

Ortiz v Five Seven Naught Assoc.

2006 NY Slip Op 30596(U)

April 18, 2006

Sup Ct, New York County

Docket Number: 402804/05

Judge: Walter B. Tolub

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

PRESENT: TOLUB
Justice

PART 15

ORTIZ, ARGENTINA,
ET AL

INDEX NO.

402804/05

MOTION DATE

MOTION SEQ. NO.

01

MOTION CAL. NO.

FIVE SEVEN NAUGHT ASSOC.,
ET AL

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

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Mtn Seq 001, 003, 004 & 005 are
consolidated.

Dated: 4/26/06

WALTER B. TOLUB

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED
APR 26 2006
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED

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

[Handwritten signature]

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

PRESENT: TOLUB
Justice

PART 15

ORTIZ, ARGENTINA,
ET AL
- v -
570156 LLC,
ET AL

INDEX NO. 402804/05
MOTION DATE _____
MOTION SEQ. NO. 03
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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
APR 26 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/12/06

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

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

PRESENT: _____
Justice

PART 15

ARGENTINA ORTIZ

INDEX NO.

402804/05

MOTION DATE

MOTION SEQ. NO.

4

MOTION CAL. NO.

- v -
570156 LLC

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

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 DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

APR 26 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/18/06

WALTER H. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

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

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

PRESENT: _____
Justice

PART 15

Argentina Ortiz

INDEX NO. 6284/05

- v -

MOTION DATE _____

J70156 UC

MOTION SEQ. NO. 885

MOTION CAL. NO. _____

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

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 DECIDED

IN ACCORDANCE WITH PARAGRAPH 10 OF RULE 101.1 OF THE JUDICIAL BRANCH

FILED
APR 26 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/18/06

WALTER B. WOOD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15

-----X
ARGENTINA ORTIZ, ANTONIA TORRES,
FELICIA HENRY, GLADYS ESCOBAR, LATASHA
JONES, and GERALDINE BRUCE,

Plaintiffs,

-against-

Index No. 402804/05

DECISION AND ORDER

FIVE SEVEN NAUGHT ASSOCIATES, KVEST LLC,
E. JULIO G. REALTY LLC, 530 EAST 22ND REALTY LLC,
and 770 SAINT MARKS LLC,

Defendants.
-----X

WALTER TOLUB, J:

Motion sequence 001, 003, 004 and 005 are consolidated for disposition and resolved in the following memorandum decision.

FILED
APR 26 2006
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NEW YORK

The plaintiffs in this action are all Section 8 rent stabilized tenants whose landlords have elected to opt-out of the Section 8 program, and have demanded that the tenants now pay that portion of their rent that was previously federally subsidized. Each of the tenants is being sued in housing court for nonpayment of rent. Plaintiffs ultimately seek a declaratory judgment finding that: 1) a landlord/owner of a rent stabilized apartment in which the tenant is receiving a Section 8 rent subsidy must continue to accept the Section 8 rent subsidy as a term and condition of the tenancy so long as the tenant remains a rent stabilized tenant; and 2) the owner of a building who receives a J51 tax abatement, in which a tenant is receiving a Section 8 rent subsidy, must continue to accept the Section 8 rent subsidy as long as the landlord receives the J51 tax abatement.

In motion sequence 001, plaintiffs move for a preliminary injunction staying the housing

court nonpayment cases against the plaintiffs until this case is decided. In motion sequence 003, Denise Gill, who is also being sued in Housing Court for nonpayment of rent under similar circumstances, moves to intervene in the action. In Motion sequence 004, another tenant in similar circumstances, Dale Jones, also moves to intervene. In motion sequence 005, two more tenants, Tracey Jordan and Magda Guzman move to intervene.

The Section 8 program was introduced as part of the Housing and Community Development Act of 1974 (42 USC §§ 1414-1440). Section 8 provides landlords with rental subsidies for qualified tenants who occupy an approved housing unit. In New York City, the New York City Housing Authority (NYCHA) and the New York City Department of Housing Preservation and Development (HPD) administer the Section 8 program, acting as Public Housing Administrators for the United States Department of Housing and Urban Development (HUD). Tenants apply for Section 8 assistance to the NYCHA and HPD. Tenants are accepted for the program on the basis of their income; only a family whose annual income does not exceed 80% of the median income for the area in which the family lives is eligible. Once a family is accepted into the program, they may locate a suitable apartment, and the lease or proposed lease between the landlord and the Section 8 tenant is reviewed by NYCHA. If the apartment meets specified "housing qualified standards" (HQS), then the NYCHA or HPD may enter into a "Housing Assistant Payment" (HAP) contract with the landlord. Thereafter, the family is responsible for paying generally no more than 30% of the household income, and NYCHA pays the landlord a subsidy equal to the balance of the fair market rent.

Originally, the Act provided that a Section 8 tenancy could not be terminated "except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable

Federal, State, or local law, or for other good cause” (42 USC § 1437f [d] [1] [B] [ii]). This created what was commonly called an “endless lease rule” whereby, once having accepted a Section 8 tenant, the landlord could not choose to end his participation in the Section 8 program. In 1998, Congress amended this provision to provide that “*during the term of the lease*, the owner shall not terminate the tenancy except for serious or repeated violations of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause” (emphasis added) (*id.*). Thus, the amendment has the effect of removing the endless lease rule, and allowing landlords to choose whether they want to continue to participate in the program.

The defendant landlords claim that the amendment makes clear that they have the right to refuse to continue with the Section 8 program. Indeed, at least one court has noted that “the burdens of Section 8 participation are substantial enough that participation should not be forced on landlords . . .” (*Salute v Stratford Greens Garden Apartments*, 136 F3d 293, 300 [2d Cir 1998]).

Plaintiffs claim that state law requires that the landlord continue to accept the plaintiffs’ Section 8 rent subsidy. The Rent Stabilization Code, section 2522.5 (g) (1) requires landlords to offer rent stabilized tenants renewal leases “on the same terms and conditions as the expired lease” (9 NYCRR § 2522.5[g]; *Roxborough Apts. Corp. v Becker*, 296 AD2d 358 [1st Dept 2002]). Plaintiffs reason that the Section 8 rent subsidy has been an essential aspect of the plaintiffs’ leases, and that it is a quintessential “term and condition” that must be included in any renewal lease.

First, as to the motions to intervene, CPLR 1013 provides, in relevant part that “any

person may be permitted to intervene in any action . . . when the person's claim or defense and the main action have a common question of law or fact." The statute further instructs that the court consider whether the intervention will unduly delay the determination of the action, or prejudice the rights of any party. Here, each of the proposed interveners has alleged that they, like the named plaintiffs, hold Section 8 vouchers, and are in good standing with the program. Each has alleged that they are long-term residents of their apartments and that their landlord has previously participated in the Section 8 program. Each has also alleged that, like the named plaintiffs, their landlord has chosen to "opt-out" of the Section 8 program, and has demanded that they pay the full amount of rent. Proposed intervener Denise Gill lives in the same building as two of the named plaintiffs. Each alleges that the landlord has commenced a nonpayment summary proceeding against them in Housing Court. It therefore appears that the issues to be decided in this case are identical regarding both the named plaintiffs and the proposed interveners. Nor is there any indication that allowing intervention will delay the action. The action is in the early stages and primarily involves a legal issue rather than factual issues. Discovery, if conducted at all, will be minimal. Further, each of the named plaintiffs as well as the proposed interveners are represented by the Legal Aid Society, and it unlikely that the proposed intervention will create further motion practice on the part of the interveners. Under these circumstances, intervention is warranted (see, Teichman v Comm. Hosp. of W. Suffolk, 87 NY2d 514 [1996]; Lamboy v Gross, 129 Misc 2d 564 [Sup Ct, NY County 1985] aff'd 126 AD2d 265 [1st Dept 1987]).

As to the motion for a preliminary injunction, in order to obtain injunctive relief, a plaintiff must demonstrate: (1) a likelihood of ultimate success on the merits; (2) irreparable

injury if provisional relief is withheld; and (3) a weight of the equities in its favor (Aetna Ins. Co., v Capasso, 75 NY2d 60 [1999]).

As to the likelihood of plaintiffs' ultimate success on the merits, the defendant landlords' argument is premised largely on the contention that the federal amendment eliminating the endless lease provisions of Section 8 preempts state law regarding rent regulation. The courts that have dealt with this issue have split on this issue and there are no controlling Appellate decisions. In Rosario v Diagonal Realty, LLC (9 Misc 3d 681 [Sup Ct, NY County 2005]) Justice Madden, in her excellent and extensive analysis of the law and the decision of the trial courts concludes that the Section 8 amendment eliminating the endless lease requirement does not preempt the provisions of New York's Rent Stabilization Code, giving rent-stabilized tenants the right to a renewal lease on the same terms and conditions as the expired lease (i.e. with the Section 8 rent subsidies), nor did it preempt New York City's J-51 law prohibiting landlords from discriminating against section 8 recipients. In Kouznetski v Verga Assocs. (NYLJ, July 10, 2002, at 29, col 2), Justice Dowd of Supreme Court, Kings County, found *inter alia*, that "generally the Section 8 legislative scheme does not preempt State Law regarding rent regulation."

