

Noto v Bedford Apartments Company

2004 NY Slip Op 30226(U)

September 22, 2004

Supreme Court, New York County

Docket Number: 0104650/2004

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN PART 6

Justice

X

KATHERINE NOTO,
Plaintiff(s),

INDEX NO. 104650/04
MOTION DATE 6-8-04
MOTION SEQ. NO. 01

- against -

BEDFORD APARTMENTS COMPANY,
Defendant(s).

X

The following papers, numbered 1 to 4 were read on this motion for a toll and cross-motion to dismiss.

<u>NUMBERED</u>	<u>PAPERS</u>
Notice of Motion/— Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3
Replying Affidavits (Cross-Motion)	4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

OCT 05 2004

NEW YORK
COUNTY CLERK'S OFFICE

IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM.

Dated: Sept 27, 2004


EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EILEEN BRANSTEN

PRESENT: J.S.C.
Justice

PART 6

Katherine Loto

INDEX NO. 104650/04

MOTION DATE 6-8-04

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

Bedford Apartments B.

The following papers, numbered 1 to 2 were read on this motion to/for intervene

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM

FILED

OCT 05 2004

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9-27-04

Eileen Bransten
EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----X
KATHERINE NOTO,

Plaintiff,

Index No: 104650/04
Motion Date: 6/8/04
Motion Seq. Nos.: 01, 02

-against-

BEDFORD APARTMENTS COMPANY,
Defendant.

-----X
PRESENT: EILEEN BRANSTEN, J.

Motion Sequence Numbers 01 and 02 are consolidated for disposition.

In this action plaintiff Katherine Noto (“Ms. Noto”) seeks, among other things, a declaration that defendant Bedford Apartments Company (“Bedford”) never properly deregulated apartment 15C of 168 West 86th Street, and thus, the apartment remains subject to rent stabilization.

In Motion Sequence Number 01, Ms. Noto moves for an Order tolling the period within which she has to accept the market-rate lease renewal offer issued by defendant Bedford on March 16, 2004. Bedford cross-moves for dismissal of the action and seeks payment of rent for the months subsequent to commencement of this action.¹

¹ This Court already ordered Ms. Noto to pay rent. *See*, June 8, 2004 So-Ordered Stipulation. She must continue to pay rent as well. Failure to make rent payments would deem Ms. Noto to have unclean hands and she would be wholly undeserving of any equity from the courts. Because rent payments have been made, this portion of the cross-motion is now moot. Ms. Noto, however, is Ordered to continue paying rent pending determination of her action.

In Motion Sequence Number 02, pursuant to CPLR 1012(a)(3) and 1013, William Wachtel (“Mr. Wachtel”), moves to intervene in this action as a plaintiff. Bedford opposes the motion.

Background

Katherine Noto, her husband (now ex-husband) William Wachtel and their children resided in a building owned by Bedford, which is located at 168 West 86th Street in Manhattan.² Ms. Noto was the named lessee for apartment 15B and Mr. Wachtel was the named lessee of apartment 15C. Although Noto and her husband paid rent separately, the wall between the two apartments was removed thereby adjoining the premises. Significantly, after Ms. Noto and her husband renovated the premises the two apartments became a combined living space: there was only one kitchen (located in 15C), a master bedroom suite (in 15B) and other bedrooms (in 15C).

High-Income-Deregulation Proceedings

In 1998, Bedford filed a petition for high income rent deregulation of apartment 15B. Bedford alleged that the legal rent for the apartment was over \$2,000 and requested verification of the household income in order to establish that it exceeded \$175,000 in each of the two preceding years.

² Ms. Noto and Mr. Wachtel separated in June 2000. They are now divorced. Ms. Noto and the couple’s three children (ages 13, 17 and 20) now reside in the apartments.

Ms. Noto responded that she alone leased apartment 15B and that her husband separately leased and occupied the adjacent apartment 15C.

The Rent Administrator disagreed, concluding that Mr. Wachtel was an occupant of apartment 15B and that his income could be considered in decontrol analysis. Based on the Department of Taxation and Finance's ("DTF") finding that the household income for the Noto/Wachtel family exceeded \$175,000 in both 1996 and 1997, the Rent Administrator determined that apartment 15B should be deregulated at the expiration of the current lease.

Ms. Noto filed a petition for administrative review ("PAR").

The Commissioner of DHCR denied the PAR, explaining that for purposes of rent decontrol the occupants of apartment 15C could be deemed occupants of apartment 15B and "the fact that the apartments have separate renewal leases, are registered separately, and have their rents paid separately is not relevant to the issue of whether the two apartments should be considered combined for purposes of luxury decontrol."

