GDA Realty Corp., Petitioner/Landlord v. Ramon Puello and Otto Puello, Respondents/Tenants, 71407/2014

71407/2014

Civil Court, New York County, Housing Part R NYLJ Publication Date: Feb 24, 2015

Cite as: GDA Realty Corp. v. Puello, 71407/2014, NYLJ 1202718428158, at *1 (Civ., NY, Decided February 6, 2015)

71407/2014

Judge Jack Stoller

Read Summary of Decision

Decided: February 6, 2015

DECISION/ORDER

*1

GDA Realty Corp., the petitioner in this proceeding ("Petitioner"), commenced this summary proceeding against Otto Puello, the respondent in this proceeding ("Respondent")[1] seeking a money judgment and possession of 65 Park Terrace West, Apt. 5C, New York, New York ("the subject premises") on the ground of nonpayment of rent. Respondent interposed an answer raising a defense and counterclaim sounding in breach of the warranty of habitability. The Court held a trial of this matter.

At trial, Petitioner proved that it is the proper party to commence this proceeding pursuant to RPAPL §721; that Petitioner complied with the registration requirements of MDL §325; that the subject premises is exempt from rent regulation; and that Petitioner properly demanded payment of rent prior to commencement of this proceeding pursuant to RPAPL §711(2).

Petitioner introduced into evidence a lease between the parties commencing on June 1, 2012 and expiring May of 2013 with a monthly rent of $2,400.00. Petitioner introduced into evidence a rent ledger ("the ledger") that demonstrates that for thirteen months after the lease expired. Respondent paid $2,400.00 a month and Petitioner accepted said tenders. The ledger shows Respondent's balance as zero at the end of February of 2013. The ledger shows Respondent's rent liability accruing at a rate of $2,400.00 a month from March of 2013 to May of 2014 and then at

a rate of $2,450.00 from June of 2014 through January of 2015, although no lease is in evidence showing a monthly rent of $2,450.00. The ledger credits payments from Respondent from March of 2013 through January of 2015 totaling $36,025.00. Petitioner moved to amend the petition to reflect rent arrears through January of 2015 totaling $19,625.00.

Respondent testified on his own behalf that he moved into the subject premises in June of 2012; that the subject premises consists of three bedrooms, two bathrooms, a dining room, a kitchen, and a living room; and that he lives with his adult son and his cousin.

Respondent testified that the subject premises does not have walls, the bathrooms are open, and the ceilings are open. Respondent entered into evidence photographs of the subject premises depicting an apartment with walls and ceilings stripped bare of tiles and sheetrock, revealing the inside of the walls of the building in which the subject premises is located ("the Building") underneath. Respondent testified that there is no privacy in the bathroom because of this condition. Respondent testified that the subject premises started looking like that around December 5, 2014, when Petitioner undertook extensive work in the subject premises to abate a mold condition there. Respondent introduced into evidence photographs of a mold condition on the walls and ceiling of the subject premises.

At Respondent's request, the Court took judicial notice of a report of violations of the New York City Housing Maintenance Code issued by the Department of Housing Preservation and Development of the City of New York ("HPD") on October 24, 2014. The inspection reports "B" violations for broken and defective surfaces in the ceiling and walls and surfaces of the bathrooms, the kitchen, a private hallway, and two other rooms; broken wall tiles in the bathroom; a broken wooden countertop in the kitchen; a broken counterbalance on a window sash in the bathroom and another room; improper caulking around the bathtub; broken electrical outlets; a defective carbon monoxide detector and smoke detector; a defective ventilator in both bathrooms; leaky faucets in the bathroom; and a broken light fixture; and "C" violations for a water leak behind the ceiling walls of both bathrooms, a private hallway, the kitchen, and two other rooms; exposed live electrical wires; leaky bathtub faucets; a broken fireproof door; a defective water closet; leaky kitchen faucets; and mold in one of the bathrooms and another room at the subject premises.[2]

Respondent testified he once went to the emergency room because he was coughing and had rashes and is now awaiting the results of tests doctors have done on him. Respondent testified that he couldn't live in one of the bedrooms at the subject premises because of leaks coming in through the bricks.

Respondent testified that he complained about the conditions of the subject premises to an officer in the LLC that comprises Petitioner ("the officer") and different people who worked for Petitioner, including a former super of the Building ("the prior super") and that the officer and the prior super saw the condition of the subject premises one and a half years prior to Respondent's testimony in January of 2015, and in some instances since December of 2012.

Respondent testified that the prior super planned to fix it, that he would paint over mold, and then the leaks would cause the problems to recur.

