137-86 70th Ave., LLC v Padel
2015 NY Slip Op 31413(U)
July 17, 2015
Civil Court of the City of New York, Queens County
Docket Number: 62143/14
Judge: Gilbert Badillo
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART D
----------X

(ROY BERENHOLTZ),
137-86 70TH AVENUE, LLC,

Petitioner,

-against-

MEIR PADEL,

Respondent,

JOHN DOE
JANE DOE,

Respondents-Undertenants.

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Index No. 62143/14

(Sequence Nos. 003and 004)

DECISION/ORDER

Recitation, as required by CPLR 2219(a), of the papers considered in the review of petitioner's motion for an order striking respondent's defenses; granting it summary judgment, a final judgment of possession, and related relief; or, in the alternative, awarding it use and occupancy from May 2014 forward, and respondent's cross-motion for an order awarding him summary judgment dismissing the petition or, in the alternative, staying all proceedings for the New York State Division of Housing and Community Renewal to determine the regulatory status of his apartment and the apartment's lawful regulated rent:

PAPERS	NUMBERED
Petitioner's Notice of Motion, Affirmations, and Exhibits	1
Respondent's Notice of Cross-Motion, Affidavits, and Exhibits	2
Petitioner's Affirmation in Further Support of Motion and in Opposition to Cross-Motion	3
Respondent's Reply Affidavit	4
Respondent's Reply Memorandum	5

Gilbert Badillo, J.

Background

This "no grounds" holdover proceeding was originally commenced by petitioner

Roy Berenholtz against respondent Meir Padel and respondents-undertenants John Doe and Jane Doe in May 2014. Subsequently, the pleadings were amended to substitute 137-86 70th Avenue, LLC as petitioner in place of Mr. Berenholtz.

The petition alleges, among other things, that the subject apartment (the "Apartment") is not Rent Controlled or Rent Stabilized because it is contained in a two-family house and became vacant after April 1, 1953; that Mr. Padel is in possession of the Apartment pursuant to an oral rental agreement; and that on March 25, 2014, prior to commencing this proceeding, petitioner served Mr. Padel with a notice of termination which directed him to remove himself from the Apartment on or before April 30, 2014.

By order to show cause dated June 30, 2014, Mr. Padel moved for an order dismissing the petition on the ground that the Apartment is Rent Controlled or Rent Stabilized. In his motion, he argued that the Apartment is a garden apartment and was placed under Rent Control pursuant to Expulsion Order 326 (the "Expulsion Order"), issued by the Conciliation and Appeals Board ("CAB") in June 1979; that the Apartment remains Rent Controlled; and that even if it is not Rent Controlled, it is Rent Stabilized pursuant to Section 2520.11(d) of the Rent Stabilization Code.

By decision and order dated October 3, 2014, the court denied Mr. Padel's motion, holding that he had not sustained his burden of proving that the Apartment was Rent Controlled because, while his address is 137-86 70th Avenue, 1st floor, the address set forth in the Expulsion Order for a tenant named Kirby, which he claimed to be the same apartment as the one in which he now resides, appeared to be a different one, 137-86 79th Avenue (lower) unit 6. The court did not address Mr. Padel's alternative argument that the Apartment is Rent Stabilized.

By decision and order dated April 15, 2015, the court denied Mr. Padel's motion for reargument and renewal.

On or about October 20, 2014, Mr. Padel filed an answer, which asserts a general denial, a defense, and two affirmative defenses. The defense alleges that the Apartment is regulated either pursuant to the Expulsion Order or Section 26-505 of the Rent Stabilization Law; the first affirmative defense alleges that the address set forth in the Expulsion Order for Kirby should read 137-86 70th Avenue, and that it reads 137-86 79th Avenue due to a scrivener's error; and the second affirmative defense alleges that "except for any time a garden apartment unit is exempt from regulation when [an] owner occupies same as [his] primary residence, said unit if at any time be rental property must be recognized under law as regulated property."

