

2333 Grand Ave. HDFC v 2333 Grand Ave.

2010 NY Slip Op 32806(U)

October 7, 2010

HCIV, Bronx County

Docket Number: L&T72662/09

Judge: Sabrina B. Kraus

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART B

2333 GRAND AVE HDFC, X

Petitioner-Landlord

-against-

DECISION & ORDER
Index No.: L&T 72662/09

HON. SABRINA B. KRAUS

2333 Grand Avenue, Apt. 3A
Bronx, New York 10468

Respondent-Tenant

“JOHN DOE” & “JANE DOE”

Respondent-Undertenants

X

BACKGROUND

This summary holdover proceeding was commenced by **2333 GRAND AVE HDFC** (Petitioner) and seeks to recover possession of Apartment 3A at 2333 Grand Avenue, Bronx, New York 10468 (Subject Premises) based on allegations that **GLADYS RODRIGUEZ** (Respondent) the tenant of record, is in possession of the Subject Premises pursuant to a lease which has expired, and that Respondent refused the offer of a renewal lease with an increase.

PROCEDURAL HISTORY

Petitioner served no predicate notice and instituted this proceeding by service of a service of the notice of Petition and Petition which are dated December 16, 2009. The petition was served by delivery to Respondent at the Subject Premises on January 4, 2010, and the

proceeding was initially returnable in Court on January 13, 2010. Respondent appeared through counsel, The Legal Aid Society on the initial return date. The proceeding was adjourned to February 9, 2010 for settlement or trial. On February 9, 2010, Respondent moved for dismissal of the proceeding. The proceeding was adjourned by the parties on consent, on numerous occasions for the submission of opposition papers. On August 5, 2010, Petitioner cross-moved for a stay pending a DHCR decision.

On August 12, 2010 the parties entered into a stipulation adjourning the motions to September 15, 2010 for DHCR to issue the decision. The motions were adjourned one more time from September 15 to September 30, 2010, and on September 30, 2010 the Court reserved decision on the motions.

FACTS

Respondent first moved into the Subject Premises on June 2, 1982, pursuant to a written lease agreement, annexed to the moving papers. Respondent states that the Subject Premises is subject to Rent Stabilization. Respondent has lived in the Subject Premises continuously since her initial occupancy in 1982. Respondent states she has not been offered a renewal lease.

On April 11, 2007, Respondent filed a rent overcharge complaint with DHCR. On May 21, 2008, DHCR issued an order finding that the Subject Premises is governed by Rent Stabilization, and that Respondent had been overcharged. The DHCR order under Docket Number VD 610065 R provides in pertinent part:

The tenant filed a complaint of Rent Overcharge alleging that the rent of \$1146 charged and collected by the owner on April 11, 2007 constitutes an overcharge.

The base date for this proceeding is April 11, 2003, which is the date four years prior to the filing date of the complaint.

Pursuant to the Rent Stabilization Code the Rent Administrator finds that subsequent to April 11, 2003 a rent overcharge occurred as shown on the attached Rent Calculation chart.

As further explained in the attached rent calculation chart, the owner is responsible for:

The complainant remains subject to the Rent Stabilization Code and Laws because she occupied the subject apartment as a rent stabilized tenant prior to both City and Housing Fund and Development Corporation ownership.

The owner is directed to roll back the rent to the legal regulated rent, to recompute the current base thereon, and to make a full refund or credit to the tenant of any rent paid in excess of the legal regulated rent and any security in excess of such rent, as shown on the attached chart. The owner is further directed to refund any excess rent paid by a current occupant if the complainant is no longer in occupancy.

(See exhibit C to Respondent's moving papers). The calculation chart annexed to the order provides that Respondent has been overcharged in the amount of \$6540, and is entitled to \$19,620.00, including treble damages.

Respondent also receives Section 8 benefits for the Subject Premises, and a portion of the overcharge is to be refunded to NYCHA.

