

**Barrett Japaning, Inc. v Bialobroda**

2008 NY Slip Op 30869(U)

March 19, 2008

Supreme Court, New York County

Docket Number: 0102165/2006

Judge: Marylin G. Diamond

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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**  
**PRESENT: HON. MARYLIN G. DIAMOND PART 48**

*Justice*

BARRETT JAPANING, INC.,

Plaintiff,

- v -

ANNA BIALOBRODA et al.,

Defendants.

INDEX NO. 102165/06

MOTION DATE

MOTION SEQ. NO. 009

MOTION CAL. NO.

**FILED**

MAR 27 2008

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that the motions with sequence numbers 009, 010 and 011 are consolidated herein for decision.

Plaintiff Barrett Japaning, Inc. is a New York cooperative corporation which owns a building on Suffolk Street in Manhattan. The building consists of five floors. Defendant Anna Bialabroda is the proprietary lessee of one-half of the fourth floor and the entire fifth floor. The other proprietary tenants are Joel Mirer, who owns the basement and ground floor, and Howard Buchwald, who owns the second and third floors and one-half of the fourth floor. The basement, ground floor, second floor and part of the fourth floor are allegedly used exclusively as commercial space. Buchwald resides on the third floor pursuant to an Artist-In-Residence ("AIR") Certificate issued to him by the New York City Department of Buildings in 1969. Mirer and Buchwald are the majority shareholders in control of the plaintiff cooperative. Through them, the plaintiff claims that Bialobroda moved out of the premises years ago and has, since at least 2003, been unlawfully subletting her leased space to various individuals for residential purposes. The plaintiff asserts that this subleasing is improper not only because it was undertaken without the corporation's consent, but because the building is not a legal multiple dwelling, lacks a certificate of occupancy and is unsafe for residential occupants.

This dispute has given rise to extensive litigation in Civil Court concerning, *inter alia*, whether (1) the plaintiff was required to obtain a certificate of occupancy for the building, (2) the property was a legal multiple dwelling and (3) Bialabroda had unlawfully subleased her space for residential purposes. The parties entered into a settlement agreement in Civil Court in 2002 in which plaintiff agreed to promptly seek funding for work that would be necessary in order to legalize the building for use as joint living-working quarters under article 7B of the Multiple Dwelling Law. It was also agreed that all tenant-shareholders, including Bialobroda, refrain from subleasing any portion of their space for residential purposes until the later of (a) the issuance of a temporary certificate of occupancy for the building or (b) three years from the date of the stipulation. After the plaintiff failed to obtain the necessary funding for converting the building to a legal multiple dwelling, Bialabroda once again permitted various individuals to occupy her fifth floor premises. As a result, the plaintiff served Bialabroda with a notice of violation, dated September 30, 2005, and then moved in Civil Court to vacate the 2002 stipulation. This motion led to a second stipulation, executed on or about April 12, 2006, in which the parties agreed, *inter alia*, to enforce the 2002 stipulation. The 2006 stipulation provided that it was entered into without prejudice to the parties' assertion of their respective claims or defenses in the present Supreme Court action.

This action was brought against Bialobroda and some of the individuals whom she has permitted to occupy her fifth floor premises. The complaint seeks a declaration that the use and occupancy of the fifth floor by "transient roomer [sic] defendants" is (1) unlawful, (2) a violation of the proprietary lease for the fifth floor and (3) a violation of the 2002 stipulation. The plaintiff also seeks a declaration that the proprietary lease between the plaintiff and Bialobroda is terminated due to her failure to cure the alleged breaches of the proprietary lease set forth in the September 30, 2005 notice of violation. The plaintiff also seeks an order enjoining Bialobroda from suffering or permitting the illegal use of the fifth floor for residential purposes and either restraining the other defendants from using and occupying any portion of the fifth floor premises or ejecting them from the premises. Finally, the complaint seeks to enjoin and restrain Bialabroda from attempting to vacate the 2002 stipulation.

