2019-11-22

IWC 827-829 Halsey Street LLC v. Penny

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

IWC 827-829 Halsey Street LLC

Petitioner

Against

DECISION/ORDER

Index No. 71954/17

Paralee Osbourne Penny; "John" "Doe"; "Jane" "Doe"

Respondent

Petitioner commenced this holdover proceeding on June 12, 2017 after serving respondents, Paralee Osbourne Penny; "John" "Doe"; "Jane" "Doe", with a Seven (7) Day Notice of Termination which terminated her tenancy on the grounds that she was committing or permitting a nuisance in the subject apartment. Respondent, Paralee Osbourne Penny, appeared by counsel and interposed an answer with the following affirmative defenses: petition fails to state a cause of action for nuisance; the predicate notice is vague; petition fails to state a cause of action for subletting; and respondent's fourth affirmative defense and first counterclaim is for violation of the warranty of habitability. Respondent also asserted counterclaims for correction of Housing Code violations and attorney's fees. No other respondent appeared in this proceeding.

Petitioner's witness, Claudia Alabau, testified that she is employed by Choice Management as a property manager, and she manages the subject building which is owned by petitioner. Ms. Alabau stated that she is familiar with respondent and knows her to be the tenant of record for the subject apartment.

Ms. Alabau testified that petitioner requested that their attorney prepare a Notice of Termination to serve on respondent because petitioner was informed that there were squatters in the boiler room, and they were connected to respondent. After notice was served, Mr. Alabau stated that respondent did not vacate, and a Notice of Petition and Petition were served on respondent. Petitioner requested that the court take judicial notice of the holdover proceeding under Index Number 97792/16 to which respondent had no obligation.

On cross examination, Ms. Alabau maintained that she has been employed by Choice Management as a property manager for the subject building since November 2017. Ms. Alabau acknowledged that she was not employed by Choice Management when this case was commenced, and she has no personal knowledge of the events which formed the basis for this proceeding. Ms. Alabau stated that petitioner requested that this case be commenced against respondent.

On redirect, Ms. Alabau testified that she had conversations with Jennifer Almonte, the prior property manager, regarding this case against respondent.

Petitioner's witness, Nicole Williams, stated that she is an Investment Associate at IWC Capital Management (hereinafter, "IWC"), and she serves as the liaison between her company, IWC, and Choice Management. Ms. Williams stated that she acts on behalf of IWC when Choice Management brings matters regarding the buildings to IWC's attention.

Ms. Williams testified that she is familiar with the subject building, and she explained that she was present for the eviction of squatters from the basement in or about June 2017. Ms. Williams stated that the Marshal came to open the basement door, and a locksmith changed the locks to the basement. According to Ms. Williams, while the locks were being changed, respondent came downstairs to the basement and told her that she needed a copy of the new keys because she gives service providers access into the building. Ms. Williams then informed respondent that it was the superintendent's responsibility to give the service providers access to the basement. Ms. Williams recalled that respondent stated that she was not familiar with the superintendent and she was the only superintendent for the building. Ms. Williams stated that respondent continued to assert that she needed a copy of the keys.

Ms. Williams recalled that during the eviction, she observed partitions in the basement which she had not previously observed. Ms. Williams stated that she visited the subject building a couple of months prior to the scheduled eviction, and while walking through the entire building, she did not observe partitions in the basement.

Ms. Williams recounted that petitioner became aware of squatters in the basement because there were electrical problems in the building. Ms. Williams stated that service providers, who were contracted to correct the electrical problems, had difficulty gaining access to the basement because of the squatters. While the electrical problems were not corrected, Ms. Williams stated that she did not contact other additional service providers because petitioner had already begun the process of filing a proceeding in court to evict the squatters, and petitioner's goal was to eradicate the problem with the squatters first.

Ms. Williams stated that after the eviction, the basement area was empty and there were no squatters. Ms. Williams added that she did not provide respondent with a copy of the key to the basement, and she did not allow respondent to handle any superintendent work for the building.

On cross examination, Ms. Williams testified that she was present during the eviction and she was outside of the building when the Marshal arrived. She stood on the upper level and did not enter the basement until the locksmith changed the locks. Ms. Williams stated that there are stairs that lead into the basement, and she observed respondent coming from the first-floor apartment and into the basement. Ms. Williams also stated that she observed respondent coming down the basement stairs without assistance.

Ms. Williams stated that she has visited the subject building approximately three (3) times in the past three years, including the date of the eviction. Ms. Williams recalled that when she visited in 2015, she did not observe respondent or visit her apartment. Ms. Williams stated that she did

not visit respondent's apartment at the time of the eviction. Ms. Williams stated that in her most recent visit to the subject apartment, she did not observe respondent or her apartment. Ms. Williams acknowledged that she is aware that respondent resides in the first apartment on the first floor of the subject building.

