2023-03-27

2275 Morris Realty LLC v. Garcia

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2023 NY Slip Op 50234(U) [78 Misc 3d 1216(A)]
Decided on March 27, 2023
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
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Decided on March 27, 2023

Civil Court of the City of New York, Bronx County

2275 Morris Realty LLC, Petitioner,

against

Santa Fermin Garcia & FRANCISCO A. BAUTISTA FERMIN & "JOHN DOE" & "JANE DOE," Respondents.

Index No. 326703-2022

Petitioner Attorney: Lazarus Karp Ehrlich Mccourt LLP, by Demitri Giannakakis
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Shorab Ibrahim, J.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion.

Papers/Numbered
Notice of Motion with Affirmation & Affidavit Annexed

[NYSCEF Doc. Nos. 12-15] 1
Affirmation in Opposition
[NYSCEF Doc. No. 16] 2
Affirmation in Reply [NYSCEF Doc. No. 17] 3

After oral argument held on January 12, 2023, and upon the foregoing cited papers, the decision and order on these motions is as follows:

FACTUAL & PROCEDURAL HISTORY

This is a summary holdover proceeding seeking possession of the subject premises pursuant to RSC §2524.3(a) and §2524.3(b), breach of lease and nuisance, based on the allegations that respondents installed and/or are maintaining illegal alterations to the subject premises. (*see* Notice to Cure and Notice of Termination at NYSCEF Doc. 1).

Specifically, petitioner alleges that respondents installed and/or are maintaining illegal partitions inside the subject premises, creating additional rooms and blocking access to the fire escape and preventing proper egress, ventilation and lighting. (*id.*). Further, there is alleged [*2]illegal electrical wiring at the ceiling lighting of the apartment, which is also a fire and safety hazard. Petitioner attached a letter from a registered architect to its pleadings attesting to these conditions as of December 8, 2021. (*id.* at p. 14).

After obtaining counsel, respondent Francisco Bautista filed an answer on or about November 7, 2022, and, on or about December 16, 2022, moved to dismiss. The motion is fully briefed and after argument, the court reserved decision.

Respondent seeks dismissal on several grounds: (i) when respondent moved into the apartment in 2014, the partitions/alterations were already in place, the apartment was already configured as is and any claim for illegal alterations is therefore outside of the six (6) year statute of limitations on contract claims; (ii) petitioner has waived and/or is estopped from maintaining the instant cause of action because the partitions/alterations were there when Respondent Santa Fermin Garcia first moved into the apartment in 2010 and neither respondent Garcia nor respondent Bautista made these alterations. (*see* Affirmation in Support at NYSCEF Doc. 13,p. 13); and (iii) the predicate notices are insufficient because they are not clear about what alterations were made, when they were made, or how petitioner knows they were made by respondents, and because the notices do not cite to any violations of building or other codes. (*id.* at p. 8).

In opposition, petitioner argues that the predicate notices are reasonable under the circumstances and sufficient to apprise respondents of petitioner's claims and enable

respondents to formulate defenses. Petitioner also argues that the principles of waiver and estoppel are inapplicable to unlawful structures, as unlawful actions are not waivable, and that the statute of limitations has not expired as the illegal alterations constitute an ongoing wrong. Finally, petitioner argues it does not need a violation of record as it can prove same, and/or the existence of illegal alterations, through testimony of its engineer/architect and prior owners/agents of the subject premises. (*see* Affirmation in Opposition at NYSCEF Doc. 16).

DISCUSSION

When considering a motion under CPLR § 3211, the court must afford the pleadings a liberal construction. The court must deem the facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*see Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]) In assessing a motion under CPLR § 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 636, 389 NYS2d 314 [1976]).

Thus, "a motion to dismiss made pursuant to CPLR § 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law." (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker*, *LLP*, 38 AD3d 34, 38, 827 NYS2d 231 [2nd Dept 2006]; *see also Leon v Martinez*, 84 NY2d at 87-88; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152, 746 NYS2d 131 [2002]).

The court must not consider whether the petitioner will be able to ultimately prove the allegations made in the pleadings. (*see Howard Stores Corp. v Pope*, 1 NY2d 110, 114, 150 NYS2d 792 [1956]; *Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 964-965, 95 NYS3d 97 [2nd Dept 2019]).

