2024-09-27

CONSULTING SS, INC. v. McKELLAR

APPELLATE TERM OF THE SUPREME COURT
OF THE STATE OF NEW YORK FOR THE 2ND, 11TH & 13TH JUDICIAL DISTRICTS

Argued - September 4, 2024 Term

CHEREÉ A. BUGGS, J.P.
WAVNY TOUSSAINT
MARINA CORA MUNDY, JJ.

Consulting SS, Inc., Appellant, v Vincent Gorham, Respondent, John Doe and/or Jane Doe, Undertenants.

DECISION & ORDER

Appellate Term Docket No. 2023-872 K C

Lower Court # L&T 304052/20

Consulting SS, Inc., Appellant, v Annie McKellar, Respondent, John Doe and/or Jane Doe, Undertenants.

Appellate Term Docket No. 2023-873 K C

Lower Court # L&T 304049/20

Consulting SS, Inc., Appellant, v Raphel Faison, Respondent, John Doe and/or Jane Doe, Undertenants.

Appellate Term Docket No. 2023-874 K C

Lower Court # L&T 304050/20

Borah, Goldstien, Altschuler, Schwartz & Nahins (Paul N. Gruber of counsel), for appellant.

Brooklyn Legal Services (Alexander M. Maltezos of counsel), for respondents.

Appeals from three orders of the Civil Court of the City of New York, Kings County (Kevin C. McClanahan, J.), dated September 26, 2022. Each order, in separate holdover summary proceedings, granted a motion by the tenant therein for summary judgment dismissing the respective petition.

ORDERED that, on the court's own motion, the appeals are consolidated for purposes of disposition; and it is further,

ORDERED that the orders are affirmed, without costs.

Landlord commenced separate holdover proceedings to recover possession of three units in the same building a basement apartment and two single-room occupancy (SRO) units alleging that the units are not rent stabilized because the two-family building has fewer than six units. In the predicate notice for each proceeding seeking possession of an SRO unit, landlord admitted that the prior owner of the building had illegally used individual rooms on the first and second floors of the building as SRO units and that, since landlord had purchased the building, more than one room on both the first and second floor had been individually occupied. Each tenant interposed an answer alleging that their unit is rent stabilized because there were seven residential units in the building one apartment and six SRO units. Each tenant moved, in their respective proceeding, for summary judgment dismissing the petition on the ground that they were entitled to, but never received, statutory termination notices (*see* Rent Stabilization Code [RSC] [9 NYCRR] § 2524.2]). The Civil Court (Kevin C. McClanahan, J.) granted each motion. Landlord appeals from each order, arguing that, because the use of the SRO units was illegal, the building should not be treated as having at least six housing accommodations and, therefore, the units are not rent stabilized.

Housing accommodations in buildings built before January 1, 1974 containing six or more units are subject to rent stabilization (*see* Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-504.1; RSC [9 NYCRR] § 2520.11). The Rent Stabilization Code defines a housing accommodation as "[t]hat part of any building or structure, occupied or intended to be occupied by one or more individuals as a residence, home, dwelling unit or apartment" (RSC § 2520.6 [a]). "The issue of whether a building is subject to rent stabilization turns on the function of the units as housing accommodations (i.e. their continuous and exclusive use and occupancy as residences for a period of time), not the 'legality' of their usage in the absence of a certificate of occupancy" (*Balay v Manhattan 140 LLC*, 204 AD3d 491, 493 [2022]). "An individually rented room in a rooming house is a housing accommodation, and therefore . . . a building with six or more individually rented rooms is subject to rent stabilization" (*Robrish v Watson,* 48 Misc 3d 143[A], 2015 NY Slip Op 51299[U], *1 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]; *see Joe Lebnan, LLC v Oliva*, 39 Misc 3d 31 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2013]). Contrary to landlord's contention, its "alleged lack of knowledge does not give rise to an exemption from rent stabilization since landlord acquired the building subject to those rights and protections enjoyed by the building's tenants at the time of acquisition" (*Rashid v Cancel*, 9 Misc 3d 130[A], 2005 NY Slip Op 51585[U], *1-2 [App Term, 2d Dept, 2d & 11th Jud Dists 2005] [internal quotation marks omitted]).

Landlord also argues that summary judgment is premature because it is entitled to discovery regarding how and when the various rooms in the subject building were occupied (*see* CPLR 3212 [f]). In a summary proceeding, a party seeking discovery must seek leave of court (*see* CPLR 408), which landlord has not done. "A party who claims ignorance of critical facts to defeat a motion for summary judgment (*see*, CPLR [f]) must first demonstrate that the ignorance is unavoidable and that reasonable attempts were made to discover the facts which would give rise to a triable issue" (*Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 488 [2006] [internal quotation marks omitted]). In any event,

landlord "failed to offer an evidentiary basis to suggest that discovery might lead to 'facts essential to justify opposition' (CPLR 3212 [f]) or that facts essential to opposing the motion were exclusively within [each tenant's] knowledge and control" (*885 Park Ave. Brooklyn, LLC v Goddard*, 55 Misc 3d 74, 78 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2017]).

Since each tenant has demonstrated that their unit is subject to rent stabilization, service of a statutory termination notice was required to commence each proceeding (*see* RSC § 2524.2; *Beverly Holding NY, LLC v Blackwood*, 63 Misc 3d 160[A], 2019 NY Slip Op 50877[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019]). As it is undisputed that no such notice was served, each motion for summary judgment was properly granted. Accordingly, the orders are affirmed.

BUGGS, J.P., TOUSSAINT and MUNDY, JJ., concur.

ENTER:

Paul Kenny
Chief Clerk