On redirect, Ms. Williams stated that she is aware that respondent is the tenant in Apartment #1R because the property manager confirmed that apartment on the first floor was leased to respondent.

Petitioner's witness, Jennifer Almonte, testified that she has been employed as a property manager at BRP Companies since March 2018. Previously she was a property manager at Choice New York Management, and she is familiar with the subject building because she managed the property from 2016 until March 2018. Ms. Almonte stated that she was familiar with this court proceeding because she recommended that her client begin a proceeding when squatters were discovered in the basement in approximately November 2016. Ms. Almonte recalled that there was a makeshift apartment in the basement, and the boiler room contained clothing, furniture, bags, gym equipment and a kitchen with a gas stove was located adjacent to the boiler room.

Ms. Almonte stated that she is familiar with respondent and knows that she resides in the subject apartment. Ms. Almonte recalled that during her encounter with the squatters, respondent visited the basement and respondent told her that the squatters were her [respondent's] sons. Ms. Almonte described the squatters as a tall man was with dreads, a shorter man of medium build and bald, but she could not recall their names. Ms. Almonte stated that respondent told her that she [respondent] was the superintendent and had access to the basement. Ms. Almonte further recalled that respondent told her that her sons could live in the basement, and her sons had resided in the basement for a long time.

Ms. Almonte recalled that she had encounters with the squatters until they were evicted. She recalled a time when the basement door was broken by the squatters, and she knew the squatters broke the door because they were the only people who had access to the basement. Ms. Almonte stated that she visited the building approximately 3-4 times between November 2016 until June 2017, and she observed respondent in the hallway or on the stoop sometimes alone or surrounded by loiterers.

Ms. Almonte testified that she never visited the subject building alone because she did not feel safe, as she has been threatened by the people who resided in the basement. Ms. Almonte stated that after the eviction, she did not observe any squatters in the building.

On cross examination, Ms. Almonte testified that she is employed by petitioner's agent and worked with petitioner from July 2016 until she ceased working with them in approximately March 2018.

Further, Ms. Almonte testified that on November 4, 2016 she visited the subject building with the superintendent to investigate complaints from vendors because they informed her that they

were unable to access the basement. Ms. Almonte stated that when she went to the basement to investigate the complaint, she observed the squatters arriving at the building with respondent.

Ms. Almonte stated that she determined that the gentlemen were squatters because she had not previously observed them in the building and they did not have a lease. In addition, the Certificate of Occupancy does not permit residential occupancy of the basement. Petitioner commenced an eviction proceeding against the squatters, and she signed an Affidavit attesting to the fact that she went to the building on November 4, 2016 and discovered squatters in the basement. Ms. Almonte acknowledged that she signed the Affidavit in February 2017. Ms. Almonte acknowledged that her Affidavit did not include the fact that she had a conversation with respondent on that date when she encountered the squatters.

According to Ms. Almonte, she last visited the subject premises in February 2018, and no one was residing in the basement.

Petitioner's witness, Rachael Bonner, testified that she is employed as a Property Manager at Akelius Real Estate, and she previously worked for Choice New York Management as an Assistant Property Management from January 2016 to November 2017. Ms. Bonner testified that she worked exclusively with petitioner and the subject apartment building. Ms. Bonner testified that she is familiar with this proceeding because she assisted Jennifer in dealing with the issues surrounding the squatters in the basement of the subject building.

Ms. Bonner stated that she learned of the issue with the squatters when she investigated the property after being assigned to this building. Ms. Bonner explained that after her investigation, she noticed that there was an issue with access to the basement because there were a lot of men hanging out in the front of the building which made it intimidating to access the basement. The basement housed the boiler, meters and electrical wiring which serviced the building, and the squatters refused to give access to the basement. Ms. Bonner recalled that there were two gentleman, one woman and two children who lived in the basement in approximately November 2016, and vendors were unable to gain access to the basement. Ms. Bonner recalled that when the boiler had to be serviced, the squatters would not grant access to allow the boiler repairmen into the basement. In addition, when the electrical wiring needed to be serviced, the squatters refused to give access. Ms. Bonner testified that she visited the subject building over 20 times, and she felt very intimidated going to the building because of the individuals in the basement during the entire time that she managed the subject building.

