

Espinal v 180 Realty

2007 NY Slip Op 32497(U)

August 6, 2007

Supreme Court, New York County

Docket Number: 0120020/2003

Judge: Shirley W. Kornreich

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

JUDGE SHIRLEY WERNER KORNREICH

PRESENT
Index Number : 120020/2003

PART 54

ESPINAL, GINA

vs
180 REALTY

INDEX NO. _____

MOTION DATE 6/28/07

Sequence Number : 007

MOTION SEQ. NO. _____

CONFIRM/REJECT REFEREE REPORT

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for confirm
referee's reports and judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits _____

3-4

Replying Affidavits _____

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 13 2007

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 8/6/07


HON. SHIRLEY WERNER KORNREICH

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
COUNTY OF NEW YORK: PART 54

-----X
GINA ESPINAL,

Plaintiff,

Index No.: 120020/03

-against-

**DECISION and
ORDER**

180 REALTY,

Defendant.

FILED
AUG 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
KORNREICH, SHIRLEY WERNER, J.:

This is an action by a tenant to enforce a rent overcharge award ordered by the Division of Housing & Community Renewal ("DHCR"). The issue of whether plaintiff "self-credited" her rent under the DHCR order was referred to Special Referee Nicholas Doyle. In his March 12, 2007 report (the "Report"), Special Referee Doyle found that plaintiff did not self-credit. Plaintiff moves to confirm the Report and to amend the judgment by naming as judgment debtors, jointly and severally, 180 Realty, LLC, 819 West 180th Street Associates, Morris Piller, and Shorecliff Co., LLC. Defendant cross-moves to reject the Report and to find instead that plaintiff did self-credit.

I. *Background*

On May 7, 1990, plaintiff and her husband, Javier Espinal, signed a lease with defendant for Apartment 31, 819 W. 180th St., New York, NY (the "Apartment"). The landlord named in the lease was 180 Realty Co., with an address of 1274 49th St., Brooklyn, NY. Plaintiff moved into the Apartment with her husband on May 15, 1990 and was charged a monthly rent of \$795. Shortly after moving into the Apartment, plaintiff filed a rent overcharge complaint with the

DHCR.

On July 28, 1993, the DHCR issued an order finding a rent overcharge from May 15, 1990 to May 14, 1993. Since the overcharge was willful, the DHCR granted plaintiff treble damages, for a total award of \$49,878.53, to be paid by 180 Realty c/o M.P. Management Co. at 1274 49th St., Brooklyn, NY. According to the order, plaintiff had two options if the owner did not refund the money before the next month's rent was due or file a Petition for Administrative Review ("PAR") within 35 days. Plaintiff could either self-credit up to 20% of the overcharge each month until the overcharge was fully credited or enter and enforce the order as a judgment.

Following the order, defendant filed a PAR. When the PAR was denied on January 8, 1999, defendant appealed under CPLR Article 78. The Article 78 proceeding was dismissed on July 19, 1999. On August 21, 2003, the DHCR certified to plaintiff that the Article 78 judgment had been entered on June 18, 2001. Following the certification, plaintiff signed an affidavit on September 20, 2003, swearing that she had not received any payment of the DHCR award in cash or as an offset against rent payments. The DHCR order was entered and filed as a judgment on November 20, 2003 with interest from July 28, 1993, for a total due of \$96,208.17.

In the Report, Special Referee Doyle made the following undisputed findings in support of his conclusion that plaintiff did not self-credit. Plaintiff lived in the Apartment with her husband until moving to Florida in October 2000; her husband remained in the Apartment. Due to financial difficulties, the Espinals sometimes failed to make timely rent payments, doubled up on rent payments, or failed to make any rent payments. From January 1994 to October 2003, the Espinals failed to make approximately 29 and 3/4 rent payments out of a total of 118, with more than half of the missing payments in 1997 and 1998. The Espinals made all payments in 1999,

2001, and 2003.

