2023-05-01

One Lenox LLC v. Rivers

One Lenox LLC v Rivers
2023 NY Slip Op 31554(U)
May 1, 2023
Civil Court of the City of New York, Kings County
Docket Number: Index No. LT No. 3072592/22
Judge: Hannah Cohen

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART H
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One Lenox LLC.,

Petitioner Index No. LT # 3072592/22

- against - **DECISION/ORDER**

Beverly Rivers
125 Lenox Road
Apt 3C
Brooklyn, New York 11226

Respondent-Tenants,

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HON. HANNAH COHEN:

Recitation, as required by CPLR 2219(a), of the papers considered in review of respondent's motion seeking summary judgment pursuant to CPLR 3212 based upon Multiple Dwelling Law 302-a and petitioner's cross motion for sanctions pursuant to 22 NYCRR 130-1.1 and ensuing opposition and reply.

Papers	**Numbered**
Motion	1
Cross Motion	2
Reply	3

Upon the foregoing cited papers, the Decision and Order on these motions are as follows:

Petitioner commenced this nonpayment proceeding in April 2022 seeking rental arrears from August 2021 through April 2022 for a total of $8,011.56. Respondent initially appeared pro se and answered the proceeding on May 27, 2022 asserting the following defenses and counterclaims: (1) the monthly rent asked for is not the legal rent or amount of the current lease; (2) the rent or part of the rent has already been paid to the petitioner; (3) warranty of habitability; (4) general denial (5)

ERAP A9QYJ and counterclaims (1) based upon the above defenses and (2) rent impairing violations in the building. On June 6, 2022 a notice of appearance was filed by Catherine Barreda from Brooklyn Legal Services.

On July 11, 2022 petitioner by motion sought to vacate the ERAP stay as respondent had already received 15 months rent in her previous case LT 300870-20 under ERAP application A9QYJ in which Ms. Barreda also represented the respondent. In support of the motion was an affidavit from the petitioner indicating it already had received $15,148.20 from ERAP on February 22, 2022 and that respondent still owed rent through July 31, 2022 of $10,574.22. Attached to the motion was a rental breakdown from 2020 indicating that respondent last paid rent March 2020 and no payments have been made to date except a lump sum labeled ERAP on the breakdown in February 2022 for $15,148.20 (which is over 15 months of rent as respondent applied and received the full 15 months of rent despite the amount respondent pays each month is lower due to a DRIE credit). The motion was originally returnable July 21, 2022. On July 22, 2023 respondent, while being represented by counsel filed a second ERAP application. Due to the court schedule, the motion was adjourned to August 21, 2022. On July 25, 2023 respondent counsel emailed the court twice requesting a stay pending the second ERAP application. By order dated August 31, 2022 the court vacated the ERAP stay and restored the case to the calendar on September 29, 2022. Respondent again while represented by counsel then files an appeal of her first ERAP application which already paid the full 15 months of rent in February 2022. On September 21, 2022 Respondent filed a motion to amend the answer and to permit Brooklyn Legal Services to hold funds per the rent impairing violation defense in their escrow account. In a stipulation dated October 28, 2022 both parties agreed to waive any defense regarding the incorrect months sought in the petition that was already

paid by ERAP previously and the case was adjourned for motion practice.

On November 28, 2022 the court granted respondent's motion to amend their answer and ordered respondent to deposit with the clerk of the court $8,011.56 by December 2, 2022. On December 6, 2022 respondent by motion sought summary judgment pursuant to CPLR 3212 on the rent impairing violation defense pursuant to MDL 302-a. Respondents seek a 100% abatement from August 2021 to present based upon the following rent impairing violations: 1450728, 12872536, 13501562, 13812869. Three of the violations are in common areas or areas controlled by the petitioner and one is in respondent's unit. Attached to the motion is a copy of the deposited funds, respondent's affidavit and the HPD violation report as of December 2, 2022. Both parties agree that the three common area rent impairing violations were removed by DHPD on January 5, 2023.

