

**Telephone Co. Bldg. LLC v Decamps**

2007 NY Slip Op 31010(U)

April 24, 2007

Supreme Court, Kings County

Docket Number: 0039323/2005

Judge: Mark I. Partnow

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At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24<sup>th</sup> day of April, 2007

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

-----X  
TELEPHONE COMPANY BUILDING LLC,

Plaintiffs,

- against -

Index No. 39323/05

CRAIG DECAMPS, et al.

Defendants.

-----X  
The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1-3, 4-5
Opposing Affidavits (Affirmations)_____	_____
Reply Affidavits (Affirmations)_____	6
_____Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, defendant Craig De Camps moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint. Plaintiff Telephone Company Building LLC cross-moves for an order a) pursuant to CPLR 3212, granting plaintiff summary judgment on the complaint, awarding a judgment of possession and awarding a writ of assistance, and b) awarding past use and occupancy in the amount of

\$5,313.00 through July 31, 2006 as well as ongoing use and occupancy of \$759.00 per month pendente lite.

Plaintiff commenced this action to eject defendant from a certain space in the subject premises at 51-55 Nassau Avenue in the Greenpoint section of Brooklyn. The building is located within a R-6/M1-1 light manufacturing zoning district and has a certificate of occupancy which allows it to be used only for manufacturing and commercial artist studios. Defendant took occupancy of unit 2E in the building in or around 1989, at which time the unit was raw space. Defendant subsequently installed a stove, kitchen sink, refrigerator and a full bathroom. In 2000, Melissa Etlin, the prior named owner of the building and currently a member of the plaintiff LLC which holds record title to the building presently, commenced a holdover action against defendant in Kings County Civil Court, which action was consolidated with four other holdover actions against other tenants in the building. These consolidated actions culminated in a bench trial, after which the trial judge (Hon. Debra Silber, J.C.C.) issued a decision and order dated April 14, 2000 dismissing the action on jurisdictional grounds. Specifically, the Civil Court determined that the tenants had proven that at least three units in the building were used for residential purposes, and thus the building was a de facto multiple dwelling. Because there was no multiple dwelling registration for the building, the court found that it did not have jurisdiction to entertain the action under the Multiple Dwelling Law. While the court dismissed the action for lack of jurisdiction, in the body of the decision, the court addressed the additional issue of whether

the tenants were eligible for protection under the Rent Stabilization Law and Code. In determining this issue, the court essentially took into consideration its finding that the five units which were the subject of the owner's suit qualified as "dwelling units" due to their residential nature, and made an additional finding that an additional unit was used residentially by the owner herself. As there was a finding of six dwelling units in the building, the court determined, applying the law which existed at the time, that the building was entitled to the protections of rent stabilization.

In August 2002, plaintiff filed an application with the Department of Buildings to convert the existing manufacturing and commercial artists units in the building to residential class A apartments. The application was disapproved on the grounds that such changes were inconsistent with applicable zoning and Multiple Dwelling Law.

In February 2004, plaintiff commenced an action against defendant in the Housing Part of the Kings County Civil Court for nonpayment of rent. In his answer to the proceeding, defendant argued, inter alia, that since the building was a multiple dwelling which lacked a residential certificate of occupancy, no rent could be recovered by plaintiff. This proceeding was settled by stipulation dated August 2, 2004. Among the provisions in the stipulation were the following:

2. The total rent due from [defendant] is \$33,333.33.
3. (a) [Defendant] agrees to pay [plaintiff] \$11,111.11 within seven (7) days after execution of this stipulation.

(b) An additional \$11,111.11 will be paid when [plaintiff] obtains a certificate of occupancy permitting [defendant's] residential use of the subject premises provided further that [plaintiff] obtains same within three (3) years after the date of execution of this stipulation. [Plaintiff's] failure to obtain same within said three (3) years shall result in a forfeiture of payment of such additional sum which shall then be retained by [defendant].

(c) The remaining amount due shall be retained by [defendant] in full satisfaction of all of [defendant's] affirmative defenses and/or counterclaims.

