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ZHAO v. ZHANG

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Civil Court of the City of New York
County of Queens: Housing Part P
YINJIE ZHAO and KAREN YIN JUAN ZHAO,
Petitioner

QL&T# 300702-22

-against-

Decision/Order

LEI ZHANG and HAORAN WAN
JOHN DOE and JANE DOE
Respondents.

The instant holdover proceeding seeks possession of the subject basement apartment. Petitioners are represented by counsel. Respondent Zhang (hereinafter "Zhang") is represented by Queens Legal Services. Respondent, Wan did not answer or appear and the trial is deemed an inquest as to him.

Neither side contests that the subject apartment is an illegal occupancy and that no rents or use and occupancy is owed. Rather, the issues for this proceeding are whether Respondent, Zhang was constructively evicted and is entitled to damages and whether this proceeding was commenced in retaliation for Respondent asking for repairs.

The testimony from both sides showed that the impetus for these issues, defenses and counterclaims is Hurricane Ida. The hurricane occurred on or about September 1, 2021. On that date, New York City experienced unprecedented flooding in residences, particularly illegal basement apartments. Immediately thereafter, Petitioners and Zhang met and discussed what would happen next. In short, both sides agree that there was excessive flooding, rendering the premises, at least temporarily, destroyed and uninhabitable. Petitioners informed Zhang they wanted Respondents to move and would pay for them to surrender possession. Zhang testified that Petitioners offered her \$10,000.00 and she requested \$20,000.00, because of lost/destroyed personal property, though it appears that no amount was agreed upon and no payment was ever made.

It is undisputed that a few days after Hurricane Ida, Zhang accepted temporary housing assistance from the Red Cross in the form of a hotel room. On September 30, 2021, Zhang signed a month-to-month lease for an apartment located in Elmhurst, NY commencing October 1, 2021. Zhang occupied the Elmhurst apartment through February 2022, when she returned to the subject apartment. During that time, Petitioner issued a Notice of Termination mid-October 2021 identifying a vacatur date of January 14, 2022. Thereafter, the underlying Petition and Notice of Petition Holdover was served at the beginning of February 2022.

CONSTRUCTIVE EVICTION

A tenant is "constructively evicted" from a premises where the tenant leaves the premises due to conditions that are dangerous to the tenant's life, health and/or safety and render said unit uninhabitable. NY Real Prop. Law §227. Constructive evictions can be total or

partial. See Minjak Co. v. Randolph, 140 AD 2d 245, 528 NYS 2d 554 (1st Dep't. 1988) and Barash v. Pennsylvania Terminal Real Estate Corp., 26 NY 2d 77, 308 NYS2d 649 (1970) If a tenant is constructively evicted, in total or partially, the obligation to pay rent under a leasehold is suspended. 542 East 14th Street, LLC v. Moses, 38 Misc.3d 127(A), 967 NYS2d 866 (App Term 2012) However, vacatur due to the conditions, is a requirement. NYCHA v. Ramos, 41 Misc. 3d 702, 971 NYS 2d 422 (Civ. Kings 2013)

In the instant proceeding, it is true that Hurricane Ida caused terrible conditions in the subject apartment. Both sides agree that the subject apartment was "uninhabitable". After the parties discussed her vacating in a "cash for keys" deal, but without agreeing to the amount of the payment or receiving any monies, Zhang left the subject apartment soon after the hurricane to accept Red Cross temporary housing. Zhang then left the temporary housing and signed a lease to occupy a different apartment, which she did for approximately five months, still without agreeing on an amount to be paid by Petitioner for her surrender of the subject apartment. It is unclear whether the "cash for keys" negotiations between the parties continued during that time. At no time did Zhang surrender possession, leaving her belongings and a rooster in the subject apartment. According to the testimony, Zhang returned to the subject apartment regularly, if not daily. The record showed that she resumed residing in the subject apartment, still without any payment from Petitioner, because she accepted employment closer to the subject apartment than the Elmhurst address.

The case law makes clear that the days immediately following Hurricane Ida should not be considered supportive of a claim of constructive eviction. NYCHA v. Ramos, *Id.* This exception to the statutorily mandated obligation to maintain the warranty of habitability stems from a lack of "wrongdoing" by a landlord in the cases of severe weather. In that case the Court relied on the definition of a constructive eviction, namely that to succeed in establishing the defense, a tenant must show that the "landlord's wrongful acts substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises". See Barash v. Pennsylvania Terminal Real Estate Corp., *supra*. Also required is that the tenant actually abandon all or a part of the property. Here, Zhang did not abandon the subject property because of the conditions. Rather, she vacated because she thought Petitioners were going to pay her a lot of money to not reside there anymore and give up her possessory interest in the apartment. Given the conditions that Hurricane Ida had caused, and the potential of a financial windfall, it is clear that Zhang chose not to wait for the conditions to be addressed.

