

Ginezra Assoc. LLC v Ifantopoulos

2008 NY Slip Op 31769(U)

June 19, 2008

Supreme Court, New York County

Docket Number: 0104858/2007

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 104858/2007

GINERZA ASSOCIATES LLC.

vs
IFANTOPOULOS, KOSTAS

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

*and all
motions are decided per attached*

FILED

JUN 25 2008

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

Dated: 6/19/08

EMILY JANE GOODMAN

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: Part 17

-----X

GINEZRA ASSOCIATES LLC,

Plaintiff,

Index No. 104858/07

-against-

KOSTOS IFANTOPOULOS and SUZANNE
PILLSBURY,

Defendants.

-----x

Emily Jane Goodman, J.S.C.:

In this action seeking to eject defendants from certain loft units in plaintiff's building, the following applications are here addressed: plaintiff Ginezra Associates LLC's (Ginezra) motion for summary judgment on the complaint, and for an order dismissing defendant Kostos Ifantopoulos's (Ifantopoulos) eighth affirmative defense; and the separate cross motions of Ifantopoulos and defendant Suzanne Pillsbury (Pillsbury) for summary judgment dismissing the complaint.

FILED

I. Background

JUN 25 2008

Since 1970, Ginezra has owned a building located at 188 Duane Street, New York, New York, which contains three loft units (the building). The building is an Interim Multiple Dwelling (IMD) under Article 7-A of the Multiple Dwelling Law (MDL or Loft Law). MDL § 280, et seq. Pillsbury rents the second and third floor units, by means of an assignment of lease, which commenced

NEW YORK
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in 1981. The second and third floor lofts are each self-contained, both having kitchens and bathrooms, and separate entrances to the street. Pillsbury resides solely in the second floor unit.

When Pillsbury commenced her residency in the building, the third floor (the loft) was occupied by non-party Avi Fima (Fima), under a subtenancy agreement with Pillsbury's predecessor. Pillsbury has never occupied the loft. In 1984, Fima vacated the loft, which was immediately taken over by Ifantopoulos. Pillsbury claims that she did not have prior notice of, and had not given her consent to, Ifantopoulos's subtenancy, and that these parties only reached an agreement as to the rent which Ifantopoulos was required to pay, and signed a lease to that effect, in 1990. The rent was set at \$600, where it remains. Ginezra claims that it was not aware of the sublease at the time, and never gave its consent to it.

Under the Loft Law, a building will not be found to be an IMD unless it is comprised of three or more separate residential units. MDL § 281 (1).¹ In 1982, the Loft Board ruled that the building contained three separate units, and was thus an IMD entitled to the protections of the Loft Law, despite the fact that Pillsbury held a single lease for two of the units.

¹The actual language of the MDL § 281 (1) (iii) with regard to separate units is "the residences or home of any three or more families living independently of one another."

In 1996, Ginezra commenced a summary holdover proceeding against Pillsbury and Ifantopoulos in the New York Civil Court, seeking possession of the loft, claiming that Pillsbury did not occupy the loft as her primary residence. When this proceeding was either dismissed or withdrawn, Ginezra commenced a second proceeding (the proceeding) seeking possession, based on Pillsbury's non-primary residence of the loft. *See Ginezra Associates v Pillsbury*, Index No. 118750/96 (the proceeding).

This proceeding was dismissed in a decision by Judge Douglas Hoffman, dated July 3, 1997. In the decision, Judge Hoffman determined that, although the second floor and the loft were separate units under the Loft Law, they were a single leasehold under Pillsbury's lease. As such, Judge Hoffman determined that the fact that Pillsbury did not physically occupy the loft was irrelevant, in that she still occupied the leasehold as her primary residence. He stated that Pillsbury "ha[d] the right to occupy either or both of the floors of this two-floor leasehold as she [saw] fit" (Notice of Motion, Ex. 10, at 8), and that "there is no law which provides that a tenant must use and occupy the entire square footage of the leased space." *Id.* As such, Judge Hoffman determined that "Pillsbury occup[ied] the leased space, consisting of the second and third floors, as her primary residence"

