2023-05-18

# COD, LLC v. Ljuljdjuraj

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R
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COD, LLC,

Petitioner, Index No. 308455/2021

- against -

**DECISION/ORDER**

MIRAS LJULJDJURAJ,

Respondents.
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Present: Hon. Jack Stoller
Judge, Housing Court

COD, LLC, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Miras Ljuljdjuraj ("Respondent"), a respondent in this proceeding, and "John Doe" and "Jane Doe" ("Co-Respondents"), other respondents in this proceeding (the Court collectively refers to Respondent and Co-Respondents and "Respondents"), seeking possession of 151 East 80th Street, Apt. 9A, New York, New York ("the subject premises") on the basis that Respondent's occupancy was incidental to his employment with Petitioner and that Petitioner terminated Respondent's employment. Respondents interposed an answer with a defense that there is a lease between the parties that remains in effect and a counterclaim for attorneys' fees. The Court notified the parties on its own application that the Court would be entertaining a resolution of this matter pursuant to CPLR §409(b) and adjourned the matter to afford the parties an opportunity to proffer submissions to the Court to this point.

The Court takes notice of following exhibits posted on NYSCEF and deems the exhibits to be incorporated as exhibits to this order: NYSCEF ##3 and 8 (the notice of petition, petition and predicate notice); NYSCEF ##10-12 (the answer with two attachments); NYSCEF ##13-25

(Respondents' motion for summary judgment with supporting papers); NYSCEF ##26-27 (Petitioner's opposition to Respondents' summary judgment motion); NYSCEF ##29-30 (Respondents' reply); NYSCEF #31 (order denying summary judgment); NYSCEF ##42-44 (Petitioner's affidavit, affirmation, and exhibit in a submission); and NYSCEF ##62-68 (order notifying parties of the Court's intention to determine the matter according to CPLR §409(b) and the submissions of the parties).

**Background**

The Court's review of the pleadings and motion papers reveals that there is no dispute as to the following material facts: (1) Petitioner is the owner of the subject premises;[1] (2) Petitioner hired Respondent to be the super for the building in which the subject premises is located ("the Building");[2] (3) the parties entered into a lease with one another ("the Lease");[3] (4) Petitioner terminated Respondent's employment on or about November of 2021;[4] and (5) Respondent remained in possession of the subject premises for more than ten days after the termination of his

[1] Respondent appears to concede this point in his affidavit in support of the motion for summary judgment, NYSCEF #15, at ¶¶4, 5 and 7, where Respondent avers that Petitioner's agent hired him to be the super for the Building, which is one of the buildings in Petitioner's portfolio.

[2] The petition makes this allegation at ¶2 of NYSCEF #8. Respondent avers that Petitioner hired him as a super for the Building in his affidavit at ¶¶4 and 7 of NYSCEF #15.

[3] Both parties represent to the Court that they entered into the Lease with one another and annex the Lease to their papers. Respondent annexed the lease to his motion at NYSCEF #19. Petitioner annexed it to its submission to the Court at NYSCEF #44, accompanied by an averment of Petitioner's Regional Property Manager confirming that the parties entered into the Lease at ¶4 of NYSCEF #42.

[4] The verified petition makes this allegation at ¶4 at NYSCEF #8. Respondent concedes this point in his affidavit at ¶¶13-14 at NYSCEF #15.

employment.[5]

The Lease is entitled "EMPLOYMENT APARTMENT LEASE AGREEMENT". The Lease stated that Petitioner hired Respondent as the super; that "as incident to [Respondent's] employment" Respondent "will have the use of the subject premises … subject to the terms and conditions contained herein"; and that the Lease commenced on January 15, 2021 and will expire on January 31, 2026 unless Petitioner terminates the Lease on Respondent's breach therein.

The Lease states the following at ¶3:

> [Respondent] shall have use of the [subject p]remises as long as he remains employed with [Petitioner] free of charge …. In the event either party terminates the Employer-Employee relationship for any reason whatsoever, including with or without cause, then [Respondent] shall have ten (10) days from the date of termination to remain in possession of the [subject p]remises. … In the event [Respondent] remains in possession at the expiration of the ten (10) day period, [Respondent] shall pay rent at a rate of $3,000.00 per month. This amount shall increase by five (5%) percent on each respective November 1st during the lease term. … In the event [Respondent] remains in possession after its [sic.] employment has ended, [Respondent] is required to give [Petitioner] an amount equal to one (1) month of the current rent as a security deposit.

The Lease also states that upon Respondent's breach of the Lease, Petitioner may serve a default notice and that on continued breach of such a notice, Petitioner may serve a notice terminating the Lease.

After Petitioner terminated Respondent's employment, Petitioner commenced this proceeding. Respondent then moved for summary judgment in his favor. The Court denied the motion by an order dated March 21, 2022 ("the Order"). The Order held as follows:

> The dispute at hand is essentially whether [R]espondent is, as he claims, a tenant pursuant to a valid and enforceable lease agreement, or as [P]etitioner claims, simply holding over in an apartment that was solely to be occupied by him as the superintendent for the premises. The conflict presents a bona fide issue of fact more properly determined at

[5] The petition makes this allegation at ¶5, NYSCEF #8. Respondent avers on February 15, 2022 that he still resides in the subject premises as of that date, ¶1 at NYSCEF #15.

