2020-08-25

ZB Prospect Realty LLC v. Frankel

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ZB Prospect Realty LLC v Frankel
2020 NY Slip Op 50956(U) [68 Misc 3d 1214(A)]
Decided on August 25, 2020
Civil Court Of The City Of New York, Kings County
Stoller, J.
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Decided on August 25, 2020

Civil Court of the City of New York, Kings County

ZB Prospect Realty LLC, Petitioner,

against

Deneice Frankel, Respondent.

56349/2019

For Petitioner: Steve Sidrane

For Respondent: Ellery Ireland

Jack Stoller, J.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Pages numbered

Notice of Motion Supplemental Affidavits and Affirmations Annexed 1, 2

Affirmation and Affidavit In Opposition 3, 4

Affirmation In Reply 5

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

ZB Prospect Realty LLC, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Deneice Frankel, the respondent in this proceeding ("Respondent"), seeking possession of 846-48 Prospect Place, Apt. 4, Brooklyn, New York ("the subject premises") on the basis of termination of a month-to-month tenancy. Respondent interposed a counterclaim sounding in rent overcharge. Petitioner then discontinued this proceeding and the proceeding continues on Respondent's counterclaim. Respondent now moves for partial summary judgment on her counterclaim.

Respondent shows a history of registrations of the subject premises with the New York State Division of Housing and Community Renewal ("DHCR") pursuant to 9 N.Y.C.R.R. §2528.3 ("the registration history"). The registration history shows that, while Petitioner [FN1] annually registered the subject premises, it did not do so in 2000, 2001, 2002, or 2010, and did [*2]not register the subject premises at all after 2011. The last registered rent was $1,227.00 for a lease that expired on January 31, 2012.

Respondent annexes to her motion the following leases for the subject premises: one that commenced on October 15, 2012 that Petitioner purportedly entered into with other tenants with a monthly rent of $3,700.00, another commencing on October 1, 2013 that Petitioner purportedly entered into with other tenants with a monthly rent of $4,100.00, and a third lease commencing on February 1, 2017 that Petitioner purportedly entered into with a number of co-tenants, including one named "Deneice France," with a monthly rent of $4,200.00. None of these leases appear in the registration history.

Respondent argues that Petitioner's past failures to register the rent for the subject premises has the effect of freezing the rent in effect at the level of the last registered rent. N.Y.C. Admin. Code §26-517(e). Ascertaining that last registered rent, however, requires an inspection of the registration history more than four years before Respondent interposed her counterclaim.[FN2]

Before the passage of the Housing Stability and Tenant Protection Act ("HSTPA") in 2019, the Court could not consider registrations made four years before the interposition of a rent overcharge cause of action, even if a landlord failed to register a rent-stabilized apartment within that four-year timeframe. 435 Cent. Park W. Tenant Ass'n v. Park Front Apartments, LLC, 183 AD3d 509, 510-11 (1st Dept. 2020), *Myers v. Frankel*, 292 AD2d 575,

576 (2nd Dept. 2002),[FN3] *Sessler v. NY State Div. of Hous. & Cmty. Renewal*, 282 AD2d 262 (1st Dept. 2001), *Ridges & Spots Realty Corp. v. Edwards*, 4 Misc 3d 130(A)(App. Term 1st Dept. 2004). HSTPA amended the Rent Stabilization Law so as to permit a review of, *inter alia*, the entire registration history. N.Y.C. Admin. Code §§26-516(a), 26-517(h).

A statute has a retroactive effect if it would impair rights a party possessed when the party acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. *Matter of Regina Metro. Co., LLC v. NY State Div. of Hous. & Cmty. Renewal*, 2020 NY Slip Op. 02127 (Court of Appeals). Granting Respondent's summary judgment motion in this context would indeed increase Petitioner's liability for its failure to [*3]register the subject premises more than four years before Respondent interposed her cause of action. Such a retroactive application of this provision of HSTPA, to consider a registration for more than four years, violates substantive due process. *Id*. That violation of due process means that the Court must resolve Respondent's overcharge claim according to the law in effect at the time the overcharge occurred which, as noted above, proscribed the inspection of the registration history more than four years before the cause of action. *Myers*, *supra*, 292 AD2d at 576, *Sessler*, *supra*, 282 AD2d at 262, *Ridges & Spots Realty Corp.*, *supra*, 4 Misc 3d at 130(A). *Regina*, *supra*, itself noted that a lack of registrations in the four years prior to an overcharge complaint does not warrant a consideration of older registrations, as the regulation used the rent charged, not the registered rent, as the basis upon which to evaluate an overcharge complaint. 9 N.Y.C.R.R. §§2526.1(a)(3)(i), 2520.6(e). *See* 435 Cent. Park W. Tenant Ass'n, *supra*, 183 AD3d 509, at 510 (using the rent charged four years prior to the overcharge complaint as the basis to determine the lawful rent in the absence of registrations).