Judge Hoffman likened the proceeding as one to "recover one

bedroom from a three-bedroom apartment on the ground that only two of the bedrooms are being utilized as the tenant's primary residence," and that "[t]he law recognizes no such cause of action." *Id.* at 9. He concluded that, pursuant to Real Property Law § 235-f (3), "[e]very rental agreement for residential purposes is construed to permit occupancy by the tenant, the tenant's immediate family, and one additional occupant. Here, the additional occupant is Ifantopoulos." *Id.* at 11. This, and the facts that the lease permitted Pillsbury to sublet the second floor of the loft, and that Ginezra "had knowledge of the third floor occupancy by a person other than Pillsbury since 1982, when Pillsbury listed Fima as a third-floor occupant in her application before the Loft Board" (*id.*), led Judge Hoffman to conclude that Pillsbury occupied the loft (as well as the second floor) as her primary residence. The decision was appealed and, on appeal, was affirmed. See *Ginezra Associates v Pillsbury*, 2002 NY Slip Op 50047(U), 2002 NY Misc LEXIS 70 (App Term, 1st Dept 2002).

Ginezra commenced another Civil Court proceeding against Pillsbury and Ifantopoulos in 2006, which was marked off the calendar in December 2006, and, apparently, has not been restored. This proceeding has apparently lapsed. CPLR 3216.

In October 2006, Ifantopoulos brought an application before the Loft Board to be adjudged a person covered by the Loft Law,

pursuant to Rules of the City of New York (RCNY), 29 RCNY §2-09 (b) (3). However, following a conference before the Loft Board's Administrative Judge, Ifantopoulos withdrew his application, with prejudice.

The present action is brought on the grounds (1) that Pillsbury does not occupy the loft as her primary residence, and so has no right to retain it; (2) that neither Pillsbury nor Ifantopoulos can claim to be covered persons under the Loft Law with regard to the loft; and (3) that, by charging Ifantopoulos \$600 a month, while Pillsbury only pays Ginezra \$781 a month, Pillsbury is engaging in illegal price profiteering, and that, as a result, Ginezra has the legal right to evict her.

II. Discussion

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Ayotte v Gervasio*, 81 NY2d 1062, 1062 (1993), quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986); see also *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985); *Kesselman v Lever House Restaurant*, 29 AD3d 302, 303 (1st Dept 2006). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to offer evidentiary facts sufficient to raise a triable issue of fact. See *Alvarez v Prospect Hospital*, 68

NY2d 320, *supra*; *Kesselman, supra*.

Ginezra initially argues that it is entitled to summary judgment allowing it to repossess the loft, because Pillsbury does not occupy it as her primary residence. *Affirm. in Support of Summary Judgment*, at 1, 9-11.

While Ginezra elaborates on its theme that the second floor and the loft are two separate units under the Loft Law, in order to establish that Pillsbury and Ifantopoulos occupy separate covered units, such a discussion is unnecessary. The Loft Board has already determined that the second floor and the loft are separate units for purpose of Loft Law coverage, although only one lease covers both floors. It is unnecessary to re-establish that fact here.² Judge Hoffman was also aware that the second floor and the loft were two separate units. The issue is not whether the two floor are separate units, but whether the fact that Pillsbury does not physically occupy the loft means that Ginezra has the absolute right to repossess it.³

²Ginezra apparently brought this argument up for the first time on its appeal of the Civil Court action, because the Court, stated that "were the landlord's arguments properly before us, we would find that the Loft Boards' calculation of 'residential units' for purposes of coverage under Article 7-C of the Multiple Dwelling Law is not dispositive of the non-primary residence issues in this proceeding." Appellate Term decision, 2002 Misc LEXIS 70, at **3.

³Ginezra never explains what would happen to Pillsbury's rent were Ginezra permitted to take possession of the loft, as Pillsbury's rent is based her possession of the entire leased premises.

Ginezra, citing to RCNY 2-01 (b) (4), argues that "[a] loft tenant" always "has no right to a covered unit if he or she does not utilize that unit as his or her primary residence." Aff. in Support of Motion, at 8. 29 RCNY 2-09 (b) (4) states that:

[t]he prime lessee, or sublessor who is not the prime lessee, shall be deemed the residential occupant qualified for the protection of Article 7-C, if he/she can prove that the residential unit covered as part of an IMD is his/her primary residence, even if another person is in possession. If the prime lessee or sublessor fails to prove that such unit is his or her primary residence, the rights of such person to recover such a unit are extinguished.

Ginezra may not argue here that Pillsbury does not occupy the loft as her primary residence, or that her admission that she is not a covered person with regard to the loft means that Ginezra may repossess it. The fact that her primary residency extends to the loft has already been established in the Civil Court decision, and the doctrine of res judicata bars Ginezra from rearguing the matter.

Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merit exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again.

