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2023-02-24

Tzifil Realty Corp. v. Mazrekaj

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[*1]

Tzifil Realty Corp. v Mazrekaj
2023 NY Slip Op 50278(U) [78 Misc 3d 128(A)]
Decided on February 24, 2023
Appellate Term, Second Department
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This opinion is uncorrected and will not be published in the printed Official Reports.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 February 24, 2023

SUPREME COURT, APPELLATE TERM, SECOND DEPARTMENT, 2d, 11th and 13th
JUDICIAL DISTRICTS

PRESENT: : WAVNY TOUSSAINT, P.J., CHEREÉ A. BUGGS, MARINA CORA MUNDY,
JJ
2021-762 K C

Tzifil Realty Corp., Appellant,

against

Hassan "Andy" Mazrekaj, Respondent.

Felipe E. Orner, for appellant.

Hassan "Andy" Mazrekaj, respondent pro se (no brief filed).

Appeal from an order of the Civil Court of the City of New York, Kings County (Heela D. Capell, J.), entered November 22, 2021. The order denied petitioner's motion seeking the court's recusal, denied petitioner's separate motion, dated September 17, 2021, seeking, among other things, an award of use and occupancy and that the court decide the pending recusal motion, granted occupant's cross motion to sever petitioner's claim for use and occupancy, and dismissed petitioner's claim for possession (see CPLR 409 [b]) in an RPAPL 713 (11) summary proceeding.

ORDERED that the order is modified by providing that so much thereof as dismissed petitioner's claim for possession is vacated, petitioner's claim for possession is reinstated, occupant's cross motion to sever petitioner's claim for use and occupancy is denied, and the

matter is remitted to the Civil Court for a new determination of petitioner's September 17, 2021 motion other than the branch thereof regarding recusal; as so modified, the order is affirmed, without costs.

Petitioner commenced this summary proceeding pursuant to RPAPL 713 (11) in December 2019 to recover possession of a superintendent's apartment from occupant, the former [*2]superintendent whose employment had been terminated by petitioner. Insofar as is relevant to this appeal, petitioner subsequently moved for Judge Heela D. Capell to recuse herself. In a separate order to show cause signed on September 17, 2021, petitioner moved for, among other things, the court to render a decision on the previously filed motion for Judge Capell to be recused, "an immediate trial" of the proceeding, the entry of a determination of the amount of monthly use and occupancy, and a judgment for 21 months of use and occupancy then owed. It was undisputed that occupant vacated the premises in September 2021. Occupant cross-moved to sever petitioner's use and occupancy claim. In an order dated November 22, 2021, the Civil Court (Heela D. Capell, J.) denied petitioner's motion seeking the court's recusal, denied petitioner's September 17, 2021 motion seeking, among other things, "an immediate trial" of the proceeding and a judgment awarding use and occupancy then owed, granted occupant's cross motion to sever petitioner's claim for use and occupancy, and dismissed petitioner's claim for possession.

The "record is inadequate to enable this Court to review" petitioner's recusal arguments on appeal ([*KISSM Realty Corp. v Brooklyn Community Mgt., LLC*, 129 AD3d 781](#), 782 [2015]), as the underlying motion papers seeking recusal were not contained in the reproduced record. Contrary to petitioner's arguments on appeal, the Civil Court did not err by not entertaining petitioner's request that sanctions be imposed against occupant and occupant's attorney, because, as a threshold issue, the imposition of sanctions must be made upon notice to afford the parties "a reasonable opportunity to be heard on the issue of sanctions" ([*Singh v North Shore Univ. Hosp.*, 76 AD3d 1004](#), 1006 [2010]; *see* Rules of Chief Admin of Cts [22 NYCRR] § 130-1.1 [d]) and petitioner merely mentioned sanctions in the body of its motion.

The Civil Court appears to have concluded that, because occupant vacated the premises during the pendency of the proceeding, petitioner's claim for possession had to be dismissed. Thus, the court granted occupant's cross motion to sever petitioner's claim for use and occupancy and dismissed what remained of the petition—petitioner's claim for possession (*see* CPLR 409 [b]). However, in a summary proceeding, the court retains jurisdiction to award possession even where the occupant vacates after the commencement of the

proceeding ([*see 92 Bergenbrooklyn, LLC v Cisarano, 50 Misc 3d 21*](#), 25 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]). Thus, here, it was improper for the court to dismiss petitioner's claim for possession. As the Civil Court granted occupant's motion to sever petitioner's claim for use and occupancy on the ground that a money judgment cannot be awarded in a summary proceeding without a concomitant award of possession ([*see 615 Nostrand Ave. Corp. v Roach, 15 Misc 3d 1*](#), 4 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2006]; [*Fieldbridge Assoc., LLC v Sanders, 70 Misc 3d 140*](#)[A], 2021 NY Slip Op 50128[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021]; [*Patchogue Assoc. v Sears, Roebuck & Co., 37 Misc 3d 1*](#) [App Term, 2d Dept, 9th & 10th Jud Dists 2012]), and since the dismissal of the claim for possession was improper, there was no basis to sever petitioner's claim for use and occupancy.

In light of the foregoing, we remit the matter to the Civil Court for a new determination of petitioner's September 17, 2021 order to show cause, other than the branch regarding recusal. [*3] We note that, as the Civil Court correctly stated, RPAPL article 7 only allows for an award of use and occupancy as a money judgment concomitant with an award of possession to the petitioner at the end of the proceeding (*see* RPAPL 747 [4]). While not an award of use and occupancy, a court may also, where appropriate pursuant to RPAPL 745 (2), order a respondent to deposit use and occupancy during the pendency of a summary proceeding (*see e.g. Nisim v Ramirez, 73 Misc 3d 126*[A], 2021 NY Slip Op 50877[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021]). Petitioner has acknowledged on this appeal that it has not been awarded a final judgment of possession, but has argued that the rule against awarding a money judgment without a concomitant award of possession does not apply here because it has been seeking use and occupancy all along. It is unclear from petitioner's appellate brief under which theory petitioner is seeking relief with respect to use and occupancy, if any.

Accordingly, the order is modified by providing that so much thereof as dismissed petitioner's claim for possession is vacated and petitioner's claim for possession is reinstated, occupant's cross motion to sever petitioner's claim for use and occupancy is denied, and the matter is remitted to the Civil Court for a new determination of petitioner's motion seeking, among other things, an award of use and occupancy.

TOUSSAINT, P.J., BUGGS and MUNDY, JJ., concur.

ENTER:
Paul Kenny
Chief Clerk

Decision Date: February 24, 2023

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