SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 38

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RAYMOND A. HILL III, : Index No. 650598/2019

Plaintiff, : DECISION & ORDER

-against- :

PETER ANDREWS and WILK AUSLANDER LLP, :

Defendants. :

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LOUIS L. NOCK, J.

By order dated October 11, 2019, a Housing Court holdover proceeding (L&T Index No. 054388 [Civ Ct, Housing Part D, NY County]), titled *Raymond A. Hill III v Peter J. Andrews*, parties hereto, was consolidated with this Supreme Court action (*see*, NYSCEF Doc. No. 49) (the "Housing Court Proceeding"). That proceeding was commenced by notice of holdover petition and holdover petition seeking: (i) a final judgment awarding plaintiff possession of residential premises located at 55 Liberty Street, Apt. No. 12/13/14C, a/k/a 12/13/14C & 12D, New York, New York 10005 (the "Premises"); and (ii) a money judgment for use and occupancy.[1]

Defendant Andrews has moved to dismiss the Housing Court Proceeding. Plaintiff cross-moved for summary judgment on the petition. For the reasons set forth hereinbelow, the motion to dismiss is denied and the cross-motion for summary judgment is granted.

BACKGROUND

Plaintiff is the proprietary lessee of the Premises. By written sublease agreement dated June 25, 2014, plaintiff leased the Premises to defendant Andrews (*see*, Notice of Cross-Motion,

[1] Mr. Andrews is captioned in that proceeding as "Respondent-Tenant" and additional John and Jane Doe respondents are captioned as "Respondents-Undertenants."

dated April 26, 2019, Exh. "A"). Paragraph 57 of the sublease rider granted defendant Andrews a right to purchase plaintiff's interest in the Premises. Per that grant, defendant Andrews entered into a Contract of Sale, dated April 11, 2018, for a sales price of $4,400,000.00 (*see, id.*, Exh. "B"). The Contract of Sale fixed a time of the essence closing date of August 1, 2018, which date was consensually extended to August 30, 2019. Moreover, paragraph 1.16.1 of the Contract of Sale required defendant Andrews to deposit the sum of $229,400.00 with defendant Wilk Auslander LLP ("Wilk") as escrow agent pending the closing.[2] Defendant Andrews made that deposit.

Paragraph 6.2 of the Contract of Sale required defendant Andrews to submit an application to the cooperative corporation owning the Premises for approval of the anticipated sale. Paragraph 6.4 provides that if the cooperative corporation denies the application for any reason other than "Purchaser's bad faith conduct," then the purchaser (i.e., Andrews) would not be deemed in default of his obligations under the Contract of Sale and would be entitled, therefore, to a return of his deposit from escrow. A key fact of this case, however, is that defendant Andrews never submitted any application at all to the cooperative corporation as paragraph 6.2 of the Contract of Sale required him to do. That significant fact is not in dispute. To make matters worse, and consistent with Andrews' failure to seek corporate approval for the sale, one day before the closing deadline of August 30, 2019, his attorney informed Wilk that Mr. Andrews would be unable to close the sale.

Paragraph 13.1 of the Contract of Sale provides that "[i]n the event of a default . . . by Purchaser, Seller's sole and exclusive remedies shall be to cancel this Contract, [and] retain the Contract Deposit as liquidated damages . . . . Purchaser prefers to limit Purchaser's exposure for

[2] Wilk was plaintiff's transactional attorney for purposes of this transaction.

actual damages to the amount of the Contract Deposit, which Purchaser agrees constitutes a fair and reasonable amount of compensation for Seller's damages under the circumstances and is not a penalty." Plaintiff, in fact, cancelled the Contract of Sale pursuant to that provision, as his attorney, Wilk, notified Andrews' attorney by letter dated September 4, 2018 (Notice of Cross-Motion, dated April 26, 2019, Exh. "C"). That letter also notified that plaintiff would be seeking retention of the Contract Deposit out of escrow pursuant to paragraph 13.1 of the Contract of Sale. Moreover, consistent with that paragraph, paragraph 11 of the Contract of Sale rider states that:

> [I]n the event this Contract is cancelled . . . the Contract Deposit is non-refundable and . . . in the event of such cancellation the Escrowee shall pay the Contract Deposit to Seller and Seller shall retain same as Seller's property, and Purchaser shall have no claim to same or other amounts . . . .