\* \* \*

7. [Plaintiff] and [defendant] agree to work cooperatively and expeditiously to work out the terms of a new written lease agreement and rent-stabilization rider for the premises. The parties agree that the lease shall provide for a monthly rent of \$759.00 for the time period beginning August 1, 2003 and ending July 31, 2005.

Apparently, plaintiff and defendant thereafter failed to enter into a lease and in late 2005, plaintiff served defendant with a thirty day notice to vacate and commenced the instant action for ejectment and to recover use and occupancy. Defendant sets forth thirteen affirmative defenses and four counterclaims, alleging, in essence, that plaintiff is not entitled to recover use and occupancy as the building is not registered as a multiple dwelling, that defendant's unit is rent stabilized, and that these issues were previously decided by the Civil Court order, which may not be collaterally attacked by the instant action.

“Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity. The policies underlying its application are avoiding relitigation of a decided issue and the possibility of an inconsistent result” ( *Buechel v Bain*, 97 NY2d 295, 303 [2001][citations omitted]).

“Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling. The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party. The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination” (*id.* at 303-304 [citations omitted]).

“It is a general principle of law that statements made by a court in an opinion which are unnecessary to the holding are dicta; such statements do not have the force of judicial authority and usually are not followed as authority even though they deal precisely with the point before the court” (*Chiasson v New York City Dept. of Consumer Affairs*, 138 Misc 2d 394, 396 [1988]).

Multiple Dwelling Law § 4(7) defines a multiple dwelling as a dwelling occupied as the residence of three or more families living independently of each other. Under Multiple

Dwelling Law § 325(1), every multiple dwelling must be registered as such and have a multiple dwelling registration on file with the Department of Housing Preservation and Development (HPD). At the time of the 2000 Civil Court proceeding, the Multiple Dwelling Law was interpreted so as to preclude an owner that failed to register a multiple dwelling from maintaining either a summary proceeding predicated upon nonpayment of rent or a holdover action (*see Vidod Realty Co. v Calvin*, 147 Misc 2d 488 [1989]).<sup>1</sup> It is clear from the Civil Court's order that the only issue necessary to its holding was whether the building constituted a multiple dwelling under the Multiple Dwelling Law (i.e. the existence of three "dwelling units") and if so, whether the building was properly registered so as to implicate the court's jurisdiction. Any further findings with respect to additional dwelling units or rent stabilization status were not germane to the jurisdictional issue. Therefore, as the court's finding that the building was subject to rent stabilization was mere dicta, such issue was never "necessarily decided" for collateral estoppel purposes (*see Pollicino v Roemer and Featherstonhaugh P.C.*, 277 AD2d 666, 667-668 [2000]; *Town of East Hampton v Omabuild USA No. 1, Inc.*, 215 AD2d 746 [1995]; *Hirsch v Borowik*, 2001 NY Slip Op 40023[U], n 2). Rent stabilization is a matter of statutory right that cannot be created by by waiver or estoppel (*Ruiz v Chwatt Assocs.*, 247 AD2d 308 [1998]). It has been held that

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<sup>1</sup>The *Vidod Realty Co.* case has since been overruled by *Czerwinski v Hayes* (8 Misc 3d 89 [2005]), which held that the owner of unregistered multiple dwelling may maintain a holdover proceeding and may recover possession in such proceeding when the ground for recovery is not rent-based, although no ancillary money judgment may be sought or awarded.

where a landlord settled a nonpayment proceeding pursuant to a stipulation expressly granting the tenant full rent stabilization rights, the stipulation is binding and the tenant therefore would be afforded rent stabilization protection ( *546 West 156 Street HDFC v Smalls*, 2005 NY Slip Op 51207[U]). In this matter, however, plaintiff never expressly agreed in the 2004 stipulation of settlement to grant defendant perpetual rent stabilization rights, but rather only agreed “to work cooperatively and expeditiously [with defendant] to work out the terms of a new written lease agreement and rent-stabilization rider for the premises.” The mere attachment of rent stabilization riders to leases or the offering of renewal leases using rent stabilization forms do not confer any rent stabilization rights upon the tenant (*Heller v Middagh St. Assocs.*, 4 AD3d 332 [2004]). Further, it is not clear whether a landlord may legally confer rent stabilization status to a tenant via contract or stipulation where, as here, the subject zoning resolution prohibits residential use. Moreover, the fact that plaintiff alleged in its nonpayment petition that the unit was subject to rent stabilization does not alone confer any protections (*see Corastor Holding Co. Inc. v Mastny*, 12 Misc 3d 13 [2006]).

