2023-12-08

BRX GROUND 1 LLC v. TEJERAS

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART J

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BRX GROUND 1 LLC,

Index No. 300958/2021

Petitioner,

DECISION/ORDER

-against- Motion Seq. 1

MANUEL TEJERAS, "JOHN DOE"
& "JANE DOE,"

Respondents.

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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 and Annexed
[With Exhibits A-F] [NYSCEF Doc. Nos. 12-20] ……..……..... 1
Affirmation in Opposition
[With Exhibits A-C] [NYSCEF Doc. Nos. 25-28] ….…….…….....…... 2
Affirmation in Reply
[With Exhibits A-G] [NYSCEF Doc. Nos. 33-41] …...……..……..3

After oral argument, and upon the foregoing cited papers, the decision and order on this motion is as follows:

FACTUAL AND PROCEDURAL HISTORY

This is a holdover proceeding commenced by Petitioner BRX Ground 1 LLC ("petitioner") against Manuel Tejeras, ("respondent"). Petitioner seeks possession of 423 East 135th Street, Apt. G2 Bsmt. Rear, Bronx, NY 10454, ("the subject premises" or "apartment"), on the basis that respondent's occupancy of the apartment is illegal as a prior *legal* single basement unit was illegally converted into two units, including the subject premises. The parties concede that a violation exists which requires petitioner to "legalize the alteration or restore premises to prior legal condition."

Respondent now moves for dismissal alleging that the petition misstates the apartment's regulatory status and fails to state a cause of action because it does not clearly allege that a violation exists for the subject apartment, does not allege *any* attempts to legalize the unit, and does not sufficiently state that it would be unduly burdensome to do so.

Respondent argues that petitioner's allegations in the termination notice that legalizing the two basement units is not possible because (i) it cannot create two exits in each unit; (ii) it

cannot create two units that contain enough square footage to constitute two legal class-A units; or (iii) it cannot convert the two units back to one legal unit without eviction of respondent are entirely unsupported.

Furthermore, respondent argues that petitioner fails to demonstrate that respondent's eviction, rather than temporary relocation, is necessary to convert the two units back to one legal class-A unit.

In opposition, petitioner relies entirely on an attorney affirmation. It points out that a violation was issued to the building, requiring submission of plans to obtain a certificate of occupancy for the two basement units or restore the units to their prior condition (one unit, instead of two). As such, petitioner argues, it *has* stated a cause of action since the permissible use for the basement is for one class-A unit, not two. The only way to cure the violation, according to counsel, is to convert the basement back to one unit, and the only way to do so is for respondent to be evicted, due to the scope of the work which would render the apartment uninhabitable for an extended period.

Petitioner's opposition does not discuss whether it has, will, or can attempt to legalize the two basement units currently existing. The sole discussion regarding legalization of the two current units is limited to one paragraph which simply reiterates the statements in the termination notice: (i) that the subject premises only has one exit rather than two, and (ii) that the basement area is too small to create two legal class-A units. Petitioner's argument is that whether more than one exit exists or can be created in the subject premises is irrelevant because the two basement units must be converted back into one to legalize the occupancy.

Respondent points out that the opposition's conclusions are not based on personal knowledge.

DISCUSSION

MISSTATEMENT OF THE REGULATORY STATUS

Leave to amend a petition should be freely given, (*see New York City Housing Authority v Jackson*, 88 Misc. 2d 121, 122, 387 NYS2d 38 [App Term, 1st Dept. 1976]), and de minimis or technical irregularities, including misstatement of regulatory status, are not jurisdictional defects and do not *require* dismissal of the proceeding. (*see Paikoff v Harris*, 185 Misc. 2d 372, 376, 713 NYS2d 1099 [App Term, 2nd Dept. 1999]; *see also Coalition Houses L.P. v Bonano*, 12 Misc. 3d 146[A], *1, 2006 NY Slip Op 51516[U] [App Term, 1st Dept. 2006]).

Here, respondent alleges the petition must be dismissed because the petition does not state the apartment is subject to rent stabilization and because it refers to respondent as a month-to-month tenant.

However, the petition clearly states the building is subject to rent stabilization and the termination is based on provisions of the *Rent Stabilization Code*. Accordingly, it is obvious that the subject tenancy also enjoys rent stabilization protections.

