2023-03-15

# West 115 11-13 Assoc. LLC v. Pierre

**Civil Court of the City of New York**
County of New York
Part: D, Room: 524
Date: 3/15/2023

Index #: **LT-302102-22/NY**
Motion Seq #: 1 & 2

## Decision/Order

West 115 11-13 Associates LLC
Petitioner(s)
-against-
Kettly Pierre; Patrick Simeon; "John" "Doe"; "Jane" "Doe"
Respondent(s)

**Present:** TRACY FERDINAND
Judge

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this Motion for:
**Judgment – Summary and to Dismiss**

| PAPERS | NUMBERED |
|---|---|
| Notice of Motion and Affidavits/Affirmations Annexed | 1 [NYSCEF 9-11] |
| Order to Show Cause and Affidavits Annexed | |
| Notice of Cross-Motion Affidavits/Affirmations and Answering Affidavits/Affirmations | 3 [NYSCEF 30-33]; 5 [NYSCEF 42] |
| Replying Affidavits | 6 [NYSCEF 43] |
| Exhibits | 2 [NYSCEF 12-27]; 4 [NYSCEF 34-41] |
| Stipulations | |
| Other | |
| | |

Upon the foregoing cited papers, the Decision/Order in this Motion is as follows:

Petitioner commenced this summary holdover proceeding seeking possession of the premises known as 315 West 115th Street, New York, New York (the "Building") apartment 62 (the "Apartment") on the grounds that respondents' tenancy had been terminated following their failure to cure alleged illegal alterations in the Apartment. Respondent Kettly Pierre, represented by counsel, interposed an Answer asserting two defenses, res judicata and laches, and a counterclaim for attorney fees.

Petitioner now moves for an Order dismissing respondent's defenses and counterclaim and granting summary judgment on its claim for possession. Respondent opposes and cross moves pursuant to CPLR §§3211 and 3212 for an Order dismissing the petition pursuant to the doctrine of res judicata and/or granting summary judgment on their defense of laches and for other and further relief. The motions are consolidated herein for a determination.

This proceeding is the second Housing Court proceeding involving the parties and centers around alleged unauthorized alterations respondent is said to have performed in the Apartment in 2016.

In or about July 2016 petitioner commenced a holdover proceeding against respondent under Index No.: LT-68590-16/NY titled *West 115 11-13 Associates LLC, v Kettly Pierre, Patrick Simeon and Mercedes Jin Louise* (the "2016 proceeding"). The predicate Notice of Termination in the 2016 proceeding provided, in pertinent part:

> "PLEASE TAKE NOTICE, that your tenancy is hereby terminated effective July 5, 2016 for the reasons that: You are committing or permitting a nuisance in the subject housing accommodation, and as a result of said nuisance you are interfering substantially with the comfort and safety of the landlord and of other tenants and occupants of the subject building. Further, you have wilfully (sic.)

violated a substantial obligation of your tenancy inflicting serious and substantial injury upon the owner within the past ninety (90) days.

In this regard, you have performed substantial illegal alterations to Apartment 62 at 315 West 115th Street, New York, New York 10026 (the "Apartment") that have materially changed the character of the premises. These substantial illegal alterations were done without permits and/or done contrary to applicable building codes. As these illegal alterations are substantial, these illegal alterations are not curable."

That Notice of Termination continued with a recitation of the alleged illegal alterations, a recount of how petitioner's agents discovered the alterations and their impact on the Building and the Apartment.

The Notice states that respondent "did not seek or obtain the landlord's consent for any alterations to the Apartment" and further provided:

"No Notice to Cure is served herein on these nuisance allegations, based upon the serious nature of the situation created at the premises and based on the fact that it does not lend itself to a cure. Further, No Notice to Cure is served herein, as your extensive illegal alterations constitute a wilful (sic.) violation of a substantial obligation of your tenancy inflicting serious and substantial injury upon the owner within the past ninety (90) days. Moreover, no Notice to Cure is served herein your conduct constitutes a nuisance in that it constitutes a continuous invasion of rights and threatens the health and safety of other tenants in the building and no Notice to Cure is required by the Rent Stabilization Code."