For a pleading to be dismissed for failure to state a cause of action, there can be no [*3]legally cognizable theory that could be inferred from the pleading and if the pleading, construed liberally, states in some recognizable form a known cause of action, a motion to dismiss must fail. (*see Howard Stores Corp. v. Pope*, 1 NY2d at 114; *Union Brokerage, Inc. v Dover Ins. Co.*, 97 AD2d 732, 733, 468 NYS2d 885 [1st Dept 1983]; *Quinones v Schaap*, 91 AD3d 739, 740, 937 NYS2d 262 [2nd Dept 2012]).

STATUTE OF LIMITATIONS, WAIVER AND ESTOPPEL

The petition here states two causes of action: one for breach of lease, and one for nuisance. Petitioner alleges that not only did respondents make or maintain the alterations in their apartment in violation of the lease, but that such alterations constitute a nuisance because the partitions create additional rooms, block access to the fire escape and prevent proper egress, ventilation, and lighting. Petitioner argues that the alterations create a fire and safety hazard. Similarly, petitioner alleges that the illegal electrical wiring of the ceiling lighting is a lease violation as well as a nuisance because it also creates a fire and safety hazard.

The law is clear that if the conduct complained of "merely constitutes a violation of a lease provision, but is otherwise neither illegal nor an interference with the rights of other lessees, the statute of limitations may bar an untimely action to evict based upon the violation of the lease." (*1050 Tenants Corp. v Lapidus*, 289 AD2d 145, 146, 735 NYS2d 47 [1st Dept 2001]). However, the statute of limitations is inapplicable "where it is alleged that the complained-of conduct constituted not merely a violation of the lease, but a lease violation consisting of illegal conduct or conduct causing ongoing damage to other apartments." (*1050 Tenants Corp. v Lapidus*, 289 AD2d at 146, *distinguishing Westminister Props. v Kass*, 163 Misc 2d 773, 624 NYS2d 738 [App Term, 1st Dept 1995]).

"In such circumstances, the wrong is not referable exclusively to the day the original wrong was committed ... Like the maintenance of a continuous nuisance, such conduct is not immune from suit once it has continued past the limitations period." (*1050 Tenants Corp. v Lapidus*, 289 AD2d at 146).

As the allegations in the petition and predicate notices must be accepted as true, (*see Leon v Martinez*, 84 NY2d at 87-88), where petitioner alleges that the alterations and electrical wiring are a nuisance, the six-year statute of limitations on a breach of lease claim is inapplicable. Whether petitioner can prove at trial that the alterations and electrical wiring are a nuisance, as they allegedly create a fire and safety hazard, is irrelevant at this juncture and the motion to dismiss the nuisance claim must be denied. (*see Howard Stores Corp. v Pope*, 1 NY2d at 114).

Respondent's reliance on *Magal Props. LLC v Gritsyk* does not warrant a different result. (49 Misc 3d 144(A), 28 NYS3d 649 [App Term, 1st Dept 2015]). There, the Appellate Term upheld the dismissal of the holdover proceeding as time barred because the landlord was attempting to claim a nuisance "to avoid the consequences of predecessor landlord's

express written consent to alterations performed by tenant," and held the current landlord bound by the "*express written* consent" of the prior owner. (*Id*) (emphasis added).

The respondent here alleges that when he moved into the apartment in 2014 (and when respondent Garcia moved in, in 2010), the apartment configuration was the way it is now, and that respondents did not create the alterations. The court will set aside the issue of whether respondent has personal knowledge of what the apartment looked like when respondent Garcia moved in four years prior to him. Regardless, respondent does not allege that any prior owners [*4]made the alterations, that any prior owners knew of or acquiesced in the alterations, and certainly does not claim that any prior owners gave express, written consent for the alterations.