> trial. Further, evidentiary issues, if any, in this instance including but not limited to those pertaining to [the Lease] are more appropriately reserved for the trial court. …. Accordingly, and in light of the above, [R]espondent's motion is denied.

The Court subsequently transferred this matter to the trial part.

**Discussion**

The outcome of this proceeding turns on the Lease. If the Lease confers a tenancy upon Respondent even if his employment is terminated, Petitioner has no cause of action for possession. If the Lease is contingent on Respondent's employment, Petitioner has a cause of action for possession. Petitioner indicated in its submission to the Court that it intended to submit evidence at trial as to the understandings of Respondent and Petitioner's property manager as to the meaning of the Lease, in particular what it meant to provide that the Lease was incidental to Respondent's employment.

A lease is a contract. Vt. Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004), 255 Butler Assoc. LLC v. 255 Butler LLC, 208 A.D.3d 834, 836 (2nd Dept. 2022). The Court must first give due weight to the substance of the contract before looking to evidence of what was in the parties' minds. W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157, 162 (1990), Outstanding Transp., Inc. v. Interagency Council of Mental Retardation & Developmental Disabilities, Inc., 110 A.D.3d 1049 (2nd Dept. 2013), Ashwood Capital, Inc. v. OTG Mgmt., Inc., 99 A.D.3d 1, 7 (1st Dept. 2012). Accordingly, the Court first considers the content of the Lease before considering the question of testimony as to the parties' understandings of the meaning of the Lease.

Canons of contractual construction mandate an examination of the entire contract and consideration particular words in the light of the obligation as a whole and the intention of the

parties as manifested thereby. Chester Music Ltd. v. Schott Musik Int'l GmbH & Co. (In re Estate of Stravinsky), 4 A.D.3d 75, 81 (1st Dept. 2003). The Court should further construe a contract so as to avoid a finding of inconsistency, National Conversion Corp. v. Cedar Bldg. Corp., 23 N.Y.2d 621, 625 (1969), In re Estate of Sherez, 212 A.D.2d 536, 537 (2nd Dept. 1995), and reconcile seemingly inconsistent provisions if possible. 112 W. 34th St. Assoc., LLC v. 112-1400 Trade Props. LLC, 95 A.D.3d 529, 531 (1st Dept.), *leave to appeal denied*, 20 N.Y.3d 854 (2012).

The various provisions of the Lease cohere as a whole as a five-year lease which draws distinctions as to Respondent's liability for rent. Respondent is not liable for rent while Petitioner employs him and liable for rent when Petitioner does not employ him. Thus, the Lease provides that Respondent shall have use of the subject premises free of charge while he remains employed with Petitioner. The Lease further provides that if Petitioner terminates Respondent's employment, Respondent has ten days to remain in possession of the subject premises without incurring liability for rent. Respondent's continued possession at the end of the ten-day period triggers both Respondent's liability for rent and Respondent's obligation to provide one month's security deposit. The Lease contemplates that Respondent's may remain in possession after Petitioner terminates the Lease for a number of years, as the Lease provides that Respondent's rent shall increase by 5% per year on each respective November 1st during the term.

Petitioner argues that as the overarching purpose of the Lease is to house an employee of Petitioner, and as the Lease accordingly states that the Lease is an incident of Respondent's employment, the Lease is therefore ambiguous as to whether Respondent's tenancy would survive Petitioner's termination of Respondent's employment.

A contract is ambiguous if it is reasonably susceptible to more than one interpretation. Brad H. v. City of New York, 17 N.Y.3d 180, 186 (2011), Banco Espírito Santo, S.A. v. Concessionária Do Rodoanel Oeste S.A., 100 A.D.3d 100, 106 (1st Dept. 2012), 844 Westend LLC v. Boulos, 62 Misc.3d 144(A)(App. Term 1st Dept. 2019). The only way to construe the Lease so as to preclude Respondent's tenancy after Petitioner terminates Respondent's employment, however, would be to completely disregard the language in the Lease that Respondent must pay rent after Petitioner terminates Respondent's employment, the language that Respondent must pay a security deposit if Petitioner terminates Respondent's employment, and the language that Respondent's rent would increase in successive years after Petitioner terminates Respondent's employment. Disregarding all of these provisions of the Lease would violate a "cardinal" rule of construction against interpreting a contract so as to render words and provisions without effect. ARHC BSHUMMO01, LLC v. Big Spring Prop. Holdings LLC, 191 A.D.3d 519, 520 (1st Dept. 2021). Rather, the Lease addresses that it is incidental to Respondent's employment by conditioning his rent-free occupancy on his continued employment, not the tenancy itself. Accordingly, the Lease is not susceptible to more than one reasonable interpretation and is therefore not ambiguous. In the absence of ambiguity in a contract, parol evidence of the kind that Petitioner wishes to submit to the Court is inadmissible. Schron v. Troutman Sanders LLP, 20 N.Y.3d 430, 436 (2013).

