

Walsh v Salva Realty Corp.

2009 NY Slip Op 31573(U)

July 13, 2009

Supreme Court, New York County

Docket Number: 102525/2008

Judge: Paul G. Feinman

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

HON. PAUL G. FEINMAN

PRESENT:

PART 12

Justice

Index Number : 102525/2008

WALSH, TERRI

VS.

SALVA REALTY CORP.,

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 102525-08

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

file attached

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.**

FILED

JUL 17 2009

COUNTY CLERKS OFFICE

NEW YORK

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

Dated: 7/13/2009

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
TERRI WALSH and DOUGLAS GOMEZ,
Plaintiffs,

Index Number 102525/2008

against

Mot. Seq. No. 001

SALVA REALTY CORP.; SALVA DELAWARE,
LLC, and CAST IRON REAL ESTATE CO., INC.,
Defendants.

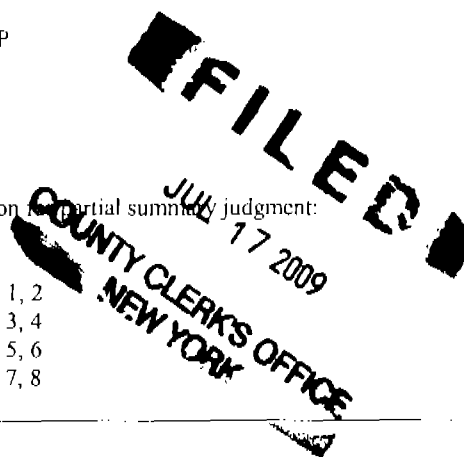
DECISION AND ORDER

-----X
For the Plaintiffs:
Lance Corbin Kramer, Esq.
26 Court Street, Suite 613
Brooklyn NY 11201
(718) 222-0083

For the Defendants:
Belkin Burden Wenig & Goldman, L.L.P.
By: Joseph Burden, Esq.
270 Madison Ave.
New York NY 10016
(212) 867-4466

Papers considered in review of this motion to dismiss and cross motion for partial summary judgment:

Papers	Numbered
Notice of Motion and Affidavits Annexed, Memo of Law	1, 2
Cross-Motion & Memo of Law in Opposition	3, 4
Affidavit & Memo of Law in Further Supp. of Motion	5, 6
Reply Affidavit & Reply Memo of Law	7, 8



PAUL G. FEINMAN, J.:

The motion and cross-motion are consolidated for purposes of decision.

Defendants move to dismiss the action pursuant to CPLR 3211 and for a judgment declaring that the plaintiffs are not rent stabilized tenants. Plaintiffs cross-move for partial summary judgment pursuant to CPLR 3212 (e) and a declaration that they are rent stabilized tenants of the subject apartment. For the reasons which follow, the defendant's motion is granted and the plaintiffs' cross-motion is denied.

Background

Plaintiffs, wife and husband, are rental tenants in unit 5B in defendant's building known as

546-548 Broadway, New York, New York.¹ The building is a five-story mixed use building, with the first three floors occupied by commercial tenants and the fourth and fifth floors now consisting of 15 residential apartments.² The building was registered in March 1983 with the New York City Loft Board as an Interim Multiple Dwelling (IMD), then defined under the Loft Law in part as a building which was once occupied for manufacturing, commercial or warehouse purposes, lacks a certificate of compliance or occupancy, and as of December 1, 1981 was occupied for residential purposes by three or more individual families (Multiple Dwelling Law § 288 [a]). In September 2004, the owner was found to have complied with the requirements under the Loft Law, and the building was declared by the Loft Board to no longer be an IMD and no longer under the jurisdiction of the Loft Board (Mot. Ex. J, Loft Board Order No. 2878, Sept. 23, 2004). The owner was directed to issue leases subject to the Emergency Tenant Protection Act of 1974 (EPTA) for ten units and register them with the New York State Division of Housing and Community Renewal, and the Loft Board set the initial legal regulated rents for the same ten units. Apartment 5B, and two other units, were declared not subject to rent regulation because the owner had previously bought the rights, or rights and improvements, from the former tenants of record pursuant to the Loft Law (Multiple Dwelling Law § 286 [12]) (Mot. Ex. J, Loft Board Order No. 2878, Report &

¹Salva Delaware, LLC is the owner of the building. Prior to February 21, 2007, the building was owned by Salva Realty Corp., which acquired the building in September 1981. The principals of Salva Realty are the same as the members of Salva Delaware (Mot., Soussan Aff. ¶ 13). For ease of reading, this decision refers to “Salva” or “the owner” without distinguishing between the entities.

