

Noble Drew Ali Plaza Tenants v Noble Drew Ali Plaza Hous. Corp.
2003 NY Slip Op 30234(U)
October 2, 2003
Sup Ct, Kings County
Docket Number: 53655/02
Judge: Gerard H. Rosenberg
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At an IAS Term, Part 12 of the Supreme Court
of the State of New York, held in and for the
County of Kings, at the Courthouse, at Civic
Center, Brooklyn, New York, on the
2nd day of October, 2003

P R E S E N T:

HON. GERARD H. ROSENBERG,

Justice.

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NOBLE DREW ALI PLAZA TENANTS
ASSOCIATION, individually and on behalf
of each and every one of its members,

Plaintiff,

- against -

Index No. 53655/02

NOBLE DREW ALI PLAZA HOUSING CORP., et al.,

Defendants.

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The following papers number 1 to 9 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-2, 3-4</u>
Opposing Affidavits (Affirmations) _____	<u>5</u>
Reply Affidavits (Affirmations) _____	<u>6</u>
_____ (Affirmations) _____	<u>7-9</u>
Other Papers _____	

Upon the foregoing papers, defendants Noble Drew Ali Plaza Housing Corporation
(NDA) and Abdur Rahman Farrakhan (Farrakhan) (hereinafter NDA) move by order to show
cause for an order compelling co-defendants New Lots Family Transitional Center LLC

(NLFTC LLC) and Somerstein Associates to pay TUC Management (TUC), on its behalf, use and occupancy for 230-232 and 240-242 New Lots Avenue in Brooklyn, New York from the inception of its occupancy in April 2002 and for each month thereafter that it used and occupied those premises, and to compel NLFTC LLC and Somerstein Associates to pay NDA reasonable attorney's fees incurred in the collection of such use and occupancy. NLFTC LLC and Somerstein Associates cross-move to vacate/modify and/or clarify this court's March 7, 2003 order.

Use and Occupancy

In April, 2002, New Lots Plaza LLC, purportedly as agent for NDA, entered into a 10-year lease agreement with NLFTC LLC for the rental of 230 and 240 New Lots Avenue in Brooklyn, New York (the Lease), for a monthly rent of \$1350.00 per apartment. In December, 2002, NLFTC LLC entered into a license agreement for 230 and 240 New Lots Avenue with Women In Need (WIN), a not-for-profit operator of a State-licensed Tier II homeless shelter.

According to NDA, New Lots Plaza LLC was not authorized to act as its agent in the rental of the property. In this regard, NDA contends that it only learned of the Lease in March 2003, that NLFTC LLC knew or should have known that New Lots Plaza LLC was not its authorized agent, and that it advised NLFTC LLC of same by letter dated August 20, 2003, in which it declared the Lease void *ab initio*.

Presently, NDA seeks use and occupancy from NLFTC LLC from the inception of its occupancy at 230 and 240 New Lots Avenue in April 2002 and for every month thereafter that NLFTC LLC occupied the premises. In its affirmation in support, NDA concedes that NLFTC LLC paid use and occupancy, albeit late, for **the** months of May, June, and July, 2003, but asserts, nor is it disputed, that NLFTC LLC has only made partial payment in the amount of \$125,000 for its August 2003 use and occupancy pursuant to this court's direction, leaving a shortfall of approximately \$60,000 for that month. In addition, at oral argument heard on this application, counsel for NDA asserted that sometime after August 2002, NLFTC LLC either did not pay "rent" at all or paid "rent" to New Lots Plaza LLC, but did not pay "rent" to **NDA**.

NDA argues that without use and occupancy from NLFTC LLC, it will not have sufficient funds to effectively maintain and repair the premises, namely the entire Noble Drew Ali Plaza housing complex, nor will it be able to pay the substantial debts it has incurred for essential services, such as electricity. Thus, NDA requests that either all apartments which become vacant at WIN be turned over to NDA for rental pursuant to rent stabilized leases, or that NLFTC LLC be compelled to pay use and occupancy. Although in its affirmation in support NDA seeks use and occupancy based upon the fair market value of \$3000.00 per apartment per month, at oral argument, counsel modified its request to \$1900.00 per apartment per month, the amount the City represents that WIN pays for each apartment it uses.

In Its affirmation in opposition, NLFTC LLC contends, *inter alia*, that is not liable to

NDA for rent since NDA failed to provide it with building services and has mismanaged the complex. It also contends that since NDA failed to establish that the Lease was void, any rent due must remain at the amount set forth in the Lease. NLFTC LLC also asserts that it has occupied 230 and 240 New Lots Avenue since April 2002 and that NDA has accepted \$1350.00 per apartment per month since the inception of the Lease.

