

**609 West Assoc., L.P. v Santana**

2008 NY Slip Op 30428(U)

January 29, 2008

Supreme Court, New York County

Docket Number: 0109091/2007

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUB  
*Justice*

PART 15

609 WEST ASSOCIATES LP,

INDEX NO. 109091 /2007

Petitioner-Landlord,

MOTION DATE 10/26/07

- v -

MARITZA SANTANA

MOTION SEQ. NO. 001

Respondent-Occupant.

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

Motion sequence 001 and 002 are consolidated and resolved in the accompanying memorandum decision.

RECEIVED  
FEB 15 2008  
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OFFICE

FILED  
FEB 15 2008  
NEW YORK  
COUNTY CLERKS OFFICE

Dated: 1/29/08

W  
WALTER B. TOLUB, J.S.C.

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):

*MIA*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
609 WEST ASSOCIATES, L.P.

Petitioner-Landlord,

-against-

MARITZA SANTANA

Respondent-Occupant.  
-----x

Index No. 109091/07  
Mtn Seq. 001, 002

**FILED**  
FEB 15 2008  
NEW YORK  
COUNTY CLERK OFFICE

WALTER B. TOLUB, J.:

Application sequences 001 and 002 are consolidated and resolved in the following memorandum decision.

These applications for relief arise out of respondent's occupancy of what petitioner characterizes as a basement apartment. Petitioner seeks to terminate respondent's lease on the grounds that the apartment is illegal, and cannot be occupied.

Petitioner is the landlord and owner of the building known as 609 West 196<sup>th</sup> Street, New York (the "premises"). Petitioner acquired the building in 1993 (Holdover Petition, Sequence 001, Exhibit 1). The Certificate of Occupancy for the six-floor building, unamended since its issuance in 1929, is devoid of any language which would indicate that the "cellar" level was ever issued a certificate of occupancy for residential purposes (Holdover Petition, Sequence 001, Exhibit 3). Notwithstanding the obvious omission, petitioner, who is not a novice to the real estate industry in this City, registered the apartment identified

as "Bsmt 3 a/k/a B2 Right" ("the apartment") as a rent-stabilized unit with the New York State Division of Housing and Community Renewal (DHCR), began collecting rent for the apartment, and continued to annually re-register the apartment as rent stabilized from 1994 through 2006 (Notice of Motion, Sequence 002, Exhibit B).

For the last six years, respondent has been the rent-stabilized tenant of the subject apartment. On February 28, 2007, petitioner served respondent with a "Thirty Day Notice of Termination" (the "termination notice"). In pertinent part, the termination notice states that:

"the landlord reasonably believes that the facts necessary to establish the existence of such ground of termination include, but are not limited to, the fact that you are occupying an apartment which you have no right to occupy due to the fact that the Department of Buildings has not granted the Premises a certificate of occupancy for residential purposes"

(Notice of Motion, Sequence 002, Exhibit A).

Shortly after issuing the termination notice, petitioner commenced a holdover proceeding, and the instant applications followed. In application 001, petitioner moves for an order granting final judgment and possession of the apartment predicated upon the contention that the apartment cannot be legalized under Section 302(b) of the Multiple Dwelling Law. In application sequence 002, respondent moves to dismiss the holdover petition, and petitioner cross-moves for an order

[\* 4 ]  
amending the petition to reflect that the subject premises are a multiple dwelling and properly registered with the New York City Department of Housing Preservation and Development ("HPD").

Discussion

Petitioner's claim rests squarely upon the contention that respondent is occupying an apartment which is illegal and cannot be legalized because of its basement location. In support of this position, petitioner, in addition to relying on MDL § 300(6) and § 216, offers the affidavit of Philip Toscano, an architect (see, Cross Motion, Motion Sequence 002, Exhibit 1). Mr. Toscano's affidavit concludes, seemingly without ever viewing the apartment or reviewing the building's plans, that petitioner's building cannot legally contain a basement apartment because to do so would violate Multiple Dwelling Law §§ 300(6)<sup>1</sup> and 216<sup>2</sup>

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<sup>1</sup>In pertinent part, MDL § 300(6) reads as follows:  
No room in a cellar or basement shall be occupied for living purposes unless the department shall issue a written permit for such occupancy after all the applicable provisions of law have been complied with. If such permit is refused or revoked, the reason for such action shall be stated by the department in writing and a copy of such statement shall be recorded by the department and be accessible to the public [...].

