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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 111101/2007
FLORKO, GREGORY
VS.
HOPPENFELD, JOAN
SEQUENCE NUMBER : 002
RENEWAL

INDEX NO. 111101/07
MOTION DATE 3/20/07
MOTION SEQ. NO. 002
MOTION CAL. NO.

this motion to/for renewal

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion to renew is decided in accordance with the annexed Memorandum Decision + order.

FILED
JUN 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 10, 2008

J.S.C.

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

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: IAS PART 11

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

Plaintiffs,

-against-

JOAN HOPPENFELD and HOPPYS REALTY CORPORATION,

Defendants.

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Index No.
111101/

JOAN MADDEN, J.:

In this action brought by four tenants seeking a declaration that their building is subject to the rent stabilization laws, defendants Joan Hoppenfeld and Hoppys Realty Corporation (together "Hoppenfeld") move to renew their cross motion to dismiss which this court denied in its decision and order dated December 4, 2007 (hereinafter "the original decision"). Plaintiffs oppose the motion, which is denied for the reasons below.

Background

Plaintiffs reside in a four-story building located at 164 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, Hoppenfeld brought a holdover proceeding against plaintiff Gregory J. Florko ("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, that it 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 moved to stay the holdover proceeding, and remove it to this court for consolidation with this action.[1] In support of their argument that the Building is rent stabilized, plaintiffs relied 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, 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 submitted a DHCR Order and Determination Finding of Rent Overcharge dated February 16, 1994, relating to Apartment 1B, that provides for the freezing of the rent until the owner files a registration for the apartment.

In addition to opposing the removal of the holdover proceeding for consolidation with this action, Hoppenfeld cross moved to dismiss the complaint, asserting that the Building

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[1]Florko subsequently withdrew his cross motion to dismiss filed in the Civil Court.

always had a five residential units. In support of the cross motion, Hoppenfeld submitted a certified copy of the Certificate of Occupancy dated February 11, 1959, showing 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.

In addition, in her affidavit, Ms. Hoppenfeld stated 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.

Following the submission of plaintiffs' reply, Hoppenfeld submitted an affidavit from Ms. Hoppenfeld's son, Bernard Hoppenfeld ("B. Hoppenfeld"), concerning the details regarding the creation of the duplex apartment. However, as B. Hoppenfeld's affidavit was submitted after the final submission date and without the court's permission, the court did not consider it.

In its original decision and order the court granted plaintiffs' motion to remove the holdover proceeding from the Civil Court of the City of New York and to consolidate it with this action. The court also denied Hoppenfeld's cross motion to

dismiss, writing that:

> [C]ontrary 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.

Hoppenfeld now moves for renewal of that part of the original decision and order that denied its cross motion to dismiss relying on B. Hoppenfeld's affidavit, which was belatedly submitted with the original motion. In his affidavit, B. Hoppenfeld states that the two units were combined in June 1985, when he was a law student and that he hired a contractor to connect his third floor apartment with a vacant office below by installing a staircase, and that he assumed that "if anything had to be approved or filed (the contractor) did it." B. Hoppenfeld further states that when the first contractor did not finish the work, he hired a second contractor to complete the job.[2]

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[2]B. Hoppenfeld submits copies of bank statements showing the names of contractors and the amounts paid to them. While this evidence tends to show that the contractors identified by B. Hoppenfeld performed the work during the relevant period, it has no bearing on whether the lower portion of the duplex was an office at the time that it was combined with the apartment above.

B. Hoppenfeld, who is now an attorney, also denies that the DHCR orders provide a basis for concluding that the Building was rent stabilized and attaches a "Building Report" from the DHCR which he asserts relates to the three DHCR orders relied on by plaintiffs and points out that one was dismissed and another was closed.[3] As for the remaining complaint, which according to the Building Report was granted, B. Hoppenfeld states, without substantiation, that "I've been informed, and verily believe, that the case will be opened and once the facts are presented, dismissed as well."

Plaintiffs oppose the motion to renew, arguing that Hoppenfeld provides no reasonable justification for its failure to timely present the facts with the original motion. Plaintiffs further argue that even if the court were to consider the additional facts, B. Hoppenfeld's self-serving affidavit is insufficient to show that the lower portion of the duplex was an office, so that the Building was not subject to rent stabilization.

In reply, Hoppenfeld asserts that the delay in submitting B. Hoppenfeld's affidavit was caused by the lengthy process involved in searching boxes of records from B. Hoppenfeld's deceased father. Hoppenfeld also submits a reply affidavit from B.

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[3]The Building Report does not obviously refer to the DHCR Orders relied on by plaintiffs, and B. Hoppenfeld does not explain how he arrived at this conclusion.

Hopenfeld and attaches rent records for the Building which he asserts demonstrate that the lower portion of the duplex was historically used as an office.

Discussion

CPLR 2221(e) sets for the elements of a motion for leave to renew. "A motion for leave to renew: (1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination; and (3) shall contain a reasonable justification for the failure to present such facts on the prior motion."

"A motion for leave to renew is intended to bring to the court's attention new facts or additional evidence which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore not brought to the court's attention." Tishman Constr. Corp. of New York v. City of New York, 280 AD2d 374, 376 (1st Dept 2001)(citations omitted). At the same time, however, a court, in its discretion, may grant renewal "in the interest of justice," even when the facts on which the renewal motion is based were known to the party at the time of the original motion. Id.

In this case, the court properly refused to consider B. Hoppenfeld's affidavit when it was belatedly submitted in connection with the original motion since it essentially constituted a sur-reply. See Traders Co. v. AST Sportswear,

Inc., 31 AD3d 276, 277 (1st Dept 2006)(holding that arguments in defendant's sur-reply could not be considered where papers were submitted after filing deadline without demonstration of good cause). Moreover, while Hoppenfeld now asserts that the delay in submitting B. Hoppenfeld's affidavit was the result of the lengthy process involved in reviewing the Building's records, B. Hoppenfeld does not appear to reference such records in his original affidavit.

In any event, even if the court were to grant renewal and consider the evidence submitted on this motion, such evidence would not resolve the disputed factual issues as to whether the Building is rent stabilized. Specifically, the statements in B. Hoppenfeld's affidavit regarding the reasons for not obtaining proper work permits or obtaining a new certificate of occupancy and his assertion that the lower unit was a vacant office at the time it was joined with the apartment above, are insufficient to eliminate factual issues raised by the DHCR orders indicating that the Building is rent stabilized. Likewise, the Building Report relied on by B. Hoppenfeld, which shows that one of the relevant cases before the DHCR was dismissed, another closed and the third still pending, do not resolve these issues, and since B. Hoppenfeld has no personal knowledge of these cases, his statements interpreting the Building Report are not probative.

Furthermore, even assuming arguendo that B. Hoppenfeld's

reply affidavit is a sufficient foundation for the handwritten xeroxed copies of what appear to be the Building's rent records for certain years, such records are inadequate to provide a basis for dismissal in light of the DHCR orders indicating that the Building is rent stabilized. Finally, while B. Hoppenfeld's statements in his reply affidavit that the unit was used as an office until 1980 and then was vacant until it became the lower part of the duplex in 1985 support Hoppenfeld's position that the Building always consisted of five residential units, his affidavit, which is unsupported by any conclusive proof, is also not dispositive here.

Accordingly, it is

ORDERED that the motion to renew is denied.

DATED: ~~May~~ June 10, ~~2008~~ 2008

J.S.C.

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NEW YORK