



RUMICHE CORP. v. CHARLES EISENREICH

352 N.E.2d 125 (1976) | Cited 0 times | New York Court of Appeals | June 17, 1976

The issue is whether certain repairs and alterations made by a tenant to his rent-controlled apartment constitute grounds for eviction under the provisions of subdivision a of section 52 of the New York City Rent, Eviction and Rehabilitation Regulations.

The Civil Court of the City of New York granted the landlord's petition for eviction; the Appellate Term and the Appellate Division, successively, each affirmed. The tenant appeals to this court by leave of the Appellate Division. For the reasons which follow, we believe there should be a reversal.

Subdivision a of section 52 of the Rent, Eviction and Rehabilitation Regulations, in pertinent part, reads:

"[An] action or proceeding to recover possession of any housing accommodation shall be maintainable * * * upon one or more of the following grounds:

"a. The tenant is violating a substantial obligation of his tenancy other than the obligation to surrender possession of such housing accommodation and has failed to cure such violation after written notice by the landlord that the violation cease within 10 days; or within the 3 month period immediately prior to the commencement of the proceeding, the tenant has wilfully violated such an obligation inflicting serious and substantial injury upon the landlord ". (Emphasis added.)

Turning to the facts, the record on this appeal discloses that the tenant has lived in his one-room studio apartment for approximately 10 years. In May of 1973, the building was purchased from its former owner by the landlord, who immediately requested the existing rent-controlled tenants to vacate the building so that he could renovate the premises, offering at least some of them a sum of money as inducement to do so.¹ The tenant before us received such an offer but declined to move. He also called the landlord's attention to the fact that his ceiling was falling in and asked that it be repaired. The landlord did not do so.

The tenant thereupon replaced it with one constructed of three-eighths inch sheetrock and, in the course of doing so, had a licensed electrician install a working ceiling light fixture controlled from a wall switch in place of the pre-existing malfunctioning, old-fashioned, pull-chain one. He also attached a single wooden closet to a wall and erected a small decorative wooden frame around the room's only window. That is the sum total of the "repairs and alterations" involved here.

In essence, in its petition brought pursuant to subdivision a of section 52, the landlord alleged that



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the repairs to the ceiling did not conform to section 60 of New York City's Fire Code, which specifies five-eighths inch rather than three-eighths inch sheetrock be used, and that the lighting fixture, the closet and the window frame were so permanent or lasting in nature and so materially altered the premises that they violated the "substantial obligation" of the tenancy contemplated by the section. In support of its position, it cites *Freehold Investments v Richstone* (69 Misc. 2d 1010, revd 72 Misc. 2d 624, revd 42 A.D.2d 696, revd 34 N.Y.2d 612).

It is to be noted, however, that, unlike the present case, *Freehold* involved the terms of a lease. That was not the only difference between the two cases. The alterations there included "extensive *** wall reconstructions" and other changes costing \$5,500. And, though no prior defective conditions, such as the defective ceiling here, had existed there, the work was expressly found to have resulted in "substantial injury to the freehold" (72 Misc. 2d 624, 625-626, *supra*).

Further, the *Freehold* lease's language prohibited (p 625) "any alterations" without the landlord's express permission. The violation of an express covenant not to make alterations is a substantial violation (see *Deutsch v Hoe Estate Co.*, 174 App Div 685; *Holden v O'Brien*, 209 App Div 266, *affd* 240 NY 560; *Cohen v Bass, Inc.*, 246 NY 270; *First Nat. Stores v Yellowstone Shopping Center*, 21 N.Y.2d 630; *Sigsbee Holding Corp. v Canavan*, 39 Misc. 2d 465, *affd* by App Term, 1st dept., Oct., 1963, No. 171; see, also, *Bentley, An Alternative Residential Lease*, 74 Col L Rev 836, 840).

The present case proceeds on a different legal footing. Whether there was here a violation of the tenant's obligations to the landlord is to be determined within the regulatory framework of subdivision a of section 52. It sets out two alternative conditions under which a landlord may seek eviction. While both require the violation of a substantial obligation of the tenancy, the first requires that the landlord have given notice. If, within 10 days, the violation is cured by the tenant, there may be no eviction. The second alternative permits the landlord to omit notice and proceed directly to eviction if the violation, in addition to being substantial, is willful and injurious to the landlord. Since the parties conceded that no notice to cure was ever given, the landlord must bring himself within the conditions imposed by the second part of subdivision a of section 52, which are the portions emphasized above.

