

**Acevedo v The Piano Building LLC**

2008 NY Slip Op 31504(U)

May 27, 2008

Supreme Court, New York County

Docket Number: 0105755/2005

Judge: Marcy S. Friedman

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

**MARCY S. FRIEDMAN**

PART 57

PR Index Number : 105755/2005

— ACEVEDO, JAMES

vs  
PIANO BUILDING LLC

Sequence Number : 008

SUMMARY JUDGMENT

INDEX NO.

105755/05

NOTION DATE

NOTION SEQ. NO.

008

NOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion ~~is~~ for summary judgment

Notice of Motion/ and cross-motion Order to Show Cause — Affidavits — Exhibits

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

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

PAPERS NUMBERED

1, 2

3-4

5-6

Memo of law

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion and cross-motion

are

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

**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 1240).

Dated: 5/27/08

Marcy S. Friedman  
**MARCY S. FRIEDMAN** J.S.C.

Check one:  FINAL DISPOSITION  DO NOT POST  NON-FINAL DISPOSITION 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 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x

JAMES ACEVEDO, et al.,

*Plaintiff,*

- against -

THE PIANO BUILDING LLC, et al.,

*Defendants.*

Index No.: 105755/05

DECISION/ORDER

**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 1419).**

In this action, plaintiffs seek a declaratory judgment determining that their tenancies are subject to the Rent Stabilization Law and Emergency Tenant Protection Act, and damages for rent overcharges. Plaintiffs Nancy Hoffnman, Sherry Millner and Ernie Larsen, and Joan Howard move for summary judgment for the relief sought in the complaint. Plaintiff Steve Rosenthal, represented by different counsel, separately moves for summary judgment for such relief.

The relevant facts are not in dispute. Plaintiffs are residential tenants of 115 West 23<sup>rd</sup> Street in Manhattan. Plaintiff Nancy Hoffman moved into Apartment 24 on the second floor of the premises, pursuant to a three-year lease commencing on September 1, 1992. Plaintiff Sherry Millner moved into Apartment 23 on the second floor of the premises, pursuant to a two-year lease commencing on July 15, 1995. Plaintiff Ernie Larsen, her domestic partner, resides with her in the apartment. Plaintiff Joan Howard moved into Apartment 43 on the fourth floor of the premises, pursuant to a two-year lease commencing on March 1, 1998. Each of the tenants entered into a series of renewal leases, the last of which has now expired. Plaintiff Steve

Rosenthal is the tenant of Apartment 32 on the third floor of the premises, pursuant to an initial lease dated June 1999.

An order of the New York City Loft Board (Loft Board Order No. 328), dated October 30, 1985, granted a coverage application, holding “that the premises at 115-117 West 23<sup>rd</sup> Street are determined to be an interim multiple dwelling, and that the third floor east, third floor west, fourth floor east, fifth floor east, fifth floor west, sixth floor east and sixth floor west units are covered units as defined in Section 281 of the Multiple Dwelling Law and Loft Board regulations.” It is undisputed that the units of plaintiffs Hoffman and Millner/Larsen were not units that were held to be covered by the Loft Law (Multiple Dwelling Law [“MDL”] Article 7-C), but that the units of plaintiffs Howard and Rosenthal, when occupied by predecessor tenants, were held to be covered units. A prior owner obtained a Certificate of Occupancy for the premises in 1994. The Certificate of Occupancy permits residential occupancy by 18 apartments, including all of the apartments occupied by plaintiffs in this action.

As to plaintiffs Hoffman and Millner/Larsen, defendant argues that their tenancies are not subject to the Emergency Tenant Protection Act of 1974 (McKinney’s Unconsol Laws of NY § 8621 *et seq.* [L 1974, ch 576, § 4, as amended]) because there were less than six dwelling units at the premises when the statute was enacted in 1974. The Appellate Division of this Department has rejected the contention that 1974 is a “base date” as of which six dwelling units must have existed in order for ETPA coverage to apply. (See Wilson v One Ten Duane St. Realty Co., 123 AD2d 198, 201 [1<sup>st</sup> Dept 1987].)

