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M42-43 Ithaca St. LLC v Rivera
2022 NY Slip Op 32769(U)
July 30, 2022
Civil Court of the City of New York, Queens County
Docket Number: Index No. L&T 51744/20
Judge: Jeannine Baer Kuzniewski
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART A
M42-43 ITHACA STREET LLC,

Petitioner-Landlord,

Index No. L&T 51744/20

DECISION/ORDER

-against-

NOELIA RIVERA, JOHN DOE & JANE DOE,
Respondent-Occupants.

Hon. Jeannine Baer Kuzniewski

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this Notice of Motion:

PAPERS	NUMBERED
NOTICE OF MOTION, AFFIRMATION & AFFIDAVITS ANNEXED	_____ 1 _____
ORDER TO SHOW CAUSE & AFFIRMATION ANNEXED	_____
ANSWER AFFIRMATION	_____ 2 _____
REPLYING AFFIRMATION	_____ 3 _____
EXHIBITS	_____
STIPULATIONS	_____
OTHER	_____

Upon the foregoing cited papers, the Decision/Order on the petitioner’s motion for use and occupancy and for discovery in this licensee holdover proceeding is as follows:

The petitioner seeks to recover possession of the premises at 42-43 Ithaca Street, apt. 3A, Elmhurst, NY 11373 alleging that the respondents are occupying the apartment as licensees of the tenant of record who passed on or about August 25, 2019. Noelia Rivera and Demitri Rivera appeared by counsel and submitted an answer which asserted an affirmative defense of succession and an affirmative defense and counterclaim alleging a breach of the warranty of habitability and a separate counterclaim for legal fees. Noelia Rivera alleges that she is the sister of Miquel Corchado, the tenant of record, and she co-resided with him for the two years immediately preceding his death.

The petitioner is moving pursuant to RPAPL §745(a)(2) for an order compelling the payment of use and occupancy pendente lite, and for an order granting leave to conduct discovery pursuant to CPLR Section 408 and Article 31. The respondents oppose.

The Petition was filed on January 29, 2020 and it was calendared on February 19, 2020. On that date it was adjourned to March 25, 2020 to afford the respondents the opportunity to obtain counsel. On March 7, 2020 the NYS governor issued Executive Order 202 which declared a State disaster emergency for the entire state of NY. On March 17, 2020 the NYC Housing Court were limited to essential matters only. On March 20, 2020 the governor of New York signed an executive order which caused the state of New York to go on PAUSE due to the

COVID 19 pandemic. It became effective on March 22, 2020 at 8:00 PM.¹

The petitioner argues that the March 25, 2020 date should be charged to the respondent for purposes of RPAPL §745(a)(2).

"In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020."

"Governor Cuomo later issued a series of nine subsequent executive orders that extended the suspension or tolling period, eventually through November 3, 2020 (see Executive Order [A. Cuomo] Nos. 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67, 202.72 [9 NYCRR 8.202.14, 8.202.28, 8.202.38, 8.202.48, 8.202.55, 8.202.55.1, 8.202.60, 8.202.67, 8.202.72]). These subsequent executive orders either stated that the Governor 'hereby continue[s] the suspensions, and modifications of law, and any directives, not superseded by a subsequent directive,' made in the prior executive orders (Executive Order [A. Cuomo] Nos. 202.14, 202.28, 202.38, 202.48, 202.67, 202.72 [9 NYCRR 8.202.14, 8.202.28, 8.202.38, 8.202.48, 8.202.67, 8.202.72]) or contained nearly identical language to that effect (see Executive Order [A. Cuomo] Nos. 202.55, 202.55.1, 202.60 [9 NYCRR 8.202.55, 8.202.55.1, 8.202.60]). While most of the subsequent executive orders did not use the word 'toll,' Executive Order (A. Cuomo) No. 202.67 (9 NYCRR 8.202.67) issued on October 5, 2020, provided that the:

