Tomfol Owners Corp. v Hernandez
2020 NY Slip Op 32425(U)
July 23, 2020
Supreme Court, New York County
Docket Number: 160519/2019
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART IAS MOTION 12EFM

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TOMFOL OWNERS CORP., Plaintiff,	INDEX NO. 160519/2019
- v -	MOTION DATE
ISMAEL HERNANDEZ, JOHN DOE ONE, JOHN DOE TWO Defendants.	MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12-52, 54-68 were read on this motion for summary judgment.

By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order awarding it summary judgment. Defendant opposes.

I. UNDISPUTED FACTS

Plaintiff cooperative owns the building located at 206 East 7th Street in Manhattan. On October 10, 2006, defendant purchased nine shares appurtenant to his proprietary lease for apartment nine in the building.

As pertinent here, article IV, paragraph first of the lease provides that:

> Lessee acknowledges that upon or after the happening of any of the events mentioned in subdivisions (a) through (g) below, the Lessor may give to the Lessee a notice which specifies the nature of the default and demands a cure within 15 days, and further, that if at the end of the 15 days, either the default is not cured or the Lessee has not diligently commenced the curing of it, the Lessor may give a second notice stating that the [sic] this Lease will be terminated at the end of an additional 5 days.
>
> [...]
>
> Lessee agrees that, at the end of the notice period for either the termination or the expiration mentioned above, Lessor may lawfully re-enter the apartment and remove all persons and personal property therefrom, either by summary dispossess proceedings, or by any other suitable action at law or equity, and repossess the apartment and return it to

> its former state as if this lease had not been made:
>
> Conditions Permitting Limitation
>
> […] (e) if the Lessee shall default in the performance of any covenant or provision hereof, other than the covenant to pay maintenance, for thirty days after written notice of the default has been given by the Lessor;
>
> (f) if at any time the Lessor shall determine, upon the affirmative vote of the holders of record of at least two-thirds of its shares, at a meeting of the shareholders called to take action on the subject, that because of objectionable conduct on the party of the Lessee, or of a person dwelling in or visiting the Lessee's apartment, the tenancy of the Lessee is undesirable. Repeatedly to violate or disregard the rules and regulations attached or established in accordance with the provisions of this lease or to permit or tolerate a person who disrupts or infringes on the peace or privacy of other shareholders to enter or remain in the building or apartment shall be deemed to be objectionable conduct within the meaning of this paragraph if such conduct continues after the above-mentioned 15-day notice or default.
>
> Article III, paragraph ninth of the lease provides:
>
> If the Lessee shall at any time be in default, the Lessee will reimburse Lessor for the expense of reasonable attorney's fees and disbursements incurred by the Lessor and the Lessor shall have the right to collect them as additional rent.

(NYSCEF 15, Exh. A).

In a 30-day notice of default dated March 19, 2019, purportedly issued pursuant to article IV, subsections (e) and (f) of the lease, and served on defendant, plaintiff alleges that between April 2018 and February 2019, defendant and/or his guests engaged in objectional conduct. Also alleged in the notice is that on February 17, 2019, there was a fire in defendant's apartment, resulting in damage to his and adjacent apartments. The notice provides that if the defaults are not cured within 30 days, plaintiff would commence termination proceedings. (NYSCEF 15, Exh. B).

A fire department incident report reflects the noticed fire in defendant's apartment, that the cause of the fire was under investigation, that a fire detector had alerted the occupants who failed to respond, and that there had been a delay in reporting it. (NYSCEF 20). Another fire

incident report, dated April 23, 2019, reflects that the fire was caused by a problem with the electrical wiring insulation in the ceiling-floor assembly between defendant's apartment and the one directly above it. (NYSCEF 21).

A 15-day notice to cure, dated May 7, 2019, and served on defendant, reflects allegations identical to those listed in the 30-day notice and provides that if the defaults are not cured within 15 days, plaintiff would commence termination proceedings. (NYSCEF 15, Exh. C).

By letter dated July 30, 2019, plaintiff's president noticed a special shareholder meeting to be held on August 20, 2019, at which time a vote would be held to determine the desirability of defendant's tenancy. (NYSCEF 15, Exh. D). At the meeting, it was resolved that defendant's conduct, including but not limited to the events detailed in the 30- and 15-day notices, was objectionable, and that defendant's lease was to be terminated in accordance with article IV, subsection (f) of the lease. (NYSCEF 15, Exh. F).

