Beacon 109 204-206 LLC v Leon
2015 NY Slip Op 32083(U)
November 9, 2015
Civil Court of the City of New York, New York County
Docket Number: 92235/2013
Judge: Michael Weisberg
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART

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BEACON 109 204-206 LLC,

Index No. 92235/2013

Petitioner,

DECISION/ORDER

-against-

MARTINA JUAREZ LEON a/k/a MARTINA JUAREZ,
"JOHN DOE," and "JANE DOE,"

Respondents.

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Present: Hon. Michael Weisberg
Judge, Housing Court

Green & Cohen, P.C., New York City, for Petitioner
Goddard Riverside, Law Project, New York City, for Respondent Juarez

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed……..	1
Answering Affirmation and Affidavit Annexed…..……...	2
Replying Affirmation……..	3

Upon the foregoing cited papers, the decision and order on this motion are as follows:

This holdover summary eviction proceeding was settled[1] with an agreement in which Respondent agreed to refrain from "committing or permitting a nuisance" in the nature of the conduct alleged in the predicate notice and petition. The main allegation in Petitioner's predicate notice is that Respondent caused damage to the building as the result of allowing her bathtub or sink to overflow on at least four occasions over a period of just over three years. The agreement entitles Petitioner to restore the proceeding for a hearing on whether Respondent "breached the

[1] Although the date noted on top of the written stipulation of settlement is August 26, 2014, it is clear from other stipulations contained in the court file, the notations on the court file itself, and the case history listed in UCMCS that the agreement was actually entered into on February 10, 2015.

terms herein under the Rent Stabilization Code," but only if 1) Petitioner "alleges in good faith that this agreement has been materially breached" and 2) the allegations forming the good faith basis for Petitioner's motion are set forth in an affidavit by someone with personal knowledge of the alleged breach.

Petitioner moves to restore the proceeding for a hearing, alleging that Respondent breached the agreement by "purposefully overflowing and/or flooding their bathtub" on two occasions, both times resulting in a leak from the lobby ceiling directly below and creating a "flood situation" in the lobby. The questions before the court are 1) what conduct would constitute a material breach of the agreement; 2) whether Petitioner alleged sufficient conduct to establish material breach of the agreement; and 3) whether Petitioner alleged sufficient facts under the agreement in support of its claim of material breach.

To answer these questions the court is guided by the following principles of law. "A valid stipulation should be construed as an independent agreement subject to the well-settled principles of contractual interpretation" (*Savoy Mgmt. Corp. v. Leviev Fulton Club, LLC*, 51 AD3d 520, 520-521 [1st Dept 2008] [internal citations omitted]). "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent" (*Greenfield v. Phillies Records, Inc.*, 98 NY2d 562, 569 [2002] [internal citations omitted]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Id.* [internal citations omitted]). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Id.* [internal citations omitted]). "It is also important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases" (*South Rd. Assoc., LLC*, 4 NY3d 272, 277 [2005] [internal citations omitted]). "A contract should be construed so as to give

full meaning and effect to all of its provisions" (*American Exp. Bank Ltd. v. Uniroyal Inc.*, 164 AD2d 275, 277 [1st Dept 1990] [internal citations omitted]).

The settlement agreement conditions Petitioner's entitlement to a hearing on its good faith allegation that the agreement has been materially breached. To determine what constitutes a material breach under the agreement, the court refers back to Respondent's obligation under the agreement. Paragraph "2" requires that Respondent "refrain from committing or permitting a nuisance at the premises as set forth in the notice to cure[2] and termination [notice] or substantially similar to what is alleged in the notice of termination/petition." The court finds it significant that the wording of the agreement requires Respondent to refrain from committing or permitting "a nuisance," rather than from committing or permitting certain conduct.

Also useful in determining the meaning of material breach under the agreement is paragraph "3," which sets forth the parameters for the hearing that is to be held. The unambiguous language of the agreement is that the issue for the hearing will be whether "Respondent has breached the terms herein *under the Rent Stabilization Code*" (emphasis added). Finally, the court looks to the language of the agreement later in paragraph "3" with respect to Petitioner's burden at the hearing. Here as well the agreement refers to "nuisance" when setting forth Petitioner's burden should a hearing occur: Petitioner is only entitled to relief, such as a judgment of possession and issuance of a warrant of eviction, if it proves that Respondent has "breached this agreement and committed nuisance."

Applying the above-cited principles of contract interpretation to the language in the agreement, the only possible interpretation of the agreement is that Petitioner has alleged material breach and is entitled to a hearing only if its motion is supported by allegations

[2] Reference to a notice to cure notwithstanding, there appears to have been no such notice served, alleged, or annexed to the petition.

comprising "nuisance," which has been defined in the landlord-tenant context as "a pattern of continuity or recurrence of objectionable conduct" (*Frank v. Park Summit Realty Corp.*, 175 AD2d 33, 34 [1st Dept 1991]) and a "continuous invasion of rights" (*Domen Holding Co. v. Aranovich*, 1 NY3d 117, 124 [2003]). The court is effectively required to determine whether Petitioner has pleaded a cause of action for nuisance under the Rent Stabilization Code.