Matter of Hunter, 4 NY3d 269, 274 (2005); see also *Matter of Mays v New York City Police Department*, 48 AD3d 372 (1st Dept 2008).

Judge Hoffman's decision specifically addressed whether

Pillsbury used the loft as her primary residency. The Judge determined that, as the loft was a part of her leasehold, Pillsbury was the prime resident of the entire leased space, including the loft.

Ginezra, in its reply herein, denies that its present motion is based on the theory that Pillsbury does not occupy the loft as her primary residence. Instead, Ginezra insists that the present action, and this motion, are based on different grounds not raised in the prior proceeding, to wit, (1) that neither Pillsbury or Ifantopoulos is a covered person of the loft under the Loft Law; and (2) that Pillsbury's alleged price gouging is a valid cause to evict defendant. In support for its proposed right to possess the loft, Ginezra relies on dicta in a decision rendered by Judge Hoffman in a motion to reargue the Civil Court decision [Notice of Motion, Ex. 11], in which the Judge said: "[i]f as petitioner contends, this is not, in fact, a roommate situation but a purely commercial transaction in which Pillsbury is recovering a windfall due to the rent-regulated status of the building, an entirely different showing would be required by petitioner, as well as different allegations." Notice of Motion, Ex. 11, at 6. Ginezra maintains this is just such a situation, and just such an action, and not a roommate situation at all, regardless of the language of Judge Hoffman's original decision.

In the first instance, the court notes that Ginezra did

indeed base the present motion on the theory that Pillsbury is not the primary resident of the loft (see Aff. in Support of Motion, at 9-11), and cannot claim otherwise, merely because Ginezra has become aware that this argument will not prevail.⁴ Ginezra had a full and fair opportunity to litigate the matter of primary residence, and the legality of the sublet to Ifantopoulos, and lost on the original action, and on appeal. The court notes that Judge Hoffman separately found that Ginezra effectively consented to Ifantopoulos's tenancy, by failing to object to his presence, even though Ginezra clearly knew that Ifantopoulos was in residence for many years, and had even dealt with him directly on occasion. The Appellate Term agreed, based on Ifantopoulos's "open and undisturbed possession of the loft" "without interruption." 2002 NY LEXIS 70, at *2. Therefore, Ginezra cannot rely on any law which is based on the existence of an illegal subtenancy. Ifantopoulos's tenancy has been found by two courts to be legal.

Nevertheless, Ginezra flatly proposes that "[a] loft tenant has no right to a covered unit if he or she does not utilize that unit as his or her primary residence." Aff. in Support of Motion, at 9. In support of this precept, Ginezra cites to *Lower Manhattan Loft Tenants v New York City Loft Board* (66 NY2d 298

⁴Ginezra's complaint contains only two causes of action: one based on Pillsbury's failure to prove primary residency, and the other to obtain the fair market value in rent for the premises.

[1985]); *Matter of Elliot v New York City Loft Board* (205 AD2d 460 [1st Dept 1994]); and *BLF Realty Holding Corp. v Kasher*, 299 AD2d 87 (1st Dept 2002).

In *Lower Manhattan Loft Tenants*, the primary tenant of the loft space was a tenants association, and the individual parties residing in the loft space were all members of the association. These tenants could not establish that the premises was their primary residence, because they dwelt there only intermittently, while possessing other residences. This case has no applicability to the present one, where the tenant's primary residency extends to the entire leasehold, not just to the second floor. *Elliott v New York City Loft Board*, *supra*, also stands for the proposition that "[i]nfrequent occasional use does not constitute residency for the purposes of Loft Law protection," an equally irrelevant case. *Id.*, 205 AD2d at 460. *BLF Realty Holding Corp. v Kasher*, (299 AD2d 87, *supra*), does not address the issue of a tenant's primary residency, and so, is inapplicable to support any claim of non-primary residence.

After moving away from the primary residency argument, Ginezra proposes another theory of recovery of the loft: that neither Pillsbury nor Ifantopoulos are covered by the Loft Law with respect to the loft, so that the findings of Justice Hoffman concerning primary residency are not relevant to the present action. Rather, Ginezra argues that, because Pillsbury has

stated that she is not claiming to be a covered person with regard to the loft, she cannot claim any right to it; and that Infantopoulos essentially admitted that he was not a covered person when he withdrew his Loft Law application with prejudice.

Ginezra bases its right to possession of the loft on 29 RCNY §§ 2-09 (b) (5) and 2-09 (c) (4) (1).

