PEEKSKILL CITY COURT
COUNTY OF WESTCHESTER: STATE OF NEW YORK

----------x

VIRGINIA DESIANO,

DECISION & ORDER

Petitioner/Landlord,

--against--

Index No. LT-676-15

JANE FITZGERALD,

Respondent.

----------x

REGINALD J. JOHNSON, J.

This is a non-payment proceeding commenced by Virginia Desiano ("Petitioner") against Jane Fitzgerald ("Respondent") seeking $17,600.00 in rental arrears including late fees, attorney's fees, and possession of 121 Viewpoint Terrace, Peekskill, New York 10566 ("the subject premises"). After the parties were unable to settle this case, the Court permitted the parties to submit motions.

Procedural History

On December 28, 2015, the Petitioner commenced this non-payment proceeding against the Respondent seeking $17,600.00 in rental arrears, including late fees, attorney's fees, and possession of the subject premises (Respondent's Exh. "E").

LT-676-15

On February 2, 2016, the parties made a first appearance in court, at which time the Respondent filed her answer. The case was adjourned to February 23, 016.

On February 23, 2016, the parties appeared in Court. The case was adjourned to April 12, 2016.

On April 12, 2016, the parties appeared in Court and requested and was granted permission to file motions. Thereupon, the Court set the following motion schedule: May 3, 2016 for Respondent's motion; May 10, 2016 for opposition; May 17, 2016 for reply, if any; and a decision on June 7, 2016. The Petitioner also represented that she filed a Chapter 13 Bankruptcy Petition.

On April 14, 2016, the Court notified the parties to appear on April 26, 2016.

On April 26, 2016, the parties appeared and the Court stayed the motions and directed the Petitioner to notify the Chapter 13 Trustee of the commencement of this case and inquire if he takes any position or interest in this matter. The case was adjourned to 5/24/16.

On May 24, 2016, the parties appeared and the case was adjourned to June 7, 2016.

On June 7, 2016, the Petitioner tendered to the Respondent a cashier's check in the sum of $4122.00 plus interest. Thereupon, the

LT-676-15

Respondent withdrew her counterclaim for the return of her escrow deposit. The Court was presented with a letter from the Chapter 13 Trustee who stated that he will not take any position or state any interest in the proceeding. Based upon this letter, the Court determined that the case should proceed and set the following motion schedule: June 28, 2016, motion by Respondent; July 12, 2016, opposition by Petitioner; and July 26, 2016, reply, if any, by Respondent.

On June 28, 2016, the Respondent filed a Motion for Summary Judgment with an accompanying Memorandum of Law.

On July 25, 2016, the Petitioner filed a Cross Motion for Summary Judgment. [1]

On July 27, 2016, the Respondent filed a Reply Affidavit.

On August 9, 2016, the parties appeared and the Court marked the motions fully submitted.

Contentions of the Parties

The Petitioner alleges that the Respondent committed a breach of contract when she failed to make her contractual payments when they became due (Lang Affirmation at ¶ 6). Petitioner also alleges that she

[1] The Petitioner's Cross Motion for Summary Judgment was filed approximately 13 days late. According to the Petitioner, the cross motion was mistakenly sent to the Poughkeepsie City Court instead of the Peekskill City Court. The Petitioner presented no proof of this law office failure. Nevertheless, a 13-day delay does not appear to prejudice the Respondent since she filed an Affidavit in Reply in Opposition to a Notice of Cross Motion for Summary Judgment. Petitioner is advised that ill explained law office failures of this sort can invite unintended consequences.

does have standing to bring the instant non-payment proceeding notwithstanding the fact that the subject premises[2] are in foreclosure, because she has not yet surrendered the premises (Lang Affirmation at ¶¶ 8-10).

