2022-09-20

689 E 187th St LLC v. Mathu

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689 E 187th St LLC v Mathu
2022 NY Slip Op 50885(U)
Decided on September 20, 2022
Civil Court Of The City Of New York, Bronx County
Lutwak, J.
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This opinion is uncorrected and will not be published in the printed Official Reports.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 September 20, 2022

Civil Court of the City of New York, Bronx County

689 E 187th St LLC, Petitioner-Landlord,

against

Jacqueline Mathu, Respondent-Tenant,
and "JOHN DOE" and "JANE DOE", Respondents-Undertenants.

L&T Index No. 302284/21

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Diane E. Lutwak, J.

Recitation, as required by CPLR Rule 2219(A), of the papers considered in the review of Petitioner's Motion to Restore to Calendar and Respondent Jacqueline Mathu's Cross-Motion to Dismiss or Deem Proposed Answer Duly Served and Filed:

Papers	NYSCEF Doc #
Petitioner's Notice of Motion	19
Attorney's Affirmation and Agent's Affidavit in Support of Motion	20-21
Petitioner's Exhibits A-D	22-25
Respondent's Notice of Cross-Motion/Attorney's Affirmation in Opposition to Motion and in Support of Cross-Motion	28
Respondent's Exhibits A-G	29-35
Attorney's Affirmation and Agent's Affidavit in Reply and Opposition	36-37
Petitioner's Exhibits A-B	38-39

PROCEDURAL HISTORY

This is a holdover proceeding against a Rent Stabilized tenant based upon alleged violation of a substantial obligation of the tenancy and unreasonable refusal to provide access to the landlord to inspect, make repairs and correct violations of the Housing Maintenance Code (HMC) placed by the New York City Department of Housing Preservation and Development (HPD), in violation of Rent Stabilization Code (RSC) §§ 2524.3(a) and 2524.3(e) and HMC § 27-2008. The Petition is based on a Notice to Cure dated August 12, 2020 which includes a detailed list of 21 violations HPD found in Respondent's apartment, seven on February 26, 2020 and fourteen on July 21, 2020. The Notice to Cure lists dates in March, July and August 2020 when Petitioner tried unsuccessfully to schedule access dates with Respondent and advises Respondent to effectuate a cure by providing access by September 11, 2020. The Notice to Cure was followed by a Notice of Termination dated February 12, 2021 asserting that Respondent failed to cure by September 11, 2020 and thereafter failed to provide access on December 14, 2020, a date when Petitioner again attempted access. The Petition seeks a final judgment of possession, issuance of a warrant of eviction, fair value of use and occupancy of the premises and a money judgment for rent arrears, reasonable attorneys' fees, costs and disbursements.

The Petition was filed on April 7, 2021 and, initially, placed on the Court's Holdover Administrative Calendar pursuant to then-existing COVID-19 pandemic protocols. Thereafter, the case was stayed first because Respondent filed a "Hardship Declaration" under the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020

("CEEFPA") and then because Respondent filed an application for the Emergency Rent Assistance Program ("ERAP"). Now before the Court is Petitioner's motion seeking to calendar the case for conference and, if the case does not settle, for trial, and Respondent's cross-motion to dismiss or, alternatively, for leave to file an Answer and to deem her proposed Answer duly served and filed. The motions were argued and marked submitted on September 12, 2022.

PETITIONER'S MOTION

In its agent's affidavit in support of its motion Petitioner asserts that the case should be calendared and permitted to proceed to trial if not settled because Respondent's ERAP application was denied and Respondent has still failed to provide Petitioner with access to correct the 54 open HMC violations in her apartment placed by HPD. Petitioner also points out that Respondent has not filed an Answer to the Petition.

RESPONDENT'S OPPOSITION AND CROSS-MOTION

Respondent, by counsel, argues that Petitioner's motion should be denied and Respondent's cross-motion to dismiss should be granted because it was not unreasonable for her to refuse to provide access during the height of the COVID-19 pandemic, citing to *MHM Sponsors Co v Hirsch* (15 Misc 3d 641, 831 NYS2d 315 [Civ Ct NY Co 2007]), and the access dates listed in Petitioner's predicate notices all fell during the State of Emergency declared by Executive Order of the Governor of New York State. Respondent also argues that, in any event, there is evidence — including "evidence submitted by Petitioner", Respondent's Attorney's [*2]Affirmation at ¶ 27, and an email exchange between counsel in January 2022 provided by Respondent's counsel - that Respondent both did provide access and further offered to provide additional access.

Alternatively, Respondent asks the Court for leave to interpose an Answer, arguing that it is timely under RPAPL § 743, which permits an answer in a holdover proceeding to be interposed "at the time the petition is to be heard", and pointing out that the case was stayed due to pandemic-related issues and has not yet been heard. Further, if the Court finds the Answer to be late, Respondent argues that the Court should exercise its discretion to deem it duly served and filed as the delay was not willful, there is no prejudice to Petitioner and strong public policy favors resolution of cases on their merits. Respondent's proposed Answer, in addition to addressing each paragraph of the Petition (admits/denies/lacks information or knowledge), is comprised of two defenses (defective notice of termination and

failure to provide adequate opportunity to cure), two affirmative defenses (cure and request for an opportunity to cure) and one counterclaim (attorneys' fees).