29 RCNY § 2-09 (b) (5) reads:

[i]n an IMD where a prime lessee is in possession of a portion of the space which he or she leased from the landlord, such prime lessee shall be entitled to remain in possession, and be qualified for the protections of Article 7-C, only with respect to the portion of such space which he or she occupied as a residential unit (including any portion thereof used for home occupations or as the working portion of a joint-living-working quarters for artists), and shall not be entitled to claim any of the remaining space as a primary residence against the occupant of any other residential unit within such space, except to the extent provided for in § 2-09 (c) (5) of these regulations, below, of these regulations and notwithstanding the provisions of §§ 2-09 (b) (3) and (b) (4) above. The current residential occupants of the remaining units created through subdivision shall be qualified for protection under Article 7-C with regard to their respective residential units covered by Article 7-C, except as provided in §§ 2-09 (b) (3) and (b) (4), above, of these regulations.

29 RCNY § 2-09 (c) (4), which deals with "subletting rights of occupants qualified for protection under Article 7-C" states:

[a]ll occupants qualified for protection under Article 7-C shall have the right to sublet their units pursuant to and in accordance with the procedures specified in § 226-b of the Real Property Law, notwithstanding that such occupants may reside in an interim multiple dwelling (IMD) having fewer than 4 residential units,

and that such occupants may not have a current lease or rental agreement in effect. The residential occupant of a unit in a subdivided space, who is not in privity with the landlord, must obtain the consent of both the prime lessee of such space and the landlord to a proposed sublet of such unit, which may not be unreasonably withheld in accordance with § 226-b of the Real Property Law.

29 RCNY § 2-09 (c) (4) (i).

Inspection of these two sections finds no support for Ginezra's argument. In contrast, they cement the fact that Pillsbury is permitted to sublet a portion of her unit, which she did with the tacit consent of Ginezra (as found by Judge Hoffman and the Appellate Court). These sections do not say that a party in possession of two units loses the right to the part of his or her leasehold, which is a separate unit under the Loft Law, merely by subletting it. On the contrary, it allows for subletting of the unit. Ginezra's reading of these sections would negate the right of a primary tenant to legally sublet a unit within his or her leasehold, clearly an untenable result. *Cf. Florencia Properties NV, Inc. v Wertheim*, 2002 NY Slip Op 500394(U), 2002 NY Misc LEXIS 255 (App Term 2002, 1st Dept) (landlord entitled to recover Loft Law unit occupied by illegal sublet)⁵; *Matter of Korn v Batista*, 131 Misc 2d 196 (Sup Ct, NY County), *affd* 123 AD2d 526 (1st Dept 1986) (same).

⁵While the court in *Florencia* found that the tenant was not the primary resident of the illegally sublet loft, in the present case, a court has found Pillsbury in residence of the entire leased premises, including the loft.

Ginezra next challenges Ifantopoulos's right to the loft, arguing that Ifantopoulos has admitted that he is not a covered person under the Loft Law when he voluntarily withdrew, with prejudice, the proceeding he commenced before the Loft Board for a finding that he was a covered person. Ifantopoulos sought to be adjudged a covered person under 29 RCNY § 2-09 (b) (3).

29 RCNY § 2-09 (b) (3) reads as follows:

[w]hen a residential occupant took possession of a residential unit covered as part of an IMD, on or after June 21, 1982, or on or after July 27, 1987 for an IMD unit subject to Article 7-C solely by reason of MDL § 281 (4) and the rules issued pursuant thereto, such occupant shall be qualified for the protection of Article 7-C if:

(i) he/she is a prime lessee with a lease currently in effect ... as a statutory tenant pursuant to Article 7-C, without the issuance of a new lease; or

(ii) he/she is the assignee of a prime lessee and such assignment was consented to by the landlord; or

(iii) prior to establishment of such occupancy, the landlord was offered the opportunity to purchase improvements pursuant to § 286 (6) of the MDL and regulations promulgated pursuant thereto.

Ifantopoulos argues that, by withdrawing his application before the Loft Board, he was only giving up the right to claim coverage under 29 RCNY § 2-09 (b) (3), but not to any other section which might support a claim of coverage under the Loft Law. He cites to where, in the transcript of the withdrawal, his attorney stated that Ifantopoulos was not giving up the right to

bring any further applications to the Loft Board, or any other court, "pursuant to any applicable Loft Board Rules" other than 29 RCNY § 2-09 (b) (3). Transcript of Proceeding, Aff. in Support of Summary Judgment, Ex. 20, at 5.