The Respondent contends that the Petitioner lacks standing to commence the present proceedings because she agreed to surrender the subject premises as a part of her Chapter 13 proceeding (Klein Memo of Law at pp. 2-3; Fitzgerald Affidavit at ¶¶ 12-13). Further, the Respondent argues that her tenancy is protected under Real Property Law §339-kk (Klein Memo of Law at p. 3; Fitzgerald Affidavit at ¶¶ 7-8). Lastly, the Respondent argues that she is entitled to attorney's fees if she prevails and that the Petitioner should be sanctioned because she commenced the instant frivolous proceedings regarding the subject premises after she agreed to surrender said premises as part of her Chapter 13 Plan that was confirmed prior to the commencement of these proceedings (Klein Memo of Law at pp. 5-6).

Legal Analysis & Discussion

I. Petitioner's Lack of Standing

The Respondent argues that Petitioner lacks standing to commence

[2] The Petitioner filed a Chapter 13 bankruptcy proceeding on May 6, 2015. In a letter dated June 6, 2016, the Chapter 13 Trustee stated that he neither has any interest nor will he take any position in the subject proceedings (Respondent's Motion, Exh. "M").

the instant proceedings because she agreed to surrender the subject premises as part of a Chapter 13 reorganization plan that was confirmed by the Bankruptcy Court on December 14, 2015 (Klein Memo of Law at pp. 2-3). In support of this argument, the Respondent cites Kelsey v. McTigue, 171 A.D. 877, 157 N.Y.S. 730 (1916) for the curious proposition that Petitioner has failed to prove that "she has an estate in fee or for life, or for term of years in the property the recovery of which is sought" (Klein Memo of Law at p. 2).[3]

The late Professor David D. Siegel said,

> It is the law's policy to allow only an aggrieved person to bring a lawsuit. One not affected by anything a would-be defendant has done or threatens to do ordinarily has no business suing, and a suit of that kind can be dismissed at the threshold for want of jurisdiction without reaching the merits. When one without the requisite grievance does bring suit, and it's dismissed, the plaintiff is described as lacking 'standing to sue' and the dismissal as one for lack of subject matter jurisdiction.

Siegel, New York Practice §136 (5th ed.).

In fact, the issue of "[s]tanding goes to the jurisdictional basis of a

[3] Kelsey v McTigue, 171 A.D. 877, *supra*, stands for the sole proposition that an equitable interest in land is insufficient to compel an ejectment from the premises; only a legal interest is sufficient to eject a party from the premises. In the case at bar, for the reasons set forth herein, the Petitioner has a legal interest in the subject premises.

court's authority to adjudicate a dispute." Matter of Eaton Associates v. Egan, 142 A.D.2d 330, 334-335, 535 N.Y.S.2d 998 (3d. Dept. 1988), [citing Allen v. Wright, 468 U.S. 737 at 750-751, 104 S. Ct. 3315, 82 L.Ed.2d 556 (1984)]. It is axiomatic that a summary proceeding commenced by a party without the requisite standing must be dismissed. See, Metropolitan Realty Group v McSwain, 27 Misc.3d 1216[A] (N.Y. City Civ. Ct., 2010). See, generally Real Property Actions and Proceedings Law (RPAPL) §721 which enumerates the classes of persons who may maintain a summary proceeding.

Although the Respondent does not expressly argue that the Court lacks subject matter jurisdiction, her contention that the Petitioner lacks standing to commence the instant proceedings because she was divested of title to the subject premises via her Chapter 13 Plan prior to the commencement of these proceedings does call into question this Court's subject matter jurisdiction over this matter. See, Terner v. Brighton Foods, Inc., 27 Misc.3d 1225(A) (N.Y. City Civ. Ct., 2010) [Court held if landlord transferred title after the tenant was granted possession he lacks standing to commence a summary proceeding against the tenant].

