179-94 St LLC v Hassan
2018 NY Slip Op 33161(U)
December 11, 2018
Supreme Court, New York County
Docket Number: 155214/2015
Judge: Paul A. Goetz

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 47

179-94 ST LLC, and YASHAR FOUNDATION, INC.,

Plaintiffs,

-against-

SANIA HASSAN, GAGO PROPERTIS LLC, ROBERT GAGO and BRIAN M. LIMMER,

Defendants.

Index No.: 155214/2015

DECISION/ORDER

Mot. Seq. 003

PAUL A. GOETZ, J.S.C.:

Plaintiff 179-94 ST LLC is the owner of real property located at 179 East 94th Street, New York, New York, which it purchased from defendant Gago Properties LLC by assignment of a mortgage in foreclosure. Plaintiff Yashar Foundation Inc. is the net-lessee of the property. Upon purchasing the building, plaintiffs learned that one of the units was occupied by defendant Sania Hassan, who had entered into a 15-year lease with the prior owner, Gago Properties LLC, a month before the sale. Upon learning of the tenancy, plaintiffs commenced an action against defendant Hassan seeking a judgment declaring Hassan's lease void, ejectment of Hassan from the premises, and damages for use and occupancy. Plaintiffs also commenced a separate action against the prior owner, its principal, Robert Gago, and their attorney, Brian Limmer, for damages. By order dated November 2, 2016, these actions were consolidated into the present action. Plaintiffs now move pursuant to CPLR 3212 for summary judgment on their claims against defendant Hassan and also seek dismissal of her affirmative defenses and counterclaims.

Plaintiffs' Summary Judgment Motion on the Causes of Action in the Complaint

In their motion, plaintiffs argue that defendant Hassan's lease and tenancy should be voided and offer several arguments in support, which are addressed in seriatim below.

First, plaintiffs argue that Hassan's 15-year lease is unenforceable because it was never recorded. Real Property Law § 291 states that any conveyance of real property which is not recorded is void as against any bona fide purchaser of the property. This provision is applicable to conveyances of a lease which exceeds a term of three years, like the one here (RPL § 290[1]). However, "a purchaser with prepurchase notice, actual or constructive, of an unrecorded instrument or encumbrance is not a good faith purchaser for value and cannot avail himself or itself of the benefits of the recording statutes" (*Unique Laundry Corp. v. Hudson Park NY LLC*, 55 A.D.3d 382, 383 [1st Dep't 2008] [internal citations and quotations omitted]). Plaintiffs assert that one of their associates, Reginald Beauvais, toured the building before the purchase, and did not see Hassan's occupancy (Affidavit of Michael Kaplan sworn to on June 5, 2018, ¶ 7 [citing to affidavit of Reginald Beauvais]). However, according to Hassan, she was living in her unit at the time of plaintiffs' purchase and made no effort to hide her tenancy from anyone, including plaintiffs (Affidavit of Sania Hassan sworn to on June 28, 2018, ¶ 25). Thus, there is an issue of fact as to whether plaintiffs had notice of Hassan's tenancy and whether plaintiffs satisfied their duty of inquiry (*Unique Laundry Corp.*, 55 A.D.3d at 383; *Nethaway v. Bosch*, 199 A.D.2d 654, 655 [3d Dep't 1993] [stating that "[t]he general rule is that actual possession of real estate is notice to all the world of the existence of any right which the person in possession is able to establish"]; *Vitale v. Pinto*, 118 A.D.2d 774, 776 [2d Dep't 1986]).

Second, plaintiffs argue that the lease is unenforceable because it contradicts the restrictions on the prior recorded mortgage. However, defendant Hassan was not a party to the mortgage, which was extinguished on October 14, 2014, by Discharge of Mortgage (Affirmation of Brian D. Graifman dated June 5, 2018, Exh. 26). Thus, this argument is unavailing as plaintiffs may not rely on obligations in a mortgage agreement which has since been

extinguished (*Dorff v. Bornstein*, 277 N.Y. 236, 241 [1938] [stating that "[a]ll rights of subsequent mortgagees have been finally and conclusively cut off and a new estate in the new owner has been created" as a result of the foreclosure]; *White v. Citibank, N.A.*, 2018 N.Y. Slip. Op. 31813(U), at 17 [Sup. Ct. Suffolk Cty. 2015] [stating that "the plaintiff's interest in the subject property . . . [was] extinguished by the foreclosure sale of the subject property"]).

Third, plaintiffs argue that the lease is voidable under CPLR 6501 because plaintiffs' predecessor-in-interest filed a notice of pendency on the property prior to Hassan entering into the lease. Pursuant to CPLR 6501, "[a] person whose conveyance or incumbrance is recorded after the filing of the notice [of pendency] is bound by all proceedings taken in the [foreclosure] action" and the lease may be voided following the purchase (*West 56th & 57th Street Corp. v. Pearl*, 242 A.D.2d 508, 508 [1st Dep't 1997]). However, under CPLR 6513, a notice of pendency is valid for three years after filing, unless it is extended. Here, the notice of pendency was filed on June 6, 2011 and there is no evidence that it was ever extended. Thus, the notice of pendency expired on June 6, 2014, three months before Hassan entered into the lease, on September 14, 2014 (Graifman Aff., Exhs. 7, 15). Accordingly, plaintiffs may not rely on CPLR 6501 in order to void the lease.