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"PLEASE TAKE FURTHER NOTICE, that this notice is being sent pursuant to Section 2524.3(a) and Section 2524.3(b) of the Rent Stabilization Code."

A trial was conducted over the course of four days in late 2017 and early 2018 and culminated in the dismissal of the proceeding after trial.

The trial court held as follows:

"The Court finds that the evidence at trial shows no genuine dispute of fact that Petitioner is the proper party to commence this proceeding according to RPAPL §721; that Petitioner and Respondent are in a landlord/tenant relationship with one another by a lease dating from 1984 with a clause that prohibits alterations of the subject premises without Petitioner's consent; that the subject premises is subject to the Rent Stabilization Code; that Petitioner served a notice of termination according to the Rent Stabilization Code, but no notice to cure; that Respondents engaged in some alterations of the subject premises; and that Respondent engaged in at least some curative work at the subject premises." *West 115 11-13 Associates LLC, v Kettly Pierre, Patrick Simeon and Mercedes Jin Louise,* LT-68590-16/NY (Civ. Ct NY Co. 4/17/2018, Stoller, J.)

The court found, based upon the trial record, that petitioner did not waive objection to the alterations and extensively analyzed each unauthorized alteration citing the standard enunciated by the Appellate Term in *259 W. 12th, LLC v Grossberg*, 28 Misc 3d 132[A], 2010 NY Slip Op 51314[U] [App Term 2010], ultimately holding:

"As Petitioner has not proven that Respondents have caused a lasting or permanent injury to the subject premises, for the reasons stated above, the Court finds that this matter is distinguishable from 259 W. 12th LLC, supra, on the particular facts herein…For the reasons stated above, the

> Court does not find that Respondent's breaches of her lease have been incapable of a cure. As Petitioner has failed to satisfy a condition precedent of this proceeding, i.e., a notice to cure, the Court dismisses this proceeding after trial." *Supra. p. 15-16.*

This included respondent's contractors work on the gas and water lines which the trial court found had been "concluded for some time..." (*Supra.* at p. 13).

Petitioner appealed. In affirming the trial Court's determination, the Appellate Term held:

> "we sustain the posttrial dismissal of this holdover proceeding, premised upon allegations that the stabilized tenant breached a substantial obligation of the tenancy and committed a nuisance by making incurable illegal alterations to the subject apartment. A fair interpretation of the evidence supports the finding that landlord failed to establish that the alterations caused lasting or permanent injury to the premises that was incapable of meaningful cure (*see Grove Equities LLC v Butensky*, 61 Misc 3d 130[A], 2018 NY Slip Op 51409[U], 110 N.Y.S.3d 783 [App Term, 1st Dept 2018]; *201 W. 54th St. Buyer LLC v Rodin*, 47 Misc 3d 154[A], 18 N.Y.S.3d 581, 2015 NY Slip Op 50863[U] [App Term, 1st Dept 2015]; *cf. 259 W. 12th, LLC v Grossberg*, 89 AD3d 585, 933 N.Y.S.2d 256 [2011]). In this regard, it was undisputed that, prior to the trial, tenant retained landlord's own expert witness, a plumber, to cure the defects arising from tenant's switching of the location of the sink and stove, and that their current configuration is now legal. In addition, the trial evidence, including the testimony of landlord's own project manager, established that the cabinets installed by tenant could be easily removed, and that the countertop, floor and backsplash were comparable to work landlord had done elsewhere in the building. With respect to the other work performed by tenant, "there was insufficient proof of any ... alteration which could be characterized as one causing permanent or lasting injury to the premises" (*Mengoni v Passy*, 175 Misc 2d 498, 669 N.Y.S.2d 780 [App Term, 1st Dept 1997], *affd* 254 AD2d 203, 679 N.Y.S.2d 122 [1988], quoting *Rumiche Corp. v Eisenreich*, 40 NY2d 174, 180, 352 N.E.2d 125, 386 N.Y.S.2d 208 [1976])." *W. 115 11-13 Assoc. LLC v Pierre*, 63 Misc 3d 158[A], 2019 NY Slip Op 50854[U], [App Term 2019]).

