Neighborhood Restore Hous. Dev. Fund Corp. v Surti
2017 NY Slip Op 31168(U)
May 31, 2017
Supreme Court, New York County
Docket Number: 158276/16
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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NEIGHBORHOOD RESTORE HOUSING DEVELOPMENT FUND CORPORATION,

Plaintiff,

Index No.: 158276/16
DECISION/ORDER
Mot. Seq. No.: 001

-against-

DINESH SURTI, JANE FOSS, TAPINDER KAUR, RICHARD BIEL, ROGER MATUTE, BETRIZ PULIDO, MARY JANE DEFROSCIA, JUANA ADORNO, GEORGE RIVERA, ERIC LOWENKRON and LEELA RUBY NADAR,

Defendants.

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HON. KATHRYN FREED, J.S.C.:

In this residential landlord/tenant action, three of the defendants move for summary judgment to dismiss the complaint as against them (motion sequence number 001). For the following reasons, this motion is **granted**.

BACKGROUND

Plaintiff Neighborhood Restore Housing Development Fund Corporation (landlord), a not-for-profit corporation, is the owner of a residential apartment building (the building) located at 1772 2nd Avenue, in the County, City and State of New York. *See* notice of motion, exhibit C (complaint), ¶ 1. Defendants are tenants of the building. *Id.*, ¶ 2. The instant motion is brought by three of those tenants - Tapinder Kaur (Kaur), Roger Matute (Matute) and Juana Adorno (Adorno) (collectively the moving defendants).

Landlord acquired the building on July 9, 2004 via a deed from the New York City

Department of Finance, which had acquired title to the building from the building's prior owner as a result of an in rem tax foreclosure proceeding. *See* notice of motion, exhibits E-B. Pursuant to the provisions of Title 11, Chapter 4, of the Administrative Code of the City of New York (Admin Code), landlord was permitted to purchase the building because it previously had been designated a qualified third-party purchaser by the New York City Department of Housing Preservation and Development (HPD), pursuant to the Third-Party Transfer Program (TPT). Landlord's executive director, Salvatore D'Avola (D'Avola), states that the building is now managed by non party ELH Mgmt., LLC (ELH), which is also "the designated developer for the proposed building rehabilitation." *See* D'Avola aff in opposition, ¶ 12.

The building is in a severe state of disrepair, and has been for some time. In 2009, the New York City Department of Buildings (DOB) issued a vacate order to relocate the building's tenants due to serious Building Code violations. *See* notice of motion, DeFroscia aff, ¶6; exhibit F. The moving defendants have presented a copy of a June 26, 2009 petition that some of the building's tenants had filed to commence an "HP Proceeding" in the Civil Court of the City of New York, Housing Part, to compel the landlord to perform repairs in the building and remove the Building Code violations (the Housing Court case). *Id.*, exhibit E. The moving tenants have also presented a copy of an August 17, 2009 stipulation of settlement (and annexed documents), by which those tenants and the landlord sought to resolve the Housing Court case. *Id.*, exhibit F. The 2009 stipulation provides, in relevant part, as follows:

> "1. [Landlord] represents that [it has] filed plans with DOB to commence work on the [building's] parapet and [that] said work is underway, and further, . . . [that it] has done substantial work on said repair.
>
> "2. [Landlord] has arranged for further work to be done in that it is

simultaneously working in the Petitioners' apartments to make them habitable. Such work includes the repair and/or replacement of doors, holes in walls, as necessary, to make the premises habitable. [Landlord] will also arrange for the clean up of debris caused by construction within the apartments and to return furniture, which was removed to permit the installation of anchors, to its original positions as best as possible.

"3. Provided DOB signs off on the work done by [landlord], [landlord] believes that the repair of the parapet and the restoration of the apartments can be completed on or before August 21, 2009 and will use best efforts to have the vacate order lifted and prepare the apartments for re-occupancy so [the] apartments [are] habitable by said date. In the event that DOB LIFTS THE VACATE ORDER PRIOR TO THE COMPLETION OF THE APARTMENT REOCCUPANCY WORK, Petitioners agree not to reoccupy the apartments until the reoccupancy work is complete, but under no circumstances shall the reoccupancy date be later than August 21, 2009.

* * *

"6. It is understood that [landlord], in conjunction with UHAB [the Urban Homesteading Assistance Board], is attempting to obtain financing for a complete rehabilitation of the subject building, in accordance with the agreement between the parties. A copy of that agreement as to sponsorship is annexed hereto and incorporated herein as 'Exhibit A.'