In the instant proceeding, it is the passage of time that could create a "wrong-doing" by a landlord in not addressing the conditions. As Zhang points out, in NYCHA v. Ramos, Hurricane Sandy had caused that Respondent to have no elevator and other services for five (5) weeks. This Court agrees that while the immediate time after the natural disaster should not be charged to a landlord, the failure to address said concerns after a reasonable period of time could give rise to a claim of constructive eviction. However, in this proceeding, there was little in terms of the passage of time before Zhang took occupancy in another apartment.

Zhang's constructive eviction claim fails for another reason. She is adamant that Petitioners made no repairs to the subject apartment in the six months between Hurricane Ida and her return to the subject apartment. Yet, to this Court's knowledge, Respondent occupied the subject apartment from February 2022 to the date of trial (August 1, 2022) and is occupying the subject apartment as of the writing of this decision/order. The Court must wonder how

Zhang continues to occupy the subject apartment, without any repairs having been made, and still claim there was a constructive eviction. If vacating is a prerequisite, Zhang's decision to return to the subject apartment even though no repairs were made, precludes her from asserting she was constructively evicted. It may be that if repairs were made, changing the condition of the subject apartment, and then Zhang returned to possession, a temporary, constructive eviction could be found. However, this Court places more credence on Zhang's testimony that obtaining a new job, very far from the apartment in Elmhurst and being outraged over Petitioners seeking to evict her, precipitated her return.

RETALIATORY EVICTION

RPL §223-b prohibits a landlord from serving a termination notice or commence any action or summary proceeding to recover real property in retaliation for, amongst other things, the tenant making a good faith complaint to the landlord or to an agency. This provision was written to make the mere complaint and demand for repair to a landlord a basis for a defense to any subsequent eviction proceeding commenced within a year of the complaint. In other words, there is a very low bar to provide a tenant with a rebuttable presumption that any and every proceeding is commenced because a repair was sought. Thus, it is the tenant's burden to establish that a complaint and demand for repairs was made to a landlord or its agent.

Zhang's testimony had very little related to demanding Petitioners repair the subject apartment. Instead, her testimony was that she called Petitioner when the rain was coming into the apartment and that she met one of the landlords at the premises the next day. At that time the landlord said there was too much damage and that Zhang would have to move out. Presumably at that time, there was an implicit, if not actual, request for repairs. According to Zhang, two or three days later, the landlord offered her \$10,000.00 to move out and she countered with \$20,000.00. If the subject premises was not in the terrible condition that both sides agree it was, there would be little reason for a monetary offer to vacate.

Zhang testified that she agreed to vacate the subject apartment quickly to get the money. Zhang contacted the Red Cross for temporary housing in a hotel. After staying there for a month, Zhang entered into a lease for a different premises and remained residing there for five months. However, it seems clear that no monies were paid to Zhang and no keys to the subject apartment were returned to Petitioners. According to Zhang, this was because an inspector came to the premises to observe the conditions. According to the testimony, this occurred in September 2021. Zhang's testimony was that one of the landlord's told her she would not get paid because they believed Zhang requested the inspection.

Since the instant proceeding was commenced within a year of Zhang complaining about the condition of the subject apartment, and an inspection occurring, the Court must start with the rebuttable presumption that the instant proceeding was commenced in retaliation for Zhang seeking repairs. The question is whether or not Petitioners have rebutted that presumption. This Court must conclude that Petitioners did not rebut the presumption. Petitioners offered no reason why this proceeding was commenced at the time that it was. Nothing occurred prior to the service of the notice of termination that could be identified as a basis for the instant proceeding. Rather, it seems clear that since Zhang's continued occupancy

would force Petitioners to repair the subject apartment, the instant proceeding was commenced.

That they wanted Zhang to move instead of repairing the subject apartment was clear. Steps were taken to cause Zhang to vacate but they were not completed. Petitioners claim that they did not pay because Zhang did not move out. Yet, it is clear that Zhang took more steps towards completing her part of the deal than Petitioners did. Petitioners never agreed on an amount with Zhang nor did they make it clear that they were prepared to make a payment, so how and why would she have moved out? It seems that Petitioners expected Zhang to rely on their representation of payment, move out and then hope she was paid. When this did not occur, Petitioners commenced this proceeding.

Both sides agree an inspector came to the premises. Given that the subject apartment is an illegal basement apartment, this could not have made Petitioners happy. If anything, the inspector's presence does provide some credence to Zhang's position.

CONCLUSION

Based on the foregoing, the Court finds that Zhang failed to prove the defense of constructive eviction. The Court further finds that Petitioners did not rebut the presumption that the instant proceeding was commenced in retaliation for Zhang seeking repairs or, in the alternative, a payment to vacate as offered by Petitioners.

The instant proceeding is dismissed. The dismissal is without prejudice to Zhang commencing an HP proceeding. The Court declines to issue an order to correct given that Hurricane Ida occurred a year ago and there is nothing to establish the current condition of the premises given that Zhang has resided there for the last six months.

This constitutes the decision and order of the Court.

Dated: Queens, New York
September 6, 2022



JOHN S. LANSDEN, JHC