

**Katz Park Ave. Corp. v Jagger**

2005 NY Slip Op 30128(U)

May 25, 2005

Supreme Court, New York County

Docket Number: 0109310/2004

Judge: Leland G. DeGrasse

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

PRESENT: LELAND DeGRASSE  
*Justice*

PART 25

Index Number : 109310/2004  
KATZ PARK AVENUE CORPORATION

vs  
JAGGER, BIANCA

Sequence Number : 2  
REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_  
MOTION DATE FEB 03 2005  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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**  
MAY 27 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: MAY 25 2005

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  
 COUNTY OF NEW YORK

-----X  
 KATZ PARK AVENUE CORPORATION,

Plaintiff,

-against-

Index No. 109310/04

BIANCA JAGGER, et al,

Defendants.  
 -----X

**DeGrasse, J.:**

Motion sequences 2 and 3 are consolidated. Defendant moves for an order consolidating this action and Jagger v Katz Park Avenue Corp. (Index No. 602947/03) and granting her leave to renew her motion to dismiss the complaint. Plaintiff cross-moves for summary judgment. By complaint filed on June 23, 2004, plaintiff seeks ejectment on the ground that defendant's rent stabilized apartment is not her primary residence. Defendant's lease expired on February 29, 2004. On or about November 1, 2003, plaintiff served defendant with a notice for renewal of the parties' lease pursuant to Rent Stabilization Code (9 NYCRR) § 2523.5 (a). By operation of the Code provision and the notice itself, defendant had 60 days from the date of service to renew the lease upon terms set forth in the notice. Nevertheless, on November 25, 2003, plaintiff served defendant with a termination notice pursuant to RSC §§ 2524.2 and 2524.4 ©. The stated ground for termination was defendant's failure to use the apartment as her primary residence. On or about December 22, 2004, defendant served plaintiff with an executed renewal form by which she agreed to enter into a one-year renewal lease.

RSC § 2523.5 (a) provides that "the owner *shall* [emphasis added] furnish to such tenant a copy of the fully executed renewal lease form bearing the signatures of the owner and the tenant

within 30 days of the owner's receipt of the renewal lease form signed by the tenant." Therefore, defendant's acceptance of the proposed renewal on the terms set forth in plaintiff's notice created a binding lease agreement (*see 123 W. 15, LLC v Compton*, 4 Misc 3d 138; 2004 NY Slip Op 50938 [U]; 2004 WL 1924042 [App Term, 1<sup>st</sup> Dept 2004]). "A tenant should not have to be placed in the position of having to parse equivocal notices given by the landlord in renewal situations" (*id.*). *Alsaedi v Ninth Avenue Realty, LLC* (2 AD3d 233 [2003]) and the other cases plaintiff cites are distinguishable because they do not involve the Rent Stabilization Code. Thus, plaintiff's ejectment claim cannot be maintained because the notice of termination was superseded by defendant's renewal of the lease.

Defendant has relied upon the parties' purported agreement to exempt the apartment from the Rent Stabilization Law. Such an agreement is a nullity. Deregulation is available only by statutorily specified means (*see Rent Stabilization Law of 1969 Administrative Code of the City of NY § 26-503*). It cannot be achieved by private compact (*390 W. End Assocs. v Harel*, 298 AD2d 11, 15 [2002]). Also, contrary to defendant's assertion, this action was not barred by the discontinuance of the parties' prior summary proceeding without prejudice. Defendant's prior motion to dismiss the complaint was denied on the ground that her papers did not include a copy of the complaint. The omission is fatal to the motion (*see Soule v Lozado*, 232 AD2d 825 [1996]).

Plaintiff bases its motion for summary on the fact that defendant, a British citizen, in a nonimmigrant who has entered the United States on a B-2 tourist visa. Plaintiff argues that defendant's immigration status precludes her from claiming any address in the United States as her primary residence. Pursuant to 22 CFR § 41.31, an alien can be classified as a nonimmigrant

visitor for business (B-1) or pleasure (B-2) if the consular office is satisfied that the alien qualifies for entry into the United States under the provisions of the Immigration and Nationality Act § 101 (a) (15) (B) (8 USC § 1101 [a] [15] [B]). To qualify under the Act, an alien must have a residence in a foreign country which she does not intend to abandon and must be visiting the United States temporarily for business or pleasure. To obtain a B-2 visa an alien must establish that her stay in the United States is temporary, or, stated differently, that her domicile is in another country. A person's domicile is where that person has established a fixed habitation and intends to remain permanently or indefinitely (*Lew v Moss*, 797 F2d 747, 749-750 [2004]).

Plaintiff seeks summary judgment on the erroneous premise that the concepts of domicile and primary residence can be equated. As explained by the court in *Sommer v Turkel, Inc.*, 137 Misc 2d 7, 9-10 [App Term, 1<sup>st</sup> Dept 1987]),

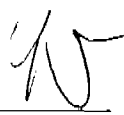
The two are not synonymous. Thus, one may be domiciled in another state, reside predominantly in a New York City apartment, and be viewed as a primary resident of that apartment. On the other hand, a tenant's domicile may be in New York City, but if he is residing elsewhere almost all of the time, year after year, it would be illusory to maintain that the New York apartment is the tenant's primary residence.

For the foregoing reasons, defendant's motion for leave to reargue her motion to dismiss the complaint is denied. Plaintiff's cross motion for summary judgment is denied. Pursuant to CPLR 3212 (b) summary judgment is granted in favor of defendant and plaintiff's ejectment cause of action is dismissed. Plaintiff's remaining causes of action and defendant's counterclaims are severed and continued. The court makes no determination regarding the validity of a second notice of termination served by plaintiff on or about November 10, 2004. The same was served after this action was commenced and is not addressed in the pleadings.

It is undisputed that some of defendant's counterclaims in this action and the claims she makes in her action against plaintiff stem from allegations of toxic mold in the apartment. Nevertheless, consolidation would be a potential source of jury confusion because it would cause each party to appear as plaintiff and defendant in the consolidated action (*see Bass v France*, 70 AD2d 849 [1979]). A joint trial would be more appropriate. Accordingly, this action shall be jointly tried with *Jagger v Katz Park Avenue Corp.* which is pending in this court under index number 602947/03. Upon payment of the appropriate calendar fees, the filing of notes of issue and statements of readiness in each of the two actions, and upon the filing of a copy of this order with notice of entry on the Clerk of the Trial Support Office, the said Clerk shall place both actions upon the trial calendar for a joint trial.

Upon the court's initiative, discovery shall be supervised by a special referee pursuant to CPLR 3104. All subsequent discovery motions and applications shall be made to the special referee in the first instance. Plaintiff shall file a copy of this order with the IAS Judicial Support Office within 20 days after entry.

Dated: May 25, 2005

  
\_\_\_\_\_  
J. S. C.

**FILED**  
MAY 27 2005  
NEW YORK  
COUNTY CLERKS OFFICE