

Frangos v 85th Estates Co.

2008 NY Slip Op 32304(U)

August 18, 2008

Supreme Court, New York County

Docket Number: 0106174/2008

Judge: Barbara R. Kapnick

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

PRESENT: KAPNICK
Justice

PART 12

CHRYSOLA FRANGOS

INDEX NO. 106174/08

- v -

MOTION DATE _____

8500 ESTIMATES COMPANY

MOTION SEQ. NO. 001

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

and cross motion are decided
in accordance with the
accompanying memorandum decision

FILED

AUG 19 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/18/08

[Signature]
BARBARA R. KAPNICK J.S.C.
J.A.G.

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 12

-----X
CHRYSOULA FRANGOS,

Plaintiff,

- against -

85TH ESTATES COMPANY,

Defendant.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 106174/08
Motion Seq. No. 001

FILED
AUG 19 2008
COUNTY CLERK'S OFFICE
NEW YORK

In this action, plaintiff Chrysoula Frangos seeks specific performance requiring defendant 85th Estates Company to provide her with a renewal lease for the subject premises, 185 East 85th Street, Apt. 30 G/H, in Manhattan, containing the terms and conditions of her previous rent stabilized lease, incorporating all of her rights under the Rent Stabilization Law ("RSL") and regulations, and providing for a rent in an amount no greater than the last rent plus the percentage increase that would be permissible under rent stabilization (first cause of action).

Plaintiff also seeks a declaration that she has the right to continue her tenancy in her apartment in accordance with the lease between the parties which incorporates all rights afforded tenants under the RSL and code (second cause of action), as well as a permanent injunction (third cause of action).

In addition, plaintiff seeks a declaration that: (i) defendant waived any claim that plaintiff's tenancy is [not] subject, by

[* 3]

agreement, to the rights and privileges of the RSL; (ii) defendant is estopped from denying plaintiff's tenancy is subject, by agreement, to the rights and privileges of the RSL; and (iii) defendant's actions constitute ratification of an agreement that plaintiff's tenancy is subject to the rights and privileges of the RSL (fourth cause of action). Finally, plaintiff seeks an award of attorneys' fees, costs and disbursements in accordance with the terms of the lease and Real Property Law § 234 (fifth cause of action).

Plaintiff now moves by Order to Show Cause for an order:

(1) granting a preliminary injunction pursuant to CPLR § 6301 et seq. and/or a *Yellowstone* injunction staying the running of the 10-day response period for acceptance of defendant's purported market lease rental offer in connection with the apartment, as set forth in a letter/notice dated April 22, 2008 from defendant to plaintiff, pending the final determination of this lawsuit and plaintiff's pending application before the DHCR for a determination that the apartment remains subject to coverage under the RSL;

(2) restraining and enjoining the defendant, and any agent, employee or person acting on behalf or in concert with it, from commencing any action or proceeding or otherwise taking any steps to evict plaintiff from the apartment based on the claim in its April 22, 2008 letter/notice that plaintiff has not timely accepted a purported market rental lease offer that defendant claims to have

provided pursuant to RSL § 26-504.3, pending a final determination by DHCR of plaintiff's pending application.¹

Defendant opposes the motion and cross-moves for summary judgment dismissing this action in its entirety and awarding judgment in defendant's favor on its first and second counterclaims which seek a judgment:

(i) declaring that the Fair Market Offer is proper, valid and binding pursuant to RSL § 26-504.3, and that plaintiff is required to respond to the Fair Market Offer within the time frame set forth by RSL § 26-504.3 and the terms of the Fair Market Offer (as adjusted by the Court to take into account the temporary stay issued on May 2, 2008), failing which plaintiff will be a holdover occupant of the apartment subject to a holdover proceeding which

¹ This Court granted a temporary restraining order on May 2, 2008, pending the hearing of this motion, (i) staying the running of the 10-day response period for acceptance of the defendant's purported market lease rental offer in connection with the apartment, as set forth in defendant's letter/notice dated April 22, 2008; and (ii) restraining defendant, and any agent, employee or person acting on behalf or in concert with defendant from commencing any action or proceeding or otherwise taking any steps to evict plaintiff, based on the claim that plaintiff has not timely accepted a purported market rental lease offer that defendant claims to have provided pursuant to RSL § 26-504.3, in connection with the apartment.