As an initial matter, City Courts are not statutorily empowered to decide matters involving title to land. See, generally Uniform City Court Act (UCCA) §204.[4] However, when the rare question of title is

[4] UCCA §204 (Summary Proceedings) states "[t]he Court shall have jurisdiction of summary proceedings

interposed as a defense (See, Respondent's Answer annexed as Exh. "F" to Motion at ¶ 5), the Courts have not been universal in their view as to whether lower courts are divested of jurisdiction. See, Mahshie v. Dooley, 48 Misc.2d 1098, 266 N.Y.S.2d 661 (Sup. Ct. Onondaga County, 1965) [Court held that a party may not interpose title as a defense in a summary proceeding]; Mohar Realty Co. v. Smith, 46 Misc.2d 849, 260 N.Y.S.2d 685 (App. Term, 2d Dept., 1965) [Court held that the interposition of title as a defense in a summary proceeding is permissible and does not divest the lower court of jurisdiction]; Muzio v. Rogers, 20 Misc.3d 143[A], 867 N.Y.S.2d 376 (App. Term, 9th & 10th Jud. Dists., 2008) [same]; Paladino v. Sotille, 15 Misc.3d 60, 835 N.Y.S.2d 799 (App. Term, 9th & 10th Jud. Dists., 2007) [same]; Rasch, New York Landlord and Tenant-Summary Proceedings §43:20 (4th ed.) [Lower courts are not divested of jurisdiction because a tenant asserts title as a defense in a summary proceeding]; Ferber v. Salon Moderne, Inc., 174 Misc.2d 945, 688 N.Y.S.2d 864 (App. Term, 1st Dept., 1997) [Court stated that questions of ownership are not to be litigated in a summary proceeding]; Mason v. Foxcroft Village, 67 A.D.2d 1012, 1013 (3d. Dept., 1979) ("[q]uestions of title or ownership are not litigated in summary proceedings"); but see, Terner v. Brighton Foods, Inc., supra, 27 Misc.3d 1225(A) *3 [Court held Ferber v Salon, supra, should not be

---

to recover possession of real property located in whole or in part within the city, to remove tenants

read to preclude a tenant from raising the landlord's lack of title and consequent lack of standing to commence the summary proceeding by showing landlord's title interest was transferred after the tenant took possession]; see also, Besmanoff v. Allen, 143 Misc.2d 309, 543 N.Y.S.2d 608 (App. Term 9th & 10th Jud. Dists., 1989) [same].

It has been held, however, that the general rule is that a tenant is estopped from denying that the landlord from whom the tenant received possession is the owner of the property. See, Parkway Assocs. v. Berkoff, N.Y.L.J., March 7, 1995, at 29, col 2 (App. Term, 2d Dept.); see also, Rasch, New York Landlord and Tenant-Summary Proceedings §5:8 (4th ed.)["It is well settled that a tenant who has once acknowledged his landlord's title, and taken and held possession under him, and who has not surrendered his lease, nor been evicted from the premises, and who can prove no fraud against the landlord nor transfer of the latter's title after the lease began, is precluded from denying that the landlord, under whom he has so held and claimed, is the owner of the property."]

As almost every general rule has an exception, so does the general rule estopping a tenant from challenging his landlord's title in a summary proceeding. See, Terner v. Brighton Foods, Inc., 27 Misc.3d 1225(A) (N.Y. City Civ. Ct., 2010) [Court held tenant can raise issue that landlord transferred title after the tenant was granted possession and that landlord

---

therefrom, and to render judgment for rent due without regard to amount."

lacks standing to commence summary proceeding against the tenant]; Besmanoff v. Allen, 143 Misc.2d 309, 543 N.Y.S.2d 608 (App. Term 9th & 10th Jud. Dists., 1989) [same]; Muzio v. Rogers, 20 Misc.3d 143[A], 867 N.Y.S.2d 376 (App. Term, 9th & 10th Jud. Dists., 2008) [same]; Durand v. Simmons, 16 Misc.3d 133[A] (App. Term, 9th & 10th Jud. Dists., 2007) [same]; Decaudin v. Velazquez, 15 Misc.3d 45, (App. Term, 9th & 10th Jud. Dists., 2007) [same].