A holdover proceeding is a special proceeding. RPAPL §701. In a special proceeding, the Court "shall" make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. CPLR §409(b). As demonstrated above, given the lack of dispute that Petitioner and Respondent entered into the Lease, that the Lease entitles

Respondent to possession even after termination of Respondent's employment, and that the proceeding was commenced during the pendency of the Lease term, the "pleadings, papers, and admissions" demonstrate that Petitioner does not have a cause of action against Respondent for possession by reason of Petitioner's termination of Respondent's employment. This proceeding is therefore ripe for the kind of summary disposition that CPLR §409(b) provides for.

Petitioner argues that the Order bars a summary disposition of this proceeding as per CPLR §409(b), based on the proposition that the Court has no authority to rule on a matter already reviewed by another judge of equal authority.[6] The law of the case doctrine is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as judges and courts of co-ordinate jurisdiction are concerned. RPG Consulting, Inc. v Zormati, 82 A.D.3d 739, 740 (2nd Dept. 2011).

Significantly, however, law of the case doctrine applies only to legal determinations that a Court resolved on the merits. Benjamin v. Yeroushalmi, 212 A.D.3d 758, 759 (2nd Dept. 2023), Perini Corp. v. City of N.Y., 122 A.D.3d 528, 528 (1st Dept. 2014). A denial of a motion for summary judgment is not an adjudication on the merits. Metropolitan Steel Indus., Inc. v. Perini Corp., 36 A.D.3d 568, 570 (1st Dept. 2007), Fairfield Beach 9th LLC v. Shepard-Neely, 74 Misc.3d 14, 16 (App. Term 2nd Dept. 2021). Compare Rufo v. Orlando, 309 N.Y. 345, 351

[6] Petitioner invokes "collateral vacatur." A Lexis search reveals that no appellate court has cited the doctrine of "collateral vacatur" since 1986, in the matter People v. Jennings, 69 N.Y.2d 103, 113-14 (1986). The decision in Jennings, supra, cites Spahn v. Griffith, 101 A.D.2d 1011, 1012 (4th Dept. 1984) in reference to "collateral vacatur." The decision in Spahn, supra, itself does not use the phrase "collateral vacatur" but instead states, "[t]he decision of the Judge who first rules in a case binds all courts of co-ordinate jurisdiction as 'the law of the case.'" Id. As the great bulk of the authority that addresses the issue uses the rubric of "law of the case," authority addressing law of the case doctrine guides the Court's analysis of this issue.

(1955), Pentacon, LLC v. 422 Knickerbocker, LLC, 165 A.D.3d 829, 830 (2nd Dept. 2018), Feinberg v. Boros, 99 A.D.3d 219, 224 (1st Dept. 2012)(an order denying a motion to dismiss is not preclusive as per law of the case doctrine). Rather, the denial of a motion for summary judgment "establishes nothing except that summary judgment is not warranted at this time." Fairfield Beach 9th LLC, supra, 74 Misc.3d at 16. A denial of a motion for summary judgment therefore does not necessarily establish that there is a fact issue to be determined at trial, Juarez by Juarez v. Wavecrest Mgmt. Team, 212 A.D.2d 38, 44 (1st Dept. 1995), *reversed on other grounds*, 88 N.Y.2d 628 (1996), Armetta v. Gen. Motors Corp., 158 A.D.2d 284, 285 (1st Dept. 1990), and does not preclude a court of coordinate jurisdiction from granting summary judgment. Juarez by Juarez, supra, 212 A.D.2d at 44.

The same standards and rules of decision that apply to a summary judgment motion apply to an adjudication of a special proceeding pursuant to CPLR §409(b). Matter of People of the State of N.Y. v. Quality King Distribs., Inc., 209 A.D.3d 62, 74 (1st Dept. 2022), Gonzalez v. City of New York, 127 A.D.3d 632, 633 (1st Dept. 2015), Port of N.Y. Auth. v. 62 Cortlandt St. Realty Co., 18 N.Y.2d 250, 255 (1966), *cert. denied sub nom.* McInnes v. Port of New York Auth., 385 U.S. 1006 (1967). As a denial of a prior summary judgment motion does not preclude a subsequent granting of summary judgment, then, a denial of a prior summary judgment motion in a special proceeding does not preclude its adjudication according to CPLR §409(b).

Accordingly, it is ordered that the Court dismisses this proceeding pursuant to CPLR §409(b), with prejudice to a cause of action sounding in possession based upon Petitioner's termination of Respondent's employment, and without prejudice to the causes of action and/or

defenses of either party arising from allegations concerning the Lease or otherwise.

As noted above, Respondent counterclaims for attorneys' fees. The Court shall restore this matter for a conference on this counterclaim on a date to be picked in consultation with counsel for the parties over email.

This constitutes the decision and order of the Court.

Dated: New York, New York
May 18, 2023

HON. JACK STOLLER
J.H.C.