

4 Arts Coop. Corp. v Ensley
2018 NY Slip Op 33485(U)
December 7, 2018
Civil Court of the City of New York, New York County
Docket Number: 73948/17
Judge: Gary F. Marton
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FILED: NEW YORK COUNTY CLERK 12/17/2018 04:58 PMCIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART C

x Index No. 73948/17

4 ARTS COOPERATIVE CORP.,

Petitioner,

DECISION/ORDER

-against-

SUSAN ENSLEY AS EXECUTRIX OF THE ESTATE Present:
OF EDWARD CHAPLIN et al.,

Respondents.

Hon. GARY F.x MARTONCIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART C

Index No. 73949/17

4 ARTS COOPERATIVE CORP.,

Petitioner,

DECISION/ORDER

-against-

483 BROOME CORP. et al.,

Present:

Respondents.

Hon. GARY F.x MARTON

Recitation of the papers considered in the review of the motion:

<u>Papers</u>	<u>Numbered</u>
Respondent's motion to dismiss	1
Petitioner's cross motion	2
Respondent's reply affirmation	3
Respondent's affidavit in opposition	4
Petitioner's reply affirmation	5
Petitioner's supplemental affirmation	6
Petitioner's reply affirmation	7
Respondent's response to supplemental affirmation	8
Respondent's motion for a stay	9
Petitioner's affirmation in opposition	10
Respondent's reply affirmation	11
The court files	12

Petitioner's counselRosenberg & Estis, P.C.
733 Third Avenue
New York, NY 10017
(212) 867-6000Respondents' counselJack L. Lester
99 Park Avenue - Ste. 1100
New York, NY 10016
(212) 832-5357

Petitioner commenced these two holdover proceedings in September, 2017. Thereafter, respondents (hereinafter "Ensley") interposed answers and then moved to dismiss, petitioner (hereinafter, "4 Arts Co-op") cross-moved to strike defenses, for summary judgment, and for related relief, and Ensley in a second and later motion moved for a stay. By a decision and order dated November 28, 2018 the court denied Ensley's motions but continued to reserve decision on petitioner's motion. Now, as set out below, the court grants petitioner's motion.

BACKGROUND

The premises at issue in these proceedings (hereinafter, the "Housing Court proceedings") consists of two cooperative apartments that occupy the entire top floor of a five-story building. By a two-attorney stipulation "so ordered" herein on October 17, 2017 the parties agreed, inter alia, that "[t]his proceeding and the proceeding of 4 Arts Cooperative Corp. v 438 Broome Corp. L&T Index No. 73949/17 are hereby consolidated for the purpose of motion practice and trial only, with both matter[s] proceeding under this index number 73948/17."

Petitioner is the proprietary lessor of both apartments; Edward Chaplin, until his death in 2011, was the proprietary lessee of one apartment and a shareholder of the corporate proprietary lessee of the other. Upon Chaplin's death Susan Ensley became the executor of his estate and the sole shareholder of the corporate lessee.

In July, 2014 Ensley began two proceedings against 4 Arts Co-op and a dozen other defendants in Supreme Court, New York County (hereinafter, the "Supreme Court proceedings") under index numbers 156926/14 and 157932/14. Ensley sought money damages for 4 Arts Co-op's alleged breach of the warranty of habitability and failure to remedy alleged conditions of inhabitability at the premises. At about the same time she moved by order to show cause in both proceedings for a TRO and injunctive relief. The court (Kenney, J.) signed the show cause orders, made them returnable on September 9, 2014 and, pending the hearing of the motions, restrained 4 Arts Co-op "from undertaking, or taking any act to terminate the Proprietary Lease of the plaintiffs for failure to pay unpaid rents, additional rents, maintenance, assessments, late fees, penalties, legal fees, management fees, other professional fees, portion of taxes and mortgages."

About 10 months later, in July, 2015, Ensley began HP proceedings in this court under index numbers 6160/15 and 6112/15. She alleged that there were violations of the housing maintenance code at the premises. She brought the HP proceedings against the instant petitioner, against the statutorily required Department of Housing Preservation and Development of the City of New York ("HPD"), and against one other respondent, RM Building Consulting LLC. By a three-attorney stipulation "so ordered" on September 9, 2016 the parties settled the matter.