In addition, the tenants make a strong argument that Section 8 assistance payments are a material term and condition which must be renewed with the rent stabilized renewal lease (see Cosmopolitan Assocs. v New York City Department of Housing Preservation and Development, [Sup Ct, Queens County], Order dated May 31, 2005, Index No. 4816/05; Ellwood Realty LLC v Polanco, [Civ Ct, NY County], Order dated December 13, 2004, Index No. 69979/04). The NYCHA has also indicated that they believe with plaintiffs' position that Section 8 is a term and

condition of a rent stabilized lease.

Further, recently in Licht v Moses (2006 WL 542797 [App Term, 2d & 11th Jud Dists, 2006]) the Appellate Term, 2nd and 11th Judicial Districts, although never reaching the issue presented here, ruled that a nonpayment proceeding must be predicated on an agreement by the tenant to pay the rents demanded (citing Real Property Actions and Proceedings Law, section 711 [2]). Therefore, after termination of a Section 8 subsidy, in the absence of a new agreement, a landlord cannot recover the subsidized portion of the rent in a nonpayment proceeding. The court finds that the plaintiff tenants have shown a likelihood of success on the merits. But the court notes that the likelihood of success on the motion for a preliminary injunction should not be equated with a certainty of success (*see* Four Times Square Associates, LLC v. Cinga Investments, 306 AD2d 4 [1st Dept 2003]; Parkmed v. Pro-Life Counselling, 91 AD2d 551 [1st Dept 1982]; Tucker v. Toia, 54 AD2d 322 [4th Dept 1976]). There are a number of issues proffered which require amplification.

As to the requirement of irreparable injury, plaintiffs argue that they face immediate eviction and an inability to find affordable housing. Defendants cite a Southern District Court action entitled Deidre Williams v New York City Housing Authority (81 CIV 1801 [SD NY RJW]), in which Judge Robert J. Ward declined to issue an injunction in response to other Section 8 tenants who had nonpayment proceedings initiated against them under similar circumstances. Judge Ward found that eviction was not certain in that none of the cases filed in housing court had yet worked its way through the state-court appellate process. This court disagrees. Eviction constitutes irreparable damage. It is the loss of one's home. Rather than place the risk of this injury on the tenant, as well as the burden to appeal a possibly negative

outcome, it is reasonable to maintain the status quo pending the outcome of this proceeding.

Finally, in balancing the equities, the plaintiff tenants will suffer a far greater hardship than the landlords of the Housing Court if the cases are not stayed. The tenants are threatened with eviction from their homes. On the other hand, the landlords are not damaged if a stay is granted. The tenants will pay their share of the rent pending these proceedings. The landlords may accept the Section 8 subsidy without prejudice pending this action so that the landlords will receive the entire rent each month and suffer no harm.

Accordingly, based upon the foregoing it is

ORDERED that motion sequences 003, 004 and 005, seeking intervention of plaintiffs Denise Gill, Dale Jones, Tracey Jordan and Magda Guzman is granted; and it is further

ORDERED that the caption and complaint of the action are to incorporate those proposed changes as submitted by the interveners; and it is further

ORDERED that motion sequence 001 seeking a preliminary injunction is granted; and it is further

ORDERED that, pending the outcome of this action, the following summary nonpayment proceedings commenced by the defendant landlords which are presently pending in the Civil Court of the City of New York, are stayed pending the outcome of this action: Five Seven Naught Assocs. v Ortiz, L & T Index No. 079417/05 (Civ Ct NY County), Kvest LLC v Torres, L & T Index No. 082545/05 (Civ Ct Kings County), E. Julio G. Realty LLC v Escobar, L & T Index No. 37788/05 (Civ Ct Kings County), 530 East 22nd Realty LLC v Henry, L & T Index No. 82394/05 (Civ Ct Bronx County), 770 Saint Marks Realty, LLC v Jones, L & T Index No. 81882/05 (Civ Ct Kings County), 770 Saint Marks Realty LLC v Bruce, L & T Index No.

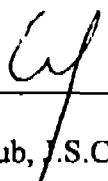
81881/05 (Civ Ct Kings County), 770 Saint Marks Realty LLC v Gill, L & T Index No. 81883/05 (Civ Ct Kings County), 550 Realty Heights LLC v Jones, L & T Index No. 54036/05 (Civ Ct NY County), M.R.S. Realty LLC v Guzman, L & T Index No. 72584/05 (Civ Ct NY County), and Anderson Avenue Assocs. v Jordan, L & T Index No. 065795/05 (Civ Ct Bronx County); and it further

ORDERED plaintiffs shall serve a copy of this order upon the Landlord/Tenant Clerk of each court where the affected actions are pending, within seven days after entry of this order.

This shall constitute the decision and order of the Court.

Dated: April 18, 2006

FILED
APR 26 2006
COUNTY CLERK'S OFFICE
NEW YORK



Hon. Walter B. Tolub, J.S.C.