Respondent testified on cross-examination that he knows the name of the prior super was "Avran," and that he does not know him by the name "Rafael Gonzalez." Respondent testified on cross-examination that he did not put complaints about the subject premises in writing to Petitioner. Respondent testified on cross-examination that he did not remember the date that the officer came to the subject premises.

Respondent testified on redirect examination that he spoke with the prior super on the phone and texted with another employee of Petitioner. Respondent testified on redirect examination that Avran was the same person as a super named Rafael.

The officer testified on Petitioner's rebuttal case that the prior super was named Rafael Gonzalez and that the current super ("the current super") is a different person, and that neither is known as "Avran." The officer testified that he had numerous conversations with Respondent over the prior two years, all of which were about rent arrears and none of which were about conditions in the subject premises. Petitioner introduced into evidence letters regarding rent arrears sent to Respondent. The officer testified that Respondent never responded to these letters or complained about conditions at the subject premises. The officer testified that complaints about conditions would either be directed to him or to a super.

The officer testified on cross-examination that the prior super worked for Petitioner until November of 2014, when he retired. The officer testified on cross-examination that the prior super would always relay information concerning repairs to him. The officer testified that the prior super occasionally worked on conditions at the subject premises like a leak in a faucet or in the toilet.

The officer testified on cross-examination that there were no violations or conditions at the subject premises since before 2011 and that Petitioner has since removed the walls as depicted in some photos of the subject premises in evidence to remediate the mold condition there. The officer testified on cross-examination that Respondent did not provide him with access to the subject premises, that the officer repeatedly knocked on the door of the subject premises seeking access to the subject premises, but that Respondent denied access, telling the officer that he wanted to wait until a hearing in Court.

The officer testified on redirect examination that it has been difficult to get work done in the subject premises because of Respondent's failure to provide access. The officer testified that he obtained such access two times.

The current super testified on Petitioner's rebuttal case. The current super testified that he has worked in his capacity since November 26, 2014; that he knows Respondent; that on December 10, 2014, he tried to gain access to the subject premises once the mold remediation occurred; that he gained access to the subject premises twice for the purposes of restoring the subject premises to its prior state after the mold remediation was completely done, but that it has been difficult for him to gain access to the subject premises. The current super testified on cross-examination that

he provides twenty-hours' notice when he wants access to the subject premises by sending a note or knocking on his door. The current super testified on cross-examination that Respondent told him that he could access the subject premises from 10 a.m. to 4 p.m. and that weekends were optional and that that's when the current super worked. The current super testified on cross-examination that another helper who works for Petitioner has been in the subject premises since November 26, 2014.

A cause of action for nonpayment of rent sounds in contract. Solow v. Wellner 86 N.Y.2d 582, 589-90 (1995), Fasal v. La Villa, 2 Misc.3d 137A (App. Term 1st Dept. 2004), Fucile v. LCR Dev., Ltd., 2011 N.Y. Slip Op. 32256U (Dist. Ct. Nassau Co.). Accordingly, in order to establish its prima facie case for a judgment. Petitioner bears the burden of proving, at trial, the existence of a contract between itself and Respondent to pay the rent demanded. 402 Nostrand Ave. Corp. v. Smith, 19 Misc.3d 44, 46 (App. Term 2nd Dept. 2008). To establish the existence of an enforceable agreement, Petitioner must establish, inter alia, a meeting of the minds on all essential terms. Kowalchuk v. Stroup, 61 A.D.3d 118, 121 (1st Dept. 2009).

There is no written lease in effect after May 31, 2013, although Respondent paid the same rent and Petitioner accepted it after the expiration of the lease. Petitioner's acceptance of Respondent's monthly payments created a month-to-month tenancy by operation of law. RPL §232-c. There is conflicting authority as to whether a landlord may avail itself of a nonpayment proceeding against such a month-to-month tenant. See Krantz & Phillips, LLP v. Sedaghati, 2003 N.Y. Misc. LEXIS 58 (App. Term 1st Dept. 2003) (even assuming that a month-to-month tenancy was created following expiration of the lease, there was no agreed-upon rental for any month ensuing after a tenant ceased paying rent and no basis for holding a tenant contractually liable for the rent reserved in the expired lease), 1400 Broadway Assocs. v. Henry Lee & Co., 161 Misc.2d 497, 499-500 (Civ. Ct. N.Y. Co. 1994) (a month-to-month tenant is not obligated to pay rent as if an agreement on rent still existed after the parties cease paying and accepting rent, and a landlord in such circumstances is not allowed to commence a nonpayment proceeding against Respondent, but is relegated to a holdover proceeding pursuant to RPL §232-a). Islands Heritage Realty Corp. v. Joseph, 31 Misc.3d 1220(A) (Dist. Ct. Nassau Co. 2011) (a landlord cannot maintain a nonpayment proceeding against a month-to-month tenant for rent which accrues after the lease expires and after the month-to-month tenant stops paying rent, as the landlord's sole remedy is to bring a holdover proceeding for the fair and reasonable value of past and present occupancy); But See Priegue v. Paulus, 43 Misc.3d 135(A) (App. Term 2nd Dept. 2014) (it was proper for landlords to bring a nonpayment summary proceeding against month-to-month tenants to recover the unpaid rents since the written lease had expired, as the month-to-month tenancy on the same terms as those in the original lease is implied, inasmuch as tenants remained in possession after the expiration of the lease and continued to pay rent); Tricarichi v. Moran, 38 Misc.3d 31, 33-34 (App. Term 2nd Dept. 2012) (when a month-to-month tenancy continues on the same terms as were in the expired lease, a nonpayment proceeding should not have been dismissed).

