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### Zev Ger Inc. v. Garcia

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[\*1]

<b>Zev Ger Inc. v Garcia</b>
2022 NY Slip Op 50825(U)
Decided on July 18, 2022
Civil Court Of The City Of New York, Kings County
Cohen, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on July 18, 2022

Civil Court of the City of New York, Kings County

<p><b>Zev Ger Inc., Petitioner,</b></p> <p><b>against</b></p> <p><b>Emilio Garcia, Respondent.</b></p>
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Index No. LT No. 301234/22KI

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Hannah Cohen, J.

Recitation, as required by CPLR §2219(a), of the papers considered in review of respondent's motion seeking an order dismissing the instant proceeding pursuant to C.P.L.R. § 3212; petitioner's cross-motion to strike respondent's First and Second affirmative defenses, correct the name of respondent to Emilio Rivera, and three counter-claims, and such other relief this court deems just and proper.

Papers/Numbered

Motion 1

Opposition 2

Reply 3

Upon the foregoing cited papers, the Decision and Order on this motion is as follows:

Petitioner commenced this non-payment proceeding seeking rental arrears from Emilio Garcia for the premises located at 739 Dekalb Avenue, Apt. 1-F, Brooklyn, NY 11216 by service of Petition and Notice of Petition non-payment. The subject premises is not subject to rent stabilization based upon substantial rehabilitation. On April 22, 2022, respondent appeared by counsel and filed a "General denial" as his answer. On May 16, 2022, Respondent filed an amended answer asserting three affirmative defenses: (1) no certificate of occupancy for the subject building during the period for which rent is sought thereby barring petitioner from collecting rent; (2) the rent is below the deregulated rent threshold in a eight unit building making respondent as a rent stabilized tenant; (3) warranty of habitability based upon existing hazardous and extremely hazardous conditions in the apartment; and three counter claims.

Pursuant to CPLR § 3212, Respondent moves to dismiss this proceeding based upon the ground that petitioner is barred from collecting rent due to lack of certificate of occupancy. Multiple Dwelling Law ("MDL") § 302. Petitioner opposes and asserts that the delay in issuance of a certificate of occupancy was a direct result of tenants working in concert to prevent petitioner and Department of Buildings ("DOB") access to their respective units to inspect and issue a certificate of occupancy for the building that was ultimately issued on December 17, 2021.

Petitioner cross-moved to amend the name of respondent to be Emilio Rivera, strike respondents first and second affirmative defense, and all three counterclaims.

Summary judgement "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 a judgment in favor of any party." CPLR § 3212(b). When a moving party makes a *prima facie* showing of entitlement to judgment as a matter of law giving sufficient evidence to eliminate any material issue of fact, summary judgment should be granted. *Weingrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). "Failure to make such a showing requires a denial of the motion, regardless of the motion papers." *Id* at 853.

In Appellate Division Second Department, a landlord cannot collect rent and/or use and occupancy for the period with no certificate of occupancy in a subject premises. *Jalinos v Ramklup*, 255 AD2d 293, 294 (AD2nd 1998). However, "[i]n *Chatsworth 72nd St. Corp. v Rigai* (35 NY2d 984, 324 NE2d 888, 365 NYS2d 531 [1975]), the Court of Appeals, adopting the opinion of then-Judge Beatrice Shainswit of the Civil Court of the City of New York (71 Misc 2d 647, 336 NYS2d 604 [1972]), held that where the tenant had prevented the owner from obtaining a residential certificate of occupancy, *Multiple Dwelling Law* § 302 does not bar the collection of rent from the tenant. [\*Caldwell v American package Co. Inc.\*, 57 AD3d 15](#), 24-25 (AD 2nd 2008).

In this proceeding, the parties acknowledge that there was no certificate of occupancy for the subject premises for a period in which Petitioner seeks rental arrears as evidenced by the February 4, 2020, violation issued by the New York City Department of Buildings ("DOB"). It is undisputed that Petitioner commenced a Supreme Court action, index number 507127/2021, against ten tenants including the Respondent in this proceeding for [\*2]immediate access to permit Plaintiff the ability to inspect, repair and upgrade as necessary, plumbing and electrical work previously performed to obtain a final sign-off and Certificate of Occupancy from the Department of Buildings in order to remove the violation and bring the building up to Code. Respondents represented by counsel opposed Petitioner's Order to Show Cause for access. Hon. Loren Baily-Schiffman issued an order on May 25, 2021, requiring respondents (Apt. 1F, Emilio Rivera; Apt. 1B, Jasmine Ortiz/Ivonne Sanjurjo; Apt. 3F, Zoi Yi; Apt. 3B, Enrique Gonzalez/Ivonne Sanjurjo; and Apt. 4F Marco Antonio Garcia) to provide access or face contempt of court. Also, it is undisputed that Petitioner obtained access to the units and DOB issued a new Certificate of Occupancy in December 2021.

The court finds that there is an issue of fact as to whether Respondent's failure to provide access to Petitioner to the subject premise rise to the level of preventing Petitioner from obtaining a certificate of occupancy such that it does not bar Petitioner from collecting

rent from Respondent so determined by the courts in *Chatsworth* and *Caldwell*.

Petitioner's cross-motion to amend Respondent's name from Emilio Garcia to Emilio Rivera, without opposition, is granted *nunc pro tunc*. The remaining balance of Petitioner's cross-motion are denied as Respondent have raised sufficient issues for his remaining affirmative defense and counter-claims to be determined at trial.

Based upon the foregoing, Respondent's motion for summary judgment is denied, and Petitioner's cross-motion is granted in part and denied in part. The instant proceeding is adjourned August 3, 2022, at 9:30am for settlement or trial.

This constitutes the decision and order of this court.

Dated: July 18, 2022  
Brooklyn, New York  
Hannah Cohen, J.H.C.

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