2023-04-18

89th St. Assoc. 1 LLC v. Fellner

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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89TH STREET ASSOCIATES 1 LLC,

Plaintiff,

- v -

DIETER FELLNER and CORRINE FELLNER,

Defendants.

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INDEX NO. 654027/2021

MOTION DATE 11/30/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, and 76

were read on this motion for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, plaintiff's motion is granted. Plaintiff landlord established prima facie entitlement to summary judgment on its claims for rental arrears by submission of "the existence of the lease . . . the tenant's failure to pay the rent, the amount of the underpayment, and the calculation of the amounts due under the lease (*Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498 [1st Dept 2016]). Moreover, the record reflects that the lease expired as of February 28, 2022, and defendant tenants have remained in the premises without paying rent, establishing landlord's prima facie entitlement to both use and occupancy for the time tenants have held over (Real Property Law § 220; *520 E. 81st St. Assoc. v Lenox Hill Hosp.*, 276 AD2d 395, 396 [1st Dept 2000]), and a judgment of ejectment and warrant of eviction (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408, 410 [2d Dept 2009]). Finally, the lease provides that landlord may recover its reasonable attorney's fees and costs for this action (lease, NYSCEF Doc. No. 15, ¶ 19).

In opposition, tenants fail to raise a material issue of fact requiring trial. Among their various affirmative defenses and counterclaims, tenants make three primary arguments in their

defense: breach of the warranty of habitability (sixth affirmative defense, fifth counterclaim), breach of the covenant of quiet enjoyment (sixth affirmative defense, fifth counterclaim), and that the demised premises was illegally deregulated prior to their tenancy and, thus, they have been overcharged for rent (first, third, fourth, fifth, and seventh affirmative defenses and first, second, third, and fourth counterclaims).[1]

Tenants do not allege that they were actually or constructively evicted from the premises, barring any defense of a breach of the covenant of quiet enjoyment (*Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 237 [1st Dept 2006]). As to the asserted breaches of the warranty of habitability, "the obligation of a tenant to pay rent (or maintenance) is dependent upon a landlord's satisfactory maintenance of the premises in a habitable condition" (*12-14 E. 64th Owners Corp. v Hixon*, 130 AD3d 425, 425 [1st Dept 2015]). "[T]he occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety" (Real Property Law § 235-b). Tenants allege that the premises was delivered to them in an unclean state, yet this allegation is not supported by contemporaneous documentary evidence ((*Hooke v Speedy Auto Ctr.*, 4 AD3d 110, 112 [1st Dept 2004] [granting summary judgment after opposing party "did not produce any contemporaneous documentary evidence corroborating its testimony"]); indeed, the photographs of the apartment asserted to be from that time period appear to reflect a clean premises (photos, NYSCEF Doc. No. 68). Tenants also allege that the shower head fell out of the wall of their bathroom, partially because of a leak from the apartment above them, and that landlord never fixed the resulting damage to the bathroom. These allegations, however, are contradicted by other evidence that tenants previously

[1] The second affirmative defense states that landlord failed to plead the regulatory status of the premises, but such a defense applies only to the holdover proceeding that was consolidated into the present action (RPAPL 741; decision and order, NYSCEF Doc. No. 47). In any case, the holdover petition adequately alleges what landlord believes to be the regulatory status of the premises (holdover petition, NYSCEF Doc. No. 40, ¶ 9).

submitted. As part of their opposition to landlord's prior and ultimately withdrawn motion for summary judgment, tenants submitted several forms from the New York City Department of Housing Preservation & Development ("HPD") titled "Notice of Receipt of Violation Certification" (HPD notices, NYSCEF Doc. No. 27). Each notice lists the violations complained of, and states that "the landlord of the above referenced building claims to have corrected the violations listed on this form" (*id.*). It then instructs the recipient on further remedial steps to take if the violations have not been corrected (*id.*). The record does not contain any evidence that tenants took any further remedial steps after HPD investigated and reported the violations corrected.

Finally, as to the allegedly fraudulent deregulation of the apartment, landlord submits, in support of its motion, a summary of the building's registrations (building registration summary report, NYSCEF Doc. No. 58), leases from prior to the apartment's deregulation in 2008 (prior leases, NYSCEF Doc. No. 59), and an invoice for electrical work done on the apartment in 2008, a percentage of which landlord included in its permitted rent increase for the year, which increased the rent above the threshold at which landlord could remove the apartment from rent stabilization (invoice, NYSCEF Doc. No. 60; *Altman v 285 W. Fourth LLC*, 31 NY3d 178, 184 [2018]). The documentary evidence submitted establishes prima facie that tenant's apartment was properly deregulated. In response, tenants fail to raise an issue of fact to the contrary. A sizeable increase in rent, coupled with a tenant's skepticism as to the extent and quality of improvements to the apartment, such as are offered here, are insufficient to establish a fraudulent deregulation (*Breen v 330 E. 50th Partners, L.P.*, 154 AD3d 583, 584 [1st Dept 2017]). To the extent that tenants claim landlord applied the improper percentage of the repair costs, even assuming landlord had only applied increases as allowed upon vacancy of the apartment or

renewal leases, the rent for the apartment would have crossed the deregulation threshold before 2018, when tenants first leased the apartment (*id.*). The court also notes that the registration summary reflects that the large increase in rent between 1984 and 1987 is adequately explained by the departure of the rent-controlled tenant, allowing landlord to enter into a stabilized lease at an amount agreed to by the landlord and the new tenant (Rent Stabilization Code [9 NYCRR] § 2521.1[a][1]).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendant as follows; and it is further

ADJUDGED that, as sought in the holdover proceeding consolidated herein, plaintiff is entitled to possession of apartment 1A of the building located at 238 East 89th Street, New York, New York as against defendants Dieter and Corinne Fellner, and the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this Order and Judgment and payment of proper fees, is directed to place plaintiff in possession accordingly; and it is further

ADJUDGED that immediately upon entry of this Order and Judgment, plaintiff may exercise all acts of ownership and possession of apartment 1A of the building located at 238 East 89th Street, New York, New York, including entry thereto, as against defendants Dieter and Corinne Fellner; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff and against defendants on the first cause of action in the amount of $ 47,450.00, together with interest at the rate of 9% per annum from the date of June 1, 2021, until entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate until satisfaction of judgment; and it is further

ORDERED that the first cause of action is severed, and the balance of the claims are continued; and it is further

ORDERED that the defendant is found liable to plaintiff on the second and third causes of action for use and occupancy and attorneys' fees and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that the action shall continue as to the second and third causes of action; and it is further

ORDERED that defendants' affirmative defenses and counterclaims are severed and dismissed; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 1166, 111 Centre Street on May 15, 2023, at 2:00 PM.

This constitutes the decision and order of the court.

Louis L. Nock

4/18/2023
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	[X]	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**