"7. Pursuant to said agreement, the Petitioners agree to cooperate with re-location during the rehabilitation period as follows below.

"8. The issuance of a commitment from a lender to [landlord] shall trigger a 60 day period during which Petitioners must re-locate to temporary apartments ('trigger event').

"9. A choice of apartments, within acceptable neighborhoods, shall be offered to Petitioners starting immediately; however, Petitioners are not obligated to re-locate until the trigger event takes place.

"10. Said apartments will be substantially the same or better [than] the apartments in the subject premises in which Petitioners currently reside and Petitioners shall only be obligated to pay the same amount as their current rents, with any rent differential being paid by [landlord], to be reimbursed to [landlord] by the loan being sought by UHAB at comparable rent.

"11. Petitioners and [landlord] reserve all rights as to the agreement made with UHAB/[landlord] reflected in the agreement annexed as Exhibit A.

* * *

"Third Party Transfer Program Tenant Petition (2004)

"We, the tenants of [the building] by signing below, affirm our commitment to becoming a limited-equity cooperative under the sponsorship of [UHAB].

"Furthermore, we understand that in signing this petition we are acknowledging that we will fully cooperate with UHAB in their effort to manage, rehabilitate the building, and train tenants in becoming limited-equity cooperative shareholders.

"Moreover, we understand and agree to cooperate should it become necessary to temporarily relocate to other premises to rehabilitate and renovate the building as deemed necessary by UHAB, the project architect, [HPD] and any participating financing agency or lender.

* * *

"Third Party Transfer Program Tenant Petition (2003)

* * *

"We, the undersigned tenants living in the building . . . , are in support of the not-for-profit organization listed above as Sponsor [UHAB]. We request that the City of New York transfer the building to this organization under the Third Party Transfer Program.

"If the Sponsor [UHAB] is selected by [HPD] to redevelop the property, we understand that the Sponsor [UHAB] will acquire, manage, and rehabilitate the building with the intention of sponsoring a tenant organization to eventually own this property at a future date after rehabilitation."

Id., exhibit F.

D'Avola admits that landlord has not yet performed the specified repair work or renovated the building. *See* D'Avola aff in opposition, ¶ 29. Additionally, UHAB, the

building's original proposed sponsor under the TPT, is not a party to this action. D'Avola states that, while UHAB was originally the building's "manager," ELH is both the current "manager" and "designated developer," although he does not explain the circumstances of the transfer of roles from UHAB to ELH. *See* D'Avola aff in opposition, ¶ 12. D'Avola also states that "the formation of a low income cooperative was not an essential term of the" August 17, 2009 stipulation, and that, "while discussions were entertained in regard to the possibility of converting the building into a cooperative form of ownership, and the tenants initially expressed an interest in this possibility (as set forth in the TPT petition submitted to HPD), there was no firm agreement that this outcome was guaranteed." *Id.*, ¶ 18. Finally, D'Avola states that the two TPT petitions that are annexed to the August 17, 2009 stipulation are "not . . . legally binding agreement[s]," and concludes that "the ultimate decision on whether [the] cooperative form of ownership was available is entirely HPD's." *Id.*, ¶¶ 15, 21. For their part, the moving defendants note that they were not petitioners in the Housing Court case, and that they did not sign either the TPT tenants' petition or the August 17, 2009 stipulation. *See* notice of motion, Grimble affirmation, ¶¶ 14-22.

Landlord commenced this action on September 26, 2016 by filing a summons and complaint that sets forth causes of action for: 1) breach of contract; and 2) specific performance. *See* notice of motion, exhibit C (complaint). On October 28, 2016, defendants filed an answer that included counterclaims for: 1) breach of the warranty of habitability; 2) attorneys' fees; 3) fraudulent misrepresentation; and 4) a declaratory judgment. *Id.*, exhibit D. Now before this Court is the moving defendants' motion for summary judgment to dismiss the complaint as against them only (motion sequence number 001).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). Here, landlord's complaint asserts causes of action for breach of contract and for specific performance, and the moving defendants seek summary judgment to dismiss those claims as against them. This Court will consider each in turn.

