Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

All Decisions

Housing Court Decisions Project

2023-06-30

Aqua Realty LLC v. Truesdale

Follow this and additional works at: https://ir.lawnet.fordham.edu/housing_court_all

Recommended Citation

"Aqua Realty LLC v. Truesdale" (2023). *All Decisions*. 973.
https://ir.lawnet.fordham.edu/housing_court_all/973

This Housing Court Decision is brought to you for free and open access by the Housing Court Decisions Project at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in All Decisions by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

[*1]

Aqua Realty LLC v Truesdale
2023 NY Slip Op 50653(U)
Decided on June 30, 2023
Civil Court Of The City Of New York, Bronx County
Ibrahim, 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This opinion is uncorrected and will not be published in the printed Official Reports.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 June 30, 2023
Civil Court of the City of New York, Bronx County

Aqua Realty LLC, Petitioner,

against

Stacy Truesdale, "JOHN DOE" & "JANE DOE," Respondents.

Index No. 329871/2022

For Petitioner: Mark H. Cohen & Associates by Mark Cohen

For Respondent: The Legal Aid Society by Marisol Cordero

Shorab Ibrahim, J.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion.

Papers Numbered

Notice of Motion with Affirmation Annexed
[With Exhibits A-K] [NYSCEF Doc. Nos. 9-21] 1
Affirmation in Opposition
[NYSCEF Doc. No. 23] 2
Affirmation in Reply [NYSCEF Doc. No. 24] 3

After oral argument, and upon the foregoing cited papers, the decision and order on this motion is as follows:

FACTUAL AND PROCEDURAL HISTORY

This is a holdover proceeding commenced by Petitioner Aqua Realty LLC ("petitioner") against Stacy Truesdale, ("respondent"), seeking possession of 2533 Aqueduct Ave, Apt. 5A, Bronx, NY 10468, ("the subject premises" or "apartment"), on the basis that respondent refused and/or failed to execute a rent stabilized renewal lease sent to her by petitioner.

Respondent now moves to dismiss pursuant to CPLR §3211(a)(7), alleging vitiation of the termination notice and defective predicate notice, or, in the alternative, granting leave for respondent to file an answer.

In the motion, respondent argues that petitioner vitiated the termination notice in this 2022 holdover proceeding when it restored a 2019 nonpayment proceeding against respondent (Index No. 44108/19). By motion dated January 31, 2023, petitioner sought to restore the nonpayment proceeding, setting the matter down for a conference, and permission to execute on the warrant issued per a January 8, 2020 stipulation. Respondent argues that nonpayment and holdover proceedings are mutually exclusive remedies, so proceeding on the nonpayment case vitiates the holdover.

Respondent further argues that dismissal is required as the termination notice is defective [*2]because the renewal lease was sent by regular mail, with certificate of mailing, while the initial lease requires "notices" to be sent by certified mail.. Respondent argues that the termination notice is further deficient because the renewal lease contained 24 pages, seeking additional information and containing riders, so that the renewal was not on the same terms and conditions as the expiring lease. Finally, respondent states that the termination notice does not cite to the relevant sections of the rent stabilization code ("RSC"), but to a non-existent Section 2323.5.

In opposition, petitioner points out that respondent's motion is not supported by anyone with personal knowledge. Petitioner argues that the proper section of the RSC was cited in the termination notice, Section 2524.3(f), and the renewal lease offered was properly mailed with certificate of mailing. Petitioner contends that it only took action on the nonpayment case *after* this proceeding was already in court and actively litigated and that the nonpayment case, and judgment, was commenced, and obtained, years prior to commencement of the

instant proceeding.

DISCUSSION

STANDARD ON MOTION TO DISMISS PURSUANT TO CPLR § 3211(a)(7)

When considering a motion under CPLR § 3211, the court must afford the pleadings a liberal construction. The court must deem the facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*see Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). In assessing a motion under CPLR § 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 636, 389 NYS2d 314 [1976]).

Thus, "a motion to dismiss made pursuant to CPLR § 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law." (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker*, *LLP*, 38 AD3d 34, 38, 827 NYS2d 231 [2nd Dept 2006]; *see also Leon v Martinez*, 84 NY2d at 87-88; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152, 746 NYS2d 131 [2002]).