²The 2007 Certificate of Occupancy indicates 15 apartments Cross-Mot. Ex. E). Many of the facts in this section are taken from the Report and Recommendation of the New York City Loft Board, dated September 1, 2004 (Mot. Ex. J).

Recommendations at unnumbered 2).³ As of May 2007, the building's Certificate of Occupancy classified it under the Multiple Dwelling Law as containing dwelling units that are "joint living work quarters for artists" under Zoning Resolution § 12-10 (Cross-Mot. Ex. E).

Plaintiff Walsh rented apartment 5B in early 2004 pursuant to a one-year lease at a market rate of \$3,000 per month, with an option to renew for additional years up through February 2007. The lease contained a rider stating in part that the apartment was not subject to rent stabilization, rent control, or the Loft Law (Mot. Ex. I, Salva-Walsh Lease, Rider ¶ 4). Walsh and Gomez renewed the lease twice, each time paying higher rents. However, in February 2007, the plaintiffs began to dispute the amount of renewal rent, and there was a breakdown in relations between the landlord and them that led to this lawsuit.

Plaintiffs argue that they have been illegally paying market price rents for what should be a rent stabilized unit, notwithstanding the previous sale of rights by the former tenant. They seek a declaratory judgment that apartment 5B is subject to the Emergency Tenant Protection Act and that they are protected under the Rent Stabilization Code, and seek injunctive relief preventing the defendant owner from terminating their tenancy or from charging them more than the lawful regulated rent. They also seek compensation for rent overcharges and damages.

Defendants, the current and former owner of the building and the realtor that found the apartment for plaintiffs, seek dismissal of the complaint. They argue that the apartment properly is not registered with the DHCR as a rent stabilized apartment. Salva provides a copy of the 1998 settlement agreement with the former tenant, which includes a clause that the agreement is "deemed

³Also according to the Loft Board Report and Recommendations, possession of another unit had previously been awarded to the owner in 2002 after a non-payment proceeding in Civil Court.

to constitute a sale of improvements pursuant to Multiple Dwelling Law § 286 (6), and a sale of rights pursuant to Multiple Dwelling Law § 286 (12).” (Mot. Ex. D, Stipulation ¶ 19; Mot. Ex. E). In consideration for the sale of improvements and rights, Salva agreed to pay the then tenant \$35,000, as well as \$15,000 for signing the stipulation itself (Mot. Ex. D, Stipulation ¶¶ 19, 20). Defendants note that these actions and transfer of rights were memorialized in the findings of the Loft Board which concluded that the apartment was not a rent regulated unit. They argue that the court is bound by the administrative decision.

Defendants further argue that plaintiffs’ apartment falls within the High Rent Vacancy Exemption given to apartments with a legal regulated rent of \$2,000 or more per month after July 1993.⁴ They explain that after the sale of improvements and rights to the owner in 1998, apartment 5B has been rented at market rate of \$2,000 or more to three tenants prior to plaintiffs, with each lease, including plaintiffs’ lease, containing a rider provision that the apartment was not subject to rent regulation or protections under the Loft Law (Mot. Ex. F, G, H). Alternatively, defendants argue that plaintiffs are in violation of the lease because Walsh is allegedly operating a gym out of the apartment.⁵

The Statutes and Regulations

The New York State Division of Housing and Community Renewal (DHCR) has promulgated the Rent Stabilization Code (RSC), codified at 9 NYCRR §§ 2520, et seq. The DHCR

⁴See, EPTA § 8625 (a) (13); RSL § 26-504.2 (a); RSC § 2520.11 (r).

