

**Matter of Lawlor v 543 Second Ave. LLC**

2005 NY Slip Op 30431(U)

December 1, 2005

Supreme Court, New York County

Docket Number: 101697/04

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN  
Justice

PART 17

*KATHLEEN PAUL LAW OR*  
*543 Second Avenue NE*

INDEX NO. 10169767  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

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

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is denied in accordance with the attached*

COUNTY CLERK  
NEW YORK  
DEC - 8 2005  
**FILED**

Dated: 12/1/05

*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

**EMILY JANE GOODMAN**

\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : I.A.S. PART 17

-----X  
In the Matter Of The Application Of  
KATHLEEN STAR LAWLOR,

Plaintiff-Petitioner,

Index No. 101697/04

-against-

543 SECOND AVENUE LLC and HEE NAM BAE,

Defendant-Respondents.

-----X  
**EMILY JANE GOODMAN, J.S.C.:**

KATHLEEN STAR LAWLOR (“Lawlor” or “Plaintiff”) seeks an order determining (1) that 543 SECOND AVENUE LLC (the “LLC”) and HEE NAM BAE (“Bae”) (collectively “Defendants”), violated New York City Administrative Code 26-408, (2) that she is entitled to restoration to the apartment (the “Apartment”) located at 543 Second Avenue (the “Premises”), or relocation to suitable alternate housing, and (3) that she is entitled to treble damages as the result of her unlawful eviction, plus attorney’s fees and cost. Defendants oppose the motion on the ground the Lawlor has not demonstrated a likelihood of success because her claim for restoration is time barred and because she has not established “her presence at the subject premises by competent proof.” As a result of the latter contention, and in order to determine whether an injunction was proper, the Court held a hearing on September 14, 2004 to determine

whether Lawlor was entitled to succession rights.<sup>1</sup>

The motion for injunctive relief, declaratory relief, and damages is denied.

Assuming that the Apartment was subject to rent regulation, Lawlor established her rights to succeed to the Apartment.<sup>2</sup> However, she has failed to establish, at this early stage, a likelihood of success that she will prevail under New York City Administrative Code 26-408 (2), and has failed to establish that she is entitled to restoration or relocation to suitable alternative housing. Further, her request for treble damages can not be determined in a summary fashion as an injunction does not lie where the relief sought is

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<sup>1</sup>At the hearing, Defendants objected, for the first time, that the hearing was premature and irrelevant to the determination of the motion (Tr 4). However, as Defendants were notified of the Court's intention to hold the hearing months before the hearing was held, and did not object until the actual hearing date, the objection is waived. Moreover, the relevance of the hearing was established by Defendants themselves, who raised the issue in their opposition papers, by maintaining that Lawlor had not established her entitlement to succession rights. Pursuant to CPLR 6313, a hearing was proper.

<sup>2</sup>Although Defendants never previously maintained that the status of the Apartment was at issue, Defendants maintain in their Memorandum of Law that Lawlor failed to prove that the Apartment was subject to rent control. Lawlor's attorney, surprisingly, submitted no evidence at the hearing concerning the regulatory status of the Apartment, despite the opportunity to subpoena the appropriate government agency. The Court notes evidence exists indicating that the Apartment is subject to rent control. In Defendants' Affirmation In Opposition, a copy of the contract of sale for the Premises is attached, reflecting, for the Apartment, the number "180" under the column designated "Rent," "No" under the column designated "Lease," and "yes" under the column designated "Controlled/Stabilized" (Ex 1 to Affirm In Opposition). Defendants also acknowledge that they believed that the Apartment was subject to rent regulation and previously commenced a non-payment proceeding seeking monthly rent of \$180.00 (*id.* ¶ 7). Thus, other than "putting Plaintiff to her proof," it appears that Defendants have no good faith basis to dispute the regulatory status of the Apartment. However, the Court makes no finding, at this point in time, that the Apartment is subject to rent control or rent stabilization.

monetary damages.

### Background

The LLC purchased the Premises on or about April, 2002. Hee Nam Bae is a member of the LLC. In the underlying action (improperly brought as a special proceeding),<sup>3</sup> Lawlor alleges that she is the disabled daughter of deceased rent-controlled tenants and that she grew up in the Apartment. On October 10, 2002, a vacate order was placed on the Premises by the Department of Buildings, closing it due to imminent danger to the life and safety of the occupants. It is undisputed that the building no longer exists. In the underlying action, Lawlor alleges that Defendants intentionally rendered the Premises unsafe and purposefully impaired its structural integrity for the purpose of causing the placement of a vacate notice in order to evict Lawlor in circumvention of the protections and procedures under the New York City Rent Control Laws.

