

Matter of Silverstein v Goodman

2009 NY Slip Op 30568(U)

March 13, 2009

Supreme Court, New York County

Docket Number: 119998/93

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Judge

PART 36

Index Number : 119998/1993

SILVERSTEIN, JEROME

VS.

GOODMAN, MAX

SEQUENCE NUMBER : 035

LEAVE TO INTERVENE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for intervene

1-4

PAPERS NUMBERED	
1, 2	_____
3	_____
4	_____

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 intervene is denied*
in accordance with the attached nonrandom
decision.


FILED

MAR 17 2009

COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 3/13/09



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 36

-----X
In the Matter of the Application of
JEROME SILVERSTEIN,

For a Decree Removing the Trustee

-against-

MAX GOODMAN and VIOLA GOODMAN

Petitioner,

FILED

Index No.: 119998/93
DECISION/ORDER

Motion Seq. No.: 035

MAR 17 2009

GOODMAN
Respondents.
CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN, JSC:

In this action on a trust, a non-party moves for leave to intervene pursuant to CPLR 1012 and/or 1013 (motion sequence number 035). For the following reasons, this motion is denied.

FACTS

Preliminarily, the court notes that this proceeding was commenced in 1993, approximately 16 years ago, and was settled over one (1) year ago.

The Parties

Petitioner Philip Silverstein (Philip) and his brother, the non-party proposed intervenor herein Maurice Silverstein (Maurice), are the sons of the late Jerome Silverstein (Jerome). See Notice of Motion, M. Silverstein Affidavit, ¶¶ 2, 4. Respondent Viola Goodman was Jerome Silverstein's sister (Viola), and the late Max Goodman was Viola Goodman's husband (the Goodmans). *Id.*, ¶ 5.

After the death of Jerome and Viola's mother, Leontine Silverstein, Jerome and Viola became the sole beneficiaries of a trust that she had established for them. *Id.* The trust property consists of a building located at 1582 First Ave. in the County, City and State of New York (the building). *Id.* The trust named the Goodmans as trustees. *Id.* The Surrogate's Court appointed a receiver to manage the building. Jerome commenced this action in 1993 to remove the

Goodmans as trustees. *Id.*, ¶ 6. Since that time, both Jerome and Max Goodman have died, and Philip has been appointed administrator of his father's estate, and has been substituted as the petitioner of record in this action. *Id.*, ¶ 4.

The central dispute in both this action on the trust and the instant motion to intervene concerns the use and occupation of apartment 2N at the building. Jerome resided in this rent-stabilized apartment from 1973 until his death in October 1999. *Id.*, ¶ 13. Maurice alleges that he resided in the apartment with his father from 1992 until 1999. *Id.*, ¶ 14. Maurice also alleges that he vacated the apartment in 2000 so that Philip and his family, who had returned from Japan, could move in.¹ *Id.*, ¶ 16. Maurice asserts that he and Philip did not execute a formal sublease, but that Philip agreed that Maurice would retain rights to the apartment as the tenant of record. *Id.*, ¶ 17. Philip, who still resides in the apartment with his family, denies Maurice's claims, and asserts that Maurice abandoned the apartment in April 2000 to move to Costa Rica. *See P. Silverstein Affidavit in Opposition*, ¶ 4. Philip states that he has been paying the apartment rent in his own name to the receiver since July 2000. *Id.*, ¶ 6.

Prior Proceedings

In November 2003, Viola filed an order to show cause seeking an order to remove Philip from apartment 2N as well as other relief (motion sequence number 26). *See Notice of Motion, M. Silverstein Affidavit*, ¶ 21; Exhibit J. On January 30, 2004, this court (Omansky, J.) entered a decision that denied Viola's motion, and referred this action to a special referee for a long accounting. *Id.*; Exhibit L. The special referee entered that accounting on July 8, 2004, and it was confirmed by this court (Shafer, J.) in an order dated October 12, 2005. *Id.*; Exhibit D. The parties cross-appealed the court's confirmation, and, on December 28, 2006, the Appellate

¹ Maurice admits that he currently "temporarily resides" at 484 West 43rd St., New York, N.Y. *See Notice of Motion, M. Silverstein Affidavit*, ¶ 9.

Division, First Department, entered a decision that modified the court's order and remitted this action to the special referee for further hearings. The special referee conducted those hearings, during which time the parties agreed to settle this action. The court so ordered the parties' stipulation of settlement in an order dated November 7, 2007. *Id.*; Exhibit B. The relevant portion of the stipulation provides that the parties agree to put the building up for sale and that:

As a material part of this settlement, all of the parties have agreed that they will vacate and surrender possession of their respective ... apartments and shall deliver them vacant and broom-clean either at the time of closing or as we will provide in the contract that these parties shall have up to two weeks to vacate and deliver the premises broom-clean two weeks from the date of closing... ..

The parties also agree to sign consents for the entry of the judgment of final possession with regard to the units that have been described herein above. Namely, final judgment of possession shall be entered against Mr. [Philip] Silverstein with regard to apartment 2N ... These judgments shall be stayed until such time as a closing takes place and two weeks thereafter.

Id. at 4-6.