Analysis

To determine whether NDA is entitled to use and occupancy, and if so, the amount thereof, analysis of the Lease is required. As indicated, NDA contends the Lease is void because New Lots Plaza LLC was not its agent. NLFTC LLC argues that NDA failed to make that showing, and asserts that in any event, NDA is not entitled to rent or to use and occupancy.

Subdivision 2 of section 5-703 of the General Obligations Law provides, in pertinent part, that “[a] contract for the leasing for a longer period than one year . . . of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, ***or by his lawful agent thereunto authorized by writing***” (see *Genesee Management, Inc. v Del Bello*, 60 AD2d 779).

Here, while there is no evidence of any written authorization for New Lots Plaza LLC to lease 230 and 240 New Lots Avenue to NLFTC LLC on NDA’s behalf, as NLFTC LLC contends, NDA, as movant, has failed to submit an affidavit of its principal or an individual

with personal knowledge attesting to the fact that New Lots Plaza LLC was not its agent for the purpose of contracting with NLFTC LLC. Absent an affidavit from such principal with personal knowledge of the matter, the court must presume that the Lease is valid.

As to the amount of rent due NDA, the court finds that NDA is entitled to the remainder of the rent under the Lease for the month of August 2003 and for all future rent. In this regard, it is undisputed that a valid lease exists and that NLFTC LLC failed to pay the full amount of rent due for August 2003. While NLFTC LLC contends, without citation to authority, that ordering rent payments without consideration of abatement claims for lack of repairs violates the Lease and the “right of a tenant” to assert a warranty of habitability claim, to the extent NLFTC LLC may be considered a corporate entity, it is settled that “[t]he obligation of a commercial tenant to pay rent is not suspended if the tenant remains in possession of the leased premises, even if the landlord fails to provide essential services” (*Towers Organization, Inc. v Glockhurst Corp. N.V.*, 160AD2d 597). In any event, pursuant to the no-set off provision contained on the first page of the Lease, NLFTC LLC is not permitted to withhold rent “by reason of the failure of Owner to comply with the covenants of this [repair provision] or any other articles of this lease” (see *342 Madison Ave. Assocs. v Suzuki Assocs.*, 187 Misc.2d 488,489).

As for rent from April 2002 through April, 2003, the court is unable to determine on this record whether NDA accepted rent for that time period. NDA fails to provide proof of lack of payment through the submission of an affidavit of a principal or an individual with

personal knowledge, and NLFTC LLC only asserts, through its attorney's affirmation, that NDA received rent since the inception of the Lease.

As such, the court directs that NLFTC LLC pay NDA the remainder of the rent for August 2003 pursuant to the provisions of the Lease and to pay all future rent, without prejudice to any future claims by NLFTC LLC for rent abatement. That branch of the order to show cause seeking attorney's fees is denied as it is unsupported by any legal analysis or authority therefore.

Modification of Preliminary Injunction

NLFTC LLC cross-moves to vacate, modify and/or clarify the preliminary injunction granted pursuant to this court's March 7, 2003 order. For reasons explained in the order itself and ensuing related orders, the court declines to vacate the order.

As for modification and/or clarification of the order, NLFTC LLC contends, and the Assistant Attorney General and the City concur, that that branch of the order enjoining any individual from taking possession of any apartment at the complex except pursuant to a rent stabilized lease should be modified to allow apartments that were used to house the homeless as of the date of the injunction to continue to be used as such when they become vacant. NDA does not oppose the motion. Plaintiff has submitted an affirmation in opposition.

According to NLFTC LLC and the City, due to the above-noted branch of the injunction, DHS, which administers funds to WIN, has been precluded from referring additional homeless families to WIN once apartments in the homeless shelters in 230 and 240

New Lots Avenue become vacant. As a result, the number of homeless families sheltered at WIN has dropped, which has caused a concomitant drop in the monthly amount WIN is permitted to seek as reimbursement from the City. Accordingly, the monthly amount paid by WIN to NLFTC LLC has or will decrease.

NLFTC LLC asserts, in substance, that the above-requested modification is necessary to enable it to pay NDA its monthly rent. In this regard, Mr. Somerstein states that if the injunction is modified, “the City and WIN will continue to make payment to [NLFTC LLC] who will in turn pay the Landlord [NDA]).” NLFTC LLC, as well as NDA, also maintain that the proposed modification will enable NDA to provide maintenance and services to the entire apartment complex.