The Court harmonizes this authority, in particular the decisions of the different Departments of the Appellate Term, with reference to the language in Krantz & Phillips, LLP, supra, 2003 N.Y. Misc. LEXIS at 58 that a nonpayment proceeding did not lie when there was no agreed-upon rental for any month ensuing after tenant ceased paying rent. Accordingly, upon a particularized

factfinding that there was indeed an agreed-upon rental between the parties, the holding of Krantz & Phillips, LLP, supra, 2003 N.Y. Misc. LEXIS at 58, would not prevent a finding consistent with Priegue, supra, 43 Misc.3d at 135(A), and Tricarichi, supra, 38 Misc.3d at 33-34 that Petitioner has a cause of action sounding in nonpayment of rent against Respondent despite Respondent's month-to-month tenancy.

For thirteen months after the expiration of the lease between the parties, Respondent paid, and Petitioner accepted $2,400.00 a month, the same rental amount as in the prior lease between the parties. Repeated payment of the same monthly amount over time can be proof of an agreed-upon rental amount. Gordon v. Baez, N.Y.L.J. Jan. 10, 2002 at 28:5 (App. Term 2nd Dept.). The Court also notes that Respondent counterclaims for damages for breach of the statutory warranty of habitability, a cause of action which sounds in breach of contract. Bandler v. Battery Park Mgt. Co., 10 Misc.3d 133A (App. Term 1st Dept. 2005). While Respondent's pleading of a counterclaim does not ipso facto determine that Respondent accepts that there is a landlord/tenant relationship between the parties, as counterclaims and defenses may be pleaded alternatively and hypothetically, MBIA Ins. Corp. v. Royal Bank of Can., 28 Misc.3d 1225(A), 1225A (S. Ct. N.Y. Co. 2010), CPLR §3014, Respondent's interposition of a counterclaim sounding in breach of contract is at least probative that Respondent accepts that there is a landlord/tenant relationship between the parties.

Respondent testified on cross-examination that he intends to remain in possession of the subject premises, a factor in a finding of a landlord/tenant relationship sufficient to give rise to a landlord's cause of action for nonpayment of rent. Priegue, supra, 43 Misc.3d at 135(A). The record on this case evinces that Respondent withheld rent because of conditions in the subject premises, a means by which tenants may pursue a cause of action sounding in breach of the warranty of habitability. Law v. Franco, 180 Misc.2d 737, 741 (S. Ct. Bronx Co. 1999), citing Ansonia Assocs. v. Ansonia Residents' Association, 78 A.D.2d 211, 220 (1st Dept 1980). The facts specific to this case, particularly Respondent's pursuit of relief sounding in breach of the warranty of habitability and Respondent's payment and Petitioner's acceptance of thirteen months' worth of rent, demonstrate by a preponderance of evidence that there is a landlord/tenant relationship between the parties with a monthly rent of $2,400.00.

At a rate of $2,400.00 a month from March of 2013 through January of 2015, Respondent's aggregate rent liability for this time period is $55,200.00. The ledger credits payments from Respondent from March of 2013 through January of 2015 totaling $36,025.00, leaving a balance of $19,175.00.

The HPD inspection report together with Respondent's testimony compels a finding that the conditions Respondent testified about existed.

The parties dispute whether Petitioner had notice of the conditions. Respondent testified that he told a prior super and the officer about the conditions and that at some point a prior super did some work in the subject premises, to wit, painting over mold. The prior super, who retired about six weeks prior to the trial as per the testimony of the officer and the current super, did not testify. The officer testified that Respondent never told him about the conditions in the subject premises, that the prior super never gave him notice of such conditions, and that he delivered a

number of written communications to Respondent mentioning rent arrears but nothing about conditions in need of repair.