Plaintiff previously moved, *inter alia*, for a preliminary injunction restraining Bialobroda from subleasing any portion of the fifth floor premises for residential purposes and restraining the other defendants from subleasing, using or occupying those same premises. The plaintiff also moved to dismiss Bialabroda's affirmative defenses and counterclaims. Bialabroda cross-moved for summary judgment. By decision and order dated October 17, 2006, this court denied the plaintiff's motion for a preliminary injunction, but dismissed Bialobroda's first, third and tenth affirmative defenses and all of her counterclaims. Bialobroda's cross-motion was denied.

Following the conclusion of discovery, the plaintiff now moves, in motion sequence numbers 009 and 010, for summary judgment on its causes of action for an order enjoining Bialobroda from suffering or permitting the illegal use of the fifth floor for residential purposes and restraining the other defendants from using and occupying any portion of the fifth floor premises and/or ejecting them from the premises. It also seeks summary judgment on its cause of action for an order permanently enjoining Bialobroda from renting or subleasing space in the premises for residential purposes. In motion sequence number 011, Bialabroda moves for summary judgment dismissing the complaint.

### **Discussion**

The September 30, 2005 notice of violation advised Bialobroda that by allowing the other defendants to reside in her apartment, she had violated the provision in her proprietary lease which bars her from subletting all or a portion of her premises without approval from the cooperative's Board of Directors. The notice also asserted that her use of the premises for residential purposes violated the provision barring any unlawful use of the demised premises.

As to the subleasing charge, Bialobroda disputes the plaintiff's allegation that she no longer resides in the building. She argues that since she continues to reside in the apartment along with the other occupants, she cannot, as a matter of law, be considered to have sublet the premises. She argues that the other occupants are her roommates and, as such, they are entitled to the protection of the Roommate Law (Real Property Law § 235-f).

The court agrees that Bialobroda has established that she continues to reside in her apartment and cannot therefore be considered to have sublet the premises. *See 520 East 81<sup>st</sup> Street Associates v. Roughton-Hester*, 157 AD2d 199, 201 (1<sup>st</sup> Dept. 1990); *Killington Investors v. Leino*, 148 AD2d 334, 335 (1<sup>st</sup> Dept. 1989). Indeed, she has submitted her own affidavit, along with an affidavit from another occupant of the fifth floor, Erin Drinkwater, attesting to the fact that she continues to use the apartment as her primary residence. Although Mirer and Buchwald claim that she does not actually live there, they have failed to offer any evidence to support this claim. Since the plaintiff has not therefore raised a

triable question of fact on this issue, the court finds that Bialobroda's co-defendants must be considered her roommates and not her sublessees. As such, Bialobroda has not violated the provision in the proprietary lease which prohibits subletting without the Board's permission.

Nevertheless, the Roommate Law does not allow Bialobroda to have an unlimited number of roommates. Real Property Law § 235-f provides, in relevant part, that "Any lease or rental agreement for residential premises entered into by one tenant shall be construed to permit occupancy by the tenant, immediate family of the tenant, one additional occupant, and dependent children of the occupant..." In this respect, the proprietary lease includes a provision which restricts occupancy of any unit in the building to the lessee, the lessee's spouse, their children, grandchildren, parents, grandparents, brothers and sisters and domestic employees, unless the lessee gives prior written consent to allow others to occupy the unit. Although the provision does not expressly permit occupancy by one additional occupant who is unrelated to the lessor, it must be construed, under the Roommate Law, as permitting such additional occupancy.

