CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART Q, RM. 407

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81-05 135 STREET LLC,

Petitioner,

Index No. L&T 78742/2015

DECISION/ORDER[1]
AFTER TRIAL

-against-

JIMMY C. SOLOMOS AND ELENA DHIMA,

Respondents-Tenants.

JOHN DOE AND JANE DOE,

Respondents-Undertenants.

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Hon. Joel R. Kullas

Petitioner commenced this summary non-payment proceeding alleging Respondent owed $3,915.00 for the subject unregulated unit. Respondent interposed a written answer that included several affirmative defenses. When the parties could not reach a settlement, the court conducted a trial. The parties also submitted Post Trial Briefs.

At trial, Scott Cordovi testified on behalf of petitioner. He established petitioner's prima facie case by introducing into evidence: 1) as petitioner's Exhibit 1, a deed establishing Petitioner's ownership of the subject premises; 2) as petitioner's Exhibit 2, a multiple dwelling registration statement establishing that petitioner has registered the premises in compliance with the Multiple Dwelling Law; and 3) as petitioner's Exhibit 3a, a lease between petitioner and respondent renting the subject premises to respondent. Petitioner testified that, pursuant to the lease, rent was due on the first of the month in the amount of $2,300 per month and that the last month in which rent was received from respondent was September 2015. The court granted petitioner's application to amend the petition to include all rent through December 2015. The amount sought in this proceeding is thus $2,300.00 per month for the months of October through December of 2015 for a total of $6,900.00. Petitioner also seeks legal fees in this proceeding.

Respondents then testified regarding four affirmative defenses: 1) retaliatory eviction; 2) surrender; 3) breach of the warranty of habitability; and 4) partial actual eviction.

Elena Dhima alleged the marijuana smell in the unit was terrible and she couldn't stand to be in certain rooms, including the living room and office. She claimed that Mr. Cordovi put up posters forbidding smoking in building and put air wicks in the hallways, but these efforts did

[1] The court conducted trial on March 8, 2016 (FTR counter numbers 12:20:19-4:54:00) March 9, 2016 (FTR Counter numbers 3:30:33-4:39:37) and March 22, 2016 (FTR Counter numbers 2:52:36-4:30:27) The parties submitted post-trial memoranda by April 22, 2106.

not eliminate the problem. She claimed respondents stopped paying rent in October 2015 because the marijuana smoke was so bad. On cross-examination, Ms. Dhima acknowledged there were no texts sent to Mr. Cordovi regarding the smoke.

Jimmy Solomos also testified, describing the unit as a "drug den." He claimed that he notified petitioner by phone numerous times about the marijuana. Mr. Solomos stated petitioner addressed marijuana through: aromatherapy; put up signs forbidding smoking; placed odor eater cans in the stairwell; and motion sensor wicks. Mr. Solomos claimed none of these efforts worked, and that he couldn't bring family over for nearly a year. Mr. Solomos also alleged that "half a dozen times" he had altercations with other tenants regarding the parking spot. Finally, Mr. Solomos stated that he tried to surrender the keys to petitioner in November 2015 and that by November 30, 2015, respondents had vacated, shut off the gas service and left the unit in broom clean condition.

Mr. Cordovi testified in rebuttal that respondents neither surrendered nor returned the keys. Mr. Cordovi insisted that when Mr. Solomos called him about prematurely terminating the lease and living out the security that he rejected that request and cited the terms of the lease. Mr. Cordovi stated that he never received any texts regarding alleged drug dealers. Mr. Cordovi testified that he posted signs in June 2015 forbidding smoking. He believed his efforts rectified the problem.

Turning to the validity of respondents' defenses, the allegation by respondent that this proceeding was brought by petitioner in retaliation for respondent's attempts to surrender the premises due to habitability issues regarding the subject premises is without merit. New York Real Property Law §223-b does prohibit landlords from commencing summary proceedings to recover real property in retaliation for certain actions by tenant. However, New York Real Property law §223-b does not apply to nonpayment proceedings. *390 W. End Assocs. V. Raiff, 166 Misc. 2d 730, 734, 636 N.Y.S.2d 965 (App. Term. 1st Dept. 1995).*

Respondents' allegation that by moving out of the subject premises and attempting to surrender possession subsequent to petitioner commencing this non-payment proceeding relieves them of the liability to pay rent for December 2015 is without merit. Respondent cites *Patchogue Associates v. Sears, Roebuck and Co.* for the proposition that where a landlord commences a summary proceeding for nonpayment of rent and tenant subsequently surrenders possession of the premises, the landlord-tenant relationship is terminated by tenant's surrender. *37 Misc.3d 1, 951 N.Y.S.2d 314 (App. Term 9th & 10th Jud. Dists. 2012).* The Appellate Term noted, however, that it would have reached a different decision had the subject lease contained a survival clause. *Id. at 5.* Paragraph 15D of the lease in this case, entered into evidence as Petitioner's Exhibit 3a, states: "If the Lease is ended or Landlord takes back the Apartment, rent and added rent for the unexpired Term becomes due and payable." Based on this survival language included in the lease, the holding in *Patchogue Associates* does not apply. Thus, Petitioner is entitled to rent for the month of December 2015.

Respondents present a meritorious allegation regarding petitioner's breach of the warranty of habitability by allowing drug use and other criminal conduct in the building and allowing marijuana odors and smoke in the building and the subject premises. New York Real

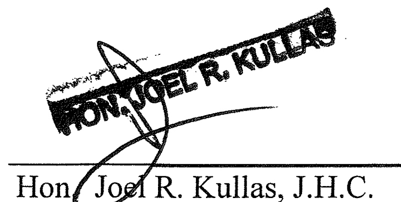
Property Law §235-b provides in relevant part: "In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased… are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety." The Court of Appeals has held that "…the proper measure of damages for breach of the warranty is the difference between the fair market value of the premises if they had been as warranted, as measured by 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, 391 N.E.2d 1288 (1979).*

Based on the evidence presented, the court finds a breach of the warranty of habitability. The court finds that petitioner's attempts to remedy the situation affected moderate improvements, and that respondents were not credible to the degree of impairment the condition caused. The claim that the building was a "drug den" was not substantiated. Respondents admission that they did not text petitioner about the smoke undermines their claim. Therefore, the court awards respondent an abatement equal to ten percent (10%) of the rent for the period from November 2014 when the condition began to November 2015 when Respondents vacated the subject premises. The monthly rent was $2,300.00 per month. Ten percent (10%) of $2,300.00 is $230.00. November 2014 to November 2015 is a period of thirteen (13) months. A $230.00 abatement for a period of thirteen (13) months equals a total abatement of $2,990.00.

Finally, respondents' allegations regarding partial actual eviction regarding denial of the use of the parking spot from October 1, 2015 is without merit. Partial actual eviction is a defense to a non-payment proceeding. *Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 117, N.E. 579 (1917).* In order to establish a defense of partial actual eviction, the tenant must show that he was actually excluded from a portion of the demised premises. *524 West End Ave. v. Rawak, 125 Misc. 862, 212 N.Y.s 287 (App. Term. 1st Dept. 1925).* Petitioner's Exhibit 6b is a text message sent from petitioner to respondent on October 7, 2015 that stated "If October rent is not paid. Do not park your car in the back since you're avoiding your lease on own terms without our approval." Respondents argue that this statement was sufficient to create a partial actual eviction. Respondents do not present any evidence to establish that Petitioner made any affirmative action to enforce the statement made in the text message. A mere statement denying use of a portion of the demised premises without any affirmative action by petitioner to evict respondents is not sufficient to establish a defense of partial actual eviction.

Based on the foregoing, the court awards a final judgment of possession in favor of petitioner in the amount of $3,910.00, representing the $6,900.00 in rent/use and occupancy due for the period of October 2015 through December 2015 minus the abatement of $2,990.00. Issuance of the warrant of eviction is stayed five days for payment. This decision is without prejudice to both parties' claims to legal fees.

This constitutes the decision and order of the court.



Dated: May 11, 2016

Hon. Joel R. Kullas, J.H.C.