Defendant further contends that the ETPA is not applicable to the Hoffman and Millner/Larsen units because the building was found to be an interim multiple dwelling (“IMD”)

subject to the Loft Law, but these plaintiffs' units were not covered by the Loft Law. Defendant further claims that "the Loft Law provides the sole statutory vehicle for rent regulation." (Aff. In Opp., ¶ 12.)

Contrary to defendant's contention, the fact that the building was an IMD does not as a matter of law preclude coverage of units, like the Hoffman and Millner/Larsen units, which were not residentially occupied within the Loft Law window period and therefore were not registered with the Loft Board. Rather, the Appellate Division of this Department, and other courts which have repeatedly considered the issue, have held that where the Loft Law does not cover a unit in an IMD, such a unit may be subject to rent stabilization under the ETPA provided that "the unit is capable of being legalized." (See Duane Thomas LLC v Wallin, 35 AD3d 232, 233 [1<sup>st</sup> Dept 2006]; 480-486 Broadway, LLC v No Mystery Sound, Inc., 16 Misc 3d 137[A], 2007 NY Slip Op 51730[U], affg 11 Misc 3d 1056[A], 2006 NY Slip Op 50236[U] [Civ Ct NY County 2006]; Tan Holding Corp. v Wallace, 187 Misc 2d 687 [App Term 1<sup>st</sup> Dept 2001]; Miller v Margab Realty LLC, 6 Misc 3d 1012(A), 800 NYS2d 350 [Sup Ct, NY County 2001]. See also Matter of 315 Berry St. Corp. v Hanson Fine Arts, 39 AD3d 656 [2d Dept 2007], lv dismissed 10 NY3d 742 [2008] [unit in premises deregulated under Loft Law held subject to ETPA where, among other factors, landlord acquiesced in subsequent unlawful conversion to residential use].)

Wolinsky v Kee Yip Realty Corp. (2 NY3d 487 [2004]), on which defendant relies, is not to the contrary. There, the Court of Appeals held that the ETPA was not applicable to commercial units that were illegally converted to residential occupancies, where the units were not occupied during the window period and therefore were not within the purview of the Loft Law, and where the City Zoning Resolution prohibited the residential occupancies. As

interpreted by the Appellate Division, Wolinsky does not preclude ETPA coverage of units that are “capable of being legalized.” (See 480-486 Broadway, LLC, 2007 NY Slip Op 51730[U] \*1; Duane Thomas, 35 AD3d at 233.)

Here, it is undisputed that the units of plaintiffs Hoffman and Millner/Larsen were not occupied for residential purposes or were vacant until after the Loft Law window period and were not covered by the IMD order. It is also undisputed that these plaintiffs’ residential occupancies are legal under the City Zoning Resolution and are expressly authorized by the Certificate of Occupancy obtained by the predecessor owner of the building in 1994. Moreover, there is no claim that the ETPA otherwise exempts the units. Under these circumstances, the court holds that the Hoffman and Millner/Larsen units are subject to the ETPA and are therefore rent-stabilized.<sup>1</sup>

In so holding, the court rejects defendant’s assertion that plaintiffs’ claim of rent stabilized status is barred by laches. Even assuming arguendo that laches may be raised as defense to such claim, defendant fails to make any showing that it relied on or was prejudiced by plaintiffs’ delay in asserting the claim.

As to plaintiffs Howard and Rosenthal, defendant argues that their apartments were subject to the Loft Law and were deregulated by buy-out agreements pursuant to Multiple

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<sup>1</sup>The ETPA provides coverage for all housing accommodations except those which it does not expressly exempt. (See McKinney’s Uncons Laws of NY § 8625[a]; Matter of Salvati v Eimicke, 72 NY2d 784, 791 [1988].) The Hoffman and Millner/Larsen units were not occupied for residential purposes until the 1990s. The ETPA exempts units that were “substantially rehabilitated” after January 1, 1974. (See McKinney’s Uncons Laws of NY § 8625[a][5].) While defendant claimed at the oral argument that this provision is applicable to all of the plaintiffs’ units, its papers on the motion do not claim an exemption from coverage under this provision, and do not raise any issue of fact as to whether the units were substantially rehabilitated after January 1, 1974.