Ms. Bonner testified that she is familiar with respondent, and acknowledged that respondent resided in the subject apartment. Ms. Bonner stated that respondent had access to the basement, and respondent told Ms. Bonner that she let her sons, her son's girlfriend and their children into the basement. Ms. Bonner stated that respondent's apartment is located on the first floor of the subject building, and there were problems with respondent leaving the front door of the building open, which allowed people to enter the building. In addition, the back entrance of the basement was locked by the squatters. The front entrance of the basement is located under respondent's apartment at the front of the building, and the squatters refused to give anyone access. Ms. Bonner testified that petitioner changed the locks and doors of the basement to secure the area from the squatters, and she saw that the squatters opened the door with crow bars and broke the

door and locks. Ms. Bonner testified that on one occasion, she spoke with respondent and respondent informed her that she told the squatters to break the door because she wanted to have access to the basement and the Con Edison meters.

Ms. Bonner testified that after evicting the squatters in approximately June or July 2017, Ms. Bonner noticed that respondent was not happy, and respondent told her that she believed she was entitled to have access to the basement. Ms. Bonner noticed that after the eviction, she saw the squatters in front of the subject building with respondent approximately five (5) times. Ms. Bonner described the individuals as one black gentleman who was tall and slim, another black gentleman who was short, and a black woman with two (2) children. Ms. Bonner also observed respondent having conversations with the individuals who had resided in the basement.

On cross examination, Ms. Bonner testified that after the eviction which took place in 2017, she observed the same individuals inside of the basement. Ms. Bonner stated that she visited the subject building multiple times and since the eviction, she visited the basement approximately 10 times. Ms. Bonner stated that on one occasion, there was a leak which stemmed from the first floor, and upon accessing the basement, she observed the same people who were previously evicted from the basement. Ms. Bonner stated that the last time she was at the subject building was October 2017, and she hasn't returned to the subject since that time.

On redirect, Ms. Bonner stated that after the eviction, she did not observe respondent with the squatters when she saw the squatters in the basement. Ms. Bonner recalled that she observed respondent inside the vestibule of the subject building with the squatters after the eviction approximately 3 or 4 times.

Petitioner rested, and respondent moved for an order of judgment pursuant to CPLR 4401 arguing that petitioner failed to meet its' prima facie burden of proving nuisance as a matter of law. Respondent argued that petitioner's evidence did not establish its' right to judgment, and continuing with the trial would force respondent, who is an approximately 80-year-old woman with health conditions, to testify which is unjust and would present a hardship for her.

Respondent argued that the Court of Appeals has held that a nuisance involves a continuous invasion of rights, a pattern of continuity or reoccurrence of objectionable conduct, and something more than a mere annoyance must be shown to prove nuisance. In addition, a high threshold of proof is required for an eviction. Respondent contended that petitioner's witnesses failed to allege any conduct caused by respondent which resulted in any alleged nuisance. Respondent argued that petitioner did not produce a witness who alleged that respondent herself tampered with any locks, broke into the basement with a crow bar, broke security apparatus or that she had any control over the individuals who engaged in any of the alleged acts. Petitioner also acknowledged that an eviction took place in June 2017, and petitioner presented no evidence to establish that there has been illegal activities since October 2017. Further, respondent argues that there is no allegation that there is anyone living in the basement, or that there was any issue with securing the basement. Respondent has resided in this apartment for more than 47 years, and her rent is only $600.00 per month, and respondent claimed that petitioner's desire to evict respondent is rooted in greed.

Petitioner contends that this case was filed as a fundamental breach of the tenancy, and respondent was not given the opportunity to cure. Petitioner maintained that the testimony at trial established that respondent is directly connected to the individuals who resided in the basement, respondent possessed a key to the boiler room, and respondent knew the individuals to whom she gave access to the basement. In addition, after the eviction, the testimony at trial established that these individuals were observed outside of the building. Petitioner stated that the seriousness and egregiousness of the conduct warrant judgment as a matter of law. Petitioner argued that the squatters installing a kitchen in the basement created a fire hazard for other occupants in the building.

The court reserved decision on the motion.

Respondent, Paralee Osbourne Penny, testified that she is 85 years old and she has resided in the subject apartment for a long time, although she could not recall how long. Ms. Penny testified that her daughter helps her pay her rent, and she could not recall what amount she pays in rent. Ms. Penny also stated that she did not have a lease for the subject apartment.

Ms. Penny stated that she does not have keys to the basement, and never had keys to the basement.

On cross examination, Ms. Penny testified that she did not have keys to the boiler room. Ms. Penny stated that her sister, Marie, resides in the subject apartment. Ms. Penny stated that she has two children whose names are Shanice and Aaron. Ms. Penny stated that Aaron resided in her apartment when he was a child, and she was not aware where he currently resided. Ms. Penny stated that he did not live in the boiler room. Ms. Penny stated that the last time she saw her son, Aaron, was approximately two (2) days ago.