⁵Defendants’ additional argument that plaintiffs are not authorized to live in the apartment which is designated for joint living/artistic space, is apparently withdrawn based on plaintiffs’ inclusion of a certificate from the New York City Department of Cultural Affairs document dated June 8, 2007, certifying that plaintiff Douglas is an artist for purposes of the Multiple Dwelling Law (Cross-Mot. Ex. 7).

is authorized to administer the Rent Stabilization Law (RSL), codified in the New York City Administrative Code at section 6-501 and subsequent (see also McKinney's Uncons Laws of NY §§ 26-501 et seq.). The RSL regulates most class A multiple dwellings not owned as cooperatives or condominiums, with six or more dwelling units, which were built after February 1, 1947 (RSL § 26-504 [a] [1]). It also regulates other housing accommodations in class A or B multiple dwellings that have been made subject to the RSL by the Emergency Tenant Protection Act of 1974 (RSC § 26-504 [b]). The Emergency Tenant Protection Act (ETPA) (McKinney's Uncons Laws of NY §§ 8621 et seq.), was enacted in response to the continued housing shortage, and "effectively allowed New York City to bring apartment buildings of six or more units within New York City's rent stabilization system" (*KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Commun. Renewal*, 5 NY3d 303, 311 [2005]).

The Loft Law (Multiple Dwelling Law Article 7-C), became effective in 1982 and was designed "to bring stability to the . . . illegal conversions of commercial lofts to residential use" (*315 Berry St. Corp. v Huang*, 2003 NY Slip Op. 51740U, *4; 800 NYS2d 358 [Civ. Ct., Kings County 2003] [citation omitted]). As described by *315 Berry St. Corp.*, the Legislature had determined that many tenants with commercial leases were making substantial improvements to their illegally occupied lofts to make them fit for residential occupancy, with the owners' knowledge, but without any financial protections. The Loft Law gave rent-stabilized status to tenants who had resided in their lofts within certain time frames as set forth in the statute (Multiple Dwelling Law § 281), while also providing that landlords of interim multiple dwellings had the right to collect rent and commence summary proceedings without a certificate of occupancy during the time they brought lofts into compliance with the residential code (*315 Berry St. Corp. v Huang*,

2003 NY Slip Op. 51740U; 800 NYS2d 358 [Civ. Ct., Kings County 2003] [citation omitted]).

The “broad remedial purpose” of the Loft Law was to confer rent-stabilized status on *legalized* interim multiple dwellings” (*Tan Holding Corp. v Wallace*, 187 Misc. 2d 687, 688 [App. Term 1st Dept. 2001], emphasis in original). After a residential certificate of occupancy was obtained, tenants would become rent stabilized and subject to the RSL and RSC (*Randall Assoc., LLC v Fylypoweyz*, 841 NYS2d 828, 2007 NY Slip Op. 51325U, *2 [Civ. Ct., New York County 2007]).

Under the Loft Law, residential tenants in IMD units qualified for Loft Law protection are allowed to sell any improvements they made in the loft unit to the owner for the fair market value (Multiple Dwelling Law § 286 [6]). Upon the owner’s purchase of the improvements, “any unit subject to rent regulation solely by reason of [the Loft Law] and not receiving any benefits of real estate exemption or tax abatement, shall be rented at market value subject to subsequent rent regulation if such building had six or more residential units at such time.” (Multiple Dwelling Law § 286 [6]). In other words, after purchase of the fixtures from the tenant, the landlord is allowed to collect market-rate rent from that tenant, with subsequent leases to be calculated under the terms of rent stabilization, if the loft is in a building with six or more residential units.

In addition to this provision allowing the sale of improvements, the Loft Law provides that an owner and a residential loft occupant may also agree to the purchase by the owner of the residential occupant’s rights in a unit (Multiple Dwelling Law § 286 [12]). Among other things, this results in the tenant vacating the premises.

