

Matter of Baumrind v Van Amerongen

2010 NY Slip Op 30567(U)

March 12, 2010

Supreme Court, New York County

Docket Number: 109226/09

Judge: Joan B. Lobis

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SCANNED ON 3/18/2010

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

PRESENT: Joan B. Lobis

PART 6

Index Number : 109226/2009
BAUMRIND, MARTIN
VS.
VANAMERONGEN, DEBORAH
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 12/11/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

1 this motion to/for _____

PAPERS NUMBERED
1-19
20-22 *Return
23-26

Notice of ~~Motion~~ ^{Petition} / Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).

PETITION
MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER, AND JUDGMENT

Dated: 3/12/10

[Signature]
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
NEW YORK COUNTY: IAS PART 6**

-----X
In the Matter of
MARTIN BAUMRIND and 173 AVENUE A LLC,

Petitioners,

Index No. 109226/09

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

Decision, Order and Judgment

- against -

DEBORAH Van AMERONGEN, Commissioner
of the Division of Housing and Community
Renewal of the State of New York, and
DANIEL NAUKE,

Respondents.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1438).

-----X
JOAN B. LOBIS, J.S.C.:

Petitioners Martin Baumrind and 173 Avenue A LLC (the "LLC") bring this proceeding, pursuant to Article 78 of the C.P.L.R., seeking to overturn the April 27, 2009 opinion and order (the "Order") of the Deputy Commissioner of the State of New York Division of Housing and Community Renewal ("DHCR" or the "Division"), denying petitioners' petition for administrative review ("PAR"). The denial of the PAR upholds the Division's determination denying the request for an appropriate rent adjustment in the legal regulated rent for the building's ground floor apartment for the time period in which the owner failed to offer lease renewals to the tenant.

Martin Baumrind is the Managing Partner of the LLC, which owns a residential apartment building located at 442 East 11th Street, also known as 173 Avenue A, in Manhattan (the "Building"). Baumrind purchased the Building on October 25, 1993 at a judicial foreclosure sale.

The LLC owns the Building pursuant to a deed dated February 15, 2006. Respondent David Nauke has been a tenant at the Building since 1980, and occupies the ground floor storefront of the Building. He took occupancy pursuant to a three-year commercial lease that commenced on May 1, 1980. According to the petition, Nauke wilfully refused to pay rent for over twenty (20) years, after he made illegal alterations to his apartment; these alterations were made long before the LLC purchased the Building. Nauke installed a kitchen, bathroom and bedroom, which Baumrind claims was done without the then-owner's consent or permission. According to DHCR, the mixed-use of the premises and the work that was performed was approved by the former owner at the time the work was performed. A subsequent owner, however, did not approve of the use of the premises, and refused to offer Nauke a rent-stabilized renewal lease.

Baumrind alleges that he purchased the Building without any prior knowledge of the non-conforming uses, improper leases or other irregularities with the tenants, the Building or the Certificate of Occupancy. But, on December 14, 1983, Nauke filed a complaint with the New York City Conciliation and Appeals Board (the predecessor to DHCR), contending that the owner failed to offer him a renewal lease. The decision of the District Rent Administrator notes that an inspection of the premises on September 27, 1984 revealed that the Apartment was being utilized as both a residence and as commercial space for Nauke's graphic art activities. The District Rent Administrator concluded that as a mixed-use unit, the Apartment was subject to the Rent Stabilization Law. The order was affirmed by the Deputy Commissioner, and upheld in a decision by the Hon. Helen E. Freedman in an Article 78 proceeding brought by the former owner. Matter of 173 Avenue A Co. v. State Division of Housing and Community Renewal, Index No. 499/07

(Sup. Ct. N.Y. Co. May 15, 1987). In her decision, Justice Freedman found that the former owners challenging DHCR's determination were bound by the actions of the prior owners. Accordingly, the prior owners were obligated to provide Nauke with a renewal lease. Notwithstanding this decision, the former owner never provide Nauke with a lease. Moreover, no repairs were made to the Apartment to enable it to conform to zoning requirements for a residential certificate of occupancy.

When Nauke refused to pay rent, the prior owners commenced a proceeding in Housing Court for non-payment. In a decision and order dated June 13, 1989, the Hon. Robert Lippmann granted Nauke's motion to dismiss the petition, finding that the Department of Buildings has exclusive jurisdiction to determine whether the existing residential use of the Apartment can be legalized, and that the tenancy was in violation of the Certificate of Occupancy. 173 Avenue A Company v. Nauke, L&T Index No. 106838/88. After Baumrind purchased the Building in 1993, Baumrind attempted to have Nauke comply with his rent obligations. By letter dated July 7, 1994, Nauke's counsel informed Baumrind's counsel that based on Judge Lippmann's decision, no eviction proceeding could be brought against Nauke until the Department of Buildings made a determination as to whether the residential usage may be legalized.

Petitioners sought approval from the Department of Buildings, which was complicated and delayed by the fact that approval was contingent on renovations to other units to resolve the issue of room density, and reduction of the total room count for the Building, to accommodate for adding Nauke's Apartment. The Building was brought into compliance and Nauke signed his first residential rent stabilization renewal lease, for a two-year period commencing on

December 21, 2003 at a monthly rent of \$403.13. The lease was without prejudice to petitioners' right to seek a higher rent from the Division. Despite having signed the lease, Nauke still refused to pay rent and refused to allow petitioners access to the Apartment to perform necessary work on the Apartment.

