

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

All Decisions

Housing Court Decisions Project

2022-11-16

335 REALTY, LLC v. CHOI

Follow this and additional works at: https://ir.lawnet.fordham.edu/housing_court_all

Recommended Citation

"335 REALTY, LLC v. CHOI" (2022). *All Decisions*. 716.
https://ir.lawnet.fordham.edu/housing_court_all/716

This Housing Court Decision is brought to you for free and open access by the Housing Court Decisions Project at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in All Decisions by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART F

335 REALTY, LLC

Index No. 52739/20

Petitioner,

DECISION/ORDER

-against-

Motion Sequence 1

MYNG KEUN CHOI, JOSEPH CALDERISE

Respondents,

JOHN DOE, JANE DOE

Respondent-undertenants.

HON KAREN MAY BACDAYAN, JHC

*Borah Goldstein Altshuler Nahins & Goidel, PC (Evan S. Nahins, Esq.), for the petitioner
NYLAG (L. Rios O'Leary-Tagiuri, Esq.), for the respondent-Joseph Calderise*

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by
NYSCEF Doc Nos: 6 – 14.

PROCEDURAL HISTORY AND BACKGROUND

This is a summary holdover proceeding in which respondents' unregulated, free-market lease expired on September 30, 2019. On October 16, 2019, petitioner served respondents with a 90-day notice of intention not to renew the lease pursuant to Real Property Law ("RPL") Section 226-c. The notice expired on January 31, 2020. No rent was tendered, or accepted, after the lease expired and prior to the instant proceeding.

Prior to commencement of this holdover proceeding in February 2020, on or about November 20, 2019 petitioner served a 14-day rent demand upon respondents pursuant to RPAPL 711 (2) seeking May 2019 through November 2019 rent arrears despite the lease having expired on September 30, 2019. On December 30, 20219, one month prior to the expiration of the notice of nonrenewal, petitioner commenced a nonpayment proceeding against respondents seeking the same rent arrears as demanded in the 14-day notice. (*335 Realty, LLC v Calderise et al*, Index No. 074569/19, NYSCEF Doc No. 4, legacy file at 1-6.) On February 25, 2020, a judgment against respondents was obtained on respondents' failure to answer. (*Id.* at 23.) A

warrant issued, but restrictions and stays imposed due to the COVID-19 pandemic prevented execution. Respondent applied for an Emergency Rental Arrears Program (“ERAP”) grant, and rent arrears covering October 2020 through December 2021 were approved and accepted by petitioner. Upon respondents’ motion, the default judgment and warrant were later vacated in a decision and order dated April 25, 2022. (*335 Realty, LLC v Calderise et al*, Index No. 074569/19, NYSCEF Doc No. 49.) In that decision, the Hon. Jean Schneider ordered that “[t]he petition is amended to seek the rent initially sue[d] for plus rent at \$2,100.00 per month for December 2019 through September 2020 and rent at the same rate for January 2022 through April 2022.” (*Id.* at 2.) Several motions have been filed in the nonpayment proceeding which is still pending. Respondent, Joseph Calderise (“respondent”), is represented in the nonpayment proceeding as well as the instant holdover proceeding by the New York Legal Assistance Group.

Respondent has moved to dismiss this proceeding on the basis that the commencement of the nonpayment proceeding, in which petitioner avers that respondent is a tenant in possession pursuant to a written rental agreement and seeks rent arrears for a period of time after the expiration of respondent’s lease, vitiated the notice of termination upon which this holdover proceeding is based. (NYSCEF Doc No. 6, motion sequence 4.) Respondent argues that both petitioner’s statements and those of his attorney are inconsistent as respondent cannot be, at once, a holdover tenant, and a tenant of record with an obligation to pay rent. Respondent further argues that petitioner’s continued actions in the nonpayment proceeding, including repeatedly referring to respondent as the “tenant of record,” and seeking various forms of relief in prosecution of its claim for nonpayment mandate that the holdover proceeding be dismissed. Indeed, the petition was amended to include all rent due which was not approved and accepted from ERAP through April 25, 2022. The parties continue to actively litigate the nonpayment proceeding.

