2022-08-01

Feltman v. 106th Realty LLC

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO **PART** 33
Justice

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ROBERT FELTMAN,

Plaintiff,

- v -

106TH REALTY LLC,ATLAS PROPERTIES LLC,FIRST METRO REALTY LLC,DREYFUS REALTY MANAGEMENT

Defendant.

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INDEX NO. 162549/2019

MOTION DATE 09/15/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22

were read on this motion to/for INTERIM RELIEF.

Upon the foregoing documents, it is ordered as follows:

Defendants 106th Realty LLC, Atlas Properties LLC, First Metro Realty LLC, and Dreyfus Realty Management (collectively "Defendants") have moved for unpaid rent and use and occupancy from February 2020 to July 2022 in the sum of $65,250.00 and an order for use and occupancy *pendente lite* in the amount of $2,250.00, or in the alternative, for a hearing on the fair market value to be charged Plaintiff as ongoing use and occupancy. Plaintiff opposes Defendants' motion arguing that (1) the Multiple Dwelling Law ("MDL") bars Defendants from seeking use and occupancy, (2) this action is not the proper forum to seek unpaid rent, and (3) Defendants are not entitled to use and occupancy in the amount of the market rent. This matter was set for oral argument on April 21, 2022 with Johannes A. Wetzel, Esq. appearing for Plaintiff and Steven Kirkpatrick, Esq. appearing for Defendants. Defendants' motion is granted.

I. Background

Plaintiff is a tenant who resides in a basement unit at 62 West 106th Street, New York, New York and is seeking declaratory judgment stating his apartment is subject to rent stabilization as well as fees owed him from alleged rent overcharge (NYSCEF Doc. 6). Defendants served their Answer denying Plaintiff's allegations and asserting twelve affirmative defenses. (NYSCEF Doc. 7). Defendants then filed the instant motion seeking use and occupancy *pendente lite* and arrears through April 2022. (NYSCEF Documents 8, 21).

II. Discussion

"The award of use and occupancy during the pendency of an action or proceeding 'accommodates the competing interests of the parties' in affording necessary and fair protection to both." (*MMB Assocs. v Dayan*, 169 AD2d 422 [1st Dept 1991]). A dispute concerning rent overcharge is not sufficient to allow a tenant to occupy the premises rent free (*Levinson v 390 West End Associates, LLC*, 22 AD3d 397 [1st Dept 2005]). Here, Plaintiff has continued to occupy the premises without paying either rent or use and occupancy. Plaintiff's claim that Housing Court is the appropriate venue for Defendants to seek use and occupancy is unpersuasive and contradicted by Plaintiff's own statement that "the Supreme Court has general jurisdiction" ((NYSCEF Doc. No. 16); *see also Kingsley v 300 W. 106th St. Corp.*, 162 AD3d 420, 421 [1st Dept 2018]). Plaintiff also asserts that Defendants may not collect rent or use and occupancy pursuant to MDL §§ 301-302. MDL §301(b) provides that no certificate of occupancy is required in:

> "Any old-law tenement, or any class A multiple dwelling erected after April twelfth, nineteen hundred one, which was occupied for two years immediately before January first, nineteen hundred nine, and in which no changes or alterations have been made except in compliance with the tenement house law or this chapter, or wherein:
>
> (1) Two or more apartments are combined creating larger residential units, and

(2) The total legal number of families within the building is being decreased, and
(3) The bulk of the buildings is not being increased.

Plaintiff concedes that the building at issue is a class A building (NYSCEF Doc. 16 at ¶ 10). However, Plaintiff contends that the building is not exempt from the certificate of occupancy requirement because the building's occupancy does not conform with its multiple dwelling registration since the iCard indicates that the original building contained eleven residential units while the building registration with Department of Housing Preservation and Development ("HPD") is listed as a ten-unit building. (NYSCEF Documents 16 at ¶ 11, 17, 18). In response, Defendants submit an affidavit swearing that the number of units is still 11, any alterations made were not in violation of the tenement house law or the MDL, that the HPD records are incorrect, and requests that the Court rely on the underlying iCard documents (which are also on the HPD website) as reflecting the true number of units.