There is no indication in the record before the court that any of the current occupants of the fifth floor are immediate family members of Bialobroda. Since Bialobroda has allowed more than a single, additional occupant to reside in the fifth floor premises, she is in violation of the provision in the lease which limits occupancy of the premises. Although the plaintiff never served Bialobroda with a notice of violation of this specific provision, she has nevertheless been fully aware of the plaintiff's claim that it is entitled to restrict occupancy of the fifth floor. Indeed, not only has had a full and fair opportunity to brief the issue, she has, in fact, extensively addressed the matter. Moreover, although the lease requires the plaintiff to provide Bialobroda with notice of a specific violation and an opportunity to cure prior to seeking the termination of her tenancy, there is nothing in the proprietary lease which requires that it give her notice prior to seeking a court order enjoining or restraining her from violating a particular provision. On the contrary, without imposing any notice requirement, the lease specifically provides that in the event of a breach of any provision thereof, the plaintiff has the right to obtain an injunction. Thus, even though the September 30, 2005 notice of violation does not mention any violation of the provision in the lease limiting occupancy of the premises, it is entirely appropriate, under the circumstances, for the court to limit the occupancy of Bialobroda's premises to Bialobroda herself and a single, additional roommate of her choosing. The plaintiff's motion for summary judgment must therefore be granted to the extent that Bialobroda should be enjoined from suffering or permitting the other defendants or any unrelated person from occupying the fifth floor premises except for one roommate of her choosing.

As to that portion of the September 30, 2005 notice of violation which advised Bialobroda that, in the absence of a certificate of occupancy, her use of the premises for residential purposes violated the provision barring any unlawful use of the demised premises, the court declines to enforce this provision so as to issue an order, as plaintiff requests, ejecting Bialobroda and any additional roommate. Bialobroda has presented evidence which establishes that the building has been a de facto multiple dwelling with three or more unrelated individuals or families residing therein since 1974. *See* Multiple Dwelling Law §4(7). Thus, she has submitted an affidavit from Richard Gomber, who states that he lived in the building with Buchwald, Bialobroda and her then-husband, and an individual named James Silva from 1974 through 1977. Moreover, Buchwald and Bialobroda have continued to live in the building and the record indicates that a Steven Kobrosky has also lived there. Having been a multiple dwelling for all these years, the building continues to be multiple dwelling. Indeed, the proprietary leases which the plaintiff itself issued to Bialobroda, Buchwald and the other artists-in-residence who have lived in the building clearly permit and/or contemplate use of the demised

premises for general residential, as well as commercial and artistic, purposes. It would therefore be inequitable to allow the plaintiff to evict Bialabroda for residing on the fifth floor unlawfully when the proprietary leases which the plaintiff provided to each of its shareholders, including Bialabroda, purport to allow an equally unlawful occupancy by each of them. It is clear from the record and history of this building that its residential use of the building will continue to be unlawful until a certificate of occupancy is obtained. See MDL §301. As already noted, the parties have had an ongoing dispute in Civil Court as to who bears responsibility for the failure of the building to obtain a certificate of occupancy allowing residential use. The dispute should be resolved in that forum.

Accordingly, in motion sequence numbers 009 and 010, the plaintiff's motion for summary judgment is granted to the extent that (1) Bialabroda is hereby enjoined from suffering or permitting the other named defendants, or any person unrelated to her, except for one roommate of her choosing, from occupying the fifth floor premises 45 days after service upon her of a copy of this order with notice of entry, (2) in the event Bialobroda wishes to have one roommate of her own choosing reside with her on the fifth floor, as referred to in the preceding clause of this decision, she shall advise the plaintiff, by certified mail return receipt requested, of the identity of such an individual within 30 days after service upon her of a copy of this order with notice of entry and (3) all defendants occupying the fifth floor premises other than Bialobroda and a single roommate of her choosing shall vacate the premises within 45 days of service upon them of a copy of this order with notice of entry. In the event that any persons other than Bialobroda and the individual whom she designates as her roommate continue or begin to reside on the fifth floor more than 45 days after service upon Bialobroda of a copy of this order with notice of entry, the plaintiff may seek their eviction. The plaintiff's motion is otherwise denied. In motion sequence number 011, Bialobroda's motion for summary judgment is granted to the extent that the remainder of the plaintiff's complaint is hereby dismissed. The motion is otherwise denied.

The Clerk Shall Enter Judgment Herein

Dated: 3/19/08 \_\_\_\_\_

Check one:  FINAL DISPOSITION

MGD  
MARYLIN G. DIAMOND, J.S.C.  
 NON-FINAL DISPOSITION

**FILED**  
MAR 27 2008  
NEW YORK  
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