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East 17th LLC v Kacimi
2020 NY Slip Op 31343(U)
May 12, 2020
Supreme Court, New York County
Docket Number: Index No. 155103/2019
Judge: Kathryn E. Freed
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED, ***Justice*** — **PART** IAS MOTION 2EFM

---X

EAST 17TH LLC,

Plaintiff,

- v -

ISMAIL KACIMI,

Defendant.

---X

INDEX NO. 155103/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37

were read on this motion to/for DISMISSAL .

In this dispute concerning a residential apartment, defendant Ismail Mohamed Kacimi moves, pursuant to CPLR (a) (2), (3) and (7), for an order dismissing the complaint and for an award of costs, attorneys' fees, and sanctions for plaintiff's alleged frivolous conduct.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff East 17th LLC is the owner of a residential apartment building located at 135 East 17th Street, New York, New York (the Building) (NY St Cts Elec Filing [NYSCEF] Doc No. 28, affirmation of Alexander Paykin [Paykin], exhibit E, ¶ 1]). Defendant took up occupancy in apartment 4D (the Apartment) upon assuming a lease between plaintiff and nonparty Michael Guigli dated April 8, 2013 (the Lease) (NYSCEF Doc No. 21, defendant aff, ¶ 6; NYSCEF Doc No. 22, defendant aff, exhibit A at 1). Defendant subsequently executed a rent-stabilized renewal lease dated January 25, 2019 for the Apartment for a one-year term commencing May 1, 2019, with monthly rent set at $2,588.25 (NYSCEF Doc No. 24, Paykin affirmation, exhibit A at 1).

Plaintiff alleges that on or about May 20, 2019, its Building manager learned that defendant had been subletting the Apartment to "guests" through Airbnb (NYSCEF Doc No. 28, ¶ 4). Plaintiff commenced this action asserting causes of action for (1) a preliminary and permanent injunction predicated upon a private and public nuisance; (2) a preliminary and permanent injunction based on defendant having committed waste and subjecting plaintiff to potential civil and criminal penalties; (3) waste including a violation of the Building's certificate of occupancy; and (4) attorneys' fees, costs and disbursements under the Lease. On May 22, 2019, this Court temporarily enjoined and restrained defendant from using the Apartment as a transient hotel and from listing the Apartment on Airbnb or on other similar platforms (NYSCEF Doc No. 15 at 2). This Court granted plaintiff a preliminary injunction on June 19, 2010, and enjoined and restrained defendant from using the Apartment as a transient hotel or for any use other than as a residential apartment and primary residence (NYSCEF Doc No. 18 at 2). Defendant acknowledges that he "inadvertently failed to comply with the Lease" by subletting his rent-stabilized apartment through Airbnb (NYSCEF Doc No. 21, defendant aff, ¶ 14).

Plaintiff also served a notice of termination dated May 22, 2019 upon defendant. The notice, effective June 16, 2019, cited numerous provisions of the Rent Stabilization Law and Code, the Multiple Dwelling Law, and the New York City Administrative Code as grounds for the termination (NYSCEF Doc No. 26 at 1). In June 2019, plaintiff brought a summary holdover proceeding against defendant captioned *East 17th LLC v Kacimi*, index No. 64204/2019, Civ Ct, NY County (the Holdover Proceeding) (NYSCEF Doc No. 27 at 1). Defendant's motion to dismiss the Holdover Proceeding for plaintiff's failure to serve a predicate notice to cure a default has been denied (NYSCEF Doc No. 37, plaintiff's correspondence to the court date January 28, 2020 at 6).

Defendant now moves for dismissal for lack of subject matter jurisdiction, plaintiff's lack of legal capacity to sue, and plaintiff's failure to state a cause of action.

THE PARTIES' CONTENTIONS

On this motion, defendant argues that plaintiff failed to comply with Article 23 of the Lease, which requires plaintiff to give defendant written notice of a default and 10 days to cure the default (NYSCEF Doc No. 22 at 2-3). Defendant avers that he was never served with the requisite notice (NYSCEF Doc No. 21, ¶ 15), and urges the court to dismiss the action for defendant's failure to satisfy this condition precedent. Defendant also submits that this action is unnecessary, because he "immediately cured the inadvertent failure to comply with the Lease upon receiving the notice of termination wrongfully issued by Plaintiff" (NYSCEF Doc No. 23, Paykin affirmation, ¶ 19).

Plaintiff counters that issues regarding service of a notice to cure are better addressed in the Holdover Proceeding. More importantly, the instant action is not based upon defendant's breach of the Lease. As such, service of a 10-day notice to cure is unnecessary.

