

**Salnikova v S&P Assoc. of N.Y. LLC**

2009 NY Slip Op 30102(U)

January 13, 2009

Supreme Court, New York County

Docket Number: 106905-08

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK  
Justice  
J.S.C.

PART 2

*Salmikova*

- v -  
*S & P Associates*

INDEX NO. 106905-08  
~~10878706~~  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	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

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.

**FILED**  
JAN 21 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 1/13/09

*[Signature]*  
LOUIS B. YORK J.S.C.

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: IAS PART 2

-----X  
VERA SALNIKOVA,

Plaintiff,

-against-

S&P ASSOCIATES OF NEW YORK LLC, and  
MILFORD MANAGEMENT CORP.,  
Defendants.  
-----X

106905-08  
Index No. ~~108787/06~~

**FILED**

JAN 21 2009

COUNTY CLERK'S OFFICE  
NEW YORK

I. Background

Ms. Vera Salnikova, plaintiff, is the tenant of Apartment #32BCD ("the Apartment") in the building known as and located at 30 Lincoln Plaza (30 West 63<sup>rd</sup> Street), New York, New York ("the Building"). Defendants S & P Associates of New York LLC and Milford Management Corp., as Sponsor and the Selling Agent, have commenced a non-eviction Condominium Offering Plan ("the Offering Plan") for the Building. The Offering Plan allows a current tenant of the Building to purchase his or her apartment at an insider price offered in the Plan. If the current tenant chooses not to purchase the apartment, it will be offered for sale to an outsider at a higher price determined in the Plan. However, if a tenant is rent stabilized, as plaintiff claims to be, the tenant can choose to remain in his or her apartment as a rent stabilized tenant, and will not be forced to purchase the apartment or leave so that another purchaser can move in.

Defendants contend that plaintiff's tenancy is *not* subject to the Rent Stabilization Law. Pursuant to the Plan, the Exclusive Purchase Period, which consists of the time an "insider" maintains rights to purchase the Apartment, was due to expire on May 20,

2008. Thus, on May 19, 2008, this court granted a temporary restraining order pending this court's judgment on whether or not to grant a preliminary injunction pursuant to CPLR § 6301 and § 6311.

Currently before the court is plaintiff's motion for a preliminary injunction. Plaintiff has requested in her motion that this court toll and extend the running of the Exclusive Purchase Period of the Offering Plan until (1) this court decides whether the plaintiff is a rent stabilized tenant under the law, or (2) 90 days after entry by the Clerk of the Court of judgment declaring the Apartment to be subject to rent stabilization. Plaintiff also requests that this during this period, the Court enjoin and restrain the defendants from selling the Apartment to any other purchaser. As stated, The Court granted this relief when it signed the OSC, which included a temporary restraining order. Plaintiff also contends that because she is a rent stabilized tenant, she should be allowed either to purchase the Apartment at the insider price or to remain in the Apartment as a rent stabilized tenant.

In support of her request for a preliminary injunction, plaintiff points to the fifth and sixth causes of action in the complaint. The fifth cause of action states that there was no hiatus in possession of the Apartment when plaintiff became the tenant of the Apartment, and thus plaintiff is the rent-stabilized tenant of the Apartment. The sixth cause of action states that plaintiff should have been informed prior to the commencement of the Exclusive Purchase Period that the Apartment is subject to rent regulation. Plaintiff contends that she should not have to guess if the Apartment is subject to rent stabilization in determining whether to exercise her exclusive right to purchase the Apartment during the Exclusive Purchase Period.

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## II. Facts

In the 1980/81 tax year, a 421-a tax abatement benefit plan for the Building commenced. Section 421-a of the Real Property Tax Law was enacted in response to the serious housing shortage in New York City in the early 1970s. It provided that "new multiple dwellings, on which construction commenced after July 1, 1971 and before January 1, 1973, and was completed no later than December 31, 1974," would be exempt from taxation for local purposes for a ten year period. Hewlett Associates v. City of New York, 57 N.Y.2d 356, 360-361, 456 N.Y.S.2d 704, 705 (1982). During this ten year period, the units of the building were subject to the rent stabilization laws. At the expiration of the ten-year period, if a unit became vacant, that unit became deregulated. According to the amended RPTL §421-a of 1985, the housing accommodations in buildings that are rent-stabilized solely by virtue of receiving 421-a benefits become decontrolled when those accommodations become "vacant," as stated above.

Engin Ansay was the original tenant of the Apartment beginning in 1979. Initially, Ansay occupied the Apartment pursuant to a lease held by the Organization of the Islamic Conference as the subtenant, and thereafter he held the lease in his own name. Ansay was notified of the 421-a tax abatement, and he also was informed that the abatement would expire in 1990. It is uncontested by either party that Ansay remained as the tenant of the Apartment after the 1990 expiration of the Building's tax benefits.