In any case, respondent has failed to demonstrate prejudice. The one conclusory claim of prejudice in respondent's counsel's affirmation is patently insufficient, especially where respondent's own affidavit makes no mention of any confusion or lack of knowledge.

Therefore, dismissal on this ground is denied in its entirety.

FAILURE TO STATE A CAUSE OF ACTION

A. Standard on Motion to Dismiss Pursuant to CPLR § 3211(a)(7)

When considering a motion under CPLR § 3211, the court must afford the pleadings a liberal construction and deem 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]).

Thus, "a motion to dismiss made pursuant to CPLR § 3211(a)(7) will fail if…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]; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152, 746 NYS2d 131 [2002]).

However, where the moving party challenges the factual basis of the claims, by submitting sufficient extrinsic evidence on a motion to dismiss, the standard of proof shifts and the proponent of the claim must show that he actually has a cause of action, not merely that he has stated one. (*see JJ 201 LLC v 201 E. 62nd Apt. Corp*., 2019 NY Misc. LEXIS 5433, *7, 2019 NY Slip Op 33020(U) [Sup Ct, New York County 2019], *citing Leonard v Leonard*, 31 AD2d 620, 621, 296 NYS2d 375 [1st Dept. 1968]; *see also Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78, 760 NYS2d 438 [1st Dept. 2003]).

Here, respondent has submitted sufficient evidence challenging (i) the illegality of the subject premises; (ii) whether the HPD violation even pertains to his apartment; (iii) whether the violation is capable of cure; and (iv) whether respondent's eviction is necessary to cure, requiring petitioner to come forward with evidence in support of its cause of action.

B. Illegal Use Cause of Action

As a threshold matter, the law is clear that, to make out a cause of action for illegal use, a landlord must show an actual violation has been placed and that the landlord is "actually" subject to civil or criminal penalties. (*see 35-09 LLC v Navedo-Perez*, 2023 NY Slip Op 23378, *2, 2023 N.Y. Misc. LEXIS 22774 [Civ Ct, Queens Co 2023]), *quoting 210 W. 94 LLC v Concepcion*, 2003 NY Slip Op 50612(U) [App Term, 1st Dept. 2003]; *625 West End, Inc. v Howard*, 2001 NY Slip Op 40496[U], *2-3, 2001 N.Y. Misc. LEXIS 729 [App Term, 1st Dept. 2001]).

At best, the violation issued *might* refer to respondent's apartment. The HPD violation refers to "Apt 1, 2nd apartment from south at west."[1] As the subject premises is Apt. G2, the court cannot determine whether "Apt. 1" refers to respondent's apartment G2. Furthermore, respondent alleges that the subject premises has two rooms, while the HPD violation states that "Apt 1" is the "north 1 room" apartment.

Petitioner does not attempt to clarify or otherwise explain why this HPD violation, as written, must be referring to the subject premises rather than the other basement unit. Petitioner merely alleges that whether or not it refers to the subject premises, the only way to cure is to combine the two basement units back into one. Petitioner cannot evict respondent from a legal unit simply because the action of its predecessor, dividing the basement unit into two, caused an illegality that might be cured by a conversion back to one unit. Indeed, it is undisputed that the violation has existed since 2003 (*see* NYSCEF Doc. No. 16), that respondent took occupancy in or about 2008 (*see* NYSCEF Doc. No. 14), and that petitioner purchased the building with constructive knowledge of the violation. (*see* Deed, NYSCEF Doc. No. 18).

If respondent's unit itself is not the one causing the illegal occupancy, petitioner *cannot* show it has a cause of action against respondent for illegal use of a unit that has no violation placed upon it. *(see K & G Co. v Reyes*, 52 Misc. 2d 606, 608, 276 NYS2d 20 [Civ Ct, New York County 1966] ["The mere existence of a violation in and of itself does not entitle the landlord to an order of eviction .... The questions are whether it is the occupancy of *this* tenant

[1] *See* Exhibit A to Opposition, NYSCEF Doc. 26.

which is illegal ... It has not been demonstrated that this tenant's apartment is the one of the three which creates the illegal occupancy."] [internal citations omitted; emphasis added]).

