

Benshosham v 11 East 30th St. Assoc.

2007 NY Slip Op 32125(U)

July 5, 2007

Supreme Court, New York County

Docket Number: 0104356/2005

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

PRESENT: _____

PART 17

Justice

Index Number : 104356/2005

BENSHOSHAM, ILAN

vs

11 EAST 30TH STREET ASSOCIATES

Sequence Number : 001

DISMISS LACK OF PROSECUTION

INDEX NO. _____

MOTION DATE _____

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

*and cross motion
all decided per attached*

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

FILED
JUL 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/5/07

EMILY JANE GOODMAN

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 17

-----X
ILAN BENSOSHAM,

Plaintiff,

-against-

Index No. 104356/05

11 EAST 30TH STREET ASSOCIATES, LLC,
LEMARQUIS ASSOCIATES, LLC, SCOTT
TAYLOR, 11 EAST 30TH PARTNERS LLC,
ESA HOLDING CORP.,

Defendants.

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

FILED
JUL 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

Defendants 11 East 30th Partners LLC and ESA Holding Corp.
(moving defendants) move to dismiss the complaint on the basis of
plaintiff Ilan Benshosham's (Benshosham) alleged lack of
standing, tampering with evidence, and submitting forged
documents in response to discovery demands. Moving defendants
also seek an order removing from the action those defendants who
are predecessors in interest with respect to the ownership of the
building located at 11 East 30th Street.

Benshosham cross-moves for summary judgment on his first
cause of action for a declaratory judgment, finding, among other
things, that his tenancy is protected by the rent-stabilization
law with a legal regulated rent of \$800.00 per month as of
September 30, 2003.

The complaint alleges that plaintiff is a residential tenant
of apartment 4F at 11 East 30th Street, New York, New York, and
that his tenancy began in or about 1998, pursuant to an oral

rental agreement, at the agreed upon rent of \$800.00 per month. Plaintiff alleges that at all times, the apartment was subject to the Rent Stabilization Law. The complaint further alleges that on August 20, 2003, the then owner of the building, defendant Le Marquis Associates, LLC, offered plaintiff the choice of a one-year renewal lease at a rent of \$2040.00 per month with a preferential rent of \$816.00 per month, or a two-year lease at \$2080.00 per month with a preferential rent of \$832.00 per month. Plaintiff elected a two-year lease running from December 1, 2003 to November 30, 2005 at \$832.00 per month. Plaintiff alleges that when he signed the lease in 2003, he was not aware of his rights under the Rent Stabilization Law.

Moving defendants contend that the complaint should be dismissed, because apartment 4F was not plaintiff's primary residence during the entire lease period of January 2003 through November 2005, and, therefore, he lacks standing to bring the action. Moving defendants submit the deposition testimony of plaintiff that he moved into apartment 4F in 1998 with a roommate at the rent of \$782.00, not \$800.00 per month. They also submit two affidavits which contradict plaintiff's assertion that he lived in apartment 4F from 1998 to the present. The first affidavit is from Eivor Johansson, to whom plaintiff was married from September 26, 1997 until their divorce on January 7, 2001. Johansson states that plaintiff lived with her on a full-time

basis, at 433 West 34th Street, Apartment 12C, during their marriage, until he left her in December 2000. Johansson further states that on the divorce documents, which moving defendants submit in support of their motion, plaintiff listed his address as 32-29 Greenpoint Avenue, 2d floor, Long Island City, New York. Moving defendants also submit the affidavit of Karl McCoy, who resides at 32-29 Greenpoint Avenue. McCoy states that, in the spring of 2001, plaintiff moved in to the second floor of 32-29 Greenpoint Avenue as his subtenant, and paid him \$625.00 per month as rent during the period that he resided there. According to McCoy, to the best of his knowledge, plaintiff moved out of the Long Island City address in the summer of 2004 and moved to Manhattan.

Moving defendants submit copies of plaintiff's bank statements from December 2001 through April 2001, listing his address as 423 West 34th Street; from April 2001 through June 2004, listing his address as 32-29 Greenpoint Avenue; and from June 2004 through January 2005, listing his address as 11 East 30th Street.