Maurice initially sought to intervene in this action via order to show cause (motion sequence number 34). However, this court denied Maurice's application in a decision dated July 17, 2008. *Id.*; Exhibit M. Maurice thereafter refiled his request in the form of the instant motion (motion sequence number 35). He moves for an order to intervene in this action, to set aside the portion of the November 7, 2007 settlement that provides for the vacatur of apartment 2N, and for a judgment that he is the lawful, rent-stabilized tenant of that apartment

DISCUSSION

Maurice first cites CPLR 1012 (a) (3), which permits a non-party to intervene as of right:

When the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.

Regarding his property rights, Maurice argues that "my father ... was a rent stabilized tenant ... and ... upon his death, I succeeded him as a rent stabilized tenant by virtue of 9 NYCRR § 2104.6

(d) (1),” and that the November 7, 2007 stipulation of settlement “adversely affects my right to apartment 2N.” See Notice of Motion, M. Silverstein Affidavit, ¶¶ 15, 26. As previously mentioned, Philip responds by denying that Maurice has any rights to the apartment because he abandoned it in April 2000 and has neither lived nor paid rent there since. See P. Silverstein Affidavit in Opposition, ¶¶ 4, 6. Maurice replies that the Rent Stabilization Law operates to renew his tenancy automatically until and unless that tenancy is terminated by the service of a “Golub Notice,” and that he has never been served with such a notice. See Lutzman Reply Affirmation, ¶ 8. After reviewing the applicable law, the court finds that Maurice’s arguments lack merit.

In *Hughes v Lenox Hill Hosp.* (226 AD2d 4, 15-16 [1st Dept 1996]), the Appellate Division, First Department, observed that:

Although not expressly stated in the succession provision, implicit in the regulatory scheme ... is that the dwelling unit will remain in continuous use as a primary residence. As the cases that have considered the issue illustrate, the absence or removal from the premises, at the time an offer of a renewal lease is required to be made, of the person claiming succession rights gives rise to a presumption of abandonment of possession and waiver of the right of succession. This outcome is thoroughly consistent with public policy. If the merit to the succession provision is that it spares a family member the disruption of relocation at a time of potential emotional and financial stress, the merit to the requirement of continuous occupancy is that affordable residential accommodations, in scarce supply, will not go unutilized because ... the would-be successor has no immediate use for them [emphasis added and internal citations omitted].

Here, Maurice admits that he has not lived in apartment 2N since April 2000, and that Philip and his family have lived and paid rent there since July 2000. See Notice of Motion, M. Silverstein Affidavit, ¶¶ 16-18. Thus, pursuant to the *Hughes* holding, New York Law clearly establishes a presumption that Maurice has abandoned apartment 2N and waived his succession rights thereto. Maurice has presented no evidence to overcome this presumption. He presents neither proof that he lives there, retains property there, receives mail there, is registered to vote there, paid rent or

utilities, nor any other indicia of a nexus with the apartment whatsoever. The court finds that the e-mail correspondence between himself and Philip, wherein he purports to give Philip “permission” to live in the apartment for an indefinite period of time, is self-serving and unpersuasive and constitutes no proof.² As a result of his failure to rebut the presumption of abandonment, the court concludes that Maurice has waived his succession rights to apartment 2N. Because Maurice’s motion to intervene, pursuant to CPLR 1012 (a) (3), depended upon a finding that he possesses such rights, the court also rejects Maurice’s argument, and finds that this branch of his motion is denied.

Maurice’s motion also cites CPLR 1013 as a basis for intervention in this action. Such statute permits a party to seek the court’s leave to intervene:

Upon timely motion, any person may be permitted to intervene in any action ... when the person’s claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

Here, Maurice’s lack of any legally cognizable interest in the property that is the subject of this action - i.e., apartment 2N in the building - compels the conclusion that no “common question of law or fact” exists between his claims and the underlying dispute between Philip and Viola. Further, the within application can hardly be considered “timely”, as provided in the statute, as this proceeding was commenced in 1993, approximately sixteen years ago, and was settled over one year ago. Moreover, to disturb the November 7, 2007 stipulation of settlement, which represents the culmination of many years of legal effort expended by the parties herein, would certainly result in severe prejudice to those parties. Accordingly, the court finds that the branch of Maurice’s motion that relies upon CPLR 1013 should also be denied.

² Such e-mail is ambiguous, and merely, at best, affirms that Philip maintained his own right to live in the apartment. [Exh. G to Motion].

[* 7]

Maurice's motion also refers to his proposed petition, wherein he requests a declaration setting aside the November 7, 2007 stipulation of settlement, finding that he is the lawful, rent-stabilized tenant of apartment 2N and awarding him immediate possession thereof. *See* Notice of Motion, M. Silverstein Affidavit, ¶ 27; Exhibit A. Because the court has denied Maurice's motion to intervene in this action, however, that petition and the relief sought therein are not before the court, and they will not be considered.

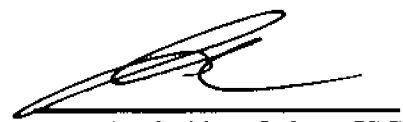
DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion to intervene, pursuant to CPLR 1012 and 1013, of proposed petitioner Maurice Silverstein is, in all respects, denied; it is further

ORDERED that within 30 days of entry of this order, petitioner shall serve a copy upon all parties, with notice of entry.

Dated: New York, New York
March 13, 2009


Hon. Doris Ling-Cohan, JSC

J:\INTERVENTION\silversteinvgoodman.wpd

FILED
MAR 17 2009
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