Ms. Penny explained that she had observed people in the boiler room, but she did not know who they were. Ms. Penny stated that she was not familiar with anyone by the name of Latif Wright, Ahsan Vinson or Darron Littles, or with any of the squatters who were evicted from the boiler room.

The Notice of Termination alleges that respondent's tenancy was terminated on the grounds that she was "committing or permitting a nuisance in such housing accommodation or the building containing such housing accommodation; or are maliciously, or by reason or gross negligence, substantially damaged the housing accommodation, or you are engaging or permitting your occupants to engage in a persistent and continuing course of conduct evidencing an unwarrantable, unreasonable, or unlawful use of the property to the annoyance, inconvenience, discomfort or damage to others, the primary purpose of which is intended to harass the owner or other tenants of occupants of the same, by interfering substantially with their comfort or safety (*see* Notice of Termination)." In addition, the Notice of Termination details that squatters resided in the basement of the subject building, and alleges that the squatters received access from respondent. Moreover, the Notice of Termination states that the at least two of the squatters admitted in court under a proceeding commenced under Index Number 97792/16 that they received permission from respondent to enter the boiler room. Petitioner alleged that the squatters subdivided the boiler room into several rooms for residential use and caused harm to

petitioner and other tenants. It was alleged that the squatters prohibited contractors from entering the boiler room, and the building's superintendent did not feel safe as a result of the squatters' presence. Further, petitioner alleged that respondent was responsible for the nuisance behavior caused by the squatters as a result of her alleged relationship to one, or more, of the squatters. Petitioner also stated in the Notice of Termination that "the totality of the aforementioned conduct is a nuisance under the rent stabilization law and code and is not subject to a cure. Therefore, the Owner/Landlord is not obligated to serve a notice to cure prior to service of this notice of termination."

A nuisance involves conduct that is recurring, frequent, continuous or extremely dangerous, which constitutes an unreasonable or unlawful use of the property to the annoyance, inconvenience, discomfort or damage of others that has the primary purpose of intentionally harassing the landlord, other tenants or occupants by substantially interfering with their comfort or safety. *Ankamah v. Abusi*, NYLJ, Mar. 20, 2019 at 31 *citing Domen Holding Co. v. Aranovich*, 1 NY3d 117, 769 N.Y.S.2d 785 [2003]. Nuisance imports a continuous invasion of rights and a pattern of continuity or recurrence of objectionable conduct *Id. citing Frank v Park Summit Realty Corp.*, 175 A.D.2d 33, 34, 573 N.Y.S.2d 655 [1st Dept 1991], *mod on other grounds* 79 N.Y.2d 789, 579 N.Y.S.2d 649 [1991].

Further, for activity to constitute a nuisance, the activity must interfere with a person's interest in the use and enjoyment of the land. *Id.* (*see* Restatement Second of Torts § 821D; *see also Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, [1977]). In addition, not every annoyance will constitute a nuisance (*Id. citing* 2 Dolan, Rasch's Landlord and Tenant--Summary Proceedings § 30:60, at 465 [4th ed]).

Petitioner's witnesses, all of whom were either affiliated with, previously or currently employed by petitioner's managing agent Choice Management, similarly testified as to events related to squatters who were residing in the basement of the subject building. At trial, petitioner's witnesses maintained that respondent was familiar with the squatters, gave the squatters access to the basement, and authorized the squatters to damage the basement door and locks. However, petitioner did not present any evidence to substantiate those claims. Petitioner did not establish that respondent was responsible for granting access to the squatters, that she continued to give the squatters access to the basement and that she was responsible for the servicemen's inability to enter the basement. Further, petitioner did not establish that respondent engaged in any recurring, frequent, continuous or extremely dangerous activities for the primary purpose of intentionally harassing petitioner or the other occupants of the building. *Domen Holding Co. v. Aranovich*, 1 NY3d 117, 769 N.Y.S.2d 785 [2003]. The issues related to access to the basement came directly from the squatters, and petitioner failed to connect the squatters to respondent to show that respondent authorized and had control over the squatters and allowed them to engage in any dangerous behavior. Although petitioner's witnesses testified that respondent stated that the squatters were her sons, and petitioner's witnesses observed respondent engaging in conversation with the squatters, this testimony alone was insufficient to attribute the responsibility for the squatters to respondent.

