2022-09-06

JSB Props. LLC v. Yershov

[*1]

JSB Props. LLC v Yershov
2022 NY Slip Op 22294
Decided on September 6, 2022
Civil Court Of The City Of New York, New York County
Stoller, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

Decided on September 6, 2022

Civil Court of the City of New York, New York County

JSB Properties LLC, Petitioner,

against

Andrey Yershov, Respondent.

Index No. 304269/2022

For Petitioner: Peter Rose

For Respondent: Jack Lester

Jack Stoller, J.

JSB Properties LLC, the petitioner in this proceeding ("Petitioner"), commenced this summary proceeding against Andrey Yershov ("Respondent"), a respondent in this proceeding, and Ilona Yershov ("Co-Respondent"), another respondent in this proceeding (collectively, "Respondents"), seeking a money judgment and possession of 208 West 23rd Street, Apt. 1500, New York, New York ("the subject premises") on the basis of nonpayment of rent. Respondent interposed an answer with defenses of laches, equitable estoppel, prior action pending, and defenses related to the Emergency Rent Assistance Program ("ERAP"),

[FN1] and counterclaims in rent overcharge and breach of warranty of habitability. The Court held a trial on August 25, 2022.

The trial record

Petitioner proved that is it the proper party to commence this proceeding; that Petitioner and Respondent had been in a landlord/tenant relationship with one another, according to two leases, a one-year lease commencing on July 1, 2018 and expiring on June 30, 2019 with a monthly rent of $3,750, and a two-year lease commencing on July 1, 2019 and expiring on June 30, 2021 with a monthly rent of $3,850.00; that the subject premises is unregulated; that Petitioner is in compliance with the registration requirements of MDL §325; and that Petitioner demanded payment of rent arrears prior to the commencement of this proceeding pursuant to RPAPL §711(2).

Petitioner submitted into evidence a rent ledger. The rent ledger showed that Respondent had a credit of $1,910.48 at the end of September of 2021; that Petitioner has not received any payments since that date; and that Petitioner charged Respondent $439.52 on October 1, 2021 for an air conditioning charge. The lease in evidence provides that Petitioner may charge air conditioning charges as additional rent if Respondents install an air conditioner.

John Medaglia ("the Building Manager") testified that a payment of $57,750 on the rent ledger was from ERAP and that the payment covered arrears from August of 2020 through October of 2021.

The Building Manager testified on cross-examination that tenants did not owe any rent after the ERAP payment; that he does not recall if another renewal lease was sent after the expiration of the first renewal lease; and that he believes there was an agreement after ERAP.

Petitioner submitted into evidence a letter that Petitioner delivered to Respondent. The letter stated that the date of ERAP application was June 7, 2021; that the monthly rent was $3,850; that ERAP paid benefits to Petitioner on September 7, 2021; and that the rent had to be held at $3,850 for the twelve months after the last month of ERAP credits, which would be August of 2022. Attached to the letter is an email from the Office of Temporary and Disability Assistance ("OTDA"), dated September 10, 2021, to Petitioner saying that OTDA did not pay anything for March through July of 2020; that OTDA paid arrears for August of

2020 through July of 2021; and that OTDA paid prospective rent from August through October of 2021.

When Petitioner rested, Petitioner moved to amend the petition to date.

Co-Respondent testified that she has been living at the subject premises for four years; that she moved in on July 1, 2018; that she entered into a lease agreement; that the lease ended on June 30, 2019; that she entered into another lease commencing July 1, 2019 and expiring on June 30, 2021; that she did not enter into another lease with Petitioner; that Petitioner contacted her about another lease; that Petitioner said that the lease was ready for renewal and that Petitioner needed to have an answer; that she said that Respondents could not renew or move out; that someone working for Petitioner called her on June 30, 2021, which was the last day of the lease, and said that they needed to know on that very day whether she would renew or move out; that she and Petitioner did not agree on a rental amount; that she said that when she received notices from Petitioner that she would forward information to her attorney; that she applied for ERAP; that she was in arrears at that point from March of 2020 through June of 2021; that she applied for assistance for those months; that she did not request assistance post-dating June of 2021; that there was a credit after the ERAP payment because she had been paying partially; that when she applied for ERAP she specified what months she applied for; and that when she was applying to ERAP she filled out a table on line. Respondents submitted into evidence the ERAP application that they made on June 7, 2021. Respondents requested payment to cover shortfalls in the payment of rent through June of 2021.

Co-Respondent testified on cross-examination that she did not move out of the subject premises after the expiration of the lease and that she does not know how much the rent was.

Respondent testified that he has lived in the subject premises since June of 2019; that he does not have a lease now; that he lives with Co-Respondent and his home-schooled thirteen-year-old son; that the subject premises is a one-bedroom apartment; that in May of 2020 there was a rancid smell in the hallway for about ten days; that he complained about it to a doorman; that the doorman did not do anything in response to the complaint; that the source of the smell was a tenant who had died ("the Deceased Tenant"); that there was a police investigation and a detective spoke to him; that on May 27, 2020 the body was removed from another apartment on his floor a few doors down from the subject premises ("the Deceased Tenant's Apartment"); that he was hardly able to reside in the subject premises at the time; that when police broke the door down the odor was horrible; that the Deceased Tenant's

Apartment was not cleaned for a year; [*2]that he could not live in the subject premises for a month because of that; that he did not complain after the fact; that the odor dissipated little by little; that they returned after a month; that in about a year the Deceased Tenant's Apartment was clean; that the police had sealed the Deceased Tenant's Apartment; that there was a situation with a pipe; that there was debris falling onto the kitchen table from a heat pipe; that on December 30, 2018 he spoke to the super about the debris falling around the pipe; that workers came to the subject premises; that the kitchen and living room are the same room; that the condition got progressively worse; that a handyman came in and made a temporary fix but he said that it expanded and contracted because of the heat and it could be permanently fixed; that the condition lasted for a few years; that this condition made it challenging because he had to be careful that the debris would not fall into water; that he had to clean more and he worried about what was in the material; that he filed a complaint with a governmental agency to rule out the possibility of asbestos contamination; and that the Building Manager sent someone within a day or two of his complaint.

Respondent testified on cross-examination that he does not recall the apartment number of the Deceased Tenant; that he does not know how many apartments are on his floor; that there are probably more than ten apartments on his floor; that the subject premises is on the same side of the floor as the Deceased Tenant's Apartment; that there are three studio apartments in between the subject premises and the Deceased Tenant's Apartment; that about thirty feet separate the subject premises from the Deceased Tenant's Apartment; that for a year there was a sign with a police seal on the door of the Deceased Tenant's Apartment saying "do not enter"; that there was tape on the sign on the door; that the tape was removed after about a year; that the smell went away after the tape was removed; that the whole pipe in the subject premises was exposed; that the pipe went from the floor to the ceiling; that the pipe probably got hot; that the debris was falling from where the pipe meets the ceiling; that the pipe is about three or four inches in diameter; that in the morning the whole floor in the kitchenette would be covered with dust and small pieces; that an inch around the pipe was affected; that the Building Manager sent a crew to fix the pipe condition within one day of the second time after a government agency contacted him; that he knows the Building Manager; that he regularly sees the Building Manager at the building in which the subject premises is located ("the Building"); that he sees the Building Manager at least once a week; that he contacted the super; that he does not recall telling the Building Manager about this condition; and that he did not tell the Building Manager because the super should take care of conditions.

Co-Respondent testified again that she photographed the condition of the pipe; that the

photographs were sent to the Building Manager when they said that they wanted to test for asbestos; that she took the photographs on October 12, 2021; that the condition was cured within two to three days after taking the photographs; and that the condition had existed since December 30, 2018. Respondents submitted into evidence photographs of a pipe condition where a riser meets a ceiling, depicting a deteriorated condition. Respondents submitted into evidence an email from Respondent to the Building Manager on regarding this condition October 12, 2021.

Co-Respondent testified on cross-examination that she and Respondent emailed the photographs to the Building Manager together; that the Building Manager contacted her after some government employee said there would be an inspection; that the Building Manager emailed a response to Respondents; that she sees the Building Manager two or three times a month at the Building; that she does not have any other emails but she has a ticket addressed to [*3]the building management, i.e., the Building Manager; that she never spoke to the Building Manager because she thought that it was a regular building issue and she was not concerned about asbestos; that she first became concerned when a friend came to the subject premises in October of 2021 and said that it looked like asbestos; and that the condition was unpleasant but she had previously been unaware of asbestos.

The Building Manager testified on rebuttal that the Deceased Tenant was named Stephanie Gotto; that she lived in Apartment 1504, on the same floor of the subject premises; that there are three apartments between the Deceased Tenant's Apartment and the subject premises; that there was a seal on the door of the Deceased Tenant's Apartment; that police put the seal there; that the seal was there for about a year; that Petitioner could not gain access while the seal was on the door; that he never got a smell; that once they got access to the Deceased Tenant's Apartment they renovated and cleaned it and redid the floor; that there are eighteen apartments on the floor; that he saw Respondents at the Building two or three times a week; that they never complained to him about the smell; that he was working at home when the smell occurred; that they never wrote him about the smell; and that he had the pipe condition addressed right away when he got notice of it.

The Building Manager testified on cross-examination that he had the pipe tested; that he shared the results of the test with Respondents by email; that he cannot recall the date or if he had a cover letter; that he did not follow up with Respondents about that; that he does not know the date of the test; that he spoke to someone named Jim Grond; that they performed an asbestos test; that they send the results to a lab; and that he does not remember the results of the test.

Discussion

Respondents argue, with support in legal authority, that a landlord may only obtain a judgment against a tenant for nonpayment of rent for a time period in which there is a lease in effect. *6 West 20*th *Street Tenants Corp. vs. Dezertov*, 2022 NY Slip Op. 50529(U)(App Term 1st Dept.). Otherwise, a landlord would be able to unilaterally bind a tenant to a rent in the absence of an agreement. *Jaroslow v. Lehigh Valley R. Co.*, 23 NY2d 991, 993 (1969), *Haberman v. Singer*, 273 AD2d 177, 178 (1st Dept. 2000), *71 W. 68th St., LLC v. Roach*, 57 Misc 3d 144(A)(App. Term 1st Dept. 2017). Respondents did not seek any ERAP benefits after the expiration of their lease, bolstering their position that after the lease expiration they did not intend to establish a landlord/tenant agreement with Petitioner at a definite amount of rent.

OTDA's action on Respondents' application complicates Respondents' argument, however. OTDA paid Petitioner for four months after the lease expiration at the rate of the prior monthly rent. A landlord must apply tenders of rent from a government agency to the months the agency earmarks the tenders for. *Neptune Dev. Corp. v. Kalogiannis*, 63 Misc 3d 164(A) (App. Term 2nd Dept. 2019), *1 Beach 105 Realty LLC v. Murphy*, 2020 N.Y.L.J. LEXIS 1865, *5 (Civ. Ct. Bronx Co.). Petitioner must therefore apply ERAP benefits to months post-dating the expiration of the lease. Payment of rent after an expiration of a lease shows an intention to continue a landlord/tenant relationship at the same monthly rent. *Priegue v. Paulus*, 43 Misc 3d 135(A)(App. Term 2nd Dept. 2014). While the record does not show that Respondents themselves designated rent payments as such, those payments occasion an inquiry into the effect of their application for ERAP benefits in the first place.

Normally, if a tenant remains in possession after a lease expires with no new agreement as to a rental amount, a landlord's remedy is to obtain possession via a holdover proceeding. [*4]RPL §§226-c(1)(a), 232-a.[FN2] However, a successful ERAP application precludes that remedy. A landlord's acceptance of rental arrears from ERAP "shall constitute agreement by the ... landlord ... not to evict for reason of expired lease or holdover tenancy any household on behalf of whom rental assistance is received for 12 months after the first rental assistance payment is received ...." L. 2021, c. 56, Part BB, Subpart A, §9(2)(d)(iv).

Following Respondent's position to its logical conclusion, then, tenants who obtain an ERAP benefit that a landlord accepts can live in their apartments for free for a year without

the landlord having a remedy. However, the law does not permit a non-owner to possess a property for free. *35 Lispenard Partners, Inc. v. 35 Smoke & Grill, LLC*, 74 AD3d 496, 496 (1st Dept. 2010), *Ruru & Assocs. LLC v. Weinberg Holdings, LLC*, 2022 NY Slip Op. 30405(U), ¶ 3 (S. Ct. NY Co.). Canons of statutory construction do not favor an interpretation of a statute that would render a right — like a right to compensation for possession of one's property — without a remedy. *In re Bailey*, 265 A.D. 758, 761 (1st Dept. 1943), *In re Myones*, 191 Misc. 280, 282 (S. Ct. Kings Co. 1947). The Court therefore does not interpret the ERAP statute to deprive a landlord of a remedy if a tenant without a written lease does not pay rent in the year after a landlord's acceptance of ERAP benefits. Rather, an occupant's ERAP application constitutes an effort to bind a landlord to treat the applicant as a tenant for one year, an act consistent with an intention to continue a landlord/tenant relationship. *Priegue*, *supra*, 43 Misc 3d at 135(A).[FN3] Accordingly, then, a landlord/tenant relationship between the parties continued at least for one year after payment of the ERAP benefits in August of 2021 at a rate of $3,850.00 a month, and the Court grants Petitioner's motion to amend the petition through the date of the trial.