Respondent argues that two leaks caused by Respondent are insufficient as a matter of law to establish nuisance. However, "there is no strict quantitative test as to how many incidents warrants a claim of nuisance. Instead, the court must weigh both the quantitative and qualitative aspects of the specific set of facts to determine if that threshold has been met" (*160 W. 118th St. Corp. v. Gray*, 7 Misc 3d 1016[A], 2004 NY Slip Op 51881[U] [Civ Ct, NY County 2004]). In *Harran Holding Corp. v. Johnson*, NYLJ, Dec. 1, 1983 (App Term, 1st Dept 1983), the Appellate Term held that the landlord had proved nuisance where the tenant caused his sink and bathtub to overflow on four occasions, causing property damage. More recently, the Appellate Term, Second Department held that the landlord established a cause of action for nuisance where it proved at trial that the tenant had caused four occasions of flooding within seven weeks and that the tenant denied access to the landlord's agents after each incident (*Ocean Neck Apts. Co., LLC v. Weissman*, 14 Misc 3d 21 [App Term, 2nd Dept 2006]).

The allegations here fall short of the claims in *Ocean Neck* and *Harran Holding*, but the court need not necessarily determine if two incidents of leaks caused by Respondent would establish nuisance. Respondent also argues that the motion should be dismissed because Petitioner has not alleged sufficient facts in support of Petitioner's claim that she has caused the two leaks. But Respondent does not argue for the standard the court should apply in determining whether Petitioner's allegations are sufficient. Were the court evaluating the predicate notice

herein, it would require Petitioner to describe the alleged nuisance with sufficient detail to allow Respondent to prepare her defense and to satisfy the specificity requirement of Rent Stabilization Code § 2524.2(b) (*see Pinehurst Corp. v. Schlesinger*, 38 AD3 474, 475 [1st Dept 2007]). Petitioner argues that it need not meet this predicate notice standard, but need allege "only that Respondent's behavior has breached the terms of her probation." The court agrees with Petitioner that what is at issue here is not a predicate notice, and there is no basis for the court to impose the pleading standards relevant to a predicate notice onto Petitioner's obligations under the agreement. But it disagrees that the standard is as low as Petitioner claims. Fortunately, the agreement itself sets forth the standard to be applied in evaluating whether Petitioner has alleged sufficient facts.

In paragraph "3" of the agreement the parties specify that Petitioner is entitled to a hearing if its allegations of material breach are made in "good faith." Petitioner alleges, without explaining or elaborating, that it "submitted this motion on good faith." In evaluating the sufficiency of Petitioner's allegations, the court cannot ignore the parties' choice to include this qualifier of Petitioner's allegations. (*see American Exp. Bank. Ltd.*, 164 Ad2d at 277 ["[r]ather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement"] [internal citations omitted]). "Good faith is an intangible and abstract quality with no technical meaning or statutory definition. The existence of defendant's good faith as a substantive fact therefore necessitates an examination and evaluation of external manifestations as well" (*Adler v.720 Park Ave. Corp.*, 87 AD2d 514, 515 [1st Dept 1982] [internal citations omitted]). Black's Law Dictionary defines "good faith," as potentially relevant here, as "a state of mind consisting in (1) honesty in belief or purpose,…or (4) absence of intent to defraud or to seek unconscionable advantage" (Black's Law Dictionary 701 [7th ed 1999]). Regarding an

insured party's obligation to inform its insurer of an incident for which it might incur liability, the Court of Appeals described a "good faith" belief of nonliability as one that must be "reasonable under all the circumstances" (*Security Mutual Ins. Co. of NY v. Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]; *cf. Hughes v. Lenox Hill Hosp.*, 226 AD2d 4, 17 [1st Dept 1996] [standard for assessment of adequacy of predicate notice is reasonableness in view of the circumstances]). In considering whether Petitioner has made it allegations in good faith, the court is guided by the above.

Attached to the motion are the affidavits of an agent of Petitioner, Kenneth Friedman, and the building superintendent, Hector Norat. The affidavits contain allegations regarding two occurrences of water leaks into the building's common area and allegations that the leaks resulted from conduct caused or permitted by Respondent. Neither affidavit contains any direct evidence of Respondent's alleged conduct. Norat's affidavit contains attenuated circumstantial evidence of her alleged conduct. Friedman alleges that Respondents breached the agreement by "purposefully overflowing and/or flooding their bathtub." With respect to the first leak, Friedman alleges that he witnessed a water leak in the lobby ceiling, which is directly below the Respondent's apartment. He directed Norat to inspect Respondent's apartment. Norat alleges that he went to Respondent's apartment the same day and ran the water in the bathtub, bathroom sink, toilet, and kitchen sink, and that none of these activities resulted in water leaking out on the apartment floor. Norat further alleges that there were no visible leaks within the pipes, walls, or floors of the bathroom, nor was there evidence of a leak or water damage in Respondent's apartment. Norat does not allege that he observed anything that would affirmatively indicate that Respondent's sink or bathtub had recently overflowed. With respect to the second leak,

Friedman alleges that he observed a water leak in the lobby ceiling directly below Respondent's bathroom, without further allegations from him or Norat regarding what caused the leak.