Petitioner cross moved pursuant to 22 NYCRR 130-1.1 seeking a determination that respondents conduct was frivolous and seeking reimbursement of petitioner's legal fees from this conduct. In support petitioner submits respondent's answer in a previous non payment proceeding, where she was represented by the same counsel where ERAP paid under case A9QYJ, petitioner's notification to the Court of the previous filed ERAP and an affidavit from petitioner that ERAP had already paid the full 15 months during the previous case. Petitioner argues that here, respondent was represented by counsel, yet counsel did nothing to correct respondent's assertion in her pro se answer when she sought a stay based upon her previous ERAP application. After petitioner made a motion to vacate the stay based upon the already paid ERAP which included a detailed breakdown indicating petitioner already received 15 months, $15,148.22 on February 22, 2022, respondent's counsel informed the court that a second ERAP was filed and sought a stay. Respondent then also filed an appeal in September 2022, of her original ERAP application, where ERAP paid the full 15 months.

Petitioner argues that respondent and her counsel purposefully delayed the proceeding in order to acquire the time they needed to raise the funds to deposit the sums with the clerk of the court, which respondent admits in her affidavit was coming from organizations. Petitioner argues that any rent impairing abatement should go through October 2022 and not present as respondent has failed to provide access to her premises repeatedly beginning in November 2022. In support petitioner avers that in November when the parties were in court with respondent being present, access dates were not provided. Petitioner attaches numerous emails from a Brooklyn Legal Services paralegal and counsel, some several pages long asking as to the implementation, methods and usages of the exterminator and the dissatisfaction with the company chosen by petitioner in order to remediate the rent impairing violation for rodents in respondent's unit. The paralegal also indicated that building wide access was needed and implied that only upon a global extermination plan for the building would access to respondent's apartment be given. Petitioner agreed to a different company to satisfy respondent's concerns. Emails reflect that respondent then left the country sometime in late November due to a death in her family in Trinidad, and then upon return some time later, had Covid-19 and was then sickly and unable to provide access to her unit until February 2023.

The court held several conferences in an attempt to facilitate a settlement and upon an inability by the parties to come to a settlement, the motions were marked submitted on April 18, 2023.

MDL 302-a states "to raise a defense under subparagraph a in any action to recover rent or in any special proceeding for the recovery of possession because of non-payment of rent, the resident must affirmatively plead and prove the material facts under subparagraph a, and must also deposit with the clerk of the court in which the action or proceeding is pending at the time

of filing of the resident's answer the amount of rent sought to be recovered in the action or upon which the proceeding to recover possession is based, to be held by the clerk of the court until final disposition of the action or proceeding at which time the rent deposited shall be paid to the owner, if the owner prevails, or be returned to the resident if the resident prevails." (Multiple Dwelling Law §302-a [3] [c]). An affirmative defense to the payment based on the existence of rent impairing violations, upon the express language of the statute, can only be raised by those who have deposited with the clerk of the court all rent sought in a proceeding. It has been held that tenants "who seek an abatement of rent under Multiple Dwelling Law 302-a for a 'rent-impairing violation' must nevertheless deposit with the court the amount of rent sought to be recovered." (*Matter of Notre Dame Leasing v Rosario*, 2 NY3d 459, 467 [2004])".

The court notes the language of MDR 302-a directs the respondents to deposit with the clerk of the court in which the action or proceeding is pending at the time of filing of the resident's answer the amount of rent sought to be recovered in the action or upon which the proceeding to recover possession is based ; See *46 E.91st St. Associates LLC v Bogoch*, the appellate term spoke to this very issue and reversed the lower court and permitted respondent to file a late answer which asserted a defense of MDL 302-a "upon a deposit of the amount allegedly due landlord at the time of tenant's motion". It is undisputed that respondent timely deposited the funds with the clerk of the court as directed by this court's earlier order.

