2018-01-19

SILVERLEAF LP v. MATTHEW

CIVIL COURT OF THE CITY OF NEW YORK
BRONX COUNTY: HOUSING PART K

----------X L&T Index # 36766/2017

SILVERLEAF LP,

Petitioner-Landlord,

-against- **DECISION & ORDER**

[redacted]MATTHEW
4[redacted] East 176th Street, [redacted]
Bronx, NY 10457,

Respondent-Tenant.

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Hon. Diane E. Lutwak, Hsg. Ct. J.:

Recitation, as required by CPLR Rule 2219(a), of the papers considered in the review of the Petitioner's Motion for Summary Judgment and other relief:

Papers	Numbered
Notice of Motion and Attached Affirmation, Affidavit & Exhibits A-G	1
Respondent's Memorandum of Law in Support of Motion	2
Affirmation & Exhibit A in Opposition	3
Affirmation in Reply	4

PROCEDURAL HISTORY AND BACKGROUND

This is a holdover proceeding based upon Respondent's alleged harboring of a dog in her Rent Stabilized apartment in violation of paragraph 22-f of her lease and paragraph 8(a) of a Rider to her lease. Respondent raised in her Answer, *inter alia*, an affirmative defense of "pet waiver", based on the assertions that: She has continuously kept pet dogs for several years; she has harbored them open and notoriously; Petitioner was aware or should have been aware of them; and Petitioner waived its right to seek a possessory judgment for breach of the lease by failing to take legal action within three months of the date it became aware of Respondent's dogs, as required by New York City Administrative Code § 27-2009.1(b) ("the Pet Law").

Respondent now moves for summary judgment on her "pet waiver" defense, and supports her motion with her attorney's affirmation, her own affidavit, the affidavit of a neighbor in the same building, [redacted] Santana, and certain documents and photographs.[1] Respondent asserts that she has lived in her apartment for eleven years and that she "took on" two Yorkshire Terrier puppies "about four years ago." She describes them as "tiny" and capable of being picked up with one arm. She asserts that

[1] CPLR 3212(b) requires that a motion for summary judgment be supported by copies of the pleadings, and while Respondent did attach a copy of the Petition (Exhibit D) and the predicate notices (Exhibit C), she did not include a copy of her Answer. While such an omission could warrant denial of the motion, *Washington Realty Owners, LLC v 260 Wash St, LLC* (105 AD3d 675, 964 NYS2d 137 [1st Dep't 2013]), in the interest of judicial economy, the court will overlook this procedural defect. CPLR § 2001 ("Mistakes, omissions, defects and irregularities").

she walks them regularly, more than once a day. To do so, she takes the dogs "in the hallway, elevator, and through the front door of the building" and then walks them in front of the building where she lives. She does not hide the dogs from visitors, and their food and water bowls are in her living room. Ms. Santana, who, in addition to being a neighbor, knows Respondent through their families as they "have a grandchild in common," asserts that she has lived in the building since 2004 and known Respondent since 2004 or 2005. She has observed Respondent with her dogs in the building and in her apartment for the past three or four years, ever since they were puppies. She sees Respondent walking her dogs in the lobby of the building as well as outside the building and asserts that Respondent walks her dogs about twice per day. Two photographs of the dogs and a one-page vaccination certificate that appears to be dated 3/7/15[2], are referenced in Respondent's attorney's affirmation, and attached as Exhibits F and G to the motion papers. The vaccination certificate includes Respondent's name and address and references a female pet with the name "Minnie Roxie" and breed "Yorkie/Maltese".

Respondent's attorney argues that Respondent is entitled to summary judgment as she "held out the pets openly and notoriously for the last four years and Petitioner's agents acquiesced to the presence of her dogs." Respondent's attorney cites to decisions in three pet holdover cases, *1725 York Venture v Block* (64 AD3d 495, 884 NYS2d 6 [1st Dep't 2009]); *184 West 10th Street Corp v Marvits* (59 AD3d 287, 874 NYS2d 403 [1st Dep't 2009]); and *Seward Park Hous Corp v Cohen* (287 AD2d 157, 734 NYS2d 42 [1st Dep't 2001]), and argues that Petitioner waived its right to enforce the pet prohibition clause of the lease by failing to comply with NYC Administrative Code § 27-2009.1(b).

