

North Flats LLC v Bradshaw
2021 NY Slip Op 30024(U)
January 4, 2021
Supreme Court, Kings County
Docket Number: 511183/2020
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73

Index No.: 511183/2020
Motion Date: 10/19/20
Mot. Seq. No.: 1

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THE NORTH FLATS LLC,

Plaintiffs,

-against-

DECISION/ORDER

NICOLE BRADSHAW, ANDREY IVANOV,
CECILIA BAATH, JORGE GONZALES, CLAIR
HECAMP and JESSICA CAPONE,

Defendants.

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The following papers numbered 1 to 3 were read on this motion:

Papers:	Numbered:
Notice of Motion/Order to Show Cause	
Affirmations/Affidavits/Exhibits/Memo of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	3

Upon the foregoing papers, the motion is decided as follows:

In this action in which plaintiff alleges causes of action for, *inter alia*, a declaratory judgment, injunctive relief and ejection, the defendants, CECILIA BAATH, JORGE GONZALES, CLAIR HECAMP and JESSICA CAPONE, move by pre-answer motion for an order pursuant to CPLR §3211(a)(7) dismissing the complaint in its entirety for failure to state a cause of action.

Background:

In the complaint, plaintiff alleges that it is the owner of a building located at 163 North 6th Street, Brooklyn, New York, that the building is zoned for commercial use and that it is now attempting to legalize the building for residential use. The plaintiff alleges that the defendants are tenants in the building who reside in apartments A1 and A7, that they came into possession of the apartments through written lease agreements which designated portions of the cellar as part of the demised premises and that the leases had expired prior to the commencement of the action. One of the leases expired approximately 5 years prior to the commencement of the action. The other expired approximately 9 months prior to the commencement of the action. The plaintiff alleges that it is illegal for tenants to use and occupy the cellar for residential

purposes, that such illegal use cannot be cured and that defendants' occupation of portions of the cellar is preventing it from legalizing the building for residential use and obtaining a permanent certificate of occupancy.

The plaintiff further claims that in order to obtain a permanent certificate of occupancy, it is required to make certain alterations to the building to prevent the defendants from accessing the cellar, that it has requested such access from the defendants and that the defendants have denied the requests.

The Causes of Action Alleged in the Complaint:

In the first cause of action alleged in the complaint, the plaintiff seeks a declaration that defendants' continued occupancy of the cellar portion of the premises is an illegal use of the building and that plaintiff is entitled to access to the cellar portion of defendants apartments to make the necessary alterations to prevent the defendants was accessing and using the cellar.

In the second cause of action, plaintiff seeks a declaration that it has a superior right to access and possess the residential portion of defendants' apartments.

In the third cause of action, plaintiff seeks a permanent injunction, enjoining the defendants from continuing to use and occupy the cellar portion of the premises.

In the fourth cause of action, plaintiff seeks a temporary restraining order, preliminary injunction, and permanent injunction barring the defendants from occupying the residential portion of the Premises and denying Plaintiff access to the residential portion of the Premises.

In the fifth cause of action, Plaintiff seeks an order and judgment granting Plaintiff a partial order of ejectment, awarding plaintiff sole and exclusive possession of the cellar, and related relief.

In the sixth cause of action, Plaintiff seeks an award of attorneys' fees.

While the complaint is unclear as to whether the plaintiff is seeking to terminate defendants' tenancy through the commencement of this action, in an affirmation submitted in opposition to the motion, plaintiff's attorney states that plaintiff is not seeking this relief and that plaintiff is "merely seeking possession of the illegal cellar portion of the Premises in order to obtain a Permanent Certificate." Plaintiff's counsel stated in his affirmation:

In fact, Plaintiff avers that the more appropriate procedure would be for the court to first adjudicate Plaintiff's declaratory claim, while holding its ejectment claim in abeyance. This would allow the Court to ascertain the nature of the Defendants' occupancy and the Plaintiff's ability (or inability) to legalize the same, without necessarily deciding on whether Defendants' tenancy actually requires termination. This is especially warranted where, as here, Plaintiff is not even seeking to terminate the Defendants' tenancy, but rather, merely seeking possession of the illegal cellar portion of the Premises in order to obtain a Permanent Certificate.

Discussion:

That branch of defendants' motion which seeks to dismiss the fifth cause of action CPLR §3211(a)(7), in which plaintiff seeks judgment ejecting the defendants from the cellar portions of the premises, is **GRANTED**. The allegations in the complaint make clear that the plaintiff has allowed the defendants to remain in possession of their apartments long after expiration of their respective leases. This creates, at a minimum, a tenancy at sufferance, which is a tenancy for an indefinite term. As the Appellate Term stated in *City of New York v. Utsey*, 185 Misc. 2d 715, 717-18, 714 N.Y.S.2d 410, 412:

“An estate at sufferance is an interest in land which exists when a person who had a possessory interest in land by virtue of an effective conveyance, wrongfully continues in possession of the land after the termination of said interest ...” (Restatement of Property § 22; *see, Livingston v. Tanner*, 14 N.Y. 64; 1 Tiffany Real Property § 174 [3d ed.]). It is essential to the creation of this interest that the party previously have had a possessory interest.