Ms. Noto next commenced an Article 78 proceeding challenging DHCR's determination. On December 19, 2002, this Court upheld DHCR's determination, holding that Mr. Wachtel's income could be considered in analyzing whether apartment 15B should be decontrolled. The Court explained that the "evidence unambiguously supports DHCR's decontrol determination based on Mr. Wachtel's occupancy of apartment 15B, the apartment occupants' total income as confirmed by DTF and the apartment's monthly rent."

Housing Court Proceedings

During the pendency of the Article 78 proceeding, Bedford litigated several proceedings commenced against Mr. Wachtel and Ms. Noto in Housing Court. One proceeding was brought to recover possession of apartment 15B ("15B Proceeding"). Bedford argued that apartment 15B had been deregulated and that the last rent stabilized lease had expired. Proceedings were also brought to recover possession of apartment 15C ("15C Proceedings"). Bedford argued that Ms. Noto and Mr. Wachtel's month-to-month tenancy had been terminated by service of a 30-day notice of termination and argued that apartments "15B and 15C as a single unified apartment are decontrolled." Kingsley Affirmation, Ex. B, at 5; Affirmation of David E. Frazer in Support of Motion for Tolling ("Aff. Supp."), Ex. Z. The third proceeding was commenced to recover possession of both apartments 15B and 15C ("15B and C Proceeding"). This time, Bedford argued that the tenants had violated a substantial obligation of tenancy by joining the two apartments without amending the certificate of occupancy.

Bedford moved to amend the caption in the proceedings. Ms. Noto opposed and cross-moved for summary judgment dismissal of the 15B Proceeding and the 15C Proceedings. Bedford, by separate application, moved for leave to discontinue all of the matters without prejudice.

In a Decision and Order dated January 22, 2004, Housing Court ordered discontinuance of the 15B and C Proceeding without prejudice. *Id.*, at 6. With regard to the 15B Proceeding, Housing Court concluded that “a valid cause of action * * * may well exist in the future. Consequently, the 15B proceeding will be dismissed, but, without prejudice to another proceeding.” *Id.*, at 7.

As to the 15C Proceedings, Ms. Noto argued that dismissal was warranted because apartment 15C had not been deregulated. She urged that the DHCR order only impacted Apt. 15B because Bedford had not petitioned for deregulation of apartment 15C. In response, Housing Court stated:

“Although, the DHCR order does not explicitly refer to Apt. 15C, this is only because Apt. 15C no longer exists. * * * [Bedford] must, therefore, still offer the market-rate lease for this combined space before commencement of any eviction proceeding. * * * As a result the space is still subject to the rent stabilization law and [Bedford’s] allegations of a month-to-month tenancy cannot be sustained. However, because the two apartments have been combined, a valid cause of action may well exist at some point in the future. * * * Therefore, the 15C proceeding will also be dismissed, but, without prejudice to another proceeding.”

Id., at 7.

On March 16, 2004, Bedford offered Ms. Noto and Mr. Wachtel a market rate lease for apartments 15B and 15C. Aff. Supp., at Ex. A. A letter accompanying the lease, addressed to Ms. Noto and Mr. Wachtel and referring to them as “tenants,” indicated that DHCR had issued an order deregulating the “apartment,” which was upheld by the court.

Accordingly, Bedford stated, it was offering a market-rate lease, which required a response within 10 days of receipt.

Pending Action

Less than 10 days later, on March 24, 2004, Ms. Noto commenced this action. In her complaint she asserts two causes of action. First, she alleges that apartment 15C was never deregulated by DHCR and, therefore, it remains subject to rent stabilization. Ms. Noto alleges that even while the deregulation proceeding went forward, Bedford always offered a separate lease for apartment 15C and that, as recently as 2002, it registered apartment 15C as rent stabilized. Aff. Supp., ¶¶ 9, 12. Ms. Noto seeks “a judgment declaring apartment 15C at 186 West 86 Street, New York, New York to be rent stabilized and plaintiff to be the tenant entitled to all the rights and benefits of rent stabilization.” Complaint, at ¶ 41. Second, she asserts that Bedford has prevented her from restoring the wall between apartments 15B and 15C and seeks “an order directing [Bedford] to cooperate with [her] restoration of the wall, including but not limited to, signing appropriate filings with the NYC Department of Buildings.” *Id.*, at ¶ 45.

Motion Sequence Number 01

On the same day that she filed her complaint, Ms. Noto moved for an order “tolling the period which [she] has to accept [Bedford’s] lease renewal offer dated March 16, 2004

pending the final determination of this action.” Order to Show Cause, at 1. Ms. Noto argues that DHCR has never authorized deregulation of apartment 15C.

