Hosameldin Oshy, Plaintiff, against Koufa Realty Corp., and Rex Realty Inc., Defendants.

21596/10

SUPREME COURT OF NEW YORK, QUEENS COUNTY

35 Misc. 3d 1207(A); 951 N.Y.S.2d 87; 2012 N.Y. Misc. LEXIS 1572; 2012 NY Slip Op 50603(U)

March 31, 2012, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

HEADNOTES

[**87] [*1207A] Landlord and Tenant--Rent Regulation--Eviction Based on Agreement to Surrender.

JUDGES: [***1] Bernice D. Siegal, J. S. C.

OPINION BY: Bernice D. Siegal

OPINION

Bernice Daun Siegal, J.

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendants, Koufa Realty Corp. ("Koufa Realty") and Rex Realty Inc ("Rex Realty") move pursuant to CPLR §3211 and §3212 for summary judgment dismissing plaintiff's claims as there are no existing issues of fact that warrant a trial.

Facts

On November 2, 2007, Koufa Realty, the owner and landlord of the premises known as 31-18 42nd Street, Astoria, New York, 11103 ("Subject Premises"), brought a non-payment against Hosameldin Oshy ("Oshy"), the plaintiff herein. Defendants contend that the non-payment was brought for past due rent owed from November 2006 through November 2007. Oshy answered the non-payment claiming that there were lead paint violations as evidenced by a Violations Summary Report dated January 8, 2008. Pursuant to an agreement between the parties, Koufa retained All-Star Design to repair the condition but access was denied by Oshy.

On February 23, 2009, in a stipulation of settlement, so-ordered by the Honorable Gilbert Badillo, wherein Oshy was represented by counsel and acknowledged that he owed past due rent in the [***2] amount of $5,660.28 and in settlement of "the issues in this matter," Oshy agreed to accept an abatement of $2,150.28 and agreed to pay $3,500. Furthermore, Oshy agreed that "[a]ny further lead abatement shall be done after school year ends in June when children can be away." Subsequently, the parties entered into an agreement ("Surrender Agreement") by which Oshy would surrender the apartment in return for $5,000, which Surrender Agreement forms the basis of the within action.

Defendants contend that Oshy requested to surrender the apartment because he had found alternative housing. Approximately, seven months after the agreement Oshy brought the within action alleging that the surrender agreement was void; plaintiff was constructively evicted from the subject premises; defendants made an unlawful entry or detainer; plaintiff was wrongfully evicted; plaintiff signed the surrender agreement under duress; defendants breached the plaintiff's lease; defendants engaged in deceptive acts or practices; defendants were unjustly enriched; defendants breached the warranty of habitability; and defendants breached the Housing Maintenance Code.

Defendants now move for summary judgment dismissing [***3] plaintiff's cause of action. Defendants' motion is granted as more fully set forth below.

Discussion

1- The Surrender Agreement and Duress

Plaintiff contends that the Surrender Agreement must be rendered void in violation of the Rent Stabilization Code §2520.12 which states, in relevant part, that "[a]n agreement by the tenant to waive the benefit of any provision of the Rent Stabilization Code ("RSC") or this code is void." (RSC 9 NYCRR § 2520.13.) However, defendants argue that the Surrender Agreement was not an agreement to waive the protections of the RSC, rather, it was an agreement in which the plaintiff elected to surrender possession of his rent regulated premises in return for compensation.

Defendants argue that according to *Merwest Realty Corp. v. Prager*, 264 AD2d 313, 694 N.Y.S.2d 38 (1st Dept. 1999), the Surrender Agreement is valid. In *Merwest Realty Corp.*, the tenant contacted the landlord, who was in arrears, asked what arrangement would the landlord provide because the tenant was considering relocating. The landlord and tenant came to an agreement that as long as the tenant vacated the property, the landlord would pay the tenant $10,000 and mutually release and settle all outstanding and [***4] prospective claims between the parties. The Court held that this settlement was valid. (*Merwest Realty Corp. v. Prager*, 264 AD2d 313, 694 N.Y.S.2d 38 [1st Dept 1999].) The Court stated that "[t]he . . . Rent Control Law, while intended to protect the rights of a rent-controlled tenant, does not prohibit a tenant from agreeing as here, where there is no evidence of bad faith or overreaching by the landlord, to surrender possession of the apartment and resolve incidental differences." (*Id.* At 314.) *Merwest Realty* is based upon facts similar to the within action. Here, Oshy and his attorney had previously approached Maria Alexiou ("Alexiou"), the Managing Agent of the defendant, Rex Realty, to discuss a possible agreement by which the plaintiff would vacate the apartment in return for compensation. Oshy, in opposition, does not deny Alexiou's assertion. According to Alexiou, Oshy wanted to enter such agreement because he had found alternative housing and wished to end his lease with the defendants. Subsequently, but without court oversight or his attorney's intervention, Oshy entered into the voluntary surrender agreement stating that Oshy would surrender the apartment in return for $5,000.00. The argument [***5] made by plaintiff, that the Surrender Agreement breached the Rent Stabilization Code because it was not approved by DHCR or by a court of competent jurisdiction in accordance to RSC section 2520.13 fails. The courts do not "perceive any distinction between in-court or out-of-court agreements." (*Merwest Realty Corp.*, 694 N.Y.S.2d at 39). Therefore, the Surrender Agreement did not violate the Rent Stabilization Code. Plaintiff, in opposition, argues that the seminal case on point is *Grasso v. Matarazzo*, 180 Misc. 2d 686, 688, 694 N.Y.S.2d 837 (App. Term 2d Dept 1999.) In *Grasso*, the court stated that "the issue of whether the out-of-court surrender agreement here is void and unenforceable ultimately depends on whether it was entered into voluntarily or under duress and coercion." (*Grasso v. Matarazzo*, 180 Misc. 2d 686, 694 N.Y.S.2d 837 [App. Term 2d Dept 1999].) In *Grasso*, the tenant signed an out-of-court agreement to surrender possession of rent-controlled premises he had resided in for approximately 35 years for $2,500. Tenant alleged that he was mentally disabled and sought to be restored to possession. Significantly, in *Grasso*, the tenant testified that he signed the agreement to surrender possession of the premises because [***6] he was threatened by landlord's son. It was also undisputed that after vacating the six-room apartment, tenant had nowhere to live. It was furthermore uncontroverted that after tenant vacated the premises, the landlord promptly changed the locks, then filed an application for decontrol of the premises, and rented out said premises to new tenants. The Appellate Term, agreeing with the lower court, concluded that the landlord's position that the agreement was voluntary lacked credibility. (*Grasso v. Matarazzo*, 180 Misc. 2d 686, 694 N.Y.S.2d 837 [App. Term 2d Dept 1999].)

The within action is distinguishable from *Grasso*, in that Oshy fails to submit proof that he was coerced or under duress when he signed the Surrender Agreement. While plaintiff's counsel uses the terms "coercion" and "induced" throughout the affirmation in opposition, there is nothing in the record which provides any evidence that defendants coerced or induced Oshy. As noted earlier, defendants assert that plaintiff and his attorney approached Alexiou to discuss a possible agreement by which the plaintiff would vacate the apartment in return for compensation. Oshy, in opposition, does not deny Alexiou's assertion. The court notes that Oshy [***7] did not request nor avail himself of legal representation when executing the surrender agreement, even though plaintiff had been represented throughout the lower court proceedings and prior stipulations had been entered into with the assistance of counsel.

Furthermore, plaintiff's counsel admits in opposition that on April 16, 2008, the parties entered into a stipulation in open court wherein defendants agreed to waive Oshy's rent arrears and give Oshy $10,000 if he vacated his apartment on or before September 15, 2008. Plaintiff acknowledges that Oshy breached the agreement when he failed to vacate the apartment. The parties then appeared in court on October 27, 2008, and entered into a new stipulation wherein the defendants agreed to repair the conditions in Oshy's apartment provided defendants would be given access on November 6, 2008, to perform an inspection. On February 23, 2009, the parties entered into another stipulation wherein the parties agreed that "[a]ny further lead abatement shall be done after school year ends in June when children can be away." Oshy is now attempting to use the Lead Paint issue to convince this court that he was, in some way, coerced into signing the [***8] Surrender Agreement. However, the February 23, 2009 agreement clearly shows that the parties were in agreement on how they were going to handle whatever lead paint issues remained and therefore there was no urgency for Oshy to vacate the premises based solely on the lead paint issue. Furthermore, there is un-rebutted testimony that Oshy had approached the defendants about entering into a Surrender Agreement.