PETITIONER'S REPLY AND OPPOSITION

On reply, Petitioner points out that Respondent has not opposed its motion or supported her cross-motion with an affidavit by anyone with personal knowledge of the facts. Petitioner's agent explains in his reply affidavit that Respondent never denied access because of COVID-19 concerns but "denied access when either the superintendent appeared or when my contractors would not work the way she directed" and that the access Respondent did provide was not meaningful "due to the high state of clutter in the premises which prevents petitioner from performing the necessary work to remedy the violations of record." Petitioner's agent refutes the factual allegations in Respondent's attorney's affirmation regarding efforts to schedule access that were made via an email exchange.

Petitioner opposes Respondent's cross-motion for leave to file an Answer, arguing there is no controlling authority "that gives respondent a wholesale right to file an answer at any time prior to the date of the adjournment". Petitioner further argues that Respondent's proposed defense of "cure" is undermined by the email exchange between counsel included as an exhibit to Respondent's cross-motion; her counterclaim for legal fees is barred by the Housing Stability and Tenant Protection Act of 2019 (HSTPA); and Respondent's proposed Answer should be rejected because it is not verified, citing to CPLR § 3020.

DISCUSSION

The Court will first address Respondent's cross-motion to dismiss, as if it is granted then Petitioner's motion to calendar the case for settlement conference or trial will be moot. On a motion to dismiss under CPLR R 3211 the court must afford a liberal construction to the pleading, *Leon v Martinez* (84 NY2d 83, 87-88, 638 NE2d 511, 513, 614 NYS2d 972, 974 [1984]), and "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.* "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc v Goldman Sachs & Co* (5 NY3d 11, 19, 832 NE2d 26, 31, 799 NYS2d 170, 175 [2005]); *TIAA Global Invs, LLC v One Astoria Sq LLC* (127 AD3d 75, 85, 7 NYS3d 1 [1st Dep't 2015]).

Respondent's argument is essentially that this case should be dismissed as Petitioner can

state no claim of an unreasonable refusal to provide access for repairs under RSC § 2524.3(e) where such refusal took place between March 7, 2020 and June 24, 2021, the period covered by [*3]the Governor's Executive Order declaring a State of Emergency due to the COVID-19 pandemic. This argument is overly broad and rejected. Petitioner's Notice to Cure, incorporated by reference in the Petition, includes a detailed list of 21 violations, 14 of which - including four categorized as Class C/"immediately hazardous" and nine as Class B/ "hazardous"[FN1] — were placed by HPD during the COVID-19 State of Emergency, on July 21, 2020, following either an inspection by HPD of Respondent's apartment or Respondent simply calling in complaints to HPD. Whether it was reasonable or unreasonable for Respondent to then refuse to provide access to the landlord to repair the conditions she had complained to HPD about is a question of fact that cannot be determined at this stage of the litigation, not a matter of law warranting dismissal of the Petition for failure to state a cause of action. What would have been unreasonable — and a violation of the Housing Maintenance Code — is if Petitioner had failed to attempt to correct the violations HPD placed, citing to the pandemic as a categorical reason for its refusal to make repairs.

Also unavailing is Respondent's argument that "The evidence submitted by Petitioner that constitutes their *prima facie* case makes clear that Respondent has, in fact, provided access for at least some necessary repairs." Respondent's Attorney's Affirmation at ¶ 27. Respondent points to one of three letters from Petitioner to Respondent attached to the Notice to Cure in which "Petitioner admits that 'as scheduled with HPD, you provided access to have the breakers in your apartment switched back on.'" *Id.* at ¶ 28. That Respondent may have provided access for one limited purpose does not undermine and negate the other factual allegations of the Petition, and the conflicting assertions by Petitioner's agent and Respondent's attorney as to efforts made to schedule access for repairs in January 2022 only emphasize the presence of issues of fact warranting a trial on the merits. Petitioner's opportunity to fully establish its *prima facie* case is at trial, not the pleading stage, and it cannot be said that dismissal is warranted on the motion papers as "the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted". *Blackgold Realty Corp v Milne* (119 AD2d 512, 513, 501 NYS2d 44, 46 [1st Dep't 1986]).

The decision cited by Respondent, *MHM Sponsors Co v Hirsch* (15 Misc 3d 641, 831 NYS2d 315 [Civ Ct NY Co 2007]), also a no-access holdover, is irrelevant to the question of whether Petitioner has stated a claim. In *MHM Sponsors,* at issue was a parquet wood floor "in a dangerously deteriorated condition". The tenant claimed that she had refused access for repairs because her health would be adversely affected by the glue used to lay the new floor.