By notice of motion dated April 30, 2015 (sequence no. 003), petitioner moves for an order striking each of Mr. Padel's defenses; granting it summary judgment, a final judgment of possession, a warrant of eviction, and a money judgment in the amount of $22,100; or, in the alternative, awarding it use and occupancy from May 2014 to the present. It argues that the Apartment is not Rent Controlled because it is contained in a two-family home (the "Building") that became vacant after April 1, 1953 (*see* New York City Rent and Eviction Regulations ["Rent Control Regulations"][9 NYCRR] § 2200.2[f][12]). It also argues that the Apartment is not Rent Stabilized because the Building does not share common ownership, heating, electrical, plumbing or other services or systems with any neighboring building; that as of August 1979, any previously shared services and systems were decoupled from neighboring units with the permission of the CAB; that the two-family homes located next door to the Building at

137-84 and 137-88 70th Avenue both have their own individual services and systems; and that as of 1983, there was no common ownership of those two buildings and the Building. Petitioner further argues that because the court has twice rejected Mr. Padel's claim that the Apartment is subject to the Expulsion Order, its determination is law of the case, and that even if the Expulsion Order did apply to the Apartment at one time, any rent regulation ended when Kirby subsequently vacated it.

In his cross-motion (sequence no. 004), Mr. Padel both opposes petitioner's motion and moves for an order granting him summary judgment dismissing the petition on the ground that the Apartment is either Rent Controlled or Rent Stabilized or, in the alternative, staying this proceeding to afford the New York State Division of Housing and Community Renewal ("DHCR") an opportunity to determine the Apartment's regulatory status and lawful regulated rent. He argues that the Apartment is part of a "garden apartment development"; that "all issues of regulation stem from the configuration of the property as of May 6, 1969"; that the Apartment remains regulated in accordance with either the Expulsion Order or Section 26-505 of the Rent Stabilization Law; and that "nothing a subsequent owner could do to the configuration of the property can change that regulated status." He also argues that the address of 137-86 79th Avenue set forth in the Expulsion Order for Kirby is a scrivener's error, and should read 137-86 70th Avenue; that there is no 137-86 79th Avenue; and that various directories from the 1970s indicate that Kirby actually resided at 137-86 70th Avenue. He further argues that the "1953 Rent Control Law" does not apply because the Building was placed under Rent Control pursuant to the Expulsion Order, and it would be absurd to permit an owner to benefit from decontrol under that circumstance.

Petitioner opposes Mr. Padel's cross-motion, largely for the reasons set forth in its own motion.

Both petitioner's motion and Mr. Padel's cross-motion are consolidated for decision.

Discussion

Whether the Apartment is Rent Controlled?

A. The Expulsion Order

Annexed to petitioner's motion papers is a copy of "Expulsion Order 326, Clarified," dated March 6, 1980 (the "Clarification Order"). Its first 17 pages consist almost entirely of the Expulsion Order, which, as noted above, was issued on June 28, 1979. Although petitioner argues that the Expulsion Order does not apply to the Apartment, it agrees that, as set forth in that Order, the Building was part of a "159 unit garden type development located in Flushing, Queens." The Expulsion Order further states that

> The owner is a member of the Rent Stabilization Association and the dwelling units involved are subject to the Rent Stabilization Law . . .
>
> . . . Although each 2 unit segment has its own two family certificate of occupancy, the entire complex was originally under common ownership and operation. Pursuant thereto, the development has been continuously registered with the Rent Stabilization Association since 1969.

The law in effect at the time the CAB issued the Expulsion Order provided that dwelling units which otherwise would be Rent Stabilized would be deemed to be Rent Controlled "unless the owner of such units is a member in good standing of any association registered with the housing and development administration pursuant to

Section YY51-6.0 or section YY51-6.1." (Rent Stabilization Law ["RSL"] [Administrative Code of City of NY] former § YY-51-4.0[a]). The law further provided that to be a member in good standing of such an association, an owner must not violate an order of the CAB and must not be found by the CAB to have harassed a tenant to obtain vacancy of his housing accommodation. (*See id*.; *see also Matter of Wood v. Metropolitan Hotel Indus. Stabilization Assn.*, 95 AD2d 560, 562-563 [1st Dept 1983]); *350 Ocean Parkway Assoc. v. Stein*, 79 AD2d 682 [2d Dept 1980], *revd on other grounds* 55 NY2d 650 [1981]).

In the Expulsion Order, the CAB found that the then owner, Lindenmere Properties, Inc., had engaged in a course of conduct constituting harassment and, pursuant to Section 7 of the former Rent Stabilization Code, directed that "the owner's membership in the Rent Stabilization Association with respect to the apartments owned by the owner herein be terminated," and referred the matter to the New York City Department of Housing Preservation and Development (the successor to the Housing and Development Administration) "for appropriate action in accordance with Section YY51-4.0 of the Rent Stabilization Law." The Order further provided that "as of the date hereof, the owner is not entitled to any of the benefits of the Rent Stabilization Law, including rent guidelines lease increases."