Respondent testified that while she observed people in the basement, she was not familiar with anyone named Latif Wright, Ahsan Vinson or Darron Littles, she did not have keys to the

basement, and she was not familiar with any of the squatters in the basement. There is a high threshold of proof required to warrant the relief of an eviction in a nuisance holdover (*see Domen Holding Co. v. Aranovich*, 1 NY3d 117, 125, 769 N.Y.S.2d 785 [Ct of Appeals, 2003]) and petitioner has failed to meet their burden of establishing nuisance as a matter of law.

Petitioner, however, maintains that this action is based on breach of a fundamental breach of respondent's tenancy, and not nuisance.

Pursuant to Rent Stabilization Code § 2524.3 (a), an action to recover possession of a housing accommodation may be commenced where a tenant is violating a substantial obligation of his or her tenancy other than the obligation to surrender possession of such housing accommodation, and has failed to cure such violation after written notice by the owner that the violations cease within 10 days; or the tenant has willfully violated such an obligation inflicting serious and substantial injury upon the owner within the three-month period immediately prior to the commencement of the proceeding. 9 NYCRR § 2524.3 (a).

A clear reading of the statute indicates that a Notice to Cure and a Notice of Termination are essential predicates to a proceeding commenced pursuant to RSC §2524.3(a). Further, the termination notice must contain specific mention that the breach has not been cured. *Ankamah v. Abusi*, NYLJ, Mar. 20, 2019 at 31 citing 31-67 *Astoria Corp v. Landaira*, 54 Misc3d 13(A) [App Term, 2nd Dept, 2017].

However, while Rent Stabilization Code 2524.3(a) requires a landlord to provide a 10-day opportunity to cure a substantial violation of a tenant's lease, this opportunity to cure is not required where the tenant has "willfully violated such an obligation inflicting serious and substantial injury upon the owner within the three-month period immediately prior to the commencement of the proceeding (*see* 9 NYCRR § 2524.3 (a); *Clent Realty Co., L.P. v Levine*, 61 Misc. 3d 260, 78 N.Y.S.3d 915 [Nassau Dist Ct., 2018])."

In the instant matter, petitioner's Notice of Termination states that respondent's actions breached her tenancy, since "respondent is in violation of Rent Stabilization Code § 2524.3 (a), (h) and RPL § 226-b because the presence of the squatters resulted in an unauthorized sublet in the subject building and/or subject apartment." There was no proof of a sublet, and petitioner failed to connect respondent with the presence and actions of the squatters, whom petitioner's witnesses had stated had been evicted from the basement.

Moreover, this proceeding was commenced on June 12, 2017, and three months prior to the commencement of this proceeding was approximately March 12, 2017. The file in the Housing Court proceeding under Index Number 97792/16 reflects that petitioner was granted a Judgment of Possession March 7, 2017, and execution of the warrant was stayed through June 2, 2017. Upon information and belief, execution of the warrant was completed on June 9, 2017, three (3) days prior to the commencement of the instant proceeding. Petitioner did not allege any actions by respondent to indicate any willful violation of such an obligation under respondent's lease which inflicted serious or substantial injury upon petitioner within three-months immediately prior to the commencement of this proceeding. As such, petitioner was required to provide a 10-

day opportunity to cure any alleged substantial violation of respondent's lease, which petitioner has failed to do.

The Notice of Termination further states that respondent is in violation of Rent Stabilization Code § 2524.3 (a), (h) and RPL § 226-b because the presence of the squatters resulted in an unauthorized sublet in the subject building and/or subject apartment. A sublet is defined as a transfer of the tenant's interest in whole or in part. *Lomax Holding Co. v. Calitri*, 117 Misc. 2d 941, 461 N.Y.S.2d 152 [App Term, 1st Dept, 1983]. There was no evidence that respondent had an interest in the basement or that respondent transferred any part of her interest in the subject apartment.

In *Rockaway One Company, LLC v. Califf*, 194 Misc 2d 191, 751 NYS2d 670 [App Term, 2nd Dept., 2002], the Appellate Term, Second Department held that a petitioner could proceed on alternative grounds where the grounds exist for the maintenance of both a nuisance holdover and a holdover based on a breach of a substantial obligation of the lease "without the procedural prerequisites of the one becoming engrafted on the other." Id. citing *Williamsen v. Bugay*, 21 Misc. 3d 1128(A), 875 N.Y.S.2d 824 [Civ Ct, Kings County, 2008]. However, whether this case is viewed as a nuisance holdover or a breach of tenancy, it is clear that petitioner has failed to meet its burden to prove entitlement to judgment as a matter of law.

Based on the foregoing, respondent's motion is granted, and the petition is dismissed.

This constitutes the decision and order of the court.

Dated: Brooklyn, New York
November 22, 2019

HON. CHERYL J. GONZALES

Cheryl J. Gonzales, JHC