The Court of Appeals has held that illegally converted lofts not eligible for protection under the Loft Law (and it is not alleged here that the subject unit is covered by the Loft Law) are further not entitled to rent stabilization protection under the Emergency Tenant Protection Act (EPTA) (*Wolinsky v Kee Yip Realty Corp*, 2 NY3d 487 [2004]; *see Gloveman Realty Corp. v Jeffreys*, 18 AD3d 812 [2005]). The *Wolinsky* court stated:

“Reading the ETPA and Loft Law together, we agree with the courts below that tenants’ illegal conversions do not fall under the ambit of the ETPA. As reflected in the legislative history and intent of the Loft Law, the fixed eligibility period was designed to address the public safety and municipal zoning emergency caused by the expansion of illegal conversions at that time. The statute was not intended to foster future illegal conversions or undermine legitimate municipal zoning prerogatives. If the prior-enacted ETPA already protected illegal residential conversions of manufacturing space, significant portions of the Loft Law would have been unnecessary. Thus, although such illegal conversions are not expressly exempted from ETPA coverage, it is evident that the Legislature did not view the ETPA as safeguarding the interests of the ‘loft pioneers’” (*Wolinsky*, 2 NY3d at 493 [citations omitted]).

While some courts have since determined that rent stabilization may apply to those units which could be legalized under current zoning restrictions (*e.g.* *480-486 Broadway, LLC v No Mystery Sound*, 2006 NY Slip Op 50236[U]; *Otus v Northside Development, L.L.C.*, 2006 NY Slip Op 51466 [U]), the subject residence here cannot be legalized as the building is located in a light manufacturing zone which does not allow residential development. Since the subject unit is an illegally converted commercial artist space and the applicable zoning law does not permit residential use, defendant is not entitled to rent stabilization protection (*Wolinsky*, 2 NY3d at 493; *Gloveman Realty Corp.*, 18 AD3d at 812).

As there is no extant lease between plaintiff and defendant nor are any other statutory or contractual protections against eviction alleged by defendant, plaintiff is entitled to recover possession of the unit.

Nonetheless, to the extent plaintiff additionally seeks past rent or use and occupancy, in the absence of a multiple dwelling registration and conforming certificate of occupancy, a landlord cannot recover rent or use and occupancy and this restriction cannot be waived by stipulation (*Dawkins v Ruff*, 10 Misc 3d 88 [2005]). It is not in dispute that plaintiff has not procured a residential certificate of occupancy. Cases permitting a landlord to collect rent or use and occupancy absent a conforming certificate of occupancy generally do so on the landlord's proof of substantial conformity to Code standards and condition such payments on the landlord's actual procurement of the requisite certificate (*Zane v Kellner*, 240 AD2d 208, 209 [1997]; *Lipkis v Pikus*, 99 Misc 2d 518, 521 [1979] *affd* 72 AD2d 697 [1979] *appeal dismissed* 51 NY2d 874 [1980]). However, no such proof is offered here.

Accordingly, defendant's motion for summary judgment dismissing the complaint is denied to the extent the complaint seeks a judgment of possession, and granted to the extent the complaint seeks use and occupancy. Plaintiff's cross motion is granted to the extent it seeks a judgment of possession and writ of assistance, and denied as to the claims for use and occupancy. Those causes of action for use and occupancy are dismissed. A judgment of possession and writ of assistance shall issue forthwith. The counterclaims of defendant for certain money damages are hereby severed.

The foregoing constitutes the decision and order of the court.

ENTER  
  
J. S. C.  
HON. MARK I. PARTNOW