

**Breckheimer v 64-68 Wooster LLC**

2010 NY Slip Op 31040(U)

April 26, 2010

Supreme Court, New York County

Docket Number: 101419/2009

Judge: Jane S. Solomon

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

JANE S. SOLOMON

PRESENT: \_\_\_\_\_  
Justice

PART 55

Breckheimer

INDEX NO. 101419/09

MOTION DATE 3/22/10

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

64-68 Wooster LLC

The following papers, numbered 1 to 22 were read on this motion to/for summary judgment

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAGES NUMBERED
<u>5-9</u>
<u>10-15</u>
<u>16-23</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the amended memorandum decision and order.

Preliminary Conference to be held on 5/24/10 at noon.

**FILED**  
APR 29 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/20/10

JANE S. SOLOMON  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 55**

GARY BRECKHEIMER,  
Plaintiff,

-against-

64-68 WOOSTER LLC,  
Defendant.

INDEX NUMBER 101419/2009  
Motion Sequence 002  
**DECISION & ORDER**

**FILED**

APR 29 2010

JANE S. SOLOMON, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Gary Breckheimer moves for partial summary judgment in his favor on the first cause of action in the complaint, which requests a declaratory judgment that the building and unit where he resides are subject to rent stabilization laws pursuant to Multiple Dwelling Law Article 7-C (the Loft Law) and he is entitled to a renewal lease as a rent-stabilized tenant.

Plaintiff is an occupant of unit 3E at 64 Wooster Street (the building) on a commercial lease due to expire on February 28, 2009 (subsequent to the commencement of the action). He has operated a photography business there since 1993; whether he also resides there is the basis for the dispute. Defendant owns the building, which has a commercial certificate of occupancy and is subject to the Loft Law.

Plaintiff argues that his unit is subject to the rent stabilization laws, because "the building at issue was built before 1974 and contains six units used for residential purposes, that landlord knew of and acquiesced in the residential use of the unit and that the applicable zoning regulations generally permit residential use . . . [and] the subject residential unit is capable of being legalized." *Argento v Yamanaka*, 23 Misc 3d 127A (App Term, 1<sup>st</sup> Dept 2009).

Plaintiff contends that, when he and Danny Miller, a fellow photographer, rented the unit

from the building's then-resident owners, William Hahn and Charles Magistro, d/b/a Ohio Management, Hahn assured him that residency "would be no problem." Breckheimer Affidavit, at para. 4. This was an issue because, in 1991, the previous tenant sold Ohio Management her Loft Law rights and it, in turn, filed a sales record form with the Loft Board declaring that unit 3E was to be used for non-residential purposes. Exhibit C attached to Notice of Motion. The original lease to plaintiff and Miller stated that the use of the premises was "photography studio (NONRESIDENTIAL)." Exhibit E attached to Notice of Motion. The lease was amended in 1994 to recognize Primus Studio c.f.g. (Primus) as the lessee in place of the named individuals. It is undisputed that Primus is owned by plaintiff and Miller.

When plaintiff, Miller and Miller's brother allegedly moved into the loft in 1993, it had no residential facilities, that is no bathroom or kitchen. At their expense, they allegedly installed a bathroom and full kitchen and constructed three bedrooms. Plaintiff claims that this work was done in the open, with Hahn, an architect, visiting the unit often to perform maintenance tasks and giving the occupants advice about their renovation project. Breckheimer Affidavit, at para. 7. Magistro often visited the unit as well over time and both partners allegedly observed the occupants in residence essentially at all hours of day and night. *Id.*, at 8. However, Ohio Management kept the unit on a commercial lease and asked the occupants for alternate residential addresses. Seven other units in the building have apparently been registered with the Loft Board as residential units, and Ohio Management and defendant have submitted plans over the years, without success, to change the occupancy status of floors two through eight in conjunction with building-wide renovations. Exhibits F and G attached to Notice of Motion.

Plaintiff now claims to be the only resident of the unit and supplies tax returns and utility bills confirming his residency. Additionally, he and Miller continue to use it for their respective

photography businesses, rent it by the day (with or without equipment) to other photographers and, once a twice a year, rent it for a meeting or gathering. Breckheimer Affidavit, at para. 6. He includes an affidavit from John Furth Peachy, an architect, who states “the Breckenheimer loft is clearly residential; it has a complete, well-used kitchen, a shower and bedrooms. From the appearance of the installations, they appear to have been in place for some time.” Peachy Affidavit, at para. 4. Peachy concludes that the “Breckenheimer unit can be legalized for residential use.” *Id.*, at para. 5. Four other occupants of the building, all in registered residential units under the Loft Law, submit affidavits attesting to plaintiff’s residential occupancy. Richard Ellis Affidavit, Judy Ellis Affidavit, Breed Affidavit, Omabegho Affidavit. These other residents preceded plaintiff in the building by at least 16 years. Exhibit M attached to the Notice of Motion contains 16 color photographs, purportedly of the unit’s interior, showing two small sofas, two upholstered chairs, three wood and steel side chairs, a dining table with four chairs and a sleeping nook with a mattress and pillows. There are also photographs of the bathroom and the kitchen area which defendant never disputes were installed by plaintiff, but contends they have no distinctly residential character.

Defendant’s opposition focuses extensively on an “undercover investigation” conducted by PGB Executive Services, LLC (PGB) in late 2008 and early 2009 into the use and status of the unit. PGB collected some advertisements by Primus for use of the unit for photography sessions and receptions, and examples of commercial photography sessions held at the unit. Exhibits D, E and F attached to Babakatis Affidavit. Paul G. Babakitis, PGB’s president, visited the unit several times and contracted to hold a party there on January 24, 2009. According to the contract, Primus provided the unit from 8 PM to 1 AM for a “bachelor party for 40 men” for \$8,950, which including an open bar until 9:30 PM and then a cash bar. Exhibit M attached to

Babakitis Affidavit. Babakitis claims to have secretly videorecorded the party, as he had done on other visits to the unit, which featured three topless women provided by Primus. Babakitis Affidavit at 11. Bakatis also accompanied a female investigator to the unit, on February 25, 2009, to discuss holding a surprise birthday party. *Id.*, at 13.

Babakitis states that, on all his visits to the unit, he never saw any indications of plaintiff, or anyone else, in residence. He avows that much of the furniture in the photographs submitted by plaintiff “were never in the loft Premises” when he was there and speculates that they may have been props for photography sessions. *Id.*, at 15. There were no beds; a room called a bedroom “was totally empty with the exception of a commercial steel coat rack.” *Id.*, at 7. The only bathroom “was barren and did not contain a toothbrush or any bath towels” (*Id.*, at 8), only “commercial type paper towels” (*Id.*, at 12). The refrigerator “was practically empty and free of any food.” *Id.*, at 8. There were two small office spaces with office furniture and equipment. While meeting with plaintiff and Miller separately on different days, during the day, to plan his party, Babakitis heard each answer the telephone with “Primus.” *Id.*, at 8 and 10. He asserts that, in his various conversations with plaintiff and Miller, they spoke of their experience hosting parties and the very busy schedule they had for use of the premises. Plaintiff allegedly only started staying in the unit day and night once he discovered Babakitis’ identity. *Id.*, at 14.

Plaintiff’s affidavit, submitted before defendant’s opposition, describes the party arranged by Babakitis in two sentences as an “attempt to claim excessive commercial use of the loft” or to prove he is not living there. Breckheimer Affidavit, at para. 14. He flatly denies the latter and states that “there is no such thing as excessive commercial use in joint living working quarters for artists.” *Id.*

Defendant submits an affidavit from Dario Zar, its managing member, who claims to

have visited the unit, accompanied by Ivan Hakimian, a real estate broker, a few weeks after the change in ownership of the building on December 11, 2008, and met with Miller to discuss a lease renewal. Zar states that Miller gave them a complete tour of the unit and he saw only a commercial photography studio with paper towels in the bathroom, but no toothpaste or toiletries, and no bed. Zar Affidavit at 2. Miller allegedly told him that the space was also used by other photographers and rented out for events. *Id.* Hakimian's affidavit duplicates Zar's concerning the visit to and inspection of the unit. No agreement was reached on the new rental rate by the parties and this action emerged. Zar maintains that the affidavits of the four building residents "do not show that the actual use of the premises was or is residential," because plaintiff might be present for long hours when operating as a photographer or caterer. *Id.*, at 6.