In opposition, Petitioner submits solely the affirmation of its attorney, who argues that the motion for summary judgment should be denied as there are material issues of fact to be resolved at trial.[3] Petitioner also cites to *Seward Park Hous Corp v Cohen, supra,* as well as to *2229-13 Apt Corp v Portnov* (26 Misc3d 1209[A], 907 NYS2d 104 [Civ Ct Kings Co 2010], *aff'd on other grounds 33 Misc3d 128[A], 939 NYS2d 744 [App Term 2nd Dep't 2011*), and argues that Respondent has failed to state sufficient facts to show that Petitioner had actual or constructive notice of her dogs: Respondent does not state the names of any particular agent or employee who knew about the dogs or any particular instances or dates when any such individuals saw them. Attached to Petitioner's attorney's affirmation as Exhibit A is a copy of a lease which Petitioner's attorney describes as being a copy of "Respondent's Original Lease". This lease is for a one year term beginning April 1, 2016 and includes a "no pet" provision at paragraph 22(f). Also attached as part of Exhibit A is a Rider dated April 1, 2015, paragraph 8(a)(iii) of which also prohibits pets, with certain exceptions.

On reply, Respondent points out that Petitioner's opposition is not supported by an affidavit of any of Petitioner's agents or anyone else with personal knowledge of the facts and argues that under the controlling case law Respondent need not prove that Petitioner had actual knowledge.

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[2] While the last digit of the date on the document is partially cut off, Respondent's attorney describes it as "veterinary records showing the existence of the dogs in 2015.".

[3] Petitioner's attorney also sets out the standard courts should follow on a motion to dismiss and argues in paragraphs 10 through 13 of his affirmation that Petitioner "adequately pled a claim that has a basis in law and fact." However, as this is a summary judgment motion under CPLR R 3212, not a motion to dismiss under CPLR R 3211(a)(7), that argument is not relevant and will not be addressed beyond this footnote.

DISCUSSION

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ Med Ctr* (64 NY2d 851, 476 NE2d 642, 487 NYS2d 316 [1985]); *Zuckerman v New York* (49 NY2d 557, 404 NE2d 718, 427 NYS2d 595 [1980]). If the movant meets its initial burden of proof, the opponent of the motion must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. *Zuckerman, supra*. The burden, however, always remains where it began, with the movant on the issue. Hence, "if the evidence on the issue is evenly balanced, the party that bears the burden must lose." *Director Office of Workers Compensation Programs v Greenwich Collieries* (512 US 267, 114 S Ct 2251 [1994]); *300 East 34th Street Co v Habeeb* (248 AD2d 50, 683 NYS2d 175 [1st Dep't 1997]).

Affidavits sworn to by individuals with personal knowledge of the relevant facts constitute a type of evidence the Court can consider on a motion for summary judgment. *See, e.g., Classic Props, LP v Martinez* (168 Misc2d 514, 646 NYS2d 766 [App Term 1st Dep't 1996]); *Hazel Towers Co, LP v Gonzalez* (41 Misc3d 1230[A], 981 NYS2d 635[Civ Ct Bx Co 2013]); *Kelly Mgt LLC v Soltero* (27 Misc3d 984, 986-988, 898 NYS2d 415, 417-418 [Civ Ct Bx Co 2010]); *Park Holding Co v Diamond* (1994 NY Misc LEXIS 694, 212 NYLJ 119 [NY Sup Ct 1994].)

