2022-05-19

88 Ave. Realty De LLC v. Castro

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88 Ave. Realty De LLC v Castro
2022 NY Slip Op 22168
Decided on May 19, 2022
Civil Court Of The City Of New York, Queens County
Sanchez, J.
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Decided on May 19, 2022

Civil Court of the City of New York, Queens County

88 Avenue Realty De LLC, Petitioner,

against

Yubelyn Castro a/k/a YUBELYN CRUEL CASTRO, PATRICK DOE, JOHN DOE and JANE DOE, Respondents.

L & T Index No. 302691/22

For Petitioners: Rosenberg & Estis PC

For Respondents: Nicole Ramon, Esq

Enedina Pilar Sanchez, J.

Procedural History

This is an alleged illegal lockout proceeding filed as an emergency order to show cause. Petitioner states that it is the owner of the building described as 148-37 88th Avenue, Jamaica, New York 11435. Respondents were in possession of Apartment 8F located within

the building. There is no dispute that petitioner itself was not ever in physical possession and has never resided therein.

The Order to Show Cause on an alleged illegal lockout was initially denied by the Housing Court. Hon. Lansden had "*Declined to sign for failure to state a cause of action. This is without prejudice to [file an] appropriate holdover proceeding."*

Petitioner filed an application to the Supreme Court Appellate Term pursuant to *CPLR 5704(b)*. The Appellate Term granted petitioner's application and the matter was calendared in the alleged illegal lockout part of the Housing Court. On March 14, 2022, the return date of the Order to Show Cause, respondent Yubelyn Castro a/k/a Yubelyn Cruel Castro appeared by counsel. An amended notice of appearance and answer were filed. The matter was adjourned for a hearing.

On March 22, 2022, prior to the hearing, the attorneys uploaded a stipulation to NYSCEF. The Court reviewed the stipulation of settlement. Foremost, the stipulation included language that the caption of the alleged illegal lock out was now a "Notice of Petition and Petition." Counsels were informed that the subject matter was filed as an Order to Show Cause and the stipulation should recite the accurate description of the case pending before the court.

Counsels were informed that the stipulation raised questions and concerns as to jurisdiction and *ultra vires.* The stipulation contains clauses that raise questions about due [*2]process, remedies unavailable in an alleged illegal lockout case, and are contrary to public policy.

The stipulation states that a February 10, 2022 lease exists and

- that the respondents admit to allegations contained in the petition which include allegations of criminal acts pursuant to the Penal Law, and

- that a final judgment of possession and warrant of eviction will issue to petitioner and

- that the alleged lockout is renamed as "Notice of Petition and Petition" and

- that an indemnity clause provision and harmless clause for "*any and all costs and expenses including reasonable attorneys fees"*and

- that there are payments for "use and occupancy" and

- that there is a modification of lease terms to include "*liquidated damages [of] a sum equal to $500.00 for each calendar day between February 15, 2022 and the date on which Respondents quit and surrender the Premises or Petitioner otherwise obtains vacant possession of the Premises*" and

- that unspecified money judgment "*for any and all sums due under this stipulation*."

- and that the Housing Court shall retain jurisdiction.

Discussion and Conclusion

Petitioner brings this case pursuant to *RPAPL Section 713(10)* which is the only way to file an emergency case when someone has been removed from possession without the benefit of legal process. See, *Watson v NYCHA-Brevoort Houses*, 70 Misc 3d 900 (Civ. Ct. Kings Co. 2020). Also, RPAPL§711 provides that *"[n]o tenant or lawful occupant of a housing accommodation shall be removed from possession except in a special proceeding*," if he or she has been in possession for thirty consecutive days or longer. See, *Vatel v. Wills*, 2022 NY Slip Op 22013 (Civ. Ct. NY Co. 2022).

The Court acknowledges that this is the only way to file an emergency case in Housing Court. A temporary restraining order (TRO) could have been sought in Supreme Court.

The undisputed facts indicate that the petitioner was not ousted from the subject premises. Petitioner retained the services of YDC, Inc d/b/a REZI "*to market and implement the leasing process*." (Affidavit Lora ¶ 2). The leasing agent rented the space to respondents, a lease was signed, and the keys delivered. The pleadings as to the validity of the lease do not and cannot constitute an ouster under *RPAPL Section 713(10).* A failure to exercise due diligence in renting an apartment is not the basis for an alleged illegal lockout proceeding.