VITIATION OF THE TERMINATION NOTICE

Respondent seeks dismissal claiming that petitioner vitiated the August 2022 termination notice, which expired in September 2022, when it moved to restore the 2019 nonpayment in January 2023.

In that motion, petitioner sought to restore, vacate the ERAP stay, set a settlement or conference date, and permission to execute on the warrant of eviction issued pursuant to the January 8, 2020 final judgment stipulation in that proceeding. The affidavit in support of that motion also seeks amendment of the petition to date and issuance of a final judgment and warrant of eviction. (*see* NYSCEF Doc. 5 at Index No. 44108/19).

The Hon. Judge Lutwak issued a decision and order on or about March 6, 2023 in the 2019 nonpayment on petitioner's motion to vacate the ERAP stay and permission to execute the warrant. Significantly, the court did not deem the motion one for amendment of the

petition to date or for issuance of a judgment. In any case, the court held that the ERAP application, as far as the nonpayment proceeding was concerned, required a continued stay, denied petitioner's motion in all respects and placed the case back on the ERAP administrative calendar. (*see* NYSCEF Doc. 15 at Index. No. 44108/19).

While a nonpayment proceeding commenced *after* a holdover proceeding may require dismissal of the holdover, the law is clear that a landlord may maintain both a nonpayment and holdover proceeding, where the nonpayment case was commenced prior to termination of the lease. (*see Ansonia Assoc. v Pearlstein*, 122 Misc 2d 566, 570, 471 NYS2d 527 [Civ Ct, New York County 1984] ("The existence of the nonpayment petition, having been brought subsequent to the alleged termination of respondent's tenancy, is therefore documentary evidence of petitioner's having reaffirmed respondent's tenancy."); *Third Lenox Terrace Assoc. v Jones*, 19 Misc 3d 1103[A], 1103A, 2008 NY Slip Op 50493[U], *1-2 [Civ Ct, New York County 2008] ("Generally, if a landlord initiates a holdover proceeding and then commences a nonpayment proceeding, the nonpayment case operates as a waiver of the right to proceed with the holdover because it reaffirms the tenancy However, where a nonpayment proceeding is brought prior to the termination of the lease, a landlord may continue with the nonpayment as long as its actions do not suggest that the tenancy is still in effect A landlord may rely on a warrant issued in an earlier nonpayment and cancel its right to evict by accepting the rent due under the nonpayment final judgment as well as the accruing rent without waiving the right to maintain a holdover proceeding") (internal citations omitted); *1050 Tenants Corp. v Lapidus*, 12 Misc 3d 1196[A], 1196A, 2006 NY Slip Op 51593[U], *5 [Sup Ct, NY County 2006] ("However, where a nonpayment proceeding is brought prior to a landlord's decision to terminate a lease, there is nothing inconsistent about the landlord's attempt to terminate the tenancy while continuing the nonpayment proceeding. The fact that while a nonpayment proceeding is pending, an event occurs which the landlord believes terminates the tenancy hardly requires that the landlord discontinue the pending proceeding so long as the landlord, after the attempted termination of the lease, does not make any representation or assert any argument in the nonpayment proceeding which suggests that the lease is still in effect."); *see also Azour, LLC v Tax Sister, Inc.*, 29 Misc 3d 29, 32, 909 NYS2d 282 [App Term, 2nd Dept. 2010] ("However, the nonpayment proceeding was commenced prior to the termination of the lease and sought pretermination arrears and therefore the proceedings were not necessarily inconsistent.")).

Respondent cites to *335 Realty LLC v Choi et al*, (Index No. 52739/20 [Civ Ct, New York County 2022]),**[FN1]** in support of her claim that petitioner's prosecution of the

nonpayment proceeding, through its January 2023 motion, vitiated the instant holdover, as it evinced an intent to reinstate the tenancy. *Choi* , of course, is not binding on this court. However, that case is factually distinguishable from the instant proceeding so that the rationale and holding of the court in *Choi* is inapplicable here.