Finally, plaintiffs argue that Hassan's lease is unenforceable because it constitutes a fraudulent conveyance under Sections 273 and 276 of the Debtor and Creditor Law. In order "[t]o prove that a conveyance is fraudulent as a matter of law under Debtor and Creditor Law § 273, the party challenging the conveyance has the burden of proving both insolvency and the lack of fair consideration" (*Epstein v. Nieves*, 258 A.D.2d 436, 436 [2d Dep't 1999]). Under Debtor and Creditor Law § 276, a conveyance may be set aside as unenforceable if it was made with actual intent to defraud creditors. Although direct evidence of fraud is not required, in

determining whether a conveyance was made with actual intent to defraud, a creditor may rely on "badges of fraud" which are circumstances that commonly accompany fraudulent transfers, such as (1) inadequacy of consideration, (2) close relationship between the parties, (3) retention of the property, (4) suspicious timing of the conveyance after the debt was incurred, (5) the use of fictitious parties, and (6) information that the transferor was insolvent as a result of the conveyance (*Wall St. Assoc. v Brodsky*, 257 A.D.2d 526, 529 [1st Dep't 1999]).

Here, plaintiffs have failed to meet their burden under either provision. First, there is no evidence, other than the existence of a foreclosure action, which shows that the seller, defendant Gago Properties LLC, was insolvent at the time of the transaction. Second, plaintiffs failed to prove as a matter of law that fair consideration was not given for the conveyance. Although the monthly rent for the unit is only $600 a month, Hassan states that she was required to pay $3,000 up front and was required to perform an additional $1,450 in repairs to the unit (Hassan Aff. ¶¶ 11, 14-15). Third, Hassan did not have any relationship, much less a close one, with defendant Gago prior to entering the lease and only learned of the apartment through her attorney, defendant Brian Limmer (Hassan Aff. ¶¶ 7-8). Thus, plaintiffs failed to prove that the conveyance should be set aside as fraudulent under Sections 273 and 276 of the Debtor and Creditor Law (*CDR Creances S.A.S. v. First Hotels & Resorts Investments, Inc.*, 153 A.D.3d 1208, 1209 [1st Dep't 2017]; *Epstein*, 258 A.D.2d at 437).

Plaintiffs' Summary Judgment Motion Seeking Dismissal of Hassan's Affirmative Defenses and Counterclaims

Plaintiffs also seek dismissal of Hassan's affirmative defenses and counterclaims. With respect to the affirmative defenses, which are based on protections of the Rent Stabilization Code, plaintiffs argue that Hassan is not entitled to these protections because her tenancy is illegal and void ab initio. In support, plaintiffs submit a vacate order which was issued by the

Department of Buildings on April 2, 2012 (Graifman Aff., Exh. 12). The vacate order provides that certain units in the building, including Hassan's unit, must remain vacant because the second means of egress from the units (the fire escape) was blocked. Plaintiffs assert that the vacate order was never cured prior to Hassan's tenancy and thus her tenancy was never legal.

Generally, a vacate order will not terminate a tenancy unless there is incontrovertible evidence that the violation cannot be cured (*Eyedent v. Vickers Mgmt.*, 150 A.d.2d 202, 204 [1st Dep't 1989] [holding that vacate orders did not terminate tenancy]; *compare Progressive Realty Assoc., L.P. v. White*, 130 A.D.3d 450, 450 [1st Dep't 2015] [holding that tenancy was illegal where there was incontrovertible evidence that unit could not be legalized because it violated certificate of occupancy]). Unlike the cases cited by plaintiffs, where the tenancy violated the building's certificate of occupancy (*see East 82 LLC v. O'Gromley*, 295 A.D.2d 173, 174 [1st Dep't 2002]), the violation here was based on the landlord's failure to provide a second means of egress from the units. Plaintiffs have not submitted any evidence to show that such a violation cannot be cured nor did they provide proof that they or the prior landlord took any steps to cure this violation but failed (*See Pineda v. Irvin*, 40 Misc.3d 5, 6 (App. Term 1st Dep't 2013) [stating that a contrary holding would in effect reward the landlord's failure to cure the violation]; *Prana Growth Fund I, L.P. v. Lazala*, 8 Misc.3d 667, 669 [Sup. Ct. Suffolk Cty. 2005] [distinguishing *East 82, supra,* on the ground that plaintiff offered no evidence to support its claim that the space cannot be legalized]). Accordingly, plaintiffs' motion to dismiss the affirmative defenses must be denied.

With respect to the counterclaims, plaintiffs correctly argue that defendant Hassan's first counterclaim for rent overcharge must be dismissed as it is undisputed that plaintiffs never accepted Hassan's rent for the apartment (Kaplan Aff. ¶ 16; Hassan Aff. ¶ 32). Likewise, there is

no basis for Hassan's second counterclaim, in which she seeks reimbursement for her renovation expenses, as Hassan voluntarily agreed to undertake these renovations when she moved into the unit (Hassan Aff. ¶ 13). Thus, the counterclaims must be dismissed.

Finally, plaintiffs seek and are entitled to an award of use and occupancy for the apartment *pendente lite*, which will be based on the amount charged in the lease (*Alphonse Hotel Corp. v. 76 Corp.*, 273 A.D.2d 124 [1st Dep't 2002] [holding that court has broad discretion to award use and occupancy during the pendency of a proceeding]).

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is granted to the extent of dismissing defendant Hassan's counterclaims and is otherwise denied; and it is further

ORDERED that defendant Hassan shall deposit with the court (unless other arrangements are made between the parties through counsel) use and occupancy for the months of February 2015 through December 2018 in the amount of $600 per month, within 30 days of entry of this order, and must thereafter continue making monthly use and occupancy deposits of $600 with the court by the 10th of each such month until this proceeding is concluded; and it is further

ORDERED that the parties shall appear for a compliance conference on

March 21, 2019 at 9:30 AM. 80 Centre Room 320.

Dated: December 11, 2018

HON. PAUL A. GOETZ