

**Matter of Bryant v New York City Dept. of  
Hous. Preserv. Dev.**

2007 NY Slip Op 33345(U)

October 10, 2007

Supreme Court, New York County

Docket Number: 0102249/2007

Judge: Eileen Bransten

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

PRESENT: Eileen Bransten  
Justice

PART 6

Bryant  
- v -  
NYC DEPT OF HOUSING  
PRESERVATION + Development

INDEX NO. 102249/07  
MOTION DATE 5-8-07  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion to/for set aside HPD determination

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3</u>

Cross-Motion:  Yes

**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 on person at the Judgment Clerk's Desk (Room 1713).

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: 10-10-07

Eileen Bransten  
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: PART SIX

-----X

In the Matter of the Application of DAVID A. BRYANT,

Petitioner,

Index No.: 102249/07

Motion Date: 5/8/07

Mot. Seq. No.: 001

For an order under C.P.L.R. Article 78,

-against-

NEW YORK CITY DEPARTMENT OF HOUSING  
PRESERVATION AND DEVELOPMENT,

Respondents.

-----X

PRESENT: EILEEN BRANSTEN, J.

**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 1413).

In this Article 78 proceeding, petitioner David A. Bryant ("Mr. Bryant") seeks a Judgment setting aside the final determination of the New York City Department of Housing Preservation and Development ("HPD"), which denied his application for a Certificate of No Harassment. HPD vigorously opposes the petition.

Background

This proceeding relates to a seven-unit building and property located at 213 West 131st Street in Manhattan ("the Property").

In July 2004, Radian Services LLC--the owner of the property--commenced an eviction proceeding against six tenants in Housing Court. Verified Answer ("Answer"), at

¶ 75.

On December 21, 2004, the Special Enforcement Unit of HPD issued an Order to Repair/Vacate Order for the Property (“Vacate Order”). Answer, at ¶ 77. The Vacate Order set forth that an inspector certified that the dwelling was “dangerous to life and detrimental to the health and safety of the occupants” based on, among other things, “sagging/collapsing stairs, \* \* \* no heat \* \* \* no gas supply \* \* \* no hot water \* \* \* no water supply \* \* \* Bldg in total disrepair.” Answer, at ¶ 77. It was ordered that the owner repair the building by the following day. *Id.*

The conditions at the Property were not timely cured. Answer, at ¶ 78. HPD continued to monitor the situation on a regular basis. *Id.*

On December 30, 2004, the Property was transferred to Jo West 131st Street, LLC (“Jo West”), of which Jeff Ozeri (“Mr. Ozeri”) was a member. Answer, at ¶ 76. Jo West was substituted as a petitioner in the Housing Court eviction proceeding. *Id.*, at ¶ 80.

On January 19, 2005, the parties to the eviction proceeding entered into a Stipulation of Settlement that was so-ordered by the court. The Stipulation indicated that the respondent tenants were A. Kym Graves, Charles Strother, Larry Wise, Robert Gillyard, Reginald Hill and Gerald Chance. Verified Petition (“Petition”), Ex. G, at ¶ 1. Under the terms of the parties’ agreement, the tenants agreed to vacate the Property. They received, among other things, \$5,500, moving costs and their use and occupancy payments were waived. *Id.*, at ¶ 7.

The stipulation stated:

“Both parties withdraw each of their claims and/or counterclaims as set forth in the petitions and answer(s) \* \* \*. Both parties also release each other, their officers, partners, members, employees, agents, heirs and assigns from any and all claims arising out of the [tenants] residency in the subject property to date. Each of the respondents [tenants] further represents that he/she has in no way been harassed by petitioner [owner].”

Petition, Ex. G., at ¶ 12 (emphasis added). If the owner failed to fulfill any of the stipulation’s obligations the tenants reserved their rights to restore the cases. *Id.*, at ¶ 13.

On January 20, 2005, pursuant to HPD’s December 21, 2004 Vacate Order, HPD vacated the Property. Verified Answer (“Answer”), at ¶ 82

On April 14, 2005, Mr. Bryant, an innocent arms-length purchaser, acquired the Property from Jo West. Petition, at ¶ 12; Answer, at ¶ 83.