### Discussion

To be entitled to a preliminary injunction, Lawlor must show a likelihood of success on the merits, the danger of irreparable injury in the absence of an injunction, and a balance of the equities in her favor (see Grant Co. v Srogi, 52 NY2d 496, 517 [1981]). In the absence of a clear right to the relief demanded, injunctive relief should not be granted until all of the issues are fully explored and the matter is resolved after trial (see

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<sup>3</sup>By Decision and Order dated November 30, 2005, the Court converted the proceeding to an action and deemed the Petition a Complaint (see CPLR 103 [c]).

Little India Stores, Inc. v Singh, 101 AD2d 727, 728 [1st Dept 1984]). Damages compensable by a monetary award do not constitute irreparable harm (see SportsChannel America Assoc. v NHL, 186 AD2d 417, 418 [1st Dept 1992]). Courts are loathe to grant a mandatory injunction (as requested here), whereby the party would obtain the ultimate relief, pendente lite (see Morgan v New York Racing Assoc., 72 AD2d 740, 741 [1st Dept 1979]). Generally it is reversible error to grant a request for the ultimate relief under the guise of a provisional remedy (see St. Paul Fire and Marine Ins. Co. v York Claims Services, Inc., 308 AD2d 347 [1st Dept 2002]).

#### Likelihood of Success

As Defendants correctly note, to obtain any of the requested relief, Lawlor must establish that she is entitled to succession rights to the Apartment. To establish succession rights, an occupant must prove that the Apartment was rent regulated, and that the occupant was a family member who resided with the tenant prior to that tenant's vacature "as a primary residence for a period of no less than two years, or where such person is a "senior citizen" or a "disabled person," . . . for a period of no less than one year" (NY City Rent and Eviction Regulations [9 NYCRR] §2204.6). The overwhelming testimony and documentary evidence establishes that Lawlor continuously lived in the Apartment with her parents, since she was born on December 22, 1976 until October 10, 2002, when the building was vacated (Tr 84-85). Lawlor's mother died on March 2, 1986 (Plaintiff Ex 1) and her father, on May 3, 1992 (Plaintiff Ex 2). Therefore, Lawlor seeks

succession rights from her father based on her co-occupancy for the period of two years prior to his death. Thus, Defendants acknowledge that “[i]n order for [Lawlor] to prevail here she would have to show that she had continuously resided with the father for [two] years prior to that which would be May of '90” (Tr 6). Defendants agree that the relevant time period is 1990-92 (Tr 6).

At the hearing, the Court heard testimony from Plaintiff, Plaintiff’s older sister, and Plaintiff’s two former neighbors. One neighbor, Andrea Persaud testified that, for 27 years, she lived two buildings away, and knew the Lawlor family because a relative of Persaud’s also lived in the Lawlor’s building (Tr 37). As a child Persaud played with the Lawlor children (Tr 39) and saw them regularly because they all attended the same girls’ club (Tr 41, 44). Persaud saw Lawlor frequently in 1991 and 1992 when their social circles interacted (Tr 44, 46). Persaud also testified that she visited the Apartment when Lawlor was there, and observed Lawlor entering or leaving the building almost every day (Tr 45, 49). Persaud also testified that she knew Lawlor’s father died and that before his death, she would see him almost every day at the window (Tr 46).

Another neighbor, Joyce Pena, testified that she knew Lawlor because she lived at the Premises from 1973 to 1986 and knew Lawlor’s parents, who also lived there at the same time (Tr 24- 25). Pena testified she lived on the 4<sup>th</sup> floor of a walk up (the top floor of the Premises) and always had to pass the Apartment (Tr at 25, 27). She further testified that she visited the Apartment for holidays and special occasions (Tr 27).

Moreover, she testified that Lawlor was born at Lenox Hill hospital and lived with her parents in the Apartment continuously since birth (Tr 28-30). After 1986 Ms. Pena moved a block away, but continued to see the Lawlor family in the neighborhood and would send the family Christmas gifts, observing Lawlor's mother waiving from the window when the gifts were received (Tr 31-32, 34). After her mother died, Lawlor's sister testified that Lawlor resided with her father and the other Lawlor siblings, and that the family never had any other residence (Tr 56, 72).