In June 2003, Ansay entered into a sublease with Ms. Valerie Belsky. At that point, Ansay no longer physically remained in the Apartment, as he was residing in California. According to Ansay's affidavit in support of plaintiff's motion, when the

Building's manager, Ms. Leslie Orgel, informed Ansay that due to the sublet of the Apartment to Belsky, the Apartment was no longer rent stabilized, Ansay disputed this fact. Orgel states that the rider to Ansay's lease states that DHCR regulations prohibit a rent stabilized tenant from subleasing an apartment for more than two years out of the four-year period preceding the expiration of the Sublease. Thus, she contends, she actually informed Ansay that "no sublease in violation of these regulations would likely be approved" (Orgel Aff. at 3). Thereafter, Ansay confirmed in a letter to Orgel that he was not returning to New York, and was relinquishing his rights to the Apartment as of August 1, 2004. The lease that Ansay maintained with the landlord allowed for a sublease to take place with the landlord's consent. Although the sublease to Belsky was in fact consented to by the landlord in writing, the landlord reminded Ansay that a subsequent sublease to Belsky would not be agreed to.

In August 2004, the landlord entered into a new two year lease directly with Belsky ("Belsky Lease"). The Belsky Lease states at the very top that "[t]his lease is not subject to rent regulation," while Provision 36 of the Belsky Lease also informs the tenant that the "Apartment [is] not subject to rent regulation." In addition, Orgel sent Belsky a letter dated July 23, 2004, which informed Belsky that "[e]ffective August 1, 2004 apartments 32B, 32C and 32D (AKA "32BCD") will become De-Stabilized and no longer subject to the laws promulgated by the Rent Stabilization Association and the Division of Housing and Community Renewal." Belsky received this letter, and signed and acknowledged the letter as well.

Soon after the Belsky Lease went into effect, Belsky assigned her lease to plaintiff with the landlord's consent, effective January 1, 2005. Plaintiff acknowledged

the status of the Building as de-regulated in the rider to the lease assignment agreement. Specifically, the rider states that plaintiff "understand[s] that THIS IS NOT A RENT STABILIZED BUILDING and there are no restrictions on future rent increases. In addition, [plaintiff has] received a copy of the prior tenants lease and [has] read it." Plaintiff signed this rider, confirming her acknowledgment that the Building was no longer subject to the Rent Stabilization Law.

The Building units are being converted into condominiums, and thus, plaintiff asks this Court to accord her rights under rent stabilization reserved to a tenant in occupancy during the benefits period. Plaintiff contends that she is a rent stabilized tenant, and should be allowed to remain a rent stabilized tenant in the Apartment if she chooses not to purchase the Apartment. In their opposition to plaintiff's motion, defendants contend that plaintiff is not a rent stabilized tenant and that her request for injunctive relief is "simply gamesmanship designed to extort a below market price for the Premises from S& P" (Memorandum of Law in Opposition to Plaintiff's Motion, at 3).

III. Discussion

As stated, plaintiff currently moves for a preliminary injunction. "To obtain a preliminary injunction, ...[the movant is] required to demonstrate a likelihood of success on the merits..., irreparable harm in the absence of the injunctive relief, and a balancing of the equities in its favor" City of New York v. Untitled LLC, 51 A.D.3d 509 (1st Dept. 2008). The granting of a preliminary injunction "is a drastic remedy that 'will only be granted if the movant establishes a clear right to it under the law and the undisputed facts'" Koultukis v Alan Phillips et al., 285 AD2d 433, 435 (1st Dept 2001) quoting Anastasi v Majopon Realty Corp., 181 AD2d 706,707 (2nd Dept 1992). For the reasons that follow, plaintiff has not met this burden.

Plaintiff does not have a strong likelihood of success on the merits of the Fifth and Sixth Causes of Action in the Verified Complaint, which allege that defendants wrongly hold plaintiff as a non-rent stabilized tenant and request that the Exclusive Purchase Period should be tolled while it is determined whether plaintiff is a rent stabilized tenant. To be considered a rent stabilized tenant, the tenant in question must "continuously reside in the apartment as a primary resident from the commencement of the tenancy, or the beginning of the relationship" with the tenant living in the rent stabilized apartment. Dziurgot v. Tower 53 Associates, **121 A.D.2d 857**, 858, 501 N.Y.S.2d 51, 52 (1st Dept. 1986). In the case at hand, when plaintiff moved into the Apartment, she took over Belsky's lease. This lease, as already stated, expressly declared that the Apartment was no longer rent stabilized. From the commencement of plaintiff's tenancy, the Apartment has not been rent stabilized, so plaintiff cannot successfully make the argument that she is a rent stabilized tenant.

The Building is subject to RPTL Section 421-a, which allows tax exemption on real property for up to ten years, and which was enacted to encourage new construction of multiple dwellings in New York City. Lincoln Metrocenter Partners, L.P. v. Tax Commission of the City of New York, 171 N.Y.S.2d 964, 965 (Sup. Ct. N.Y. County 1996). After the expiration of the tax abatement period however, the buildings become deregulated. According to RPTL §421-a, "the rents of a unit shall be fully subject to control... for the entire period during which the property is receiving tax benefits pursuant to this section... [S]uch rents

shall continue to be subject to such control to the same extent and in the same manner as if this section had never applied thereto, except that such rents shall be decontrolled if: *a unit becomes vacant after the expiration of such ten year period.*" RPTL §421-a (emphasis added.)

