2020-05-22

Grove St. Equities LLC v. Butensky

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Grove St. Equities LLC v Butensky
2020 NY Slip Op 50592(U) [67 Misc 3d 1219(A)]
Decided on May 22, 2020
Civil Court Of The City Of New York, New York County
Stoller, J.
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Decided on May 22, 2020

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

GROVE ST. EQUITIES LLC, Petitioner,

against

RICHARD BUTENSKY, et al., Respondent.

Index No. 69901/2011

For Petitioner: Carol Ann Herlihy

For Respondent: David Frazer

Jack Stoller, J.

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

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Pages numbered

Notice of Motion and Supplemental Affirmation and Affidavit Annexed 1, 2, 3

Affirmation in Opposition 4

Reply Affirmation 5

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

Grove Equities LLC, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Richard Butensky, et al., the respondents in this proceeding ("Respondents"), seeking possession of the subject premises on the basis of nuisance and breach of a substantial obligation of Respondents' tenancy, to wit, by illegal alterations and commercial use of residential premises. After trial, the Court awarded Petitioner a judgment of possession with a stay to permit Respondents to cure. Respondents cured. Petitioner appealed. The Appellate Term affirmed the Court's decision. Petitioner now moves for a judgment sounding in fines that Petitioner had to pay, unpaid use and occupancy, and attorneys' fees.

The Court found, *inter alia*, that Respondents' maintenance of an air conditioner over a fire escape adjacent to the subject premises caused Petitioner to incur a violation placed by the New York City Department of Buildings ("DOB"). By the close of the trial record, Respondents had removed the air conditioner but had not completed paperwork necessary for Petitioner to remove the violation. The Court awarded Petitioner a final judgment in part on that basis and stayed issuance of the warrant to afford Respondents an opportunity to cure pursuant to RPAPL §753(4). While Respondents apparently cured, Petitioner contends by this motion that a "cure" means that Respondents would have to pay the fines that Petitioner incurred at DOB, seeking a possessory judgment against Respondents in the amount of the fines Petitioner had to pay, with the issuance of a warrant of eviction as Petitioner's remedy for Respondents' nonpayment of such [*2]fines.

Money exchanged for possession of real property is, in fact, "rent." *See Saba Realty Partners LLC v. Int'l Gold Star Inc.*, 29 Misc 3d 850, 853 (Civ. Ct. Kings Co. 2010), *citing Solow Mgt. Corp. v. Bachko*, 66 Misc 2d 233, 235 (App. Term 1st Dept. 1970), *Gasoff Realty Corp. v. Berger*, 188 Misc. 622, 624 (App. Term 1st Dept. 1947)(finding that "rent" for purposes of RPAPL §711(2) is the quid pro quo for a right to occupy demised premises). RPAPL §702 was enacted after the commencement of this proceeding, but the statute instructively defines rent as periodic payments made in consideration for the use and occupation of a dwelling. Petitioner's application therefore effectively means that Petitioner seeks a judgment for nonpayment of "rent," as Petitioner seeks a judgment for an amount certain enforceable by a warrant of eviction that would transfer possession from Respondents to Petitioner.

The subject premises is subject to the Rent Stabilization Law. Accordingly, the legal regulated rent is the rent charged on the base date plus any subsequent lawful increases and adjustments. 9 N.Y.C.R.R. §2520.6(e). Amounts other than that cannot constitute "additional rent" in rent-stabilized apartments. *Compare Crystal World Realty Corp. v. Sze*, N.Y.L.J. December 19, 2001 at 22:6 (App. Term 1st Dept.)(attorneys' fees cannot be "additional rent" for a rent-stabilized apartment). Accordingly, the Court denies so much of Petitioner's motion as seeks a possessory judgment for fines it incurred from DOB described above, without prejudice to Petitioner's plenary cause of action for the same amounts in the appropriate forum, and without prejudice to Respondents' defenses thereto.

Petitioner moves for a judgment sounding in unpaid use and occupancy accruing at the rate of the rent from the most recent rent-stabilized lease between the parties. The petition in this matter prayed for a judgment in use and occupancy. At some point in the pre-trial proceedings, Petitioner moved for an order directing payment of use and occupancy. At trial, Petitioner's principal testified that Respondents tendered checks for rent to Petitioner and that he did not accept the checks.

