2022-04-13

ZB Prospect Realty v. Olenick

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART

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ZB PROSPECT REALTY, Index No. 308104/20

Petitioner,

DECISION/ORDER

-against-

Mot. seq. nos. 1 & 2

MIRIAM OLENICK, ET AL.,

Respondents.

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WEISBERG, J.:

The following e-filed document listed by NYSCEF document numbers (motion nos. 1 & 2) 15-38 were read on these motions for summary judgment and for sanctions.

The following facts in this nonpayment summary eviction proceeding are undisputed. In 2017 the parties entered into a one-year written lease at the rent of $2,900.00. The lease provided that the apartment was not subject to any form of rent regulation. However, as the result of the building's participation in the J-51 tax abatement program, the apartment was in fact rent-stabilized. After expiration of the written lease between the parties in 2018, Respondents continued to pay rent at the rate of $2,900.00.

By notice from DHCR dated February 28, 2020, Respondents learned that their apartment was rent-stabilized. They continued to make monthly payments of $2,9000.00. In June and July 2020, Petitioner filed registrations with DHCR for the years 2014 through 2020 stating the apartment was rent-stabilized, and around the same time offered Respondents a rent-stabilized renewal lease based on a prior rent of $2,900.00. Respondents did not sign the lease, but they continued to pay $2,900.00 per month in rent through August 2020. Thereafter they offered to pay a rent of $1,125.20 per month, which Petitioner refused.

The building was built in 1915. It has never had and does not have a certificate of occupancy. Starting around 2012, Petitioner undertook, pursuant to a permit issued by the Department of Buildings, to have the cellar, or a portion of the cellar, converted to bedrooms and connected to the apartments on the floor above, creating two duplex apartments. After the completion of the work, Petitioner did not obtain a certificate of occupancy. But DOB issued a "Letter of Completion" which stated:

> Please be advised that the work related to the above application [Job # 320494201] is completed and was signed off in the Building Information System (BIS) on 1/10/2014.
>
> Because this job was filed as Directive 14 of 1975, the owner retained a registered professional engineer or registered architect, who certified that he/she inspected the work approved on this application and that it complies with the applicable laws, rules and regulations of the Department of Buildings.
>
> Based on the nature of the work filed on this application a new certificate of occupancy is not required.

Respondents have moved for summary judgment dismissing the petition on two grounds: first, that there is no agreement to pay rent between the parties upon which a summary nonpayment eviction proceeding can be predicated; and second, that building has no certificate of occupancy, and since alterations were made to the building, Petitioner cannot sue for unpaid rent in the absence of a certificate.

Agreement to pay rent

A nonpayment summary eviction proceeding does not lie unless it is predicated on an agreement to pay rent (*E.g. Underhill Ave. Realty, LLC v Ramos*, 49 Misc 3d 155[A], 2015 NY Slip Op 51804[U] [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2015]). Where no rent is paid or accepted after the expiration of the lease, there is no rental agreement upon which a landlord can sue (*265 Realty, LLC v Trec*, 39 Misc 3d 150[A], 2013 NY Slip Op 50974[U] [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2013]). But where rent is paid and accepted after the expiration of the lease, the landlord does have a cause of action in a nonpayment summary eviction proceeding where the tenant fails to pay thereafter (*Priegue v Paulus*, 43 Misc 3d 135[A], 2014 NY Slip Op 50662[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2014]), *but cf. West 152nd Assoc., L.P. v Gassama*, 65 Misc 3d 155[A], 2019 NY Slip Op 51926[U] [App Term, 1st Dept 2019] [where a month-to-month tenancy is created, once the tenant stops paying rent there is no longer a rental agreement that would give rise to a nonpayment summary eviction proceeding]).

Here, by Respondents' payment and Petitioner's acceptance of rent after expiration of the written lease agreement (which continued after Respondents learned that their tenancy was rent-stabilized) created an implied month-to-month tenancy (*see Priegue*, 43 Misc 3d 135[A]). Respondents make much of the fact that they were initially misinformed, and their lease

erroneously asserted, that their tenancy was not rent-stabilized. But this fact alone does not make the lease invalid or unenforceable.

In a hypothetical fact pattern where 1) Tenant 1 is rent-stabilized with a legal regulated rent of $1,000.00; 2) Tenant 1 vacates; 3) Tenant 2 moves in, signing a lease also for $1,000.00, but with such lease asserting that the apartment is not rent-regulated, there is no argument that lease is unenforceable or invalid. Similarly, while questions may or may not remain here as to whether the rent set forth in the lease is correct or is an overcharge, or is otherwise improper or collectible, it is not the case that there is no agreement to pay rent at all so as to conclude that there is no basis at all for the maintenance of this proceeding.

Certificate of occupancy

For buildings built before April 18, 1929, no certificate of occupancy is required except in those cases where there have been changes or alterations to the building (Mult Dwell Law § 301). Thus, in *208 Himrod St., LLC v Irizarry* (42 Misc 3d 145[A], 2014 NY Slip Op 50344[U] [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2014]), where the landlord has altered the building by adding three "illegal" apartments, "the addition of these apartments constituted substantial alterations to the building" so as to require the building to have a certificate of occupancy where it previously did not. Here, however, not only is the nature of the alteration fundamentally different, but the circumstances are different as well.

Whereas in *Irizarry* the work was undertaken illegally, without DOB permits, the work undertaken by Petitioner was completed with the approval of DOB. After the completion of the work, DOB issued a letter of completion, which "is issued only in circumstances where a certificate of occupancy is not required upon completion of the permitted work" (NY Building Code [Administrative Code of City of NY, tit 28, ch 1] § BC 101.5). In this court's view, the issuance of a letter of completion, and thus DOB's determination that a certificate of occupancy is not required, is conclusive as to whether the alterations to the building trigger the Multiple Dwelling Law requirement that the building have a certificate of occupancy, at least with respect to whether those issues can be litigated in this court. Just as New York City Charter § 645(b)(3) invests DOB with the power to issue a certificate of occupancy, subject to review only by the board of standards and appeals (*Byrne v Board of Standards and Appeals of City of New York,* 5 AD3d 261 [1st Dept 2004]), this court concludes that DOB's determination that a certificate of occupancy is not required is not reviewable by this court.

Sanctions

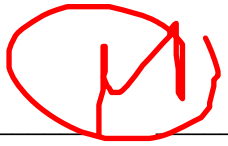
Under the circumstances here, the court does not find that either party has engaged in frivolous conduct that should be subject to sanction, at this time.

Accordingly, it is ORDERED that Respondent's motion for summary judgment and sanctions and Petitioner's motion for sanctions are denied; and it is further

ORDERED that the proceeding will be transferred to another part and calendared for all purposes.

This is the court's decision and order.

Dated: April 13, 2022



Michael L. Weisberg, JHC