On a motion for summary judgment, the court's task is issue finding rather than issue determination. *Sillman v Twentieth Century-Fox Film Corp* (3 NY2d 395, 404, 144 NE2d 387, 487 NYS2d 316[1985]). The court determines if *bona fide* issues of fact exist and does not resolve issues of credibility which are left for the trier of fact. *Glick & Dolleck, Inc v Tri-Pac Export Corp* (22 NY2d 439, 239 NE2d 725, 293 NYS2d 93 [1968]); *Yaziciyan v Blancato* (267 AD2d 152, 700 NYS2d 22 [1st Dep't 1999]). Because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v Ceppos* (46 NY2d 223, 385 NE2d 1086, 413 NYS2d 141 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied. *Stone v Goodson* (8 NY2d 8, 167 NE2d 328, 200 NYS2d 627 [1960]).

The issue presented by Respondent's motion for summary judgment is whether there is a material issue of fact with regard to her defense under the New York City Pet Law, NYC Administrative Code § 27-2009.1, which mandates a waiver of any "no pets" clause in a lease where a tenant is "openly and notoriously" harboring a household pet with the knowledge of the landlord unless the landlord moves to enforce the lease provision promptly – that is, by commencing an eviction proceeding within three months of learning of the pet's presence in the apartment. The background and purpose of the NYC Pet Law were described by the Appellate Division, First Department in *Seward Park Hous Corp v Cohen* (287 AD2d 157, 161, 734 NYS2d 42, 46 [1st Dep't 2001]), as follows:

> In 1983, the New York City Council, responding to widespread abuses by landlords who sought to evict tenants who harbored pets for an extended period of time, despite no-pet lease clauses, and without prior complaints by the landlord, enacted an ordinance (Local Law No. 52 [1983] of City of NY) which became Administrative Code § 27-2009.1. Its purpose, set forth in section 27-2009.1(a) in sum, is twofold: (1) to protect pet owners from retaliatory eviction; and (2) to safeguard the health, safety and welfare of tenants who harbor pets. The ordinance sought to balance

the rights of a landlord who acted promptly to evict a tenant upon learning the tenant harbored the pet, against the rights of a tenant who harbored such pet with the knowledge of the landlord, for an extended period of time (three months), without action being initiated by the landlord.

The court in *Seward Park Hous Corp* upheld the lower court's dismissal, after trial, of a holdover proceeding brought based upon the tenant's harboring of a dog in violation of a lease provision, held that it was appropriate for the court "to impute the actual knowledge of the landlord's servants and employees at the building to the non-resident managing agent", and noted that "The question of imputation of knowledge is a question of fact which must be resolved in light of all the circumstances of the case." (287 AD2d at 168, 734 NYS2d at 51, *quoting Cohen v Hallmark Cards, Inc* (45 NY2d 493, 500, 382 NE2d 1145, 410 NYS2d 282, 286 [1978])).

Here, Respondent's motion for summary judgment must be denied as the evidence she has submitted falls short of what is required to meet her initial burden of proving the elements of a Pet Law defense. She has made no showing that the landlord had knowledge or should have known of her dogs through the observations of its agents more than three months prior to the commencement of this proceeding. The facts proffered by Respondent are scant in scope and include no specifics as to dates and events. Respondent makes no allegations that any of Petitioner's employees or agents were in her apartment to conduct inspections or make repairs or for any other reason during the past four years or that she encountered anyone with any agency relationship to Petitioner elsewhere in or around the building while walking her dogs. As to corroborating evidence, Respondent does not provide any ownership or other related documentation to support her claim that she "took on two Yorkshire Terrier puppies" four years ago. The only animal-related documentation included in the motion papers is the vaccination certificate (Exhibit F), which includes Respondent's name and address and references a "Yorkie/Maltese" named "Minnie Roxie"; however, Respondent does not mention this document in her affidavit, and since she also does not mention the names of either of her two Yorkshire Terriers it is not even clear whether "Minnie Roxie" is one of them. Respondent's affidavit also does not refer to the photographs (Exhibit G), much less provide any details as to when or where they were taken. *Compare 167 LLC v Muniz* (53 Misc3d 1219[A], 50 NYS3d 26 [Civ Ct Bx Co 2016])(granting summary judgment to tenant where respondent in his affidavit asserted when he purchased the family's dog "Bella," and, not only what activities he himself engaged in that demonstrated open and notorious harboring of Bella since she joined the household but also what opportunities Petitioner, through its employees, had to gain knowledge of Bella's presence; documentation of Bella's purchase and the provision of follow-up medical treatment to her by a veterinarian were also submitted in support of the motion).