In reply, defendant repeats that the complaint should be dismissed because plaintiff failed to serve the predicate notice to cure. Defendant maintains that dismissal is warranted for the additional reason that he has already terminated all subleases and cancelled all Airbnb reservations. Defendant also posits that the complaint fails to state a cause of action for a public or private nuisance or for waste and should be dismissed accordingly.

LEGAL CONCLUSIONS

CPLR 3211 (a) (2) provides for dismissal where "the court has not jurisdiction of the subject matter of the cause of action." Subject matter jurisdiction concerns the court's "'fundamental ... power of adjudication'" (*Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 203 [2013], quoting *Lacks v Lacks*, 41 NY2d 71, 75 [1976], *rearg denied* 41 NY2d 862 [1977], *rearg denied* 41 NY2d 901 [1977]).

CPLR 3211 (a) (3) concerns a litigant's capacity to sue. "Capacity ... concerns a litigant's power to appear and bring its grievance before the court" (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994] [internal quotation marks omitted]).

A motion brought under CPLR 3211 (a) (7) tests the sufficiency of a pleading (*see Arister-Farer v State of New York*, 29 NY3d 501, 509 [2017]). The court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law," the motion will be denied (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). That said, "allegations consisting of bare legal conclusions ... are not entitled to any such consideration" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [internal quotation marks and citation omitted]).

At the outset, the motion is denied insofar as it seeks dismissal based on the court's lack of subject matter jurisdiction. "It is fundamental that 'Article VI, § 7 of the NY Constitution establishes the Supreme Court as a court of general original jurisdiction in law and equity'" (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 222-223 [2011], quoting *Sohn v Calderon*, 78 NY2d 755, 766 [1991]). "'Lack of jurisdiction' should not be used to mean merely 'that elements of a

cause of action are absent'" (*Manhattan Telecom Corp.*, 21 NY3d at 203 [internal citation omitted]). As applied herein, defendant's contention that plaintiff failed to satisfy a condition precedent implicates plaintiff's alleged failure to plead an element of a claim and does not implicate the court's subject matter jurisdiction.

Likewise, that part of the motion for dismissal based upon plaintiff's lack of capacity to sue lacks merit. "[C]apacity 'concerns a litigant's power to appear and bring its grievance before the court'" (*Silver v Pataki*, 96 NY2d 532, 537 [2001] [internal citation omitted], *rearg denied* 96 NY2d 938 [2001]). Plaintiff, as the Building's owner, clearly has an interest in defendant's use and occupancy of the Apartment.

Nor has defendant demonstrated that the complaint should be dismissed for plaintiff's failure to serve a predicate notice to cure. "It is well settled that, when regulated tenants rent space on a short-term basis to transient individuals at rates higher than allowed by applicable regulations, that conduct is 'in the nature of subletting rather than taking in roommates, and constitute[s] profiteering and commercialization of the premises,' which is an 'incurable violation'" (*Aurora Assoc. LLC v Hennen*, 157 A.D.3d 608, 608 [1st Dept 2018] [internal citation omitted]). "Since the alleged conduct is incurable, no notice to cure is required" (*id.*; *Goldstein v Lipetz*, 150 AD3d 562, 571 [1st Dept 2017], *appeal dismissed sub nom. Pearce v Lipetz*, 30 NY3d 1009 [2017] [dismissing the defendant's affirmative defense based on the plaintiff's failure to serve a notice to cure]; *Gruber v Anastas*, 100 AD3d 829, 829 [2d Dept 2012] [concluding that where a rent-stabilized tenant imposed a substantial surcharge upon subtenants, the tenant should not be permitted to cure a lease violation]). Here, it is alleged that defendant used his rent-stabilized Apartment as a hotel in contravention of the Rent Stabilization Code. Thus, service of a notice to cure was not required.

To the extent defendant argues that the complaint fails to plead the elements necessary to sustain claims for nuisance or waste, defendant failed to raise these arguments in his initial moving papers, and it is improper to raise them for the first time in reply.

Finally, the court declines to impose any sanction upon plaintiff (*see Hixon v 12-14 E. 64th St. Owners Corp*., 176 AD3d 480, 480 [1st Dept 2019]; *Gidumal v Cagney*, 144 AD3d 550, 552 [1st Dept 2016]). Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 (a) provides that "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court … costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." Conduct is defined as "frivolous" if, among other grounds, "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (Rules of Chief Admin of Cts [22 NYCRR] § 130-1.1 [c] [1]). In this instance, defendant has not established that plaintiff's conduct was frivolous.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant's motion to dismiss the complaint is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with written notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 2, Room 280, 80 Centre Street, on September 22, 2020 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

5/12/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION		
	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART	[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE	