Fav 45 LLC, Petitioner/Landlord v. Genever McBain, et al., Respondents/Tenants, 59732/2010
59732/2010

Civil Court, New York County, Housing Part H
NYLJ Publication Date: Mar 11, 2015

Cite as: Fav 45 LLC v. McBain, 59732/2010, NYLJ 1202720126104, at *1 (Civ., NY, Decided February 13, 2015)
59732/2010
Judge Jack Stoller
Read Summary of Decision
Decided: February 13, 2015
ATTORNEYS

The landlord-petitioner was represented by: Doreen Fischman of Fischman and Fischman.
Tenant-respondent: pro se.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion.
Papers Numbered
Order To Show Cause To Vacate a Settlement Agreement and Supplemental Affidavits
Annexed 1
Affidavit and Affirmation In Opposition 2, 3
DECISION/ORDER

*1
Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

By a petition that was first noticed to be heard on March 23, 2010, FAV 45 LLC, the petitioner in this proceeding ("Petitioner"), commenced this summary proceeding against Genever McBain, the respondent in this proceeding ("Respondent")[1] seeking a money judgment and possession of 45 First Avenue, Apt. 2L, New York, New York ("the subject premises") on the ground of nonpayment of rent, alleging, inter alia, that the subject premises is subject to the Rent Stabilization Law and Code. Respondent interposed an answer, raising a defense of, inter *2 alia, rent overcharge. The Court granted Respondent leave to obtain discovery as to the question of whether Petitioner did necessary work to

obtain an Individual Apartment Improvement ("IAI") rent increase pursuant to 9 N.Y.C.R.R. §2522.4(a)(1).

After three years of discovery proceedings and motion practice, this matter was deemed to be trial-ready and was assigned to the trial part on July 18, 2013. The trial continued over several dates to January 17, 2014. While Respondent pursued other defenses at trial, Respondent did not prosecute a defense concerning IAI's. The Court entered into a decision after trial awarding Petitioner a final judgment. Respondent thereafter paid Petitioner the judgment amount. Petitioner then moved, by a motion first returnable on February 26, 2014, for a money judgment sounding in attorneys' fees that Petitioner alleged that it had incurred. The motion was adjourned for several months while the parties, both represented by counsel throughout, negotiated Petitioner's motion and finally settled Petitioner's motion for attorneys' fees by a stipulation that the Court so-ordered on October 29, 2014 ("the Stipulation").

The Stipulation provided, inter alia, that Petitioner alleged that its legal fees exceeded $150,000.00; that Respondent owed arrears for her failure to execute prior renewal leases; that Petitioner had commenced a holdover proceeding against Respondent for failure to execute these leases; that Respondent would execute these leases that would have the effect of retroactively renewing the leases, such that the legal monthly rent for the subject premises would be higher than previously stated; that Respondent consented to a money judgment for $100,000.00 and a judgment for possession of the subject premises; that if Respondent paid $29,000.00 by a date certain that the money judgment for $100,000.00 would be vacated; that a warrant of eviction *3 was permitted to issue forthwith; that the execution of the warrant was stayed through January 30, 2015 conditioned on payment of use and occupancy at the monthly rate before the execution of the renewal leases; that Respondent agreed to make no application "of any kind whatsoever, for any reason whatsoever, to stay execution of the warrant" longer than the stays in the Stipulation, the finality of January 30, 2015 being "a major consideration" for Petitioner to entered into the Stipulation; and a general release.

Respondent has since represented to the Court that she has discharged her attorney and now moves, while pro se, inter alia, for an order discharging Respondent's attorney; vacating the Stipulation and the judgment for $100,000.00; voiding renewal leases that Respondent signed; and vacating the determination this Court made after trial.

Respondent's attorney cross-moved for relief vis a vis Respondent. The Court does not address the relief Respondent and her prior attorney seek against one another on this decision, which is reserved for a separate submission schedule, except to permit Respondent to proceed pro se with the rest of the relief she is seeking.

At the outset, there is no dispute between the parties that Respondent timely paid the $29,000.00 by the date specified in the Stipulation. Accordingly, pursuant to the terms of the Stipulation, the Court vacates the money judgment of $100,000.00. The first ground upon which Respondent seeks relief from the judgment is an allegation that Petitioner's IAI was fraudulently-obtained, relying on CPLR §§5015(a)(2) and 5015(a)(3), which provide for relief from judgments on the basis of newly-discovered evidence and on the basis of fraud. Respondent avers in her affidavit in support of her motion that she spoke with a *4 former employee of Petitioner around June 30, 2014 and learned from this employee that IAI's that Petitioner claims were not done, told Respondent's attorney about it, that Respondent's attorney recommended settlement with Petitioner, and that she then signed the Stipulation. Respondent also annexes to her motion an affidavit from someone claiming to be an expert with regard to fonts averring that the font on an invoice upon which an IAI for the subject premises was based on 2004 did not actually exist in 2004.

