101 Cooper St. LLC v Beckwith
2012 NY Slip Op 32942(U)
December 12, 2012
Civ Ct, NY County
Docket Number: 76180/2012
Judge: Jack Stoller
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART D
-- X
101 COOPER STREET LLC,

Petitioner/Landlord,

Index No. 76180/2012

- against -

DECISION/ORDER

MILES BECKWITH and MARY MCCUNE,

Respondent/Tenant.
-- X
Present:
Hon. Jack Stoller
Judge, Housing Court
Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion.

Papers	Numbered
Notice of Motion and Supplemental Affidavits Annexed.........................	1
Affidavit in Opposition	2
Affirmation in Reply	3

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

101 Cooper Street LLC, the petitioner in this proceeding ("Petitioner"), commenced this summary proceeding against Miles Beckwith and Mary McCune, the respondents in this proceeding ("Respondents"), seeking possession of 101 Cooper Street, Apt. 1M, New York, New York ("the subject premises"), on the ground of nonpayment of rent. Respondents interposed an answer raising various defenses ("the Answer"). Petitioner now moves to dismiss various defenses raised in the Answer.

The First Objection in Point Of Law in the Answer alleges that the rent demanded in the predicate notice to the petition in this matter does not seek a good faith estimate of rent that was owed to date. Petitioner moves to dismiss this objection on the ground that the total amount sued

for was indeed a good faith estimate of the rent due at the time of its service.

The standard of review on a motion to dismiss an affirmative defense pursuant to CPLR §3211(b) is akin to that used under CPLR §3211(a)(7), to wit, whether there is any legal or factual basis for the assertion of the defense. The truth of the allegations must be assumed, and if under any view of the facts a defense is stated, the motion must be denied. In re Liquidation of Ideal Mut. Ins. Co., 140 A.D.2d 62, 67 (1st Dept. 1988). Assuming *arguendo* that Respondent's allegation that the rent demanded in the predicate notice is not a good faith estimate of the rent owed, then Respondent has stated a defense. 542 Holding Corp. v. Prince Fashions, Inc., 46 A.D.3d 309, 310 (1st Dept. 2007), Dendy v McAlpine, 27 Misc.3d 138A (App. Term 2nd Dept. 2010). The Court notes that Petitioner's motion is not supported by any party with personal knowledge disputing Respondents' objection. Accordingly, the Court denies so much of Petitioner's motion as seeks to dismiss the First Objection In Point Of Law of the Answer, without prejudice to the preservation of Petitioner's claims and/or causes of action at trial of this matter.

Petitioner moves to dismiss the First Affirmative Defense and the Second Counterclaim of the Answer, which interposes a defense of the breach of warranty of habitability and a counterclaim on the same basis, on the ground that the Division of Housing and Community Renewal ("DHCR") has already issued a rent reduction order. While a rent reduction order may be the basis upon which to offset a rent abatement, it is not a total bar to recovery of a rent abatement. Baumrind v. Valentine, 2002 N.Y. Slip Op. 50137U (App. Term 1st Dept. 2002). Accordingly, then, the Court denies so much of Petitioner's motion as seeks to dismiss the First

Affirmative Defense and the Second Counterclaim in the Answer, without prejudice to Petitioner's defenses, as applicable, as against Respondent's counterclaims at trial of this matter.[1]

Petitioner moves to dismiss the Third Affirmative Defense and Third Counterclaim of the Answer, which asserts that Respondents have a claim for money they spent remedying a condition at the subject premises. Petitioner asserts by an affirmation in support of its motion that "it is clear that Petitioner immediately responded to Respondent's complaint …", annexing communications between the parties. There is no affidavit by any party with personal knowledge in support of the motion, just letters annexed to an affirmation by an attorney with no personal knowledge. Moreover, documents only show a ground to dismiss a claim when the documents resolve all of the factual issues as a matter of law. See Gephardt v. Morgan Guar. Trust Co., 191 A.D.2d 229 (1st Dept.), *leave to appeal denied*, 82 N.Y.2d 656 (1993). Even setting aside whatever any other difficulties Petitioner may have, Respondents dispute the import of Petitioner's allegations in her affirmation in opposition to the motion.[2] On a motion to dismiss pursuant to CPLR §3211, the Court may consider affidavits to remedy pleading problems. Sargiss v. Magarelli, 12 N.Y.3d 527, 531 (2009), Fitzsimmons v, Pryor Cashman LLP, 93 A.D.3d 497, 498 (1st Dept. 2012). Accordingly, the Court finds that the letters Petitioner annexes to its motion do not resolve all factual issues as a matter of law, and denies so much of Petitioner's motion as seeks to dismiss the Third Affirmative Defense and the Third

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[1] While Petitioner has not interposed a reply to the Answer raising defenses as such, no reply is required in cases brought in New York City Civil Court. New York City Civil Court Act §907(a).