B. The Clarification Order

As noted in the Clarification Order, after the Expulsion Order was issued, the two-family dwelling at 137-72 70th Avenue was sold to an individual owner, who then commenced a holdover proceeding against the tenant residing in the upper apartment of that building. During the course of that proceeding, the question arose as to the effect of

the Expulsion Order on that particular apartment, and the owner, tenant, and Housing Court judge all joined in a request to the CAB for clarification.

As further noted in the Clarification Order, during the course of an Article 78 proceeding previously brought by the owner to challenge the Expulsion Order, a CAB staff member informed that court that the Expulsion Order

> pertained to those units owned by Lindenmere Properties, Inc., at the time of issuance of [that Order], namely:
>
> 1. Kirby – 137-86 79th Avenue (lower) unit 6
> 2. Mendel – 137-86 70th Avenue (upper) unit 6
> 3. Goldberg – 137-84 70th Avenue (lower) unit 6
> 4. Symbouras – 137-84 70th Avenue (upper) unit 6
> 5. Katz – 137-82 70th Avenue (lower) unit 6
> 6. Abler – 137-82 70th Avenue (upper) unit 6
> 7. Schlanger – 137-72 70th Avenue (lower) unit 6
> 8. Tobin – 137-62 70th Avenue (lower) unit 6
> 9. Skoy – 137-79 70th Avenue (lower) unit 1

and that such list of tenants was provided in a letter from the tenants' attorney.

The attorney for the owner of the building that was the subject of the Housing Court proceeding argued that the tenant of that apartment did not occupy it at the time the CAB proceeding was commenced; that the building in which the apartment was located was sold to a new owner in August 1979 (after the Expulsion Order was issued); and that the tenant never joined in the CAB proceeding. Noting that the Expulsion Order applied by its terms "to the apartments owned by the owner herein," the CAB held that

> it is the determination of this Board that its prior Expulsion Order 326 is applicable to all dwelling units for which title was vested with Lindenmere Properties, Inc. on July 10, 1979, the issuance date of that Order,[1] whether or not the tenant occupying said dwelling joined in the proceeding which gave rise to the Order.

[1] The Clarification Order does not explain why it gives July 10, 1979 as the date the Expulsion Order was issued when the Order itself is dated June 28, 1979.

Because the Expulsion Order included the lower unit of 137-72 70th Avenue, and the owner conceded that that building had not been sold until August 1979, the CAB found that the Order "is equally applicable to both the lower and upper apartments located therein."

C. Whether the Expulsion Order Applies to the Apartment?

As noted above, another court previously denied Mr. Padel's motion to dismiss, finding that the Expulsion Order did not apply to the Apartment because its address was not referenced in that Order. That same court subsequently denied Mr. Padel's motion for reargument and renewal, rejecting his claim that the address of the former tenant, Kirby, was mistakenly listed as 137-86 79th Avenue instead of 137-86 70th Avenue due to a scrivener's error. Petitioner argues that this Court is bound by law of the case and, accordingly, must find that the Expulsion Order does not apply to the Apartment. Mr. Padel argues that the Court is not bound by law of the case because the standards of review for motions to dismiss and motions for summary judgment are different.

Although this Court believes that the Expulsion Order did, in fact, apply to the Apartment,[2] it need not decide whether it is bound to hold otherwise by law of the case

[2] There are several reasons for the Court's belief. First, as the CAB held in the Clarification Order, the Expulsion Order applied to all dwelling units for which title was vested with Lindenmere Properties, Inc. on July 10, 1979, "whether or not the tenant occupying said dwelling joined in the proceeding which gave rise to the Order." Since, as the Clarification Order makes clear, the Expulsion Order applied to the upper unit at 137-86 70th Avenue, it applied to the lower unit of that building (i.e., the Apartment) as well. Second, eight of the nine apartments listed in the Clarification Order are on 70th Avenue; the only one that is not is Kirby's apartment, which is listed as being on 79th Avenue. That 79th Avenue is listed in error is supported by the statement in the Expulsion Order that on March 26, 1979, a member of the CAB staff "visited the subject premises, specifically 137-84 70th Avenue and 137-86 70th Avenue" (Clarification Order at 15), and by the statement of the owner's agent that when he took over management of the property, the development was divided into seven sections and that this proceeding involved unit 6, with one tenant from unit 1 joining in. (Clarification Order at 12). It would be highly unlikely that Kirby's apartment, which is listed as being in unit 6, was on 79th Avenue when each of the other unit 6 apartments was listed as being on 70th Avenue. Finally, the list of apartments allegedly affected by the Expulsion Order, which indicates that Kirby's apartment was on 79th Avenue, is set forth in the Clarification Order, not the Expulsion Order itself.

because it also finds that, even if the Order did once apply, the Apartment's Rent Controlled status would have ended when Kirby vacated it.