As to the breach of lease cause of action, respondent's motion must be denied as well. Petitioner alleges that respondent has created and/or maintained the alterations and that such alterations are illegal because they impermissibly created additional rooms and block access to the fire escape, causing create a fire and safety risk. Similarly, the electrical wiring is illegal and causes a fire and safety risk. In support of its claim, petitioner attaches a letter from a registered architect stating that the partitions are illegal because they create additional rooms without proper egress, lighting and ventilation and are not in compliance with any current or previous building codes.[FN1]

Like the continuing use of an air-conditioning unit, "the installation and operation of which was allegedly in violation of the law," (*1050 Tenants Corp. v Lapidus*, 289 AD2d at 147), the ongoing maintenance of partitions and electrical wiring in the subject premises, which petitioner alleges are both illegal, is "a continuous and recurring wrong which permits the accrual of a new cause of action for each day," (*id.*), so that the six-year statute of limitations has not expired. (*see Great Jones Studios Inc. v Wells*, 190 AD3d 587, 588, 136 NYS3d 719 [1st Dept 2021] ["where it is alleged that the complained-of conduct constituted not merely a violation of the lease, but a lease violation consisting of illegal conduct the usual six-year statute of limitations for contract actions is tolled The continuing wrong doctrine also applies to plaintiff's nuisance claims, so that they are not barred by the applicable statutes of limitations."] [internal citations and quotations omitted]; *see also Irma C. Pollack LLC v OP Dev. Corp.*, 2022 NY Misc. LEXIS 2446, *18, 2022 NY Slip Op 31541(U), 14-15) [Sup Ct, NY County 2022]).

Respondent's argument that the alterations and partitions are not illegal because there are no violations for the partitions must fail. It is well-settled that "a court may conclude that

a lessee's conduct violates an applicable Building Code provision regardless of whether the [*5]Department of Buildings has made a determination to that effect." (*1050 Tenants Corp. v Lapidus*, 289 AD2d at 147; *see also Great Jones Studios Inc. v Wells*, 190 AD3d at 587 ["plaintiff demonstrated entitlement to partial summary judgment on the breach of contract claim by submitting undisputed evidence of such breach, *including defendants' own expert's assertion* that several of defendants' structures on the roof were 'unsafe, *not to code* and ... a risk'."] [emphasis added]; *Wynkoop v 622A President St. Owners Corp.*, 45 Misc 3d 1216(A) * 28, 7 NYS3d 245 [Sup Ct, Kings County 2014] ["Nor are the counterclaims precluded by the absence of formal violations issued by the Buildings Department."]; *Sam & Joseph Sasson LLC v Guy*, 2018 NY Misc. LEXIS 6264, *32, 2018 NY Slip Op 33231(U), 22 [Civ Ct, NY County 2018] ["a landlord has a cause of action for possession for such conduct even if DOB has not yet determined that a lessee's conduct violates an applicable Building Code provision."]).

As to the electrical wiring at the ceiling fixture, the court notes that the Department of Housing Preservation and Development ("DHPD") has issued a violation (no. 14520904) in the apartment for "broken or defective electrical fixture at ceiling," and the violation remains open.

Respondent also argues that the proceeding must be dismissed pursuant to principles of waiver and estoppel, arguing that these principles have been applied to illegal alteration holdovers. While respondent is correct in its claim that waiver and estoppel *can* apply to an illegal alternation holdover, dismissal is not warranted under the circumstances here, at this point in the proceeding.

Where petitioner alleges illegal partitions and electrical wiring that cause a nuisance and violate the lease due to safety and fire hazard, and where petitioner alleges that such conditions are in violation of code, this case cannot be dismissed on a motion for failure to state a cause of action.

None of the cases respondent cited to involved conditions that were alleged to be a nuisance, just that alterations were made in violation of a lease provision. Furthermore, each case involved an owner's (whether prior or current) express consent for tenants to do work in the apartment and the courts only found that the petitioner had waived its right to maintain the illegal alteration cause of action, or was estopped from doing so, *after a trial on the merits*. (*see Haberman v Hawkins*, 170 AD2d 377, 566 NYS2d 279 [1st Dept 1991]; *17 Place v Morales*, 2004 NYLJ LEXIS 2758 [Civ Ct, Kings County 2004]; *127 East 7th St.*

LLC v Grega, 2015 NY Misc. LEXIS 4310, 2015 NY Slip Op 32235(U) [Civ Ct, New York County 2015]).[FN2]

Respondent does not allege that either he, respondent Garcia, nor any prior tenant of the apartment ever received consent from petitioner or a prior owner. Respondent's affidavit is also [*6]free of any claim that *any* owner was aware of the apartment's configuration, so that waiver might be inferred. Furthermore, as this is a motion to dismiss, the court must take as true the allegations in the pleadings, whether or not petitioner can prove its causes of action at trial. (*see Howard Stores Corp. v Pope*, 1 NY2d at 114; *Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 964-965).