Thereafter, defendant was served, pursuant to article IV, subsections (e) and (f), with a five-day notice reflecting the allegations set forth in the two prior notices and requiring that defendant vacate and surrender possession of his apartment on or before September 4, 2019. (NYSCEF 15, Exh. G).

By email dated October 5, 2019, plaintiff's president informed defendant that plaintiff was seeking permits from the department of buildings for construction in his apartment, that a contractor had been hired, that a new door and lock were necessitated by the fire and "to secure the unit and stop anyone from entering [it] and injuring themselves . . . ," that the new key was available to him, and that the key to the building's front door and mailbox did not need replacing. The president also observed that plaintiff had received no communications from defendant for at least a year or a request for a key and was thus unaware of his need for a key

until advanced by his attorney in court. The president also advised defendant against entering the apartment given its dangerous condition, that construction cannot continue if the apartment is occupied, and that should defendant occupy the apartment and delay construction, he would be responsible for costs. (NYSCEF 22).

II. PLEADINGS

By summons and complaint dated October 25, 2019, plaintiff commenced this action, advancing five causes of action: (1) ejectment, (2) legal fees, disbursements, and expenses resulting from defendant's defaults under the lease, (3) a money judgment for the amount of market rent it has not been able to collect since September 4, 2019, (4) a money judgment for use and occupancy since September 4, 2019, and arrears owed from before September 4, 2019, and (5) injunctive relief preventing defendant from reentering and possessing the apartment. (NYSCEF 15).

In his answer dated November 19, 2019, defendant alleges that due to the February 2019 fire, his apartment is not safe and thus, he was and remains constructively evicted. He asserts that plaintiff compelled him to vacate the premises, that it changed the locks and refused him entry, and that the August 2019 vote to terminate his lease was conducted in bad faith and contrary to plaintiff's by-laws. Defendant thus advances counterclaims for possession of the apartment and a rent abatement due to the breach of the warranty of habitability and his constructive eviction. He also claims entitlement to treble damages under Real Property Actions and Proceedings Law (RPAPL) § 853. (NYSCEF 16).

Defendant and/or his guests did not reside in the apartment until December 2019.

III. PARTIES' PERTINENT FACTUAL CONTENTIONS

By affidavit dated January 8, 2020, plaintiff's managing agent states, as pertinent here,

that he was told by residents that their ability to locate the fire's origin and alert authorities was hindered by defendant, as he had refused access to his apartment, from which a smell emanated.

The manager also relates that in attempting to finalize a claim with the building's insurer and receive permits, a construction plan was approved, but the work halted due to defendant's occupation of the apartment notwithstanding the dangerous conditions. He denies that defendant was refused access to the apartment as keys were provided to him upon his request. He also maintains that defendant has not paid his maintenance in full since November 2018 (NYSCEF 14), as reflected in the ledger annexed to his affidavit showing that defendant was charged monthly maintenance fees of $510.84 until December 1, 2018, that starting in January 2019, his monthly maintenance fees were increased to $738.00, although defendant paid only the monthly $510.84 until June 2019. Consequently, commencing in February 2019, defendant was charged late fees. And, starting April 30, 2019, plaintiff began charging defendant various amounts in connection with purported holdover and nonpayment proceedings. The ledger also shows that, as of January 1, 2020, defendant owes plaintiff $13,606.51. (NYSCEF 36).

By affidavit dated January 10, 2020, plaintiff's president confirms that the shareholders voted to deem defendant's conduct objectionable. He provides detail on some of the incidents which prompted the shareholder vote and does not claim that defendant caused the fire, but states that other residents informed him that defendant would not give them access even though smoke was emanating from his apartment, and that he delayed in reporting the fire. After the termination of his lease on September 4, 2019, defendant has remained in possession of the apartment, and has not paid his maintenance in full since November 2018.

The president denies that defendant was locked out of his apartment, explaining that the apartment door was destroyed in the fire, needed to be replaced, and that defendant never

contacted plaintiff to gain access to the apartment. Rather, he alleges, after asking for the key in October 2019, defendant did not collect it until December 2019. According to the president, defendant has since returned to the apartment despite its unsafe condition and removed all construction materials and equipment to the hallway, causing a fire hazard. (NYSCEF 13).

By affidavit dated February 20, 2020, defendant denies, as pertinent here, responsibility for the fire and maintains that he never altered the wiring in the apartment. After the fire, although plaintiff replaced his apartment door and lock, it did not provide him with a new key. He claims to have paid what he believed was the correct monthly maintenance through June 2019, and had asked for permission to re-enter the apartment, which plaintiff denied, claiming that the apartment was uninhabitable. According to defendant, he received the new key only after the judge presiding in the non-payment proceeding had observed that he had been illegally evicted, and he denies the ongoing nature of the conduct outlined in the notices, as he neither lived in nor had access to the building at that time. (NYSCEF 49).