Here respondent asserts that the rent impairing violations entitle her to to a 100% abatement from August 2021 through present and seeks summary judgment pursuant to CPLR 3212. Petitioner cross moved for sanctions and costs for respondent's dilatory tactics in delaying this case.

Courts have held that summary judgment will be granted "if upon all the papers and proof

submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212[b]). The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). In considering a summary judgment motion, the courts function is to determine whether a material issue of fact exists, not to determine said issues (*Esteve v Abad*, 271 AD 725 [1st Dept 1947]). Summary judgement should be granted when the moving party makes a prima facie showing of entitlement to judgment as a mate of law, giving sufficient evidence to eliminate any material issues of fact from the case. See (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]).

Respondent must prove, as a prima facie matter, that Petitioner is barred from collecting rent effective six months after the notice of the first violation was posted in late January 2021 through the time period that petitioner corrects and removed the violations. (MDL 302-a) (See *50 Manhattan Ave. LLC v. Powell*, 2018 N.Y.L.J. LEXIS 777, *5-6 (Civ. Ct. NY Co.), *Worley v. 151 W. Realty Co.*, 1995 N.Y.L.J. LEXIS 9783, (Civ. Ct. NY Co.); *Food First HDFC Inc., v. Turner*, 69 Misc. 3d 1202(A), 130 N.Y.S.3d 926 (N.Y. Civ. Ct.). This defense applies to rent impairing violations that exists in the part of a multiple dwelling used in common by the residents or in the part under the control of the owner thereof, the violation is deemed to exist in the respective premises of each resident of the multiple dwelling (See 12A West's McKinney's Forms Real Property Practice § 11:36).

The Legislature, in recognizing the expertise of [HPD] over the administration of housing standards, provided [HPD] with discretion to determine what type of violations should be deemed

rent impairing." *Fed. Home Loan Mortg. Corp.*, 1994 N.Y.L.J. LEXIS at 9377; *Food First HDFC Inc., v. Turner*, 69 Misc. 3d 1202(A), 130 N.Y.S.3d 926 (N.Y. Civ. Ct. 2020). Courts have held that the statute is a constitutional exercise of the state's police powers. The statute was presented to the legislature as a 'new means to induce or compel owners of multiple dwellings to maintain and repair their properties' (Report of the Special Comm. on Housing & Urban Development of the Ass'n of the Bar of the City of N.Y., 1965, N.Y.S. Legis. Ann., p. 349). This statute was instituted to ensure the maintenance of decent housing (see, also, Social Welfare Law, s 143 b; Multiple Dwelling Law, s 309). It is 'fundamental that the state may establish regulations reasonably necessary to secure the general welfare of the community by the exercise of its police power, although the rights of private property are thereby curtailed ' (*People ex rel. Durham Realty Corp. v. La Fetra*, 230 N.Y. 429, 442, 130 N.E. 601, 605, 16 A.L.R. 152) in order to promote the public interest in the maintenance of safe and sanitary housing accommodations (see *In re Dep't of Buildings of City of New York*, 14 N.Y.2d 291, 251 N.Y.S.2d 441, 200 N.E.2d 432). The legislation was found to address a legitimate end (See *Ten W. 28th St. Realty Corp. v. Moerdler*, 52 Misc. 2d 109, 110 11, 275 N.Y.S.2d 144, 145 46 (Sup. Ct. 1966). The Court declined to strike the statute as unconstitutional (see *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413); *Ten W. 28th St. Realty Corp. v. Moerdler*, 52 Misc. 2d 109, 110 11, 275 N.Y.S.2d 144, 145 46 (Sup. Ct. 1966).