Because he wanted to renovate the Property, in August 2005, Mr. Bryant applied to HPD for a Certificate of No Harassment. Petition, at ¶ 13, Ex. B. In his application, Mr. Bryant indicated that the relevant inquiry period was August 16, 2002 through August 16, 2005. Petition, Ex. B. Item 18 of the application required him to list “all former occupants who have surrendered the units they occupied at the subject premises, or otherwise vacated, from the opening date of the Inquiry Period to the present.” The application set forth that if “you have not owned the premises during the entire inquiry period, please contact former owners for this information.” *Id.* In response, Mr. Bryant indicated “None,” omitting

occupants' names, the units they occupied, the dates they vacated, their reasons for vacating and their current contact information. *Id.*

Item 19 required Mr. Bryant to list "all lawsuits relating to the subject premises commenced, pending or resolved during the inquiry period." Petition, Ex. B. Again, Mr. Bryant indicated "None." *Id.*

By petition dated July 10, 2006, pursuant to Administrative Code § 27-2093, HPD sought to prohibit renovation of the Property for three years on the ground that "harassment occurred at the premises 213 West 131st Street, Borough of Manhattan, during the inquiry period." Petition, Ex. C, at 7. Specifically, the petition set forth that between September 14, 2002 to the present, the "alleged acts of harassment [that] were done or caused by the applicant, applicant's agents, present owners or prior owners or their agents" included:

- Failure to comply with a vacate order placed against the property effective December 22, 2004;
- Failure to provide adequate heat and hot water;
- Failure to provide gas to the building;
- Failure to repair defective plaster;
- Failure to repair holes in the ceiling;
- Failure to repair electrical problems;
- Failure to repair leaking roof;

- Failure to repair wooden floor;
- Failure [to repair] bathtub, pipes and flooding in basement;
- Failure to repair broken steps;
- Repeatedly telling tenants they had to move;
- Bringing frivolous holdover proceedings against tenants;
- Forcing tenants to bring HP actions in order to get repairs done;
- Omitting material information from the application for a certification of no harassment, including but not limited to, the HP actions brought by the tenants, the list of former tenants, etc.;
- Failure to repair hazardous violations timely which caused the Emergency Repair Program at HPD to repair said violations, which include, but are not limited to, supplying electricity to the building, concealing water leaks; and
- Generally interrupting and/or discontinuing and decreasing essential services and repairs.”

Petition, Ex. C, at 5-6.

In his answer to the petition, Mr. Bryant maintained that when he purchased the Property it was vacant and he “had no knowledge of tenants or any alleged harassment prior to the instant proceeding.” Petition, Ex. D, at ¶ 4. He asserted that “all allegations of harassment of former tenants \* \* \* pertain to [his] predecessors in interest.” *Id.*, at ¶ 5. He further contended that the January 19, 2005 so-ordered stipulation “constitutes a prior judicial determination that the alleged tenants of the subject premises had in ‘no way been

harassed' by the prior owner" and that HPD "is estopped from herein seeking to prove harassment of alleged tenants in derogation of the Civil Court Order issued January 19, 2005." *Id.*, at ¶¶ 8-9.

An administrative hearing was scheduled. HPD's potential witnesses included former tenants Arbara Kym Graves (who actually testified), Charles Strother, Robert Gillyard, Larry Wise and Reginald Hill, who were parties to the earlier Housing Court proceedings. Petition, Ex. E.

On January 19, 2007, HPD issued a final determination denying Mr. Bryant's application for a certification of no harassment based on the Report and Recommendation of the Administrative Law Judge ("ALJ"). Petition, Ex. F; Answer, Ex. T.

The ALJ found that there were "currently 146 open violations on the building" and explained that any "acts of harassment during the 36-month inquiry period are attributed to the current owner, even those acts committed by prior owners, without regard to the current owner's fault." Petition, Ex. F, at 4.

The ALJ concluded:

"There is no dispute that [the Property] has a history of housing maintenance code violations. Indeed conditions were so hazardous that [HPD] issued an emergency order to vacate the building in December 2004 due to a complete lack of services and unsafe conditions. Within four months of issuing the vacate order [Jo West] delivered the building, without tenants, to [Mr. Bryant]. This tribunal has stated that numerous violations and a vacate order are sufficient to establish a *prima facie* case of harassment and create a

presumption that there was an intent to cause lawful occupants to surrender their occupancy rights. \* \* \* Accordingly, I find that [HPD] has demonstrated harassment as defined in section 27-2093(a).”

