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6 W. 20th St. Tenants Corp. v. Dezertzov

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"6 W. 20th St. Tenants Corp. v. Dezertzov" (2022). *All Decisions*. 499.
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6 W. 20th St. Tenants Corp. v Dezertzov
2022 NY Slip Op 50529(U)
Decided on June 27, 2022
Appellate Term, First Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 27, 2022

SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT

PRESENT: Hagler, J.P., Tisch, Michael, JJ.

570036/22

6 West 20th St. Tenants Corp., Petitioner-Landlord-Appellant,

against

Michael Dezertzov and Neomi Dezertzov, Respondents-Tenants-Cross-Appellants,

and

NY Loft Kitchen & Home Interiors d/b/a NYLOFT, Respondent-Undertenant,

and

Dezer Properties LLC, Respondent-Undertenant-Cross-Appellant,

and

"John Doe" and/or "Jane Doe," Respondents-Undertenants.

Petitioner, as limited by its briefs, appeals from that portion of a final judgment of the Civil Court of the City of New York, New York County (Elena Baron, J.), entered June 2, 2021, after a nonjury trial, that dismissed the petition in a nonpayment summary proceeding. Respondents Michael Dezertzov, Neomi Dezertzov and Dezer Properties LLC, as limited by their briefs, cross-appeal from that portion of the final judgment that dismissed the counterclaims.

Per Curiam.

Final judgment (Elena Baron, J.), entered June 2, 2021, affirmed, with \$25 costs.

On a bench trial, the decision of the fact-finding court should not be disturbed on appeal unless the court's conclusions could not have been reached under any fair interpretation of the

evidence (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). Applying that standard of review here, we sustain the trial court's dismissal of the petition based upon a failure of proof, in this commercial nonpayment proceeding by a cooperative to recover unpaid capital assessments.

A nonpayment proceeding may only be maintained to collect rent owed pursuant to an agreement between the parties, express or implied, and here petitioner failed to meet its burden to establish the existence of an agreement with respondents to pay the rent and other charges demanded in the petition ([see *West 152nd Assoc., L.P. v Gassama*, 65 Misc 3d 155\[A\]](#), 2019 NY [*2]Slip Op 51926[U][App Term, 1st Dept 2019]). Although the petition alleged the existence of a written lease between the parties, petitioner admitted at trial that it was not in possession of any proprietary lease, share certificate, transfer agreement or other direct evidence of any lease agreement with respondents Michael Dezertzov and Neomi Dezertzov. Further, a fair interpretation of the evidence supports the trial court's findings that the "circumstantial" evidence petitioner offered at trial to prove such an agreement, including testimony from its sole witness and excerpts from cooperative board meetings minutes and other documents, "lacked credibility," and was otherwise "contradictory," "unreliable," and "inconsistent." Nor was any proof offered that the individual respondents ever paid maintenance or assessments to petitioner (*see Matter of Jaroslow v Lehigh Val. R.R. Co.*, 23 NY2d 991 [1969]). In these circumstances, petitioner failed to make out a prima facie case and its petition was properly dismissed ([see *459 Webster Ave., LLC v Green*, 64 Misc 3d 146\[A\]](#), 2019 NY Slip Op 51349[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2019]).

A similar lack of evidence supports the dismissal of the counterclaim for a refund of a partial payment made on behalf of respondent "sponsor" Dezer Properties LLC toward the disputed capital assessment. The offering plan provided that the sponsor, as holder of unsold shares, was responsible for the "proportionate share of the cost of renovation required to be made to the building itself and in any common [areas] of the building." Dezer Properties LLC did not establish that it was not responsible for the voluntary assessment payment or that the assessment included work other than renovations to the building and common areas, and its counterclaim was properly dismissed.

We have examined the parties' remaining arguments and find them unpersuasive.

All concur

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Clerk of the Court

Decision Date: June 27, 2022

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