50 Ave. B LLC v Wickens
2017 NY Slip Op 31521(U)
July 6, 2017
Supreme Court, New York County
Docket Number: 154307/17
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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50 AVENUE B LLC,

Plaintiff,

-against-

JANET WICKENS and "JOHN DOE" and "JANE DOE",

Defendants.

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Index No. 154307/17
Motion Sequence 001

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

This decision and order is issued in furtherance of my order in this case dated June 28, 2017 and a so-ordered stipulation between counsel for plaintiff and counsel for the defendants in this case, also dated June 28, 2017 (Stipulation). Both my order and the Stipulation are annexed hereto and made a part hereof.

This is an action for ejectment and to recover for use and occupancy of an apartment on the 1st floor of a building located at 240 East 4th Street in Manhattan. Plaintiff claims that the Certificate of Occupancy for the subject building specifically designates the 1st floor to be used for commercial purposes only. Notwithstanding, it is undisputed that defendant Janet Wickens and non-party Matthew Bertolini (Defendants) have lived in the apartment since 1995 when they were given a rent stabilized lease. Defendants live in the apartment with two dogs and a cat.

On March 30, 2017 the New York City (NYC) Department of Buildings (DOB) inspected the building and issued a Peremptory Vacate Order with respect to the subject apartment which provides in relevant part as follows:

> This order is issued because there is imminent danger to life or public safety or safety of the occupants or to property, in that . . . The legal six story mixed-use multiple dwelling is illegally converted at 1st floor retail store and is arranged and occupied as a class "A" dwelling unit. The illegal dwelling unit has no secondary egress rendering it unsafe for use and occupancy. . . It is ORDERED that the aforesaid building or part thereof remain vacant and unoccupied until such time as the condition(s) giving rise to this vacate order have been

[1]

> corrected and the vacate order is rescinded. This is a peremptory order, essential to public safety.

In furtherance of the DOB's vacate order, Plaintiff mailed a Notice of Termination to Defendants on April 20, 2017 notifying them that the lease was terminated as of May 6, 2017. Defendants did not vacate the premises, and Plaintiff commenced this action on May 10, 2017. On May 31, 2017, the Office of Administrative Trials and Hearings sustained a $2,500 fine against Plaintiff for allowing the apartment to continue to be used for residential purposes.

On or about June 3, 2017 Defendants moved by order to show cause for a stay of the DOB's vacate order. The order to show cause with temporary restraining order was signed by Justice Nervo of this court on or about June 5, 2017. On the June 26, 2016 return date counsel for both sides appeared before me. Ms. Wickens and Mr. Bertolini were also in attendance. And, despite not being a party to this action, counsel for the DOB appeared and presented the court with an affidavit by Claudio Lazo, the Construction Inspector for the DOB's Division of Borough Enforcement Inspections Unit who inspected the subject building on March 30, 2017. Mr. Lazo recommended that the 1st floor be vacated because of the buildup of personal effects and the fact that the apartment had only one means of egress (¶¶ 9-10):

> I observed that there was only one means of egress, the front door of the subject premises, which opens onto East 4th Street. The conditions of the subject premises were particularly dangerous because there was an excess of personal effects, which filled up almost the entire space within the subject premises. Due to all of the dangerous conditions that I observed, I recommended that the subject premises be vacated.
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> There was no secondary means of egress from which individuals or animals could exit the subject premises if there was an emergency such as a fire. While I observed a window in the rear of the subject premises, the window did not constitute a sufficient secondary means of egress. . . . The window was obstructed because there was a fan placed in the window and because there was a metal gate on the outside of the window that blocked the entire window. Furthermore, I observed that the window opened onto a small, enclosed courtyard that had multiple boxes stored in it. In addition, the small, enclosed courtyard did not have a fire rated exit passageway that led directly to the street.

Annexed to Mr. Lazo's affidavit are pictures which confirm the buildup of personal effects in the apartment and the lack of a second means of egress therefrom.

All counsel, Ms. Wickens, and Mr. Bertolini appeared before me again on June 28, 2017. At the conclusion of the conference I advised the parties that I was denying Defendants' request for a stay of the DOB's partial vacate order. As the party seeking an injunction, Defendants had to demonstrate, among other things, a probability of success on the merits, which they simply could not do here. *See* CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005).

In this regard, section 27-2139 of the NYC Administrative Code provides that "[a]ny dwelling or part thereof, which, because of a structural or fire safety hazard, defects in plumbing, sewage, drainage, or cleanliness, or any other violation of this code or any other applicable law, constitutes a danger to the life, health, or safety of its occupants, shall be deemed to be unfit for human habitation" and that DOB "may order or cause any dwelling or part thereof which is unfit for human habitation to be vacated." New York City has a "paramount interest in protecting the public from imminent danger" and an administrative agency such as the DOB must be able to take action "necessary to protect the public health and safety." *See Mendez v Dinkins*, 226 AD2d 219, 223 (1st Dept 1996). The nature and length of Ms. Wickens' and Mr. Bertolini's tenancy cannot undermine the DOB's determination that the subject apartment is a serious public safety hazard and must be vacated immediately.[1]

However, I believe that everyone involved in this case is sensitive to the fact that Defendants have resided in and paid rent for the subject unit for over twenty years. Accordingly, and as per the annexed Stipulation, the parties agreed that Defendants would temporarily relocate to another apartment owned by Plaintiff during the pendency of the proceedings before me. Plaintiff will

[1] The court notes that neither party has implead the DOB as a party to this action. Defendants also have not exhausted their administrative remedies by appealing the DOB's determination to the Environmental Control Board. *See, e.g., Mason v Dep't of Bldgs.*, 307 AD2d 94 (1st Dept 2003). For these reasons alone the court believes it has no jurisdiction over the DOB and therefore has no authority to grant Defendants a stay of the DOB's vacate order.

furnish the temporary apartment with a bed, table, two chairs, and a couch, and Defendants are not to pay rent during their temporary stay.

The court is appreciative of the parties' efforts and hopes that further negotiation will lead to an amicable and permanent resolution of this matter.

Accordingly, it is hereby

ORDERED that Defendants' motion for an order staying the Department of Buildings' March 30, 2017 vacate order is denied; and it is further

ORDERED that the temporary stay of the March 30, 2017 vacate order previously imposed is hereby lifted; and it is further

ORDERED that Defendants shall vacate the subject unit on or before July 1, 2017 in accordance with the terms of the annexed stipulation; and it is further

ORDERED that Defendants shall immediately alleviate the buildup of personal effects in the subject unit; and it is further

ORDERED that Defendants shall answer or otherwise respond to the complaint on or before July 11, 2017; and it is further

ORDERED that the parties appear for a further conference in Part 30, 60 Centre Street, Room 412, New York, NY 10007, on July 17, 2017 at 2:00PM.

A copy of this decision and order will be emailed by the court to all counsel, including counsel for the DOB.

This constitutes the decision and order of the court.

DATED: July 6, 2017

SHERRY KLEIN HEITLER, J.S.C.

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