<sup>2</sup>In pertinent part, MDL § 216 reads as follows:  
No room in the basement or cellar of any tenement shall be occupied for living purposes unless there is a written permit therefore as provided in subdivision five of section three hundred and it either is part of an apartment which complies with subdivision six of section thirty-four or complies with the following conditions: [...]

and the provisions contained therein.

Petitioner correctly notes that the failure to comply with the provisions set forth in MDL § 300(6) and § 216 would result in an illegal basement apartment, thereby warranting the issuance of a final judgment and order of possession. What petitioner fails to realize however, is that it is entirely possible for an apartment to be located in a basement of a residential apartment building and be perfectly legal where the apartment either falls within the exceptions set forth in MDL § 216, or where it conforms to the provisions set forth under MDL § 34(6).<sup>3</sup> This is

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2. If such room is in a tenement erected after April 12, 1901

a. such room shall be at least nine feet high in every part from floor to ceiling

b. every part of the ceiling of such room shall be at least four feet six inches above the curb level of the street [...] when such room or the apartment containing it is located at the front part of the dwelling, and at least two feet above such curb level in front of the dwelling when such room or the apartment containing it is located in the rear of the dwelling and the yard is less than sixty feet in depth and does not extend to a street along its entire width [...].

<sup>3</sup> In pertinent part, MDL 34(6) states:

6. An apartment in a cellar or basement of any multiple dwelling may be used for living purposes provided all of the following conditions are met:

a. Such apartment has at least one half of its height and all of its window surfaces above every part of an "adequate adjacent space." Such "adequate adjacent space" shall be open to the sky, shall be properly drained to the satisfaction of the department, and shall be a continuous

significant because respondent's affidavit, submitted in opposition to petitioner's application and in support of the application to dismiss the petition, contains statements which suggest that the basement apartment may conform with the provisions of MDL § 34. If further investigation reveals that the apartment is in conformity with the provisions of MDL § 34, then the apartment may be eligible for a certificate of occupancy. That investigation and determination however, is not, as petitioner would like this court to believe, the responsibility of the tenant. Obtaining a certificate of occupancy for a residential rental property, or establishing that one cannot be obtained, has always been the responsibility of the owner of the property. The failure to do so precludes, among other things, the collection of rent and/or use and occupancy (see, MDL 302(1)(b)).<sup>4</sup>

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surface area outside the dwelling not less than thirty feet in its least dimension abutting at same level, or directly below, every part of the exterior walls of such apartment and of every other apartment on the same floor. Such "adequate adjacent space" shall include only space which is located on the same lot or plot as the dwelling or on a street or public space or place.

b. Every living room of such apartment is everywhere at least eight feet high from the floor to the ceiling in dwellings erected after July first, nineteen hundred and fifty-seven, and seven feet in dwellings erected prior thereto [...].

<sup>4</sup> This court declines to address, but openly notes that for over ~~six~~ years petitioner has been collecting rent from this particular rent-stabilized tenant, for an apartment for which it

Having reviewed the parties' submissions, and for the aforementioned reasons, this court declines to issue an order to petitioner granting final judgment and possession of the apartment.

Respondent's application to dismiss the petition however, is granted. A petition in a holdover proceeding must accurately state the facts upon which the special proceeding is based, and must include, among other things, a statement with respect to the rent regulatory status of the property (RPAPL 741; Volunteers of America Greater New York v. Almonte, 17 Misc.3d 57 [Appellate Term 2007]). Where a summary proceeding is commenced involving a rent stabilized property, the occupant of the property must be given notice of the claimed violation (9 NYCRR §2524.3).

Petitioner concedes, as evidenced by their cross motion, that their holdover petition was deficient in that it failed to properly plead the DHCR status of the apartment at issue. However, notwithstanding petitioner's arguments, since the apartment is registered as rent-stabilized, the holdover petition also required the inclusion of the claimed violation. Inasmuch as the holdover proceeding does not contain this required information, the holdover petition is deemed fatally deficient, and is therefore dismissed. As such, it is

ORDERED that petitioner's application for an order granting  

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has never held a valid certificate of occupancy.


final judgment and possession of the subject apartment  
(Application Sequence 001) is denied; and it is further

ORDERED that respondent's motion for dismissal of the within  
holdover petition (Application Sequence 002) is granted; and it  
is further

ORDERED that the petitioner's cross-motion (Application  
Sequence 002) is denied.

This memorandum opinion constitutes the decision and order  
of the Court.

Dated: 1/29/08

  
\_\_\_\_\_  
HON. WALTER B. TOLUB, J.S.C.

**FILED**  
FEB 15 2008  
NEW YORK  
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