Finally, moving defendants submit certified copies of Registration Rent Roll Reports of the Department of Housing and Community Renewal (DHCR) for 11 East 30th Street for the years 1990-2000 and 2002-2005. Apartment 4F is not listed in the 1990 and 1991 reports. In the 1992, 1993, 1995 and 1996 reports

Apartment 4F is listed as a rent stabilized unit. In 1994, 1997 and 1998 the apartment is listed as Temporarily Exempt (TE) and the tenant is listed as "Hotel/SRO (transient)". In 1999, 2000, 2002, and 2003 the apartment is listed as TE with a rent of \$2000 and the tenant is listed as "other". In 2004 the apartment is listed as Permanently Excluded (PE) with a rent of \$2000 and the tenant as "high rate vacancy", and in 2005, the apartment is listed as PE with a rate of \$2000 and a tenant of "other." According to moving defendants, these documents establish that 11 East 30th Street was not plaintiff's primary residence during the entire lease period, and that, therefore, the apartment is no longer rent stabilized. However, the DCHR printout states, in relevant part:

ADVISORY NOTE: THIS DOCUMENT MERELY REPORTS THE STATEMENTS BY THE OWNER IN THE REGISTRATION(S) FILED BY THE OWNER. DHCR DOES NOT ATTEST TO THE TRUTH OF THE OWNER'S STATEMENTS OR THE LEGALITY OF THE RENTS REPORTED IN THIS DOCUMENT.

Further, the statements in the DHCR printout are contradicted by the standard rent stabilized renewal lease, for the period 2003-2005, indicating that Benshosham is the tenant for apartment 4-F.

Finally, moving defendants submit a copy of a Tax Return Listing for Tax Period December 31, 2002, provided by the Internal Revenue Service for the tax period December 31, 2002,

listing plaintiff's address as 32-29 Greenpoint Avenue Apt 2, along with the copy of plaintiff's tax return for 2002 provided in response to a discovery request, on which he lists his address as 11 East 30th Street. On the basis of the Internal Revenue Service document, moving defendants contend that plaintiff falsified the 2002 tax return submitted in response to their discovery request, and that his complaint should be dismissed.

In response, plaintiff submits copies of what he describes as "assorted rent receipts" from the prior owner of the building, Le Marquis Associates, LLC beginning on January 1, 1999, which indicate cash payments of \$800 per month for apartment 4F and list plaintiff and Lior Hagag as tenants on the first receipt, and list only plaintiff on the subsequent documents. The last rent receipt, dated 04/14/04 indicates a payment of \$832.00. Plaintiff contends that those rent receipts show that the DHCR Registration Rent Roll Reports are incorrect when they list the rent for Apartment 4F in 1999, 2000, 2002 and 2003 as \$2000 per month and indicate that the apartment is Temporarily Exempt from rent stabilization. However, as moving defendants note, Dov Elias, who was previously in charge of communications with tenants for the Marquis Hotel, testified at deposition that the records produced by plaintiff appear to be hotel records, but he could not say that they were the real hotel records or that someone had not taken hotel records and changed them. See

testimony of Dov Elias as quoted in Affidavit of Ilan Benshosham, dated February 1, 2007, ¶ 13.

In response to moving defendants' assertion that plaintiff's primary residence was in Long Island City from 2001 to 2004, plaintiff states that the Long Island City address was actually a commercial loft, not an apartment, and that he operated a series of business ventures there. In support of that contention, plaintiff submits copies of a check book for Media Run, promotional materials for B&B Gym, Inc., and New York State Tax Department correspondence for Performance Construction, all business entities that plaintiff allegedly owned, which have the Long Island City address.

According to plaintiff, the 433 West 34th Street address was his wife's residence. Plaintiff states that he married Johansson on September 26, 1997, and that on January 30, 2002, they obtained an uncontested divorce on the ground of abandonment for a period of more than one year immediately before the commencement of the divorce action. Plaintiff also submits a copy of a police accident report, dated June 18, 1998, which identifies his address as 11 East 30th Street. Plaintiff does not state that he never lived with Johansson at the West 34th Street address; however, since moving defendants appear to be basing their standing argument on plaintiff's primary residence during the lease period from 2003 to 2005, plaintiff's residence

during his marriage is not directly relevant.

