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(Cite as: 190 Misc.2d 164, 736 N.Y.S.2d 830)

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East 145 Co. v. Benayoun
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N.Y.Sup. 2001.

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1743521, 2001 N.Y. Slip Op. 21530

East 145 Co., Appellant,
v.
Avraham Benayoun et al., Respondents, et al., Re-
spondents.
Supreme Court, Appellate Term, First Department,
November 1, 2001

CITE TITLE AS: East 145 Co. v Benayoun

SUMMARY

Appeal from an order of the Civil Court of the City of New York, New York County (Jerald R. Klein, J.), dated February 22, 2001, insofar as it denied petitioner's cross motion for summary judgment and to strike respondents' third affirmative defense and first counterclaim in a holdover summary proceeding.

HEADNOTE

Landlord and Tenant--Summary Proceedings--Retaliatory Eviction

The mere settlement of a negligence lawsuit, commenced as a consequence of injuries sustained by respondent tenants' son when a fixture apparently fell in the apartment, is not, in and of itself, an adequate basis for respondents' retaliatory eviction defense to petitioner landlord's holdover proceeding. Nor is the Division of Housing and Community Renewal's denial of petitioner's permissible applications for high income rent decontrol evidence of retaliatory motive.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

[Am Jur 2d, Landlord and Tenant, §§ 649, 1030.](#)

[NY Jur 2d, Landlord and Tenant, §§ 358, 462; Real Property-- Possessory and Related Actions, § 95.](#)

NY Real Prop Serv, § 75:66.

ANNOTATION REFERENCES

See ALR Index under Ejectment, Eviction, and Ouster; Landlord and Tenant.

APPEARANCES OF COUNSEL

Borah, Goldstein, Altschuler, Schwartz & Nahins, P. C., New York City (*Jeffrey R. Metz* of counsel), for appellant. *Traub, Bonacquist & Fox, L. L. P.*, New York City (*Frederick J. Levy, Paul Traub* and *Peter G. Lavery* of counsel), for respondents.*165

OPINION OF THE COURT

Per Curiam.

Order dated February 22, 2001 modified by granting landlord's cross motion to strike the third affirmative defense and first counterclaim, and by granting summary judgment to landlord on the holdover petition; as modified, order affirmed, with \$10 costs to landlord appellant.

Tenants concede that they harbored a dog in violation of the "no pets" lease provision and that this holdover proceeding was timely commenced under Administrative Code of the City of New York § 27-209.1. We discern no factual issue as to the remaining defense of retaliatory eviction which would preclude summary judgment on the petition. There is no allegation of any prior complaint made to governmental authorities concerning conditions within the apartment or any record evidence of building code violations ([Real Property Law § 223-b](#)). The mere settlement of a negligence law-

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suit, commenced as a consequence of injuries sustained by tenants' son when a fixture apparently fell in the apartment, is not, in and of itself, an adequate basis for a retaliatory eviction claim (*see, Weil v Kaplan*, 175 Misc 2d 482 [App Term, 2d Dept]). Similarly, the Division of Housing and Community Renewal's denial of landlord's permissible applications for high income rent decontrol is not evidence of retaliatory motive in this proceeding.

Issuance of the warrant is stayed for 10 days after service of a copy of this order with notice of entry so that tenants may cure the breach of lease (RPAPL 753 [4]).

The matter is remanded to the Civil Court for further proceedings on landlord's claims for use and occupancy and attorneys' fees as the prevailing party.

William P. McCooe, J. P.

(Dissenting in part). I disagree only with that part of the majority decision which found as a matter of law that the commencement of this eviction proceeding was not in retaliation for the tenant having successfully prosecuted a personal injury action against the landlord based upon a condition in the building. A question of fact is present which precludes summary judgment.

[Real Property Law § 223-b \(1\) \(b\)](#) entitled "Retaliation by landlord against tenant" states in relevant part that a landlord shall not commence a proceeding to recover real property in retaliation for actions taken in good faith by a tenant to enforce rights under the lease or law of the State of New York regulating residential premises. The commencement of the personal injury action against the landlord based upon a condition in *166 the subject building implicates a breach of the lease and [section 78 of the Multiple Dwelling Law](#). Whether this eviction proceeding was brought in retaliation for commencing that action presents a question of fact which cannot be summarily determined. *Weil v Kaplan* (175 Misc 2d 482 [App

Term, 2d Dept]) is distinguishable since the statute does not apply to an owner-occupied two-family house.

Since the statute speaks of actions or complaints by the tenant, the filing of two petitions for high income rent deregulation by the landlord are not within the statute. In any event, by definition retaliation applies to actions previously taken by the tenant against the landlord.

The order should be modified to the extent of directing a trial on the specified issue only.

Davis and Suarez, JJ., concur; McCooe, J. P., dissents in part in a separate memorandum.*167

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