The cancellation of the Contract of Sale inevitably led to a termination of the sublease pursuant to paragraph R8 of the rider to the Contract of Sale, providing that: "[i]n the event that . . . this Contract is terminated for any reason other than Seller's default, or the Closing has not occurred by August 1, 2018, then the lease for Purchaser's tenancy of the Unit shall also be terminated" effective January 31, 2019 (Notice of Cross-Motion, dated April 26, 2019, Exh. "B"). Wilk, in fact, notified defendant Andrews' of such lease termination by letter dated September 5, 2018 (*id.*, Exh. "D").

The holdover petition alleges that defendant Andrews has held over in unlawful possession of the Premises beyond the January 31, 2019, expiration date of the terminated sublease, without payment of anything for use and occupancy, which the petition seeks in a monthly amount reflecting the sublease monthly value of $27,500.00.[3] The petition also seeks

[3] Although an order was issued by the Housing Court on March 29, 2019, directing use and occupancy payments *pendente lite* (Notice of Cross-Motion, dated April 26, 2019, Exh. "G"), defendant Andrews has made no payments whatsoever since the termination effective date of January 31, 2019.

attorneys' fees pursuant to paragraph 20 of the sublease and paragraph 13.3 of the Contract of Sale.

Defendant Andrews has moved to dismiss the holdover petition on the assertion that plaintiff has not complied with its Contract of Sale promise "to deliver to the tenant any stock certificates confirming landlord's ownership of the cooperative as required by Section 10.1.1 of the purchase and sale agreement" (Affirmation of Matthew Wagoner, Esq. [counsel for defendant Andrews], dated March 26, 2019, ¶ 2).

The instant Supreme Court action arises out of the same transaction and occurrences comprising the nature of the Housing Court Proceeding. The verified complaint in this action, filed January 30, 2019 (NYSCEF Doc. No. 1), recounts the particulars of the Contract of Sale; defendant's escrow deposit of $229,400; defendant's failure to submit an application to the cooperative corporation for approval of the sale anticipated by the Contract of Sale; Wilk's notices to defendant regarding cancellation of the Contract of Sale and attendant forfeiture of the escrow deposit; and of a letter from defendant's attorney to Wilk opining "that Wilk was not authorized to release the Deposit to Plaintiff" (Complaint ¶ 25).

The verified complaint seeks the following relief: (i) a declaration that defendant is in breach of the Contract of Sale by virtue of his failure to take action toward gaining board approval of the anticipated sale of the Premises; (ii) an order authorizing the release of the escrowed deposit to plaintiff;[4] and (iii) a judgment for plaintiff's costs and attorneys' fees predicated on a provision in the Contract of Sale titled "Defaults, Remedies and Indemnities" (Contract of Sale ¶ 13).[5]

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[4] Paragraph 1.24 of the Contract of Sale entitles "the Party entitled to the Contract Deposit" to interest accrued on the principal deposit amount of $229,400 (*see*, Contract of Sale ¶ 1.16), while in escrow.
[5] The minimum sum alleged as of the filing of the verified complaint is $30,000 (*see*, Complaint ¶ 52).

Defendant filed an answer with counterclaims in this action, filed February 26, 2019 (NYSCEF Doc. No. 5), asserting, as he did in the Housing Court Proceeding, that plaintiff "agreed to credit the rent paid during the first year of tenancy in the premises for the purchase price of the Premises" (*id.*, ¶ 7). Defendant also makes mention of more than $500,000 in improvements made by him to the Premises (*id.*, ¶¶ 10-12). However, paragraph R12 of the Contract of Sale rider only speaks in terms of rent credits and alteration credits as being earned by defendant "at Closing." No closing ever occurred, and no application was made by defendant for board authorization prerequisite to any possible closing.