In response to defendants' claims that plaintiff improperly altered the address on his 2002 tax returns, plaintiff contends that the copy that he provided to defendants in discovery was an exact copy of the tax return that he received from his accountant, with only the dollar amounts redacted.

In support of his argument that apartment 4F is rent stabilized, plaintiff submits a copy of correspondence dated August 20, 2003, from the then owner of the building, Le Marquis New York, enclosing a Renewal Lease Form "along with the Rent Stabilization Rider pursuant to the Rent Stabilization Law" as well as the renewal lease signed on August 20, 2003 by the owner, and on October 10, 2003 by the tenant. The lease states the legal rent as \$2000.00 in Part A-Offer to Tenant to Renew. Part B - Tenant's Response to Owner indicates that the tenant agrees to enter a two-year renewal lease at a monthly rent of \$832.00. The lease is accompanied by a Preferential Rent Lease Rider signed by both the owner and the tenant which states:

The parties to this Lease agree and acknowledge that the Tenant will be charged, during the term of the attached Lease Agreement, a preferential rent of (i) \$816.00 per month if Tenant elects a one year renewal term or (ii) \$832.00 per month if tenant elects a two year renewal term.

It is acknowledged that this preference is being granted to the Tenant because of the present economically depressed market.

The fact that Le Marquis New York provided a Rent

Stabilization Rider pursuant to the Rent Stabilization Law certainly raises the inference that the owner believed that the apartment, and therefore the 2003-2005 lease, was covered by the Rent Stabilization Law. It does not, however, explain on what basis the landlord arrived at the \$2040.00 and \$2080.00 figures for monthly rent.

Although plaintiff states that he now considers that he was "an idiot" to sign the renewal lease with the preferential rent rider, he states that he signed it because he was happy to finally get a lease and did not know that at the expiration of the lease the landlord would be permitted to increase the rent based upon the legal regulated rent rather than the preferential rent. In any case, if, as plaintiff contends, the apartment is rent regulated, and the legal regulated rent was in fact \$800.00 or \$832.00, not \$2080.00 as the Preferential Rent Rider states, plaintiff could not legally waive the benefit of the Rent Stabilization Law merely by signing the lease. *See East 11th St. Assoc. v Breslow*, 174 Misc 2d 994 (App Term, 1st Dept 1997), *affd* 256 AD2d 110 (1st Dept 1998); Rent Stabilization Code § 2520.13. Agreements to effectively deregulate apartments by private agreements are unenforceable against public policy. *See Georgia Properties, Inc. v Dalsimer*, 835 NYS2d 41 (1st Dept 2007).

Plaintiff also submits a copy of the Holdover Petition filed against him, on or about August 17, 2004, by 11 East 30th Street

Associates, the successor in interest to Le Marquis Hotel, LLC in which the landlord asserts that apartment 4F is a rent-stabilized apartment, and that Benshosham has allegedly sublet the apartment without the permission of the landlord. Moving defendants contend that the reference to the apartment as rent-stabilized was an inadvertent drafting error by the attorneys for the then owner of the building. However, moving defendants' assertion is mere speculation, and like the use of a Preferential Rent Rider pursuant to the Rent Stabilization Code, the assertion in the Holdover Petition that the apartment was rent stabilized, again, raises the inference that the prior owner believed it was still covered by the Code. Those two documents also undermine moving defendants' assertion contained in the affidavit of Henry Sasson, managing member of defendant 11 East Partners LLC, that the current owner was told, and conducted due diligence that showed, that apartment 4F was not subject to rent stabilization.

In arguing that plaintiff lacks standing, moving defendants rely on the provision in the Rent Stabilization Code that states that a tenant who is not a primary resident of the unit is not entitled to the protections of the Rent Stabilization Law. See 9 NYCRR 2524.4 (c). Therefore, according to moving defendants, plaintiff lacks standing to bring this action which seeks a judgment declaring his status as a protected tenant.