Petitioner's motion for leave to appeal to the Appellate Division was denied on April 16, 2020. *(See, West 115 11-13 Associates v Pierre*, 2020 NY Slip Op 65508 [U][1st Dept 2020]).

Petitioner then commenced a second summary holdover proceeding which was predicated on a notice to cure dated November 2, 2020 (the "2021 holdover"). Petitioner discontinued this proceeding in or about April 2017 apparently due to the acceptance of rent from respondent following the termination of her tenancy.

Petitioner then served a second notice to cure dated April 12, 2021, followed by a notice of termination dated May 4, 2021 which notices form the basis for this current holdover proceeding (the "2022 proceeding").

*Petitioner's Motion to Dismiss Respondents' Defenses and Counterclaim*

> "In moving to dismiss an affirmative defense pursuant to CPLR 3211 (b), the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541, 935 NYS2d 23 [1st Dept 2011]). The allegations set forth in the answer must be viewed in the light most favorable to the defendant (*182 Fifth Ave. v Design Dev. Concepts*, 300 AD2d 198, 199, 751 NYS2d 739 [1st Dept 2002]), and "the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*534 E. 11th St.*, 90 AD3d at 542). Further, the court should not dismiss a defense where

there remain questions of fact requiring a trial (*id.*)." *Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015].

Further, "[u]pon plaintiffs' motion to dismiss defendants' affirmative defenses, it is not defendants' burden to establish their defenses by admissible evidence, but plaintiffs' burden to establish that the defenses are legally inapplicable." [citations omitted] *958 Sixth Ave. Bake, LLC v SCG Realty II, LLC*, 2012 NY Slip Op 30794[U][Sup Ct, NY County 2012].

Petitioner argues that res judicata does not apply as the dismissal of the 2016 proceeding was not a "final determination on the merits" and that the respondent cannot show an unreasonable delay necessary to sustain a finding of laches. Although dismissal of respondent's counterclaim is also requested as relief, the moving papers do not address any purported insufficiency.

Respondent's Answer pleads in pertinent part:

"**FIRST AFFIRMATIVE DEFENSE: RES JUDICATA**
1. The petition must be dismissed as Petitioner is barred from relief by the doctrine of res judicata.
2. New York follows the transaction approach of res judicata. Under the transactional analysis, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different legal theories or seeking a different remedy.
3. In 2016, Petitioner commenced a holdover proceeding alleging that Respondents, by engaging in alterations in the apartment, created a nuisance and lasting and permanent injury incapable of cure. The present case arises out of the same alleged alterations.
4. Petitioner alleges no newly discovered facts to assert this claim. This theory of recovery was available to Petitioner in 2016.
5. While Petitioner asserts a different legal theory in the case at bar, both the 2016 holdover and the current holdover arise out of the same transaction or series of transactions.
6. Therefore, pursuant to the doctrine of res judicata, Petitioner is barred from asserting this breach of lease claim and the petition must be dismissed.

**SECOND AFFIRMATIVE DEFENSE: LACHES**
7. Petitioner had delayed unreasonably in commencing a summary proceeding against Respondent-Pierre for breach of lease. The possessory claims in the petition must be dismissed pursuant to the doctrine of laches.
8. Petitioner's delay in bringing a breach of lease claim is without good cause. Petitioner's 2016 case was dismissed in 2018 after trial. The Appellate Term, First Department, upheld the trial court's decision in 2019 and Petitioner was denied motion for leave to the Appellate Division, First Department in 2020.
9. Petitioner waited nearly six years to bring a breach of lease claim against Respondent-Pierre. There was nothing preventing Petitioner from pursuing a breach of lease claim while the appeal was pending.
10. Even if Petitioner was waiting for the appeal process to conclude, they still delayed nearly two years before pursuing the instant proceeding without good cause.
11. Petitioner delayed so long in bringing this proceeding that Respondent-Pierre had every reason to believe that the potential of eviction was over when the Appellate Division, First Department denied Petitioner's motion for leave to appeal in 2020.
12. Respondent-Pierre, should the Court allow Petitioner to bring this claim, will face a possessory judgment thus losing the apartment she has occupied since 1984. Respondent-Pierre is a low income person who qualifies for free legal services and has occupied this affordable rent stabilized apartment for decades, as such she would be severely prejudiced if she was now expected to find a new apartment within her budget.