DISCUSSION

Plaintiff was Justified in Terminating the Sublease

Defendant's overarching defense, forming the lynchpin of his motion to dismiss the holdover petition, is that plaintiff had failed to perform a material obligation on its part to furnish its stock certificates relating to the Premises to defendant. That position is patently meritless. Paragraph 10.1 of the Contract of Sale provides in no uncertain terms that the obligation to furnish the certificates does not accrue until the closing. That paragraph reads:

> 10.1 At Closing, Seller shall deliver or cause to be delivered:
> 10.1.1 Seller's certificate for the Shares duly endorsed for transfer to Purchaser or accompanied by a separate duly executed stock power to Purchaser, and in either case, with any guarantee of Seller's signature required by the Corporation; . . . .

No special insight, or even the slightest deliberation, is necessary to see that in the absence of a closing there does not ever accrue any obligation on plaintiff to furnish the stock certificates, or stock power and related guarantee. Of course, we know that no closing ever took place on account of defendant's failure to satisfy its unconditional obligation to "submit to the Corporation or the Managing Agent an application with respect to this sale . . . ." (Contract of Sale ¶ 6.2.1.) Therefore, plaintiff's lack of delivery of stock certificates prior to the time when

he was contractually obligated to do so cannot possibly form the basis for a defense. Based on the contractual provisions cited above, plaintiff was within his right to terminate the sublease on account of defendant's failure to seek board approval of the sale.

Relatedly, and as touched on above, defendant's assertion that rent has been paid in the form of a three-month rent credit referred to in the Contract of Sale rider, is unavailing due to paragraph R12 of the Contract of Sale rider, which only speaks in terms of rent credits and alteration credits as being earned by defendant "at Closing." As we know, no closing ever occurred, and no application was made by defendant for board authorization prerequisite to any possible closing. That, and more. Paragraph R8 of the Contract of Sale rider provides as follows:

> . . . in no event shall the termination date be later than January 31, 2019, in which case Purchaser shall quit and surrender the Unit and vacate same . . . . In such case, Purchaser shall receive a rent credit from the Contract Deposit funds. . . equal to the rent payable under the lease for the Unit for the last three months of Purchaser's possession of the Unit . . . .

It is undisputed that defendant failed to vacate by the January 31, 2019, termination date. Therefore, the unambiguous language of the Contract of Sale rider does not entitle defendant to the rent credit (*e.g.*, *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002] ["a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms"]).

The Housing Court Proceeding was Properly Commenced

Defendant has sought dismissal on the asserted ground that the holdover petition was not served on the law firm designated as "Purchaser's Attorney" in paragraph 1.2.2 of the Contract

of Sale titled "Purchaser's Attorney" (i.e., Gora, LLC, 9 West Broad Street, Suite 550, Stamford, Connecticut 06902, Attn.: Richard Gora, Esq.).[6] However, this argument is unavailing.

Insofar as designations of counsel are made in the Contract of Sale, it is clear that they are made to correspond to the provision in the Contract of Sale titled "Notices and Contract Delivery" – paragraph 17 of the Contract of Sale. That provision begins with the clause: "Any notice or demand ('Notice') shall be in writing and delivered . . . to the Party and simultaneously, . . . to such Party's Attorney . . . ." (Contract of Sale ¶ 17.1.) However, those provisions discussing "notices" are inapplicable to the commencement of court proceedings and securing of personal jurisdiction under the law, which are governed in this instance by RPAPL 735. Furthermore, the March 4, 2019, stipulation among the parties (Notice of Cross-Motion, dated April 26, 2019, Exh. "F") contained an express provision that: "Respondent acknowledges being served with the Notice of Petition and Petition and waives all defenses related to personal jurisdiction." And it is further worth noting that sublease paragraph 26, titled "Bills and Notice," provides that "[a]ny notice from Owner . . . will be considered properly given to You if it is . . . addressed to You at the Apartment and delivered to You personally . . . ."

Thus, the court rejects defendant's assertion that the Housing Court Proceeding was, somehow, improperly commenced.

Executive Orders Presently in Effect do Not Prevent Disposition of this Motion Practice

New York State Executive Order 202.66 (issued September 9, 2020) provides:

> Chapter 127 of the laws of 2020 is modified to the extent necessary to prevent, for any residential tenant suffering financial hardship during the COVID-19 state disaster emergency declared by Executive Order 202, ***the execution or enforcement of such*** judgment or warrant, including those cases where a ***judgment or warrant of eviction*** for a residential property was granted prior to March 7, 2020, through January 1, 2021.

