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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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737 PARK AVENUE ACQUISITION LLC,

Index No.154241/13

Plaintiff,

-against-

LAURA GOLDBLATT [also known as LAURA GOLDBLATT-JENSEN], SETH KATZ and TRACY EDWARDS,

DECISION/ORDER

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

Plaintiff 737 Park Avenue Acquisition LLC ("737 Park"), the owner of a 20 story residential apartment building located at 737 Park Avenue, New York, New York (the "Building"), commenced this action seeking a judicial declaration with respect to the rights of defendants to sublet Apartment 18C within the Building ("Apartment," "Apartment 18C" or "subject premises"). Defendants Laura Goldblatt [also known as Laura Goldblatt-Jensen], Seth Katz and Tracy Edwards (together, the "Siblings"), who hold a lifetime leasehold interest in Apartment 18C, responded by moving for an order, pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing the complaint in its entirety.

BACKGROUND

The Siblings are the children of non-party decedents Barbara Goldblatt and Jacob Goldblatt ("Goldblatts"). Barbara Goldblatt was the daughter of non-party decedent Louis Katz ("L. Katz"). In or about 1944, L. Katz purchased the Building. In 1958, L. Katz granted a lifetime leasehold interest in Apartment 18C to Barbara Goldblatt at a monthly rental rate of $244.37. L. Katz granted similar lifetime tenancies to his two other daughters, non-parties Ruth

Haberman (Apartment 18B) and Arlene Katz (Apartment 19C). After L. Katz's death in 1965, ownership of the building passed to non-party Katz 737 Corporation ("Katz Corp."), a corporate entity owned by L. Katz's descendants.

Barbara Goldblatt lived in Apartment 18C until 1971. At that time, the Goldblatts allegedly moved their family to Putnam County, but continued to pay the $244.37 monthly rental fee to Katz Corp. Her sisters, Ruth Haberman and Arlene Katz, continued to reside in their respective apartments.

By sublease, commencing June 21, 1975, the Goldblatts sub-leased Apartment 18C to non-party Bruce E. Bozzi ("Bozzi"), who lived there with his family pursuant to a series of subleases. Bozzi vacated the subject premises at the expiration of the last sub-lease on or about June 30, 2013. However, the Goldblatts continued to be identified as the primary tenants of the Apartment, which became subject to the Rent Stabilization laws (in 1974) prior to Bozzi's occupancy. Throughout the years of Bozzi's sub-tenancy, Bozzi paid significantly higher monthly rental fees than the $244.37 Katz Corp. accepted from the Goldblatts.

In or about 1986, when the Goldblatts refused to renew a sublease with Bozzi, he brought a declaratory judgment action in Supreme Court, New York County, against the Katz Corp., and the Goldblatts (the "Bozzi Action") seeking a judicial declaration that: Apartment 18C is Rent-Stabilized; Bozzi is the prime tenant of Apartment 18C, entitled to a lease in conformity with the Rent Stabilization laws; the Goldblatts had created an illusory tenancy and conspired with Katz Corp. to evade the Rent Stabilization laws; and Bozzi was entitled to a refund based on rent overcharges. The trial court granted summary judgment in favor of Bozzi on virtually all issues except that pertaining to a money judgment covering four years of rent overcharge. The

defendants appealed and the Appellate Division reversed the trial court's order because questions of fact existed as to whether the Goldblatts were illusory tenants, and whether the Goldblatts and Katz Corp. had conspired to evade the Rent Stabilization laws as follows:

> "The arrangement whereby the corporate defendant continued to provide the Goldblatts with an apartment at the token rental of $244 for the last 34 years is more consistent with the Goldblatts' claim of a lifetime lease than any conspiracy to evade the rent stabilization laws. Whether the Goldblatts are illusory tenants should also be determined after a trial. There is no indication that the Goldblatts devised the sublet with the intention of evading the rent stabilization laws"

(*Bozzi v Goldblatt*, 186 AD2d 82, 84 [1st Dept 1992]).

The parties eventually settled their dispute rather than proceed to trial, and executed a "Stipulation of Settlement and Discontinuance and Order" dated December 19, 1994, which was "so-ordered" by the Presiding Justice of Appellate Division, First Department on January 3, 1995 ("Stipulation"). The Stipulation provides, in relevant part:

> "(1) that the defendants-appellants Jacob Goldblatt and Barbara Goldblatt, and their children who survive them, as their successors in interest, have a lifetime leasehold of Apartment 18C (the "Apartment") . . . at a rent of Two Hundred Forty Four and 37/100 ($244.37) Dollars per month;
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> (2) that the Apartment is, and will continue to be, exempt and excluded from protection and provisions of the New York laws regulating rents, including, without limitation, the New York Rent Stabilization Law of 1969, as amended, during the tenancy of plaintiff-appellant [Bozzi], his wife, or any member of plaintiff-appellant's family, by virtue of the facts that (a) the Apartment is not, and will not be occupied by plaintiff-appellant, his wife, or any member of plaintiff-appellant's family, as a primary residence, and (b) defendants-appellants Jacob Goldblatt and Barbara Goldblatt, and their children as their successors in interest, as bona fide lessees of the Apartment, and said defendants-appellants and defendant-respondent Katz 737 Corporation, jointly, severally or in concert, have not violated or evaded any New York laws regulating rents;
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> (3) that defendants-appellants Jacob Goldblatt and Barbara Goldblatt, or their children who survive them as their successors in interest, need not offer plaintiff-appellant [Bozzi], his wife, or any member of plaintiff-appellant's family, a renewal or extension sublease agreement subsequent to the written sublease dated as of July 1st, 1993, and any extensions or renewals thereof, to be