Bedford cross-moves to dismiss the action in its entirety. Bedford argues that Ms. Noto’s claims are barred by *res judicata*. Affirmation in Support of Defendant’s Cross-Motion to Dismiss and in Opposition to Motion for a Preliminary Injunction (“Aff. Opp.”), at ¶ 2. Bedford also argues that Ms. Noto is not entitled to a toll, which in effect is a preliminary injunction, because she has not established, among other things, a likelihood of success on the merits, irreparable harm or that a balancing of the equities weighs in her favor. Aff. Opp., at ¶ 84.

Motion Sequence Number 02

Additionally, pursuant to CPLR 1012(a)(3) and 1013, Mr. Wachtel now seeks to intervene in the action as a party plaintiff. Mr. Wachtel contends that he is the tenant of record for apartment 15C, and as such, has a stake in this litigation. Mr. Wachtel bolsters his ex-wife Ms. Noto’s allegations of the “history of the apartment and the landlord’s bizarre attempt to deregulate only apartment 15B, while continuing to acknowledge that apartment 15C was rent stabilized.” Affidavit in Support of Motion to Intervene (“Aff. Inter.”), at ¶ 8.

Mr. Wachtel asserts that he was never a party to any DHCR rent deregulation proceeding and that he has a right to be heard as the status of his apartment is being adjudicated.

Bedford opposes the motion, arguing that if the complaint is dismissed, Mr. Wachtel's motion is moot. Alternatively, Bedford argues that Mr. Wachtel has no interest in the proceeding because he moved out of the residence, he does not claim a right to possess or occupy the apartment, the apartment is occupied solely by Ms. Noto and her children and any interest Mr. Wachtel had expired.

This Court disagrees with Bedford that the action is barred by *res judicata*. The Court, moreover, will allow Mr. Wachtel to intervene in this action to protect any rights he may have to apartment 15C. Finally, because Ms. Noto's claim may have merit, a preliminary injunction hearing before a Special Referee is essential. At the hearing Bedford can assert a full and vigorous defense in opposition to entry of an order tolling the time to respond to the market-rate lease.

Analysis

Cross-Motion to Dismiss the Complaint

Ms. Noto's action is not barred by *res judicata*. Neither the Article 78 judgment nor the Housing Court determination precludes assertion of the complaint. In the Article 78 proceeding, this Court limited its analysis to whether DHCR properly authorized deregulation of apartment 15B based on consideration of Mr. Wachtel's income. Nothing more was presented in that proceeding, the scope of which was very limited. Indeed, this Court did not have authority to look beyond the propriety of the administrative determination with regard

to apartment 15B; thus, the judgment was limited to that very narrow issue. The Housing Court dismissal, moreover, is not entitled to preclusive effect. Application of *res judicata* requires a final disposition on the merits. *See, e.g., Karniol v. Good Move Trucking, Inc.*, 281 A.D.2d 287 (1st Dep't 2001). Housing Court explicitly dismissed the proceedings "without prejudice." *See, Opp. Aff., Ex. B*, at 8.

To the extent Bedford argues--based on the Housing Court decision-- that collateral estoppel precludes relitigation of whether apartment 15C was deregulated, the Court rejects invoking the flexible doctrine, which is grounded on fairness and "should not be rigidly or mechanically applied," to these facts. *See, Avon Development Enterprises Corp. v. Samnick*, 286 A.D.2d 581, 582 (1st Dep't 2001). In the Housing Court proceedings, Bedford itself sought leave to discontinue all of the proceedings it had commenced without prejudice. *Opp. Aff. Ex. B*, at 5. Ms. Noto opposed the discontinuance simply because she wanted conclusive dismissal of the eviction proceedings. All that was truly at stake in the Housing Court proceedings was what type of dismissal of the eviction proceedings would be rendered (specifically, whether the proceeding would be dismissed with or without prejudice). Either way, there was no doubt that the eviction matters would be dismissed and Ms. Noto would not be evicted.

In that posture, Ms. Noto had absolutely no incentive to fully and vigorously contest the issue of whether apartment 15C was deregulated. Furthermore, because eviction

proceedings were dismissed against her and Mr. Wachtel, Ms. Noto had no incentive to ultimately appeal the Housing Court determination. Certainly, she would not spend money and require expenditure of additional judicial resources to address whether dismissal of the Housing Court proceedings should have been with prejudice and whether certain statements in the decision were erroneous. Ms. Noto's lack of incentive to fully and completely litigate the issue militates against application of collateral estoppel to bar litigation of her claim now. *See, Shaid v. Consolidated Edison Co.*, 95 A.D.2d 610, 615 (2d Dep't 1983).