Magistro and Hahn submit identical affidavits describing their involvement with the building from its purchase in 1976 until its sale in December 2008. Each states, by entering the unit from time to time over the years, "I saw and know that it was not a residential unit." Magistro Affidavit and Hahn Affidavit at 3. Both attest to the absence of a bed or bedroom and the moving in and out of furniture as needed for photography. *Id.* Throughout their ownership of the building, plaintiff reassured them of the commercial, non-residential use of the unit. *Id.*

Plaintiff's reply mischaracterizes defendant's opposition as "plaintiff uses his loft excessively for commercial purposes." Reply Affirmation, at para. 5. His counsel maintains that "the unit is residential with occasional commercial use," is rented about six times a months for photography sessions and, only once in the last two years, a party was held for a paying customer. *Id.*, at para. 6. These circumstances, combined with the allegations of Ohio Management's awareness of them and architect Peachy's opinion about legalizing the unit, make the unit an easy fit under *Argento, supra*, according to plaintiff. There is no question that this unit might become

eligible for rent stabilization once legalized under the Loft Law, even though a prior occupant of the unit had sold the Loft Law rights. *Acevedo v Piano Bldg. LLC*, 70 AD3d 124, 131 (1st Dept 2009) (“where, as here, the pre-1974 building contains six or more residential units, it is subject to rent stabilization by virtue of ETPA notwithstanding the sale of Loft Law rights by a prior tenant”) (internal punctuation omitted).

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1<sup>st</sup> Dept 2007), citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *People ex rel. Spitzer v Grasso*, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224 (1<sup>st</sup> Dept 2002).

However, it is not an issue of law that requires denial of plaintiff’s motion for summary judgment, but, rather, the stark contrast of the factual presentations by the adversaries. Plaintiff provides statements by his business partner, four other occupants of the building and an architect, along with his own, attesting to his residency in the unit. Defendant, by contrast, submits affidavits from its principal, a real estate agent, a private detective and the two previous owners of the building all claiming to have seen no evidence of plaintiff’s residential tenancy whenever they visited the unit. The statements by Hahn and Magistro, asserting the exclusive commercial

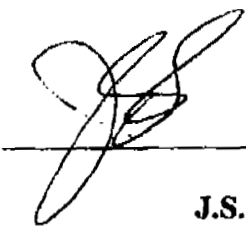
use of the unit, are especially telling because they undermine a critical *Argento* factor, "that landlord knew of and acquiesced in the residential use of the unit." In *Acevedo, supra*, the landlord issued the tenant a residential lease even after buying back the Loft Law rights to the unit. *See Matter of 315 Berry St. Corp. v Hanson Fine Arts*, 39 AD3d 656 (2d Dept 2007) (Where landlord "knew of and acquiesced in the unlawful conversion, at the expense of the occupants, of the unit from commercial to residential use," among other factors, "the unit at issue was properly determined to be subject to the rent regulations of the Emergency Tenant Protection Act of 1974 and the New York City Rent Stabilization Law and Code") (citations omitted). Here, material issues of fact are only emphasized by these motion papers. The status of the unit and plaintiff's attendant rights must be decided at trial.

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment in his favor on the complaint's first cause of action is denied.

DATED: April 26, 2010

ENTER:

  
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 J.S.C.

JANE S. SOLOMON  
**FILED**  
 APR 29 2010  
 NEW YORK  
 COUNTY CLERK'S OFFICE