With respect to the types of facts a landlord will be able allege about particular nuisance conduct, there is a difference between a nuisance in the form of causing water leaks by allowing water to overflow from a sink or bathtub and a nuisance in the form of violent or threatening behavior, willful destruction of property, vicious dogs, or other conduct that is often the subject of eviction proceedings. In cases involving the latter it will usually be more practical for a petitioner to allege specific facts as to the objectionable actions of a tenant. This is because of the self-evident fact that these types of nuisances necessarily involve other tenants or building employees to be victims of the nuisance conduct and who can inform a landlord as to what the offending tenant did to cause the nuisance (or, in the case of willful destruction of property, there is the evidence of the destroyed property itself which presumably could not have been destroyed without deliberate conduct by someone). In the case of a water leak caused by an overflowing sink or bathtub, there may be occasions when a building superintendent gains access to the apartment within minutes of learning a leak from the ceiling of the apartment below, and on those occasions the superintendent may discover water cascading over the side of the tub, or at least a tub full of water and two inches of water on the bathroom floor. But in many if not most instances there will not be anyone other than the tenant and her family present to observe the objectionable conduct. It may indeed be the case that a tenant overflowed her bathtub and as a result caused a leak, but the landlord may not ever have the opportunity to gather direct evidence that is what actually happened.

Cognizant of this difference and holding the opinion that it should not hinder a landlord from successfully pleading a cause of action for nuisance in a case like this one, the court is not

holding that Petitioner must plead evidence of a "smoking gun" that Respondent overflowed her bathtub or otherwise caused the leak. Petitioner may rely on circumstantial evidence in its motion; direct evidence is not necessarily required. However, to meet the agreement's "good faith" requirement, the specificity and sufficiency of the facts contained in Petitioner's allegations must be reasonable under the attendant circumstances. Here, "good faith" requires more than an allegation that no leak occurred after the superintendent ran the water from all faucets and toilets in the apartment. This is especially the case in New York City's housing stock, where some residential buildings are more than 100 years old.

First, to the extent that the motion alleges any facts, it only does so with respect to one of the two leaks. Second, the court considers how much water would have to overflow from a sink or a bathtub to result in that water seeping through the floor and causing, according to the affirmation of Petitioner's attorney, a "severe leak in the ceiling and flood situation in the lobby." Annexed to Petitioner's motion as "Exhibit E" is a photograph that purports to show a severe crack in the lobby ceiling, allegedly caused by the leak. Yet despite the alleged severity of the leak, one that supposedly caused a "flood situation" in the lobby, Norat's affidavit is silent when it comes to describing any evidence that copious gallons of water had recently overflowed from Respondent's sink or bathtub.

Finally, the only allegations addressing the claim that the leaks resulted from Respondent allowing her bathtub or sink to overflow are Norat's observations that running the water from the various sinks, bathtubs, and toilets in the apartment did not result in a leak and that no leaks or water damage were visible in the apartment. As a matter of law, if the only facts proven at trial were those alleged by Petitioner in its motion, then Petitioner would not have met its burden to prove that that Respondent had caused the leaks. If there is additional evidence that Petitioner

plans to submit at trial in support of its claims, then in view of the present circumstances good faith requires that at least some of that evidence be alleged in its motion. If Petitioner has no direct or stronger circumstantial evidence that Respondent caused her bathtub or sink to overflow, then under the circumstances it is not reasonable for Petitioner to fail to allege that it undertook any efforts to ascertain whether there is an underlying condition that might be causing the leak. This is especially so in light of the apparent age of the building. According to the website of the Department of Buildings, there is no certificate of occupancy for the subject building, indicating that the building was built before 1938 (*see* NY Admin Code § 28-118.3.4) or even before 1907 (*see* NY MDL 301[1][b]). Additionally, the same website indicates that a similar structure located next door to the subject building at 210 W. 109th Street was built in 1904. In New York City's housing stock it is hardly unheard of for a leak to result from an underlying condition instead of the intentional or negligent conduct of a tenant (*see* Local Law No. 6 [2013] [amending the Housing Maintenance Code to address underlying conditions]). Before haling Respondent into court for a hearing on whether she breached the agreement, and in the absence of any direct evidence or less attenuated circumstantial evidence, the circumstances here require that Petitioner allege facts showing it is unlikely that the leaks resulted from an underlying or some other condition.

As Petitioner has failed to allege sufficient facts to meet the "good faith" requirement of the agreement between the parties, its motion is denied in its entirety, without prejudice.

This constitutes the decision and order of the court.

Dated: November 9, 2015

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J.H.C.