Because of the ambiguity in the HPD violation, and petitioner's failure to clarify what unit(s) the violation refers to, it cannot show that there is an actual violation in the subject premises for which civil or criminal penalties may be assessed.

Even if the HPD violation were presumed to refer to the subject premises, the court's inquiry does not stop there. In an illegal use proceeding, where a landlord or its predecessor in title created the illegality, and there is no evidence of wrongdoing on the part of a tenant, the landlord may not evict the tenant without showing that the illegality may be cured "without undue expense or difficulty." (*933 Amsterdam Holdings, LLC v Jenkins*, 2020 NY Slip Op 32305[U], *6, 2020 NY Misc. LEXIS 3311 [Sup Ct, NY County 2020] ["Moreover, the landlord may not remove a tenant on the ground of illegal occupancy 'where the landlord himself created the illegality or took title with notice of an illegality created by a predecessor in title,' or 'if the illegality is susceptible of cure without undue expense or difficulty'."] [internal citations omitted]; *81 Bowery Realty Corp. v Qui Hui Chen*, 20 Misc. 3d 1103[A], *3, 2008 NY Slip Op 51210[U] [Sup Ct, NY County 2008]; *Hart-Zafra v Singh*, 21 Misc 3d 1142[A], *4, 2004 NY Slip Op 51947[U] [Sup Ct, NY County 2004] ["… [E]ven assuming a violation exists and due notice was provided, if the tenants have utilized the premises as intended by the parties, the landlord is required to 'demonstrate that the certificate of occupancy is incapable of amendment or that it would be unduly burdensome to do so'."]; *see also 625 West End, Inc. v Howard*, *supra*.).

The HPD violation, despite ambiguity in the unit it refers to, is clear in requiring petitioner to *either* legalize the alteration to two units by obtaining a new certificate of occupancy *or* restore the basement units to the previous one-unit configuration.[2]

Despite the alternatives provided to petitioner by the violation, petitioner's counsel's opposition is adamant that the *only* way to cure the violation is to evict respondent and convert the two basement units back into one. Petitioner's counsel, who has no personal knowledge, does

[2] *See* Exhibit A to Opposition, NYSCEF Doc. 26.

not provide an affidavit from anyone with knowledge of architecture or construction to support the conclusory claim that the sole remedy is respondent's eviction.[3]

In fact, the affirmation points out that the HPD violation required petitioner to submit plans to obtain a certificate of occupancy for the two basement units. However, neither the predicate notice, petition, nor affirmation in opposition even mention this portion of the violation.

Petitioner does not address at all whether it has ever attempted to file plans to legalize the two basement units currently existing. (*see Prana v Alvarez*, 2004 NYLJ LEXIS 2279, *3 [Civ Ct, New York County 2004] ["In this instance it was the petitioner who caused the illegal use … It is noted that petitioner has not alleged that the Department of Buildings has issued a violation, that petitioner has undertaken any steps to cure the alleged illegality, nor has petitioner shown that it would be impossible to legalize the unit."]; *see also 35-09 LLC v Navedo-Perez*, 2023 NY Slip Op 23378 at *2 [opining that administrative remedies (i.e. trying to legalize the unit) must be exhausted before resorting to eviction based on illegal use]; *Price v Garcia*, NYLJ 4/25/85, p. 7, col. 1 [App Term, 1st Dept. 1985]; *Grier v Fenty*, 13 Misc. 2d 542, 542, 164 NYS2d 891 [App Term, 1st Dept. 1957] (Since "all that might be necessary was the approval of these alterations or the filing of plans pertaining thereto" the landlord could not maintain proceeding)).

The affirmation in opposition, which merely reiterates the allegations in the termination notice: (i) that the subject premises only has one exit rather than two, and (ii) that the basement area is too small to create two legal class-A units, has no probative value. Petitioner does not offer any factual basis for these conclusory allegations, no documentary evidence in support (such as rejected plans for legalization of the two basement units), and no affidavit from someone with personal knowledge (like an architect, engineer or building inspector).

Respondent, on the other hand, provides evidence that the subject premises *does* have two exits[4] and that, based on the square footage alleged in the termination notice (1600 square feet), two class-A units (of 680 square feet each) *can* be created.

