[*1]

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

PRESENT: EDWARD H. LEHNER PART 19
*Justice*

0114083/2001

QUILES, MARIA
VS
TERM EQUITIES

SEQ 01

DISC

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance with accompanying memorandum decision

FILED
AUG 16 2004
COUNTY CLERK'S OFFICE

AUG 16 2004

Dated: _____

_____ J.S.C.

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

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 : IAS PART 19

----------x

MARIA QUILES, VICTOR GUZMAN, SERAFIN CALO, EMILIA GARCIA, MARIA E. LEDESMA and CEFERINA OYOLA,

Plaintiffs,

INDEX NO. 114083/01

- against -

TERM EQUITIES, NASSER FARHADIAN and KEIVAN FARHADIAN, and THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Defendants.

----------x



EDWARD H. LEHNER, J.:

The plaintiffs in this action are six tenants who formerly resided at the building known as 82 West 105th Street in Manhattan, four of whom were subject to the Rent Stabilization Law ("RSL") and two of whom were subject to the City Rent Control Law ("RCL").

On October 29, 1998 a fire severely damaged the building and on November 2 the Department of Buildings ("DOB") ordered it vacated because of an "imminent danger to the safety and life of the occupants". Plaintiffs then applied to the State Division of Housing and Community Renewal ("DHCR") for a reduction in rent and, by order dated February 3, 1999, the local Rent

Administrator issued an order to each plaintiff establishing that:

> "pursuant to Section 2522.6 that the rent on October 29, 1998 was $1.00 per month, based on the owner's failure to comply with the requirements of Section 2522.4(d), which amount is the legal regulated rent for the housing accommodation as of October 29, 1998, the date of the fire which caused the tenant to vacate involuntarily."

The order concluded that its issuance "entitles the tenant upon the payment of $1.00 per month to be restored to occupancy of the subject apartment".

By order dated August 13, 1999, the owner's petition for administrative review ("PAR") was denied and the order of the Rent Administrator was affirmed. On the PAR the defendant owner Term Equities relied on an Advisory Opinion dated April 21, 1998 (the "Advisory Opinion") issued by counsel to DHCR and sent to the owner's then attorneys regarding a different building, which opined that there "is no requirement in the rent laws or regulations that an owner construct a new residential building on a site where a residential building has been completely destroyed by fire", and concluded:

> "However, if for whatever reason, an owner did choose to construct a new building, because there is no time limit with which such construction must take place, to require the owner to offer former tenants the right to occupy an apartment in such building would result in a lack of finality and difficulties in administration regarding a right to occupancy which might not take effect for any number of years."

The opinion emphasized that the conclusion expressed therein was based on a fire that "caused the building to burn to the ground", and cautioned that the "razing of a fire-damaged building resulting from an economic decision of the owner to do so would change our opinion completely."

In its decision denying the owner's PAR, it was noted that the owner did not dispute the reduction of the rent to $1 as of the date of the fire, but "[i]nstead, the owner wanted the Administrator to address a situation that had not yet occurred – the rights of the parties should the owner determine at a future time to raze the fire damaged structure and create a new building". However, in reference to the Advisory Opinion, the decision concludes by noting that in such opinion it was stated that "if the owner razed a fire-damaged building due to an economic decision that 'would change our opinion completely'". No appeal was taken from the decision on the PAR.

On February 14, 2000, the owner executed an application for an alteration permit with DOB seeking to create 7 apartments on each floor in lieu of the 4 units that existed at the time of the fire. In that application the owner indicated that it had not notified DHCR of the intention to file for the permit nor had it complied with the requirements imposed by DHCR as a precondition for the filing thereof.

By letter from the owner's then counsel dated July 18, 2000, each of the plaintiffs was informed that the owner determined that it was under no obligation to restore "your former apartment to its former state", and that the tenant should "make such alternate housing plans as you deem necessary". Notwithstanding the decision on the PAR, counsel in that letter advised each of the plaintiffs that the owner's position was based on the Advisory Opinion.

Although in April 2001, the plaintiffs instituted proceedings in the Civil Court to have their apartments restored to their original configurations and to enjoin defendants from changing such configurations and leasing the apartments of anyone other than plaintiffs, that proceeding was discontinued in June 2001 without prejudice to the determination to be made in this action.

By letter dated October 16, 2001, defendants were notified by DOB that the alteration permit would be revoked in ten days "on the basis that you failed to provide evidence of notification of DHCR as property contains housing accommodations, subject to control under Chapter 3 of Title 26 of the Administrative Code" (the RCL). Shortly thereafter, a "Report and Certification to Alter or Demolish Occupied Housing Accommodations" dated October 25, 2001 (the "Certification") was filed with DHCR by the owner in which it is asserted that no certificate of eviction was required "as the interior of the

building was destroyed due to fire", and that the DHCR orders reducing the rent to $1.00 per month "held that the owner is not required to restore the former units or restore the former tenants to possession of the former units in that said former units no longer exist". However, no proceedings were ever instituted before DHCR to terminate plaintiffs' tenancy rights, nor were any formal notices sent to plaintiffs attempting to affect these rights.