Respondents oppose the motion, in part, on the ground that the petition has never been amended. However, Petitioner's cause of action for unpaid use and occupancy would not have ripened until after the judgment that the Court entered. *40 W. 55 LLC v. Kurland*, 2003 NY Slip Op. 50606(U), ¶ 4 (App. Term 1st Dept.). Petitioner's prior appeal does not bar its cause of action. *Id*. Nor does Respondents' cure of the breach that Court found bar Petitioner's cause of action as such. *See*, *e.g.*, *72A Realty Assocs., L.P. v. Mercado*, 36 Misc 3d 137(A)(App. Term 1st Dept. 2012). *See Also Ansonia Assocs. v. Bozza*, 186 Misc 2d 845, 846 (App. Term 1st Dept. 2000)(affirming as modified a judgment for use and occupancy even though the tenant had already cured the breach giving rise to underlying holdover cause of action).

Respondent argues in opposition to the motion that Petitioner refused Respondent's tenders of rent starting in 2009, which is consistent with Petitioner's principal's trial testimony. However, Petitioner had previously moved for a judgment sounding in use and occupancy against Respondent during the course of this litigation. While the Court denied the motion because the Court found that Petitioner had incurred delay in pre-trial discovery proceedings, the motion put Respondent on notice that Petitioner was indeed seeking payment of rent. That notice belies the proposition that Petitioner was attempting to manipulate Respondent into a position where Respondent would be unable to satisfy a

judgment and be evicted, the hallmark of a tender-and-refusal defense. *Haberman v. Singer*, 3 AD3d 188, 192 (1st Dept. 2004), *Anderson Ave. Assocs., L.P. v. García*, 50 Misc 3d 1065, 1068 (Civ. Ct. Bronx Co. 2015).

Petitioner's rent breakdown shows that Respondent's rent has been $562.90 per month and, at that rate, Respondent owes $71,488.30 in arrears from May of 2009 through January of 2020. Petitioner is entitled to a judgment in this amount.

Petitioner also moves for a judgment sounding attorneys' fees, showing in support of its motion a lease between the parties with an attorneys' fees clause, the legal effect of which is to entitle the prevailing party in litigation to such a judgment. RPL §234. To be considered a prevailing party, one must prevail on the central claims advanced, and receive substantial relief in consequence thereof. *542 E. 14th St. LLC v. Lee*, 66 AD3d 18, 24-25 (1st Dept. 2009), *Sykes v. RFD Third Ave. I Assoc., LLC*, 39 AD3d 279 (1st Dept. 2007), *Board of Managers of 55 Walker Street Condominium v. Walker Street LLC*, 6 AD3d 279, 280 (1st Dept. 2004). Such a determination requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope. *Free People of PA LLC v. Delshah 60 Ninth, LLC*, 169 AD3d 622, 623 (1st Dept. 2019), *Excelsior 57th Corp. v. Winters*, 227 AD2d 146, 147 (1st Dept. 1996).

As the "central relief sought" in a holdover proceeding is a judgment of possession, *Nestor v. McDowell*, 81 NY2d 410, 416 (1993), the Court's entry of a judgment in favor of Petitioner makes the straightforward case that Petitioner prevailed, *Soho Vill. Realty, Inc. v. Gaffney*, 188 Misc 2d 261 (App. Term 1st Dept. 2001), even if Respondents obtained a stay so they could cure. *600 Realty Heights, LLC v. Paula-Molina*, 49 Misc 3d 136(A)(App. Term 1st Dept. 2015), *B & B Manhattan, L.L.C. v. Sack*, 19 Misc 3d 135(A)(App. Term 1st 2008).

Respondents argue that Petitioner's failure to prevail on a number of its claims against Respondents deprives Petitioner of prevailing-party status. Indeed, after a ten-day trial, spanning from March 12, 2013 to February 20, 2014, the Court dismissed Petitioner's cause of action sounding in nuisance, dismissed Petitioner's cause of action sounding in commercial use of the subject premises, did not find that Respondents engaged in the more serious accusations of alterations, and rejected Petitioner's position that the alterations that Respondents engaged in deprived Respondents of the opportunity to cure.

Normally, a party need not prevail on all of its claims in order to prevail for attorneys' fees purposes, *Cmty. Counseling & Mediation Servs. v. Chera*, 115 AD3d 589, 590 (1st Dept. 2014), *Wiederhorn v. J. Ezra Merkin*, 98 AD3d 859, 863 (1st Dept. 2012), although the

prevailing party cannot obtain a judgment for fees incurred pursuing unsuccessful claims, *RSB Bedford Assoc. LLC v. Ricky's Williamsburg, Inc.*, 112 AD3d 526, 528 (1st Dept. 2013), *Nestor v. Britt*, 16 Misc 3d 368, 380 (Civ. Ct. NY Co. 2007), *affirmed for the reasons stated*, 19 Misc 3d 142(A)(App. Term 1st Dept.), *leave to appeal from the Appellate Term denied*, 2008 NY App. Div. LEXIS 10374 (1st Dept. 2008), leaving the Court to parse out expenditures incurred on successful as opposed to unsuccessful claims. *See*, *e.g.*, *Rangoon Inc. v. Yi Gui Lin*, 60 Misc 3d 1220(A)(Civ. Ct. NY Co. 2018).