The dispute in this case centers on the meaning of the word "vacant." New York State's Rent Stabilization Code ("RSC") defines a vacancy lease as "the first lease or rental agreement for a housing accommodation that is entered into between an owner and a tenant." RSC § 2520.6(g). As stated, Belsky and the landlord entered into a new non-rent stabilized lease agreement in 2004, before plaintiff moved into the Apartment. According to the Belsky Lease, and thus the sublease between Belsky and plaintiff, both tenants knew that the lease into which they entered was a free market lease, which allowed the Apartment to be subject to future rent at the control of the landlord.

Therefore, the Apartment became vacant with the signing of the Belsky Lease, which was signed in August, 2004. The Belsky Lease is a "vacancy lease" according to RSC §2520.6(g) because it was a new lease "entered into between an owner and a tenant." In fact, as previously mentioned, Provision 36 of the Belsky Lease expressly states that "the building is not subject to the Rent Stabilization Law, Rent Control or any other form of rent regulation which either limits the amount that Owner can charge for rent or compels Owner to renew this Lease." This provision explains to the tenant that while the Building was previously subject to rent regulation under Real Property Tax Law §421-a, it is no longer stabilized under this law. Therefore, when Belsky assigned plaintiff the Belsky Lease, plaintiff commenced her tenancy as a non-rent stabilized tenant. It is clear from the above-stated facts that notice was given to Belsky of the deregulated status of the Apartment, and thus, Plaintiff should have known of the Apartment's status as well.

Plaintiff has not offered sufficient evidence to the Court that she should be considered a rent stabilized tenant or that a vacancy of the Apartment never occurred.

Thus, a preliminary injunction should not be granted because the plaintiff does not have a likelihood of success on the merits of her rent stabilization claim.

Plaintiff also cannot show that she will suffer irreparable harm in the absence of injunctive relief. "The claims of a plaintiff that harm is imminent and irreparable must be clearly demonstrated to the Court." Wright v. Lewis, 21 Misc.3d 1120(A), Slip Copy, 2008 WL 4681929 (Table) N.Y. Sup., 2008. If the claims "are wholly speculative and conclusory," then the Court will find that they "are insufficient to satisfy the burden of demonstrating irreparable injury." Khan v. State University of New York Health Science Center at Brooklyn, 271 A.D.2d 656, 706 N.Y.S.2d 192, 194 (2d Dept 2000). Denying the instant motion would in no way change or alter plaintiff's status. Plaintiff can either purchase the Apartment at the insider price, or she can decide not to purchase the Apartment and take the risk that someone will purchase the Apartment at the outsider price.

Plaintiff is already being offered a significantly better price on the Apartment than an outsider will be offered. According to the Offering Plan, the tenant or "insider" purchase price for the Apartment is \$3,765,000.00 while the offering price to outsiders is \$5,020,000.00. Thus, if plaintiff decides to buy at the insider price, she will be saving a considerable amount of money compared to what outsiders will be offered at the free market price.

On the other hand, defendants will suffer irreparable harm if preliminary injunction is granted. An injunction will not be granted "when it appears that the injury [to movant] is not serious or substantial, and that to restrain the acts complained of would subject the other party to great inconvenience and loss." Forstmann v. Joray Holding Co. 244 N.Y. 22, 29 (1926). The granting of an injunction "is an extraordinary remedy and the court must weigh the conflicting considerations of benefit to the plaintiff and harm to the defendant which would follow the granting of such a drastic remedy" Sunrise Plaza Associates, L.P., v. International Summit Equities Corp., 288 A.D.2d 300, 301, 733 N.Y.S.2d 443, 445 (2d Dept 2001). The harm plaintiff claims is not the type of harm that is considered irreparable; "[d]amages compensable in money and capable of calculation, *albeit* with some difficulty, are not irreparable" Sports Channel Am. Assoc. v. National Hockey League, 186 A.D.2d 417, 418 (1st Dept 1992).

Because plaintiff is not a rent stabilized tenant, granting her motion for a preliminary injunction would only prevent defendants from marketing the Apartment to outsiders, if plaintiff does not in fact want

to purchase the Apartment. Defendants claim they have a potential purchaser who is willing to make an offer on the Apartment that exceeds the \$5,020,000.00 asking price from outsiders set forth in the Offering Plan. If plaintiff chooses to buy the Apartment, she can do so at the insider price. Otherwise, the defendants can assert their right to put the Apartment on the market and offer it at the price they see fit.

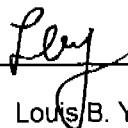
IV. Conclusion

Based on the forgoing, it is

ORDERED that plaintiff's motion for a preliminary injunction is denied.

SO ORDERED:

DATED: 1/13/09

  
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Louis B. York, J.S.C.

**LOUIS B. YORK  
J.S.C.**

**FILED**  
JAN 21 2009  
COUNTY CLERK'S OFFICE  
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