SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

Lenox Avenue Developments LLC

INDEX NO. 155378-2021

MOT. DATE

- v -

MOT. SEQ. NO. 003

Eric Curtis. et. al.

The following papers were read on this motion to/for default judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

In this action, plaintiff Lenox Avenue Developments LLC ("LAD") asserts three causes of action against defendant Eric Curtis ("Curtis") seeking: 1) ejectment from apartments 4A and 4B at 339 Lenox Avenue, New York, New York 10027 (the "premises"); 2) a declaratory judgment asserting plaintiff's exclusive ownership and control over the premises; and 3) a permanent injunction barring defendant from interfering with the plaintiff's access to and ownership of the premises. Curtis now moves for an order dismissing plaintiff's first cause of action pursuant to CPLR § 3211 (a). Curtis also seeks costs and sanctions against the plaintiff for bringing a frivolous action pursuant to 22 NYCRR § 130-1.1.

Previously, plaintiff moved for an order preliminarily enjoining Curtis from exerting control over and interfering with plaintiff's access to the premises. The court granted plaintiff's motion in a decision and order dated July 15, 2021. The 7/15/21 Decision is herein incorporated by reference. In pertinent part, the 7/15/21 Decision provides:

> The record before the court shows that there was a UCC Foreclosure Sale on or about June 15, 2020 of the Curtis brothers 100% membership interest in LAD including defendant's 50% membership interest. On September 25, 2020 the Curtis brothers executed an assignment of each of their 50% interest in LAD. Further, plaintiff, as licensor, has served notices to quit on defendant Curtis, as licensee to vacate the apartments on or before April 8, 2021, and to date, defendant has not vacated.

Now, Curtis argues that the plaintiff's first cause of action for ejectment must be dismissed because it fails to state a cause of action since the eviction is prohibited by the Covid-19 Emergency Eviction and Foreclosure Prevention Act of 2020 ("CEEFPA"). Curtis also argues that the conduct of the plaintiff in commencing this eviction proceeding is so willful and callous that it constitutes sanctionable conduct.

Dated: 10/28/2021

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☑ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐ **GRANTED** ☑ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

Plaintiff opposes the motion, arguing that its first cause of action for ejectment should not be dismissed because the Supreme Court of the United States has held Part A of CEEFPA to be unconstitutional, and because the defendant has no legal right to occupy the apartments, but is a mere licensee-occupant.

CPLR § 3211(a): Dismissal of the First Cause of Action:

The court will first consider the motion to dismiss. Pursuant to CPLR § 3211 (a) (7), a party may move for judgment dismissing one or more causes of action asserted on the ground that the pleading fails to state a cause of action. The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

The first cause of action in the complaint is for ejectment pursuant to RPAPL Art. 6. This statute gives the owner of real property a cause of action to recover that real property through common law ejectment (RPAPL Art.6; *LLDP Realty Co., LLC v. AGHR Enters. LLC*, 2014 NY Slip Op 24182 [Civ Ct Kings Co 2014]). "In order to maintain a cause of action to recover possession of real property, the plaintiff must (1) be the owner of an estate in fee, for life, or for a term of years, in tangible, real property, (2) with a present or immediate right to possession thereof, (3) from which, or of which, he has been unlawfully ousted or disseized by the defendant or his predecessors, and of which the defendant is in present possession" (*Jannace v. Nelson, L.P.*, 256 AD2d 385 [2d Dept 1998]; *GMMM Westover LLC v. New York State Elec. & Gas Corp.*, 2015 NY Slip Op 32824(U) [Sup Ct Broome Co 2015]).

Plaintiff is the owner of the premises and Curtis remains in possession of two of the apartments in the premises. In March 2019, Curtis claims to have leased the apartments from plaintiff pursuant to two written lease agreements, both with a term of one year expiring on March 2020. Both leases are purportedly residential stabilized leases. Movant has provided copies of the leases to the court.

Curtis argues that plaintiff does not have a present or immediate right to possession of those apartments. He maintains that the cause of action for ejectment is untenable because eviction is prohibited by the Covid-19 Emergency Eviction and Foreclosure Prevention Act of 2020 ("CEEFPA") and this action was commenced while the CEEFPA moratorium was still in effect.

CEEFPA was signed by Governor Cuomo on December 18, 2020. Part A of this Act prohibits the initiation of an eviction proceeding against a tenant who signs a "hardship declaration." The only exception to this moratorium is if the eviction is premised on the grounds that the tenant is "persistently and unreasonably engaging in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others" (Covid-19 Emergency Eviction and Foreclosure Prevention Act of 2020). The moratorium that CEEFPA created was extended through August 31, 2021 by an amendment to CEEFPA and Small Business Act that was signed by Governor Cuomo on May 4, 2021. This extension precluded actions for ejectment from being filed prior to August 31, 2021. The summons and complaint in this action was filed on June 3, 2021.

The motion is further supported by the sworn affidavit of Eric Curtis. Curtis states based upon personal knowledge the following. Since 2012, he has been the managing member of LAD. Curtis, along with his brother, set up LAD for the purpose of acquiring title to, operating and managing the buildings at 339 Lenox Avenue and 341 Lenox Avenue. Curtis invested much of the capital contribution to LAD. His brother's contribution was in sweat equity; maintaining and completing the office duties for the buildings. Curtis claims that he and his brother agreed that Curtis and his family would be entitled to reside in one of the buildings virtually rent-free for so long as LAD owned the property or until Curtis received the value of the capital contributions that he had made to LAD in the form of free rent. This agreement was memorialized in the two written lease agreements for apartments 4A and 4B that were submitted to the court.

The two leases that Curtis submitted to the court are rent stabilized leases which expired on March 31, 2020. Curtis signed both leases with his name, "Eric Curtis" in the signature block as both "Owner/Agent" and "Renter".