As Respondent did not meet her initial burden of making a *prima facie* showing on all elements of her Pet Law defense, under CPLR R 3212 the burden does not shift to Petitioner to make any showing at this juncture. *Pullman v Silverman* (28 NY3d 1060, 66 NE3d 663, 43 NYS3d 793 [2016]), *citing Winegard v NYU Med Ctr, supra*. Accordingly, it is not necessary to address the fact that Petitioner's opposition does not include an affidavit of anyone with personal knowledge.

The three decisions in pet holdover cases which Respondent cites in her memorandum of law were all issued post-trial after the presentation of extensive evidence, and all found there to be credible testimony at those trials that the landlords in each of those cases had constructive knowledge of the pets based on observations made by their agents. In *1725 York Venture v Block* (64 AD3d 495, 884

NYS2d 6 [1st Dep't 2009]), the court affirmed the Appellate Term's reversal of the lower court's decision which had awarded possession to the landlord where it was "undisputed that the doormen learned that respondents possessed a dog more than three months before petitioner commenced the holdover proceeding". Similarly, in *184 West 10th Street Corp v Marvits* (59 AD3d 287, 874 NYS2d 403 [1st Dep't 2009]), the court affirmed the Appellate Term's reversal of the lower court's decision awarding possession to the landlord; while the Appellate Division's decision is brief, the Appellate Term's lengthier one, *184 W 10th St Corp v Marvits* (18 Misc3d 46, 49, 852 NYS2d 557, 559 [App Term 1st Dep't 2007]), notes that "the tenant's credible, consistent, and uncontradicted account of the multiple visits to her apartment made by the prior landlord's managing agent, superintendent, and contractors in 2000 and 2003 strongly supports an inference that the prior landlord knew or should have known of the presence of tenant's cats, first complained of in December 2004. Even were we to assume that none of the building personnel and agents who ventured throughout the tenant's small, two-room apartment actually saw the cats due to the animals' "shy" nature, the obvious presence of various pet paraphernalia--particularly the litter box "visibl[y]" situated in the bathroom--was sufficient to alert the prior owner's agents that tenant had a pet or pets." Finally, in *Seward Park Hous Corp v Cohen, supra,* the court noted that the trial court had found it "undisputed that building personnel not only visually observed the dog but physically interacted with the pet on various occasions," (287 AD2d at 160, 734 NYS2d at 45), and held that, "A review of the facts in this case reveals that petitioner would have had to close its eyes, cover its ears, and hold its breath to have remained ignorant of the presence of respondent's puppy," (287 AD2d at 169, 734 NYS2d at 52). Here, Respondent in her affidavit does not allege that any agents of Petitioner ever entered her apartment at any time or otherwise had any encounters in or near the building which support an inference that the landlord knew or should have known that she had dogs at any point prior to the Pet Law's three-month window.

CONCLUSION

For the reasons set forth above, Respondent's motion for summary judgment is denied and this proceeding is hereby restored to the court's calendar on March 2, 2018 for settlement or trial. This constitutes the Court's Decision and Order, copies of which are being provided in hand at the courthouse to the parties' respective counsel.

Diane E. Lutwak, Hsg. Ct. J.

Dated: Bronx, New York
January 19, 2018

HON. DIANE E. LUTWAK
Judge, Housing Court

Attorney for Petitioner:

Sperber Denenberg & Kahan, P.C.
48 West 37th Street, 16th floor, New York, New York 10018 (917) 351-1335

Attorney for Respondent:

Bianca Cappellini, Esq.
Bronx Legal Services
349 East 149th Street, 10th floor, Bronx, New York 10451 (718) 928-2883