[2] The Respondent is an attorney appearing for herself and her co-respondent.

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Counterclaim of the Answer, without prejudice to Petitioner's defenses to Respondents' counterclaims at trial.

Petitioner moves to dismiss the Fourth Affirmative Defense of the Answer, which asserts a defense of laches. The Answer alleges that Petitioner delayed commencement of this proceeding by five months from the date Respondents began to withhold rent and that Respondents are prejudiced by this delay. In order to establish laches, a party must show: (1) conduct by an offending party giving rise to the situation complained of; (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so; (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief; and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant. All four elements are necessary for the proper invocation of the doctrine. Meding v Receptopharm, Inc., 84 A.D.3d 896, 897 (2nd Dept. 2011), Dwyer v. Mazzola, 171 A.D.2d 726 (2nd Dept. 1991), A & E Tiebout Realty v. Johnson, 23 Misc.3d 1112A (Civ. Ct. Bronx Co. 2009), *aff'd*, 26 Misc.3d 131A (App. Term 1st Dept. 2010).

While there is some authority standing for the proposition that an accumulation of three months of outstanding rent is sufficient to show unreasonable delay for this purpose, Marriott v. Shaw, 151 Misc.2d 938, 941 (Civ. Ct. Kings Co, 1991), Dedvukaj v. Madonado, 115 Misc.2d 211, 214 (Civ. Ct. Bronx Co 1982), this authority is not binding on this Court and the Court, with all due respect, disagrees with this authority. To find that a three-month delay in commencement of a nonpayment proceeding is unreasonable effectively puts landlords on a hair trigger and has the undesirable effect of encouraging more litigation, which is not necessarily even to the benefit

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of tenants. See Denza v. Independence Plaza Assoc. LLC, 17 Misc.3d 1122A (S. Ct. N.Y. Co. 2007), Weisent v. Subaqua Corp., 16 Misc.3d 1115A (S. Ct. N.Y. Co. 2007), *citing* White, et al. v. First American Registry, Inc., et al., 2007 U.S. Dist. LEXIS 18401, 2007 WL 703926 (S.D.N.Y.) (discussing the adverse consequences to a tenant's credit history upon being sued in a summary proceeding). Moreover, the allegation of the Answer that Petitioner's ostensible delay has prejudiced Respondents is conclusory. There is no allegation that Respondents cannot pay the arrears because of the delay nor any allegation that Respondents cannot prepare for trial because of the delay. Accordingly, the Court grants so much of Petitioner's motion as seeks dismissal of Respondents' Fourth Affirmative Defense.

Petitioner moves to dismiss Respondents' Fifth Affirmative Defense of the Answer. The Fifth Affirmative Defense alleges that Petitioner commenced this proceeding within six months of Respondents' complaints with the Department of Housing Preservation and Development of the City of New York ("HPD") and that this proceeding "must be considered to be retaliatory" pursuant to RPL §223-b. Respondents' reference to RPL §223-b clearly refers to the statutory presumption that a proceeding commenced in such a time frame is in retaliation for the complaint. RPL §223-b(5)(a). However, the statute is explicit in providing that the presumption does not apply in a nonpayment proceeding. RPL §223-b(5)(c). Accordingly, the Court grants so much of Petitioner's motion as seeks to dismiss the Fifth Affirmative Defense of the Answer.

Petitioner moves to dismiss Respondents' counterclaims, on the ground that a lease between the parties bars Respondents from interposing counterclaims. Respondents counterclaim for relief pertaining to their defense that Petitioner breached the warranty of

habitability and for attorneys' fees. The lease between the parties, annexed as an exhibit to Petitioner's motion, states at ¶27 that Respondents cannot make a counterclaim unless they "are claiming that [Petitioner] has not done what [Petitioner] is supposed to do about the condition of [the subject premises]." Clearly, the breach of the warranty of habitability Respondents allege encompasses a claim that Petitioner has not done what it is supposed to do about the condition of the subject premises, so by the terms of the very lease Petitioner refers to, Respondents have not waived any counterclaims. The terms of the lease are irrelevant, however, as lease clauses that purport to modify rights pursuant to the warranty of habitability are void as contrary to public policy. RPL §235-b(2).

The lease Petitioner annexes to its motion provides that Petitioner may collect legal fees arising out of litigation with Respondents. RPL §234 provides that such lease clauses confer upon tenants the right to counterclaim for attorneys' fees, and further provides that lease clauses purporting to waive this right are void as against public policy. Accordingly, the Court denies so much of Petitioner's motion as seeks to dismiss Respondents' counterclaims.

The Court restores this proceeding to the calendar for all purposes on January 28, 2013 at 9:30 a.m. in part D, Room 524 at the Courthouse located at 111 Centre Street, New York, New York.

This constitutes the decision and order of this Court.

Dated: New York, New York
December 12, 2012

HON. JACK STOLLER
J.H.C.