Presently before the court is a cross-motion by plaintiffs for summary judgment on their first cause of action for wrongful eviction[1]. In that cause of action, each plaintiff seeks to recover $750,000 in actual damages for wrongful eviction, which they request to have trebled pursuant to RPAPL §853. Although not before the court on the present motion, in their fifth cause of action plaintiffs seek to have defendants "repair the premises, return plaintiffs' apartments to their original reconfiguration and restore plaintiffs to possession of their respective apartments at the premises". While this cause of action thus seeks to have the building reconstructed and, in essence, to evict existing tenants who entered into possession after the renovation, plaintiffs would appear to be agreeable to waive their asserted reoccupancy rights if awarded damages,

---

[1] Although the pleadings are not attached to the present cross-motion for summary judgment nor on file in the County Clerk's office, they are attached to a discovery motion in this action which has been adjourned to September 24.

although this has not yet formally been agreed upon (Tr. p. 10).

The legal relationship among the parties essentially is based on the administrative determination of the Local Administrator reducing the rent of each of the plaintiffs to $1.00 per month and directing that each of them be restored to possession upon reconstruction of their units, which direction was affirmed on the PAR. Such order was in accord with Operation Bulletin 95-2 issued December 15, 1995 recognizing the concept of "constructive occupancy", whereby upon the payment of a $1.00 nominal rental while a "vacate order is in effect", a tenant is permitted "to resume occupancy without interruption of his or her rent stabilized status, upon restoration of the housing accommodation to a habitable condition". The Bulletin goes on to provide that where a "building has been substantially rehabilitated, constructive occupancy will have the effect of excepting the housing accommodation from exemption from rent regulation based up such rehabilitation". The effect of this Bulletin with respect to the concept of constructive occupancy was recognized by the court in Fernandez v. DHCR, 193 Misc. 2d 511 (Sup. Ct., N.Y. Co. 2002); rev'd. on other grds., 3 AD3d 366 (1st Dept. 2004).

The court observes that while it may not agree that there should be a difference in legal consequence depending on whether a building is burned to

the ground or only substantially damaged as the "lack of finality and difficulties in administration regarding a right to occupancy", as referred to in the Advisory Opinion, would not appear to differ depending on the extent of the damage. However, the court cannot say that such conclusion lacks a rational basis, and the "judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" [Ostrer v. Schenck, 41 NY2d 782, 786 (1997)]. See also, Verbalis v. DHCR, 1 AD3d 101, 107 (1st Dept. 2003). In any event, since no appeal was taken from the PAR, the administrative decision is binding upon the parties hereto.

The statement by the owner in the Certification that the "DHCR orders held that the owner is not required to restore the former ... tenants to possession of the former units" was totally false as the orders affirmed on the PAR held directly to the contrary.

If the building were considered to have been demolished, no eviction of a plaintiff subject to the RCL could occur without the issuance of a certificate of eviction by DHCR [Administrative Code §26-408(b)(4)], and, with regard to tenants subject to the RSL, without the approval of DHCR pursuant to 9 NYCRR 2524.5(a)(2). In any event, since here no application for eviction of the plaintiffs was ever made to DHCR, their rights of "constructive occupancy"

were never terminated. Hence, when they were denied the right to reassume possession of their apartments, they were unlawfully evicted. See, Akos Realty Corp. v. Vandemark, 157 AD2d 632 (1st Dept. 1990), where notwithstanding a determination in an Article 78 proceeding that the landlord was not required to reinstate the tenant to her apartment after a fire gutted the unit, the court observed that while the tenant "is enjoined from occupying the premises due to safety consideration, she cannot be evicted from the apartment until (the landlord) commences a proceeding to terminate her right of possession"(p. 634).

Since plaintiffs have been denied their right to return to their units after the renovation of the building, in contravention of the orders issued by DHCR, they have been unlawfully evicted and therefore are entitled to summary judgment on their claim of liability as set forth in the first cause of action. Upon the filing of a note of issue and statement of readiness the Clerk shall place this case on the calendar for an assessment of damages.

With respect to the claims for treble damages, RPAPL §853 provides:

> "If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrongdoer."

Prior to the 1981 amendment to this section the element of force was a requirement to seek a remedy thereunder. However, that year the words "or by unlawful means" were added (Ch. 487). In determining the intent of this amendment, the Appellate Division decisions in Mayes v. UVI Holdings, Inc. 280 AD2d 153, 160 (1st Dept. 2001) and Lyke v. Anderson, 147 AD2d 18, 24 (2d Dept. 1989), both referred to the memorandum of the amendment's sponsor, Assemblyman Richard Gottfried, wherein he wrote: "Present procedural remedies only apply where the illegal eviction was carried out by 'force'. However, these evictions are usually carried out by removing the tenant's possessions while he or she is out, or by plugging or changing the door lock – actions beyond the narrow legal definition of force." (1981 NY Legis. An. at p. 256). While it is doubtful that failing to restore a tenant to possession when a building is reconstructed after a fire would come within the intent of the remedy provided by §853 as amended, the issue is not before the court on this motion by plaintiffs for summary judgment on liability. See in general, Mayes v. UVI Holdings, Inc., supra at pp. 159-161.

While there is no motion before the court with respect to the cause of action wherein plaintiffs assert the right to have the building reconstructed to the configurations prior to the fire and to be restored to possession, it would seem

that if plaintiffs wish to pursue such claim the tenants now in occupancy would have to be joined as necessary parties as their rights to possession would be affected. Further, it would seem that the issue of damages would be affected by whether plaintiffs are entitled to reinstatement.

This decision constitutes the order of the court.

Dated: August 16, 2004

J.S.C.