'suspension in Executive Order 202.8, as modified and extended in subsequent Executive Orders, that tolled any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby continued, as modified by prior executive orders, provided however, for any civil case, such suspension is only effective until November 3, 2020, and after such date any such time limit will no longer be tolled.'"²

Based upon the executive order, the Court will not charge the March 25, 2020 court date

¹ See governor.ny.gov

² ([Brash v Richards, 195 AD3d 582, 583-584 \[2d Dept 2021\]](#)) See also *Powell v United States*, 2022 U.S. Dist. Lexis 93314, 2022 WL 1645545.

to either party as the court was closed to the appearance and the governor's executive order tolled the statute.

“This language in Executive Law § 29-a(2)(d) indicates that the Governor is authorized to do more than just ‘suspend’ statutes during a state disaster emergency; he or she may ‘alter[]’ or ‘modif[y]’ the requirements of a statute, and a tolling of time limitations contained in such statute is within that authority.”³

Once the tolling was expired, November 4, 2020, there were a number of days calendared by the court, however, neither side has presented facts for which the Court can make a determination as to who these adjournments were charged. The petitioner argues that all days since March 25, 2020 should be charged to the respondent. The respondents claim that since the original adjournment application by the respondent on February 19, 2020 to obtain counsel, they have not made any further applications. It is conceded by both sides that the petitioner requested an adjournment for purposes of filing this motion on May 11, 2022. As the state of NY was on PAUSE and the executive order tolled the requirements of a statute, the Court is not swayed by the petitioner's argument to charge the respondent all the time since March 25, 2020 as it is contrary to statute and case law.

Additionally, the RPAPL §745(2)(a) provides:

“2. In the city of New York:

(a) In a summary proceeding upon the second of two adjournments granted solely at the request of the respondent, or, upon the sixtieth day after the first appearance of the parties in court less any days that the proceeding has been adjourned upon the request of the petitioner, counting only days attributable to adjournment requests made solely at the request of the respondent and not counting an initial adjournment requested by a respondent unrepresented by counsel for the purpose of securing counsel, whichever occurs sooner, the court may, upon consideration of the equities, direct that the respondent, upon a motion on notice made by the petitioner, deposit with the court sums of rent or use and occupancy that shall accrue subsequent to the date of the court's order, which may be established without the use of expert testimony. The court shall not order deposit or payment of use and occupancy where the respondent can establish, to the satisfaction of the court that respondent has properly interposed one of the following defenses or established the following grounds:

(iv) a defense based upon the existence of hazardous or immediately hazardous violations of the housing maintenance code in the subject apartment or common areas; ...”

The answer submitted by the respondents assert as a Second Affirmative Defense and First Set-Off and Counterclaim a Violation of the Warranty of Habitability. Pursuant to the

³ *Id.*

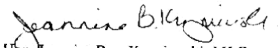
Multiple Dwelling Law §328(3) the Court will take judicial notice of the violations of record for the premises. In the apartment that is the subject of this proceeding, there are currently 2 open “C” violations. The NYC Administrative Code §27-2115 classifies violations with a “B” violation being hazardous and a “C” violation as immediately hazardous. As this apartment currently contains 2 immediately hazardous violations, and the respondents have interposed a defense of the warrant of habitability, “the court shall not order deposit or payment of use and occupancy.”⁴

Pursuant to the foregoing, that part of the motion seeking an Order compelling the payment of use and occupancy pendente lite is denied.

The balance of the motion seeks discovery. The respondent offers no opposition to this application, accordingly, in the absence of opposition it is granted.⁵

The proceeding is marked off calendar pending the respondents’ compliance with the deposition and document demand.⁶

Dated: July 30, 2022


Hon. Jeannine Baer Kuzniewski, J.H.C.
So Ordered

Hon. Jeannine Baer Kuzniewski, J.H.C.

4 Supra. RPAPL §745(2)(a)(iv).
5 *Brown v Chase*, 3 Misc. 3d 129(A).
6 See NYSCEF document 32.