It must be remembered that subdivision a of section 52 is part of a legislative design regulating relationships between landlords and tenants in rent-controlled apartments. That design imposes certain conditions on both parties, on the one hand limiting the return which landlords may receive on their investments, and, on the other, making it unlikely that tenants will receive any but such services as the regulation dictates rather than those which might be obtainable in an open rental market (see *H.I.M. Props. Corp. v Gross*, 6 Misc. 2d 666, 668; *Suppus v Bradley*, 278 App Div 337, 338-339; cf. *Matter of 89 Christopher v Joy*, 35 N.Y.2d 213, 217). In such circumstances, it would be unrealistic not to expect tenants themselves to provide desirable amenities which rent-controlled landlords will not furnish. Indeed, subdivision a of section 52 is not hostile to their doing so, provided they refrain from the commission of waste as the common law defines that term.



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The question then is whether the repairs and alterations before us constituted waste.

Basically, at common law waste had three different definitions, each related to particular types of conduct on the part of tenants. Involuntary waste was defined as failure to prevent damage to the premises, in other words negligence.² Equitable waste was defined as failure to do what a prudent owner would do and was available as a cause of action only in limited circumstances. Neither of these concepts is relevant to the facts at hand. But the third, voluntary waste, is. It occurs when a tenant injures the premises by an affirmative act (see 5 Powell, Real Property, par 640; 63 NY Jur, Waste, § 2, p 109, and cases cited therein).

Voluntary waste as a concept stems from early English common law concern that the interests in land held by reversioners or remaindermen be protected from depredations by life tenants of scarce natural resources (5 Powell, Real Property, par 637). For instance, the cutting of trees or exhaustion of coal supplies were regarded as waste because their effects extended well beyond the term of the tenant's temporary interest in the land or premises. It is the impingement upon the ultimate estate of the landlord which is the keynote to the definition of waste (Rasch, New York Landlord and Tenant [2d ed], § 455).

Its application in a modern landlord-tenant setting is well described in *Pross v Excelsior Cleaning & Dyeing Co.* (110 Misc 195, 201): "[Such] a change as to affect a vital and substantial portion of the premises; as would change its characteristic appearance; the fundamental purpose of the erection; or the uses contemplated, or a change of such a nature, as would affect the very realty itself, extraordinary in scope and effect, or unusual in expenditure".

Other courts have also emphasized the definition of waste as permanent or lasting damage (*Wall Nut Prods. v Radar Cent. Corp.*, 20 A.D.2d 125, 126-127, and cases cited therein; *Agate v Lowenbein*, 57 NY 604; 63 NY Jur, Waste, § 1, p 108, and cases cited therein).

Thus, not every change or alteration made by a tenant constitutes waste. For instance, prior to modern leasing developments, except as provided in tenement house legislation (see Multiple Dwelling Law, § 78), it was, and is, the tenant's and not the landlord's obligation to make repairs (*Altz v Leiberson*, 233 NY 16; *Emigrant Ind. Sav. Bank v 108 West Forty-Ninth St. Corp.*, 280 NY 791; cf. *Tonetti v Penati*, 48 A.D.2d 25).

Short of waste, a tenant may also make nonstructural alterations consistent with the use of the premises contemplated by his possession of them (*Diener v Burghart*, 186 NYS 565; *Klein's Rapid Shoe Repair Co. v Sheppardel Realty Co.*, 136 Misc 332, affd sub nom. *Klein's Rapid Shoe Repair Co. v 120-122 East 14th St. Corp.*, 228 App Div 688; *Leong Won v Snyder*, 94 N.Y.S.2d 247; *Rubinger v Del Monte*, 217 N.Y.S.2d 792; *Andrews v Day Button Co.*, 132 NY 348; *Sigsbee Holding Corp. v Canavan*, supra).



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The ready removability of installations is a significant factor. For "[it] does not follow that a tenant, by virtue of his obligation to commit no waste, may make no alterations whatsoever. Except as the tenant's rights may be limited by the terms of the lease, the tenant is at liberty to erect structures, or to make non-structural alterations, for the purpose of carrying on legitimate business on the demised premises, and to remove them within the term, provided such structures or alterations will not do any serious injury to the realty" (Rasch, New York Landlord and Tenant [2d ed], § 455, p 577, citing *Andrews v Day Button Co.*, supra; *Agate v Lowenbein*, 57 NY 604, supra).

In this perspective, it becomes apparent that in the case before us there was insufficient proof of any repair or alteration which could be characterized as one causing permanent or lasting injury to the premises. The apartment in issue remains a one-room studio. Its four walls are intact and remain in place. The closet and windowframe built by the tenant are merely nailed to and not built into the walls; there was no showing that either cannot be taken down and removed at minimal, if any, expense or damage. They are clearly consistent with the tenant's use of the apartment as a residence. The ceiling light fixture is a straight replacement of the old and unworkable one by a new and functioning equivalent; the addition of a modern wall switch could hardly have been more de minimis. The replacement for the defective ceiling itself, though, according to the parties' stipulation, not as thick as that required by the fire code, was of the required composition and, interestingly, no violation because of it had ever been issued by the city. More pointedly, the landlord made no showing whatsoever, whether by stipulation or otherwise, that the thickness of the falling ceiling which it replaced was any greater than the one of which it complained in this proceeding.