Petition, Ex. F, at 5.

The ALJ rejected Mr. Bryant’s arguments that HPD was collaterally estopped from alleging harassment based on the Housing Court stipulation and that alleged “criminal behavior” by the tenants in soliciting a monetary settlement precluded a harassment finding.

Petition, Ex. F, at 5.

Specifically, with respect to collateral estoppel, the ALJ found that Mr. Bryant “failed to demonstrate that the issue of tenant harassment was litigated in the Housing Court proceeding, [and] HPD \* \* \* demonstrated that it did not have a full and fair opportunity to litigate this question prior to this proceeding.” Petition, Ex. F, at 5-6. The ALJ set forth that the one-line in the stipulation that mentioned harassment was not enough to implicate preclusion, stating that “the tenants’ stipulation, standing alone, is insufficient to establish that the issue of tenant harassment was actually litigated in the prior proceeding.” HPD was not in privity with the tenants for purposes of applying collateral estoppel, the ALJ found, because it “was not a party to the Housing Court proceeding and there is no evidence that it had any control over the litigation.” *Id.* The ALJ explained that unlike the eviction proceeding, the present case was commenced “pursuant to the SRO Anti-Harassment ordinance in response to a request for a certificate of no-harassment” and that HPD “has a

statutory obligation to make a determination whether harassment of SRO tenants has occurred within three years of receiving such a request.” *Id.*, at 7.

The ALJ further found that the tenants “monetary demand” to Mr. Bryant, which HPD considered “inappropriate,” and the sustained objection to admitting evidence of the settlement offer at the hearing, did not alter the conclusion that there had been harassment at the Property. Petition, Ex. F, at 7.

The ALJ stated that even though Mr. Bryant “is an innocent owner with no prior connection to those responsible for the acts of harassment, and appears willing and able to renovate the uninhabitable building, the statute makes no provision for a remedy other than the non-issuance of a certificate of no harassment.” Petition, Ex. F., at 8.

Mr. Bryant commenced this Article 78 proceeding seeking a Judgment setting aside HPD’s final determination. He argues that the ALJ improperly failed to apply collateral estoppel to prevent relitigation of a decided issue. Petitioner’s Memorandum of Law (“Bryant Mem.”), at 20. Mr. Bryant contends that HPD and the tenants in the Housing Court proceedings have a “mutually beneficial posture” and therefore that they meet the “broad definition of being in privity for collateral estoppel purposes.” Bryant Mem., at 22. He asserts that HPD “is acting herein on behalf of the same tenants” that were subject to the consent order “and is in privity with its five tenant witnesses who previously were the litigants.” *Id.*, at 24.

Mr. Bryant states that “neither [HPD] nor the administrative court below have appellate jurisdiction necessary to review the civil court consent order.” Petitioner’s Reply Memorandum of Law (“Reply Mem.”), at 2-3.

Mr. Bryant also maintains that the tenant witnesses attempted to bribe him by asking for \$20,000 in exchange for refusing to testify on HPD’s behalf. Petition, at ¶¶ 51, 53. He urges that it was error for the ALJ to allow one of the tenants to testify but deny him the opportunity to cross-examine her related to the \$20,000 solicitation on the ground that settlement negotiations are inadmissible. *Id.*, at ¶¶ 54-55.

HPD counters that collateral estoppel is inapplicable because the Housing Court stipulation does not establish that the issue of harassment was actually litigated or decided by the court. Answer, at ¶ 106. HPD further contends that Mr. Bryant has not demonstrated privity between HPD and the tenants since its interests were not represented in the Housing Court proceeding. *Id.*, at ¶ 107. HPD emphasizes that the “tenants and the landlord cannot foreclose [it] from carrying out its duty by one line in a stipulation in a proceeding in which HPD did not even participate.” *Id.*, at ¶ 107. HPD also maintains that the ALJ properly precluded discussion of the parties’ settlement negotiations at the hearing. Answer, at ¶ 114.

HPD defends its determination, explaining that it “followed all applicable procedures” and that “denial of the application for a Certificate of No Harassment was within [its] authority, and was reasonable and proper in all respects.” Answer, at ¶ 108.