Where the illegal occupancy was created by petitioner's predecessor, and respondent moved into the subject premises after petitioner took over and after the creation of any illegal

[3] *See Arriaga v Michael Laub Co.*, 233 AD2d 244, 649 NYS2d 707 [1st Dept. 1996]; *Iandoli v Lange*, 35 AD2d 793, 794, 315 NYS2d 752 [1st Dept. 1970] (conclusory affidavits lack probative value)).
[4] *See* Exhibits E & F to motion, NYSCEF Docs. 19 & 20.

occupancy, petitioner cannot attempt to evict respondent without proof that the two basement units cannot be legalized rather than converted back into one unit. Here, petitioner has not submitted any proof that it has attempted to create two legal class-A units. (*see 625 West End, Inc. v Howard*, 2001 NY Slip Op 40496[U] at *3 ["Even assuming the existence of a violation, landlord would be required to demonstrate that the certificate of occupancy is incapable of amendment or that it would be unduly burdensome to do so… Moreover, any violation of the Multiple Dwelling Law with respect to occupancy of the basement is not a basis for eviction at this juncture in the absence of any application to the Department for a permit or the Department's rejection of plans for legalization."] [internal citations omitted]; *933 Amsterdam Holdings, LLC v Jenkins*, 2020 NY Slip Op 32305[U] at *7).

Furthermore, even assuming the two units had to be converted back into one, petitioner does not show any evidence that conversion would require respondent's eviction. Petitioner's counsel's claims that respondent must be evicted because converting the two units would render respondent's apartment uninhabitable for a long period of time are conclusory, unsupported by anyone with personal knowledge. Even if these claims are to be believed, petitioner has not proven that respondent's eviction, rather than temporary relocation, is the sole means to legalize the two basement units. (*see K & G Co. v Reyes*, 52 Misc. 2d at 609-610 ["…[L]andlord made no attempt to show there was not some way other than removal of the tenant to make the premises conform to the law, conceding that nothing had been done to accomplish that result…Landlord has failed to establish that compliance cannot be effected without removal of the tenant…The landlord must demonstrate to the satisfaction of the court that the violation cannot be cured without removing the tenant, or that the violation was created by some act of the tenant.").

The court notes that petitioner has not alleged anywhere that it would be unduly expensive or difficult to legalize the basement units. (*see 933 Amsterdam Holdings, LLC v Jenkins*, 2020 NY Slip Op 32305[U] at *6; *81 Bowery Realty Corp. v Qui Hui Chen*, 20 Misc. 3d 1103[A] at *3; *Hart-Zafra v Singh*, 21 Misc. 3d 1142[A] at *4; *McDonell v Sir Prize Contracting Corp.*, 32 AD2d 660, 660, 300 NYS2d 696 [2nd Dept. 1969]).

As petitioner has not shown that the HPD violation was issued for respondent's apartment, where petitioner took over a building where the illegal occupancy was caused by its predecessor in interest, with no wrongdoing on the part of respondent, and where petitioner has not provided any evidence that the illegal use cannot be cured without converting the two

basement units back into one or without respondent's eviction, the petitioner fails to state a cause of action for illegal use. Respondent's motion to dismiss is granted on this ground.

As a final note, no matter the status of the subject unit (legal or illegal), respondent is a rent-stabilized tenant, as is his basement neighbor. The pleadings here are a textbook example of a violation being used as a vehicle to evict. Public policy requires that violations placed for unsafe living conditions must not be used this way. (*see Sima Realty LLC v Philips*, 282 AD2d 394, 395, 724 NYS2d 51 [1st Dept. 2001]; *816 Fifth Ave Inc. v Purdy*, 127 NYS2d 695 [App Term, 1st Dept. 1951]).

CONCLUSION

Based on the foregoing, it is Ordered, that respondent's motion to dismiss is granted for the reasons set forth herein and judgment in entered in favor of respondent. The portion of the motion seeking to interpose a late answer is denied as moot.

This constitutes the decision and order of the court. It will be posted on NYSCEF.

Dated: December 8, 2023
Bronx, New York

SO ORDERED,
/S/

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HON. SHORAB IBRAHIM
Judge, Housing Part