entered into between the parties or their respective successors and assignees, pursuant to the Stipulation of Settlement, dated as of July 1st, 1993, as amended by agreements dated May 4, 1994, and as of December 26, 1994 (the "Stipulation of Settlement"), nor is plaintiff-appellant, or a successor in interest or assignee of plaintiff-appellant, if any, entitled to demand or receive such a renewal or extension sublease agreement by virtue of the fact, among others, that plaintiff-appellant, his successors in interest, or assignees, if any, do not occupy, and will not be occupying, the Apartment as a primary residence;

(4) that the plaintiff-appellant's occupancy under the Sublease shall not create any rights of occupancy as primary tenant;

(5) that in the event the parties to the written sublease agreement to be entered into mutually agree to extend the term of such sublease, such tenancy and sublease renewals and extensions, or other written agreements entered into pursuant thereto, shall be exempt and excluded from the protection and provisions of the New York laws regulating rents, including, without limitation, the New York Rent Stabilization Laws, as amended;

(6) that the legal sublease regulated rent for the Apartment, pursuant to the New York laws regulating rent, as of July 1st, 1993, is Five Thousand and no/100 ($5,000.00) Dollars per month, and, upon the application by defendants-appellants Jacob Goldblatt and Barbara Goldblatt, or their children, as their successors in interest, or any of them the New York Division of Housing and Community Renewal (the "DHCR") shall permit and accept a registration by them, for the Apartment, which provides that the legal sublease regulated rent, as of July 1st, 1993, which can be charged for the Apartment by Jacob Goldblatt and/or Barbara Goldblatt, and their successors in interest, as sublessor, is Five Thousand and no/100 ($5,000.00) Dollars per month;

(7) that the DHCR shall permit and accept further future registrations for the Apartment by defendants-appellants Jacob Goldblatt and/or Barbara Goldblatt, and their children who survive then, as their successors in interest, as sublessor, providing for permissible rent guideline increases of the said legal sublease regulated rent of the Apartment, provided, however, that such guideline increases shall have no force or effect upon the terms and provisions contained in any sublease between defendants-appellants Jacob Goldblatt and/or Barbara Goldblatt, and their successors in interest, as sublessor, and plaintiff-appellant, and his successors in interest, and assignees as sublessee, or any extensions or renewals thereof;

(8) that for the purpose of any amendment of any New York law regulating rents, including, without limitation, the New York Rent Stabilization Law, the Apartment is to be deemed vacant, during and without regard to its occupancy by plaintiff-appellant, and his family members;

(9) that upon payment by plaintiff-appellant of the amounts provided for in the Stipulation of Settlement, as amended, between plaintiff-appellant and defendants-appellants Jacob and Barbara Goldblatt, plaintiff-appellant shall have

> no further liability, either past due or to become due, to defendants-appellants Jacob Goldblatt, Barbara Goldblatt, and/or defendant-respondent Katz 737 Corporation, for rent or charges for use and occupation prior to the effective commencement date of the sublease;
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> (10) that neither plaintiff-appellant, defendant-respondent Katz 737 Corporation, nor defendants-appellants Jacob Goldblatt and/or Barbara Goldblatt, shall be entitled to recover costs and disbursements or sanction in this action against each other; and
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> (11) that the claims, counterclaims, and cross-claims of the parties against one another are dismissed, with prejudice, upon the Court marking this Stipulation 'So Ordered.'"

The last rental agreement entered into between Bozzi and Goldblatts, with respect to the Apartment, was an agreement dated April 30, 1997, which amended and supplemented the parties' July 1, 1993 sublease. This brief document amends the July 1, 1993 sublease to include the parties' recognition of the Stipulation, stating, in relevant part, ". . . that the Apartment is exempt from any New York laws or rules regulating rents, including, without limitation, the Rent Stabilization Law, as amended during the tenancy of the Sublessees." This document also set forth a schedule of steadily increasing rents due between the years 2003 and 2013. However, prior to the end of Bozzi's extended lease term on June 30, 2013, both Goldblatts passed away, with Jacob Goldblatt passing away in 1997, and Barbara Goldblatt passing away in or about October 2009.

In or about October 2009, the Siblings and Katz Corp. decided to draw up a written lease memorializing the Siblings' interest in Apartment 18C, in preparation of the possible sale of the Building. This written lease, dated October 3, 2009, sets forth the terms and conditions of the landlord/tenant (Katz Corp./Siblings) relationship pertaining to Apartment 18C. This document, referred to in defendants' papers as the "Original Lease," provides, at section 3, in relevant part:

> "Landlord acknowledges that Tenant holds a lifetime leasehold in Apartment 18C and, notwithstanding anything to the contrary contained herein, the term of this Lease (the "Term") shall continue without termination or interruption until the respective death of the last to die of the co-tenants, at which time the unit will revert back to Landlord . . .."