Plaintiff argues that although the Rent Stabilization Code

does permit a landlord to refuse to renew a lease where a court has determined that the apartment is not occupied by the tenant as his or her primary residence, the owner must give the tenant 30 days' notice of his or her intention to bring an action to recover possession of the apartment. See 9 NYCRR 2524.4 (c); see also 9 NYCRR 2524.2 (c) (4), which requires notice to the tenant to vacate or surrender possession at least 90 and not more than 150 days prior to the expiration of the lease term; *Golub v Frank*, 65 NY2d 900 (1985) (landlord who has not given requisite notice may not refuse to renew lease based on nonprimary residence); *Ansonia Assoc. v Rosenberg*, 163 AD2d 101, 102 (1st Dept 1990) ("a jurisdictional prerequisite to nonrenewal of a stabilized lease on the basis of nonprimary residence is that the landlord have served a notice of nonrenewal during the specified window period prior to the expiration of the existing lease term"). Plaintiff further argues that, while these sections of the rent stabilization regulations may provide a basis for non-renewal of a lease, there has been no court determination that Apartment 4F is not occupied by plaintiff, and, in any case, these regulations are not intended to provide a basis for determining standing.

The moving defendants have not demonstrated that plaintiff lacks standing to bring this action, which is merely another way of arguing that plaintiff cannot prevail in this action.

Although the moving defendants have submitted evidence suggesting that plaintiff did not maintain 11 East 30th Street as his primary residence during at least part of the lease period, the evidence submitted by plaintiff countering their assertions raises sufficient questions of fact that must be decided by the trier of fact. Moving defendants appear to recognize this problem in their opposition to plaintiff's motion for summary judgment, when they argue that the disputes of fact regarding plaintiff's primary residence preclude summary judgment to plaintiff.

Moving defendants also argue, without citation, that the fact that the Renewal Lease states that the "legal rent" for apartment 4F is \$2000.00 per month demonstrates that the apartment is no longer rent stabilized. According to moving defendants, once the legal rent of an apartment reaches \$2000.00 per month or more, it enters the free market. Under the Rent Stabilization regulations, however, a \$2000.00 rent results in the apartment become destabilized only if it becomes vacant (see 9 NYCRR 2520.11 [r]), or if the tenant has an income of more than \$175,000.00 for two consecutive calendar years. See 9 NYCRR part 2531 governing high income decontrol. And given the conflicting evidence, it is not clear when and how the rent purportedly reached the \$2000.00 mark.

Moving defendants also argue that the complaint should be

dismissed because plaintiff falsified his address on the tax return that he provided during discovery. Moving defendants contend that, because the tax return that plaintiff provided has a different address from the address on the 2002 Tax Return Listing provided by the Internal Revenue Service, plaintiff must have falsified his address. Plaintiff asserts that the copy he provided to defendants he obtained, as is, from his accountant. Moving defendants offer no evidence to counter plaintiff's assertion, but, rather, assert rhetorically, "what could possibly be the accountant's motive for changing the address without Plaintiff's permission or consent?" Affirmation of Margie Sasson, Esq., dated February 15, 2007, ¶ 37. Although there may be some circumstances where falsification of documents justify dismissal of an action, here, moving defendants only speculate that plaintiff has falsified the address on his tax return, and that, without more, is insufficient to justify dismissal.

Finally, moving defendants seek an order removing from the complaint those defendants who are predecessors in interest with respect to the ownership of the building. Although it is not clear that plaintiff has a viable claim against those parties, they do not appear to be represented by the attorneys for moving defendants, and thus that request is denied.

With respect to plaintiff's cross motion, the court agrees with moving defendants that questions of fact preclude a grant of

summary judgment.

Accordingly, it is hereby

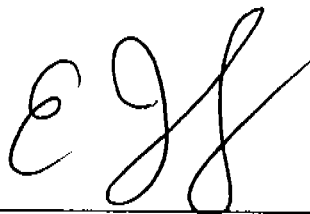
ORDERED that the motion of defendants 11 East 30th Partners LLC and ESA Holding Corp. is denied, and it is further

ORDERED that plaintiff's cross motion is denied.

This Constitutes the Decision and Order of the Court.

Dated: July 5, 2007

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED
JUL 12 2007
NEW YORK
COUNTY CLERK'S OFFICE