Folnsbee v Kenny
2017 NY Slip Op 33407(U)
December 1, 2017
Supreme Court, Onondaga County
Docket Number: Index No. 2017EF2911
Judge: James P. Murphy
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

PATRICIA FOLNSBEE,

Plaintiff,

vs.

MICHAEL KENNY, EDAINA JESCHKE,

Defendants.

DECISION

Index No. 2017EF2911
RJI No. 33-17-2777

APPEARANCES:

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MURPHY, J.

This action was commenced by Plaintiff Patricia Folnsbee ("Plaintiff") by the electronic filing of a Summons and Complaint on July 12, 2017, against Defendants Michael Kenny and Edaina Jeschke ("Defendants"). Plaintiff, by Order to Show Cause signed by this Court on September 5, 2017, seeks an Order granting a preliminary injunction pursuant to C.P.L.R. §§ 6301 and 6311 and New York State Executive Law § 290 *et seq.* enjoining and restraining Defendants, their officers and/or agents, from taking any action to terminate the tenancy of Plaintiff or to evict her from her residence at 258 Woodruff Avenue, Syracuse, NY 13203, and from showing, renting, or disposing of 258 Woodruff Avenue, during the pendency of this action.

By way of background, this action arises out of Plaintiff's need for the installation of a ramp at property located at 258 Woodruff Avenue, Syracuse, which is owned by Defendants and rented by Plaintiff. The Complaint alleges that Plaintiff is a tenant at the subject property owned by Defendants, and moved in on or around October 30, 2016. Plaintiff alleges that she is unable to enter or exit her apartment without assistance and, therefore, requested that Defendants' install a ramp to allow her to use a wheelchair. Plaintiff claims that Defendant Michael Kenny ("Mr. Kenny") refused and expressed his concerns that a ramp would impair his ability to sell the house, should he choose to do so. Mr. Kenny further refused to install a ramp even if the ramp could be temporary in nature. *See*, Complaint dated July 11, 2017. Thus, Plaintiff has brought this action to restrain Defendants from terminating the tenancy and/or taking any action to prevent the installation of a temporary and/or removable ramp at Plaintiff's residence at Plaintiff's own expense.

In opposition, Defendants state that there is no written lease entered into between the parties and, thus, Plaintiff is on a month-to-month tenancy which can be terminated at any time. *See,* R.P.L. § 232-b. In addition, Defendants contend that Plaintiff has failed to pay rent in a timely manner, and in May, 2017, Defendants were fined $250.00 by the City of Syracuse for a code violation which was assessed as a result of Plaintiff having placed large electronics at the road. Based upon these breaches and violations, Defendants served a 30-day notice to quit on Plaintiff on July 10, 2017.

C.P.L.R. § 6301 titled "Grounds for preliminary injunction and temporary restraining order" states:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

It is well settled that a preliminary injunction may be granted under CPLR Article 63 when the party seeking such relief demonstrates (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the relief is withheld; and (3) a balance of equities tipping in the moving party's favor. *See, Doe v. Axelrod*, 73 N.Y.2d 748 (1988).

In support of her application for a preliminary injunction, Plaintiff argues that Defendants have violated Executive Law § 296 titled "Unlawful discriminatory practices," which states in pertinent part:

> 5. (a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:
>
> (2) To discriminate against any person because of race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status, or any intent to make any such limitation, specification or discrimination.

18. It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right of ownership of or possession of or the right to rent or lease housing accommodations:

(1) To refuse to permit, at the expense of a person with a disability, reasonable modifications of existing premises occupied or to be occupied by the said person, if the modifications may be necessary to afford the said person full enjoyment of the premises, in conformity with the provisions of the New York state uniform fire prevention and building code except that, in the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

Likelihood of Success on the Merits

To establish that a violation of the Human Rights Law (Executive Law Article 15) occurred and that a reasonable accommodation should have been made, the petitioner must demonstrate that they are disabled and that they are otherwise qualified for the tenancy and that, because of their disability, it is necessary for them to have a wheelchair ramp for their use and enjoyment of their tenancy, and that a reasonable accommodation could be made to accomplish this. *See, generally, Kennedy Street Quad, Ltd. v. Nathanson*, 62 A.D.3d 879 (2d Dept. 2009).

Once a plaintiff has made an initial showing under the Executive Law, the defendant is required to present legitimate, independent and nondiscriminatory reasons to support its actions. If the defendant meets that burden, the plaintiff would then have to show that the reasons given by the defendant were merely a pretext. *See, Delkap Management, Inc. v. New York State Division of Human Rights*. 144 A.D.3d 1148 (2d Dept. 2016).

With regard to whether Plaintiff is likely to succeed on the underlying merits, the law is well settled that Plaintiff must first demonstrate that she is disabled. Executive Law § 292.21 (c)(2) defines the term "disability" to mean "(i) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques." *See, State Division of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213 (1985). Here, in support of Plaintiff's claim that she is disabled as that term is defined in the Executive Law, Plaintiff submits a letter dated November 21, 2016, from Martha Aliwalas, M.D., which briefly concludes, without specifics: "To Whom It May Concern: It is medically necessary for Ms. Folnsbee to have a wheelchair ramp so patient can get in and out of her apartment." The letter is electronically signed, and it is not verified in any manner. Plaintiff submits no further medical evidence to support her claim.