Some eight months later in the Supreme Court proceedings, and by a two-attorney stipulation "so ordered" on April 20, 2017, the parties agreed that the "TRO is modified to permit co-op [defendants] to file a counterclaim or separate action against [petitioner] for nonpayment. All other requested relief is hereby withdrawn." Shortly thereafter, 4 Arts Co-op began the instant Housing Court proceedings.

RESPONDENT'S ANSWERS

Ensley interposed identical answers in each of the Housing Court proceedings. Each answer sets out what are denominated as six affirmative defenses and two counterclaims, the first counterclaim overlapping with the fifth affirmative defense and the second counterclaim overlapping with the sixth affirmative defense.

The first affirmative defense seeks dismissal on the ground that the Supreme Court proceedings constitute "another action pending between the parties for the same cause of action," CPLR 3211(a)(4). However, the causes of action are not the same and, in addition, the parties are not the same. The court grants petitioner's motion to the extent of striking the first affirmative defense.

The second affirmative defense alleges in conclusory terms that the petition is defective, that necessary parties have not been named, and that certain unspecified dates are erroneous. The court holds that this second defense is pled without sufficient particularity and the court grants petitioner's motion to the extent of striking the second affirmative defense.

The third and fourth defenses are to the effect that legally sufficient service of the petition, notice of petition, and "all predicate notices" was not made. However, in two-attorney stipulations "so ordered" on October 17, 2017 and November 13, 2017 these defenses were waived. The court grants petitioner's motion to the extent of striking the third and fourth affirmative defenses.

The fifth affirmative defense and first counterclaim are to the effect that petitioner breached the warranty of habitability. However, inasmuch as respondent has raised this breach of warranty claim in the Supreme Court proceedings, and inasmuch as the proprietary leases (at paragraph 1(d)) bar the assertion of these claims here, and inasmuch as respondent does not demonstrate the invalidity of this bar, see, e.g., *Dune Deck Owners Corp. v Liggett*, 34 AD 3d 523 (2nd Dep't, 2007), the court grants petitioner's motion to the extent of striking the fifth affirmative defense and the first counterclaim.

The sixth affirmative defense and second counterclaim are to the effect that petitioner breached the proprietary lease when it "wrongfully and illegally amended the By-laws ... in bad faith without a reasonable business purpose in violation of the Business Judgment Rule solely to punish and penalize Respondent for raising claims ... relating to Petitioner's breach of the Warranty of Habitability." Inasmuch as respondent has raised her breach of warranty claims in the Supreme Court proceedings, and inasmuch as she may not raise them here, the court grants petitioner's motion to the extent of striking the sixth affirmative

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defense and the second counterclaim. The court declines to address the argument that this court lacks subject matter jurisdiction to address the argument that the bylaws were amended to penalize respondent.

SUMMARY JUDGMENT

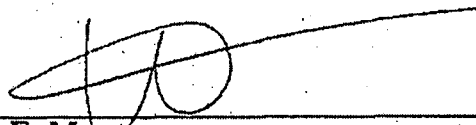
"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [citations omitted]. *Winegrad v New York University Medical Center*, 64 NY 2d 851, 853 (1985). Here the moving papers show that petitioner is the lessor of the premises, that respondent is the lessee, that the premises is located in a building duly registered with HPD as a multiple dwelling, that petitions, notices of petition, and predicate notices were duly served, that uncontestedly maintenance has not been paid since March 1, 2014, that payment of the same is required by the leases, that through December 31, 2017, to which date the court amends the petition, the maintenance arrears total \$218,944.39, and that petitioner otherwise proved a prima facie case.

Accordingly, the court grants petitioner's motion as follows:

- (1) a possessory judgment for \$218,944.39 shall be entered in petitioner's favor,
- (2) one or more warrants of eviction may issue forthwith without stay of execution but such issuance shall not preclude an application for relief pursuant to RPAPL § 753, and (3) on papers setting for the particulars thereof petitioner may move for an award of attorney's fees, interest, late fees, and such other relief as may seem just.

The court will mail to the parties copies of this decision and order.

Dated: New York, NY
December 7, 2018



Gary F. Marton