It is now well settled that a tenant may raise title as a defense against her landlord in a summary proceeding, but that the issue of title may not be affirmatively established in a summary proceeding. See, Muzio v. Rogers, 20 Misc.3d 143[A], 867 N.Y.S.2d 376 (App. Term, 9th & 10th Jud. Dists., 2008); Decaudin v. Velazquez, 15 Misc.3d 45, 834 N.Y.S.2d 614 (App. Term, 9th & 10th Jud. Dists., 2007). In other words, a tenant will be permitted to proffer evidence in a summary proceeding that her landlord does not have title to the subject premises and therefore no standing to commence and/or maintain a summary proceeding against her, but she will not be permitted to proffer evidence showing affirmatively who does possess title to the subject premises. Muzio v. Rogers, *supra*; Decaudin v. Velazquez, *supra*.

The dispositive question for the Court is whether, as argued by the Respondent, the Petitioner was divested of title when she voluntarily agreed to surrender the subject premises to the mortgagee Wells Fargo as

part of her Chapter 13 Plan (Fitzgerald Affidavit at ¶¶ 12-13; Klein Memo of Law at pp. 2-3). The answer to this question will presumably determine the issues of the Petitioner's standing and the Court's subject matter jurisdiction.

Respondent's contention that Petitioner was somehow divested of title to the subject premises because she voluntarily agreed to surrender said premises to Wells Fargo as part of her Chapter 13 Plan is without merit. Where, as in the case at bar, the Petitioner agreed to voluntarily surrender the subject premises to the secured creditor, Wells Fargo, as part of her Chapter 13 Plan, title remains in the Petitioner until the subject premises is actually sold pursuant to a foreclosure sale. See, In re Sherwood, No. 15-10637 (JLG), 2016 Bankr. LEXIS 263, 2016 WL 355520 (Bankr. S.D.N.Y. January 28, 2016) (Garrity, J.); In re Sneijder, 407 B.R. 46, 52-53 (Bankr. S.D.N.Y. 2009) ("Until the property is actually sold pursuant to a foreclosure sale, title to the property remains vested in the debtor.").

Since the Petitioner was not divested of title to the subject premises simply because she voluntarily agreed to surrender the subject premises as part of her confirmed Chapter 13 Plan, she has the requisite standing to commence the instant non-payment proceedings against the Respondent. Therefore, this Court has proper subject matter jurisdiction over the proceedings as the Petitioner and the Respondent are in a

landlord and tenant relationship. See, RPAPL §711.

The Respondent also argues that the subject premises was subject to a foreclosure proceeding in which a Judgment of Foreclosure and Sale was granted on February 18, 2015 but that the sale of the premises was stayed by the automatic stay generated by the Chapter 13 filing (Klein Memo of Law at pp. 1-2.). Petitioner counters that she has not surrendered the subject premises yet and said premises has not been sold at foreclosure and that she is still the titled owner (Lang Affirmation at ¶¶8-10; Fitzgerald Affidavit ¶¶ 10-13). This Court agrees with the Petitioner. See, In re Sherwood, *supra;* In re Sneijder, *supra.*

Since New York State is a lien theory jurisdiction, unless and until the subject premises is sold at foreclosure, the Petitioner remains the titled owner of the subject premises and entitled to all the rents accruing therefrom. See, Nelson, Real Estate Finance Law—Rights and Duties of the Parties Prior to Foreclosure §4:22 (6th ed.) ("Under the lien theory of mortgages, the mortgagor remains the full legal and beneficial owner of the mortgaged property until the mortgagor's rights are extinguished by foreclosure sale."); Levraad Realty Corp. v. James F. Ogden, 226 A.D.675, 233 N.Y.S. 221 (2d Dept. 1929) ("The rents belong to the mortgagor as an incident to his ownership of the land, and he can, until divested of his ownership, dispose of them."); 77 N.Y. Jur.2d Mortgages §177 ("As against the mortgagee, and as long as the mortgagor remains

in possession, the mortgagor-owner is entitled to the rents from the mortgaged premises until a judgment of foreclosure and sale.").