Although neither party offered case law on point, and the Court was unable to find any, both the Rent Control Regulations and the current Rent Stabilization Code ("RSC") provide guidance on this issue.

Section 2200.2(f)(17) of the Rent Control Regulations provides that Rent Control shall not apply to housing accommodations which became vacant on or after June 30, 1971 by voluntary surrender or pursuant to a legal eviction, unless DHCR finds that the vacancy occurred because the landlord, or any person acting on its behalf, engaged in certain proscribed conduct with the intent to cause the tenant to vacate. Section 2521.1(a)(2) of the RSC (9 NYCRR) provides that

> For housing accommodations which on March 31, 1984 were subject to the penalties provided in former section YY51-4.0 of the Administrative Code of the City of New York, and which become vacant thereafter, the initial legal regulated rent for the first rent stabilized tenant shall be the rent established by the DHCR for the prior tenant, increased by the guidelines rate of rent adjustments applicable to the new lease plus such other rent increases as are authorized pursuant to section 2522.4 of this Title, and shall not be subject to a Fair Market Rent Appeal pursuant to section 2522.3 of this Title.

The language in Section 2521.1(a)(2) of the RSC inevitably leads to the conclusion that an otherwise Rent Stabilized apartment which was made subject to Rent Control as a penalty pursuant to former Section YY51-4.0 of the RSL loses its Rent Controlled status once the tenant of that apartment vacates it, at which time it becomes Rent Stabilized once again. Since it is undisputed that Kirby vacated the Apartment before Mr. Padel moved in, and Mr. Padel has neither asserted succession rights nor

shown proof that petitioner or its predecessors engaged in conduct proscribed by Section 2200.2(f)(17) of the Rent Control Regulations with the intent of causing Kirby to vacate, the Court finds that the Apartment is not Rent Controlled.

Whether the Apartment is Rent Stabilized?

As set forth in the Expulsion Order and acknowledged by petitioner, the Building was part of a 159-unit garden apartment type development. As also set forth in the Expulsion Order, although each of the buildings in the development had its own two-family certificate of occupancy, the dwelling units involved in the CAB proceeding were Rent Stabilized and the development was continuously registered with the Rent Stabilization Association from 1969 through June 1979, when the Order was issued.

While buildings with fewer than six dwelling units are generally not subject to Rent Stabilization (*see* RSL former § YY51-3.0; RSL § 26-504[a]; RSC § 2520.11[d]), the development was Rent Stabilized because it qualified as a "garden-type maisonette" pursuant to former Section YY51-3.1,[3] which provided as follows:

> For purposes of this title a class A multiple dwelling shall be deemed to include [a] multiple family garden-type maisonette dwelling complex containing six or more dwelling units having common facilities such as sewer line, water main, and heating plant, and operated as a unit under a single ownership on May sixth, nineteen hundred sixty-nine, notwithstanding that certificates of occupancy were issued for portions thereof as one- or two-family dwellings.[4]

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[3] The Administrative Code of the City of New York formerly contained two sections YY51-3.1. The one described herein was the first such section.

[4] The mandate of Section YY51-3.1 was preserved in Section 26-505 of the current RSL, as well as in Section 5(a)(4)(b) of the Emergency Tenant Protection Act of 1974 (which did not include the May 6, 1969 date for determining the eligibility of the dwelling unit for Rent Stabilization status [*see Matter of Ruskin v. Miller*, 172 AD2d 164 (1st Dept 1991)] and Section 2520.11(d) of the RSC (which substituted "the date the building or complex first became subject to the RSL" for May 6, 1969 as the date for determining the eligibility of the dwelling unit for Rent Stabilization status).