In short, the statute of limitations does not apply to a continuing wrong that creates or maintains a nuisance, which a violation of applicable code might be. In this case, it remains petitioner's burden to prove both that there is such a nuisance and that it is violation of applicable code. As to a lease violation, respondent is free to interpose testimony and any other evidence at trial in support of his defense of waiver and estoppel.

SUFFICIENCY OF THE PREDICATE NOTICES

Respondent also argues that petitioner failed to state a cause of action due to defects in the predicate notices.

In determining whether a predicate notice is adequate, the standard is one of "reasonableness in view of all attendant circumstances." (*Hughes v Lenox Hill Hospital*, 226 AD2d 4, 17, 651 NYS2d 418 [1st Dept 1996]). "A summary holdover petition need only state 'facts upon which the special proceeding is based' so as to inform the tenant of the factual and legal claims that must be met, thus enabling the tenant to interpose any available defense." (*McGoldrick v DeCruz*, 195 Misc 2d 414, 415-416, 758 NYS2d 756 [App Term, 1st Dept 2013]; *Rascoff/Zsyblat Org., Inc. v Directors Guild of Am., Inc.*, 297 AD2d 241, 242, 746 NYS2d 388 [1st Dept 2002]; *Hughes v Lenox Hill Hosp.*, 226 AD2d at 18).

Furthermore, "[a] holdover proceeding will not lie absent a proper predicate notice. Predicate notices 'must be clear, unambiguous, and unequivocal in order to serve as the catalyst which terminates a leasehold.'" (*Ellivkroy Realty Corp. v HDP 86 Sponsor Corp.*, 162 AD2d 238, 238, 556 NYS2d 339 [1st Dept 1990]). Facts in the predicate notices must also be pleaded with sufficient specificity. (*London Terrace Gardens, L.P. v Heller*, 40 Misc 3d 135(A), *2, 975 NYS2d 710 [App Term, 1st Dept 2009]

The predicate notices here are sufficient to give respondent notice of what petitioner is alleging and allow him to formulate defenses. Both the cure and termination notices allege causes of action for nuisance and a violation of law and the lease. They specify the ground under the rent stabilization code that petitioner is proceeding on, RSC §2524.3(a), breach or lease, and RSC §2524.3(b), nuisance, as well as the lease provisions petitioner relies for its breach of lease claim, articles 8, 12 and 20. (*see* predicate notices at NYSCEF Doc. 1)

The notice to cure states that respondents must cure the alleged breach of lease by January 14, 2022 and the termination notice states that respondents' tenancy is terminated as of September 7, 2022 and that respondents must "remove from and surrender" the subject premises by the termination date. (*id.*).

The predicate notices are clear as to what conduct is complained of that allegedly constitutes a nuisance and is in breach of the lease: respondents either erected or maintained partitions in the living room of the subject premises, creating additional rooms with framed walls and doors, blocking access to the fire escape, blocking proper egress, and preventing proper lighting and ventilation. The partitions allegedly create a fire and safety hazard which could potentially subject the landlord to penalties. The notices also allege that there is illegal electrical wiring of the ceiling lighting, which was done without a permit, and also creates a fire and safety [*7]hazard in the building. The termination notice is also clear that the superintendent confirmed the conditions continued to exist as of January 23, 2022, after the time to cure expired. (*see* predicate notices at NYSCEF Doc. 1).

As such, the predicate notices comport with the requirements of RSC §2524.2(b), which holds that any predicate notice to a rent stabilized tenant "shall state the ground under section 2524.3 or 2524.4 of this Part, upon which the owner relies for removal or eviction of the tenant, the facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession." (*see also Cosmopolitan Broadcasting Corp. v Miranda*, 143 Misc 2d 1, 2, 539 NYS2d 265 [Civ Ct, New York County 1989]).

That respondent disputes creating the conditions complained of in the predicate notices does not make the notices improper, nor does the failure to state the basis for petitioner's belief that respondents were the ones who created the conditions. [FN3] This is especially true in light of the claim in the predicate notices that respondent created *or maintained* the conditions. If petitioner can prove at trial that the conditions are in violation of applicable building or other codes, it is of no import that respondents did not create the conditions.