Respondents had a credit of $1,910.48 by the end of September of 2021. Applying that credit to the eleven months of rent from October of 2021 through August of 2022 leaves a balance of $40,439.52 through August 31, 2022. While the lease between the parties does authorize an air conditioning charge if Respondents installed an air conditioner, no proof in the record shows that Respondents did that. The Court therefore uses the baseline of $40,439.52 against which the Court applies Respondents' counterclaim for a breach of the warranty of habitability.

Respondents proved that they endured a bad smell from the Deceased Tenant's Apartment. While Petitioner attempted to raise an issue with notice, Petitioner was clearly aware of the condition and Petitioner did not rebut Respondents' testimony that they gave the doorman notice of the condition. While there is no dispute that police sealed the Deceased Tenant's Apartment, Petitioner is responsible for conditions diminishing habitability even if an act of a third party caused the problem, *Park West Management Corp. v. Mitchell*, 47 NY2d 316, 327, *cert. denied*, 444 U.S. 992 (1979), *Duane Fabs Properties Corp. v. Cronus Consulting LLC*, [*5]N.Y.L.J. Sept. 11, 2002 at 18:5 (S. Ct. NY Co.), and even if Petitioner acted in good faith to correct the condition. *McBride v. 218 E. 70th St. Assocs.*, 102 Misc 2d 279, 283 (App. Term 1st Dept. 1979), *Leris Realty Corp. v. Robbins*, 95 Misc 2d 712, 714 (Civ. Ct. NY Co. 1978), *citing Reichick v. Matteo*, N.Y.L.J. January 23, 1978, at 13:2 (App. Term 2nd Dept.), *George v. Bd. of Dirs. of One W. 64th St., Inc.*, 2011 NY Slip Op.

32325(U), ¶ 9 (S. Ct. NY Co.), *Brooks Family Holdings Llc v. Morrison*, 2017 N.Y.L.J. LEXIS 657, *5 (Civ. Ct. Queens Co.). The Court credits Respondents' evidence that they had a hard time living in the subject premises for one month and that the smell in the common areas affected them for eleven months thereafter. The Court awards Respondents an 80% abatement for one month and a 3% abatement for eleven months. At a rate of $3,850, the total abatement that the Court awards for this condition is $4,350.50.

There is also no dispute that a riser in the subject premises was crumbling where it met the ceiling. Again, while the Building Manager disputed that he personally received notice, Petitioner did not rebut the testimony that Respondents gave notice to the super. The Court finds that this condition diminished the habitability of the subject premises by 4% from January of 2019 through September of 2021. Respondents' aggregate rent liability for this time period, at a rate of $3,750 from January through June of 2019 and at a rate of $3,850 from July of 2019 through September of 2021, is $126,450.00. Four percent of $126,450.00 is $5,058.00.

The total amount of abatements the Court awards is $9,408.50. Offsetting these counterclaims against the arrears of $40,439.52 leaves a balance of $31,031.02. Accordingly, it is ordered that the Court awards Petitioner a final judgment in the amount of $31,031.02. Issuance of the warrant of eviction is stayed through September 12, 2022 for payment of $31,031.02.[FN4] On payment, issuance of the warrant shall be permanently stayed. On default, the warrant may issue.

The parties are directed to pick up their exhibits within thirty days or they will either be sent to the parties or destroyed at the Court's discretion in compliance with DRP-185.

This constitutes the decision and order of the Court.

Dated: New York, New York
September 6, 2022

_____
HON. JACK STOLLER
J.H.C.

Footnotes

Footnote 1:ERAP is codified at L. 2021, c. 56, Part BB, Subpart A, and L. 2021, c. 417, Part

A.

Footnote 2: Such a remedy applies to unregulated dwelling like the subject premises. The Rent Stabilization Code also subjects rent-stabilized tenants who default in renewing properly-offered renewal leases to a cause of action for possession. 9 N.Y.C.R.R. §2524.3(f). *See Also* 24 CFR §982.310(d)(1)(i)(a failure by a federally-subsidized tenant to accept an offer of a new lease constitutes good cause to terminate a tenancy).

Footnote 3:A landlord's acceptance of ERAP arrears also restricts the landlord from increasing the rent. L. 2021, c. 56, Part BB, Subpart A, §9(2)(d)(iii).

Footnote 4: After a judgment in a nonpayment proceeding, the issuance of the warrant can be stayed for five days. RPAPL §732(2). Five days from this writing is September 11, 2022, a Sunday. If a period of time according to which an act is to be done falls on a Sunday, the act may be done on the next business day. General Construction Law §25-a(1). The next business day after September 11, 2022 is September 12, 2022.

Return to Decision List