Section 11 of the Original Lease provides, in relevant part:

> "You cannot sublet the Apartment without Owner's advance written consent in each instance to a request made by You in the manner required by Real Property law § 226-b. Owner shall not unreasonably withhold its consent to a sublet by Tenant . . . . Notwithstanding anything contained herein to the contrary, (a) any sublease or renewal of a sublease entered into by Tenant shall not have a term lasting more than two (2) years beyond the end of the Term and (b) each of Landlord and Tenant hereby acknowledges and agrees that it is bound by the terms and conditions of that certain Settlement Agreement, dated as of November 16, 1994, by, between and among Landlord, Katz Park Avenue Corporation, the Testamentary Trust for the Benefit of Barbara Goldblatt and her Issue under the Last Will and testament of Louis Katz . . . ."

In early 2011, Katz Corp. began negotiating with 737 Park, an entity affiliated with real estate developer Harry Macklowe ("Macklowe"), for the sale of the Building. The Siblings state that 737 Park, through Macklowe and non-party Richard Zirinsky,[1] knew that several of L. Katz's descendants had lifetime tenancies, with nominal rental rates, in some of the best apartments in the Building. Inasmuch as the parties understood that the Katz family-tenancies would survive the closing, the Siblings further state that the final purchase price for the Building reflected these encumbrances.

On or about April 29, 2011, Katz Corp. and 737 Park executed a Purchase and Sale Agreement ("PSA"). Defendants point out that Article 2 of the PSA identifies the liens and encumbrances constituting the "Permitted Exceptions," which would survive the passing of title

[1] Throughout their papers, the parties reference both Richard Zirinsky and Robert Zirinsky, using their names, often just their last name, interchangeably, without explaining the role each played/plays in this, or otherwise differentiating between them.

upon closing. PSA § 2.1 (b) specifically provides that "the memoranda of leases described in Schedule 1 (B) hereto (the "Family Memoranda of Leases") which may be recorded on, prior to, or after the Closing Date. Seller's right to record the Family Memoranda of Leases shall survive the Closing." PSA § 5.1 (e) discloses the leases, including those listed on Exhibit M-1 to the PSA, which includes the Lease Agreement for Apartment 18C and the leases for the aunt's apartments, apartments 18B and 19C, and the PSA confirms that the leases are "in full force and effect in accordance with their terms." PSA also provides at section 5.3 (ii):

> "[a] copy of any material amendment and any renewal, expansion or termination of an existing Lease or of any new Lease which seller wishes to execute between the Effective Date and the Closing Date will be submitted to Purchaser prior to execution by Seller. Except with respect to any renewals to which a tenant is entitled at law, Seller shall not enter . . . . Notwithstanding anything to the contrary herein contained, Seller shall, at Closing, cause to be entered the leases of Units 18B, 18C and 19C and may, at any time prior to the Closing, cause to be entered into the other Leases and lease amendments, in each case as described on Exhibit M-1 substantially in the forms attached hereto as Exhibit M-2 (collectively, the "Family Leases") . . .."

The closing took place a few months later on August 5, 2011. On the day of the closing, the Siblings and Katz Corp. executed several additional documents in furtherance of the parties' agreement for the sale of the Building. The first document, dated August 5, 2011 ("Lease Amendment Agreement"), effectuates certain changes to the terms of the Original Lease dated October 3, 2009 . Notably, the Lease Amendment Agreement modified the Siblings' lifetime interest in Apartment 18C, by limiting it to the passing of their last surviving aunt, Ruth Haberman or Arlene Katz, plus the 90 days. The Lease Amendment Agreement specifically provides, at section B (2) (a), that:

> "Section 3 of the Original Lease shall be deemed deleted in its entirety and replaced with the following:

> Owner and Tenant hereby acknowledge and agree that, notwithstanding anything to the contrary herein contained or at law (including, without limitation, any rent stabilization or rent control or regulation) the term of this Lease (the "Term") shall continue without termination or interruption until the passing of the later to survive of Ruth Haberman (the tenant of Unit 18B in the Building) and Arlene Katz (the tenant of Unit 19C in the Building) (the "Termination date"), without any right of succession in favor of any entity or individual (including, without limitation, any spouse, child or other family member, executor, administrator, heir, heiress or representative); provided that Tenant's heirs and representatives shall be entitled to a ninety (90) day period of the Termination Date during which to vacate the Premises. Tenant's right to occupy Apartment 18C for the Term shall supersede any conflicting rights of Owner contained in this Lease . . .."