13. Respondent-Pierre clearly establishes each element of the doctrine of laches. Therefore, the proceeding must be dismissed due to Petitioner's delay."

Both of respondent's defenses are fully articulated in the answer and their elements of each are plead with particularity. The affidavit and affirmation offered in opposition to petitioner's motion further lend to the credibility and sufficiency of the defenses. Respondent is not required to prove her defenses in opposition to a motion to dismiss, only that they are sufficient as a matter of law. Examining respondent's defenses in the most favorable light, the Court finds petitioner has not sustained its burden in demonstrating the defenses and counterclaim should be dismissed. Accordingly, this part of petitioner's motion is denied.

*Respondent's Motion to Dismiss the Petition*

Next the Court turns to respondent's motion to dismiss. Although not delineated as such, respondent's moves pursuant to CPLR 3211(a)(5) that this proceeding may not be maintained due to res judicata, specifically that the dismissal of the 2016 proceeding acts as a procedural bar to the commencement of this proceeding.

Petitioner opposes arguing that respondent fails to establish the requisite elements of res judicata namely that this proceeding is based upon a different cause of action and that the prior dismissal was not a final adjudication of the merits.

> "The general doctrine of *res judicata* gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein. (See *Matter of New York State Labor Relations Bd.* v. *Holland Laundry*, 294 N.Y. 480, 493; *Elder* v. *New York & Pennsylvania Motor Express*, 284 N.Y. 350; *Good Health Dairy Products Corp.* v. *Emery*, 275 N.Y. 14, 17; *Sears Roebuck & Co.* v. *9 Ave.-31 St. Corp.*, 274 N.Y. 388, 400.) "'Sound public policy'", this court has written, "'requires that different judicial decisions shall not be made on the same state of facts, and that a judgment rendered jurisdictionally and unimpeached for fraud shall be conclusive, as to the questions litigated and decided, *upon the parties thereto and their privies*, whom the judgment, when used as evidence, relieves from the burden of otherwise proving, and bars from disproving, the facts therein determined.'" (*Matter of New York State Labor Relations Bd.* v. *Holland Laundry, supra*, 294 N.Y. 480, 493.)" *In re RAFTERY*, 309 NY 605, 616 [1956].
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> "This State has adopted the transactional analysis approach in deciding *res judicata* issues *(Matter of Reilly v Reid*, 45 NY2d 24). Under this address, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy *(id.*, at pp 29-30). Here, all of defendants' conduct falling in the first category was also raised during the 1973 suit as the basis for that litigation. That proceeding having been brought to a final conclusion, no other claim may be predicated upon the same incidents…When alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts such as would [*358] constitute a single "factual grouping" (Restatement, Judgments 2d, § 61 [Tent Draft No. 5]), the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions." *O'Brien v Syracuse*, 54 NY2d 353, 357, 358 [1981].
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> "The rule applies not only to claims actually litigated but also to claims that *could have been raised* in the prior litigation" (*Matter of Hunter*, 4 NY3d 260, 269, 827 NE2d 269, 794 NYS2d 286 [2005] [emphasis added]). *UBS Sec. LLC v Highland Capital Mgt., L.P.*, 159 AD3d 512, 513 [1st Dept 2018]."

Petitioner attempts to distinguish the cause of action in this proceeding from that asserted in the 2016 proceeding. The 2016 proceeding sought to recover the premises on the dual grounds of nuisance and willful violation of a substantial obligation of tenancy. The 2022 proceeding petitioner's claim is brought as a breach of lease. Both proceedings, one predicated on the tenant's willful breach of an obligation and one alleging a breach after an opportunity to cure, both derive from the identical section of the Rent Stabilization Code, 9 NYCRR §2524.3(a). That the latter requires petitioner to establish an additional element, respondent's failure to cure, does not transform it into a separate and distinct cause of action.