After trial, the court granted the landlord a judgment of possession, finding that the respondent's belief that she should withhold access under the circumstances presented was unreasonable, and that "[a]n ordinary prudent individual would accept a potential short-term risk to his or her health in order to alleviate a condition that was causing an ongoing and continuing risk to her health and safety." *MHM Sponsors Co v Hirsch* (15 Misc 3d at 646, 831 NYS2d at 319). This is necessarily a fact-laden determination made after trial, not on a motion to dismiss where the [*4]question is whether a claim has been stated, not whether the petitioner "can ultimately establish its allegations." *EBC I, Inc v Goldman Sachs & Co, supra*.

Having denied Respondent's motion to dismiss, the court now grants Petitioner's motion to calendar this case for a pre-trial settlement conference. Respondent has raised no factual issues in response to Petitioner's assertion that Respondent's ERAP application was denied and that, accordingly, the stay of this proceeding imposed by the ERAP Law, L. 2021, c. 56, Part BB, Subpart A, § 8, as amended by L. 2021, c. 417, Part A, § 4, should be lifted.

Respondent's alternate request for an order deeming her proposed Answer duly served and filed is also granted. Respondent correctly argues that under RPAPL §743 the answer in a holdover proceeding is to be asserted or filed "at the time when the petition is to be heard", and the Petition is only just now being calendared in this Decision and Order to be heard for the first time. When it was filed, the Notice of Petition did not "specify the time and place of the hearing" as required by RPAPL § 731(2), or state "that if respondent shall fail at such time to interpose and establish any defense that he may have, he may be precluded from asserting such defense or the claim on which it is based in any other proceeding or action," *id*. Rather, pursuant to then-existing COVID-19 pandemic protocols, the Notice of Petition states that the date on which Respondent "must come" to court was "to be determined". The information in the Notice of Petition about how to answer the Petition ("tell the judge the legal reasons that you should be allowed to stay in your home" and "Important! If you don't tell the Clerk about a defense in your Answer you might not be able to talk about it later in the case") must be read in light of the fact that the Notice of Petition advised Respondent that she was not to come to court until "The court will set a date and notify the parties when we are able to do so."

After the Petition was filed, the Court Clerk's office initially placed this case on the court's "Holdover Administrative Calendar" and, to date, other than the date for hearing the pending motion and cross-motion, the case has not been calendared to be heard, first because of Respondent's filing of a Hardship Declaration pursuant to CEEFPA and then due to

Respondent's filing of an ERAP application. The date on which the court calendared the pending motions to be heard does not constitute "the time when the petition is to be heard" under RPAPL § 743.[FN2]

Petitioner argues that the proposed Answer should be rejected as it is not verified by Respondent. However, as RPAPL § 743 allows a respondent in a holdover proceeding to answer the petition orally, *a fortiori* an unverified written answer is also permitted. *See Turk v B Jakobsons & Son* (188 Misc203, 66 NYS2d 430 [1st Dep't 1946]); *Profile Enters LP v Sanzo* (2005 NY Misc LEXIS 3403, 234 NYLJ 8 ([Civ Ct NY Co 2005]); *and compare Glorius v Siegel* (5 Misc 3d 1015[A], 798 NYS2d 709 [Civ Ct NY Co 2004]). As for Petitioner's argument that Respondent's counterclaim for attorney's fees is barred by HSTPA, a reference to the 2019 amendments to RPAPL § 702 and RPL § 234, *see, e.g., 744 E 215 LLC v Simmonds* (65 Misc 3d 1234[A], 119 NYS3d 828 [Civ Ct Bx Ct 2019]); *Magnano v Stewart* (71 Misc 3d 1223[A], 145 NYS3d 329 [Justice Ct, Town of Ossining, Westch Co 2021]), it must be noted that the Petition [*5]includes a claim for attorney's fees in the request for relief. Accordingly, the question of whether the prevailing party in this proceeding is entitled to attorney's fees will await another day for resolution.

CONCLUSION

For the reasons stated above, it is ORDERED that Petitioner's motion is granted to the extent of restoring the case to the Court's calendar for a pre-trial, in-person conference on **October 26, 2022 at 12:00 noon** and Respondent's motion is granted to the extent of deeming her proposed Answer duly served and filed. This constitutes the Decision and Order of the Court, which is being uploaded on NYSCEF.

_____
Diane E. Lutwak, HCJ
Dated: September 20, 2022
Bronx, New York

Footnotes

Footnote 1:A class "A" violation is "non-hazardous" pursuant to N.Y.C. Admin. Code §27-2115(c)(1); a class "B" violation is "hazardous" pursuant to N.Y.C. Admin. Code §27-2115(c)(2); and a class "C" violation is "immediately hazardous" pursuant to N.Y.C. Admin. Code §27-2115(c)(3). *See, e.g., 13 E 9th St LLC v Seelig* (63 Misc 3d 1218[A] n 4, 114 NYS3d 817 [Civ Ct NY Co 2019])

Footnote 2: Accordingly, there is no need to address Petitioner's argument that there is no controlling authority for the proposition that under RPAPL § 743 the time for Respondent to file an answer is extended by adjournment of the proceeding. *But see Picken v Staley* (2011 NY Slip Op 33237[U], ¶ 4 [Civ Ct NY Co 2011]).

Return to Decision List