Petitioner seeks to remove the respondents from possession. That is called an eviction. The eviction is accomplished by filing a holdover or a non-payment proceeding by notice of petition and petition. Petitioner argues that it must be restored because the lease was given on false basis presented by a respondent. Petitioner's pursuit of an alleged illegal lockout is simply untenable because petitioner was not in possession and was not removed from the apartment without the benefit of legal process. Petitioner is the landlord. Its leasing agent tendered the keys and lease to the respondents. Petitioner's remedy would be to file a holdover in Housing Court or file an action in Supreme Court for declaratory relief and for all the remedies available under the equitable powers of the Supreme Court.

The alleged illegal lock out case seeks to circumvent the predicate notice provisions mandated by Article 7 of the *Real Property Actions and Proceeding Law*. The Appellate Term [*3]has stated that a landlord cannot "*short-circuit the procedural requirements of a summary proceeding by way of a counterclaim." Martinez v. Ulloa,* 50 Misc 3d 45 (App. Term, 2nd Dept. 2015). In *Martinez v. Ulloa*, the tenant as the petitioner filed the unlawful entry and detainer summary proceeding pursuant to *RPAPL §713(10).* The landlord-respondent filed a cross motion seeking a judgment of possession which was denied. The Term explained: *"While RPAPL 743 provides for the assertion of a legal counterclaim in a summary proceeding, it does not allow a respondent to circumvent the requirements of RPAPL Article 7 for the maintenance of a summary proceeding to obtain a judgment of possession."* at 48.

Petitioner, as the owner of the building, was never in physical possession of the apartment. Petitioner pleads that the respondents was given possession pursuant to a lease. When this alleged illegal lockout was filed, a physical ouster of the petitioner had not taken place.**[FN1]**

An alleged illegal lockout is meant to address an emergency and to determine if someone should be restored to possession after an ouster occurred without the benefit of legal process. See, *Romanello v. Hirschfield, 98 AD2d 657, (1st Dept., 1983),* aff'd as modified *63 NY2d 613 (1984); Mondrow v. Days Inns Worldwide, Inc.*, 53 Misc 3d 85 (App. Term, 1st Dept. 2016); *Truglio v. VNO 11 East 68th Street, LLC.*, 35 Misc 3d 1227(A) (Civ Ct. NY Co. 2012).

As the petitioner itself was not in actual possession, there can be no basis for it to seek restoration. Petitioner may be entitled to other relief but not through *RPAPL Section 713(10).*

Petitioner fails to state a cause of action because restoration is not the ultimate remedy sought; the ultimate remedy sought is an eviction and a warrant of eviction. Pursuing an alleged illegal lockout claim when the landlord-petitioner was not in possession is an attempt to circumvent the predicate notice requirements of *RPAPL Article 7.* It is, in effect, an attempt to place a case on the emergency calendar when it is not an emergency. The emergency calendars are meant to address actual emergencies, that means when someone has been ousted without the benefit of legal process and is homeless. Linguistic constructions do not change the requirement that one seeking to be restored to possession must have been ousted from possession to be within the operative language of the section. See, *Tavares v. Tavares*, 2021 NY Slip Op.50386(U) (App. Term, 1st Dept.) absent an issue of possession

arising from an alleged ouster the petition must be treated as academic rather than on the merits and it must be dismissed. See, *Ramjohn v. Khan*, 2022 NY Slip Op 50104(U) (Civ. Ct. Queens Co. 2022).

Petitioner's request for a final judgment of possession and warrant of eviction, as contained in the proposed stipulation, was not so ordered in the provident analysis and discretion of this Court. There was no hearing to determine that an ouster occurred within the meaning of an alleged illegal lockout case. The stipulation categorically shows that petitioner and respondents entered into a landlord and tenant relationship, albeit based upon questionable documents. Petitioner was not in possession of the apartment but is the owner of the building. Petitioner's agent may have failed to exercise due diligence in the scrutiny of documents it reviewed, and this may go to the subject of a breach of contract, but it does not lie in an alleged illegal lockout case.

Judicial discretion to decline to approve a stipulation is within the fundamental powers of the judiciary.[FN2] A stipulation cannot go beyond the subject matter jurisdiction of the Housing Court as provided in *New York City Civil Court Act §110.*

When a "two attorney stipulation" is presented to the Housing Court is that the end of the inquiry? Does it mean that the Housing Court must approve a stipulation because it's a "two attorney stipulation?" Is the Housing Court expected to act as a rubber stamp? Should the Housing Court accept and approve an admission of a penal law without regard to the rights of the accused under the Constitution of the United States and the laws of the State of New York? If it did so, does that mean that a respondent can now be treated as a defendant and the Housing Court should engage in allocution of a guilty plea? What does a guilty plea or admission of the penal law mean when accomplished through the Housing Court? Can such a guilty plea result in the eventual sentence and incarceration of the respondent? Does this mean that Housing Court is a place where litigators can bypass the protocol of entering a guilty plea under the penal law?