IV. DISCUSSION

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable

inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. Business judgment rule

1. Arguments

Plaintiff contends that it complied with all of the procedures set forth in the lease for termination of a tenancy and that the shareholders' vote to terminate defendant's tenancy constitutes competent evidence that defendant's conduct was objectionable within the meaning of RPAPL § 711. It thus maintains that it is entitled to summary judgment on all of its causes of action. (NYSCEF 37).

Defendant argues that having been constructively evicted and without access to the apartment since the fire, the conduct described in the 30-day and 15-day notices did not continue after their issuance, and as the lease requires that the objectionable conduct continue beyond the issuance of the notices, the termination of his lease was outside the scope of plaintiff's authority. He also asserts that the special shareholder meeting was improperly called and conducted, that the board is not properly constituted, and that plaintiff acted in bad faith. (NYSCEF 52). In support, he submits the affidavits of two shareholders who allege that plaintiff has acted in bad faith and violated the by-laws in seeking to terminate defendant's tenancy. (NYSCEF 50, 51).

In reply, plaintiff argues that defendant's conduct is incurable, and thus, it is immaterial that he was not in possession of the apartment at the time he received the notices, and it denies having acted in bad faith and without the scope of its authority. (NYSCEF 68). In support, plaintiff offers the affidavit of its president who reiterates his belief that defendant's conduct was objectionable (NYSCEF 54), as well as the affidavits of other shareholders in which they detail their personal observations of defendant's conduct (NYSCEF 58-64).

2. Analysis

Pursuant to RPAPL § 711(1), the termination of a lease due to a tenant's objectionable conduct must be supported by "competent evidence ... that the tenant is objectionable." When a cooperative exercises its right to terminate a tenancy based on objectionable conduct, that exercise is deemed competent evidence and is afforded deference under the business judgment rule, which may be scrutinized only where the board acted "(1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith." (*40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 155 [2003]). A cooperative acts within the scope of its authority when it complies with the procedures contained in the lease and by-laws to terminate a tenancy. (*Id.* at 155-56; *Trump Plaza Owners, Inc. v Weitzner*, 61 AD3d 480, 480 [1st Dept 2009] [granting plaintiff-cooperative summary judgment where it followed requisite procedures in terminating defendant's tenancy]).

Here, the lease provides that "upon or after the happening" of a shareholder vote deeming a tenancy undesirable due to objectionable conduct, plaintiff may send a notice of default and demand a cure within 15 days and absent a cure, the lease may be terminated after an additional five days. Moreover, conduct is deemed objectionable only "if [it] continues after the above-mentioned 15-day notice of default." As it is undisputed that defendant was served with the 15-day notice to cure before the special shareholder meeting and vote to terminate his lease, and that defendant did not reside in the building after February 17, 2019 and that the conduct alleged in the 15-day notice did not continue during the 15 days following service of the notice, his conduct is not "objectionable" within the meaning of the lease.

While objectionable conduct may be deemed incurable when a tenancy is terminated pursuant to statute (*see e.g.*, *Chi-Am Realty, LLC v Guddahl*, 33 AD3d 911, 912 [2d Dept 2006]

[tenant not entitled to opportunity to cure nuisance under rent stabilization code]), plaintiff elected to terminate defendant's tenancy under article IV of the lease, which not only mandates an opportunity to cure objectionable conduct, but deems conduct objectionable only if not cured within the 15-days after the notice to cure is served. In *Gordon v 476 Broadway Realty Corp.*, a cooperative tenancy was terminated based on a lease provision which allowed for a super majority of shareholders to evict for objectionable conduct. (2014 NY Slip Op 31291[U] [Sup Ct, NY County 2014], *affd* 129 AD3d 547 [2015]). Thus, the cooperative's denial of an opportunity to cure was upheld as the defendant's tenancy had been terminated pursuant to the lease, which did not provide for an opportunity to cure. (*Id.*).