The Appellate Division, First Department, holds that "'the burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it.'" *Eden Temporary Servs., Inc. v House of Excellence*, 270 AD2d 66, 67 (1st Dept 2000), quoting *Paz v Singer Co.*, 151 AD2d 234, 235 (1st Dept 1989). Here, landlord's complaint states that:

> "10. Defendants have failed and refused to comply with the temporary relocation requirements incumbent upon them pursuant to the terms of the [August 17, 2009 stipulation] Agreement. Said refusal is an unjustified violation of the obligations of the Agreement.
>
> "11. By virtue of the foregoing, Defendants have breached the Agreement, and have caused [landlord] to suffer damages exceeding $500,000.00, or a sum to be determined at trial, plus interest and attorneys' fees."

See notice of motion, exhibit C, ¶¶ 10-11. It is axiomatic that a breach of contract claim cannot be maintained against a defendant who was not a party to the agreement in question. *See*

Blank v Noumair, 239 AD2d 534, 534 (2d Dept 1997). Here, the moving defendants correctly assert that landlord's claims against them must fail because they were not signatories to the 2009 stipulation. *See* notice of motion, Grimble affirmation, ¶¶ 14-21. They are not listed as petitioners on the order to show cause with which the building's tenants commenced the 2009 HP proceeding against landlord. *Id.*, exhibit E. As a result, the 2009 stipulation may not be enforced against them. Therefore, this Court finds that the moving defendants are entitled to summary judgment dismissing landlord's first cause of action.

Landlord's second cause of action seeks specific performance. "The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law (citations omitted)." *EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 (1st Dept 2004). Here, landlord's complaint states that:

> "13. The terms of the Agreement provide for the defendants' reasonable temporary relocation to reasonable accommodations.
>
> "14. Based on the terms of the Agreement, [landlord] is entitled to specific performance of the obligations imposed upon the Defendants, including but not limited to, requiring and directing defendants to comply with their obligations pursuant to the 2009 Agreement and to temporarily relocate to temporary residential accommodations provided by [landlord] until the building has been fully rehabilitated."

See notice of motion, exhibit C, ¶¶ 13-14. However, this Court has already determined that the 2009 stipulation may not be enforced against the moving defendants. As a result, the remedy of specific performance is unavailable to landlord as against these defendants. Therefore, this Court finds that the moving defendants are entitled to summary judgment dismissing landlord's second

cause of action, as well.[1] Accordingly, this Court grants the moving defendants' motion.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion, pursuant to CPLR 3212, of defendants Tapinder Kaur, Roger Matute and Juana Adorno is granted, and the complaint insofar as asserted against those defendants is dismissed with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the balance of this action shall continue; and it is further

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[1] This Court notes in passing, without deciding the issue, that there is serious doubt that landlord will be entitled to enforce the 2009 stipulation at all. First, that agreement was executed more than six years before this action was commenced. Second, despite landlord's protests that the TPT petitions, annexed to the August 17, 2009 stipulation, are "not . . . legally binding agreement[s]," paragraph 6 of the stipulation plainly states that those agreements are "annexed hereto and incorporated herein," and paragraph 11 of the stipulation provides that the building's tenants had reserved their rights under the agreement between landlord and UHAB, executed as a result of those petitions. *See* notice of motion, exhibit F. Since, in the intervening time, landlord has ended its relationship with UHAB, and thereby vitiated the TPT agreement between those two parties, it may not unilaterally enforce the 2009 stipulation against the building's tenants, who had expressly reserved their rights under said TPT agreement and may deem landlord to be in breach thereof.

ORDERED that the caption of this matter will hereinafter read as follows:

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NEIGHBORHOOD RESTORE HOUSING
DEVELOPMENT FUND CORPORATION,

Plaintiff,

-against- Index No.: 158276/16

DINESH SURTI, JANE FOSS, RICHARD BIEL,
BETRIZ PULIDO, MARY JANE DEFROSCIA,
GEORGE RIVERA, ERIC LOWENKRON and
LEELA RUBY NADAR,

Defendants.
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And it is further

ORDERED that this constitutes the decision and order of the court.

Dated: May 31, 2017

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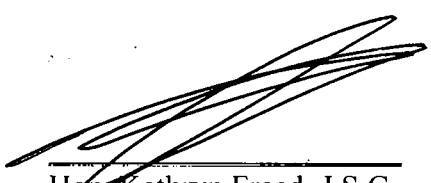

Hon. Kathryn Freed, J.S.C.