Thus, as of June 1979, just before the Expulsion Order was issued, at least those apartments in the buildings owned by Lindenmere Properties, Inc., including the Building,[5] were Rent Stabilized.[6] That being the case, the Apartment either became Rent Controlled once the Expulsion Order was issued and then reverted to Rent Stabilized status when Kirby vacated it (see p. 9, *supra*) or if, as petitioner argues, the Expulsion Order did not apply to it, it continued to be Rent Stabilized when the Order was issued and retained its Rent Stabilized status after the Building was sold (*see Orin Mgt. Corp. v. CAB*, NYLJ, March 7, 1984, at 6, col 1 [Sup Ct, New York County]),[7] after it was altered so that it no longer shared common facilities with other buildings in the complex (*see Fallon v. New York State Div. of Hous. & Community Renewal*, 154 Misc 2d 340, 341 [Sup Ct, Queens County 1992]; *Orin Mgt. Corp. v. CAB*, *supra*, NYLJ, March 7, 1984, at 6, col 1; Daniel Finkelstein & Lucas A. Ferrara, Landlord and Tenant Practice in New York § 11:91 [December 2014]["Landlord and Tenant Practice in New York"]), and after Kirby vacated it (*see Matter of Zandieh v. Division of Hous. & Community Renewal of State of N.Y.*, 249 AD2d 553 [2d Dept 1998]; Landlord and Tenant Practice in New York,

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[5] As noted in the Clarification Order, the Expulsion Order applied to the upper apartment at 137-86 70th Avenue. Thus, the Building was still owned by Lindenmere Properties at the time the Expulsion Order was issued.

[6] Contrary to petitioner's argument, although the Clarification Order stated that the "garden development complex" was *formerly* subject to the RSL, that was not because some of the buildings in the complex had been sold to *bona fide* purchasers (see n 7, *infra*) but because "a portion of [it] was expelled from [that law] by virtue of [the Expulsion Order] . . ." Moreover, at the time the Expulsion Order was issued, Lindenmere Properties had not sold the Building.

[7] Although the Expulsion Order indicates that, pursuant to the CAB's prior holding in *Matter of Sidransky* (Opinion No. 6529), apartments in the development would lose their Rent Stabilized status when the buildings in which they were located were sold to *bona fide* purchasers, that holding did not apply to the Building, which had not been sold at the time the Order was issued. By 1983, the CAB had abandoned that position, holding that "no basis exists in the law to deprive the tenants of their rights by virtue of the owner's unilateral action after the base date," and that "[t]o the extent the Board's ruling in *Matter of Sidransky*, Opinion Number 6529 is not consistent therewith, the Board chooses no longer to follow said earlier ruling." (CAB Opinion No. 25,607, dated March 17, 1983, *quoted in Orin Mgmt. Corp. v. CAB*, *supra*, NYLJ, March 7, 1984, at 6, col 1).

supra, § 11:91; *cf. Fleur v. Croy*, 137 Misc 2d 628 [Civ Ct, New York County 1987], *affd* 139 Misc 2d 885 [App Term, 1st Dept 1988][apartment in building with six or more units on base date remains Rent Stabilized even where rented to new tenant after number of apartments is subsequently reduced to fewer than six). The Court's finding that the Apartment remains Rent Stabilized is further supported by those cases holding that once an apartment is Rent Stabilized, actions taken by an owner to reduce the number of dwelling units in the building to fewer than six have no effect on its regulatory status. (*See Matter of Ki Wai Leung v. Division of Hous. & Community Renewal of State of N.Y.*, 266 AD2d 545 [2d Dept 1999]; *Matter of Shubert v. New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 162 AD2d 261 [1st Dept 1990]; *Rashid v. Cancel*, 9 Misc 3d 130[A], 2005 NY Slip Op 51585[U][App Term, 2d & 11th Jud Dists 2005]; *Rosenberg v. Gettes*, 187 Misc 2d 790 [1st Dept 2000]; *Fleur v. Croy*, *supra*, 137 Misc 2d 628, *affd* 139 Misc 2d 885). For the Court to hold otherwise "would be inconsistent with the purposes underlying the legislation regulating rents for multiple dwellings." (*Matter of Shubert v. New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, *supra*, 162 AD2d at 261).

Given the Court's finding that the Apartment is Rent Stabilized, the petition, which does not assert a ground permitted by the RSC for evicting Mr. Padel, fails to state a cause of action. Accordingly, the Court grants Mr. Padel's cross-motion to the extent of awarding him summary judgment dismissing the petition and denying the other relief he requested as moot. Petitioner's motion is denied in all respects.

This constitutes the decision and order of the Court.

Dated: July 17, 2015
Jamaica, NY

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Hon. Gilbert Badillo
Housing Court Judge

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