

Florim Realty Corp. v Thomas
2018 NY Slip Op 30110(U)
January 10, 2018
Supreme Court, New York County
Docket Number: 154820/2016
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
Florim Realty Corp.,

Plaintiff,

Index Number:

-against-

154820/2016

Garen Thomas, "John Doe"
and "Jane Doe,"

Defendants.
-----X

Gerald Lebovits, J.:

Defendant Garen Thomas moves to dismiss plaintiff's complaint for lack of subject-matter jurisdiction, res judicata, and failure to comply with various requirements of the Rent Stabilization Code (the Code). Plaintiff cross-moves for summary judgment under CPLR 3212 for a judgment of possession and a warrant of eviction or, alternatively, for an order directing the payment of use and occupancy.

Underlying Allegations

This case involves apartment 5 (the Apartment) in a building (the Building) located at 136 West 87th Street, New York, New York. Plaintiff is the owner of the Building. Thomas initially signed a lease for the Apartment, commencing on April 1, 2008, at a monthly rent of \$1850.

Plaintiff contends that Thomas has been illegally subletting the Apartment, that she has moved to California and that the Apartment is not her primary residence, that the Apartment has been vacant since Desirae Duncan moved out of the Apartment at the end of June 2015, and that Thomas has not executed a renewal lease or made any rental payments since May 12, 2015.

Plaintiff brought a holdover proceeding in the Civil Court of the City of New York, New York County, Housing Part, L&T index number 87612/2014 (the Housing Court proceeding), entitled *Florim Realty, petitioner, against Garen Thomas, respondent-tenant, and Desirae Duncan, "John Doe" and "Jane Doe", respondent-undertenants*. The Housing Court proceeding was settled by stipulation (the Stipulation) dated May 12, 2015, and so-ordered by Judge Michelle Schreiber. The Housing Court proceeding sought possession of the Apartment based on a claim that Thomas was illegally subletting the Apartment to Duncan by overcharging and profiteering. The Stipulation provided that the claim against Thomas was discontinued with prejudice, that outstanding rent claims were resolved, and that Duncan agreed to vacate the Apartment and restore Thomas to possession. Thomas brought a proceeding against plaintiff

before the New York State Division of Housing and Community Renewal (DHCR), claiming that plaintiff was overcharging the legal rent. DHCR determined that the legal rent was \$1887, as of November 1, 2013.

Thomas contends that she never received a renewal lease after the Stipulation was executed, that in early July 2015, she moved back into the Apartment after Duncan vacated the Apartment, and that the resolution of the Housing Court Action bars this action. She also asserts that, since Duncan moved into another apartment in the Building, Duncan's affidavit asserting that Thomas does not reside in the Building and supporting plaintiff's contention that the Apartment is not Thomas's primary residence, should be disregarded.

Plaintiff seeks summary judgment on its claim for eviction, based on its assertion that Thomas was illegally subletting the Apartment, that it is not her primary residence, and that Thomas has not executed a renewal lease. Alternatively, it seeks use and occupancy for the Apartment during the pendency of this litigation.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). "[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment" (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; *accord Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

Res Judicata and Collateral Estoppel

"Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation [because] . . . a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). Under New York's "transactional analysis approach [to res judicata,] ... once a claim is

brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy” (*O’Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 474 [1st Dept 2011]).

Compared to res judicata or claim preclusion, “[c]ollateral estoppel, or issue preclusion, ‘precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . , whether or not the tribunals or causes of action are the same’” (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999], quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Collateral estoppel “applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action” (*Parker*, 93 NY2d at 349; *BDO Seidman LLP v Strategic Resources Corp.*, 70 AD3d 556, 560 [1st Dept 2010]; *Lumbermens Mut. Cas. Co. v 606 Rest., Inc.*, 31 AD3d 334, 334 [1st Dept 2006]).

Discussion

In this matter, there are many significant disputed issues of fact including whether Thomas is residing in the Apartment or whether the Apartment is vacant, whether Thomas received a renewal lease for the Apartment, whether the Apartment is Thomas’s primary residence or whether she is residing in California, and whether Thomas was illegally subletting the Apartment by overcharging subtenants. On the motion and cross-motion for summary judgment, the court must accept as true, for the purpose of deciding the motion, the non-movant’s version and give it all favorable inferences. The conflicting affidavits on these issues require resolution by a finder of fact, which can weigh the credibility of testimony. The court notes that this action raises issues not within the scope of the Housing Court proceeding, including whether Thomas received a renewal lease after the Stipulation was executed and whether Thomas moved back into the Apartment or whether it is vacant. Thomas has not shown the identity of issues required to establish collateral estoppel (*see Parker*, 93 NY2d at 349). Accordingly, Thomas’s motion for summary judgment dismissing plaintiff’s complaint and the portion of plaintiff’s cross-motion that seeks summary judgment on its claim for eviction are both denied.

Plaintiff alternatively seeks use and occupancy for the Apartment. Thomas has asserted that she moved into the Apartment in early July 2015 and has not contested that she has not paid rent. Plaintiff is entitled to use and occupancy in the amount of \$1887 per month, the amount DHCR found to be the legal rent. The portion of plaintiff’s cross-motion that seeks use and occupancy is granted to direct Thomas to pay use and occupancy in the amount of \$1887 per month, as it accrues, from the date of this order until the resolution of this action or until further order of the court. Plaintiff is also entitled to past use and occupancy from July 2015, when Thomas stated she moved into the Apartment, until the date of this order, in the amount of \$1887 per month, within 90 days after service of a copy of this order with notice of entry.

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Accordingly, it is, therefore,

ORDERED that the motion of Garen Thomas for summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that the portion of Florim Realty Corp.'s cross-motion for summary judgment granting judgment on its claim for eviction is denied; and it is further

ORDERED that the portion of Florim Realty Corp.'s cross-motion for use and occupancy is granted, and Garen Thomas is directed to pay use and occupancy in the amount \$1887 per month as accruing from the date of this order until resolution of this action or further order of the court, and to pay past use and occupancy in the amount of \$1887 per month from July 1, 2015 until the date of this order, within 90 days after service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff serve a copy of this decision and order on defendants.

Dated: January 10, 2018



J.S.C.