What distinguishes this matter is that Petitioner unsuccessfully appealed the Court's decision. Generally, the litigant who has successfully obtained a judgment or order in its favor — what some might characterize as prevail — has no need and, in fact, no right to appeal, *Denza v. Indep. Plaza Assocs.*, LLC, 95 AD3d 153, 162 (1st Dept. 2012), although, to be fair, a litigant successful at the lower Court may still appeal if the Court did not grant that litigant complete relief. *Parochial Bus Sys., Inc. v. Bd. of Educ.*, 60 NY2d 539, 544-45 (1983).

Be that as it may, an appeal is a separate enterprise from a trial, entailing tasks and [*3]billable hours wholly detachable from a trial, foreseeably incurring substantial fees.[FN1] Respondents still had to defend Petitioner's appeal and expend fees to do so.

If the Court would grant Petitioner's motion and award Petitioner a judgment against Respondents for attorneys' fees for Petitioner's prevailing at trial, Petitioner would bear no consequence for its unsuccessful appeal, a result inconsistent with the "overriding purpose" of RPL §234, i.e., "to level the playing field between landlords and residential tenants ." *Graham Court Owner's Corp. v. Taylor*, 24 NY3d 742, 750 (2015), *citing Duell v. Condon*, 84 NY2d 773, 780 (1995). Put bluntly, where is the reciprocity that RPL §234 contemplates if Respondents must pay for Petitioner's prevailing at trial, but Petitioner need not pay for Respondents prevailing on appeal?

Despite Petitioner prevailing at trial, then, Petitioner's subsequent appeal and Respondents' prevailing on appeal reveal something about the "true scope" of the dispute between the parties. The resulting outcome of this litigation therefore was not substantially favorable to either party. *12-14 E. 64th Owners Corp. v. Hixon*, 38 Misc 3d 135(A)(App. Term 1st Dept. 2013). To put it another way, "neither [party] can claim to have been merely the hapless victim of the other's combative litigation style." *Mosesson v. 288/98 W. End Tenants Corp.*, 294 AD2d 283, 284 (1st Dept. 2002).

Accordingly, it is

ORDERED that the Court denies so much of Petitioner's motion as seeks a judgment sounding in fines that Petitioner had to pay DOB, without prejudice to Petitioner's plenary cause of action for such relief in the appropriate forum, and without prejudice Respondents' defenses thereto, and it is further

ORDERED that the Court grants so much of Petitioner's motion as seeks a judgment for unpaid use and occupancy to the extent of determining that Petitioner is entitled to a judgment in the amount of $71,488.30 through January of 2020 and an issuance of a warrant of eviction on nonpayment of that amount. As of this writing, however, Court operations are suspended because of a public health emergency. If Respondent pays this amount before it is logistically possible for Petitioner to obtain entry of a judgment, then any further enforcement action by Petitioner for nonpayment of such an amount shall be permanently stayed. If Respondent defaults in payment of this amount by the time that Court operations resume such that Petitioner may obtain entry of a judgment, then Petitioner may obtain entry of a judgment on ex parte application to the Court with proof of five days' email notice to Respondent's counsel of said application and then obtain a warrant of eviction forthwith, and it is further

ORDERED that the Court denies so much of Petitioner's motion as seeks a judgment for [*4]attorneys' fees.

This constitutes the decision and order of this court.

Dated: New York, New York
May 22, 2020

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HON. JACK STOLLER
J.H.C.

Footnotes

Footnote 1: While an amount that an attorney moves for is not determinative of the cost of an appeal, an attorney in a recently-reported decision moved for an undertaking of $50,000.00 to cover the costs of an appeal. *Ar-Rahman Found. Inc. v. Millat Food Inc.*, 66 Misc 3d 1228(A) (Civ. Ct. NY Co. 2020). Even assuming *arguendo* that the Court would discount this estimate by, say, fifty percent, that would still leave fees of $25,000.00. *See Also Ninth Ave. Realty*

LLC v. McKay and Silver, 2012 NY Misc. LEXIS 6116 (Civ. Ct. NY Co. 2012)(the decision awarded, before interest, $118,408.97 for a case that was tried and then appealed; while the decision did not divide the fees by trial and appeal, the broader point is that an appeal incurs added expense).

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