In *Choi*, the landlord commenced the nonpayment proceeding after the lease expired, sometime between the time the tenant was served with the notice of intent not to renew and the expiration of said notice. The landlord later obtained a default judgment in February 2020 in the nonpayment proceeding, the same month it commenced the month-to-month holdover against the tenant. The nonpayment case remained on the ERAP calendar through December 2021. The landlord made several motions during pendency of the nonpayment proceeding, for various forms of relief. By decision and order dated April 25, 2022, the court vacated the judgment and warrant and amended landlord's petition to date. The case was restored from the ERAP calendar and the landlord continued actively litigating the nonpayment proceeding throughout the [*3]pendency of the holdover. Under *these* facts, the court in *Choi* granted tenant's motion to dismiss the holdover proceeding based on vitiation.

Even if this court were persuaded by the reasoning in C*hoi*, the circumstances here are entirely different. Petitioner here commenced the nonpayment proceeding several years prior to the instant holdover. Petitioner also obtained a judgment on consent, by stipulation, not on default, and obtained such judgment and warrant in or about January 2020, years prior to the instant holdover. Unlike the landlord in *Choi*, petitioner here only filed one motion, seeking to restore from ERAP and to execute a judgment it obtained prior to the pandemic. Importantly, petitioner never amended its judgment to include arrears after January 2020 and the nonpayment proceeding did not seek rent that accrued after the expiration of the lease or after the expiration of the termination notice in this holdover. Finally, the court in the nonpayment proceeding denied petitioner's motion and never restored the case from the ERAP administrative calendar.

The court notes that this motion is not supported with an affidavit from respondent, thus there is no proper allegation that she was misled by the dueling proceedings, especially where respondent is represented by experienced housing attorneys in both proceedings. "Inasmuch as the creation of a tenancy is ultimately a matter of intent, it cannot be said in the circumstances of this case that landlord's commencement of the nonpayment proceeding evidenced an intent to reinstate the tenancy." (*Rockaway One Co. v Califf*, 194 Misc 2d 191, 193, 751 NYS2d 670 [App Term, 2nd Dept. 2002]).

As such, respondent's motion to dismiss, alleging vitiation of the termination notice, is denied.

MANNER OF MAILING OF THE RENEWAL LEASE

Respondent next argues for dismissal alleging that the termination notice is defective because the renewal lease was sent by regular mail, with certificate of mailing, while paragraph 4 of the initial lease requires notices to be sent by certified mail. This argument must fail.

In New York City, rent stabilized renewal leases offers must be in accordance with Rent Stabilization Code ("RSC") § 2523.5(a), which requires lease renewals to be done "by mail or personal delivery." "The term 'mail' has been defined as the whole body of matter transported by postal agents, or any letter or package forming a component part of it (see, 72 CJS, Postal Service, § 2)." (*Reliance Properties, Inc. v Cruz*, 143 Misc 2d 556, 557, 544 NYS2d 901 [App Term, 2d Dept. 1989]). [FN2] Whether the mailing was by first class mail, certified mail, return receipt requested, or certificate of mailing, is irrelevant, as the requirement of "mailing" under the RSC has been met. (*see id*.)

Paragraph 4 of the initial lease between the parties requires a "notice" to be "sent by certified mail." However, a renewal lease is not a notice under the lease but rather a new lease. A notice is a document such as a letter advising of a default, a landlord's change of address, or an intent not to renew, etc.

A more applicable lease provision is paragraph 28, regarding changes in the lease. This paragraph states that the lease may only be changed by an "agreement in writing signed by and delivered to each party." As a renewal lease is a change in the lease term and rental amount, [*4]paragraph 28 requires only that the agreement be made in writing, be signed and be "delivered." Petitioner here has done just that: prepared a renewal lease, in writing, signed by petitioner, and delivered it by first class mail with certificate of mailing. (*see* Exhibits I and J to respondent's motion).

In any case, whether the initial lease specifically referred to how a renewal lease is to be offered is irrelevant. A renewal lease is offered pursuant to the Rent Stabilization Law and RSC, not pursuant to the "Notices" provision in an initial lease. As such, mailing the renewal lease by first class mail with certificate of mailing, even if the initial lease required certified mail, is proper, as it is sufficient under RSC § 2523.5(a). (*see 390 West End Assocs., L.P. v*

Atkins, 1998 NY Misc. LEXIS 728, *6 (Civ Ct, New York County 1998), *citing 340 East 57th Street Assoc. v Comras*, NYLJ, Nov. 30, 1994, pg. 25, col. 6 [App Term, 1st Dept. 1994]).