In considering Plaintiff's proof in the first instance, the Court finds that Plaintiff's unverified letter from Dr. Aliwalas is insufficient, and fails to demonstrate Plaintiff suffers from the existence of a medically-recognized condition. Put another way, Plaintiff completely fails in her proof to show that she suffers from any medical impairment. Accordingly, based on the above, the Court finds that it is not likely that Plaintiff will be successful on the merits.

In the alternative, even if it could be argued that Plaintiff has somehow met her burden that she is disabled, Defendants in opposition clearly present legitimate, independent and non-discriminatory reasons to end Plaintiff's tenancy. Defendants submit uncontroverted proof that Plaintiff failed to make timely payments, including the failure to submit a security deposit. Additionally, Defendants submit an Affidavit in support from Scott Wright, the son-in-law of Plaintiff, who confirms Defendants' testimony that the monthly rent was supposed to be for the sum of $650.00 and that a security deposit was to be provided, however, Mr. Wright worked out an agreement with Defendants that his mother-in-law would pay only $500.00 per month, and that he would perform property maintenance, including lawn mowing, trimming and landscaping to make up the difference. Mr. Wright states that he breached the agreement and has not done any of these things, and he confirms the fact that at no time did he ever advise or indicate to Plaintiff that she could live in this residence indefinitely. In addition, Defendants were cited by the City of Syracuse Codes Department relating to a violation due to Plaintiff unlawfully leaving electronics at the curb.

Accordingly, based on all of the foregoing, the Court finds that Defendants have clearly shown non-discriminatory, justifiable reasons for terminating the tenancy, which in any event could have been terminated with a 30-day written notice. *See*, RPL § 232-b. In reply, Plaintiff's conclusory assertion that Defendants' reasons for the eviction are merely a pretext are insufficient based upon the clear, mostly undisputed proof provided by Defendants, specifically the imposition of code violations for Plaintiff's actions.

The Prospect of Irreparable Injury if the Relief is Withheld

In support, Plaintiff contends that she will face irreparable injury if injunctive relief is not granted based on the fact that Defendants will then proceed to commence eviction proceedings to have her removed from her apartment. In the first instance, Plaintiff concedes that there is no lease and that she is on a month-to-month tenancy. The facts before the Court show that to date, Defendants have not commenced any eviction proceeding, but had only served upon Plaintiff a 30-day notice to quit.

In *Church v. Allen Meadows Apartments*, 69 Misc.2d 254 (Supreme Court, Onondaga County, 1972), the Court was faced with a similar issue which was brought by a tenant facing eviction. The plaintiffs, who leased an apartment in a complex controlled by defendants as managing agent, sought a preliminary injunction to prevent the defendants from evicting plaintiffs. The plaintiffs allege that they had been active and vocal in a tenants' association which had been seeking corrective action for various housing code violations by defendants in the apartment complex. In reviewing whether to grant injunctive relief, the Honorable J. Robert Lynch denied granting a preliminary injunction noting that the plaintiffs would be entitled to raise as a defense in an eviction proceeding the defense of retaliation. *Id.* at 255; *see also, Kanter v. East 62nd Street Associates*, 111 A.D.2d 26 (1st Dept. 1985), where the First Department denied the plaintiff injunctive relief precluding the landlord from commencing an action or proceeding to evict a tenant concluding that the tenant could obtain full relief in a civil court by defending any summary proceeding. *Id.* at 27. Here, based on the above cases, should an eviction proceeding be commenced by Defendants, Plaintiff will have available to her any defense under the Executive Law. The Court, therefore, finds that Plaintiff will not suffer irreparable injury should the Court deny Plaintiff's application for injunctive relief.

Balancing of the Equities

In support, Plaintiff claims that she will continue to pay rent every month and that Defendants will benefit by having her as a tenant, specifically that Defendants will not have to repaint the apartment for a new tenant or to process rental applications. Plaintiff further contends that the installation of a ramp would be of no cost to Defendants and would be removable if and when she eventually vacates the apartment. In opposition, Defendants cite to the fact that Plaintiff cannot meet her burden that she is disabled but secondly, that it is fundamentally unfair to Defendants to have a ramp installed even if Plaintiff were to cover the cost. Finally, Defendants contend that there is absolutely no proof that Plaintiff has been unable to leave her apartment at any time or that, as she contends, is a prisoner within the subject property.

In considering the above, the Court finds that Plaintiff has not met her burden showing that the equities tip in her favor. Fundamentally, as set forth above, there has been no showing by Plaintiff that she suffers from a disability as defined under the Executive Law. Secondly, there has been no showing that Plaintiff is in fact a "prisoner" who is unable to leave her apartment at this point in time. At best, the record demonstrates that she has some difficulty with the stairs.

Accordingly, based on all of the foregoing, the Court denies Plaintiff's application as set forth in the Order to Show Cause which seeks a preliminary injunction precluding Defendants from bringing an eviction proceeding and preventing Plaintiff from installing a ramp for ingress and egress.

The above constitutes the Decision of the Court. Defendants' attorney shall electronically file a proposed Order to the Court, on notice to opposing counsel, within fifteen (15) days of the date of this Decision.

Dated: December 1, 2017

J

ENTER

James P. Murphy
Justice of the Supreme Court

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