Furthermore, HPD is empowered to promulgate a list classifying certain violations of the Multiple Dwelling Law, Multiple Dwelling Code (Administrative Code of City of New York, s D26 1.0 et seq.), and the Health Code as 'rent impairing'. (Multiple Dwelling Law, s 302 a(2b)) A 'rent impairing' violation is defined as 'a condition in a multiple dwelling which, in the opinion

of the department, constitutes, or if not promptly corrected, will constitute, a fire hazard or a serious threat to the life, health or safety of occupants thereof.' (Multiple Dwelling Law, s 302 a(2a)) Subdivision 3 of the statute sets forth the consequences for failure to correct a 'rent impairing' violation. Upon notice of a 'rent impairing' violation, an owner is given six months to remedy the condition. Thereafter, if the owner fails to make the necessary repairs or corrections, the tenant is empowered to interpose such noncompliance as a defense to a nonpayment proceeding, after depositing the rent due with the court. The owner will be deprived of the rents if it is found that the condition has, in fact, gone unremedied for over six months from notice of the violation (See *Ten W. 28th St. Realty Corp. v. Moerdler*, 52 Misc. 2d 109, 109 10, 275 N.Y.S.2d 144, 145 (Sup. Ct. 1966).

The MDL 302-a statute enumerates only a few defenses to defeat an MDL 302-a abatement claim that is properly raised, and where a rent abatement may not be awarded if:

(1) the condition referred to in the department's notice did not in fact exist, notwithstanding the notation thereof in the records of the department; or

(2) the condition has in fact been corrected, though the notice thereof in the department has not been removed or cancelled; or

(3) the violation has been caused by the resident from whom rent is sought to be collected or by members of his or her family or by his or her guests or by another resident of the multiple dwelling or the member of the family of such other resident or by his or her guests; or

(4) the resident proceeded against for rent has refused entry to the owner for the purpose of correcting the condition giving rise to the violation.

MDL § 302-a(3)(b).

As petitioner alleges a partial defense to MDL 302-a, failure to provide access to petitioner to correct the rent impairing violation in her apartment as she was admittedly out of the country, then returned, had Covid and then was ill for a time. The court finds as follows: Per MDL 302-a petitioner was required to correct several rent impairing violations issued in 2020 and 2021 and failed to do so. Both parties agree the building wide rent impairing violations were removed by HPD on January 5, 2023. The Court finds that respondent is entitled to a 100% abatement from November 2021 through January 5, 2023. Although respondent seeks an abatement from August 2021, respondent is incorrect in her view that monies voluntarily and already paid should be accorded to the her as an abatement. The statute clearly indicates that monies paid voluntarily cannot be recovered even if a tenant ultimately prevails on their MDL 302-a defense (MDL § 302-a (3)(d)) (See *Alphabet Soup Assocs., LLC v. Ken Wu*, 66 Misc. 3d 1209(A), 120 N.Y.S.3d 716 (N.Y. Civ. Ct. 2020). As ERAP paid August through October 2021 rent, respondent is not entitled to an abatement for that time period. The court further respectfully declines to adhere to the reasoning in *Food First HDFC v Turner*, 69 Misc3d 1202(A) [Civil Ct, NY Co 2020]) supra which held that the rent abatement continues throughout the monthly period if the violation is corrected at any time during the month.

The court declines to extend the rent abatement beyond January 5, 2023 despite the possible existing rent impairing violation in respondent's apartment for rodents, as access was not provided by respondent to her unit for a few months as she was out of the country and then returned but was ill.

Respondent's motion for summary judgment seeking a 100% rent abatement pursuant to MDL 302-a is granted for the time period of November 2021 through January 5, 2023. As such the

petition seeking rental arrears is dismissed in accordance with this decision without prejudice to any rent owed after January 5, 2023 and any defenses or claims by either side hereto.

Petitioner cross moves for sanctions pursuant to 22 NYCRR 130-1.1. in that respondent's frivolous and numerous ERAP applications and appeals had no merit and were designed to delay or prolong the resolution of the litigation, as respondents were seeking time to raise funds to support their rent impairing violations.

Conduct is frivolous and can be sanctioned under this rule is "it is completely without merit...and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law or...it is undertaken to delay or prolong the resolution of the litigation, or to harass or maliciously injure another (22 NYCRR 130-2.2[c][1],[2]...).