The purpose of the MDL is to ensure residents have safe, sound, and approved construction of their homes as evidenced by a certificate of occupancy (MDL § 2; *Washington Square Professional Bldg., Inc. v Leader*, 68 Misc.2d 72 [Civ Ct, New York County 1971]). MDL §§ 301-302 are penal statutes in derogation of the common law and are to be strictly construed so that a landlord is not deprived of rent due for use and occupation of her property (*Coulston v Teliscope Productions, Ltd.*, 85 Misc. 2d 339 [App Term, 1st Dept 1975]).

Here, the only allegation as to why the building at issue should be found to be in violation of MDL § 301(b) is that there appears to have been an alteration as reflected by the number of units being listed as 11 on the iCards but listed as 10 according to HPD records. Plaintiff did not submit any affidavit or allegation that any alterations were not in compliance with the tenement house law or that the alteration somehow endangered or affected plaintiff's unit. Moreover, MDL

§ 301(b) expressly provides that if the alteration involves two or more units being combined to create a larger residential unit, and neither the mass of the building nor the number of families living in the building are increased, then a certificate of occupancy is not required. Because the only alleged violation of MDL § 301(b) is that the number of units decreased from 11 to 10, and there is no affidavit alleging an increase in the number of families or mass of the building, the certificate of occupancy requirement has not been violated. MDL §§ 301-302 do not bar Defendants from seeking past due rent or use and occupancy *pendente lite*, especially since there is no allegation that any alleged alteration of the building was in violation of the MDL or tenements housing law or affects the safety of Plaintiff's unit.

Plaintiff next argues that should the Court decide to make an award of use and occupancy, it should make the award in the amount of legal regulated rent after any rent overcharge has been credited to the Plaintiff. This action was initiated on December 30, 2019 (NYSCEF Doc. 1). Therefore, if Plaintiff is to be credited any overcharge it is limited to the subscribed look back period prior to initiating this action (CPLR §213-a). Plaintiff's rent has not increased since 2015 when it was set at $2,250.00 (NYSCEF Doc. No.12). Absent an indicia of fraud, the base date upon which to calculate legal rent is four years for alleged overcharges that occurred prior to June 2019 or six years for alleged overcharges that occurred after June 2019. (*Regina Metropolitan Co., LLC v New York State Division of Housing and Community Renewal*, 35 NY3d 332 [2020]). At this time, the Court finds there has been no showing of an indicia of fraud, nor was any asserted in Plaintiff's opposition to Defendants' motion other than a conclusory allegation that a discrepancy between HPD registration and iCards reflecting the number of units in the building. (NYSCEF Documents 1,16-18). In the absence of fraud, the base date rent is the rent actually charged on the base date, which is $2,250.00. (NYSCEF Documents 11-12). Because the rent has never been

illegally inflated within the proscribed statute of limitations, there is nothing with which to credit Plaintiff. (*Sandlow v 305 Riverside Corp*, 201 AD3d 418, 421 [1st Dept 2022]).

Therefore, Defendants are entitled to collect use and occupancy *pendente lite* from August 1, 2022. Moreover, since the Plaintiff has not paid any rent for over two and a half years, Defendants are entitled to secure a bond for retroactive use and occupancy from February of 2020 through July of 2022 (*Esposito v Larig*, 174 AD3d 574, 576, [2d Dept 2019]; *Levinson v 390 West End Associates, L.L.C.*, 22 AD3d 397, 403 [1st Dept 2005]). Should at the conclusion of this matter it is found that there was fraud and the legal rent should be determined by some other formula, Plaintiff will be entitled to a credit based on use and occupancy paid.

Accordingly, it is hereby

ORDERED that Plaintiff pay use and occupancy *pendente lite* in the amount of $2,250.00 beginning on August 1, 2022 and until this matter has been discontinued; and it is further

ORDERED, that Plaintiff post a bond in the amount of $65,250.00 for past due rent and use and occupancy that has accrued since February of 2020 through July of 2022 no later than September 1, 2022.

This constitutes the Decision and Order of this Court.

8/1/2022
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
	x	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE