

Mia v Lyons

2022 NY Slip Op 34738(U)

November 14, 2022

Civil Court of the City of New York, Bronx County

Docket Number: L&T Index No. 313214/21

Judge: Diane E. Lutwak

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

-----X L&T Index # 313214/21

AMINUL MIA,

Petitioner,

-against-

DECISION & ORDER

FAITH URSULA LYONS,

Respondent (Tenant of Record),

HUSSUF GINEM, "JOHN DOE", "JANE DOE",

Respondents (Occupants).

Premises: 2498 Arthur Avenue, Apt 2nd Fl, Bronx NY 10458

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Hon. Diane E. Lutwak, HCJ:

Recitation, as required by CPLR Rule 2219(a), of the papers considered in the review of Respondent-Tenant's Motion for Summary Judgment (motion seq #2):

| <u>Papers</u> | <u>NYSCEF Doc. #</u> |
|---|----------------------|
| Notice of Motion | 17 |
| Attorney's Affirmation in Support | 18 |
| Exhibits A-O in support | 19-33 |
| Attorney's Affirmation and Petitioner's Affidavit in Opposition | 35 |
| Attorney's Affirmation in Reply | 36 |

PROCEDURAL HISTORY & BACKGROUND

In this holdover eviction proceeding, petitioner seeks to recover possession of "all rooms of APARTMENT 2ND FLOOR," at 2498 Arthur Avenue in the Bronx, Petition at ¶ 4, from respondent Faith Ursula Lyons¹, a "NYCHA [New York City Housing Authority] Section 8 month-to-month tenant", Petition at ¶ 2, whose tenancy was terminated by a 90-day notice of termination effective September 30, 2021. The Petition, dated November 12, 2021, alleges that the apartment is not subject to Rent Stabilization or Rent Control as the building – which is not a multiple dwelling - contains less than six apartments. Petition at ¶¶ 7 & 8. Respondent by counsel filed an Answer on July 29, 2022 raising, *inter alia*, objections in point of law, affirmative defenses and counterclaims arising from the allegation that respondent's apartment is a *de facto* Rent Stabilized apartment as the building was erected prior to 1974 and has contained six or more separate residential dwelling units during her tenancy.

¹ The Petition also names three respondent-occupants; however, as they have not appeared the term "respondent" refers to respondent-tenant unless otherwise stated.

RESPONDENT'S MOTION

Respondent now moves for summary judgment under CPLR R 3212 on the ground that the apartment is subject to Rent Stabilization and seeks dismissal of the Petition for failure to state the regulatory status. In support of her motion, respondent states in her affidavit (Exhibit A/NYSCEF Doc. #19) that she has lived on the second floor of 2498 Arthur Avenue since 2009 and from then until 2019 the second floor had two apartments with hers designated as "2F". When she moved in, she thought she was renting the full second floor, but "the landlord told me he needed to do repairs on the other half of the apartment and he blocked off the doorway between my living room and dining room." Respondent's Affidavit at ¶ 3. After that, "Someone else began living on the other side of the wall," id. at ¶ 5, and "approximately four (4) different tenants", id. at ¶ 10, lived in that other second floor apartment. Further, respondent asserts that both the first floor and basement had two occupied apartments each from 2009 until September 2019. Id. at ¶ 10.

Respondent supports her affidavit with various documents. For the assertion that the second floor was divided into two apartments from 2009 through 2019 and her apartment was designated as "Apartment 2F" respondent includes a copy of the court file jacket and other papers from a holdover eviction proceeding petitioner filed against her in 2011 (Exs B & O/NYSCEF Doc ## 20 & 33); her lease renewal dated February 15, 2012 (Ex C/NYSCEF Doc # 21); a NYCHA form letter dated February 15, 2012 (Ex D/NYSCEF Doc #22); and a court computer printout showing a holdover proceeding filed in 2013 against the tenant in apartment "2R" (Ex N/NYSCEF Doc #32).

For the assertion that the building has had six or more apartments in it, contrary to its Certificate of Occupancy dated October 2, 1941 for a two-family dwelling (Ex E/NYSCEF Doc # 23), respondent includes six NYC Department of Buildings (DOB) violation summaries:

- Dated 03/05/2002, for "residence altered for occupancy for more than the legally approved number of families from legal use cellar (no occupancy) to illegal use three SRO location cellar" (Ex F/NYSCEF Doc # 24);
- Dated 04/27/2002, for "residence altered for occupancy for more than the legally approved number of families – building dep records state premises is a 2 family. Now converted to 7 families ..." (Ex G/NYSCEF Doc # 25);
- Dated 06/07/2002, for "occupancy contrary to that allowed by bldg. dept records. Cellar converted from ordinary use into Class 'A' Apartment label "BB" full bathroom and kitchen areas" (Ex I/NYSCEF Doc # 27);
- Dated 05/10/2011, for "Work w/o permit. Work noted: at the cellar, partitions were erected to create rooms. Rooms are contrary to approved plans dated 3/27/09 under #201124853; There are no bathrooms or kitchen, only 3 rooms" (Ex J/NYSCEF Doc # 28);

- Dated 06/03/2011, for “Work w/o permit. Noted: On 2nd flr in flr through apt (entire flr) installed hot & cold water supply W/2” drain on northerly wall in living room (III) installed second electric service panel (1) removed 2 HR” (Ex K/NYSCEF Doc # 29);
- Dated 09/05/2018, for “Work w/o permit. Noted at second floor erected various full height partitions to sub-divide apartment to create 2 class “A” apartments. With electrical lines for lights, switches, and outlets. Installed AD” (Ex L/NYSCEF Doc # 30).