Courts are aware that protocols must be followed upon entering a guilty plea. A plea agreement under the penal law must be approved by the court. *People v. Harris*, 61 NY2d 9 (1983); *People v Pellegrino*, 26 NY3d 1063 (2015). The trial judge accepting a guilty plea has the vital responsibility to make sure that the accused has full understanding of what the plea means and its consequences. Waiver of a guilty plea allocution would be contrary to public policy. Most recently on April 20, 2022, in *People v. Mothersell*, 2022 NY Slip Op 02661, the Appellate Division wrote, "*A trial court is constitutionally required to ensure that*

a defendant, before entering a guilty plea, has a full understanding of what the plea entails and its consequences" citing (*People v Belliard*, 20 NY3d 381, [2013]; *People v Streber*, 145 AD3d 1531, 1532, [4th Dept 2016]). See also, *Riverside Syndicate, Inc. v. Munroe*, 10 NY3d 18 (2008), finding that a stipulation waiving Rent Stabilization cannot be enforced as it is contrary to public policy.

As the stipulation contains paragraphs and admissions which are potentially incompatible with the Constitution of the United States and the State of New York, the Court declines to approve the stipulation. The stipulation that was filed cannot be accepted by the Court. Nor can the Court deconstruct the stipulation and parse out parts that are proper or improper.

The Housing Court is not authorized to hear allegations under the penal law that would require proof beyond a reasonable doubt. This allegation is simply beyond the jurisdictional mandates of the Housing Court.

In a special proceeding, *CPLR 409(b)* requires that a summary determination be made whenever no triable issues of fact are raised, regardless of the posture of the proceeding. *See Torres v Sedgwick Avenue Dignity Developers LLC*, 74 Misc 3d 1209[A], (Civ Ct, Bx. Co. 2022) citing *Triangle Pac. Bldg. Products Corp., v National Bank of North America*, 62 AD2d 1017 (2nd Dept 1978), holding that *CPLR § 409* and *§ 410* mandate a trial only of those issues *"which cannot be disposed of by summary determination upon the pleadings."*

Pursuant to *CPLR 409(b),* it is the Court's duty to search the record and make summary determinations where appropriate. *See 1091 River Avenue LLC v Platinum Capital Partners, Inc.*, 82 AD3d 404 (1st Dept. 2011); *22 Park Place Cooperative, Inc. v. Board of Assessors*, 102 AD2d 893 (2nd Dept. 1984). In this matter, the petitioner was not ousted from the apartment without the benefit of legal process and a lease is referenced as an integral part of the parties' agreement. There are no triable issues of fact in this alleged illegal lockout out petition.

Accordingly, it is

ORDERED that petitioner's oral application for a final judgment of possession and a warrant of eviction based upon its order to show cause with verified petition is denied and the case is dismissed for failure to state a cause of action, dismissal is without prejudice to file a holdover proceeding, and it is

ORDERED that if the respondents have vacated the premises pursuant to the terms of the stipulation, this Court does not have jurisdiction to address any part of the stipulation.

This Decision/Order will be filed to NYSCEF.

This constitutes the Decision and Order of the Court.

Dated: May 19, 2022
Queens, New York
So Ordered,

_____
HON. ENEDINA PILAR SANCHEZ
Judge, Housing Court

Footnotes

Footnote 1:*Leagem Partners, LLC v. Gallimore*, 2021 NY Slip Op 32862(U), is not applicable nor dispositive. In the case before the Court, it is undisputed that there is a lease in place and that very lease is being used to structure the agreement that is the subject of review.

Footnote 2: Both in the Federal and State Courts, judicial review to disallow agreements which are not authorized by law has been affirmed and approved by the appellate courts. See, *In re Purdue Pharma, L.P.*, 635 B.R. 26 (U.S.D.C., Southern District Dec. 16, 2021) appeal pending U.S. Court of Appeals 2nd Circuit; *Wright v. Brockett*, 150 Misc 2d 1031 (Sup. Ct 1991); See also, *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (U.S.C. A. 2nd Circuit August 7, 2015.)

Return to Decision List