The Court finds that the letters that the officer sent Respondent to have very little probative value regarding the question of whether Respondent notified Petitioner of conditions in the subject premises. Writings that parties send one another certainly prove notice of a party's position. The connection between the officer's omission of repairs in his letters and the officer's notice of the repairs is much more attenuated. The letters follow the same format, including a rent breakdown, include much of the same text, and appear to have been generated from a template on a word-processing program that is updated as Respondent's rent liability accrues.

The letters do not naturally lend themselves to addressing repair issues.

What remains for the Court to resolve is the discrepancy between Respondent's testimony that he told the prior super and the officer and the officer's testimony that Respondent did not do so. In resolving this fact dispute, the Court first notes that there is no evidence in the record that the prior super's retirement less than two months before the trial of this matter rendered him unavailable to offer rebuttal testimony.

The Court next notes that the conditions portrayed in the raft of Respondent's photographic evidence and the housing maintenance code violations depict strikingly acute hazards, including mold infestation, exposed wires, and water damage. Accepting Petitioner's evidence to the exclusion of Respondent's evidence requires a finding that Respondent lived with undisputably extreme conditions dislocating him from some of the rooms in the subject premises and precipitating him to withhold rent and that the topic did not come up in the multiple communications the officer testified he had with Respondent. The Court should not discard common sense in evaluating testimony. People v. Garafolo, 44 A.D.2d 86, 88 (2nd Dept. 1974). Common sense and the lessons of human experience should not be strangers to the decision-making process. People v. Jones, 19 Misc.3d 1143(A) (S. Ct. N.Y. Co. 2008). The lack of plausibility Petitioner's narrative demands coupled with the lack of rebuttal testimony from the prior super militate in favor of a finding that Petitioner did have notice of the conditions.

Petitioner also offered some testimony that Respondent denied Petitioner access to the subject premises, but the evidence of such a denial is not strong enough to satisfy Petitioner's burden of proving a defense to Respondent's counterclaim. The current super testified that he and another worker of his gained access to the subject premises at least twice or more throughout the month of December 2010 alone. Moreover, the photographs of the subject premises show that Petitioner removed walls from the subject premises in an apparent effort to abate the mold there, a job of substantial scale that had to require multiple days of access to the subject premises.

As the Court finds that the condition exists, that Respondent gave Petitioner notice of these conditions, and that Petitioner has had access to the subject premises, the Court therefore considers the conditions demonstrated by the evidence in determining an appropriate rent abatement.

The measure of damages for breach of the warranty of habitability is the difference between the rent reserved under the lease and the value of the premises during the period of the breach. Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 329, cert. denied, 444 U.S. 992 (1979), Elkman v. Southgate Owners Corp., 233 A.D.2d 104, 105 (1st Dept. 1996). From July of 2013, a year and half before Respondent's testimony, the time which Respondent testified that Petitioner had notice of the conditions, through November of 2014, the Court finds that the habitability of the subject premises was severely compromised and warrants an abatement of fifty percent. From December of 2014 through January of 2015, the evidence shows that the habitability of the subject premises diminished further as the mold abatement led to walls in the subject premises being tom down. The Court awards Respondent an abatement of rent of eighty percent for these months.

Fifty percent of $2,400.00, $1,200.00, for the seventeen months spanning July 2013 through November of 2014, is $20,400.00. Eighty percent of $2,400.00, $1,920.00, for the two months of December of 2014 and January 2015, total $3,840.00. The total abatement/counterclaim the Court awards Respondent is $24,240.00.

Offsetting the abatement in favor of Respondent against the rent arrears of $19,175.00 leaves a balance of $5,065.00 in favor of Respondent. Accordingly, the Court dismisses the petition against Respondent and awards Respondent judgment on his counterclaim in the amount of $5,065.00 against Petitioner.

The Court also orders Petitioner to correct the housing maintenance code violations HPD placed on the subject premises on or before March 5, 2015, and the Court directs Respondent to provide access to Petitioner to the subject premises for this purpose on a date to be mutually arranged by both parties on notice to both parties.

The parties are directed to pick up their exhibits within 30 days or they will either be sent to the parties or destroyed at the Court's discretion and in compliance with DRP-185.

This constitutes the decision and order of this Court.

Dated: February 6, 2015

New York, New York

1. There were other respondents in this proceeding, but Otto Puello is the only respondent who testified at trial. Therefore, for the sake of convenience only and without prejudice to the rights of any party, the Court only refers to Otto Puello as "Respondent."

2. A class "B" violation is "hazardous" pursuant to N.Y.C. Admin. Code §27-2115(c)(2) and a class "C" violation is "immediately hazardous" pursuant to N.Y.C. Admin. Code §27-2115(c)(3). Notre Dame Leasing LLC v. Rosario, 2 N.Y.3d 459, 463 n.1 (2004).