Defendant refused to accept any further rent payments after October 2003. When Javier Espinal sent defendant a cashier's check for \$2,816.46 on July 13, 2004, defendant's counsel returned the check with a letter stating that plaintiff was self-crediting. Defendant, however, initiated nonpayment proceedings against plaintiff on August 20, 1999 and December 8, 2003. Defendant claimed that the proceedings were filed automatically by a computer program and were discontinued because plaintiff was self-crediting. Special Referee Doyle found defendant's explanation contradicted by other evidence, such as invoices sent to plaintiff showing rent arrears in excess of \$35,000 and rent records that did not reflect any set-off for the DHCR order.

The Shorecliff Co., a general partnership, was the fee owner and registered landlord of 819 W. 180th St., New York, NY (the "Building") in 1989. In 1990, a memorandum of lease for 819-825 W. 180th St., New York, NY, was recorded between The Shorecliff Co. as the landlord and 819-825 Realty Associates, a general partnership, as the tenant. On the annual apartment registration, 180 Realty Co. was named as the registered owner of the Building, while M P Management Co. was listed as the manager. In 1994, the registered owner was named as 180 Realty and the manager listed as MP Management.

180 Realty Co. was converted from a partnership into 180 Realty, LLC, on March 13, 1995. On April 28, 1995, the memorandum of lease was terminated, with Morris Piller as the signatory partner for 819-825 Realty Associates. The Shorecliff Co. was converted into The Shorecliff Co., LLC, on June 23, 1999. In July 1999, a new memorandum of lease for 819-825 W. 180th St., New York, NY, was recorded between The Shorecliff Co., LLC as the landlord and 180 Realty, LLC as the tenant. The memorandum stated that the lease term ran from June 28,

1989 to June 27, 2038, and the original net lease was made between The Shorecliff Co. and 819-825 Realty Associates. During the Special Referee hearing, Mr. Piller testified, as plaintiff's landlord and President of 180 Realty, that 180 Realty was the net lessee of the Building.

Defendant's counsel was unable to produce documents concerning the status of Morris Piller, but he informed the court that Mr. Piller is currently the sole member of 180 Realty, LLC. Counsel was unable to provide further details regarding the partnership prior to conversion.

II. *Conclusions of Law*

A. *Confirming the Special Referee Report*

Under CPLR 4403, a court may confirm or reject, in whole or in part, the report of a Special Referee, and the court may make new findings without taking additional testimony. Generally, a court confirms the findings of a Special Referee whenever they are substantially supported by the record and the Referee has clearly defined the issues and resolved matters of credibility. *Kaplan v. Einy*, 209 A.D.2d 248, 251 (1st Dept. 1994). The Special Referee is considered to be in the best position to determine the issues presented. *Nager v. Panadis*, 238 A.D.2d 135, 136 (1st Dept. 1997).

The record in the instant case supports a confirmation of Special Referee Doyle's finding that plaintiff did not self-credit. Special Referee Doyle outlined the self-crediting issue clearly and made fair judgments of credibility based on the evidence. Defendant argues that Special Referee Doyle misconstrued the law on self-crediting and ignored the course of conduct established by the parties; however, defendant's arguments are unpersuasive.

In the Report, Special Referee Doyle relied on the Court of Appeals holding in *Mohassel v. Fenwick*, 5 N.Y.3d 44 (2005). In *Mohassel*, a tenant sought to enforce a rent overcharge award

as a judgment against his landlord. *Id.* However, judgment was not entered until several months after the DHCR notified the tenant that the landlord's Article 78 appeal had been denied. *Id.* The Court found that since the tenant was not a party to the appeal, he could not be faulted for awaiting word from the DHCR before entering judgment. *Id.* The Court pointed out that such conduct was consistent with the DHCR's written instructions, which state that the filing of a PAR or Article 78 appeal delays the tenant's ability to enter judgment. *Id.* Similarly, in the instant case, plaintiff entered judgment of the overcharge award without any undue delay. Plaintiff was not a party of the Article 78 proceeding and requested entry of judgment approximately one month after the DHCR certified that the Article 78 decision was final.