In support of her motion, Respondent cites *125 Court St., LLC v. Nicholson*, 67 Misc 3d 28, 33 (App. Term 2nd Dept. 2019) and *325 Melrose, LLC v. Bloemendall*, 65 Misc 3d 43 (App. Term 2nd Dept. 2019). However, these matters post-dated the passage of HSTPA but pre-dated the Court of Appeals' holding that a retroactive application of that HSTPA provision violates due process. Respondent also cites *Ema Realty, LLC v. Leyva*, 64 Misc 3d 11, 14 (App. Term 2nd Dept. 2019). However, the Court in this matter considered rent registrations older than four years to determine an apartment's rent regulatory status, not for overcharge cause of action. Law pre-dating HSTPA already permitted inspection of older rents registered and/or charged to determine rent regulatory status, *Rosa v. Koscal 59, LLC*, 162 AD3d 466, 466 (1st Dept. 2018), *H.O. Realty Corp. v. State of NY Div. of Hous. & Community Renewal*, 46 AD3d 103, 109 (1st Dept. 2007), *East West Renovating Co. v. State*

of NY Div. of Hous. & Community Renewal, 16 AD3d 166, 167 (1st Dept. 2005), *449 W. 37 Realty LLC v. Herman*, 2019 NY Slip Op. 50201(U)(App. Term 1st Dept.), *CS 393 LLC v. Eisenberg*, 48 Misc 3d 128(A)(App. Term 1st Dept. 2015), *49 E. 74th St., LLC v. Slater*, 42 Misc 3d 134(A)(App. Term 1st Dept. 2014), a proposition of law that *Regina*, *supra*, did not disturb. "Critically, there is a distinction between an overcharge claim and a challenge to the deregulated status of an apartment." *Regina*, *supra*, 2020 NY Slip Op. 02127 n.4.

Respondent also cites *125 Court St., LLC v. Sher*, 58 Misc 3d 150(A)(App. Term 2nd Dept. 2018). However, this decision did not award damages on a rent overcharge claim. Instead, the decision found fault with a rent demand pursuant to RPAPL §711(2) and dismissed a nonpayment petition because of that.

Respondent argues in reply that the Court can consider the entirety of the registration history because Petitioner engaged in a fraudulent scheme to deregulate the subject premises. However, this was not the basis for which Respondent moved for summary judgment at the outset. The Court cannot award relief based upon a ground raised for the first time in reply. *Stang LLC v. Hudson Square Hotel, LLC*, 158 AD3d 446, 447 (1st Dept. 2018), *All State Flooring Distribs., L.P. v. MD Floors, LLC*, 131 AD3d 834, 836 (1st Dept. 2015).

Even assuming *arguendo* that the Court could consider the rent registered more than four years before Respondent interposed her cause of action, the Court "permit[s] tenants to use such evidence *only* to prove that the owner engaged in a fraudulent scheme to deregulate the apartment. For overcharge calculation purposes, the last regulated rent charged before that period [is] 'of no relevance,'" Regina Metro. Co., LLC, *supra*, 2020 NY Slip Op. 02127, ¶ 5, with [*4]the so-called "default formula"[FN4] used to set rents in such a situation. Id., *Gold Rivka 2 LLC v. Rodriguez*, 2020 NY Slip Op. 50904(U)(Civ. Ct. Bronx Co.).

The Court therefore denies Respondent's motion for summary judgment, without prejudice to the ultimate outcome of Respondent's cause of action.

Although Petitioner does not cross-move for such relief, Petitioner's opposition papers contain a request that the Court, pursuant to CPLR §3212(b), to search the record and award a possessory judgment for unpaid rent.

A Court may only search the record and grant summary judgment in favor of a nonmoving party with respect to a cause of action or issue that is the subject of the motions before the Court. Dunham v. Hilco Constr. Co., 89 NY2d 425, 429-30 (1996), Zhigue v. Lexington Landmark Props., LLC, 183 AD3d 854, 856 (2nd Dept. 2020). Not only is

Respondent's payment or nonpayment of rent not an issue on this motion practice, it is not even a cause of action in this proceeding, which started out as a holdover proceeding. And even that holdover cause of action was discontinued. A summary judgment motion is not an occasion for opposing parties to seek relief on "every claim and defense asserted by every other party." Weinberg v. Picker, 172 AD3d 784, 788 (2nd Dept. 2019).