In the case at bar, the Respondent is liable under the lease until she is evicted. See, Metropolitan Life Ins. Co. v. Childs Co., 230 N.Y. 285, 290, (1921); Mason v. Lenderoth, 88 A.D. 38, 84 N.Y.S.740 (2d Dept. 1903) (Court held that landlord can recover rent for the full period preceding a foreclosure sale of the premises); In re Banner, 149 F. 936 (S.D.N.Y. January 18, 1907) (Court held that tenant must continue to pay rent to landlord even if premises is in foreclosure, so long as tenant continues to occupy the premises.).

II. Respondent/Tenant's Occupancy is Protected/Guaranteed by Real Property Law Section 339-kk

The Respondent claims that she received a letter together with a copy of Real Property Law §339-kk from the Board of Managers of Riverview Condominium II ("Board of Managers") informing her that the Petitioner was in default in the payment of her common charges, assessments and late charges to the condominium and demanding that all future rent payments are to be made directly to them. (Fitzgerald Affidavit at ¶ 7; Klein Memo of Law at p. 3; Board of Managers' letter annexed as Exh. "C" to Respondent's Motion). In response to the letter, the Respondent claims that she submitted her rent payments directly to

the Board of Managers from October 2015 through June 2016[5] (Fitzgerald Affidavit at ¶ 8).

Real Property Law §339-kk states, in pertinent part, that where a non-occupying unit owner rents her unit and fails to pay common charges, assessments and late fees, upon the expiration of any grace period for the payment of said charges, assessments and fees, the Board of Managers shall send a notice to the owner and tenant that all future rent payments are to be made directly to the condominium association until all charges, assessments and fees are brought current. This law also provides that a tenant who makes such payments in compliance with this section shall be immune to a suit for non-payment of rent.

The dispositive question on this issue is whether, as the Respondent argues, her payment of rent directly to the Board of Managers for the months of October 2015 through June 2016 warrants a dismissal pursuant to RPL §339-kk(e) [Klein Memo of Law at pp. 3-4], or whether the Respondent is immune from a non-payment proceeding only for those monthly payments she remitted to the Board of Managers in order to bring the account current, as Petitioner argues [Desiano Affidavit at ¶ 14]. This Court is not aware of any reported cases on this point; nevertheless, the Court finds that the Respondent is only immune from a

[5] Respondent's monthly rent payment of $2200.00 was paid directly to the Board of Managers for a period of 9 months (October 2015 through June 2016) for total sum of $19,800.00 (See, copy of checks to Board of Managers annexed as Exh. "D" to Respondent's Motion).

non-payment proceeding pursuant to RPL §339-kk(e) for those months she remitted her rent payments directly to the Board of Managers until the account was brought current.

RPL §339-kk(e) states,

> Payment by rental tenant to the condominium association made in connection with this section shall relieve that rental tenant from the obligation to pay such rent to the non-occupying owner and shall be an absolute defense in any non-payment proceeding commenced by such non-occupying owner against such tenant for such rent.

(emphasis added).

It has been held that the purpose of RPL §339-kk is protect the financial security of the condominium association by ensuring that it can compel the tenant of a non-occupying owner who fails to pay common charges to remit the rent payments directly to the condominium association. See, 133 Essex St. Condominium v. Evanford, LLC, 2009 N.Y. Misc. LEXIS 4166; 2009 N.Y. Slip Op 31973(U) (Sup. Ct. New York County, 2009); see also, N.Y. Bill Jacket, 1998 S.B. 4141, Ch. 422. If the aim of RPL §339-kk is to protect the financial security of the condominium, then it is somewhat difficult to comprehend how that purpose would be effectuated if the tenant is immune from a non-payment proceeding not only for the rent payments made to the

condominium in order to bring the common charges current, but also for all other monthly rents due and owing at the time of the commencement of the non-payment proceeding.