In determining if sanctions are appropriate the Court must look at the broad pattern of conduct by the offending attorneys or parties, and upon a finding of such, the Court has discretion to impose costs and sanctions on the errant party." (See *Levy v Carol Management Corporation*, 260 AD2d 27 [!st Dept 1999]). The Court went on to note that sanctions are retributive, in that they punish past conduct but are also goal oriented in deterring future frivolous conduct not only by the particular parties, but also by the Bar at large (See *Levy supra*). In *Navin v Mosquera*, 30 AD3d 883 [3rd Dept 2006] the Court notes it was required to examine as well whether not the conduct was continued when its lack of legal or factual basis was apparent [or] should have been apparent". *In Sakow ex rel. Columbia Bagels, Inc*., 6 Misc3d 939 [Supreme Ct NY County 2004]) the Court held in assessing sanctions whether the attorney adhered to the standards of a reasonable attorney and an attorney cannot safely delegate all duties to others as a defense.

The Court notes that the ERAP application does not limit the number of times an applicant

can apply for the program, despite clear language on the website that the maximum payment any person may receive is a maximum of fifteen months. Here respondent already received 15 months in her first application, but then noted in her pro se answer ERAP, thereby notifying the Court of an ERAP stay without divulging that said application was already paid out by ERAP for 15 months in her previous non payment proceeding. Upon petitioner having to make a motion to vacate the first ERAP stay, respondent with counsel informed the court of a pending second ERAP. Upon the Court vacating the second ERAP stay by order, respondent, appealed the first ERAP determination that had paid the full 15 months. At all times after the initial answer, respondent was represented by Brooklyn Legal Services.

The Court is entitled to rely upon the accuracy of any statement of relevant fact un equivocally made by an attorney in the course of a judicial proceedings, accordingly deliberate misrepresentations of material facts by attorney in open court constitutes serious professional misconduct (See Cannons of Professional Ethics, Cannon 22. It is unprofessional for a lawyer as an officer of the court, to engage in practices having a tendency to mislead the court (Cannon 22 of the Cannons of Professional Ethics). Therefore a deliberate misrepresentation by an attorney in the course of judicial proceedings of material facts in open Court constitute serious professional misconduct (See *Matter of Rotwein*, 20 Ad2d 428 (AD 1st Dept. 1964]).

Here Brooklyn Legal Services knew or had reason to know that the respondent's first ERAP application was already paid out in the pervious case and should not have been a basis for a stay in this proceeding. Upon petitioner's motion to vacate the first ERAP, Brooklyn Legal Services should have known there was no legal merit to the second ERAP application, yet sought again a stay. When the Court vacated the second ERAP stay, respondents filed an appeal of her first ERAP application.

Brooklyn Legal Service's actions show a want of professional integrity on their part and by the respondent. A lawyers function in the administration of justice requires a rigid adherence to the aforesaid Cannon 22, and the deliberate efforts on the part of a lawyer to mislead the court in a material manner, whether by express misrepresentations, unfair and evasive tactics or other irresponsible means, has a tendency to obstruct justice and there can be no justification for the same. (See *In the Matter of Arnold Schildhaus*, 23 AD2d 152 [AD 1st Dept 1965]).

After careful consideration, as OTDA does not limit the number of ERAP applications, the court declines to put the matter down for a hearing on sanctions but strongly cautions Brooklyn Legal Services that should such conduct of failing to properly disclose facts be observed before the Court again, the court will entertain appropriate relief including sanctions.

Respondent's motion for summary judgment seeking a determination that petitioner may not collect rent from November 2021 through January 5, 2023 is granted. The Clerk of the Court to return $8,011.56 deposited with the Court, minus any appropriate court fees to respondent.

Petitioner's cross motion is denied.

This constitutes the decision and order of this court.

Dated: May 1, 2023
Brooklyn, New York

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Hannah Cohen, J.H.C.