In opposition, petitioner argues that the cases cited by respondent are inapposite as in those cases, unlike here, the nonpayment proceeding was commenced “during the pendency” of the holdover proceeding and seeks to distinguish the cases cited by respondent in this way. (NYSCEF Doc Nos. 7 – 11, petitioner’s opposition papers.) At oral argument petitioner posited that demanding and suing for rent from respondent for two months after the expiration of the lease did not vitiate the notice of termination because respondent was still a tenant until the notice of non-renewal expired on January 31, 2020 pursuant to the language of Real Property

Law 226-c (1) (a): “If the landlord fails to provide timely notice, the occupant’s lawful tenancy shall continue under the existing terms of the tenancy from the date on which the landlord gave actual written notice until the notice period has expired”).¹

Respondent’s reply reiterates the argument made in the motion in chief.

Oral argument was held on November 14, 2022.

DISCUSSION

For the following reasons, respondent’s motion to dismiss this holdover proceeding is granted. The case most relied upon by both respondent and petitioner is *Glenbriar Co. v Nesbitt*, 174 Misc 2d 547 (Civ Ct, Bronx County 1997). In that decision, the court held that a holdover proceeding and a previously commenced nonpayment proceeding for rent accruing prior to the termination of the tenancy were consistent with one another to the extent that the nonpayment proceeding sought *only rent that came due prior to the expiration of the lease*. However, the court also stated that had the landlord sought rent for months *after the termination of the tenancy*, “. . . the court would be constrained to reach a different determination as the landlord’s conduct would then signify a desire to resume or maintain the landlord/tenant relationship.” (*Id.* at 550-551.)

Herein, even *if* the nonpayment petition had sought rent from respondent only for a time respondent had an obligation to pay rent under the lease, and even though no rent accruing subsequent was initially sought in the nonpayment petition, since the nonpayment proceeding has commenced petitioner has made three motions in that proceeding for various forms of affirmative relief including execution of the warrant, has accepted ERAP monies, has received and had no quarrel with amendment of the nonpayment petition, and continues to litigate the issues therein.

Unlike in *Glenbriar*, where, importantly, upon filing of the holdover proceeding the landlord “immediately sought to discontinue the nonpayment proceeding,” *id.* at 551, petitioner here has aggressively pursued these two “mutually exclusive remedies.” (See *Harris v Timecraft Indus., Inc.*, 132 Misc 2d 386, 389 [also noting that “[i]f mere commencement of a nonpayment

¹ The court notes that this argument was not presented for consideration in petitioner’s opposition papers, and thus cannot be considered herein as respondent did not have an opportunity to thoughtfully reply. Thus, the court does not reach that issue as part of this decision and order. See *e.g. Rosenblatt v St. George Health and Racquetball Associates, LLC*, 119 AD3d 45 (1st Dept 2014) (the court cannot address a dispositive issue not raised by the parties).

proceeding is thus fatal to a pending holdover, prosecution to judgment of even a preexisting nonpayment proceeding should be *a fortiori*”). Based on the foregoing, the court finds that, under the facts and circumstances of these two inconsistent proceedings, it is a distinction without a difference that the nonpayment proceeding was commenced *during the window period* between service of the notice of intent not to renew and the expiration of said notice, rather than *during the pendency* of this holdover proceeding. It cannot be reasonably maintained that landlord does not seek a judgment in the nonpayment proceeding, as petitioner has already moved to execute on a warrant that was later vacated. The sheer number of sworn statements that petitioner has made, as well as affirmative acts that petitioner has taken to prosecute the nonpayment proceeding signifies a strong desire to maintain a landlord-tenant relationship, at least to the extent that such entitles petitioner to maintain the nonpayment proceeding.

Petitioner herein is enjoying the benefit of litigating two contradictory proceedings in Housing Court, perhaps throwing the dice as to which proceeding will result in a swifter resolution. However, “[t]he court is not a place to throw claims against a wall just to see what sticks.” (*E. Vill. Re Holdings, LLC v McGowan*, 53 Misc 3d 1201[A] [Civ Ct, New York County 2016], *aff'd as modified*, 57 Misc 3d 155 [A], 72 NYS3d 516 [App Term, 1st Dept 2017].)

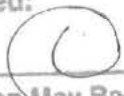
CONCLUSION

Accordingly, it is

ORDERED that respondent’s motion to dismiss this proceeding is GRANTED.

This constitutes the decision and order of this court.

Dated: November 16, 2022
New York, NY

So Ordered:


Hon. Karen May Bacdayan
HON. KAREN MAY BACDAYAN
Judge, Housing Part