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ZB Prospect Realty v. Olenick

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ZB Prospect Realty v Olenick
2023 NY Slip Op 23115
Decided on April 24, 2023
Civil Court Of The City Of New York, Kings County
Weisberg, J.
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Decided on April 24, 2023

Civil Court of the City of New York, Kings County

<p>ZB Prospect Realty, Petitioner,</p> <p>against</p> <p>Miriam Olenick, et al., Respondents.</p>
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Index No. 308104/20

Michael L. Weisberg, J.

The following e-filed document listed by NYSCEF document numbers (motion no. 4) 68-71 were read on this motion for summary judgment dismissing the petition.

The question before the court is whether Petitioner can avail itself of the statutorily created summary eviction remedy for nonpayment of rent (RPAPL 711[2]), when there is no lease in effect between the parties at the time the case is commenced, even if Respondent paid rent after the expiration of the parties' last lease. Under the Appellate Term's recent decision in [Fairfield Beach 9th. LLC v Shepard-Neely \(77 Misc 3d 136\[A\], 2022 NY Slip Op 51351\[U\] \[App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2022\]](#)), the answer is that it cannot.

It is axiomatic that "a nonpayment [summary eviction] proceeding must be predicated on a rental agreement that is in effect at the time the proceeding is commenced" (*e.g.*, 265

Realty, LLC v Trec, 39 Misc 3d 150[A], 2013 NY Slip Op 50974[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2013]). In *Trec*, the tenants' lease had expired at the end of August 2009; the landlord sued in October 2009 alleging nonpayment of rent due for July 2009 through that month. After the lower court had granted summary judgment to the landlord, the Appellate Term reversed the judgment and dismissed the petition. The court's reasoning appeared to be that since no rent had been paid or accepted after the lease expired, no month-to-month tenancy had been created, and there was therefore no rental agreement in effect upon which the summary eviction proceeding could be predicated (*id.*). The implication, intended or not, seemed to be that if rent had been paid and accepted after the lease had expired, the result would have been different.

Trec is a case out of the Appellate Term for the Second, Eleventh, and Thirteenth Judicial Districts. The Appellate Term for the Ninth and Tenth Judicial Districts made the implication in *Trec* explicit in *Priege v Paul* (43 Misc 3d 135[A], 2014 NY Slip Op 50662[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2014]): "Since the written lease had expired, a month-to-month tenancy on the same terms as those in the original lease is implied, inasmuch as tenants remained in possession after the expiration of the lease and continued to pay rent. Consequently, it was proper for landlords to bring a nonpayment summary proceeding against tenants to recover the [*2]unpaid rents" (internal citations omitted).

Meanwhile, the Appellate Term for the First Department saw it differently. In *Krantz & Phillips, LLP v Sedaghati* (2003 NY Slip Op 50032[U] [App Term, 1st Dept 2003]), the lease between the parties had expired at the end of October 2001. In February 2002 or later, the landlord sued to evict the tenant for nonpayment of January 2002 and February 2002 rent. The lower court dismissed the petition and Appellate Term affirmed, holding "even assuming that a month-to-month tenancy was created following expiration of the lease there was no agreed upon rental for any month ensuing after tenant ceased paying rent and no basis for holding tenant contractually liable for the rent reserved in the expired lease" (*id.* [internal citations omitted]).

In other words, while there may have been an agreed upon rental amount so long as the tenant paid rent and the landlord accepted it, the tenant's failure to pay rent meant that there was no longer an agreement. This somewhat counterintuitive proposition (the tenant can stop paying rent but preclude a nonpayment eviction proceeding in one fell swoop) was confirmed by the Appellate Term sixteen years later in [West 152nd Assoc., L.P. v Gassama](#) (65 Misc 3d 155[A], 2019 NY Slip Op 51926[U] [App Term, 1st Dept 2019]). Affirming dismissal of the petition, the court wrote, "even assuming that a month-to-month tenancy was created

following expiration of the license agreement, there was no agreed rental amount for any month ensuing after tenant ceased paying rent" (*id.* [internal citations omitted]).