Since plaintiff was not entitled to self-credit or enter judgment until the DHCR certified that all legal proceedings were concluded, Special Referee Doyle correctly limited his scope of inquiry to the period of rent payments after the Article 78 proceeding was dismissed. Plaintiff missed only five payments in the four years following the Article 78 decision and made all payments in two of those years. It would be illogical to hold the lack of rent payments after October 2003 against plaintiff, since defendant refused to accept them.

Even if plaintiff's entire rent payment history were considered, the record does not support defendant's argument that self-crediting was the course of conduct established by the parties. Defendant cites *Bogan v. Royal Realty Company*, Sup Ct, New York County, 1994, Davis, J., Index No. 14977/90, where the court found a tenant's failure to pay rent constituted self-crediting. However, *Bogan* is inapplicable to the instant case. The tenant in *Bogan* did not pay any rent for approximately three years, up to the amount of his overcharge award plus interest, demonstrating an intent to self-credit. *Id.* The *Bogan* landlord did not request that the

tenant resume making rent payments until the full amount of the award had been credited. *Id.* In contrast, here plaintiff continued to make rent payments until prevented from doing so by defendant. Plaintiff's undisputed history of rent payments shows no deliberate, continuous pattern comparable to the situation in *Bogan*. The fact that plaintiff occasionally failed to make rent payments due to financial difficulties is not evidence of self-crediting.

Moreover, defendant's own actions fail to demonstrate reliance on such a course of conduct. Defendant voluntarily accepted rent payments from plaintiff for more than ten years after the DHCR order was issued, sent rent arrears invoices to plaintiff for missing payments, and instituted two nonpayment proceedings against plaintiff. Defendant claims that the nonpayment proceedings were mistakes of its automated computer program. However, that claim does not explain why the proceedings were filed in years when plaintiff made all of her rent payments. Defendant's contentions regarding its decision not to prosecute the nonpayment proceedings are not sufficient evidence of reliance in the face of its other actions. Most telling is defendant's failure to explain why it took ten years for plaintiff's self-crediting to become obvious enough for defendant to refuse rent payments. Defendant's assertions aside, the record clearly supports the findings in the Report.

B. *Amending the Judgment*

Plaintiff has requested that the entered judgment be amended to include responsible parties other than the named defendant. Before such an amendment can be made, it is necessary to establish the relationships and liabilities of the relevant parties. The record permits the reasonable inference that, at the time of the DHCR order, the named defendant, 180 Realty, also known as 180 Realty Co., was a d/b/a or fictitious name for the general partnership 819-825

Realty Associates. It appears that the d/b/a was used for residential leases while the net lease with The Shorecliff Co. used the official partnership name. After 180 Realty Co. was converted into 180 Realty, LLC, the updated memorandum of lease stated that 180 Realty, LLC, was now the named tenant for the lease initially signed by 819-825 Realty Associates. Defendant failed to present any evidence that 180 Realty or 180 Realty Co. ever subleased or managed the Building as a legal entity separate from net lessee 819-825 Realty Associates.

Under New York Partnership Law, a partnership and all its partners are liable jointly and severally for any loss or injury caused by the wrongful act of any partner acting in the ordinary course of business or with the authority of his copartners. Partnership Law §§ 24, 26. Two or more persons conducting a business as a partnership may be sued in the partnership name. CPLR 1025. A partnership converted into a limited liability company ("LLC") is for all purposes the same entity that existed before the conversion. Limited Liability Company Law § 1007. After conversion, the partnership and its partners remain liable for any debts, obligations, liabilities, and penalties incurred by the partnership before the conversion took effect. Limited Liability Company Law §§ 1006, 1007. Any actions pending against the partnership at the time of conversion may be continued as if the conversion had not occurred. Limited Liability Company Law § 1007.