Accordingly, the Court finds that a tenant is immune from a non-payment proceeding only for those rent payments remitted to the condominium association pursuant to RPL §339-kk in order to bring the common charges current, and not for any other rent payments due and owing at the time of the commencement of the non-payment proceeding. See, McKinney's Real Property Law §339-kk, Practice Commentaries by Schneider and Blumenthal [2016]; 4-36 Bergman on New York Mortgage Foreclosures §36.11 (2015); 19A N.Y. Jur Condominiums and Cooperative Apartments 129 (2nd 2014) ["Payment by a rental tenant to the condominium association made in this manner relieves that rental tenant from the obligation to pay the rent to the nonoccupying owner and operates as an absolute defense in any nonpayment proceeding commenced by the nonoccupying owner against the tenant for that rent."] [emphasis added].

In the case at bar, the Respondent remitted rent payments to the Board of Managers pursuant to RPL §339-kk for the months of October 2015 through June 2016 for a total sum of $19,800.00 (Fitzgerald Affidavit at ¶¶ 7-8; Desiano Affidavit at ¶ 14). Therefore, the Respondent is immune from any non-payment proceeding for those rent payments

remitted to the Board of Managers for the months of October 2015 through June 2016. However, as correctly argued by the Petitioner, "Respondent's payments to the Board of Managers do not mitigate the Respondent's rent obligations between May and September 2015" (Desiano Affidavit at ¶ 14). Further, the Court agrees with the Petitioner that if the Respondent is not required to pay for the months of May through September 2015, it would result in her unjust enrichment (Desiano Affidavit at ¶ 16). Accordingly, Petitioner's cross motion for $11,000.00 is granted and she is entitled to a money judgment in the sum of $11,000.00 which represents outstanding rent payments for the months of May 2015 through September 2015, together with a judgment of possession and a warrant of eviction, plus costs and disbursements.

III. Respondent's Request for Legal Fees

Respondent has requested attorney's fees pursuant to Clause 19 of the Lease (Klein Memo of Law at p. 5; see copy of "Lease" annexed as Exh. "A" to Respondent's Motion). A tenant may request reciprocal attorney's fees if the landlord's lease provides for attorney's fees for the landlord. See, RPL §234. However, a tenant is only entitled to attorney's fees if the tenant has prevailed in, or made a successful defense of, any action or proceeding commenced by the landlord against the tenant arising out of the lease. See, Casamento v. Juaregui, 88 A.D.3d 345, 929 N.Y.S.2d 286 (2d Dept. 2011). In the case at bar, the Respondent has not

prevailed and therefore is not entitled to attorney's fees. Likewise, the Petitioner is not entitled to attorney's fees as the prevailing party because the Lease fails to identify attorney's fees as additional or added rent. See, RPAPL §741(5); Henry v. Simon, 24 Misc.3d 132(A), 890 N.Y.S. 369 (App. Term, 9th & 10th Jud. Dists. 2009).

IV. Respondent's Request for Sanctions

Respondent argues that the Petitioner should be sanctioned for commencing the instant proceedings after she filed her Chapter 13 bankruptcy in which she agreed to surrender the subject premises and failing to respond to Respondent's Notice to Admit (Klein Memo of Law at p. 5). In light of the Court's decision, both arguments are deemed moot.

Ordered, that the Respondent's motion is denied in its entirety.

Ordered, that the Petitioner's cross motion is granted to the extent that she is entitled to a money judgment against the Respondent in the sum of $11,000.00, together with a judgment of possession, a warrant of eviction, plus costs and disbursements.

This constitutes the decision and order of the Court.

_____

Hon. Reginald J. Johnson
City Court Judge

Dated: Peekskill, NY
August 29, 2016

LT-676-15

Order entered in accordance with the foregoing on this ____ day of August, 2016.

_____
Concetta Cardinale
Chief Clerk

To: Katz & Klein
1 Croton Point Avenue
Croton-on-Hudson, N.Y. 10520
(914) 271-6601

Greher Law Offices, P.C.
1161 Little Britain Road, Suite B
New Windsor, New York 12553
(845) 567-1002
Attn: Kathryn M. Lang, Esq.