Petitioner's opposition to Respondent's motion includes sworn statements disputing particulars of Respondent's claim that Petitioner has obtained a final judgment at trial predicated on fraud. Be that as it may, given that Respondent was aware of her claim that such fraud existed before she signed the Stipulation, such alleged fraud is not the basis upon which to vacate the Stipulation. Matinzi v. Joy, 60 N.Y.2d 835, 836-837 (1983). If the Stipulation is not vacated, Respondent's application to vacate the Court's judgment after trial is moot given that the Stipulation releases both Petitioner and Respondent from all claims against one another. Respondent may not avoid the implications of a general release on a claim of fraud that she was aware of prior to signing the general release. Arfa v. Zamir, 17 N.Y.3d 737, 738-39 (2011).

The Court notes that Respondent obtained a general release in consideration for Petitioner's forgoing pursuit of $121,000.00 sounding in attorneys' fees and that the general release was procured by valuable consideration.

Nor does Respondent show cause to vacate the judgment after trial on the basis of newly-discovered evidence. When a party has had access to records before the conclusion of the trial, as Respondent has had access to the invoices she now

questions, she had constructive knowledge of *5 disputes as to the discrepancies in the font before the conclusion of the trial. S.A.B. Enterprises v. Stewart's Ice Cream Co., 242 A.D.2d 845, 845-846 (3rd Dept.), leave to appeal dismissed, 91 N.Y.2d 848 (1997). And even assuming arguendo that Respondent could not have spoken with an employee of Petitioner prior to the conclusion of the trial, Respondent's knowledge of this evidence prior to her entering into the Stipulation, with its exchange of consideration for a general releases, evinces that Respondent's motion to vacate a judgment on the basis of newly-discovered evidence is not timely.

Respondent also moves to vacate the Stipulation on the ground that the rent increases in the retroactive lease renewals that she signed were not predicated on a base rent of $1,673.50, Respondent's last rent that Petitioner deems to be a preferential rent, but $1,733.69, the rent the Court found was not legal in the Court's determination after trial. The Settlement Agreement provided that Respondent signed five one-year renewal leases based upon the monthly rent of $1,733.69. Respondent argues that the Stipulation therefore violates the Rent Stabilization Code and therefore is void, as per Jazilek v. Abart Holdings LLC, 10 N.Y.3d 943, 944 (2008), and Riverside Syndicate v. Munroe, 10 N.Y.3d 18, 22-24 (2008).

According to N.Y.C. Admin Code §26-510(b), the Rent Guidelines Board ("RGB") establishes rent adjustments for units subject to Rent Stabilization. The adjustment for a one-year renewal lease commencing May 1, 2010 is 3.0 percent. RGB Order 41. A 3.0 percent increase over $1,673.50 is $1,723.70; a 3.0 percent increase over $1,733.69 is $1,785.70. The adjustment for a one-year renewal lease commencing May 1, 2011 is 2.25 percent. RGB Order 42. A 2.25 percent increase over $1,723.70 is $1,762.48; a 2.25 percent increase over $1,785.70 is $1,825.88. The *6 adjustment for a one-year renewal lease commencing May 1, 2012 is 3.75 percent. RGB Order 43. A 3.75 percent increase over $1,762.48 is $1,828.57; a 3.75 percent increase over $1,825.88 is $1,894.35. The adjustment for a one-year renewal lease commencing May 1, 2013 is 2 percent. RGB Order 44. A 2 percent increase over $1,828.57 is $1,865.14; a 2 percent increase over $1,894.35 is $1,932.24. The adjustment for a one-year renewal lease commencing May 1, 2014 is 4 percent. RGB Order 45. A 4 percent increase over $1,865.14 is $1,939.75; a 2 percent increase over $1,932.24 is $2,009.53.

The difference between renewing the lease based upon the rent of $1,673.50 and a rent of $1,733.69, then, is $77.29. This difference does not implicate public policy to the degree that the normal hurdles to vacatur of a stipulation are overcome.

Altman v. 285 W. Fourth LLC, 2014 N.Y. Misc. LEXIS 4560 (S. Ct. N.Y. Co. 2014) (finding that Jazliek, supra, does not apply in such an instance). Compare Oxford Towers Co., LLC v. Wagner, 58 A.D.3d 422, 422-423 (1st Dept. 2009) (a stipulation that raises the rent according to RGB increases and does not deregulate the apartment does not offend public policy).

Moreover, the true gravamen of the Stipulation was Respondent's exchange of possession of the subject premises in return for Petitioner's forgoing $121,000.00 out of a claim for legal fees of $150,000.00. The lease renewals were incidental to this bargain. Rights of tenants under rent regulation do not prohibit a tenant from agreeing to surrender possession of the apartment and resolve incidental differences. Matinzi, supra, 60 N.Y.2d at 836; Merwest Realty Corp. v. Prager, 264 A.D.2d 313, 313-314 (1st Dept. 1999). Accordingly, Respondent has failed to state a ground to vacate the Stipulation as such.
*7
Accordingly, the Court vacates the judgment against Respondent for $100,000.00 and otherwise denies Respondent's motion in its entirety. Stays remain vacated.
This constitutes the decision and order of this Court.

Dated: New York, New York
February 13, 2015
1. There were other respondents in this proceeding, but Genever McBain is the only respondent who appeared at the hearing of the motion on this case. Therefore, for the sake of convenience only and without prejudice to the rights of any party, the Court refers to Genever McBain only as "Respondent."