As the renewal lease was offered in compliance with RSC § 2523.5(a), respondent's motion to dismiss for failure to mail the renewal by certified mail is denied.

WAS THE RENEWAL LEASE ON THE SAME TERMS AND CONDITIONS

Respondent also seeks dismissal on the ground of a defective termination notice claiming the renewal lease was not offered on the same terms and conditions as the expiring or initial lease because the renewal contained documents seeking additional information and containing additional riders. However, this entire argument is based upon allegations of respondent's counsel.

Respondent has not submitted an affidavit from herself or anyone else with personal knowledge of the initial lease. She relies entirely on her attorneys' statements, made without personal knowledge. (*see Lott-Coakley v Ann-Gur Realty Corp.*, 23 Misc 3d 1114(A), *12 & 16, 886 NYS2d 67 [Sup Ct, Bronx County 2009] ("affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay."); *Gibbs v East 34th St. Dev., LLC*, 16 Misc 3d 1135(A), *8 & 11, 847 N.Y.S.2d 901 [Sup Ct Bronx County 2007] ("affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay"). An "affirmation by the plaintiffs' attorney, who clearly has no such knowledge," is insufficient and cannot be given any weight. (*see Arriaga v Michael Laub Co.*, 233 AD2d 244, 649 NYS2d 707 [1st Dept 1996]).

As such, the motion to dismiss based on alleged failure to offer the renewal on the same terms and conditions as the initial lease is denied. [FN3]

This court also notes that many of the new or additional notices, riders or information in the renewal lease packet that respondent objects to now are mandatory lead paint notices/riders, window guard riders, the Division of Housing and Community Renewal ("DHCR") mandated "New York City Lease Rider for Rent Stabilized Tenants." (*see* Exhibit J to respondent's motion). It appears disingenuous to claim that inclusion of such mandatory and seeming [*5]beneficial documents invalidates the lease renewal, especially where *failure* to include such documentation could potentially nullify an otherwise proper lease renewal offer.

FAILURE TO CITE TO A PROVISION OF THE RSC

Finally, respondent seeks dismissal for a defective termination notice claiming that it does not cite to the relevant sections of the rent stabilization code ("RSC"), but to a non-existent Section 2323.5.

RSC §2524.2(b) requires, in relevant part, that any predicate notice to a rent stabilized tenant "shall state the ground under section 2524.3 or 2524.4 of this Part, upon which the owner relies for removal or eviction of the tenant." (*see Cosmopolitan Broadcasting Corp. v Miranda*, 143 Misc 2d 1, 2, 539 NYS2d 265 [Civ Ct, New York County 1989] ("This section requires that the notice of termination state the particular ground on which the tenant's eviction is sought as well as the underlying facts which establish the ground specified."); *Rose Associates v Bernstein*, 138 Misc 2d 1044, 1045, 526 NYS2d 383 [Civ Ct, New York County 1988]).

Here, the predicate termination notice cites to RSC §§ 2523.5 and 2524.3(f). (*see* Exhibit B to respondent's motion). Contrary to respondent's claim, RSC § 2523.5 is not a "non-existent" provision; it exists. In fact, it is the section of the RSC entitled "notice for renewal of lease and renewal procedure," which, in relevant part, sets out the requirements for the contents, offer, and acceptance of a renewal lease, as well as the consequences of failing to timely offer or timely accept a renewal lease.

In the termination notice, petitioner cites to RSC § 2523.5, provides a summary of renewal offer requirements, as well as how petitioner has met those requirements in its renewal offer to respondent, and concludes by stating that respondent has refused to sign the renewal lease offer. The landlord then further cites to RSC § 2524.3(f), stating that due to the failure to sign the renewal lease, respondent as violated this RSC provision and petitioner is terminating her tenancy upon this ground.