Here, in contrast to the circumstances set forth in *Gordon*, the lease mandates that tenants be given an opportunity to cure, and thus, by failing to comply with the procedures for terminating a lease due to objectionable conduct, plaintiff did not act within the scope of its authority and the business judgment rule is not applicable. Plaintiff's failure to act within the scope of authority is dispositive, and thus, defendant's allegations of bad faith are not addressed. (*See Bd. of Managers of Amherst Condo. v CC Ming (USA) Ltd. P'ship*, 17 AD3d 183, 185 [1st Dept 2005] [business judgment rule inapplicable where board acted outside scope of authority]).

Moreover, in its complaint, plaintiff premises its ejectment claim solely on the board's decision under the business the business judgment rule. Upon a review of the record, there is no basis for applying the business judgment rule, and thus, its ejectment claim is dismissed. (*See e.g.*, *320 Owners Corp. v Harvey*, 2008 WL 4641987 [Sup Ct, NY County 2008] [as ejectment based solely on board decision absent alternative common law cause of action based on objectionable conduct, action dismissed without prejudice to further proceedings by Board]; *see also New Hampshire Ins. Co. v MF Glob., Inc.*, 108 AD3d 463, 467 [1st Dept 2013] [court may

search record and even in absence of a cross motion, grant summary judgment to nonmoving party]). And, absent a sufficient basis for ejectment, there is no need to address the sufficiency of the evidence of defendant's alleged misconduct or plaintiff's claims for attorney fees, use and occupancy, and an injunction.

B. Defendant's arrears and counterclaims

1. Arguments

Plaintiff claims that defendant has not paid maintenance since November 2018 and seeks dismissal of his counterclaims as his failure to report the fire rendered the conditions more dangerous. In addition, it argues, the apartment renovations will likely increase its value, and defendant not only is in the apartment, but never lost access to it, notwithstanding the dangerous conditions. Moreover, his occupancy is preventing construction. (NYSCEF 37).

Defendant denies that having caused the fire or delayed reporting it. He claims to have been illegally locked out of the apartment and that in July 2019, plaintiff commenced a non-payment proceeding for outstanding maintenance, but later discontinued it. He disclaims responsibility for maintenance while he was out of possession following the fire. (NYSCEF 52).

In a reply affidavit, plaintiff's president reiterates his earlier allegations concerning the fire and denial of defendant's inability to access the apartment. (NYSCEF 54).

2. Analysis

While plaintiff may maintain its remaining claim for unpaid arrears, issues of fact exist as to the amount of and its entitlement to those arrears. Plaintiff claims that defendant has not paid maintenance since November 2018 while its ledger reflects payments of various amounts until June 2019, even though defendant was out of possession since February 2019. The ledger also reflects charges for non-payment and holdover proceedings, even though the non-payment

proceeding was discontinued and there is no evidence of an agreement requiring him to pay fees for it, nor evidence that plaintiff had commenced a holdover proceeding.

In light of defendant's unresolved breach of warranty counterclaim (*see Park W. Mgmt. Corp. v Mitchell*, 47 NY2d 316, 327 [1979] [obligation of tenant to pay rent dependent on landlord's satisfactory maintenance of premises in habitable condition]; *664 W. 161 St. Tenants Ass'n v Leal*, 154 AD2d 238, 239 [1st Dept 1989] [tenants not required to pay full arrears before determination of amount of abatement due under breach of warranty of habitability]), plaintiff fails to establish, *prima facie*, its entitlement to summary judgment on its claim for arrears.

Every residential lease contains an implied warranty of habitability, whereby the landlord covenants that the premises are fit for human habitation and for uses reasonably intended by the parties, and that tenants will not be "subjected to conditions that are dangerous, hazardous or detrimental to their life, health or safety." (*Solow v Wellner*, 86 NY2d 582, 587-588 [1995] [internal quotation marks omitted]; Real Property Law § 235-b). To the extent that plaintiff's and defendant's affidavits are contradictory as to the conditions of and access to the apartment, they raise an issue of credibility, not resolvable on summary judgment. (*See Jeffrey v DeJesus*, 116 AD3d 574, 575 [1st Dept 2014] [credibility issues to be resolved by factfinder]). As plaintiff fails to describe sufficiently the condition of the apartment or detail its attempts to restore it, and as it is undisputed that the renovation is ongoing, there is no basis for dismissing defendant's counterclaims.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is denied in its entirety; it is further

ORDERED, that plaintiff's claims, except for that seeking unpaid arrears, are severed and dismissed without prejudice, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the parties either enter into a stipulation encompassing their preliminary conference on or before September 23, 2020, or appear for a preliminary conference in room 341, 60 Centre Street, New York, New York, on September 23, 2020 at 2:15 pm or virtually if necessary.

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7/23/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[X] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE