Matter of Mother Zion Tenant Assn. v Donovan
2007 NY Slip Op 30851(U)
April 11, 2007
Supreme Court, New York County
Docket Number: 0402239/2006
Judge: Marilyn Shafer

[* 1]

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

PRESENT: _____ PART _____

Index Number : 402239/2006
MOTHER ZION TENANT

vs
DONOVAN, SHAUN
Sequence Number : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

..., 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 consol w/seq 2+3 + decided pursuant to attached rem

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 4/11/07

HON. MARILYN SHAFER, JSC J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 8

In the Matter of the Application of

MOTHER ZION TENANT ASSOCIATION, MARITZA CARMONA, DEBORAH TAYLOR LOW and JULLIE ANN YOUNG,

Petitioners,

For a Judgment Pursuant to Articles 30 and 78 of the Civil Practice Law and Rules

Index No. 402239/06

-against-

SHAUN DONOVAN, as Commissioner of the New York City Department of Housing Preservation and Development; and MOTHER ZION ASSOCIATES, L.P.,

Respondents.

MARILYN SHAFER, J.:

Motion sequence numbers 001, 002, and 003 are consolidated for disposition.

Petitioners Maritza Carmona, Deborah Taylor Low and Jullie Ann Young are low-income tenants in a housing development known as the Mother Zion-McMurray Apartments, located at 2640 8th Avenue (also known as 2640 Frederick Douglas Boulevard), New York, New York. Petitioner Mother Zion Tenant Association (the Tenant Association) is an association allegedly representing over 60% of the occupied dwelling units in the Mother Zion-McMurray Apartments (the Apartments). The Apartments are owned by respondent Mother Zion Associates, L.P. (the Owner), which receives federal subsidies pursuant to the Multifamily Assisted

Reform and Affordability Act (the Section 8 program). 42 USC § 1437f.

After the Owner notified tenants that it was electing to opt out of the Section 8 program, the Tenant Association sent a notice to the owner indicating that it intended to exercise its right of first refusal to purchase the building, pursuant to New York City's Local Law 79. Administrative Code of City of NY §§ 26-801, *et seq.* The Tenant Association also notified respondent New York City Department of Housing Preservation and Development (HPD) that it intended to exercise its right of first refusal, and requested that HPD convene an appraisal panel, pursuant to section 26-802 of Local Law 79. HPD did not convene a panel and petitioners initiated this proceeding, seeking a judgment compelling HPD to convene a panel, and a declaration that the Owner is subject to the requirements of Local Law 79.

In motion sequence number 001, petitioners seek the relief requested in their petition. In motion sequence numbers 002 and 003, respondent Shaun Donovan, as Commissioner of HPD, and respondent Owner, respectively, move to dismiss the petition.

Local Law 79, which was passed by the City Council on August 14, 2005 and became effective on November 15, 2005, was intended to address the housing crisis resulting from the lack of affordable low and middle-income housing in New York City, and more specifically, the problems created by building owners

withdrawing from city, state, and federal programs for assisted rental housing.[1] The primary purpose of Local Law 79 is to enable a tenant association to exercise a right of first refusal to purchase the building, where an owner intends to sell the building or take other action which will result in the owner withdrawing from an assisted rental housing program. Pursuant to the local law, the owner must give 12 months' notice to the tenant association or tenants (collectively, tenants) and HPD of the intention to withdraw from an assisted housing program, and must also give notice of a bona fide offer to purchase the building. Administrative Code § 26-802. The tenants then have 60 days in which to notify the owner and HPD of their intention to exercise their right of first refusal. Administrative Code § 26-805. HPD must then convene an advisory panel to determine the "appraised value" of the housing. Administrative Code § 26-804. The tenants have 120 days from notice of that determination to submit a bona fide offer to purchase the building.

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[1] Assisted rental housing programs covered by the law include: "1) any program created, administered or supervised by the city or state under article II or article IV of the private housing finance law [Mitchell Lama housing], but shall not include any multiple dwelling owned or operated by a company organized under article II or article IV of the private housing finance law that was occupied prior to January 1, 1974; 2) any program providing project-based assistance under section eight of the United States housing act of 1937, as it may be amended from time to time; and 3) housing programs governed by sections 202, 207, 221, 232, 236, or 811 of the national housing act,(12 USC §§ 1701 *et seq.*), as they may be amended from time to time." Administrative Code § 26-801 (c).

[* 5]

Administrative Code § 26-806.