Petitioner further opposes on the grounds that the prior dismissal was not a final determination on the merits. Citing the trial court's decision, petitioner states that dismissal of the 2016 proceeding was merely due to petitioner's failure to comply with a condition precedent, namely service of a notice to cure. Citing several decisions in support of the proposition that failure to satisfy a condition precedent is not a disposition on the merits, petitioner argues the 2022 proceeding is not precluded.

While the trial court did reference petitioner's failure to satisfy a condition precedent in dismissing the 2016 proceeding, the court finds that the dismissal was, nevertheless, final and on the merits.

Petitioner's choice not to serve a notice to cure in the 2016 proceeding was not a pleading defect or deficiency. It was a deliberate litigation strategy and an integral part of the petitioner's theory of recovery. (*cf, Hodge v Hotel Emples. & Rest. Emples. Union*, 269 AD2d 330 [1st Dept 2000]; *Goodhue Residential Co. v Lazansky*, 2003 NY Slip Op 51559[U] [Civ Ct, New York County 2003]; *Katz Park Ave. Corp. v Olden*, 158 Misc 2d 541 [Civ Ct, New York County 1993]).

Further, the 2016 proceeding was dismissed after a full trial and upon due deliberation credible evidence, not upon papers in a pre-trial motion or before petitioner concluded their prima facie case. (*see, 156-158 Second Ave., LLC v Delfino*, 18 Misc 3d 1144[A], 2008 NY Slip Op 50440[U] [Civ Ct, New York County 2008]).

CPLR §5013 provides:

> "A judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits unless it specified otherwise, but a judgment dismissing a cause of action after the close of the proponent's evidence is a dismissal on the merits unless it specifies otherwise."

In the cases cited to by petitioner, a plaintiff's failure to timely serve a notice of claim as in *Wade v NY City Health & Hosps. Corp.*, 59 AD3d 528 [2d Dept 2009] or a claimant's failure to appear for a 50-h hearing prior to commencement of an action as in *Miller v County of Suffolk*, 48 AD3d 524 [2d Dept 2008] can hardly be likened to petitioner's intentional election to forgo a statutory pre-requisite, based upon a chosen legal theory and in pursuit of a particular form of relief.

Petitioner's failure to serve a notice to cure was deliberate and elemental to the prior litigation strategy. In dismissing the proceeding the trial court stated:

> "Petitioner may have had a cause of action against respondent sounding in breach of her lease, as Respondent is rent-stabilized, Petitioner would have had to have served Respondent with a notice to cure. 9 NYCRR §2524.3(a). Petitioner's position has been that Respondent's breaches have been incapable of cure, thus relieving Petitioner from having had to have serve a notice to cure." *West 115 11-13 Associates LLC v Pierre et al, LT-68590-16/NY (Civ Ct NY Co 2018, Stoller, J.)*

It is undisputed that the 2022 proceeding arises out of the "same transaction or series of transactions" as the 2016 proceeding, namely, respondent's alleged illegal alteration of the Apartment in April and May 2016. The 2021 notice to cure cites extensively to the 2016 proceeding. The 2016 notice of termination and the

2022 notice to cure contain the same photographs as exhibits. Petitioner could have plead in the alternative in the 2016 proceeding but instead pursued their claim on the theory that respondent's conduct was incurable.

Based upon the transactional analysis approach, petitioner now raising an alternate theory of recovery will not avert dismissal based upon res judicata, as any claim arising out of the 2016 alterations that was previously raised, or could have been raised, is precluded. *(See, Matter of Hunter,* supra at 269).

Accordingly, respondent's motion is granted and the proceeding is dismissed. The court declines to address the balance of petitioner and respondent's motions as they are now moot.

This constitutes the Decision/Order of this Court.

Date: 3/15/2023

HON. TRACY FERDINAND
JUDGE, HOUSING COURT

Judge, Civil/Housing Court