Significant too, especially on the question of the regulation's requirement that there be a showing of willfulness, is the fact that the tenant, though compelled to remedy the ceiling problem on his own and unaware that his choice of materials could be cause for complaint, upon learning that it was, offered to correct it. His offer, never withdrawn, was refused, the landlord insisting on nothing less than eviction.

We conclude, therefore, that, as a matter of law, the landlord did not establish that the tenant inflicted serious and substantial injury upon the landlord by willfully violating a substantial obligation of his tenancy. Accordingly, the order of the Appellate Division should be reversed and the petition dismissed.

Disposition

Order reversed, with costs, and the petition dismissed.

Cooke, J. (dissenting). I dissent and vote to affirm the order of the Appellate Division.

The stipulated facts demonstrate that between March 1, 1974 and March 21, 1974, appellant tenant installed in the apartment a wooden closet in the wall, a new ceiling light fixture and wooden



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molding around a window. He also replaced the ceiling, but used three-eighths inch sheetrock in violation of the fire code which proscribed the use of sheetrock less than five eighths of an inch thick. It is conceded that the tenant did not seek nor obtain the permission of the landlord in making the alterations. The issue, simply put, is whether these alterations constituted a willful violation of an obligation of the tenancy causing serious and substantial injury to the landlord (New York City Rent, Eviction and Rehabilitation Regulations, § 52, subd a).

An owner of leased property is entitled to have the property kept in a condition similar to which existed when the leasehold commenced, without material change in structure, form and character (Agate v Lowenbein, 57 NY 604; 63 NY Jur, Waste, § 8, p 115). Likewise, a tenant may make reasonable repairs to the property, in the absence of alterations which materially injure or change the nature and character of the premises or structure such as to constitute waste (Lyon v Bethlehem Eng. Corp., 253 NY 111; Bovin v Galitzka, 250 NY 228; Andrews v Day Button Co., 132 NY 348, 353). Voluntary waste consists of injury to the property, occasioned by some deliberate or voluntary act such as "the removal of wainscots, floors, benches, furnaces, windows, doors, shelves, or other things fixed to and constituting a material part of the freehold" (Regan v Luthy, 16 Daly 413, 415; see, also, Rogers v Atlantic, Gulf & Pacific Co., 213 NY 246, 250; Rasch, New York Landlord and Tenant, § 450, pp 574-575). Applying these rules, in the absence of an agreement to the contrary, it is obvious that the removal of the ceiling and its reconstruction with sheetrock of insufficient thickness to satisfy the fire code constituted waste and, therefore, that the tenant breached an obligation of the tenancy. Equally clear is the fact that the actions of the tenant in making the alterations were the result of willful conduct, that is "intentional and deliberate" (Matter of Old Republic Life Ins. Co. v Thacher, 12 N.Y.2d 48, 56). The only question remaining is whether the waste inflicted "substantial injury" upon the landlord. Alterations of a ceiling that leave the apartment in violation of the fire code could prohibit the landlord from leasing the apartment unless he bears the expense of installing an entirely new one. Resolution of whether this amounted to substantial injury raised a question of fact within the province of the trial court. The finding in favor of the landlord, having been affirmed on appeal, is beyond our power to review in the absence of legal error (Plaza Hotel Assoc. v Wellington Assoc., 37 N.Y.2d 273; Ginsberg v Yeshiva of Far Rockaway, 36 N.Y.2d 706). We observe no error of such gravity and, consequently, the order of the Appellate Division must, of necessity, be affirmed.

If the repairs were needed, the tenant had a statutory remedy at his disposal which he failed to pursue (Real Property Actions and Proceedings Law, § 803). Instead, the decision to initiate material alterations was done unilaterally and without security. The majority view that until a citation has been issued by the city no violation has been proven is similar to concluding, in an analogous criminal context, that a crime is not committed until an accusatory instrument is filed.

1. Prior to 1971, rent-controlled apartments remained so even when an existing tenant moved out and a new tenant moved in (L 1946, ch 274, § 2). In 1971, as a result of the enactment of the vacancy decontrol provision (New York City Rent, Eviction and Rehabilitation Regulations, § 2, subd f, par [17]), landlords could renovate and rerent previously controlled apartments on an uncontrolled basis at higher rents once existing rent-controlled tenants vacated (see Matter of Hartman



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v Joy, 47 A.D.2d 624). On May 29, 1974 vacancy decontrol became subject to the Emergency Tenant Protection Act (L 1974, ch 576, §§ 1, 2).

2. The use of the word "wilfully" in the second portion of subdivision a of section 52 indicates its inapplicability to situations involving mere negligence (see § 52, subd b; 5 Powell, Real Property, par 640).

