Sandy Realty LLC v Burnett
2017 NY Slip Op 31382(U)
June 14, 2017
Supreme Court, New York County
Docket Number: 155574/2016
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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SANDY REALTY LLC, Index No. 155574/2016

Plaintiff

- against - DECISION AND ORDER

KATHRYN RYLAND BURNETT and
SAHER NASAN,

Defendants

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LUCY BILLINGS, J.S.C.:

I. THE PENDING MOTIONS

Plaintiff landlord has moved for a preliminary injunction against defendant rent stabilized tenants in plaintiff's building at 43 West 8th Street, New York County. C.P.L.R. §§ 6301, 6312(a). Defendant Nasan resides in apartment 2R and defendant Burnett in 4R. Plaintiff seeks to enjoin defendants to provide plaintiff access the their apartments, so plaintiff may install new staircases in the building; to vacate their apartments until plaintiff completes renovations of the apartments, including new floors; and to refrain from interfering with plaintiff's repairs. Plaintiff claims that, when it removes the current staircases to replace them, defendants will lack a means of egress from and access to their apartments and that their apartment floors are in imminent danger of collapsing. Plaintiff alleges that it has offered defendants temporary relocation housing, but fails to demonstrate that the temporary housing is comparable to their current apartments or otherwise adequate to accommodate their

needs.

Defendant Burnett cross-moves to dismiss the claims against her based on the court's lack of jurisdiction to evict her from her apartment, even temporarily, and plaintiff's failure to allege any grounds under the New York Rent Stabilization Law (RSL) permitting plaintiff to evict defendants. C.P.L.R. § 3211(a)(2) and (7). She maintains that only the New York City Department of Buildings (DOB), Department of Housing Preservation and Development (DHPD), Department of Health and Mental Hygiene (DHMH), and Fire Department are empowered to order tenants to vacate their apartments due to dangerous conditions.

Even if not required to relocate, Burnett insists that she has been receptive to relocating temporarily to a comparable apartment at comparable rent with compensation for her moving expenses, but that plaintiff has offered only permanent relocation housing without reimbursement of moving expenses. This version of the facts, however, disputes the complaint's allegations and therefore may be considered only in opposition to plaintiff's motion for a preliminary injunction and not in support of Burnett's motion to dismiss the complaint against Burnett based on its failure to allege a claim for relief. Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 351 (2013); Lawrence v. Miller, 11 N.Y.3d 588, 595 (2008); GEM Holdco, LLC v. Changing World Tech., L.P., 127 A.D.3d 598, 599-600 (1st Dep't 2015). Nevertheless, the adequacy of plaintiff's offers of relocation is immaterial to the viability

of this action.

II. PLAINTIFF'S FAILURE TO ALLEGE A CLAIM FOR RELIEF

The regulations under the RSL dictate the exclusive circumstances when a landlord may evict a rent stabilized tenant, whether permanently or temporarily, none of which plaintiff has alleged here. 9 N.Y.C.R.R. § 2524.1(a). The Rent Stabilization Code, 9 N.Y.C.R.R. § 2524.3(e), on which plaintiff relies, permits eviction when a "tenant has unreasonably refused the owner access to the housing accommodation for the purpose of making necessary repairs or improvements required by law." New York City Administrative Code § 27-2008, on which plaintiff also relies, prohibits a tenant from refusing "to permit the owner, or his agent or employee, to enter such tenant's dwelling unit or other space under his or her control to make repairs or improvements required by this code or other law," but does not provide the owner a remedy of eviction if a tenant violates this statute.

Plaintiff alleges that defendants' apartment floors are in imminent danger of collapsing, but not that new floors, as opposed to repairs to the floors or their supporting structures, are "necessary" or "required by law." 9 N.Y.C.R.R. § 2524.3(e). Nor does plaintiff allege any instance when defendants have refused plaintiff access to their apartments to make repairs, as opposed to refusing to relocate. In fact, plaintiff seeks access only to install new staircases in the common areas, not to install new floors in their apartments, for which plaintiff seeks

defendants' relocation.