Plaintiff's counsel contends that Oshy has been diagnosed with Severe Depression Disorder. Initially, the court notes that this argument is not found in Plaintiff's Complaint or Bill of Particulars. In support, Plaintiff merely attaches a letter signed by a "clinician" from Health and Human Resources Systems stating that Oshy has been in treatment at their clinic since September 2006. Significantly, the letter is without probative value as it is unsworn and unaffirmed. (*See Washington v. Mendoza*, 57 AD3d 972, 871 N.Y.S.2d 336 [2nd Dept 2008]; *Grasso v. Angerami*, 79 NY2d 813, 588 N.E.2d 76, 580 N.Y.S.2d 178 [1991].) Furthermore, the letter relates to a "Sam Oshy" born on xx/ xx/1964, while Plaintiff's name is Hosameldin Oshy, born on xx/xx/1967. In addition, the Clinician contends that her client was not able to make "adequate choices" [***9] and that her client "misunderstood the contract he was presented and confused about consequences when he signed it." However, the letter is dated September 5, 2008, more than a year *after* the surrender agreement in question was entered into. (Emphasis added.) Accordingly, Plaintiff failed to establish that he was unable to understand the Surrender Agreement.

Based on the facts presented, this court concludes that the Surrender Agreement was not entered in bad faith; and the defendants did not overreach or coerce Oshy into surrendering his apartment, instead, Oshy had confronted the defendants about making an agreement. The argument made by Oshy, that the Surrender Agreement breached the Rent Stabilization Code because it was not approved by DHCR or by a court of competent jurisdiction in accordance to RSC section 2520.13 fails. The courts do not "perceive any distinction between in-court or out-of-court agreements." (*Merwest Realty Corp.*, 264 AD2d at 314). Therefore, the Surrender Agreement did not violate the Rent Stabilization Code

Accordingly, based on the particular facts of the within action,[1] the Surrender Agreement is deemed valid.

1 The court notes that Oshy failed to submit evidence, [***10] in admissible form, establishing any of his claims to overturn the surrender agreement, including duress, coercion or incapacity.

2- Constructive Eviction

A "constructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises." (*Barash v. Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83, 256 N.E.2d 707, 308 N.Y.S.2d 649 [1970].) In the within action, Oshy signed the Surrender Agreement wherein he voluntarily left the

premises for $5,000 and the Surrender Agreement does not contain language relating to "landlord's wrongful acts." In addition, Oshy, in his affidavit in opposition, failed to assert that he was unable to use any portion of his apartment due to the alleged wrongful acts of the landlord. On the contrary, throughout the Housing Court proceedings Oshy remained in possession and, at times, refused the landlord entry to do the necessary work to resolve the alleged conditions. Oshy failed to establish that the existence of lead paint in his apartment actually caused him to be deprived of the expected and intended use of the premises during [***11] that period, as is required for constructive eviction. (*See Pacific Coast Silks, LLC v. 247 Realty, LLC*, 76 AD3d 167, 904 N.Y.S.2d 407 [1st Dept 2010]; *see also Jerulee Co. v. Sanchez*, 43 AD3d 328, 841 N.Y.S.2d 242 [1st Dept 2010].) Accordingly, Oshy's claim of Constructive Eviction is dismissed.

3- Unlawful Entry or Detainer

Plaintiff's complaint contains a conclusory statement that the defendants used unlawful means to obtain possession of the subject premises. However, as set forth above, Oshy voluntarily entered into a Surrender Agreement. Therefore, any claims for Unlawful Entry or Detainer fail.

4- Wrongful Eviction

Plaintiff asserts that he was wrongfully evicted in violation of RPAPL §713(10). Once again, defendants did not enter the premises unlawfully, rather they entered pursuant to a signed Surrender Agreement. Accordingly, defendants "established their prima facie entitlement to judgment as a matter of law dismissing the cause of action to recover damages for wrongful eviction." (*Eze v. Spring Creek Gardens*, 85 AD3d 1102, 1103, 925 N.Y.S.2d 888 [2nd Dept 2011].) "In opposition, the plaintiffs failed to raise a triable issue of fact." (Id.) Accordingly, action pursuant to wrongful eviction is misplaced.