As a condition for the temporary restraining order, this Court directed that plaintiff pay use and occupancy to the defendant in the amount of \$2,366.98, within five (5) business days and that plaintiff continue to pay use and occupancy in said amount as it becomes due, without prejudice to either party's rights.

may be commenced by defendant in the Housing Court (first counterclaim);

(ii) awarding defendant attorneys' fees pursuant to the lease dated March 31, 1986, as renewed for a term expiring on February 28, 2004 (second counterclaim); and

(iii) awarding defendant the costs and disbursement of this motion.

Plaintiff opposes the cross-motion and argues that this Court should search the record and grant summary judgment in her favor.

Pursuant to RSL § 26-504.3, "[u]pon receipt" of an Order of Deregulation based on 'high income' from the DHCR,

an owner shall offer the housing accommodation subject to such order to the tenant at a rent not in excess of the market rent, which for the purposes of this section means a rent obtainable in an arm's length transaction. Such rental offer shall be made by the owner in writing to the tenant by certified and regular mail and shall inform the tenant that such offer must be accepted in writing within ten days of receipt. The tenant shall respond within ten days after receipt of such offer. If the tenant declines the offer or fails to respond within such period, the owner may commence an action or proceeding for the eviction of such tenant.

DHCR issued an Order of Deregulation on March 14, 2002 deregulating plaintiff's apartment "[u]pon the expiration of the existing lease." A two-year renewal of the rent-stabilized lease had already been sent out by defendant to plaintiff on or about

October 31, 2001 and was signed by the tenant on April 4, 2002, for a term expiring on February 28, 2002.

DHCR's determination was upheld in an Article proceeding by decision entered December 10, 2002 (Lewis Bart Stone, J.), affirmed, 10 AD3d 562 (1st Dep't 2004), *app dismissed*, 4 NY3d 759 (2005), *lv to app denied*, 5 NY3d 702 (2005), *rearg denied*, 5 NY3d 825 (2005).

Defendant then commenced a holdover proceeding against plaintiff in the Civil Court in 2006. By Decision/Order issued April 7, 2008,² Housing Court Judge Gary F. Marton granted summary judgment in favor of Frangos and dismissed the petition against her, finding, in relevant part, that

[a]s a predicate to terminating respondent's tenancy upon the expiration of the renewal lease on February 28, 2004, petitioner was required by statute, among other things, to have offered to respondent a renewal lease at a market rate rent. RSL § 26-504.3. The court find that petitioner did not do that. Petitioner contends that it did so by way of a letter dated April 9, 2002. However, the lease proposed by this letter would have commenced not immediately after the expiration of the then-existing lease on February 28, 2004 but instead, retroactively, at the beginning of the then-existing lease, i.e., on March 1, 2002. The court holds that petitioner's offer by letter dated April 9, 2002 did not conform to the governing statute. Petitioner also argues that its offer of the renewal lease effective March 1, 2002 constituted the statutorily required offer of a market rate lease. This argument is unavailing if only because this lease,

² The Decision/Order is mistakenly dated April 7, 2007.

as the then-existing lease under the DHCR order, was a rent-stabilized lease and not a market rate lease...

The Court thus concluded that defendant "did not fulfill a statutory predicate for terminating" plaintiff's rent-stabilized tenancy.

By letter/notice dated April 22, 2008, defendant notified plaintiff as follows:

Pursuant to applicable law, specifically Section 26-504.3 of the New York City Rent Stabilization Law, we hereby offer to renew the Lease to the Premises for a term commencing June 1, 2008 and ending May 31, 2009 at a monthly rent of \$7,000.00. Pursuant to applicable law, to wit, Section 26-504.3 of the New York City Rent Stabilization Law, you are required to accept this offer in writing within ten (10) days of your receipt of this letter if you wish to renew your lease. Should you choose to decline this offer, or should you fail to respond to this offer, within ten days of your receipt of this offer, you will be obligated to vacate and surrender possession of the Premises by May 10, 2008, a date not less than fifteen days from the date of this letter, failing which we will be entitled to commence appropriate legal proceedings against you seeking your eviction from the Premises.

Plaintiff thereafter brought this Order to Show Cause for a preliminary injunction pending the determination of DHCR of her application for an order that the apartment remains subject to coverage under the Rent Stabilization Law, based on the landlord's failure to offer her a market rent lease "[u]pon receipt" of the 2002 Order of Deregulation.