Ifantopoulos does not offer up any other rules of the Loft Law which might serve to make him a covered person thereunder. Furthermore, Ifantopoulos did not seek a declaration in his Answer, counterclaims and cross claims. The court need not reach the issue of whether Ifantopoulos is entitled to covered status in order to conclude that Ifantopoulos' withdrawal does not warrant his dispossession. 29 RCNY § 2-09 (b) (3) does not deal at all with the subject of sublets, while 29 RCNY § 2-09 (c) (4) (i) expressly allows for sublets, and does not limit a sublessee to a person named as a covered person under the Loft Law. There is no basis for a finding that a legal sublessee who is not a covered person has no right to the sublet premises in which he or she legally resides. Therefore, even if Ifantopoulos may no longer have the right to seek to be deemed a covered person under 29 RCNY § 2-09 (b) (3) does not allow Ginezra to repossess the loft.

In sum, Ginezra is barred from claiming that Pillsbury is not entitled to the loft because she is not a prime resident of that unit; and he has no valid claim to the loft under the theory that Pillsbury and Ifantopoulos are not covered persons under the

Loft Law.

B. Profiteering

In its complaint, Ginezra does not bring a cause of action for the eviction of Pillsbury from her leased premises on the ground of profiteering, by which, Ginezra claims, she has forfeited her protected status. However, considering the ease with which amendment is generally granted, the court will address the issue.

Ginezra claims that it is entitled to repossess Pillsbury's unit, because she is charging Ifantopoulos an exorbitant amount of rent in comparison with her own, and that such "profiteering" is not allowed by law. Pillsbury admits that her rent is \$720, and that she charges Ifantopoulos \$600.

Pursuant to 29 RCNY § 2-09 (c) (4) (ii) (A), "[t]he rental charged to the subtenant may not exceed the legal rent, as established pursuant to Article 7-C and these regulations, plus a ten percent surcharge payable to the residential occupant if the unit sublet is furnished with the residential occupant's furniture." The rent Pillsbury is charging Ifantopoulos clearly exceeds that statutory amount.⁶

⁶Pillsbury claims that this section does not apply to it, because section 2-09 (c) (4) (ii) (F) provides, in relevant part, that "[s]ubleases entered into on or after June 21, 1982, but prior to the effective date of these regulation, shall not be subject to subparagraph[] (ii) (A) ... of this paragraph(4) Pillsbury claims that the regulation regarding rent profiteering only became law in 1992. Pillsbury's Aff. of Cross

Ginezra maintains that the present case concerns Pillsbury's illegal commercial exploitation of the loft, and that is the very circumstance which Judge Hoffman said, in his decision denying reargument, might have altered the outcome of the holdover proceeding. Since the Loft Law does not allow for the remedy for a landlord whose tenant is found to have profited off of a sublet, the issue here raised is whether any other law allows the remedy of eviction in such cases. The Appellate Division, First Department, has found that eviction is indeed available in the right case.

BLF Realty Holding Corp. v Kasher (299 AD2d 87, *supra*), involved the sublease of a part of a loft, which the Court considered to be a sublet. The Court conceded that "the Loft Law ... is silent on the issue of eviction" (*id.* at 93), but chose to read the Loft Law prohibition against profiteering *in pari materia* with the law applicable to rent stabilized tenants, which provides for the remedy of eviction in the case of the overcharge of sublets, pursuant to the Rent Stabilization Code (9 NYCRR § 2520.1, *et seq.*). Specifically, section 2525.6 (b) provides that:

[t]he rental charged to the subtenant by the tenant shall not exceed the legal regulated rent plus no more than a 10-percent surcharge payable to the tenant if

Motion, at 10-11. This is not the case. The regulation was enacted in 1983. See New York City Charter, Article 7-C of the Multiple Dwelling Law, and Mayor's Executive Order No. 66.

the housing accommodation is sublet fully furnished. Where a tenant violates the provisions of this subdivision, the subtenant shall be entitled to treble damages.

Section 2525.6 (f) continues: "[a]n owner may terminate the tenancy of a tenant who sublets contrary to the terms of this section" Lastly, of import here, section 2525.7 (b) provides that "[t]he rental amount that a tenant may charge a person in occupancy pursuant to section 235-f of the Real Property law shall not exceed such occupant's proportionate share of the legal regulated rent charged to and paid by the tenant for the subject housing accommodations."

