

**Florko v Hoppenfeld**

2007 NY Slip Op 34086(U)

December 4, 2007

Supreme Court, New York County

Docket Number: 0111101/2007

Judge: Joan Madden

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

PRESENT: HON. JOAN A. MADDEN  
*Justice*

PART 11

Florko

Plaintiff,

- v -

Hopperfeld

Defendant.

INDEX NO.: 1111 01/07

MOTION DATE: 10-12-07

MOTION SEQ. NO.: 001

MOTION CAL. NO.:

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes [ ] No

Upon the foregoing papers, it is ordered that this motion + cross-motion are  
decided in accordance with the annexed memorandum,  
decision + order. *6*

**FILED**  
DEC 18 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: December 7, 2007

*J.S.C.*  
\_\_\_\_\_  
J.S.C.

Check one: [ ] FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----x  
GREGORY J. FLORKO, DAVID TOTTEN  
MARLA WOJACZYK and EZRA BOOKSTEIN,

Plaintiffs,

Index No.  
111101/07

-against-

JOAN HOPPENFELD and HOPPYS REALTY  
CORPORATION,

Defendants.

-----x  
JOAN MADDEN, J.:

**FILED**  
DEC 18 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

In this action brought by four tenants seeking a declaration that the building in which they reside is subject to the rent stabilization laws, plaintiffs move, by order to show cause,<sup>1</sup> to remove a summary holdover proceeding pending against plaintiff Gregory J. Florko ("Florko") in the Civil Court of the City of New York, and to consolidate that proceeding with this action. Defendants Joan Hoppenfeld and Hoppys Realty Corporation (together "Hoppenfeld") oppose the motion and cross move to dismiss the action.

Background

Plaintiffs reside in a four-story building located at 164

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<sup>1</sup>When the court signed plaintiffs' order to show cause on September 21, 2007, it enjoined defendants or their agents from taking or proceeding with any action to evict Florko or from interfering with his occupancy pending a hearing on the motion. The injunction was subsequently extended pending the determination of the motion.

Eighth Avenue, New York, NY ("the Building"). The Building is owned by defendant Joan Hoppenfeld. Defendant Hoppys Realty Corporation is the Building's managing agent. On or about August 6, 2007, Ms. Hoppenfeld and Hoppys Realty Corporation (together "Hoppenfeld") brought a holdover proceeding against Florko in the Housing Part of the Civil Court of the City of New York, alleging that although Florko's lease had expired he continued to occupy apartment 1B. The proceeding was commenced after Florko declined to sign lease that would have increased his monthly rent from \$1,500 to \$1,800.

On or about August 13, 2007, Florko, who was pro se, cross moved in the Civil Court to dismiss the proceeding on the grounds that the Building was subject to the rent stabilization laws as it originally contained six residential units, and that two of the units were later converted into one, and that Hoppenfeld did not obtain the proper permits or a new Certificate of Occupancy for the conversion. In support of his motion, Florko attached an Order and Determination from the State of New York Division of Housing and Community Renewal ("DHCR") dated October 13, 1987, indicating that the Building was subject to the rent stabilization laws, that the then tenant of Apartment 1-B had been overcharged, and that treble damages had been assessed (hereinafter the 1987 DHCR Order).

On August 14, 2007, plaintiffs filed this action for a

declaratory judgment that the various apartments in which they reside are subject to the rent stabilization laws, and to recover on rent overcharge claims. The complaint alleges that the Building is rent stabilized as it is a six unit building, which was converted to a five unit building by combining two of the apartments to create duplex apartment, and that such conversion was made without proper permits or obtaining a new certificate of occupancy.

After filing the complaint, plaintiffs made this motion to stay the holdover proceeding and consolidate it with this action. Florco then withdrew his cross motion to dismiss filed in the Civil Court. Subsequently, Hoppenfeld moved for summary judgment in Housing Court, based on the submission of a Certificate of Occupancy for the Building dated February 11, 1959, which purportedly established that the Building contained five units.