Loft units which are the subject of sales under either Loft Law section 286 (6) or 286 (12), are generally exempted under the Rent Stabilization Code and Rent Stabilization Law from regulated rent coverage if they are “housing accommodations which would otherwise be subject to

rent regulation solely by reason of the provisions of Article 7-C of the MDL requiring rent regulation”(RSC § 2520.11 [q]; see also RSL § 26-504). As explained in a DHCR policy statement concerning permanent decontrol from rent stabilization, “where the owner and tenant, pursuant to Section 286 (12) of [the Loft Law] agree on terms for the tenant to vacate the housing accommodation, such unit is no longer subject to the Loft Law and, therefore, will not be subject to the RSL” (Def. Memo of Law in Supp. Ex. A, Policy Statement 89-7 [June 21, 1989], ¶ 14).

As part of the Loft Law, the Legislature created the Loft Board to address issues arising in buildings with IMD status, including determination of status and other issues of coverage under the Loft Law; determination of claims for rent adjustments, and enforcement of rules and regulations governing housing maintenance standards in IMDs (Multiple Dwelling Law § 282). Under the Loft Board Rules, where there is a sale of rights by a tenant in an IMD unit, and the unit remains residential, the owner remains subject to all requirements of the Loft Law and the Loft Board, “except that the Unit is no longer subject to rent regulation where coverage under Article 7-C [the Loft Law] was the sole basis for such rent regulation. . .” (29 RCNY § 2-10 [c] [2]).

Discussion

On a motion to dismiss pursuant to CPLR 3211, the court accepts as true the facts as alleged in the complaint and submissions in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001], citing *Tenuto v Lederle Labs.*, 90 NY2d 606, 609-610 [1997]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

It must be noted that plaintiffs seek to challenge an agency determination, which they argue

was an abuse of discretion, that was made four years ago in September 2004. They do not address whether such a challenge is timely, nor have they sought to impleaded the Loft Board into their action. Accordingly, this decision addresses the Loft Board's interpretation of the statutes and rules and regulations, solely as they pertain to plaintiffs' apartment.

Plaintiffs argue that the Loft Board lacks the authority to find that apartment 5B was not subject to rent regulation. They further argue that the 1989 DHCR Policy Statement overreaches when interpreting the rent stabilization rules and the Loft Law as providing that where the owner buys the improvements or agrees with the tenant on terms to vacate the space, the unit in question is not longer subject to the Loft Law or to Rent Stabilization Law. They focus on section 286 (6) of the Loft Law which mandates that in a building where there are six or more units, even where an owner has bought the improvements and is allowed to rent the apartment at market value, once the building is legalized, the unit is "subject to subsequent rent regulation." Plaintiffs argue that although Salva bought the improvements and the rights from the tenant in apartment 5B in 1998, the Loft Board should have found in 2004, once the building received a certificate of occupancy, that the apartment came under the protections of the ETPA and was subject to rent stabilization, along with the other ten apartments, and set an initial legal regulated rent at that time. They cite *182 Fifth Ave. v Design Devel. Concepts, Inc.*, 300 AD2d 198 (1st Dept. 2002), which holds that notwithstanding the sale of Loft Law rights by a prior tenant, the subject loft units were eligible for protection under rent stabilization pursuant to the ETPA, and *VVV Partnership v Moran*, 809 NYS2d 484, 2005 NY Slip Op. 51958U (App. Term 1st Dept. 2005), which holds that although the owner purchased a prior tenant's rights under section 286 (12) of the Loft Law, the loft was subject to rent stabilization under the ETPA because there were more than six residential units. Neither

decision apparently involved a loft unit where the owner had bought from the former tenant both the rights and the fixtures, thus triggering market rate rental. By contrast, the Appellate Division in *Thorgeirsdottir v NYC Loft Board*, examining the Loft Law provision allowing the sale of fixtures to the owner, notes with approval that the “statutory incentive for landlord to make this purchase [pursuant to Multiple Dwelling Law § 286 (6)] is his ability to lease the now vacant unit at arms length for a fair market value rent, *unhindered by any controlling regulation*” (161 AD2d 337, 337 [1st Dept 1990], *aff’d* 77 NY2d 951 [1991] [emphasis added]).

