CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART C

PETER BRISKIN

Petitioner-Landlord

-against-

DECISION & ORDER
Index No.: L&T 91302/2012

HON. SABRINA B. KRAUS

WARREN MILLS
53 West 119th Street, 3rd Floor Front Room
NEW YORK, NY 10027

Respondent-Tenant

BACKGROUND

The underlying summary nonpayment proceeding was commenced by **PETER BRISKIN** (Petitioner) against **WARREN MILLS** (Respondent) pursuant to Rent Stabilization Law § 2524.4 based on the allegation that Petitioner wishes to recover possession of the Subject Premises for his own use. The subject building is an SRO. Respondent has moved to dismiss pursuant to CPLR 3211(a)(4) and (a)(7).

DISCUSSION

CPLR § 3211(a)(4) provides for dismissal when "there is another action pending between the same parties for the same cause of action...". Even where grounds for the section are properly invoked a court need not grant dismissal "... but make such order as justice requires." There is a cause of action for ejectment pending in Supreme Court under Index Number 101838/2012. Respondent was not sued by Petitioner is said action, but the action does

seek to evict an Andre Davis who is alleged to be living in the Third floor Front Room and the action seeks to award Petitioner possession of said premises.

The description of the premises occupied by Andre Davis in the Supreme Court summons is identical to the description of the premises sought to be recovered in this proceeding, ie the third floor front room of 53 West 119th Street.

Strictly speaking Respondent has failed to meet the requirements set forth by CPLR 3211(a)(4) in that the causes of action are not identical and the parties are not the same, although Respondent while not sued in the Supreme Court action has through counsel filed a notice of appearance is said action.

Many of the cases relied upon by Respondent are not applicable to the case at bar. For example, *518 East 80th Street Co LLC v Smith* (NYLJ 1/29/03), *Janes v Paddell* (74 Misc 409), and *Jefferson Valley Mall v Franchise Acquisition Group (*22 Misc3d 56) all stand for the proposition that an ejectment proceeding based on trespass is inherently contradictory to a summary proceeding based on nonpayment of rent, because one asserts no landlord tenant relationship and the other claim is based on such relationship. This is inapplicable to the case at bar which is not a nonpayment proceeding.

Moreover, it seems unlikely that Andre Davis and Respondent both live in the same room of the SRO, and Respondent specifically denies in his affidavit that anyone else has ever lived in the Subject Premises with him. Given that the causes of action and parties are not identical dismissal does not appear to be warranted.

However, consolidation of these two litigations may be appropriate and prevent inconsistent results. Civil Court lacks authority to send this summary proceeding to Supreme Court. Thus Respondent's motion to dismiss pursuant to 3211(a)(4) is denied without prejudice

to Respondent's right to seek consolidation of this proceeding with the action pending in Supreme Court.

CPLR 3211(a)(7) provides for dismissal where the pleading fails to state a cause of action. Respondent asserts that the pleadings fail to state a cause of action because Petitioner asserts he intends to convert the premises into a single family home and currently the premises are an SRO. The proposed conversion would require Petitioner to obtain certificates of no harassment which have not yet been obtained.

Respondent cites a single lower court decision as authority for its motion, *Schwartz v Seidman* (2003 NY Slip Op 51277U). *Seidman* does not pertain to a pre answer motion to dismiss, but was a decision issued after trial. Additionally, that decision was based on a conflict between the applicable zoning provisions and the Rent Stabilization Code. The court in *Seidman* noted that if the building were not subject to rent regulation the landlord would still be barred by the intended use based on the applicable zoning regulations (*Id*). In the case at bar that is not true. The law provides for a method to convert an SRO into a single family home, and the fact that Petitioner has not yet completed all the steps in that process may be relevant to the court's determination of the good faith intention of Petitioner at trial but does not require dismissal based on a failure to state a cause of action.

As to the fact that the notice references that a nanny will live with Petitioner and his family after the conversion, the court does not find that this is a basis for dismissal based on a failure to state a cause of action. Certainly if Petitioner is successful in converting the building to a single family home he is not precluded from having a live in baby sitter.

On a motion to dismiss for failure to state a cause of action the court must draw every favorable inference in Petitioner's favor. Assuming that all the allegations in the pleadings are

true the pleadings do set forth a cause of action. The notice sets forth the basis of the landlord's desire to occupy the Subject Premises in relation to his current home, who will use the premises and how it will be used.

Based on the foregoing Respondent's motion to dismiss pursuant to CPLR 3211(a)(4) is denied.

Finally, Respondent, while he does not seek dismissal pursuant to CPLR(a)(8) based on lack of personal jurisdiction, requests the right to include that defense in answer if the 3211 motion is denied. Respondent's affidavit in support of this motion acknowledges that he received the predicate notice, but denies receipt of the notice by mail, and acknowledges that the notice of petition and petition were both slipped under his door, and sent to him by certified mail, but denies receipt of a third copy by regular mail.

Initially, the court notes that the mere denial of receipt by mail may not be sufficient to require a traverse hearing, but the court need not reach that issue. CPLR 3211(e) provides "(a)n objection based upon a ground specified in paragraph eight ... of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection....".

Respondent seems to take the position that he can make the 3211 motion, not seek dismissal based on personal jurisdiction and seek to preserve it in his answer. Respondent cites no legal authority for this position and it is precluded by statute as noted in the practice commentaries to CPLR § 3211 which provide in pertinent part:

> The objections to lack of personal (paragraph 8) jurisdiction or rem (paragraph 9) jurisdiction under CPLR 3211(a) are singled out for special treatment by CPLR 3211(e).
>
> If the (respondent) has available either of these objections he may take them by motion under CPLR 3211 before answering or by way of defense in the answer.

. . .

> But if the (respondent) does have either of these objections available, **he is not to waste the court's or the (petitioner's) time on any CPLR 3211 motion on any ground at all unless on that motion he joins the jurisdictional ground.** If the (respondent) makes no CPLR 3211 motion on any ground, he may then safely include the jurisdictional defense in the answer without fear that he has waived it. **But if he makes any CPLR 3211 motion, regardless of ground, he must include the jurisdictional objection in the motion or he waives it. He may not, if the CPLR motion made on other grounds is denied, then turn around and serve an answer containing the jurisdictional objection.**
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> (Supplementary practice commentaries, David Siegel, 2012, C3211:57, emphasis added).

Based on the foregoing, the motion to dismiss is denied. Respondent may serve an answer within ten days, however as noted above any jurisdictional defenses have been waived by the failure to include them as a basis for dismissal in the underlying motion.

The proceeding is restored to the calendar on April 2, 2013 at 9:30 am for all purposes.

This constitutes the decision and order of this court.

`Dated: February 27, 2013
New York, New York

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Hon. Sabrina Kraus

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