Because collateral estoppel does not preclude HPD's denial of Mr. Bryant's application for a Certificate of No Harassment and because the final determination was rational, the petition is denied and the proceeding is dismissed.

#### Analysis

“Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action \* \* \* and decided against that party or those in privity.” *Buechel v. Bain*, 97 N.Y.2d 295, 303 (2001). “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.” *Id.*, at 303-304.

Additionally, in addressing whether a non-party should be deemed in privity with one who already litigated an issue, “courts must carefully analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion, and whether preclusion, with its severe consequences would be fair under the particular circumstances. Doubts should be resolved against imposing preclusion to ensure that the party to be bound can be considered to have had a full and fair opportunity to litigate.” *Buechel v. Bain*, 97 N.Y.2d, at 305 (emphasis added).

Here, there is no doubt that collateral estoppel is inapplicable.

At the outset, there is no privity between HPD and the tenants in the Housing Court matter. Indeed, they do not remotely have a “relationship that would justify preclusion.” The interests of HPD, are materially different from those of the tenants. The tenants simply cared about resolution of their pending Housing Court case. Their concern was limited to receiving sufficient compensation, nothing more.

HPD--the only party with standing to initiate a harassment proceeding pursuant to Administrative Code § 27-2093--has wholly different responsibilities, objectives and concerns. It is duty bound to ensure that there has been no harassment of lawful occupants of a multiple dwelling during the thirty-six month period before an application for a certification of no harassment. It had no opportunity or obligation to litigate “harassment” in the Housing Court proceeding. That HPD called on the Housing Court tenants to testify at its administrative proceedings, which took place long after the stipulation’s execution, is of no consequence. It does not demonstrate that HPD was in privity with these individuals then or over a year earlier when the stipulation was signed.

Mr. Bryant’s reliance on *Buechel v. Bain* is misplaced. There, parties to be bound by an earlier judicial determination were named parties in that earlier action and were partners with the party against whom the issue was decided. They had notice of what was being

litigated in the earlier action and the evidence established that they understood they could be bound by a judicial determination adverse to their partner.

HPD, in stark contrast, was not a party to the Housing Court matter, and with its own independent objectives and responsibilities, does not have a relationship with the former tenants “that would justify preclusion.”

Additionally, the issue of harassment covered by Administrative Code § 27-1093 was not actually litigated or decided by the Housing Court. The Housing Court proceedings did not address whether there had been any harassment pursuant to Administrative Code § 27-2093. Indeed, there had not been any application for a certificate of no harassment and HPD had no occasion to investigate the matter. The issue of harassment under Administrative Code § 27-1093 was not actually litigated and certainly not decided by virtue of the one-line mention of “harassment” in a stipulation to which HPD was not a party. *See, Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 457 (1985) (no collateral estoppel based on stipulation); *Angel v. Bank of Tokyo-Mitsubishi, Ltd.*, 39 A.D.3d 368, 371 (1st Dept. 2007) (no issue preclusion based on a “consent order” because “collateral estoppel is inapplicable if an issue has not been fully litigated, e.g., if there has been a stipulation”).

It is preposterous to even suggest that tenants, who have private interests entirely different from HPD’s, could enter into a stipulation that would then bind the governmental

agency and prevent it from furthering public interest. If preclusion were to apply under such circumstances private parties could entirely circumvent the Administrative Code.

In the end, HPD, which was not in privity with the Housing Court tenants, did not have any incentive or any opportunity--much less a full and fair one--to contest the issue of harassment in the Housing Court proceeding.

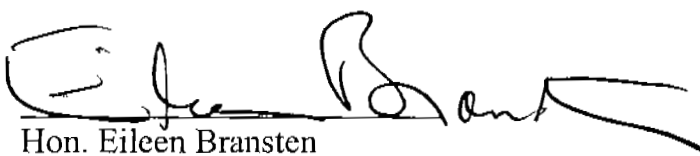
Finally, because there was a rational basis for denying Mr. Bryant's application for a Certificate of No Harassment, the determination must be upheld.

Accordingly, it is ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the Decision, Order and Judgment of the Court.

Dated: New York, New York  
October 10, 2007

ENTER:



Hon. Eileen Bransten

**UNFILED JUDGMENT**  
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