Here, the each of the defendants initially obtained a possessory interests in the premises pursuant to a written lease. The plaintiff has allowed Ms. Capone to remain in possession for five years after purported expiration while allowing Mr. Gonzales to remain for nine months. Both periods are sufficient to create a tenancy at sufferance for an indefinite term (*see Kerrains v. People*, 60 NY 221[landlord must resume control of property within “reasonable time” measured by days or weeks]; *167 North Ninth Street Corp. v Helfand*, 33 Misc.3d 518, 521[former superintendent allowed to remain two years after termination found to be tenant at will or by sufferance]). Since the defendants are tenants for an indefinite term, before the plaintiff

can seek to eject the defendants from the premises, or any portion thereof, the plaintiff was required to serve the defendants them with a six-month notice to quit (*see Kosa v. Legg*, 12 Misc.3d 369, 816 N.Y.S.2d 840; *Edwards v. All Star Recovery Corp.*, 56 Misc. 3d 1208(A), 63 N.Y.S.3d 305). Since there are no allegations in the complaint that a notice to quit was served prior to the commencement of the action, the fifth cause of action for ejectment fails to state a cause of action.

In the third and fourth causes of action, the plaintiff seeks injunctive relief. In the third cause of action, the plaintiff seeks to permanently enjoining the defendants from continuing to use and occupy the cellar portion of the premises. In the fourth cause of action, plaintiff seeks a temporary restraining order, a preliminary injunction, a permanent injunction barring the defendants from occupying the residential portion of the premises and denying plaintiff access to the residential portion of the premises. One of the elements that a party must demonstrate in order to obtain injunctive relief is that there is no adequate remedy at law (*see Xiaokang Xu v. Xiaoling Shirley He*, 147 A.D.3d 1223, 1225, 48 N.Y.S.3d 530; *see also Caruso v. Bumgarner*, 120 A.D.3d 1174, 1175, 992 N.Y.S.2d 102; *Elow v. Svenningsen*, 58 A.D.3d 674, 675, 873 N.Y.S.2d 319). Here, the relief that plaintiff is seeking in the third and fourth causes of action can be obtained in a properly alleged ejectment action, which is an action at law (*see Miceli v. Riley*, 79 A.D.2d 165, 169, n 2, 436 N.Y.S.2d 72; *Kraker v. Roll*, 100 A.D.2d 424, 432, 474 N.Y.S.2d 527, 533).

To the extent plaintiff seeks a declaration that it has a superior right to access and possess the residential portion of defendants' apartments, the relief the plaintiff seeks in the second cause of action, can also be obtained in a properly alleged ejectment action. Thus, plaintiff's second, third and fourth causes of action fail to state a cause of action.

With respect to the first cause of action, in which the plaintiff seeks a declaration that defendants' continued occupancy of the cellar portion of the premises is illegal and that plaintiff is entitled to access to the cellar portion of defendants apartments to make the necessary alterations to prevent the defendants was accessing and using the cellar, "[a] motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration" (*Staver Co. v. Skrobisch*, 144 A.D.2d 449, 450, 533 N.Y.S.2d 967). Accordingly, where a cause of action is

sufficient to invoke the court's power to “render a declaratory judgment ... as to the rights and other legal relations of the parties to a justiciable controversy” (CPLR 3001; *see* 3017[b]), a motion to dismiss that cause of action should be denied (*see St. Lawrence Univ. v. Trustees of Theol. School of St. Lawrence Univ.*, 20 N.Y.2d 317, 325, 282 N.Y.S.2d 746, 229 N.E.2d 431; *State Farm. Mut. Auto. Ins. Co. v. Anikayeva*, 89 A.D.3d 1009, 934 N.Y.S.2d 196; *see also* 5–3001 Weinstein–Korn–Miller, N.Y. Civ. Prac. ¶ 3001.13). A justiciable controversy requires a “real dispute between adverse parties, involving substantial legal interests, for which a declaration of rights will have some practical effect” (*Downe v. Rothman*, 215 AD2d 716, 717 [2d Dept 1995]).

Applying these principles, that branch of defendants’ motion which seeks to dismiss the first cause of action CPLR §3211(a)(7) is **DENIED**. Clearly, whether defendants’ use of the cellar is illegal and if so, whether such use can be made legal are real issues in dispute, a resolution of these issues will have a real practical effect as to whether defendants use of the cellar can continue.

Finally, plaintiff’s six cause of action for attorneys’ fees also states a valid cause of action.

Accordingly, it is hereby

ORDERED; defendants’ motion is **GRANTED** solely to the extent that the second, third, fourth and fifth causes of actions alleged in the complaint are **DISMISSED** for failure to state a cause of action.

This constitutes the decision and order of this Court.

Dated: January 4, 2021



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020