Defendant argues that plaintiff cannot demonstrate a likelihood of success on the merits because it has now complied with what the Housing Court determined to be a statutory predicate for terminating plaintiff's rent-stabilized tenancy.

Plaintiff argues, inter alia, in reply to her motion for injunctive relief and in opposition to defendant's cross-motion to dismiss that this Court need look no further than the Notice of Petition filed by 85th Estates Company in a non-payment proceeding in the Housing Part of the Civil Court on May 7, 2008, just days after the instant Order to Show Cause was signed, in which the landlord alleged that "[p]ursuant to the Order, and subject to the Appeal, the Premises are subject to the New York City Rent Stabilization Code and Law, and the rent requested herein does not exceed the legal regulated and registered rent for the Premises." Moreover, defendant has consistently registered the apartment every year since the Order of Deregulation was issued as an apartment which is subject to rent stabilization.

Thus, plaintiff contends that defendant has admitted that the terms of the tenancy agreement include all rights under rent stabilization. In addition, plaintiff argues that rent stabilization rights were created by express contract by virtue of the rent stabilized lease extension signed by defendant's attorney.

However, "[i]t is well settled that the parties to a lease governing a rent-stabilized apartment cannot, by agreement, incorporate terms that compromise the integrity and enforcement of the Rent Stabilization Law." *Drucker v Mauro*, 30 AD3d 37, 39 (1st Dep't 2006), *app. dismissed*, 7 NY3d 844 (2006). Likewise, the parties cannot remove an apartment from the the operation of the RSL's luxury decontrol provision by private agreement.

Moreover, contrary to plaintiff's claim in the fourth cause of action, it is well settled that "coverage under a rent regulatory scheme is governed by statute and may not be created or destroyed by laches, waiver and estoppel (citation omitted)." *Matter of Jo-Fra Props., Inc.*, 27 AD3d 298, 299 (1st Dep't 2006), *lv to app denied*, 8 NY3d 801 (2007); *Ruiz v Chwatt Assoc.*, 247 AD2d 308 (1st Dep't 1998). Thus, once deregulated, the apartment could not be re-regulated by the actions or inactions of the parties.

In addition, by letter dated May 5, 2008, Gerald L. Garfinkle, DHCR's Bureau Chief of Overcharge/Luxury Decontrol Bureaus, denied a request by plaintiff that DHCR issue a superseding order revoking its March 14, 2002 Order of Deregulation, noting that

while the failure by an owner to comply with the requirements of Section 26-504.3(e) may be grounds for dismissing a proceeding commenced by the owner to terminate a tenancy, as the Hon. Gary F. Morton ruled in the Housing Court litigation between the owner and the

tenant, it is not a basis for revoking or modifying a previously issued DHCR order of deregulation.

DHCR's Rent Administrator Jerry M. Scher thereafter issued an 'Order Terminating Proceeding' on June 6, 2008, finding that the "subject housing accommodation was deregulated" in 2002.

Accordingly, based on the papers submitted and the oral argument held on the record on June 11, 2008, this Court finds that plaintiff cannot demonstrate a likelihood of success on the merits. Plaintiff's motion for a preliminary injunction is, therefore, denied.³

Defendant's cross-motion for summary judgment is granted based on DHCR's determination that the subject premises is not subject to the RSL, and it is hereby

ORDERED that the Clerk may enter judgment dismissing plaintiff's Complaint with prejudice and with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and it is further

³ Plaintiff's request for 'Yellowstone' relief must also be denied since this action does not involve a commercial premises.


ORDERED and DECLARED that plaintiff is required to respond to defendant's Fair Market Offer within 10 days of service of a copy of this order with notice of entry, and it is further

ORDERED that defendant is entitled to recover attorneys' fees incurred in connection with this action, and that the issue of the amount of said fees is referred to a Special Referee to hear and determine, and it is further

ORDERED that upon service of a copy of this order with notice of entry, the Special Referee Clerk shall place this matter on the Part 50 calendar for reference to the Special Referee.

This constitutes the decision and order of this Court.

Dated: August 18, 2008



BARBARA R. KAPNICK
J.S.C.

**BARBARA R. KAPNICK
J.S.C.**

FILED
AUG 19 2008
COUNTY CLERK'S OFFICE
NEW YORK