Dwelling Law §§ 286 (6) and (12). It is undisputed that plaintiff Howard's unit, Apartment 43, and plaintiff Rosenthal's unit, Apartment 32, were subject to the Loft Law prior to the commencement of these plaintiffs' respective tenancies. Defendant submits competent evidence of an executed Loft Board "MDL Section 286(12) Sales Record - Form," dated December 5, 1995, between the predecessor owner and the former tenant of the Rosenthal unit (Keith Christianson). Defendant also asserts that a section 286(12) Form was executed for plaintiff Howard's unit in 1988, but it acknowledges that it has not located a signed form for this unit.<sup>2</sup>

Plaintiff Howard argues that defendant has failed to submit competent evidence that a buy-out agreement was made for her apartment. Plaintiffs Howard and Rosenthal both also argue that execution of a buy-out agreement does not preclude ETPA coverage, and that their units are otherwise subject to the ETPA.

Multiple Dwelling Law § 286(6) provides in pertinent part that: "Upon purchase of such improvements [to the unit] by the owner, any unit subject to rent regulation solely by reason of this article and not receiving any benefits of real estate tax exemption or tax abatement, shall be exempted from the provisions of this article requiring rent regulation if such building had fewer than six residential units as of the effective date of the act which added this article [June 21, 1982]." Multiple Dwelling Law § 286(12) permits an agreement, subsequent to the effective date of the Act, for an owner to purchase a residential occupant's rights in a unit. In conformity with these provisions, Rent Stabilization Code § 2520.11(q) exempts from rent stabilization "housing accommodations which would otherwise be subject to rent regulation solely by reason

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<sup>2</sup>The court is unpersuaded by plaintiff Howard's claim that defendant is precluded from raising affirmative defenses to her complaint. Defendant's defenses to plaintiff Howard's claims are therefore considered on the merits.

of the provisions of article 7-C of the MDL requiring rent regulation, but which are exempted from such provisions pursuant to sections 286(6) and 286(12) of the MDL.”

Under MDL § 286(6), an owner’s purchase of the tenant’s improvements is thus not a deregulating event unless the unit was both subject to rent regulation solely by reason of the Loft Law and the building had less than six residential units as of June 21, 1982. Here, however, Loft Board Order No. 328 by its terms finds, and defendant does not dispute, that the premises had seven residential units as of April 1, 1980. Contrary to defendant’s contention, therefore, even if MDL 286(12) buy-outs were executed for the Howard and Rosenthal units, they would not have served as a matter of law to deregulate the units. Moreover, sale of Loft Law rights by a prior tenant does not preclude coverage by the ETPA. (See 182 Fifth Ave, LLC v Design Dev. Concepts, Inc., 300 AD2d 198 [1<sup>st</sup> Dept 2002]; Matter of 315 Berry St. Corp., 39 AD3d at 657; VVV Partnership v Moran, 10 Misc 3d 130[A], 2005 NY Slip Op 51958[U] [App Term, NY County].) Here, as the premises has six or more legal residential units, the Howard and Rosenthal units are subject to the rent stabilization law pursuant to the ETPA. (See id.)

Turning to plaintiffs’ rent overcharge claims, the court finds that there are triable issues of fact, including issues as to whether defendant’s overcharges are willful.

It is accordingly hereby ORDERED that plaintiffs’ motions for summary judgment are granted to the extent that it is

ORDERED, ADJUDGED and DECLARED that plaintiff Hoffman’s unit, Apartment 24 at the subject premises, is subject to the rent stabilization law pursuant to the ETPA; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiffs’ Millner and Larsen’s unit,

Apartment 23 at the subject premises, is subject to the rent stabilization law pursuant to the ETPA; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff Howard's unit, Apartment 43 at the subject premises, is subject to the rent stabilization law pursuant to the ETPA; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff Rosenthal's unit, Apartment 32 at the subject premises, is subject to the rent stabilization law pursuant to the ETPA; and it is further

ORDERED that a trial determining the amount of each plaintiff's legal regulated rent and an assessment of damages against defendant The Piano Building LLC c/o The Chetrit Group, LLC is directed; and it is further

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment herein above directed.

This constitutes the decision, judgment and order of the court.

Dated: New York, New York  
May 27, 2008

  
MARCY FRIEDMAN, J.S.C.

**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 141B).