The Court found the testimony of all the witnesses very credible and detailed. Defendants produced no witnesses. Defendants also conceded that all of the medical and school records (from Lawlor's childhood), reflect the Premises' address (Tr at 86, 89). Defendants also admit that they had no evidence to controvert the fact that the Lawlor family lived in the Apartment since 1976 (Tr 5). The death certificates of both Jessica Lawlor and Leon Lawlor bears the Premises' address.

Faced with the overwhelming evidence in favor of Lawlor, Defendants speciously argue that Lawlor has not met her burden to establish succession rights because she presented no evidence that Leon Lawlor was her father,<sup>4</sup> nor that he resided in the Apartment as his primary residence, as the tenant of record. In light of the evidence, the arguments are frivolous and potentially sanctionable. Defendants offer absolutely no proof to contradict the voluminous evidence. Instead, they unpersuasively attempt to

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<sup>4</sup>Lawlor's sister testified that her mother was Jessica Godwin Lawlor and that her father was Leon Lawlor (Tr 52).

poke holes in various documents or testimony. Thus, Defendants complain that Lawlor did not introduce mail or other receipts at the hearing, despite being only a teen during the requisite period, and, despite the fact that one normally would not keep such records for 17 years. Moreover, having left under a vacate order, it is unlikely that such papers, even if possessed, would be taken. Defendants also maintain that the medical, educational and other documentary proof the years 1990 to 1992 was entitled to little weight because there was no indication that the makers “verified” that the address and further complain that all the witnesses were “interested” witnesses. However, the non-party witnesses were not “interested” witnesses; even if they were, the Court is entitled to evaluate and credit their testimony.

The testimony clearly established that Leon was Lawlor’s father, and that he resided in the Apartment as his primary residence from at least 1973 until his death (Tr 24, 28, 53-57). As Lawlor correctly notes, there is a legal presumption that a minor child resides with his or her parents (see Cox v J.D. Realty Assoc., 217 AD2d 179 [1st Dept 1995]). Although the Court need not resort to the presumption because the evidence in this case is overwhelming, the presumption is applicable and should not, as Defendants contend, be disregarded.<sup>5</sup>

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<sup>5</sup>The Court does not consider Lawlor’s belated documentary submissions in her Further Supporting Memorandum On Behalf Of Petitioner (see Mulligan v Wetcheler, 39 AD2d 102 [1<sup>st</sup> Dept 1972]). The Court admonishes Lawlor’s counsel for not following the proper procedure, which would entail moving this Court for an order allowing the reopening of Lawlor’s case for further proof.

Thus, assuming that the Apartment is subject to rent regulation, the Court finds that Lawlor has succession rights to the Apartment. However, the motion is denied because Lawlor failed to establish that she has a clear likelihood of success to obtain the ultimate relief of restoration (or relocation to alternative suitable housing) under New York City Administrative Code 26-408. That section provides that a rent controlled tenant may not be evicted except for certain enumerated grounds (not applicable here) unless the landlord has obtained a certificate of eviction. Here, however, Lawlor was not evicted pursuant to a certificate of eviction, but rather was ousted pursuant to a vacate order. Lawlor's counsel has not articulated how New York City Administrative Code 26-408 supports her requested relief. As to her request for a finding that Defendant is liable for treble damages, an injunction may not be obtained for money damages.

It is hereby

ORDERED that the motion for declaratory relief, injunctive relief, and damages is denied; and it is further

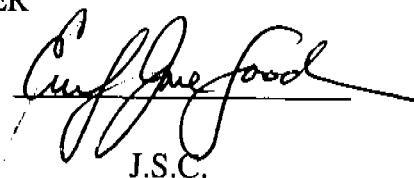
ORDERED that Defendants are directed to send written notification to Plaintiff and the Court of any intent to dispose of, or encumber, any interest in the land where the Premises once stood at least five business days before such actually disposing of, or

encumbering, said interest.

**This constitutes the Decision and Order of the Court.**

Dated: December 1, 2005

ENTER



A handwritten signature in cursive script, appearing to read "Emily Jane Goodman", written over a horizontal line.

J.S.C.

**EMILY JANE GOODMAN**

**FILED**  
DEC - 8 2005  
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