RSC § 2524.3(f) specifically allows a landlord to commence a holdover eviction proceeding against a tenant who "has refused, following notice pursuant to section 2523.5 of this Title, to renew an expiring lease in the manner prescribed in such notice at the legal regulated rent authorized under this Code and the RSL, and otherwise upon the same terms and conditions as the expiring lease." Whether petitioner can prove at trial that respondent has failed and/or refused to sign a proper renewal lease is irrelevant; [FN4] what is relevant is that the termination notice properly gives respondent notice of the ground under the RSC upon which petitioner has relied to terminate respondent's tenancy.

As the termination notice clearly and properly cites to RSC §§ 2523.5 and 2524.3(f), as well as the factual bases in support of petitioner's claim that respondent has violated these RSC provisions, respondent's motion to dismiss for failure to cite to a proper RSC provision is denied.

LEAVE TO INTERPOSE AN ANSWER

This branch of respondent's motion is granted. An answer in a holdover proceeding can be submitted "at the time when the petition is to be heard" pursuant to RPAPL §743. Many courts have interpreted this language to mean that adjournments extend the time to answer unless [*6]otherwise agreed. (*Eugene Smilovic Housing Development Fund Corp. v Lee*, 61 Misc 3d 1216(A) at *2, 2018 NY Slip Op 51534(U) [Civ Ct, Bronx County 2018]; *Gluck v Wiroslaw*, 113 Misc 2d 499, 449 NYS2d 567 [Civ Ct, Kings County 1982]; *974 Anderson LLC v Davis*, 53 Misc 3d 1220(A) at *4, 2016 NY Slip Op 51765(U) [Civ Ct, Bronx County 2016]).

Further, the proposed amended answer contains meritorious defenses. While proposed defenses which "plainly lack merit" should be denied, (*see Thomas Crimmins Contracting Co. v New York*, 74 NY2d 166, 170, 544 NYS2d 580 [1989]), at least some of the proposed defenses are, in fact, potentially meritorious. (*See Goldman v City of New York*, 287 AD2d 482, 483, 731 NYS2d 212 [2nd Dept 2001]).

Petitioner does not oppose the portion of respondent's motion seeking to file the answer and has certainly not alleged any prejudice. In any event, prejudice in this context is shown where the nonmoving party is "hindered in the preparation of his case or has been prevented from taking some measure in support of his position." (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, 444 NYS2d 571 [1981]; *Jacobson v McNeil Consumer & Specialty Pharmaceuticals*, 68 AD3d 652, 654-655, 891 NYS2d 387 [1st Dept 2009] (prejudice does not occur simply because a defendant is exposed to greater liability or because a defendant has to expend additional time preparing its case) [internal citations omitted]).

As such, the motion to interpose a late answer is granted in all respects.

CONCLUSION

Based on the foregoing, it is So Ordered, that respondent's motion to dismiss is denied in all respects, and respondent's motion for a late answer is granted. The proceeding is

adjourned to August 2, 2023 at 11:00 AM, for a pre-trial conference.

This constitutes the decision and order of the court. It will be posted on NYSCEF.

Dated: June 30, 2023
Bronx, New York
SO ORDERED,
HON. SHORAB IBRAHIM
Judge, Housing Part

Footnotes

Footnote 1:*see* Exhibit F to respondent's motion at NYSCEF Doc. 16.

Footnote 2: By contrast, for tenants outside of New York City, who are covered by the Emergency Tenant Protection Act of 1974 ("ETPA"), a renewal lease offer must be made by "certified mail" only. (*see* 9 NYCRR §2503.5(a); *see also Reliance Properties, Inc. v Cruz*, 143 Misc 2d at 557)

Footnote 3: This court also notes that many of the new or additional notices, riders or information in the renewal lease packet that respondent objects to now are mandatory lead paint notices/riders, window guard riders, the Division of Housing and Community Renewal ("DHCR") mandated "New York City Lease Rider for Rent Stabilized Tenants." (*see* Exhibit J to respondent's motion). It appears disingenuous to claim that inclusion of such mandatory and seeming beneficial documents invalidates the lease renewal, especially where *failure* to include such documentation could potentially nullify an otherwise proper lease renewal offer.

Footnote 4:(*see Howard Stores Corp. v Pope*, 1 NY2d 110, 114, 150 NYS2d 792 [1956]; *Victory State Bank v EMBA Hylan, LLC, 169 AD3d 963*, 964-965, 95 NYS3d 97 [2nd Dept 2019]).

Return to Decision List