2023-09-14

East Harlem MEC Parcel C, LP v. Smalls

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK, HOUSING PART U

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EAST HARLEM MEC PARCEL C, L.P.

Petitioner, Landlord,

-against-

Index No. L&T 300884/22- HA

DECISION AND ORDER

REGGIE SMALLS

Respondent-Tenant

JOHN DOE and JANE DOE

Respondents, Tenants/Undertenants

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FRANCES A. ORTIZ, JUDGE

Recitation as required by CPLR 2219(a), of the papers considered in the review of Respondent's motion to dismiss.

Papers	**Numbered**
Notice of Motion, Affirmation, Exhibits & Memorandum of Law	1/NYSCEF 19, 20, 24
Affirmation, Affidavit, Memorandum of Law in Opposition & Exhibits	2/NYSCEF 24 - 29
Reply Affirmation & Exhibit	3/NYSCEF 30 -31

MOTION SEQ. # 2

Upon the foregoing cited papers, the Decision/Order on this Motion(s) is as follows:

This is a non-payment proceeding. Now, respondent moves for dismissal pursuant to *CPLR § 3211 (a)(1) & (7)* for failure to state a cause of action. Specifically, respondent seeks dismissal claiming that the subject building does not have a valid certificate of occupancy and that the last temporary certificate of occupancy ("C of O") expired on June 4, 2015. As a result,

respondent argues that petitioner is barred from collecting rent or maintaining this non-payment proceeding. Respondent recognizes that the Department of Buildings ("DOB") issued a final certificate of occupancy for the subject building on December 1, 2011 (listing a retail store and seven (7) residential units per floor) but in 2013 renovations and alterations were made to the building's first floor. These alterations commenced involved an installation of an eating and drinking establishment which respondent argues requires a new building-wide C of O. According to respondent, the building obtained a temporary C of O to reflect the new usage of the building which includes the restaurant and the seven residential units per floor. However, respondent argues that the temporary C of O's issued have expired and that currently there is no temporary or final certificate of occupancy that conforms with the usage of the building. *(Braudy Affir'm ¶s 4 & 5/NYSCEF Doc. 19).*

Petitioner in opposition argues that it has been making changes to the first floor commercial space and applied for a temporary C of O related to the changes, that currently there is an open application for the changes, that the final C of O in 2011 remains valid, and that the C of O for the residential portions of the building floors 2- 8 remain valid. *(Johnson-Clarke Aff'd ¶s 3-5/NYSCEF Doc. 26).*

Respondent in reply argues that petitioner chose to make alterations to the subject building in 2013 which required a new C of O, that petitioner allowed the temporary C of O's to expire, that since 2013 has petitioner not obtained a new final C of O for the entire building except for temporary C of O's with the last one expiring in 2015, that petitioner made a choice over the last eight years to not seek renewal of the temporary C of O, that even though the building's second through eighth floors were unaffected by the alterations to the first floor, the

law requires that a new final C of O be issued. *(Braudy Reply Affir'm ¶s 13- 15 /NYSCEF Doc. 30).*

DISCUSSION

Upon a review of a motion to dismiss a complaint for failure to state a cause of action pursuant to *CPLR §3211 (a) (7)*, the court must accept all of the allegations in the complaint as true, and, drawing all inferences from those allegations in the light most favorable to the plaintiff or petitioner, determine whether a cognizable cause of action can be discerned therein, not whether one has been properly stated. *Leon v. Martinez, 84 N.Y.2d 83 (1994)*; *Rovello v. Orofino Realty Co., 40 N.Y.2d 633 (1976); Dulberg v. Mock, 1 N.Y.2d 54, 56, (1956)*. Lastly, the complaint or petition must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory. *MatlinPatterson ATA Holdings LLC v. Fed. Express Corp., 87 A.D.3d 836, 839 (1st Dep't 2011), leave to appeal denied, 21 N.Y.3d 853 (2013).*

The basis of respondent's motion to dismiss for failure to state a cause of action is that petitioner may not collect rent for the subject premises because the subject building does not have a proper certificate of occupancy C of O from DOB. Under *MDL §301, (*1),

> No multiple dwelling shall be occupied *in whole or in part* until the issuance of a certificate by the department that said dwelling conforms in all respects to the requirements of this chapter, to the building code and rules and to all other applicable law…

Additionally, *MDL §302 (1) (b),* indicates:

> b. No rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefor, or for possession said premises for nonpayment of such rent.

Specifically, respondent seeks dismissal claiming that the subject building does not have a valid certificate of occupancy and that the last temporary certificate of occupancy ("C of O") expired on June 4, 2015. Here, petitioner does not dispute that the last temporary C of O related to the 2013 renovations and alterations made to the building's first floor for an installation of an eating and drinking establishment expired on June 4, 2015.

Under *Multiple Dwelling Law § 302* (10 (b), no rent is collectible by the petitioner when a building lacks a valid certificate of occupancy if the dwelling is occupied *in whole or in part* in violation of *Multiple Dwelling Law § 301(1)*. Therefore, petitioner cannot maintain this non-payment of rent proceeding. *GVS Properties LLC v. Vargas, 172 A.D.3d 466 (1st Dep't 2019); 49 Bleecker, Inc. v. Gatien, 157 A.D.3d 619, 620 (1st Dep't 2018); Chazon, LLC v. Maugenest, supra.* Nor may the owner of such dwelling maintain an action or special proceeding for possession of the premises for nonpayment of rent, even if the subject premises is not the subject of the alteration. "If that is an undesirable result, the problem is one to be addressed by the Legislature." *Chazon, 19 N.Y.3d at 416, supra.* The intent of *Multiple Dwelling Law § 302 (1) (b)* is to benefit and further the public interest in the safety of buildings. *Cashew Holdings, LLC v. Thorpe-Poyser, 66 Misc. 3d 127(A) (AT 2nd Dep't 2019).* Accordingly, respondent's motion to dismiss is granted for the reasons discussed above. The petition is dismissed.

ORDERED: Respondent's motion to dismiss is granted and the proceeding is dismissed.

This is the decision and order of this court. Copies of this decision will be uploaded to NYSCEF.

Dated: New York, NY

September 14, 2023

Frances A. Ortiz
Judge, Housing Court

Frances A. Ortiz, JHC