At section B (2) (b), the Lease Amendment Agreement provides that:

> "Section 11 (Assigning, Subletting) of the Original Lease shall be deemed deleted in its entirety and replaced with the following:
> Tenant may sublease the Apartment without Owner's consent thereto, provided that any sublease entered into by Tenant after the date hereof shall have a minium term of six (6) months and a maximum term of two (2) years (inclusive of all renewals); provided however, that the maximum term limitation contained in the preceding sentence shall not apply to the sublease to Bruce E. Bozzi, Mary Ann Bozzi, Andrea Bozzi Thimm, Bruce E. Bozzi, Jr. and [Palm] Management Corp. as co-subtenants. . . . Notwithstanding anything herein to the contrary, in the event that the Lease shall terminate, Owner agrees that as long as any sublease and its extensions or renewals provided therein shall be in force and effect and provided the subtenant under such sublease is not in default of any term, covenant or condition of the sublease beyond applicable notice and cure period, Owner (i) will not make the subtenant a party to any action or proceeding to evict or regain possession of the Apartment, (ii) will not disturb subtenant's possession under the sublease or evict or attempt to evict subtenant and (iii) subject to such sublease having a term not exceeding two (2) years (inclusive of all renewals) from the commencement thereof, will recognize subtenant as subtenant under the sublease and the rights of subtenant under the sublease shall not be diminished, reduced or adversely affect [sic] by reason of the termination of the Lease subject to subtenant's compliance with the terms, provision, covenants and condition of the sublease; provided that, Owner shall not be (x) liable for any prior act or omission of Tenant as landlord under the sublease, (y) subject to any offset not expressly provided in such sublease . . . , or (z) bound by any prior modification of the sublease or by any prepayment of more than one month's fixed rent."

Next, Katz Corp. executed an Assignment of Leases, dated August 5, 2011, by which it assigned and conveyed to 737 Park all of its rights, title and interest to leases in the Building. The Siblings also executed a Memorandum of Lease confirming, among other things, that their lease term for Apartment 18C would continue, without termination or interruption, until the passing of the last surviving aunt, plus 90 days (*see* Assignment of Leases and Memorandum of Lease).

About a year later, in the fall of 2012, Robert Zirinsky, who identifies himself, in a sworn affidavit, as an attorney who "holds an equity investment interest in a limited liability company that in turn holds an indirect equity interest in 737 Park," approached the Siblings seeking to buyout their interest in Apartment 18C (*see* Robert Zirinsky Affidavit). It is alleged that Macklowe and 737 Park's intention in purchasing the Building was to upgrade and convert the dwelling units into condominiums for sale on the open market. In keeping with this plan, it is alleged that it was 737 Park's intention to eventually acquire the Sibling's leasehold interest in Apartment 18C, convert it into a luxury condominium, and sell it on the open market for approximately $9.7 million.

Following the Siblings's rejection of Zirinsky's buyout offer on the basis that it was too low, animosity arose between the new Building owners and the Siblings. According to the Siblings, it was at that point in time that 737 Park began its campaign, with Zirinsky's assistance, to acquire the Katz Family apartment by any means, including: (1) tortious interference with contract, in that it forced Bozzi to move out under threat of legal action, in order to prevent Bozzi from renewing his sublease with the Siblings; and (2) attempting to unilaterally re-write the terms of the Original Lease/Lease Amendment Agreement that it had expressly assumed, and

which had factored heavily into the purchase price of the Building. It is claimed by the Siblings, and not denied by 737 Park, that Zirinsky advised Bozzi that, after Bozzi's current sublease term expired on June 30, 2013, the Siblings could not continue to sublet the Apartment to him, and engage in illegal profiteering in the process. Zirinsky also advised Bozzi that signing the proposed new sublease could be problematic in that Bozzi might end up in litigation (Zirinsky Aff., ¶ 11).

As a result of 737 Park's interaction with Bozzi, the parties' called upon their attorneys to convince the other side of the merits of their respective positions with respect to the proper interpretation of the Stipulation. It was the Siblings's position that, as successors in interest to their parents' leasehold and bona fide lessees themselves, they inherited the unrestricted right to sublet the Apartment, which was not subject to rent regulations, at fair market rates, regardless of the size of their profit, until the end of their lifetime tenancy. They assert that these issues (including the charge of illegal profiteering) had been raised and thoroughly examined in the Bozzi Action, resolved in their favor, and ultimately incorporated into the Stipulation. As a result, the Siblings claim that 737 Park is barred, or estopped, from raising them again in this dispute.

737 Park took the position that the Siblings misread Stipulation. Upon Bozzi's vacatur at the end of his sublease term on June 30, 2013, they contend that the Apartment became subject to the Rent Stabilization laws, requiring primary residency by the named tenant(s) and subletting in accordance with 9 NYCRR § 2525.6 and Real Property Law ("RPL") § 226-b, neither of which permits a prime tenant to engage in profiteering, by charging a sub-tenant more than the legal regulated rent, plus 10%, if furnished. 737 Park also reads the Stipulation as permitting only

Barbara or Jacob Goldblatt, as the signatories to the written sublease agreement referenced in paragraph five of the Stipulation to enter into, or renew, a sublease with Bozzi, not the Siblings.

Due to the parties' conflicting interpretations of the Stipulation, their attorneys, prior to commencement of this action, communicated, both orally and in writing, in an attempt to expedite a resolution.