A predicate notice need not lay bare a landlord's proof at trial and is found to be sufficient where "the notice is 'as a whole sufficient adequately to advise tenant and to permit it to frame a defense'." (*McGoldrick v DeCruz*, 195 Misc 2d at 415-416, *quoting Rascoff/Zsyblat Org., Inc. v Directors Guild of Am., Inc.*, 297 AD2d 241, 242, 746 NYS2d 388 [1st Dept 2002]).

"Given the relative detail of the allegations listed in the notice to cure and restated in the notice of termination, the [predicate notices] meets the minimum standard of reasonableness, at least to survive a CPLR § 3211(a)(7) motion." (*985 Bruckner Blvd. Owners LLC v Fuentes*, 2022 76 Misc 3d 1226(A), *4, 176 NYS3d 475 [Civ Ct, Bronx County 2022])

To the extent that respondent seeks any further information to help prepare a defense, he may do so through appropriate devices. (*see McGoldrick v. DeCruz*, 195 Misc 2d at 415; *City of New York v Valera*, 216 AD2d 237, 238, 628 NYS2d 695 [1st Dept 1995] ["the allegations herein more than adequately met any due process requirements for notice at this stage of proceedings. Any further information necessary for preparation of a defense can be acquired through a bill of particulars."]; *985 Bruckner Blvd. Owners LLC v Fuentes*, 2022 76 Misc 3d at *5; *Chelsea 19 Assocs. v Coyle*, 22 Misc 3d 140(A), *2, 881 NYS2d 362 [App Term, 1st Dept 2009]

CONCLUSION

Based on the foregoing, it is So Ordered, that respondent's motion to dismiss is denied in all respects. The proceeding is adjourned to May 2, 2023 at 9:30 am for all purposes, including pre-trial conference or settlement.

Dated: March 27, 2023
Bronx, New York
SO ORDERED,

_____
HON. SHORAB IBRAHIM
Judge, Housing Part

Footnotes

Footnote 1: The court refers the parties to *People v Rios*, 26 Misc 3d 1225(A) [Sup Ct, Bronx County 2010], a case dealing with what occurred during a catastrophic fire at a Bronx apartment building on January 23, 2005. Two firefighters died and four others were severely

injured when they were forced to jump to concrete pavement from five stories above. The investigation revealed that an illegal partition hid and blocked the firefighters' access to the fire escape. The partition also hid from the firefighters the full intensity of the fire: "The illegal partition also affected the fire by containing it in the rear of the apartment until it grew with such intensity that it created a fireball that literally blew down the main hallway through the length of the apartment. Because of the partition and the location of the fire, this main hallway was the only means of egress. This sudden inferno struck with such ferocity that it blew the front door closed, eliminating any safe means of escape. The six firefighters became trapped in the three front bedrooms. As the fire spread into the front rooms, the intense heat and lack of air forced the men to the windows. To avoid being consumed by the fire that raged at their backs, the firefighters were forced to jump to the concrete pavement five stories below. Lieutenant Meyran and Firefighter John Bellew died from the impact. The other men sustained severe and terrible injuries." Whether respondents are responsible for the partition or not, removal of it to avoid this type of tragedy is what needs to happen if petitioner's claims are true.

Footnote 2: In addition, respondent cites to other cases decided *after trial*. (*see Barklee v O'Keefe*, 856 NYS2d 496 [App Term, 1st Dept 2008] (The alteration was an installation of a radiator cover some 20 years prior.); Other cases cited by the respondent are readily distinguishable. For instance, while *Magal Properties LLC v Gritsyk* was dismissed on a motion, it was because the predecessor landlord expressly consented to the alterations in writing. In any event, it is unclear form the Appellate Term decision what those alterations were. (*see* 49 Misc 3d 144(A) [App Term, 1st Dept 2015]); *Grand Concourse East HDFC v Dejesus* was not an "an illegal alterations holdover" as respondent contends. (*see* Affirmation in Reply at NYSCEF Doc. 13, par. 25). *Dejesus* involved the alleged failure to recertify which did not violate any applicable law, or affect the rights of other tenants. (*see* 61 Misc 3d 403 [Civ Ct, Bronx County 2018]).

Footnote 3: The court notes that respondent's claims that the termination notice is improper due to claims of lack of access are wholly unsupported. The termination notices make no reference whatsoever to lack of access and it is unclear why arguments predicated on lack of access are included in respondent's motion.

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