Respondent’s other supporting documents are:

- A hand-filled-in inspection form index card dated 05/08/02 listing the occupants of 2498 Arthur Avenue as: two named tenants in a 3-room (“KIT, LR, BR”) “Front Cellar Apt.”; a vacant 1-room (“BR”) “Rear Cellar Apt.”; a named tenant in a 3-room (“KIT, LR, BR”) “1st Sty Rear Apt.”; and an indication of no access to “1st Sty Front Apt.” and “2nd Sty Apt.” (Exhibit H/NYSCEF Doc. # 26).
- Copies of nonpayment petitions filed in 2009 and 2011 against two different tenants in apartment 1R (Exhibit M/NYSCEF Doc. # 31).
- A court computer printout listing a 2002 HP action filed by the tenants listed on the 05/08/02 inspection card as occupying “Front Cellar Apt.” (Ex N/NYSCEF Doc # 32).

In opposition, petitioner submits his own sworn affidavit and his attorney’s affirmation. Petitioner asserts that the subject building “is a two-story building with two residential units”, Petitioner’s Affidavit at ¶ 5; denies that there were ever more than five apartments in the building, *id.* at ¶ 6; acknowledges DOB violations “due to partitions in the basement”, *id.* at ¶ 11; points out that the DOB records show he never paid any fines, “all violations have been marked as ‘RESOLVED’,” *id.* at ¶ 12, and that “there has never been any finding of fact against Petitioner for creating residential units in the Basement,” *id.* at ¶ 13. Petitioner further explains that, “At one point, I attempted to subdivide the Basement solely to create an office for myself” with the intent to create a commercial, non-residential unit. *Id.* at ¶ 14. Petitioner’s attorney argues that summary judgment should be denied as there are issues of fact for trial.

On reply, respondent’s attorney argues that petitioner has ignored the DOB’s findings that there were at least six dwelling units in the building at one time, which petitioner was aware of as evidenced by the filing of “multiple certificates of correction to the DOB in November 2008”, Attorney’s Reply Affirmation at ¶ 4, and that petitioner’s “self-serving” affidavit is insufficient to create an issue of fact for trial.

DISCUSSION

Summary judgment pursuant to CPLR R 3212 is a drastic remedy which should not be granted where there is any doubt as to the existence of material and triable issues of fact. *Sillman v Twentieth Century-Fox Film Corp* (3 NY2d 395, 404, 144 NE2d 387, 165 NYS2d 498, 505 [1957]). The court should not pass on issues involving credibility, as the function of summary judgment is “issue finding, not issue determination”. *Rodriguez v Parkchester South*

Condominium, Inc (178 AD2d 231, 577 NYS2d 52, 53 [1st Dep't 1991]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact. *Winegrad v New York Univ Med Center* (64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316, 317 [1985]); *Zuckerman v New York* (49 NY2d 557, 404 NE2d 718, 427 NYS2d 595 [1980]).

Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Alvarez v Prospect Hospital* (68 NY2d 320, 324, 501 NE2d 572, 508 NYS2d 923, 925-926 [1986]); *Zuckerman v New York* (49 NY2d at 562, 427 NYS2d at 598). A conclusory affidavit in opposition will be found insufficient to defeat summary judgment if it "fails to present facts sufficient to show any bona fide issue requiring a trial". *P D J Corp v Bansh Props, Inc* (29 AD2d 927, 928, 289 NYS2d 32, 32 [1st Dep't 1968], *aff'd*, 23 NY2d 971, 246 NE2d 749, 298 NYS2d 988 [1969]). On a defendant's motion for summary judgment, the court must accept the plaintiff's pleadings as true and make its decision on the version of the facts most favorable to the plaintiff. *Henderson v City of NY* (178 AD2d 129, 130, 576 NYS2d 572 [1st Dep't 1991]). The motion must be denied where conflicting inferences may be drawn from the evidence. *Meridian Mgmt Corp v Cristi Cleaning Serv Corp* (70 AD3d 508, 511, 894 NYS2d 422, 425 [1st Dep't 2010]).