Plaintiffs do not discuss *19 W. 36th Holding Corp. v Parker*, 193 Misc. 2d 519 (Civil Court, NY County 2002), which is heavily relied upon by defendants and which involved the regulatory status of a loft unit in a former IMD. The court in *19 W. 36th Holding Corp.* held that the tenant’s argument that a purchase of rights pursuant to Multiple Dwelling Law § 286 (12) is not a deregulating event, was not a correct interpretation of the statute. “The mere fact that the building has over six units does not make the subject premises rent regulated under the RSL. The only reason some IMD units which would otherwise be exempt from the RSL are sometimes regulated is article 7-C of the Multiple Dwelling Law.” (193 Misc. 2d at 521). Interestingly, the court noted that where the owner filed a sale record with the Loft Board showing that the former tenant had sold its rights to the landlord (meaning that the tenant also vacated the apartment), the sale of article 7-C rights makes the subject apartment a residential unit newly created after January 1, 1974, and thus exempts the subject unit from coverage under the RSL and rent regulation pursuant to Multiple Dwelling Law § 286 (6) and (12). (*See*, RSC § 2520.11 [q]). (*19 W. 36th Holding Corp.*, 193 Misc 2d at 522). The court also pointed out that the tenant improperly sought to collaterally attack the Loft Board’s decision, and that the tenant did not have standing to dispute the

Loft Board determination because he only began his tenancy after the Loft Board found the building was legal (*Id.*, at 523).

The analysis offered in *315 Berry St. Corp. v Huang*, 2003 NY Slip Op. 51740U, 800 NYS2d 358 (Civ. Ct., Kings County 2003), is instructive. *315 Berry St.* concerned a building with IMD status, containing three loft units the rights for which the owner bought from the tenants more than a decade prior to the litigation, pursuant to Loft Law § 286 (12), and Loft Board Regulation 2-10 (c). The current loft tenants sought the protection of rent regulation under the Rent Stabilization code (9 NYCRR § 2520.11 [q]) and the Loft Board Rules (29 RCNY § 2-10 [c] [2]). The court denied their application because they themselves did not convert the lofts to residences but only moved into the premises some time after the bought-out tenants vacated the lofts. The decision states in part that “[t]o the extent that *19 W. 36th Holding* . . . might be read to suggest that a Loft Law buy out permanently exempts from rent stabilization every unit bought out, it is now clear from *182 Fifth Avenue*, that ‘notwithstanding the sale of Loft Law rights by a prior tenant,’ tenants who convert commercial to residential space will be protected if the landlord knew about it and consented” (2003 NY Slip Op 51740U, * 7).

Here, of course, the issue plaintiffs argue is that the Loft Board was wrong to allow the apartment to remain outside rental regulation at the time it determined the building was legalized. Decisions of an administrative agency and their construction given statutes and regulations should be upheld by the courts when there is a reasonable basis in the law for such (*Lower Manhattan Loft Tenants v New York City Loft Bd.*, 104 AD2d 223, 224-225 [1st Dept. 1984], *aff’d* 66 NY2d 298 [1985]). Courts have repeatedly upheld construction given statutes and regulations by the agency responsible for their administration, if such construction is not irrational or unreasonable. (*See*,

Matter Johnson v Joy, 48 NY2d 689 [1979]; *Matter of 902 Assocs. v. New York City Loft Bd.*, 229 AD2d 351 [1st Dept 1996]).

Given the discussion set forth above, the effect of the sale of both the fixtures and rights pursuant to Multiple Dwelling Law § 286 (6) and (12) of apartment 5B, freed the loft from rent regulation and allowed the owner to rent the loft at a monthly rent that was at or above the level of vacancy rental decontrol.

For all of the above reasons, defendants' motion for dismissal of the complaint is granted.⁶ The plaintiffs' cross-motion seeking summary judgment and a declaration in their favor is denied.


ORDERED that the motion to dismiss the complaint is granted with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further;

ORDERED that the cross-motion for partial summary judgment and declaratory judgment in plaintiffs' favor is denied; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: July 13, 2009
New York, New York



J.S.C.

FILED
JUL 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

⁶There is no reason to address defendants' argument in their opposition to the cross-motion, that Walsh has, unbeknownst to them, operated a "gym" out of their apartment, in derogation of the lease and the certificate of occupancy (Soussan Aff. In Furth. Supp.), allegations which she vigorously disputes (Walsh Reply Aff.).