Plaintiffs argue that the summary proceeding now pending in the Civil Court action should be removed and consolidated with this action since (1) any rent overcharge counterclaim asserted in the holdover proceeding would be severed, (2) the facts regarding plaintiffs' claims will require discovery, including the year the duplex was created, and that such discovery is permitted in summary proceedings only with leave of the court,

which Florko may not be able to obtain,<sup>2</sup> and (3) only Florko is a plaintiff in the summary proceeding and the other named plaintiffs may be adversely affected by what occurs there.

In support of their argument that the Building is rent stabilized, plaintiffs rely on the 1987 DHCR Order, and two subsequent DHCR orders. Specifically, plaintiffs submit a DHCR Order and Determination Finding of Rent Overcharge dated January 11, 1991 (hereinafter the 1991 DHCR Order) with regard to Apartment 2A which is currently occupied by plaintiff David Totten. The 1991 DHCR Order identifies Ms. Hoppenfeld as the owner, states that the Building is subject to the rent stabilization laws, that the owner failed to register the building with DHCR, and that the owner failed to served the initial rent registration form on the tenant then in occupancy.

Plaintiffs also submit an DHCR Order and Determination Finding of Rent Overcharge dated February 16, 1994, which relates to Apartment 1B, and provides for the freezing of the rent until the owner files a registration for the apartment.

Hoppenfeld opposes the motion to remove the holdover proceeding from Civil Court action and consolidate it with this

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<sup>2</sup>Plaintiffs also argued that discovery was required as to the issue of whether the certificate of occupancy submitted by Hoppenfeld in the summary holdover proceeding in support of their summary judgment motion was bogus. However, in opposition, Hoppenfeld eliminated this issue by submitting a certified copy of the certificate of occupancy.

action, arguing that Civil Court is the preferred forum for resolution of landlord-tenant summary proceedings and that the Civil Court has jurisdiction to determine whether the Building is rent stabilized. Hoppenfeld also argues that consolidation is inappropriate as the parties in this action are not identical to those in the Civil Court action. Hoppenfeld alternatively asserts that if the holdover proceeding is removed to this court then plaintiffs must be directed to continuing paying their rent and Florcko should be directed to pay use and occupancy while this action is pending.

Hoppenfeld also cross moves to dismiss the complaint asserting that the Building always had a five residential units, and submits a certified copy of the Certificate of Occupancy dated February 11, 1959, which shows that there was a store on the building's ground floor, an apartment and doctor's office on the second floor, and two apartments on each of the third and fourth floors. Ms. Hoppenfeld states in her affidavit that the Building never contained six residential units and was never rent stabilized. With respect to the DHCR orders, she states that the complaints were never served on her or the Building, none of the tenants identified in the orders ever contacted her or the managing agent about their claims, and the DHCR Orders were issued on default.

As for the creation of the duplex apartment, counsel for

Hoppenfeld states that the changes were made by Ms. Hoppenfeld's son in 1985 and involved the conversion of the second story office space into a living space for the apartment above it. Thus, he asserts contrary to plaintiffs' claims, the change did not reduce the number of residential units from six to five.

In reply, plaintiffs argue that DHCR orders are presumptive evidence that the Building is rent stabilized and notes that although Ms. Hoppenfeld stated that she was not aware of the DHCR orders, she did not deny that the address on the DHCR orders was the correct address for her and the Building's then managing agent. Plaintiffs further argue that the action should be removed from Civil Court so that the issue as to the rent stabilization status of the Building is not summarily decided in a proceeding without the participation of three of the four tenants directly affected.

Following the submission of plaintiffs' reply, Hoppenfeld submitted the affidavit from Ms. Hoppenfeld's son, Bernard Hoppenfeld.<sup>3</sup> However, as Mr. Hoppenfeld's affidavit was submitted after the final submission date and without the court's permission, it will not be considered.

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<sup>3</sup>Mr. Hoppenfeld's affidavit concerned the details regarding his creation of the duplex apartment. Mr. Hoppenfeld, who is an attorney, also denied that the DHCR orders provided a basis for concluding that the Building was rent stabilized and attaches a "Building Report" from the DHCR which lists, inter alia, the three complaints relied on by plaintiffs and indicates that one was dismissed and the other closed.