By letter dated October 23, 2012, 737 Park's counsel advised the Siblings and their counsel that their purported estoppel defense, based on the language in PSA § 5.3 (a) (ii), which states that Katz Corp. "shall, at Closing, cause to be entered into the leases of units 18B, 18C and 19C," would fail because the provisions of the Lease, which permit the Siblings/co-tenants to engage in profiteering with respect to this Rent Stabilized Apartment, are void or voidable, as contrary to public policy.

By letter dated November 2, 2012, the Siblings's counsel responded by pointing out that: (1) across the top of the Original Lease, in bold print, it states "THIS LEASE AND THE APARTMENT ARE NOT SUBJECT TO RENT STABILIZATION, RENT CONTROL OR ANY OTHER RENT REGULATION;" (2) under section 11, it was agreed that the Siblings (co-tenants) were permitted to sublet the Apartment; (3) the lease is subject to the [Stipulation]; and (4) the agreed upon language accompanying the August 5, 2011 modifications to sections 3 and 11 of the Original Lease, provides that, except as modified, all lease terms "shall remain in full force and effect and are hereby in all respects ratified and confirmed," and that this includes the fact that the Apartment is not subject to any form of rent regulation. The Siblings's counsel contends that at the time of the closing it was clear and understood by 737 Park that Apartment 18C was not subject to the Rent Stabilization Laws, that it was a fair market rental apartment,

and that the Siblings had an absolute right to sublet the Apartment at a fair market rental price. Counsel insists that these issues had already been decided and incorporated into the Stipulation.

737 Park's counsel responded by letter dated November 7, 2012, acknowledging the Stipulation, but insisting that there is nothing in the language which could be interpreted as extending a suspension of the Rent Stabilization laws past the Bozzi tenancy. Counsel also contends that even if there were any ambiguity in Stipulation as a matter of practical construction, it is telling that, beginning in 1985, and continuing for each year thereafter until 2010, Katz Corp. registered the lease for Apartment 18C with DHCR, as "RS" (Rent Stabilized), with a legal registered rent of $244.37 (except for the few years which listed it at $273.21), and that Katz Corp. identified either Barbara Goldblatt or her husband as the named tenant of Apartment 18C for each of those years. Counsel concludes that the Siblings's attempt to ignore the Rent Stabilized status of Apartment 18C (by calling it a typo), or their attempt to avoid the ramifications of such status through the language printed at the top of the Original Lease, executed by Katz Corp. and the Siblings on October 3, 2009, and ratified on August 5, 2011, is without merit, contrary to public policy, and an inadequate premise on which to base an estoppel defense.

The parties reached an impasse and 737 Park commenced the instant action seeking a judicial declaration that, upon the vacatur of Bozzi, any further subletting by the Siblings must be done in compliance with 9 NYCRR § 2525.6, which requires the tenant to establish his or her intention of occupying the apartment as a primary residence at the expiration of the sublease, and proscribes profiteering, and RPL § 226-b, which requires the tenant to seek the written consent of

the landlord in advance of a sublet, notwithstanding any "sweetheart" agreements between the Siblings and Katz Corp.

The Siblings responded by serving this motion to dismiss on the grounds that the complaint does not state a cause of action because there is no justiciable controversy before the court; the action is barred by collateral estoppel and res judicata; plaintiff must seek its requested relief from the Appellate Division; at the closing, plaintiff expressly assumed all terms of defendants' tenancy; plaintiff tortiously interfered with their sub-tenancy relationship with Bozzi; and plaintiff denied them access to the Apartment after Bozzi vacated, and performed work which has made the Apartment uninhabitable. 737 Park opposes the motion.

ARGUMENTS

This Court has granted the parties wide latitude in presenting their arguments, including oral argument on three separate occasions, and permitting the submission of sur-reply papers and sur-sur reply papers.

The central dispute argued is whether the Stipulation contemplated and permitted future unrestricted subletting (as to choice of tenant, amount of rent, and term of subtenancy) by the Goldblatts, and by "their children who survive them as their successors in interest," and whether 737 Park is obligated under the terms of the PSA to recognize and comply with these "unfettered" entitlements based on their assumption of the Original Lease, as amended and/or modified by the Lease Amendment Agreement. The Siblings offer the following arguments and explanations in support of their position.

When the issue of the Goldblatts' purported evasion of New York's Rent Stabilization laws was reviewed by the Appellate Division, the First Department noted that the payment of

token rental fees over decades was more consistent with a lifetime lease than a conspiracy to evade the rent regulations (*Bozzi v Goldblatt*, 186 AD2d at 84). Pursuant to the terms of the Stipulation, which recognized and included the Siblings as the Goldblatts' successors in interest, it was agreed that: the Goldblatts were entitled to continue paying $244.37 monthly rent for the duration of their lifetime tenancy interest (Stipulation, ¶ 1); the Apartment is, and will continue to be, exempt and excluded from New York's rent regulation laws, without limitation, during the tenancy of Bozzi and/or his family (Stipulation, ¶ 2); neither the Goldblatts, Katz Corp., nor the Siblings, as the Goldblatts' successors in interest, have violated or evaded New York's rent regulation laws (*id.*); and any further sublease extension "to the written sublease agreement to be entered into," will also be exempt and excluded from New York's rent regulation laws (Stipulation, ¶ 5). The Siblings argue that their right to future subletting with parties other than members of Bozzi's family is demonstrated by the inclusion of language in paragraphs six and seven of the Stipulation which both establish a legal sublease regulated rent for the Apartment as of July 1, 1993, of $5,000.00, upon application to DHCR by the Goldblatts or the Siblings (Stipulation, ¶ 6) with rent guideline increases, but which do not apply to Bozzi's sub-tenancy (Stipulation, ¶ 7).