Here, respondent met her initial burden on summary judgment with her affidavit and documents supporting her claim that there have been at least six apartments in the building, rendering her tenancy subject to Rent Stabilization. Petitioner, too, has met his burden, opposing the motion with more than simply a conclusory affidavit. Petitioner acknowledges at most a total of five residential units in the building, with only one in the basement. While the parties seem to agree that both the first and second floors have been used contrary to the Certificate of Occupancy with two apartments on each floor at one time or another, the use of the basement is less clear. The parties' conflicting assertions create issues of fact for trial: As petitioner points out, of the six documented DOB violations only one was unresolved and resulted in payment of a penalty and that was for work done on the building's second floor (Exhibit K). The other five DOB violations – including the four pertaining to the basement (Exhibits F, G, I & J) - were marked "Violation Resolved", with Certification accepted, a "Hearing Status" of either "Written Off" or "Cured" and either no penalty imposed or, where a penalty was imposed, both the "Amount Paid" and "Penalty Balance Due" of \$0.00. Nor does the documentation of various court filings support respondent's position, as they show just one tenancy in the basement.


Thus, while respondent's supporting documents corroborate certain of her allegations, they do not unequivocally establish the existence of six or more units in the building. Summary judgment must be denied where the parties' documentary evidence "raises questions rather than answers" and the remaining proof consists of "dueling affidavits". *366 Audubon Holding,*

LCC v Morel (22 Misc3d 1108[A], 880 NYS2d 227 [Sup Ct NY Co 2008])(denying landlord's summary judgment motion in ejectment action against occupant of an alleged illegal, unregulated cellar apartment who raised Rent Stabilized status as a defense). *Compare, e.g., White Knight Ltd v Shea* (10 AD3d 567, 782 NYS2d 76 [1st Dep't 2004]) (upholding summary judgment finding premises to be subject to Rent Stabilization where landlord admitted there were at least eight residential units in the pre-1947 building); *567 W 184th LLC v Martinez* (2017 NYLJ LEXIS 1011 [Civ Ct NY Co Apr 4, 2017])(granting summary judgment to respondents and dismissing holdover petition for failure to allege rent regulatory status where DOB violation established a sixth residential unit, and its removal by petitioner did not exempt building from Rent Stabilization); *2042a Pac LLC v Kelley* (2017 NYLJ LEXIS 2611 [Civ Ct Kings Co 2017]) (granting summary judgment to respondents and dismissing holdover petition for failure to state rent regulatory status where moving papers "overwhelmingly" established there to be ten separate units and petitioner did not dispute the configuration but rather claimed lack of knowledge of and consent to the conversion from a two-family to a rooming house).

Certainly, if it is ultimately proven that the building contains or has contained six or more separate "housing accommodations" as defined in the Rent Stabilization Code, under the Emergency Tenant Protection Act of 1974 they will be subject to Rent Stabilization unless otherwise expressly excluded from coverage. *Gracecor Realty Co v Hargrove* (90 NY2d 350, 683 NE2d 326, 660 NYS2d 705 [1997]); *Rosenberg v Gettes* (187 Misc2d 790, 723 NYS2d 598 [App Term 1st Dep't 2000]). However, it would be premature to dismiss this proceeding on a CPLR R 3212 motion for summary judgment which requires the absence of any material issues of fact. Whether the parties can ultimately establish their competing allegations at trial, *see, e.g., Joe Lebnan, LLC v Oliva* (39 Misc3d 31, 965 NYS2d 268 [App Term 2nd Dep't 2013])(upholding trial court's determination of Rent Stabilization coverage where the proof at trial established that, despite certificate of occupancy for five residential units and one commercial space, the building in fact had contained eight residential units); *Feldheim v Stuckey* (2017 NYLJ LEXIS 3559 [Civ Ct Bx Co Dec 20, 2017])(after trial, finding housing accommodations in five consolidated holdover proceedings to be subject to Rent Stabilization and dismissing petitions for failure to plead proper regulatory status where evidence established seven residential units); *Mohamed v Abdulai* (2017 NYLJ LEXIS 3081 [Civ Ct Bx Co Nov 1, 2017])(after trial, dismissing holdover proceeding and finding respondent's tenancy subject to Rent Stabilization where evidence established six residential units as "each locked interior room in both the first and second floor apartments constitute independent 'housing accommodations'"); *Rivas v Conty* (57 Misc3d 986, 62 NYS3d 763 [Civ Ct Qns Co 2017])(after trial, finding respondent to be a Rent Stabilized tenant and dismissing holdover petition alleging unregulated tenancy where landlord's claim of only five residential units was conclusively refuted by a DOB violation showing there to be ten units), is not a consideration at this juncture.

CONCLUSION

Accordingly, respondent's motion for summary judgment pursuant to CPLR R 3212 is denied and this proceeding is restored to the calendar for an in-person, pre-trial conference in Resolution Part C on **December 16, 2022 at 10:30 a.m.** This constitutes the Court's Decision and Order, which is being uploaded on NYSCEF and mailed to the unrepresented respondents.



Hon. Diane Lutwak, HCJ

Dated: Bronx, New York
November 14, 2022

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