The United States Congress has enacted a variety of different federal assisted housing programs to further the policy of providing "decent, safe, and sanitary housing for every American by strengthening a nationwide partnership of public and private institutions...." 12 USC § 17151. Among those programs are federal mortgage insurance (*see* National Housing Act § 221, 12 USC § 17151), and mortgage interest subsidies (*see* National Housing Act § 236, 12 USC § 1715z-1), which were originally established by Congress in the 1960's to encourage private developers to build affordable housing for low-income citizens, by offering developers below-market interest rates. Under those programs, the developers had the right to prepay federal mortgages and exit the programs after 20 years, without the prior consent of the federal Department of Housing and Urban Development (HUD). In the 1980's, Congress became concerned that there would be a "flood of repayments" that would increase the shortage of available housing, so additional legislation was passed authorizing HUD to offer more incentives to discourage prepayment, but set additional stringent conditions for prepayment. In 1990, Congress again changed the law, giving additional incentives to remain in the assisted housing programs, but requiring that owners of federally assisted housing had to notify the federal and local governments as well as the tenants

of the intention to prepay federal mortgages. Low Income Housing Preservation and Resident Homeownership Act (LIHPRHA), 12 USC §§ 4101, *et seq.* That 1990 law contained express preemption provisions, prohibiting states from restricting or inhibiting prepayment. 12 USC § 4122 (a). In the late 1990's, however, because of the expense of the incentive programs, Congress cut back on the funding of the earlier programs and passed yet another law, the Housing Opportunity Program Extension Act of 1996 (HOPE)(Pub L No 104-120, 110 Stat 834), which provided for prepayment of federal mortgages, notwithstanding the requirements of the earlier law. HOPE also removed the express preemption provisions enacted in 1990. *See* discussion of these programs in *Forest Park II v Hadley,* 336 F3d 724, 728-730 (8th Cir 2003).

In addition to the programs governing mortgage insurance and mortgage interest subsidies, Congress enacted the program involved here, project-based rental subsidies (the Section 8 program)(*see* National Housing Act § 8, 42 USC § 1437f), and tenant-based Section 8 vouchers, enabling tenants to choose the places they wish to rent (*see* 42 USC § 1437f [c][8][A]). *People to End Homelessness, Inc. v Develco Singles Apts. Assoc.,* 339 F3d 1, 3 (1st Cir 2003); *Jeanty v Shore Terrace Realty Assn,* 2004 US Dist Lexis 15773 (SD NY 2004). Section 8 project-based contracts can range in duration between one month and 15 years. 42 USC § 1437f (d)(2A). Under those contracts, the property owners

receive rent from two sources, the United States Department of Housing and Urban Development (HUD) and the low-income tenant. The program is designed to limit the tenant's share of rent to approximately 30% of the household income. 42 USC 1437a. Should the property owner decide to let the Section 8 contract lapse, HUD will provide tenant-based "enhanced vouchers" at a level that exceeds the "applicable payment standard" for an ordinary voucher to enable the family to remain in its apartment when the owner exits the project-based program and raises the rent. *See* 42 USC § 1437f (t)(2); *People to End Homelessness, Inc. v Develco Singles Apts. Assoc.*, 339 F3d 1, *supra; Jeanty v Shore Terrace Realty Assoc.*, 2004 US Dist Lexis 15773, *supra*.

Petitioners contend that if the Owner is permitted to withdraw from the project-based Section 8 program many of the tenants will not be able to remain at the Mother Zion apartments for several reasons, including, but not limited to, those discussed below. According to petitioners, federal law prohibits the use of Section 8 vouchers that do not meet housing quality standard, and petitioners provide copies of HPDonline records showing that, as of May 16, 2006, the building had 361 open violations, including 98 class A violations, 232 class B violations and 31 class C violations, class C being the most

serious.[2] Petitioners are also concerned that many of the current tenants, who have raised their families in their current apartments, would be forced to move. Because their adult children have moved away, under HUD regulations, some are now living in apartments too large for the size of their family, and there are only seven one-bedroom apartments in the Mother Zion apartments. Finally, petitioners contend that if they have to leave their current apartments, they will have problems finding housing, since a HUD study published in November 2001 found that only 57% of voucher holders were successful in finding apartments. Petition, ¶ 43. Thus, according to petitioners, if the Owner is permitted to withdraw from the project-based Section 8 program, it is crucial that they be permitted to exercise their right of first refusal to purchase the building pursuant to Local Law 79.

Both respondents Shaun Donovan and the Owner move to dismiss the petition arguing, inter alia, that Local Law 79 is preempted by federal law.[3]

Federal Preemption

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[2] The court notes, however, that according to HPDonline records, as of March 23, 2007, the building had 62 open violations, only 4 of which were class C.

[3] Both respondents also argue that Local Law 79 is preempted by New York State's Mitchell-Lama law as well, but since petitioners are seeking to purchase property leaving a federal Section 8, rather than a state Mitchell-Lama program, those arguments are not relevant and will not be addressed here.

A federal law may preempt a state or local law where it explicitly bars state or local legislation (express preemption) or where the federal government has occupied the field (implied preemption). *See Hillsborough County, Fla. v Automated Medical Labs.*, 471 US 707, 713 (1985). Furthermore, even if a state or local law has the same ultimate goal as a federal law, it may run afoul of "conflict preemption" if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *International Paper Co. v Ouellette*, 479 US 481, 492 (1987)(quotation marks and citations omitted); *see also Gade v National Solid Wastes Management Assn.*, 505 US 88, 103 (1992).

Respondents argue that Local Law 79 is expressly preempted under LIHPRHA, which provides that:

> No State or political subdivision of a State may establish, continue in effect, or enforce any law or regulation that --
>
> 1) restricts or inhibits the prepayment of any mortgage described in section 4119 (1) of this title (or the voluntary termination of any insurance contract pursuant to section 1715t of this title) on eligible low income housing;
>
> ***
>
> (3) is inconsistent with any provision of this subchapter, including any law, regulation, or other restriction that limits or impairs the ability of any owner of eligible low *income housing* to receive incentives authorized under this subchapter (including authorization to increase rental rates, transfer the housing, obtain secondary financing, or use the proceeds of any of such incentives); or

> (4) in its applicability to low-income housing is limited only to eligible low-income housing for which the owner has prepaid the mortgage or terminated the insurance contract.
>
> Any law, regulation, or restriction described under paragraph (1), (2), (3), or (4) shall be ineffective and any eligible low-income housing exempt from the law, regulation, or restriction, only to the extent that it violates the provisions of this subsection.

12 USC § 4122 (a).

Respondents rely on *Forest Park II v Hadley* (336 F3d 724, *supra*), where an owner of a federally subsidized apartment building, seeking to prepay a federal mortgage loan, challenged a Minnesota law which imposed additional notice requirements on the owner withdrawing from the federal program. There, the United States Court of Appeals for the Eighth Circuit ruled that the Minnesota statute was expressly preempted by LIHPRHA and impliedly preempted by the Housing Opportunity Program Extension Act of 1996 (HOPE)(Pub L No 104-120, 110 Stat 834), because the additional notice requirements placed by the state on federal program participants impeded and burdened the prepayment of federal mortgages. The Court concluded that even though the federal and state statutes shared the general objective of creating subsidies for low-income housing, the state statutory procedures interfered with the framework created by Congress and were, therefore, preempted. *Forest Park II v Hadley,* 336 F3d 724, *supra*. This case does not involve federal programs relating

to mortgage loans; therefore, the express preemption provision under LIHPRHA does not directly apply. However, the reasoning of the Eighth Circuit concerning implied and conflict preemption is quite relevant with respect to the right of first refusal provisions at issue here.

Where unique federal laws and programs are involved, rather than areas traditionally regulated by the states, there is no presumption against preemption. *Forest Park II v Hadley,* 336 F3d at 731, citing *Buckman Co. v Plaintiffs' Legal Comm.*, 531 US 341, 347 (2001)("[T]he relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law.")

Here, as in *Forest Park II,* a property owner is seeking to withdraw from a federal housing program pursuant to the provisions of that program that permit withdrawal, and petitioners are seeking to avail themselves of a provision of local law which will either require the property owner to remain in the program, or sell its property to the tenants. Under the federal program, the property owner is permitted to withdraw from the program, and Congress has provided that if it does, assistance will be given directly to the tenants of that landlord in the form of "enhanced vouchers" to enable them to remain in their homes. Local Law 79, which requires property owners to

remain in the project-based Section 8 program or agree to sell their property to their tenants, would appear to be in direct conflict with this Congressional scheme.

Petitioners contend that *Forest Park II* was wrongly decided, because the court ignored the primary objective of the federal housing program to provide affordable housing. Petitioners point to numerous state and local statutes which contain provisions similar to those in Local Law 79,[4] noting that only the *Forest Park II* Court has found such statutes preempted by federal law. For whatever reason, however, it appears that, with the exception of the California statute, those other state and local laws have not faced preemption challenges, and this court can draw no conclusion regarding the doctrine of preemption from the mere enactment of those laws.

In *Kenneth Arms Tenant Assn. v Martinez* (2001 US Dist Lexis 11470 [ED Cal 2001]), the United States District Court rejected a preemption challenge to California's additional notice requirements for property owners who seek to withdraw from project-based Section 8 contracts. *Contra, Forest Park II v Hadley*, 336 F3d 724, *supra*. According to the court, the goal of

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[4] *See* Cal Govt Code 65863.10, *et seq.* (2001); 1988 Conn Pub Acts 88-262; 310 Ill Comp Stat 60/3 (2004); Me Rev Stat Ann tit 30-A, 4973 (1993); Md Code tit 7-101, *et seq.* (2005); RI Gen Laws 34-45-4, *et seq.* (1988); Tex Govt Code Ann 2306.185 (f), *et seq.* (2005); Wash Rev Code 59.28 (2005); Denver, Co Mun Code 12-106, *et seq.* (2000); Portland, Or, City code 30.01.030, *et seq.* (2005); San Francisco, Ca, Admin Code 60.4, *et seq.* (1990).

both the California and federal laws was to insure the availability of low-cost housing, and the fact that the state notice provisions imposed greater procedural restrictions than those imposed by the federal law did not mean that those laws constituted an obstacle to the purposes and objectives of Congress.

The subsequent ruling of the United States Court of Appeals for the Eighth Circuit, however, carries greater weight than the prior federal District Court decision. Even assuming that were not the case, the provisions of Local Law 79 requiring a right of first refusal for tenants constitutes a far greater obstacle to withdrawing from the Section 8 program than do the additional notice requirements of the California and Minnesota statutes.

Although the California statute also has right of first refusal provision, similar to that in Local Law 79 (*see* Cal Govt Code § 65863.11 [b]-[c]), where the owner already has a bona fide offer to purchase from a "qualified entity" at the time the owner decides to sell the property, it is not required to comply with that provision. *See* Cal Govt Code § 65863.11 (f). In *Kenneth Arms Tenant Assn.*, the owners asserted that they had received bona fide offers from "qualified entities" and therefore, that the right of first refusal provision did not apply. As a result, the question of preemption was not discussed in relation to the right of first refusal provision of the statute.

Petitioners also rely on two federal cases which have ruled that local rent control statutes are not preempted by federal housing law. *See Independence Park Apts. v United States*, 449 F3d 1235 (Fed Cir 2006); *TOPA Equities, Ltd. v City of Los Angeles*, 342 F3d 1065 (9th Cir 2003). However, as the Court in *TOPA Equities* explained, the challenged Los Angeles Rent Stabilization Ordinance (LARSO) was a municipal rent control ordinance of general applicability, which was expressly exempted from the preemption provision of LIHPRHA, and furthermore, "[n]othing in the HUD regulations purports to limit states from enacting their own rent control laws of general applicability which apply equally to apartment owners who exit the federal program as well as other apartment owners." *TOPA Equities, Ltd. v City of Los Angeles*, 342 F3d at 1072.

Local Law 79, and particularly its right of first refusal provision, cannot be termed a law of general applicability. Although it also applies to property owners that wish to exit state and federal assisted housing programs in addition to Section 8, it definitely does not apply to all apartment owners; thus, it is not a program of general applicability, such as the rent control laws which have survived preemption challenges.

Petitioners also cite a series of state court cases which rejected preemption challenges to laws which required building owners to continue to honor tenant-based Section 8 vouchers. *See*

Franklin Tower One, L.L.C. v N.M., 157 NJ 602, 725 A2d 1104 (1999); *Commission on Human Rights & Opportunities v Sullivan Assoc.*, 250 Conn 763, 739 A2d 238 (1999); *Attorney General v Brown*, 400 Mass 826, 511 NE2d 1103 (1987). In those cases, however, at issue was whether an owner could discriminate against a tenant, merely because the tenant qualified for federal Section 8 housing assistance, not whether an owner would have to remain in a project-based Section 8 program or sell its property.

In enacting the Section 8 program, which combines project-based and tenant-based subsidies, Congress chose to permit property owners to withdraw from the project-based component by not renewing their Section 8 contract. Congress chose to protect tenants in buildings withdrawing from project-based programs by creating tenant-based subsidies, including enhanced vouchers. That scheme may, as petitioners contend, fail to meet the needs of some of those tenants. Nonetheless, the court reluctantly concludes that by forcing property owners to chose between remaining in the project-based Section 8 program and selling their property to their tenants, Local Law 79 not merely burdens the property owner's decision to withdraw from a project-based Section 8 program, but by requiring that the owner offer to sell the property to the tenants, it directly "interferes with the methods by which the federal statute was designed to reach [its] goal" (*International Paper Co. v Ouellette*, 479 US at 494), and

thus, is preempted by federal law. It is, therefore, unnecessary for the court to reach respondents' arguments based upon New York State law.

Accordingly, it is hereby ordered that the motions to dismiss the petition in motion sequences 002 and 003 are granted; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of the court.

Dated: 4/11/07

ENTER:

J.S.C.