Next, the Siblings assert that sections 2 and 5 of PSA recognize the existence of the Family Leases, noting that they constitute encumbrances which survived the passing of title. The Lease Amendment Agreement provides that the Siblings' lease term will continue, without termination or interruption, until the passing of the last of the two surviving aunts (B [2] [a]), and that, with the exception of the Bozzi sub-tenancy, the Siblings are entitled to sublet the apartment

without 737 Park's consent, for a minimum of six months and a maximum of two years, inclusive of renewals (B [2] [b]).

The Siblings contend that the terms and conditions set forth in the Stipulation, the PSA and the Lease Amendment Agreement establish that they have an unfettered right, as the surviving children and successors in interest to the Goldblatts, to continue to sublet the Apartment, which is and continues to be exempt from any form of rent regulation during the term of their tenancy, at fair market rent value, without inference. Furthermore, inasmuch as the issues involving subletting of the Apartment, including claims of profiteering in violation of New York's rent regulations, had been previously raised and resolved by court order, it is their position that 737 Park is barred, or estopped, from raising them again, and that to the extent 737 Park is seeking to modify aspects of the Stipulation, it must seek relief from the Appellate Division which so-ordered the Stipulation.

As to the balance of the Siblings's arguments, they contend that 737 Park has, in direct violation of section 11 of the Lease Agreement, which it assumed pursuant to the PSA, interfered with the Bozzi tenancy, by engaging in a campaign of harassing Bozzi by shutting off the gas and elevator to his Apartment, and by threatening to name him in a lawsuit if he executed a further sublease with the Siblings. They support these assertions with copies of emails documenting Bozzi's complaints (*see* Defendants' Exhibits "M," "N"), and contend that the fact that Bozzi did move, and that they do not have a prospective sub-tenant, render plaintiff's declaratory judgment action moot, as there is no justiciable controversy before the court, warranting a dismissal of the complaint.

The Siblings also assert that 737 Park comes to the court with unclean hands. To this end, they explain that, following Bozzi's vacatur on or before June 30, 2013, 737 Park shifted its attention to the Siblings, taking actions aimed at forcing them to accept a low buyout, prior to the end of their lifetime tenancy/interest, by impeding their access to the Apartment. The Siblings contend that, after Bozzi moved out, and despite their and/or their attorney's multiple requests for the return of their keys to the apartment, 737 Park refused. They assert that 737 Park employed obstructionist legal tactics, and created unnecessary confusion regarding its authority to handover Bozzi's keys, in order to delay the Siblings's ability to access their Apartment (*see* Defendants' Exhibit "P"). 737 Park used the delay to enter and start work toward the conversion of the Apartment to a condominium, without the Siblings's knowledge and consent. The Siblings allege when they finally obtained access to Apartment 18C, it was in a state of deconstruction and disarray. The Siblings also report the details of 737 Park's harassment of their aunts, in order to get them to forego their "sweetheart" leases, and accept its low buyout offers. As to the public policy issue raised in the complaint, the Siblings dismiss this as irrelevant to the contract dispute, and inapplicable to these parties.

In opposition to the dismissal motion, 737 Park reiterates its position that Apartment 18C was and is, a Rent Stabilized Apartment. Upon Bozzi's vacatur, plaintiff's contend that the Siblings are required to adhere to the subletting limitations for Rent Stabilized apartments set forth in 9 NYCRR §§ 2525.6 (a) (i) and (ii), which contain a primary residency requirement for the named tenant(s), and a proscription against profiteering, as well as to the provisions of RPL § 226-b, which requires a tenant to obtain landlord's consent to the terms of a proposed sublease.

737 Park supports its reading of the Stipulation with reference to paragraphs two and five, pointing out that paragraph two ties the agreed upon rent regulation exemption and exclusion to Bozzi's subtenancy or his family members, and not to the tenancy of the primary tenant(s) (the Goldblatts or their children) on the lease. Furthermore, plaintiff contends that since paragraph five of the Stipulation identifies the parties who can extend the Bozzi sublease as "the parties to the written sublease agreement," without using language inclusive of the Goldblatts' children, the Siblings are mistaken in their claim that they are entitled, under this Stipulation, to enter into any sublease for the Apartment, with either Bozzi, members of his family, or with any one else.