Even assuming *arguendo* that Petitioner's cause of action for unpaid rent bore some relation to this matter and this summary judgment motion, Petitioner does not prove that it demanded payment of rent from Respondent pursuant to RPAPL §711(2), a prerequisite for a judgment for nonpayment of rent.

Even assuming *arguendo* that a deficiency in a rent demand were not an issue, Petitioner's president avers in opposition to the summary judgment motion that he has no lease with any of the named respondents. A cause of action for nonpayment of rent sounds in contract. *Solow v. Wellner*, 86 NY2d 582, 589-90 (1995), *Rutland Rd. Assoc., L.P. v. Grier*, 55 Misc 3d 128(A)(App. Term 2nd, 11th, and 13th Dists. 2017), *Underhill Ave. Realty, LLC v. Ramos*, 49 Misc 3d 155(A)(App. Term 2nd Dept. 2015), *Fasal v. La Villa*, 2 Misc 3d 137(A) (App. Term 1st Dept. 2004), *Fucile v. LCR Dev., Ltd.*, 2011 NY Slip Op. 32256(U) (Dist. Ct. Nassau Co.). Accordingly, without a lease between the parties upon which Respondent may alleged to have defaulted, a cause of action for nonpayment of rent does not lie. *Jaroslow v. Lehigh Valley R. Co.*, 23 NY2d 991, 993 (1969), *Krantz & Phillips, LLP v. Sedaghati*, 2003 NY Slip Op. 50032(U), 2-3 (App. Term 1st Dept. 2003), *Eshaghian v. Adames*, 28 Misc 3d 1215(A)(Civ. Ct. NY Co. 2010), *506 W. 150th St., LLC v. Prier*, 36 Misc 3d 1201(A)(Civ. Ct. NY Co. 2012), *1400 Broadway Assocs. v. Henry Lee & Co.*, 161 Misc 2d 497, 499-500 (Civ. Ct. NY Co. 1994).

Even assuming *arguendo* that what Petitioner really seeks is a judgment in unpaid use and occupancy, Petitioner's discontinuance of the holdover petition precludes recovery for rent or use and occupancy in the same proceeding. *Community League of W. 159th St. v. Cesar*, N.Y.L.J., Apr. 21, 1989, at 21:6 (App. Term 1st Dept.). *See Also 40 W. 55 LLC v. Kurland*, 2003 NY Misc. LEXIS 153 (App. Term 1st Dept. 2003)(a cause of action for use and occupancy in a holdover proceeding ripens upon the entry of a judgment of possession). Accordingly, the Court declines Petitioner's entreaty to award it a judgment as a non-moving party. The Court [*5]restores this matter for a virtual conference to be held on September 1, 2020 at 10:00 a.m. The Court will email a link to the attorneys for the parties.

This constitutes the decision and order of this Court.

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HON. JACK STOLLER
J.H.C.
Dated: August 25, 2020
Brooklyn, New York

Footnotes

Footnote 1:A deed annexed in this motion practice indicates that Petitioner itself may not have been the landlord throughout the entire time period discussed. However, as an owner remains liable for rent overcharges collected by a predecessor-in-interest with exceptions that do not apply here, 9 N.Y.C.R.R. §2526.1(f)(2)(i), the Court, for purposes of prosaic convenience, refers to both Petitioner and Petitioner's predecessor-in-interest as "Petitioner" in this decision.

Footnote 2: Respondent's summary judgment motion does not apprise the Court of the date that Respondent interposed her counterclaim, as Respondent did not annex a copy of the pleadings to her motion as required by CPLR §3212(b). That defect alone warrants a denial of the motion. *Washington Realty Owners, LLC v. 260 Wash. St., LLC*, 105 AD3d 675 (1st Dept. 2013), *Wider v. Heller*, 24 AD3d 433, 434 (2nd Dept. 2005), *Riddell v. Brown*, 32 AD3d 1212 (4th Dept. 2006). Be that as it may, Petitioner annexes to its opposition a copy of Respondent's answer, which is verified on April 10, 2019, although it is not clear when Respondent served the answer on Petitioner. April 10, 2019, is more than four years after the latest registration of the subject premises in the registration history.

Footnote 3: This decision does not refer to a failure to register. However, the decision modified the holding in Myers v. Frankel, 184 Misc 2d 608 (App. Term 2nd Dept. 2000) so as to proscribe an inspection of a registration history for more than four years. The modified Appellate Term decision had explicitly held that a landlord's failure to register warranted an inspection of a registration history beyond four years.

Footnote 4: The "default formula" sets the rent at the rate of the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date. Id.

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