In November 2004, Baumrind commenced an action in this court, Baumrind v. Nauke, Index No. 116509/04, to compel Nauke to cooperate with the construction and allow access to the Apartment. On April 27, 2005, the Hon. Roslyn Richter so-ordered a six-page stipulation providing that the work could proceed. The parties set a new higher legal rent as the base rent from which all increases would be computed in the future. They agreed that the rent could be increased by \$200 per month, to \$603.13, based on the installation of new windows in the Apartment. Nauke, in turn, waived any claim or defense to the payment of rent based on the lack of a residential certificate of occupancy. Nowhere did the stipulation provide that the \$603.13 per month was a temporary figure, or that petitioners were reserving their right to seek a higher rent from DHCR.

Nauke signed a one-year renewal lease on December 19, 2005, which set forth that the rent was \$619.72 per month, based on the \$603.13 rent set forth in the stipulation, with an added 2.75% increase pursuant to the rent guidelines. Petitioners then filed a complaint with DHCR to raise the rent to the Apartment. They requested that the Division make an adjustment in the Apartment's Legal Regulated Rent to compensate for the time period for which the LLC failed to offer lease renewals to Nauke. Specifically, petitioners requested that the rent be increased from \$603.13 to \$1,000.64 per month. Petitioners asked DHCR to deem signed renewal leases effective for the years 1985 through 2005, when the Apartment lacked a certificate of occupancy.

Upon review of the application, the Rent Administrator denied the LLC's request, because the application sought to review the legal regulated rent for a period more than four years prior to the filing of the application. According to the decision, under the Rent Stabilization Code, the owner would have had to have offered rent stabilized lease renewals to the tenant during the years in question. An examination of the legal regulated rent four years prior to the date of the application is inconsistent with the intent of the Rent Stabilization Code. In addition, DHCR asserted that the request should have been raised in the proceedings in this court as claims for equitable relief. Therefore, the request was denied.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact.'" Id. (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id. With respect to determinations made by DHCR, the First Department has recognized that the Division "has broad discretion in setting rents to effectuate the laws governing rent." Harding v. Calogero, 45 A.D.3d 363, 364 (1st Dep't 2007) (citation omitted).

Petitioners assert that it was improper for DHCR to render the decision because the Division ignored Nauke's conduct of failing to pay rent for over twelve (12) years. In effect,

petitioners argue, DHCR has rewarded a recalcitrant tenant who failed to pay approximately \$80,000 in rent to petitioners and to former owners of the Building.

Although DHCR's determination appears unjust to petitioners, the determination was not arbitrary and capricious. The work that Nauke performed on the Apartment when the Building was owned by the prior owners converted the Apartment to a mixed commercial and residential unit. At that point, the Apartment was subject to rent stabilization and Nauke was entitled to a lease. The litigation that followed resulted in a determination that the prior owner acquiesced to the repairs, and that Nauke was entitled to a lease. This decision was not appealed. Petitioners purchased the Building "subject to the conditions as to tenancy, including any waiver of rights, that his predecessor has established if the transferee has notice of the existence of the leasehold." 52 Riverside Realty Co. v. Ebenhart, 119 A.D.2d 452, 453 (1st Dep't 1986) (citations omitted); see also, CadleRock Joint Venture II, L.P. v. ADCO Equities, L.P., 269 A.D.2d 251, 253 (1st Dep't 2000). Petitioners are bound by the determination that the owner had knowledge of and acquiesced to the repairs to the Apartment.

The Division notes that although petitioners purchased the Building in 1993, Nauke was not offered a lease renewal until 2003. The Division correctly points out that petitioners cannot rely on Nauke's failure to pay rent as a ground to overturn the determination, when they failed to offer a lease. Eden Roc Hotel, Ltd. v. Gilbert, 306 A.D.2d 50, 51 (1st Dep't), lv. dismissed in part, lv. denied in part, 1 N.Y.3d 563 (2003). As in Eden Roc Hotel, petitioners here cannot assert that they are "equitably entitled to retroactive rent increases," since their failure to offer a renewal lease was not excusable. Id. Petitioners' contention that it was futile to offer a renewal lease is unavailing.

The Division was also correct in finding that it is inappropriate to review the rent history more than four years prior to the date of petitioners' application. See C.P.L.R. § 213-a; Thornton v. Baron, 5 N.Y.3d 175, 180 (2005); Reads Development Co. LLC v. New York State Div. of Housing and Community Renewal, 282 A.D.2d 273 (1st Dep't 2001) (citation omitted); see also, AVJ Realty Corp. v. New York State Div. of Housing and Community Renewal, 8 A.D.3d 14 (1st Dep't 2004). Finally, petitioners settled the prior action by agreeing to set the legal rent at \$603.13, without reserving the right to challenge this amount later. Petitioners' argument that DHCR was compelled under the unique facts of this case to employ its broad equitable powers under the Rent Stabilization Code is unavailing.

For all of these reasons, the Division's April 27, 2009 Order denying petitioners' PAR is not arbitrary and capricious. The petition is denied and this proceeding is dismissed. This constitutes the decision, order and judgment of the court.

Dated: March 12, 2010



 JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1A-000).