In addition to maintaining its position that the Siblings and their counsel have misread the documents, 737 Park, through the affidavit of Robert Zirinsky, denies any improprieties with respect to its dealings with Bozzi, the aunts, or its performance of building-wide improvements, including the installation of new windows, elevators, and water and gas lines. As for plaintiff's communications with Bozzi, which the Siblings describe as tortious interference, 737 Park claims that it was acting within its right as the landlord to inform Bozzi, through Zirinsky, that the Stipulation does not provide for the exclusion of Apartment 18C from the Rent Stabilization rolls after the expiration of the sublease on June 30, 2013, and that there may be legal complications if he executes the proposed sublease extension.

737 Park supports its argument against the tortious interference claim with reference to *Jacobs Private Equity, LLC v 450 Park LLC* (2005 NY Slip Op 30004[U] [Sup Ct, NY County], *affd* 22 AD3d 347 [1st Dept 2005], *lv denied* 6 NY3d 703 [2006]), an action where the plaintiff tenant alleged that, but for the landlord's wrongful conduct, a sublease would have been entered into between it and its proposed subtenant. In dismissing the tenants' claim for tortious

interference with business opportunities, the court stated, among other things, that "[a]t worst, plaintiff alleges that Landlord engaged in hardball negotiation tactics . . . and [a] party to a contract is entitled to act in furtherance of its own economic benefit . . . without such conduct giving rise to a claim for tortious interference" (2005 NY Slip Op 30004[U] [internal quotation marks omitted]).

Alternately, 737 Park argues that to the extent the Stipulation and Leases can be read to permit the Siblings to profiteer through subletting Apartment 18C, those aspects of the documents must be set aside, or voided, as contrary to public policy.

MOTION TO DISMISS

On a motion to dismiss a complaint based on documentary evidence (CPLR 3211 [a] [1]), a dismissal may only be granted "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). On a motion to dismiss a complaint based on a failure to state a cause of action (CPLR 3211 [a] [7]), the court must "afford the pleading a liberal construction . . . accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88). The motion may only be granted "where the documentary evidence utterly refutes plaintiff's factual allegation, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Subject Matter Jurisdiction/Justiciable Controversy

At the outset, this Court must determine if it is vested with subject matter jurisdiction to review this declaratory judgment action in the first instance, or it must transfer this matter to the

Appellate Division, First Department due to its prior rulings. If this Court maintains original subject matter jurisdiction over this case, it must then decide if there is a justiciable controversy to declare the rights between the parties.

It is quite clear that Supreme Court is vested with the original subject matter jurisdiction to hear declaratory judgment actions (CPLR 3001). There are only limited occasions when the Supreme Court can transfer matters to the Appellate Division such as where it involves a question of "substantial evidence" of an underlying evidentiary determination (CPLR 7804 [g]). It is doubtful if there exists legal authority to transfer this action to the Appellate Division to seek clarification of the so-ordered Stipulation. Quite frankly, it is the Supreme Court's role to interpret the Stipulation in the first instance and any rulings from the Appellate Courts subject, of course, to appellate review. Moreover, since the plaintiffs are not seeking to modify the Stipulation, but only to interpret it, this Court has subject matter jurisdiction to entertain this declaratory judgement action.

Now, this Court must determine if there is a justiciable controversy to declare the rights between the parties. The decisional authority reflects the notion that courts should exercise jurisdiction in actions for a declaratory judgment with respect to lease agreements (*Stuart v Kingsview Homes, 16 Misc. 2d 492 [Sup Ct. Kings Co. 1959] appeal dismissed 13 AD2d 519 [2d Dept 1961]). In Stuart,* the Supreme Court chronicled many cases wherein the Appellate Courts acknowledged that it would be appropriate to "resolve divergent claims of parties under leases, in which it has been held that controversies of the character set out in the complaint herein are peculiarly the proper subject in an action for a declaratory judgment." (citations omitted)(*id.* at 497). The *Stuart* court also opined that it would be preferable to resolve lease disputes in the

declaratory judgment action to forestall the necessity of filing an eviction proceeding. (*id.* at 498).

To be justiciable, a "controversy must involve a present, rather than hypothetical, contingent or remote, prejudice to the plaintiff" (*Waterways Dev. Corp. v Lavalle*, 28 AD3d 539, 540 [2d Dept 2006] [citation omitted]). As such, "[w]here the probability of occurrence of the contingent event is great or the declaratory judgment may have an immediate and direct impact on the parties' conduct, the declaratory relief should be granted" *(Remsen Apts., v Nayman,* 89 AD2d 1014, 1015 [2d Dept 1982] [citations omitted] *aff'd* 58 NY2d 1083 [1983]).

Applying the above standard, it appears that the parties have numerous present and contentious lease disputes as to whether Apartment 18C is subject to the Rent Stabilization laws, and whether the Siblings have an "unfettered" right to sublet their Apartment at monthly rates that substantially exceed the last registered rent for the Apartment which the Siblings pay, without the consent of the landlord. This raging controversy is neither hypothetical nor remote, but will have an immediate and direct impact on the parties' conduct. For instance, it may prevent the commencement of a summary proceeding or the eviction of an unsuspecting third-party sub-tenant, if it is found that the defendants do not enjoy the "unfettered" right to sublet at a considerable profit within the heavily prescribed rent regulatory laws. (*id.*)

Collateral Estoppel

To establish collateral estoppel, there must have been an "identical issue . . . necessarily decided in the prior action or proceeding [which] is decisive of the present action" and a showing that "the party who is attempting to relitigate the issue had a full and fair opportunity to contest it in the prior action or proceeding" *(Matter of Howard v Stature Elec. Inc.*, 20 NY3d 522, 525

[2013], citing *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]; *see also Matter of Hoffman*, 287 AD2d 119 [1st Dept 2001]).