5- Unjust Enrichment

Plaintiff [***12] contends that the defendants were unjustly enriched when they regained possession of plaintiff's apartment. "To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." (*Zamor v. L & L Associates Holding Corp.*, 85 AD3d 1154, 1156, 926 N.Y.S.2d 625 [2nd Dept 2011]; "Generally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent." (Id. at 1157.) Here, the defendants provided consideration to the Plaintiff in exchange for Plaintiff surrendering his apartment. As set forth earlier, plaintiff has failed to set forth any mistake of fact or law which would allow this court to rule that defendants were unjustly enriched.

6- Deceptive Acts or Practices

General Business Law section 349 states that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing [***13] of any service in this state are hereby declared unlawful." Plaintiff argues that because defendants engage in "business" and "furnish a service," Gen Bus Law section 349 applies. On the contrary, Gen Bus Law section 349 is inapplicable here. "Generally, claims under the statute are available to an individual consumer who falls victim to misrepresentations made by a seller of consumer goods through false or misleading advertising. (*Small v. Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 720 N.E.2d 892, 698 N.Y.S.2d 615 [1999].) Gen Bus Law section 349 is said to only apply to consumer-oriented conduct aimed at the public at large, and not to apply to private disputes between landlords and tenants. (*Aguaiza v. Vantage Properties, LLC*,69 AD3d 422, 893 N.Y.S.2d 19[1st Dept. 2010].) "[P]rivate contract disputes which are unique to the parties do not fall within the ambit of the statute. (*Flax v. Lincoln Nat. Life Ins. Co.*, 54 A.D.3d 992, 864 N.Y.S.2d 559 [2nd Dept 2008].) Not only is this within action a private dispute but the alleged deceptive acts are aimed at Oshy, personally, not at the public at large.

Accordingly, section 349 of the General Business Law does not apply here and the defendants did not engage in deceptive acts or practices.

7- Breach of Warranty [*14] of Habitability and Housing Maintenance Code**

Plaintiff asserts that defendants breached the Warranty of Habitability and the Housing Maintenance Code. Section 27-2005 of the Housing Maintenance Code

provides that an "owner of a multiple dwelling shall keep the premises in good repair." The plaintiff alleges that the defendants breached his Warranty of Habitability for the following reasons: defective radiator shut-off valves; defective windows; obstruction of fire escape; defective plastered surface; broken flooring; mold and mildew; missing smoke detector; vermin mice; loose wall cabinets; defective wood sink cabinet; and lead paint. Plaintiff's allegation, in connection with defendants' alleged breach of the Housing Maintenance code was that defendants failed to repair the apartment. These assertions were also raised by plaintiff in connection with the non-payment proceeding and were settled in the agreement dated February 23, 2009. This settlement stated that Oshy owed $5,660.28 in past-due rent, and that Oshy agreed to accept an abatement of $2,150.28 and agreed to pay $3,500.00 to Koufa. Furthermore, the settlement states that "all issues in the matter" were settled. In addition, [***15] the Surrender Agreement provides that Oshy has "no open claims" against the landlord. Thus, the issues of breach of warranty of habitability and the Housing Maintenance Code have been resolved and cannot be asserted in the within action.

Parenthetically, had the tenant not received an abatement in the housing court proceeding this cause of action would have survived.

Accordingly, the defendants' claims of breach of the Warrant of Habitability and a breach of the Housing Maintenance Code §27-2005 must fail.

8- Plaintiff's Claim that Defendants Breached Plaintiff's Lease

Oshy alleges, in his complaint, that the defendants violated his lease due the allegations set forth in the causes of actions listed in the within action. However, as set forth above, the causes of action have been dismissed as being without merit. Accordingly, this cause of action must also fail.

Conclusion

Defendants, Koufa Realty and Rex Realty's motion pursuant to CPLR §3211 and §3212 for summary judgment dismissing plaintiff's claims as there are no existing issues of fact that warrant a trial, is granted.

Dated: March 31, 2012

Bernice D. Siegal, J. S. C.