The City submits the affidavit of Bonnie Stone, WIN’s president and Chief Executive Officer, who asserts, among other things, that the monthly amount for which WIN can seek reimbursement by the City has steadily decreased due to 40 vacant apartments, and no longer covers the facility’s operating expenses, including the payment of rent on the shelter as provided for in the budget approved by the Department of Homeless Services (DHS). She says that as a result, beginning with July 2003, WIN will only be able to pay rent on units occupied by homeless families, not on vacant apartments. Ms. Stone also states that unless the injunction is modified, the amount available to WIN to pay rent will decrease as the vacancies increase,’ that WIN cannot bear the costs of operating the shelter unless its

¹\$44,000 (July 03); \$68,000 (August 03); \$134,000 (September 03); and \$208,000 (October 03).

reimbursement rate or the occupancy rates returns to planned levels, and that the increasing vacancies puts the shelter's continuing existence into serious question. Mr. Roger Newman, Deputy Commissioner for Family Services at DHS, states, *inter alia*, that it has declined WIN's recent **request** to increase **its** daily rate for families at **the** shelter to allow the facility to meet its operating expenses with fewer families in residence. He states that unless the terms of the injunction are modified to allow DHS to refer homeless families to the shelter, the shelter will be forced to cease operations in the near future.

Analysis

The court modifies that branch of the order enjoining any individual from taking possession of any apartment at the complex except pursuant to a rent stabilized lease to allow apartments that were used as homeless shelters as of the date of the injunction at 230 and 240 New Lots Avenue to continue to be used as such when they become vacant, pending a final judgment in this action.

“[I]t is a basic principle of equity that, in a proper proceeding, the court that issued an injunction may modify its provisions to conform to changed conditions” (*Board of Trustees v. W. Wilton Wood, Inc.*, 97 AD2d 781, citing *inter alia* *Dutchess Sanitation Sew. v. Town of Plattekill*, 51 NY2d 670, 673-674; see also *Rosemont Enterprises, Inc. v. Irving*, 49 AD2d 445). Here, as a result of that branch of the injunction enjoining possession of any of the apartments in the complex except pursuant to a rent stabilized lease, apartments in the Tier II shelter at 230 and 240 New Lots Avenue have become vacant, referral of homeless families

to the shelter by the DHS, which is presently precluded by the injunction, will cause further vacancies, and an increase in vacancies will cause a concurrent decrease in the amount of money paid by DHS to WIN, and in turn a decrease in rent paid by WIN to NLFTC LLC. The limited modification granted will reverse this **cycle**, enabling WIN to pay rent to NLFTC LLC, and NLFTC LLC to pay its rent to NDA, which will assist NDA in providing essential maintenance services not only to 230 and 240 New Lots Avenue, but to the entire complex.

The court is cognizant of plaintiff's concerns regarding this modification, but nevertheless finds it justified in light of the changed conditions noted above. As for plaintiff's suggestion that the vacancies could be filled by renting those apartments to new families pursuant to rent stabilized leases, plaintiff's counsel asserts that Gregory Kern, Director of the Leased Housing Division of the New York City Housing Authority, has informed her that "a sufficient number of section 8 (federal rent) subsidies have been set aside to accommodate each and every homeless family (or other new occupant) who is given a lease and **they** have promised to grant Section 8 subsidies to every **eligible** family who is given a lease." Putting aside the absence of an affidavit from Mr. Kern so attesting, the statement fails to ensure that all those provided with rent stabilized leases will be eligible for and will therefore receive Section 8 subsidies. Absent such assurances, it is unclear whether the vacancies could be filled by Section 8 voucher holders. Moreover, as the Attorney General asserts, if payments from WIN to NLFTC LLC were to end abruptly, it is unclear whether these payments could be restored quickly through the rental of vacancies at the shelter pursuant to rent stabilized

leases ~~such~~ that the provision of services could continue without substantial interruption. Finally, plaintiff asserts that while WIN projects the money it will lose as a result of the vacancies, the decrease in revenue is offset by the decrease in expenses since there will be 40 fewer apartments for which to provide **services**. Again, putting **aside the** absence of proof to support this contention, it is controverted by Ms. Stone, who states that “[t]he 40 apartments currently vacant at [the shelter] represent 30% of the units in the facility. Our funding has been reduced accordingly and WIN can no longer afford to bear the costs of operating the shelter unless its reimbursement rate or the occupancy rate returns to planned levels.”

In sum, the court finds the temporary modification justified under the present circumstances and grants the cross motion to the extent indicated.

Finally, with respect to any future motion practice relating to this matter, the court advises the parties and intervenors to provide it with all relevant legal analysis including case law for each legal proposition identified and relied upon, as well as specific factual recitations to the record in support of their claims or defenses, and the submission, where appropriate, of affidavits from individuals with personal knowledge to support such claims or defenses, without which the court is materially hindered in the timely and efficacious resolution of the multitude of issues presented.

This constitutes the decision and order of the court.

E N T E R ;

HON. GERARD H. ROSENBERG
 J. S. C.