In the present motion, defendants assert that the Stipulation so-ordered by the Appellate Division have completely resolved the issues in this case, and that they should not be re-litigated here. To properly apply the doctrine of collateral estoppel, this Court must determine whether the terms of Stipulation which was so-ordered by the Appellate Division decided the "identical issues" which are "decisive" of this declaratory judgment action.

The issues before the Appellate Division were limited to Bozzi's claims "whether the Goldblatt defendants are illusory tenants... and whether the Goldblatts and the owner conspired to evade the rent stabilization laws." (*Bozzi v Goldblatt*, 186 AD2d at 83). The Stipulation resolved these two triable issues to the extent of permitting the Apartment to be exempt from the rent regulation laws during the sub-tenancy of Bozzi and his family members. It also provided for a unique mechanism to legitimize the Bozzi sub-tenancy by filing the "legal sublease regulated rent" with the Division of Housing and Community Renewal ("DHCR") so that Bozzi could remain in possession and the Goldblatts can continue to charge more than the registered rent because "the Apartment is to be deemed vacant, during and without regard to its occupancy by plaintiff- appellant [Bozzi], and his family members." (Stipulation, ¶ 8).

On the other hand, the issues in this declaratory judgment action are much broader which necessarily include whether the Apartment is exempt from the Rent Stabilization laws irrespective of Bozzi's claims and whether the defendants (not the Goldblatts) have an "unfettered" right to sublet the Apartment subsequent to the vacatur of Bozzi and his family members. As such, the doctrine of collateral estoppel is inapplicable herein.

Documentary Evidence/Failure to State a Cause of Action

The Stipulation, and the other documentary evidence, do not conclusively establish as a matter of law the broader legal issues presented in this declaratory judgment action. As stated above, the Stipulation only dealt with very limited discrete issues mainly relating to Bozzi's right to occupy Apartment 18C, and to preserve the "lifetime leasehold" of the deceased Goldblatts and now their children, the defendants herein. Moreover, it cannot be said at this juncture that the Stipulation permits the defendants to an unconditional right to sublet the Apartment subsequent to Bozzi and his family's vacatur. The other documentary evidence consist of various agreements between some of the parties, but they do not conclusively determine the public policy concerns in permitting the Apartment to be permanently exempt from rent regulation without specifying the exemption, and to sublet to an unsuspecting third-party at a monthly rent in excess of the prior registered rent in derogation of 9 NYCRR §§ 2525.6 which strictly prohibits such profiteering.

The law has evolved in the approximate twenty years that the Appellate Division and the original parties entered into the Stipulation. The Rent Stabilization laws have been amended several times and the courts have rejected stipulations that effectively remove regulated apartments from rent regulation. (*Drucker v Mauro*, 30 AD3d 37, 41 [1st Dept 2006] *appeal dismissed* 7 NY3d 844 [2006] [internal quotation marks and citations omitted]) (New York courts have demonstrated a reluctance to uphold private agreements which "effectively deregulate applicable housing units... even if the particular agreement is the product of a stipulated settlement"); (*Extell Belnord LLC v Uppman*, 113 AD3d 1 [1st Dept 2013](an

agreement purporting to deregulate a rent-controlled apartment was void as against public policy).

Beside the evolution of the law, the factual circumstances are also very different now because Bozzi and his family members have vacated the Apartment. This factual change alone requires this Court to re-examine the respective rights and responsibilities of the parties.

Indeed, the clearest ruling by the Appellate Division in this case is that there "is no dispute that the apartment [18C] became subject to the rent stabilization laws in 1974, prior to plaintiff's [Bozzi's] occupancy." (*Bozzi v Goldblatt*, 186 AD2d at 83). There is also the DHCR rent rolls for the years 1985-2010, which indicate that Apartment 18C was registered as "RS," (which cannot be ignored as a mere "typo," as claimed by the Siblings), with registered rents listed as ranging from $244.37 to $273.21. Thus, it cannot be said that defendants' documentary utterly refute plaintiff's factual allegations that the legal status of this Apartment was Rent Stabilized, requiring a pre-answer dismissal of the complaint (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 326). The complaint also adequately states a cause of action (CPLR 3211 [a] [7]).

CONCLUSION

Accordingly, it is

ORDERED that the defendants' pre-answer motion to dismiss the complaint is denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 30 days after service of a copy of this order with notice of entry.

Dated: May 13, 2015

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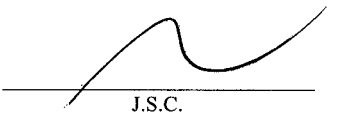

J.S.C.

SHLOMO HAGLER
J.S.C.