Curtis also claims that he completed and submitted a hardship declaration form set forth in CEEFPA for the apartment that he occupied and served it upon the plaintiff. A copy of the hardship declaration form, dated April 6, 2021, has been provided to the court.

For the reasons that follow, Curtis' reliance on CEEFPA is misplaced. On August 12, 2021, the Supreme Court of the United States issued an order enjoining the enforcement of Part A of CEEFPA because it deemed the ability to maintain property through self-assertion of a "hardship declaration" to be a violation of the Due Process Clause of the Constitution (*Chrysafis v. Marks*, 594 U.S. __ [2021]). Therefore, Curtis' arguments necessarily fail.

Assuming *arguendo* that Part A of CEEFPA was still in effect, Curtis has failed to establish that he is a tenant under this legislation as a matter of law. While Curtis asserts that he is a tenant of the apartments, plaintiff alleges that Curtis is a mere licensee and thus not entitled to the protections of CEEFPA. To the extent that Curtis relies upon documentary evidence in the form of the underlying leases pursuant to CPLR § 3211(a) (1), this proof does not conclusively establish a defense to the asserted claims as a matter of law (*Leon v. Martinez*, 84 NY2d 83, 88 [1994]).

CEEFPA defines a tenant as a "residential tenant, lawful occupant of a dwelling unit, or any other person responsible for paying rent, use and occupancy or any other financial obligation under a residential lease or tenancy agreement..." (Covid-19 Emergency Eviction and Foreclosure Prevention Act of 2020). However, a lease is void if it violated rental statutes at the time that it was entered into (*See University Prop., LLC v. Vartanian*, 2005 NY Slip Op 51962(U) [Sup Ct. NY County 2005]); *Park Towers S. Co., LLC v. Universal Attractions*, 274 AD2d 312 [1st Dept 2000]; *390 West End Assocs. V. Baron*, 274 Ad2d 330 [1st Dept 2000]). Moreover, a unit occupied by the owner of the building or the owner's immediate family renders the unit exempt from rent stabilization (RSC § 2520.11 [i] [2]).

Curtis asserts that the leases clearly establish that he has tenancy rights in the subject apartments. However, plaintiff argues that the leases are void and/or unenforceable. Specifically, plaintiff maintains that an owner cannot create a rent stabilized tenancy for himself, that the defendant's leases breached the terms of the Land Loan and Building Loan, and in any event, the leases are expired. On reply, defense counsel maintains that Curtis is not an owner and contrasts the facts here with the cases relied upon by plaintiff. Defendant further maintains that it is of no consequence that the leases have expired because Curtis is a rent stabilized tenant and is entitled to a renewal lease under the Rent Stabilization Code.

Even if CEEFPA could bar plaintiff's maintenance of this action, Curtis has failed to establish that he is a tenant or lawful occupant as a matter of law. Indeed, Curtis' purported leases may be void as against public policy. Courts have held that leases between the same or similar entities as owner and tenant are void (*see 22 CPS Owner LLC v. Carter*, 2010 NY Slip Op 31508(U) [Sup. Ct., NY Co 2010] [principal of former net lessee of the building did not create a *bona fide* tenancy within the meaning of rent stabilization code]; see also *Friesch-Groningsche Hypotheekbank Realty Credit Corp. v. Slabakis*, 215 AD2d 154 [1st Dep't 1995] [lease between corporate owner and principal of said corporation as tenant was a sham and did not afford rent stabilization protections, especially where tenant could not prove a *bona fide* lease as tenant did not pay use or occupancy]). While Curtis argues that he was not an owner and distinguishes himself from the entities/owners in *22 CPS Owner* and *Friesch-Groningsche*, *supra*, Curtis himself signed his leases as the owner. Curtis' arguments cannot be resolved on a motion to dismiss. At this stage of the litigation, all plaintiff needs to do is allege a *prima facie* cause of action, a burden which plaintiff has met.

Based upon the foregoing, Curtis has failed to demonstrate that plaintiff's first cause of action should be dismissed pursuant to CPLR § 3211 (a) (7). In light of this result, the court declines to con-

sider as moot the parties' arguments as to the terms of the Land Loan and Building Loan, and lease expiration. Accordingly, the motion to dismiss is denied.

22 NYCRR § 130-1.1: Costs and Sanctions

The court now turns to the Defendant's request for costs and sanctions against the Plaintiff and/or Plaintiff's counsel pursuant to 22 NYCRR § 130-1.1. The court may award to any party or attorney in any civil action or proceeding the costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees resulting from frivolous conduct as under 22 NYCRR § 130-1.1. Frivolous conduct is defined as conduct which: [1] is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) asserts material factual statements that are false.

In order for the court to order sanctions pursuant to 22 NYCRR § 130-1.1, the plaintiff's conduct must be frivolous. "On a motion for sanctions pursuant to 22 NYCRR § 130-1.1, the burden of proof lies with the party seeking the imposition of the sanctions" (*Minton v. Boateng*, 2020 NY Slip Op 51591(U) [Civ Ct Bronx County 2020]; *see Miller v. Miller*, 96 AD3d 943 [2d Dept 2012]). Plaintiff's conduct here is not frivolous because the defendant has failed to demonstrate that plaintiff's cause of action has no merit in law, because defendant has failed to demonstrate that this action was undertaken primarily to delay or prolong the resolutions of the litigation or to harass or maliciously injure another, and because the defendant has failed to demonstrate that the plaintiff has asserted material factual statements that are false. Accordingly, this branch of the motion is also denied.

Accordingly, it is hereby **ORDERED** that the motion is denied in its entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 10/28/2021
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.