The Court in *BLF Realty Holding* concluded that the Rent Stabilization Code and the Loft Law should be read *in pari materia*, because "[w]hile there is no specific provision in the Loft Board's regulations authorizing eviction proceedings on the basis of rent gouging, the same reasoning as in the case of rent control should be applied to loft tenants who engage in similar exploitative conduct." 299 AD2d at 91. The Court reasoned that:

[s]urely, the Legislature could not have intended ... that a covered loft tenant could profiteer on a sublet prior to the landlord's conversion of the building in compliance with the legalization requirements and the subsequent tender of a rent stabilized lease only to have that opportunity taken away once the residential occupant becomes subject to rent stabilization. Such a result makes no sense.

Id. at 92. As such, the *BLF Realty Holding* Court found that "the remedy of eviction is available against a loft tenant who charges

a subtenant rent in excess of the legal regulated amount." *Id.* at 94.

The same standard does not apply to a roommate situation. There is no provision in the Rent Stabilization Code which prohibits a tenant from charging a roommate a disproportionate share of the tenant's rent. See *Handwerker v Ensley*, 261 AD2d 190 (1st Dept 1999); *520 East 81st Street Associates v Roughton-Hester*, 157 AD2d 199 (1st Dept 1990); *270 Riverside Drive, Inc. v Braun*, 4 Misc 3d 77 (App Term, 1st Dept 2004). The court in *270 Riverside Drive, Inc. v Braun* noted that "[t]he restrictions against profiteering in sublet situations have traditionally not been applied to living arrangements involving roommates." *Id.* at 78-79.

The Court in *BLF Realty Holding* declined to apply the roommate standard under the circumstances of that case. The primary tenant insisted that the living arrangements which he shared with two others did not consist of two separate, complete, units, and so should be considered akin to a roommate situation, rather than a sublet. The Court did not agree. Real Property Law § 235-f (3) allows a rent-stabilized tenant to share his or her living accommodations with immediate family and one additional occupant, and any dependant children of that occupant, provided the tenant occupies the premises as his or her primary residence. Rather than determine whether there was more than one

unit shared by BLF Realty Holding and the other residents, the *BLF Realty Holding* Court merely noted that Kasher had occupied the premises with two additional occupants, not one, and so, could not claim a roommate situation under Real Property Law § 235-f (3).

In the present case, Judge Hoffman held that Pillsbury was the primary resident of her entire leasehold, which included the loft. Similarly, he found the arrangement between Pillsbury and Ifantopoulos akin to a roommate situation, in which one occupant resides in but a part of the leasehold. Judge Hoffman did not feel that the self-contained nature of the units altered that reality, and this decision was affirmed by the Appellate Division, First Department. The effect of these holdings is to render Pillsbury's tenancy unassailable on the ground of profiteering.

Notably, any other result would create the incongruous, and grossly unfair, situations where either Ifantopoulos would lose his residence of more than 20 years because he was the *victim* of price gouging, or, alternately, that Ginezra and Ifantopoulos would be compelled to enter into a landlord/tenant relationship sought by neither. The BLF Realty Holding Court did not have these concerns in mind, and did not address such a possibility, because the subtenants in that case were no longer in residence at the time of the decision.

In consequence of the foregoing findings, Ginezra cannot evict Pillsbury from the second floor or from the loft, and Pillsbury and Ifantopoulos are entitled to an order dismissing the complaint. Pursuant to the lease, Pillsbury is also entitled to attorney's fees. As the complaint is being dismissed, there is no call to address the part of Ginezra's motion seeking the dismissal of Ifantopoulos's eighth cause of action alleging an illusory tenancy.

Accordingly, it is

ORDERED that the motion for summary judgment on the complaint, and for the dismissal of defendant Ifantopoulos's eighth affirmative defense is denied; and it is further

ORDERED that the cross motion brought by defendant Suzanne Pillsbury is granted, and the complaint is hereby dismissed, with costs and disbursements to this defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the cross motion brought by defendant Kostos Ifantopoulos is granted, except as to a declaration that he is the protected occupant of the loft, and the complaint is hereby dismissed, with costs and disbursements to this defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the issue of defendant Pillsbury's reasonable


attorney's fees is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the part of the motion seeking attorney's fees is held in abeyance pending receipt of the report and recommendations of the Special Referee and a separate motion pursuant to CPLR 4403.

This Constitutes the Decision and Order of the Court.

Dated: June 19, 2008

ENTER:



EMILY JANE GOODMAN

FILED

JUN 25 2008

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