

Mysinski v Genuine Realty Corp.

2016 NY Slip Op 32988(U)

November 18, 2016

Supreme Court, New York County

Docket Number: 158469/2013

Judge: Peter H. Moulton

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PETER H. MOULTON
SUPREME COURT JUSTICE
Justice

PART 50

Index Number : 158469/2013
MYSINSKI, JACEK
vs
GENUINE REALTY CORP.
Sequence Number : 002
PENDENTE LITE OTHER

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *denied as attached*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11/18/16

[Signature]
_____, J.S.C.
HON. PETER H. MOULTON
SUPREME COURT JUSTICE

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 50

-----X
JACEK MYSINSKI and PAUL FEARS

Plaintiff,

-against-

Index No.: 158469/2013

GENUINE REALTY CORP.

Defendant

-----X
PETER H. MOULTON, J.S.C.:

Defendant/Landlord (the “landlord”) moves for an order directing plaintiffs/tenants (the “tenants”) to pay to it (i) the rental rate in the last executed lease agreement of \$2,000 per month for use and occupancy, pendente lite; and (ii) \$70,000 for retroactive rent arrears and/or use and occupancy for 35 months (October 1, 2013 through August 1, 2016). Alternatively, the landlord seeks an order requiring the tenants to post a bond with the court for \$70,000, all without prejudice to the rights and claims of the parties. The landlord cites case law holding that a tenant is not entitled to live rent free and cites to Real Property Law § 220, which provides for a landlord’s right to seek use and occupancy.

The tenants oppose the motion, maintaining that it is the equivalent of a motion for summary judgment on the landlord’s counterclaims or is the equivalent of a motion for a preliminary injunction, both of which lack the requisite proof. The tenants also assert that the landlord is guilty of laches because the landlord waited for nearly three years after the action was commenced to make this motion. They further stress that the landlord has overcharged them in excess of \$112,000.00 for

the period of 2009-2013. The landlord illegally deregulated the apartment, they assert, because the landlord did not make alleged improvements of \$54,000 needed to deregulate the apartment. The tenants submit the affidavit of Christopher Leahy, the Vice President and Chief Estimator of Major Renovation Management, Inc., to demonstrate that the requisite improvements were not made. They further complain that the action has been delayed by the fact that the landlord fired two sets of attorneys and delayed compliance with discovery. The tenants do not dispute that a lease was signed for a monthly rent of \$2,000 and do not dispute that they ceased paying rent in October, 2013.

In reply, the landlord reiterates its arguments. It maintains that the motion is not one for summary judgment because it is *pendente lite*, without prejudice to the parties' claims and defenses. The landlord also asserts that the motion is not akin to a motion for an injunction. The landlord further disputes that it is guilty of laches because the tenants have not demonstrated that they lacked notice that the landlord would seek relief, noting that it did not withdraw its counterclaim for rent arrears.

Discussion

I am troubled by the fact that this motion was not made until I scheduled a conference to set a trial (which is scheduled for early January, 2017) and that the motion was made nearly three years after the action was commenced. This delay distinguishes this case from all of the cases cited by the landlord. Nevertheless, *Levinson v 390 West End Associates, L.L.C.* (22 AD3d 397, 403 [1st Dept 2005]) and other cases, hold that “[c]onsistent with Real Property Law § 220, it has long been held that a dispute concerning the amount of rent owed is no reason to allow a tenant to occupy the landlord's real property gratis.” This can be the case even where a tenant has an overcharge claim which exceeds the amount withheld, absent facts suggesting that there is a real danger that the

landlord will not be able to satisfy the judgment (*id.*). Moreover, even if this motion is akin to a motion for summary judgment or for an injunction, requests for similar relief have been granted in numerous cases without the necessity of meeting the standards for summary judgment or an injunction (*id.*, *see also Oxford Towers Co., L.L.C. v Wagner*, 58 AD3d 422 [1st Dept 2009]; *Wasserman v Gordan*, 24 AD3d 201 [1st Dept 2005]).

Accordingly, under the circumstances, it is appropriate to order the tenants to pay ongoing monthly use and occupancy commencing December 5, 2016 in the amount of \$2,000 per month, *pendente lite*, without prejudice to the parties' claims and defenses. In concluding that the tenants should not be directed to pay arrears, but should only be required to post a bond for retroactive rent arrears and/or use and occupancy, I consider that this motion appears to be made defensively, given that it was made simultaneously with my scheduling of a trial, after three years of arrears have accumulated. I also consider that the legal rent has yet to be established, but that it will be established shortly at trial. Additionally, because the case law holding that a tenant should not live rent free is based on the notion of fairness and because the legal rent has not been established, I also consider that there is no evidence that the tenants are unable to pay the requested monthly amount that they previously paid in the past and there is not evidence that the tenants cannot afford to post a bond.

Accordingly, it is

ORDERED that the motion is granted to the extent stated herein; and it is further

ORDERED that plaintiffs pay ongoing monthly use and occupancy commencing December 5, 2016 in the amount of \$2,000 per month, *pendente lite*, without prejudice to the parties' claims

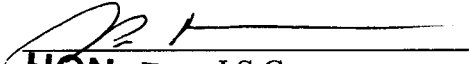
and defenses; and it is further

ORDERED that on or before December 30, 2016, plaintiffs shall post a bond for \$76,000 (October 1, 2013 through November 1, 2016) for retroactive rent arrears and/or use and occupancy, without prejudice to the parties' claims and defenses.

This Constitutes the Decision and Order of the Court.

Dated: November 18, 2016

ENTER:


HON. PETER H. MOULTON
J.S.C.