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2023-05-01

274 E. 175 Realty LLC v. Rodriguez

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274 E. 175 Realty LLC v Rodriguez
2023 NY Slip Op 50396(U) [78 Misc 3d 1231(A)]
Decided on May 1, 2023
Civil Court Of The City Of New York, Bronx County
Zellan, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on May 1, 2023

Civil Court of the City of New York, Bronx County

274 East 175 Realty LLC, Plaintiff(s)

against

Rosa Rodriguez, Defendant(s)

Index No. CV-006632-22/BX

Jeffrey S. Zellan, J.

Both sides having appeared as scheduled on April 28, 2023, and after reviewing the parties' papers regarding the legality of the apartment at issue in the instant action as part of defendant's motion to dismiss pursuant to CPLR 3211(a)(2), (a)(5), and (a)(7), the Court finds that the parties have raised allegations that necessitate an evidentiary hearing pursuant to CPLR 2218 and 3211(c) "to decide factual discrepancies and resolve, by testimony and documentation, certain ambiguities in" the legal status of the basement apartment at issue in this action for unpaid rent.^{[\[FN1\]](#)} See, e.g., *City of New York v. Freid*, 2019 NY Slip Op 33276(U), *1 (Sup. Ct., New York Co.), *temporary restraining order and lv. to app. denied*, 2019 NY Slip Op 84374(U) (1st Dept. 2019); and *15 Ft. Wash. Ave. HDFC v. Hawkins*, 1992 NYLJ LEXIS 8787, *1 (Civ. Ct., New York Co. Feb. 4, 1992) (noting that court may raise issue of subject matter jurisdiction *sua sponte*). Having previously construed defendant's arguments as a challenge to the Court's subject matter jurisdiction due to possible illegality of

the subject unit (as discussed on the record on March 29, 2023, and in the Court's orders dated March 31, 2023 and April 5, 2023), the Court cannot determine the legal occupancy of the apartment at issue without additional evidence and testimony, as neither side has provided conclusive information pursuant to the controlling provisions of the New York City Charter.

[\[FN2\]](#) See, *Freid, supra.*; and N.Y.C. Charter § 645(b)(3) (certificate of occupancy, as interpreted by a court or the New York City Board of Standards and Appeals, is controlling as against all City agencies). Much like a traverse hearing is necessary when questions regarding the Court's personal jurisdiction over a party arise, a hearing is necessary here to determine whether plaintiff has established subject matter jurisdiction over the claim.

The City notes that "[o]ccupants of illegal basement and cellar apartments face potential dangers such as carbon monoxide poisoning, inadequate light and ventilation, and inadequate [\[*2\]](#)egress in the event of a fire." [\[FN3\]](#) As a consequence, City regulations "take[] the failure to comply with the building code rather seriously including the assessment of criminal penalties in addition to civil fines." [Acquino v. Ballester, 37 Misc 3d 705](#), 708 (Civ. Ct., Richmond Co. 2012). See also, *New York City Mayor's Office of Special Enforcement v. 156 West 15th Street Chelsea, LLC*, Dkt. No. 2018SN010482, 2020 NY Misc. LEXIS 7, *2 (Sup. Ct., New York Co. Jan. 6, 2020) (noting statutory penalties and finding that "compliance with the City's building fire and safety regulations is necessary for the protection of the life, safety and property of the City and its residents").

Defendant has stated that the United States Postal Service and the New York State Department of Motor Vehicles each would not recognize the apartment at issue as a lawful residential address, which plaintiff has not contested. In response, plaintiff has offered two documents: a Letter of No Objection by the New York City Department of Buildings (commonly known as a "LNO") indicating that the building in which the apartment at issue is located is a lawful multiple dwelling, and an inspection report by the New York City Department of Homeless Services ("DHS") indicating that the apartment was fit for occupation in 2017. The LNO however, makes no reference to the apartment at issue and, during the same period in which the apartment was apparently inspected, the New York City Department of Investigation subsequently found that "Housing Specialists employed by DHS to conduct property inspections were not properly trained to detect residential health and safety hazards, nor were they properly supervised," and that "[t]he lack of proper training and oversight of Housing Specialists" led to numerous families being placed in unsuitable City-subsidized housing. N.Y.C. Dept. of Inv., *A Report on the New York City Human Resources Administration's Special One-Time Assistance Program's Placements Outside of New York*

City (Dec. 2019), at 3.^{[FN4](#)} See also, *Acquino*, at 709 (noting the sizeable "number of cases where tenants are receiving governmental subsidies for rent and are in illegal apartments"). Thus, absent a certificate of occupancy conclusively identifying and stating the lawful use of all units within the subject building (which apparently has not been issued, but may be requested by the building's owner pursuant to N.Y.C. Charter § 645(a)(3)(f)), or expert testimony based upon a review of available materials (including a document commonly known as an 'i-card' referenced in the LNO), the record before the Court does not yet conclusively establish the lawful occupancy of the apartment. As a result, the Court's subject matter jurisdiction, or lack thereof, remains an unresolved predicate issue. See, e.g., Plaintiff's Mem. in Supp., *City of New York v. Freid*, 2019 WL 4921356, *8 (Sept. 18, 2019) (discussing evidentiary hearing to determine lawful occupancy of multiple dwelling).

In directing an evidentiary hearing, the Court reminds the parties that all evidence they intend to offer at the hearing must be in in admissible form (i.e., properly authenticated documents and/or testimony admissible pursuant to hearsay rules), to be considered. To the extent subpoenas to testify and/or produce documents or other compulsory process are [*3]necessary, the parties may seek them through the clerk's office.

Accordingly, it is

ORDERED that the instant motion to dismiss this action is adjourned to September 27, 2023 at 2:30 p.m. for an evidentiary hearing to determine the lawful occupancy of the apartment at issue in this action; and it is further

ORDERED that the parties bring 3 copies of any documents they intend to rely upon at the hearing with them at the return date specified above; and it is further

ORDERED that the decision on the instant motion to dismiss is otherwise held in abeyance pending the outcome of the evidentiary hearing.

This constitutes the Scheduling Order of the Court.

Date: May 1, 2023
Hon. Jeffrey S. Zellan

Footnotes

Footnote 1: Beyond the illegality defense, defendant also asserts that the allegedly unpaid rent at issue was in fact paid by government programs.

Footnote 2: Plaintiff has not disputed (and indeed there cannot be any dispute) that the Court would lack subject matter jurisdiction over plaintiff's unpaid rent claim in the event that the apartment at issue was illegally occupied, as the claim would be premised upon an illegal contract.

Footnote 3: N.Y.C. Dept. of Hous. Pres. & Dev., *Dangers of Illegal Basement and Cellar Conversions* (2023), <https://www.nyc.gov/site/hpd/services-and-information/basement-and-cellar.page> (last accessed Apr. 30, 2023).

Footnote 4: Available at https://www.nyc.gov/assets/doi/press-releases/2019/dec/26-SOTA_Release_and_Rpt_12.5.19.pdf (last accessed Apr. 30, 2023).

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