the amount sought in the petition is inapplicable in the instant case. Such a deposit is only required when a tenant seeks to bar a landlord for collecting rent for failure to correct a violation of record pursuant to MDL § 302-a(3)(c). Here, as Respondent seeks relief pursuant to MDL § 302, no such deposit is required.

Accordingly, Respondent's motion for summary judgment is denied. The instant proceeding is adjourned to July 12, 2022, at 9:30 am.

This constitutes the decision and order of the court. The decision will be uploaded to NYSCEF.

Dated: Brooklyn, New York
June 13, 2022



HON. ELIZABETH DONOGHUE
J.H.C