The willful overcharge of rent by a landlord is a wrongful act committed in the ordinary course of business. Therefore, the partners of the general partnership 819-825 Realty Associates, d/b/a 180 Realty and 180 Realty Co., are jointly and severally liable for the DHCR overcharge award. Since the award was ordered prior to the conversion from partnership to LLC, the liability of the parties involved stems from the original partnership. As a partner, Morris Piller is

liable jointly and severally for the judgment, and his liability is unaffected by the partnership's subsequent conversion to an LLC. Contrary to defendant's arguments, a partner is not merely an agent and is not shielded from personal liability. A suit against a partnership implicates all of its partners. Furthermore, defendant concedes that Morris Piller is the sole member of 180 Realty, LLC. 180 Realty, LLC, is liable jointly and severally as the successor in interest to the partnership.

An amendment of the judgment to include these parties is not a substitution for the defendant in the original DHCR order, but merely the addition of entities liable for the actions taken in the name of 180 Realty. The CPLR permits the identity of a party to be amended during the course of a legal proceeding when further information becomes available or the relevant interest is transferred. CPLR 1024 and 1018.

Defendant argues that the instant case is comparable to *Mazelier v. 634 West 135, LLC*, 22 A.D.3d 361 (1st Dept. 2005), where the court refused to amend a judgment when the wrong defendant was named in the DHCR order. In *Mazelier*, the correct building owner was an entity completely separate from the named defendant and did not receive proper notice of the order. *Id.* However, in the instant case, the right defendant was named in the DHCR order. The fact that defendant filed both a PAR and an Article 78 appeal indicates that it received proper notice of the order and was fully aware of the situation. Moreover, defendant did not argue in either appeal that it was named incorrectly as the landlord for the Building. Defendant clearly had its "day in court" and was capable of representing the interests of the parties who overcharged the tenant.

There is no evidence in the record that the original net lessor, The Shorecliff Co., or its successor in interest, The Shorecliff Co., LLC, was responsible for plaintiff's rent overcharge.

Nor is there evidence that either the partnership or the LLC accepted liability for claims arising out of its net lessee's use of the leased property. Therefore, there is no basis for adding The Shorecliff Co. or The Shorecliff Co., LLC as judgment debtors. Accordingly, it is

ORDERED that plaintiff's motion to confirm the March 12, 2007 report of Special Referee Nicholas Doyle is granted; and it is further

ORDERED that defendant's cross-motion to reject the Report is denied; and it is further

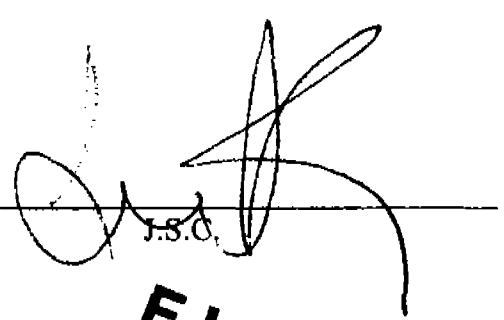
ORDERED that plaintiff's motion to renew its motion to compel the judgment debtor to bond the judgment is denied; and it is further

ORDERED that the entered judgment be amended to name as judgment debtors, jointly and severally, 819-825 Realty Associates, d/b/a 180 Realty and 180 Realty Co., 180 Realty, LLC, and Morris Piller, in his capacity as a partner in 819-825 Realty Associates; and it is further

ORDERED that upon service upon him of a copy of this order with notice of entry, the Clerk is directed to amend the judgment accordingly, without prejudice to the rights of the judgment debtors to collect any unpaid rent.

Dated: August 6, 2007

ENTER:


J.S.C.

FILED
AUG 13 2007
NEW YORK
COUNTY CLERK'S OFFICE