[6] The notice of petition and petition were served directly on Mr. Andrews.

(Emphasis added.)[7]

New York State Administrative Order 231/20 of the Chief Administrative Judge of the Courts (issued October 12, 2020) provides:

> ***All residential eviction matters, both nonpayment and holdover, may proceed in the normal course,*** subject to (1) current or further federal and state emergency relief provisions governing time limits for the commencement and prosecution of matters, limitation of eviction-related remedies, and similar issues, and (2) individual court scheduling requirements occasioned by health and safety concerns arising from the coronavirus health emergency.

(Emphasis added.)[8]

The above-quoted orders plainly address themselves to only the execution or enforcement of a judgment or warrant of actual eviction. Neither of them places any restraint on issuance of judgments declaring the possessory rights attaching to leased property. And, as the above-quoted administrative order plainly states, eviction proceedings, in and of themselves, "may proceed in the normal course" which, taken in tandem with the above-quoted executive order, means, until the point where a court would otherwise be ready to issue "a judgment or warrant of eviction." Such judgment or warrant of eviction is precisely, and exclusively, what is prevented by the foregoing orders.[9]

The within disposition does exactly what the foregoing orders allow the court to do: it declares the possessory rights of the parties. In this case, denying the defendant's cross-motion to dismiss the holdover petition; and granting the plaintiff's motion for summary judgment on its

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[7] Available at: https://www.governor.ny.gov/news/no-20266-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency

[8] Available at: www.nycourts.gov/whatsnew/pdf/AO-231-20.pdf

[9] A federal agency order issued by the U.S. Centers for Disease Control and Prevention and the U.S. Department of Health and Human Services (85 FR 55292), which expires December 31, 2020, similarly addresses itself only to eviction *per se*, by providing that a "person with a legal right to pursue eviction or possessory action, shall not evict . . . ." Therefore, application of that federal agency order does not disturb the conclusion derived from the court's reading of the state executive and administrative orders treated in the text. Moreover, the federal agency order itself provides that it "does not apply in any State . . . with a moratorium on residential evictions that provides the same or greater level of public-health protection than the requirements listed in this Order."

holdover petition to the limited extent of declaring plaintiff to be the sole party entitled to exclusive possession of the Premises while, at the same time, staying any execution of such declaratory judgment that could possibly result in actual eviction of defendant, pending further order of the court on account of the present executive order, and dependent upon the court's analysis of any future executive orders affecting the eviction moratorium currently set to expire on January 1, 2021.

Accordingly, for the reasons stated above, it is

ORDERED that defendant's cross-motion to dismiss the holdover petition is denied; and it is further

ORDERED that plaintiff's holdover petition is granted to the extent that plaintiff is granted exclusive possessory rights over the premises located at 55 Liberty Street, Apt. No. 12/13/14C, a/k/a 12/13/14C & 12D, New York, New York 10005, but that no judgment or warrant of eviction in said respect shall issue pending further order of the court; and it is further

ORDERED that plaintiff's holdover petition is further granted to the extent of its request for a money judgment for use and occupancy by defendant of said premises at the rate of $13,500 per month, consistent with the parties' stipulation in the Housing Court proceeding titled *Hill v Andrews* (L&T index No. 054388/2019 [Civ Ct, Housing Part D, NY County]), dated March 29, 2019, accruing from February 2019 to December 2020, aggregating the sum of $310,500; and it is further

ORDERED that the Clerk shall enter a money judgment consistent with the immediately preceding decretal paragraph, and that plaintiff have execution for said money judgment; and it is further

ORDERED that defendant Wilk Auslander LLP is authorized to release the monies currently held in escrow in respect of this matter to plaintiff via remittance to plaintiff's counsel, Rosenberg & Estis PC; and it is further

ORDERED that a remote inquest, to be arranged by the court, on an assessment of reasonable attorneys' fees in accord with paragraph 20 of the sublease and paragraph 13 of the Contract of Sale will be convened.

This will constitute the decision and order of the court.

Dated: New York, New York
December 8, 2020

ENTER:

Hon. Louis L. Nock, J.S.C.