In sum, plaintiff nowhere alleges that defendants have refused access to make repairs or improvements required by law. 9 N.Y.C.R.R. § 2524.3(e); N.Y.C. Admin. Code § 27-2008. Plaintiff's engineer and architect attest simply that the demolition or other structural work "that needs to be done" will place apartment occupants at risk of bodily injury. Aff. of Zahid Ismail ¶ 12; Aff. of Shawn Stiles ¶ 12. Plaintiff does not demonstrate that that need is dictated by any requirement of law. Plaintiff's witnesses describe the staircases as "excessively deformed due to the landing deflection," Ismail Aff. ¶ 6; Stiles Aff. ¶ 6, and the apartment floors as "sagging," "partially deformed" because "floor and wall planes in common were not perpendicular," "and in dire need of repair," not necessarily replacement. Ismail Aff. ¶ 7; Stiles Aff. ¶ 7. The witnesses point out that protective gear will guard against defendants' inhalation of dust, damage to their eyes, and excessive noise and do not specify how occupants will risk any other injury if they remain in the apartments during the repair. Although the witnesses describe the staircase as "unsafe," Ismail Aff. ¶ 9; Stiles Aff. ¶ 9, and "recommended" that it be "immediately replaced," Ismail Aff. ¶ 8; Stiles Aff. ¶ 8, they allow that it is "a matter of time before the stairs buckle and/or the floors collapse," and this buckling or collapse will occur only if "the stairs and floors continue to go untreated," not if they are unreplaced. Ismail Aff. ¶ 10; Stiles Aff. ¶ 10.

Insofar as plaintiff alleges demolition of a structure housing defendants' apartments, even if that level of improvement is not required by law, plaintiff's remedy is to seek a certificate of eviction from the New York State Division of Housing and Community Renewal. 9 N.Y.C.R.R. § 2425.5(a)(2); Peckham v. Calogero, 12 N.Y.3d 424, 431-32 (2009); Sohn v. Calderon, 78 N.Y.2d 755, 764-65, 767-68 (1991). Insofar as plaintiff alleges defendants' vacatur of their apartments, rather than only access, is required because one or more apartments of the building "constitutes a danger to the life, health, or safety of its occupants," N.Y.C. Admin. Code § 27-2139(a) or "is unfit for human habitation," N.Y.C. Admin. Code § 27-2139(b), plaintiff's remedy is to seek an order to vacate the apartment from DHPD, id., DHMH, N.Y.C. Admin. Code § 17-159, or DOB. N.Y.C. Admin. Code §§ 28-207.4, 28-207.4.1. See 28 R.C.N.Y. § 18.01(a). When DHPD issues an order that tenants vacate a building, for example, DHPD undertakes an obligation to assist them with relocation. N.Y.C. Admin. Code § 26-301(1)(a)(v); Smith v. Donovan, 61 A.D.3d 505, 509 (1st Dep't 2009); Toolsee v. Department of Hous. Preserv. & Dev. of City of N.Y., 299 A.D.2d 209, 211 (1st Dep't 2002).

III. CONCLUSION

For all the above reasons, the court grants defendant Burnett's cross-motion to dismiss the complaint against Burnett. C.P.L.R. § 3211(a)(7). Since plaintiff's motion for a preliminary injunction seeks the same relief sought in the

complaint and the same relief against both defendants, the court denies plaintiff's motion against both Burnett and Nasan. It not only fails to demonstrate a claim on which plaintiff is likely to succeed, C.P.L.R. §§ 6301, 6312(a); Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839, 840 (2005); A1 Entertainment LLC v. 27th St. Prop. LLC, 60 A.D.3d 516, 516 (1st Dep't 2001); Metropolitan Steel Indus., Inc. v. Perini Corp., 50 A.D.3d 321, 322 (1st Dep't 2008); U.S. Re Cos., Inc. v. Scheerer, 41 A.D.3d 151, 154-55 (1st Dep't 2007), but also seeks the ultimate relief sought by the action as a whole, rather than to maintain the status quo pending a determination of the ultimate relief. Lehey v. Goldburt, 90 A.D.3d 410, 411 (1st Dep't 2011); Jones v. Park Front Apts., LLC, 73 A.D.3d 612, 613 (1st Dep't 2010); Pamela Equities Corp. v. 270 Park Ave. Cafe Corp., 62 A.D.3d 620, 621 (1st Dep't 2009); Sithe Energies, Inc. v. 335 Madison Ave., LLC, 45 A.D.3d 469, 470 (1st Dep't 2007).

DATED: June 14, 2017

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