Shepard-Neely brings the Appellate Term for the Second, Eleventh, and Thirteenth Judicial Districts into accord with the First Department. Although the facts in *Shepard-Neely* are a little convoluted, because they involve the tenant signing lease renewals that went into effect retroactively, the salient points are that 1) the landlord commenced the proceeding in August 2019 alleging nonpayment of rent for September 2016 through April 2018; 2) at that time the last lease between the parties had expired in April 2018; and 3) the tenant had made rent payments after the lease expired at the end of April 2018 (*Fairfield Beach 9th, LLC*, 77 Misc 3d 136[A]).

On these facts, the Appellate Term dismissed the petition: "It is undisputed that no rental agreement was in effect when this proceeding was commenced, and a nonpayment proceeding lies only where a tenant has defaulted in the payment of rent, pursuant to the agreement under which the premises are held or, in other words, there must be a rental agreement in effect at the time the proceeding is commenced pursuant to which rent is due and owing. Thus, this nonpayment proceeding does not lie" (*id.* [internal citations omitted]).

Here, the relevant facts are undisputed. In 2017, the parties entered into a one-year written lease at the rent of \$2,900.00. The lease provided that the apartment was not subject to any form of rent regulation. However, as the result of the building's participation in the J-51 tax abatement program, the apartment was in fact rent-stabilized. After expiration of the written lease between the parties in 2018, Respondents continued to pay rent at the rate of \$2,900.00.

By notice from DHCR dated February 28, 2020, Respondents learned that their apartment was rent-stabilized. They continued to make monthly payments of \$2,900.00. In June and July 2020, Petitioner filed registrations with DHCR for the years 2014 through 2020 stating the apartment was rent-stabilized, and around the same time offered Respondents a rent-stabilized renewal lease based on a prior rent of \$2,900.00. Respondents did not sign the lease, but they continued to pay \$2,900.00 per month in rent through August 2020. Thereafter they offered to pay a rent of \$1,125.20 per month, which Petitioner refused. Petitioner then filed suit.

These facts fall squarely within the ambit of *Shepard-Neely*. The lease expired. Rent was [*3]paid after the lease expired. The tenant stopped paying rent. The landlord sued, but no lease was in effect at the time of commencement. The landlord was therefore not entitled

to take advantage of a summary remedy for nonpayment of rent. In opposing Respondent's motion for summary judgment Petitioner correctly notes that this is their second motion for such relief, the first having been made and decided before *Shepard-Neely* (NYSCEF Doc. 41), and argues that the motion should have therefore been denominated as one for leave to renew. In doing so, Petitioner ignores the fact that the parties explicitly agreed to have the court decide the issue by motion rather than having the proceeding transferred to a trial part for decision on what was essentially a matter of law. Petitioner's second argument is that in *Shepard-Neely* there were no payments after the expiration of the last lease. But this assertion is wrong.

Accordingly, it is ORDERED that the motion is granted and judgment shall be entered in favor of Respondents dismissing the petition. [\[FN1\]](#) [\[FN2\]](#)

This is the court's decision and order.

Dated: April 24, 2023
Michael L. Weisberg, JHC

Footnotes

[Footnote 1:](#) Because the law does not permit a landlord to prosecute a nonpayment summary eviction proceeding unless there is a lease in effect at the time of commencement, court time and resources might be conserved if landlords were required to disclose whether such lease exists on the initial court appearance and when applying for default judgments. There is currently a bill in the New York State Assembly that would require a landlord to attach a copy of any such lease to the petition (2023 NY Assembly Bill A02883).

[Footnote 2:](#) The law does not leave Petitioner without remedy. Here, as the tenancy is rent-stabilized, Petitioner could commence a holdover summary eviction proceeding based on Respondents' failure to sign a lease renewal. If the tenancy were not regulated Petitioner could commence a "no grounds" holdover summary eviction proceeding. In either case, as noted by the Appellate Term in *Krantz and Phillips*, Petitioner could commence a plenary proceeding for unpaid use and occupancy on a theory of quantum meruit (*see Eighteen Associates, LLC v Nanjim Leasing Corp.*, 257 AD2d 559 [2d Dept 1999] ["the absence of privity of contract is not a bar to a cause of action to recover damages for use and occupancy the obligation to pay for use and occupancy does not arise from an underlying contract between the landlord and the occupant rather an occupant's duty to pay the landlord for its use and occupancy or the premises is predicated upon the theory of quantum meruit, and is imposed by the law for the purpose of bringing about justice without reference to the intention of the parties"] [internal citations omitted]).

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