Therefore, Bedford's cross-motion to dismiss is denied.

Motion to Intervene

Pursuant to CPLR 1013, Mr. Wachtel is permitted to intervene as a party plaintiff. The Court, in its discretion, is permitted to allow Mr. Wachtel to intervene in this action. *See, Matter of Nestor v. New York State Div. of Hous. and Community Renewal*, 257 A.D.2d 395, 396 (1st Dep't 1999), *lv. dismissed and denied* 93 N.Y.2d 982 (1999). Mr. Wachtel has established that he has been the tenant of record for apartment 15C. Thus, he potentially has an interest in the outcome of the litigation. Indeed, the market-rate lease offered by Bedford itself is addressed to "Katherine Noto and William Wachtel" as "tenants." Supp. Aff., Ex. A. It would be unjust to let this action proceed in Mr. Wachtel's absence.

In addition, the motion comes before any discovery; thus, intervention undoubtedly will not “unduly delay the determination of the action or prejudice the substantial rights of any party.” CPLR 1013.

Toll of Time to Accept Lease Renewal

Bedford correctly points out that Ms. Noto’s request for a tolling of the time to respond to the market-rate lease offer pending determination of this action is a request for a preliminary injunction. To obtain a preliminary injunction, the movant must “demonstrate a probability of ultimate success on the merits, irreparable injury in the event that injunctive relief is denied and a balancing of the equities in its favor.” *Wall Street Garage Parking Corp. v. New York Stock Exchange, Inc.*, ___ A.D.3d ___, 2004 WL 1746357 (1st Dep’t Aug. 5, 2004). On these papers, Ms. Noto has not made the requisite showing of entitlement to injunctive relief.

The Court, however, Orders that a hearing be held before a Special Referee to ascertain, based on a more complete record, whether Ms. Noto is entitled to such relief (specifically, whether she is likely to succeed on the merits, whether she will suffer irreparable injury and whether the balance of equities weighs in her favor). Bedford will have a full and fair opportunity to set forth evidence to the contrary.

Significantly, in arguing that Ms. Noto does not have a likelihood of success on the merits, Bedford’s reliance on *Bianchi v. New York State Div. of Hous. and Community*

Renewal, 5 A.D.3d 303 (1st Dep't 2004), *lv. denied* (June 24, 2004), is entirely misplaced. In *Bianchi*, DHCR deregulated two apartments for purposes of the luxury decontrol laws. Here, by contrast, although the Court has little doubt that DHCR could deregulate apartment 15C on the exact same grounds as it deregulated apartment 15B, this Court has absolutely no evidence that DHCR actually deregulated apartment 15C or that it treats apartments 15B and 15C as one unit for all purposes.

Accordingly, it is

ORDERED that Ms. Noto's motion seeking a tolling of the period within which she has to accept the market-rate lease renewal offer issued by Bedford on March 16, 2004, is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determinations of the Special Referee or the designated referee; it is further

ORDERED that the issue of whether Ms. Noto is entitled to a preliminary injunction tolling the period within which she has to accept the market-rate lease renewal offer issued by Bedford on March 16, 2004 is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; it is further

ORDERED that a copy of this order with notice of entry shall be served by Ms. Noto's counsel within 21 days of the date of this Decision and Order on the Clerk of the Judicial Support Office (Room 311) so that the Clerk can arrange a date--for the earliest possible time--for the reference to a Special Referee; it is further

ORDERED that if Ms. Noto's counsel fails to serve this Order on the Clerk of the Judicial Support Office within 21 days, the motion will be denied in its entirety; it is further

ORDERED that pending the preliminary injunction hearing the status quo ante be maintained, including Ms. Noto's obligation to pay rent monthly at the rate agreed on in the parties' June stipulation; it is further

ORDERED that Bedford's cross-motion to dismiss is denied; it is further

ORDERED that William Wachtel's motion to intervene is granted and William Wachtel is permitted to intervene in the above-entitled action as a party plaintiff; it is further

ORDERED that William Wachtel is hereby permitted to serve his complaint upon the attorneys for the plaintiff and the defendant within 20 days from service of a copy of this Order with notice of entry; and it is further

ORDERED that the attorney for William Wachtel shall also serve a copy of this Order with Notice of Entry upon the Clerk of the Court and upon the Clerk of the Trial Support

Noto v. Bedford Apartments Company

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Office (Room 158), who are directed to amend their records to reflect the addition of William Wachtel as a party plaintiff.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
September 21, 2004

ENTER



Hon. Eileen Bransten

FILED
OCT 05 2004
NEW YORK
COUNTY CLERK'S OFFICE