2024-03-15

140-60 Beech, LLC v. Madan

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART D

.....X

140-60 BEECH, LLC — Index No. LT-310571-23/QU

Petitioner,

- against -

NOTICE OF ENTRY

KULDIP K. MADAN, et al.

Respondent,

.....X

PLEASE TAKE NOTICE, that the within is a true copy of the Decision/Order duly entered in the office of the clerk of the within named court on March 15, 2024.

DATE: March 15, 2024
Jamaica, New York

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART D

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140-60 BEECH, LLC

Index No. L&T 310571/23

Petitioner-Landlord

-against-

DECISION/ORDER

KULDIP K. MADAN, et al.

Respondents-Tenants

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Present: Hon. Logan J. Schiff
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent's motion for partial summary judgment pursuant to CPLR 3212: NYSCEF Doc. Nos. 7-33

Upon the foregoing cited papers, the court's decision and order on Respondent's motion is as follows:

This is a breach of lease holdover in a rent-stabilized apartment pursuant to 9 NYCRR § 2524.3(a). The Petition was filed in June 2023. Prior to commencement, Petitioner served a Notice to Cure dated October 25, 2022, alleging that Respondent was violating paragraphs 4, 9, and 10 of the lease by installing a window air conditioner unit that extends beyond the wall of the building rather than using the designated interior air conditioner sleeve. A second allegation claimed that the installation of the air conditioner, observed by the superintendent in October 2022, damaged the façade and would cost $2,000 to repair. Petitioner thereafter served a Notice of Termination on January 17, 2023. Respondent interposed an attorney-answer on October 11, 2023, asserting counterclaims for harassment and retaliation.

Respondent now moves for partial summary judgment, seeking dismissal of the Petition and a trial on his counterclaims. Respondent, a 72-year-old, states in an affidavit he has resided in the premises since 1998 when the building was under prior ownership, and that he paid an appliance company to install and mount an air conditioner unit in the window with built in brackets that year. He states he purchased a replacement unit in 2019, which the superintendent helped him install in the same location, and that the air conditioner is too large to fit in the sleeve designated by Petitioner. Respondent denies that the air conditioner installation has caused any damage.

Based on this affidavit, Respondent through his counsel makes two arguments for dismissal. First, he argues that the statute of limitations has run on any alleged breach related to

his installation of a window-mounted air conditioner in 1998. Second, he argues that even if a breach of lease occurred, the landlord via its predecessor-in-interest knowingly waived its right to pursue any such breach by virtue of its 25-year delay in commencing a proceeding.

In opposition, Petitioner attaches a copy of the 1998 lease at issue and argues that the purchase of a new air conditioning unit in 2019 restarted the statute of limitations on any breach of lease. As for the waiver argument, Petitioner analogizes the matter to case law in the context of New York's pet waiver law, which has been held to apply only to the original pet rather than a subsequent pet (*see Park Holding Co v. Emicke*, 168 Misc.2d 133 [App Term, 1st Dept 1996]). Petitioner's motion is supported by an affidavit from its principal, in which he alleges that Petitioner is "looking to protect and safeguard the building by enforcing a provision in the Lease that requires air condition [sic] unit be in the wall sleeve and not in the window…I cannot speak to when Respondent had a prior unit nor if a prior owner consented." The affidavit does not include any claim of damage to the façade to the building or a specific allegation that the window unit in its present location represents a safety hazard.

In reply, Respondent notes that the 1998 lease does not include any provision explicitly barring the use of an air conditioner. Respondent further argues that case law related to New York's strict 90-day pet waiver law related to the harboring of a specific animal is inapposite as it does not relate to a waiver under a lease. Respondent also cites to Division of Housing and Community Renewal ("DHCR") holdings finding that where a landlord has consented to the use of an air conditioner it becomes an existing permitted service, which may not be discontinued simply based on the installation of a replacement unit, which is not considered a removal of the permitted appliance or a relinquishment of the right to the service.

As an initial matter, having reviewed the 1998 lease, the court finds that it does not bar the use of a window unit, notwithstanding a provision in the lease authorizing the use of an air conditioner in the wall sleeve. Even assuming arguendo that the lease implicitly disallows the use of a window air conditioner unit, the court agrees with Respondent that Petitioner, through its predecessor-in-interest, waived its right to enforce any such prohibition. "Waiver has long been defined as the voluntary and intentional relinquishment of a known right" (*Wells Fargo Bank, N.A. v Kurian*, 197 AD3d 173 [2d Dept 2021]). Here, by acquiescing in and failing to challenge Respondent's use of a window unit for nearly 25 years, Petitioner waived its right to enforce any theoretical breach of lease (*see Magal Props. LLC v Gritsyk*, 49 Misc.3d 144[A] [App Term, 1st Dept 2015] ["Landlord is bound by the predecessor landlord's express written consent to the alterations (*see 52 Riverside Realty Co. v Ebenhart*, 119 AD2d 452, 500 NYS2d 259 [1986]), which served to preclude its claim."]; *Graham Ct. Owners Corp. v. Taylor*, 34 Misc.3d 153[A] [App Term, 1st Dept 2012], *modified on other grounds*, 115 AD3d 50 [1st Dept 2014], *affirmed*, 24 N.Y.3d 742 [2015]; *106 & 108 Charles LLC v. Hohn*, 96 AD3d 511 [1st Dept. 2012]; *Haberman v. Hawkins*, 170 AD2d 377 [1st Dept 1991]). Furthermore, the waiver here applied to the use of the apartment window to house a properly secured air conditioner, not one specific unit, rendering case law in the pet waiver context inapposite.

As for Petitioner's secondary allegation in its Notice to Cure that the current window unit is causing damage to the façade, this conclusory assertion was sufficiently rebutted by

Respondent's affidavit and moving papers, thereby establishing prima facie entitlement to summary judgment on the issue (*see Song v CA Plaza, LLC*, 208 A.D.3d 760, 761 [2d Dept 2022]; *Hegy v Coller*, 262 A.D.2d 606, 606 [2d Dept 1999]; *Bendik v Dybowski* , 227 A.D.228, 228 [1st Dept 1996]). In response, it was incumbent on Petitioner to lay bare its proof in evidentiary form to create a triable issue of material fact (*see Thompson v Pizzaro* 155 A.D.3d 423 [1st Dept 2017]; *Vermette v. Kenworth Truck Company*, 68 N.Y.2d 714 [1986]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Instead, Petitioner submitted only an affidavit from its principal, which does even address this allegation, focusing entirely on whether the lease permits a window unit, and failing to rebut Respondent's initial showing. Accordingly, Respondent's motion for partial summary judgment is granted, and the Petition is dismissed with prejudice.

Having dismissed the Petition, the court exercises its discretion to sever without prejudice Respondent's counterclaims pursuant to CPLR 407, as these claims are not inextricably linked to Petitioner's claim for possession (*see City of New York v Canderlario*, 223 A.D.2d 617 [2d Dept 1996]; *cf. Matter of Rockaway One Co., LLC v Wiggins*, 35 A.D.3d 36 [2d Dept 2006].

This constitutes the decision and order of the court.

Dated: Queens, New York
March 15, 2024

Hon. Logan J. Schiff, J.H.C.