Discussion

The Court of Appeals has held that "Civil Court has jurisdiction of landlord tenant disputes and when it can decide the dispute, ...it is desirable that it do so." Post v. 120 East End Avenue Corp., 62 NY2d 19, 28 (1984). In addition, "in the absence of any showing that Civil Court is unable to afford complete relief to plaintiff, there is no basis for the application to Supreme Court for declaratory and equitable relief." Cox v. J.D. Realty Associates, 217 AD2d 179, 183 (1<sup>st</sup> Dept 1995).

Here, while the Civil Court has the facilities to resolve the issues raised in the holdover summary proceeding before it, as three of the four plaintiffs in this action are not parties to that proceeding, it cannot afford full relief. Moreover, the primary issue in the holdover proceeding and in this action, concerning whether the Building is rent stabilized are substantially identical. Under these circumstances, in the interest of judicial economy and to avoid possibly conflicting results, removal of the summary proceeding from Civil Court for consolidation with this action is appropriate. See Phoenix Garden Restaurant v. Chu, 202 AD2d 180 (1<sup>st</sup> Dept 1994) (consolidation of summary proceeding in Civil Court with Supreme Court action was proper "to avoid unnecessary costs and prevent the possible injustice arising out of divergent decisions based on the same

facts"); Braun v. Fraydun Realty Co., 158 AD2d 430, 431 (1<sup>st</sup> Dept 1990) (holding that removal of Civil Court action and consolidation with interrelated Supreme Court action should have been granted "in the interests of judicial economy," and to "avoid the expense of two-track litigation"). Accordingly, the motion to remove the Civil Court action and to consolidate it with this action is granted.

During the pendency of this action, it is appropriate that Florko be required to pay future use and occupancy at the rate of \$1,500 per month based on the rental amount in his now expired lease. As it is unclear from the record, the amount, if any, that Florko owes for past use and occupancy, there is no basis at this time for awarding past use and occupancy to Hoppenfeld. In addition, as there is no evidence that the other three plaintiffs are not paying rent, a direction that they do so is not warranted.

Hoppenfeld's cross motion to dismiss the complaint must be denied as, on this record, it cannot be said as a matter of law that the Building is not rent stabilized. Moreover, contrary to Hoppenfeld's contention, the Certificate of Occupancy from February 1959 is not dispositive as to whether the Building consists of five or six residential units almost fifty years later, especially as the record suggests that in the 1980's construction was performed to join two of the Building's units,

and that no permits or new certificate of occupancy was obtained. Furthermore, while the DHCR orders do not alone establish that the Building is rent stabilized, they provide sufficient evidence to raise a factual question in this regard.

Conclusion

In view of the above, it is

ORDERED that plaintiffs' motion to remove the holdover proceeding from the Civil Court of the City of New York and to consolidate it with this action is granted; and it is further

ORDERED that the action bearing Civil Court Index No. 07/NO82138 be, and it hereby is, removed from the Civil Court of the City of New York, County of New York and transferred to this court; and it is further

ORDERED that the Clerk of Civil Court shall transfer all papers in the proceeding in the file under Civil Court Index No. 07/NO82138, to the Clerk of this court, upon service of a certified copy of this order upon him and payment of any appropriate fees; and it is further

ORDERED that upon delivery of the papers of the action to him by the Clerk of the Civil Court, the Clerk of this court shall issue to the action a Supreme Court Index Number without payment of any additional fees; and it is

ORDERED that the motion to consolidate is granted and Hoppys Realty Corp. v. Florko is consolidated for joint trial and

discovery with the above captioned action; and it is further

ORDERED that upon payment of appropriate calender fees, the filing of notes of issue and statements of readiness in each of the actions, and upon service of a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), said Clerk shall place the aforesaid actions upon the trial calendar for a joint trial; and it is further

ORDERED that defendants' cross motion to dismiss this action is denied; and it is further

ORDERED that plaintiff Florko is directed to pay Hoppenfeld future use and occupancy on the first of each month beginning on December 1, 2007, in the amount of \$1,500 per month; and it is further

ORDERED that within thirty days of this decision and order defendants are directed to file an answer to the complaint; and it is further

ORDER that a preliminary conference shall be held in Part 11, room 351, on March 6, 2008 at 9:30 am.

Dated: ~~November 1, 2007~~ December 4, 2007

  
J.S.C.  
**FILED**

DEC 18 2007

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