The order also contains the following footnote to the calculation chart:

The owner has stated that the subject building is a cooperative, and is therefore not subject to rent stabilization. Evidence submitted by the owner in docket number VA620012AD indicates that the building was established as a cooperative under the housing development fund corporation in April 1994. The complainant has submitted her initial rent stabilized lease indicating that she has occupied the subject apartment since 1982 - prior to the transfer of ownership to the city and to the cooperative conversion. The owner was asked to comment on this in a notice mailed on 11/7/2007. To date the owner has failed to respond to the request for further explanation. Pursuant to section 2522.5(H), apartments occupied at the time of the conversion to a non-evict cooperative, where the occupant elects not to purchase, remain subject to the rent stabilization code and laws.

(Exhibit C).

On February 8, 2010, Petitioner filed a PAR with DHCR asking for a review of the

agency's order dated May 21, 2008. DHCR issued an order dismissing the PAR on March 5, 2010, as untimely. Petitioner sent a letter to DHCR on April 1, 2010 requesting that the agency reconsider its decision and reopen the matter. A second request for reconsideration was filed by letter dated July 9, 2010. By letter dated August 12, 2010, DHCR stated that Petitioner presented no legal basis to reopen the case.

THE MOTIONS

Respondent moves for dismissal of the petition pursuant to CPLR § 3211(a)(7) and RPAPL § 741(4) asserting that the petition fails to state a cause of action, because it fails to state the Section 8 status of the Subject Premises, fails to state that the Subject Premises are governed by Rent Stabilization, fails to allege the HDFC regulatory status of the Subject Premises, fails to articulate good cause for the commencement of the holdover proceeding, and fails to comply with the Williams Consent decree by properly serving the pleading on NYCHA.

Petitioner cross-moves for stay pending a decision on reconsideration from DHCR, and otherwise opposes Respondent's motion by addressing only the issue of whether the Subject Premises is subject to Rent Stabilization. No other grounds for dismissal are addressed by Petitioner's moving papers. Petitioner's request for stay pending the DHCR response to the July 2010 request for reconsideration is moot, as DHCR has since responded and denied the request.

After the Court reserved decision on the motions, Petitioner commenced an Article 78 proceeding in Supreme Court under Index Number 260646/10. A copy of the moving papers and exhibits in that proceeding was submitted to this Court by Petitioner's counsel on October 5, 2010, on notice to Respondent's counsel. Petitioner, by submission of the Article 78 papers, appears to be asking that this Court stay this proceeding pending the outcome of the Article 78

litigation.

The Court finds no basis to stay this proceeding, and to the extent Petitioner makes an ongoing request for a stay this request is denied. The Court notes that the Supreme Court denied Petitioner's request for a stay of the underlying DHCR orders as to Respondent and DHCR, and that Petitioner neither sought, nor obtained, a stay of this proceeding in commencing the Article 78 proceeding.

Thus, the only opposition left to Respondent's motion to dismiss is Petitioner's argument that the DHCR order finding that the Subject Premises is governed by Rent Stabilization should be disregarded by this Court, because DHCR lacked subject matter jurisdiction over the Cooperative at the time the order was issued. Petitioner further argues that because the conversion was pursuant to an eviction plan, Respondent had no right to continue her tenancy beyond the period of the lease agreement in effect at the time of the conversion. Finally, Petitioner argues that the DHCR order does not confer rent stabilization status on the Subject Premises, where a statutory exemption to regulation applies.

DISCUSSION

In determining a pre-answer motion to dismiss, the pleadings must be liberally construed in favor of Petitioner, and all possible inferences from said pleadings must be drawn in favor of Petitioner. The court is not to not make a determination of the merits of the claim, but rather to determine whether the pleading sets forth a legally cognizable cause of action (*Guggenheimer v. Ginzburg* 43 NY2d 268).

In the case, at bar Petitioner acknowledges that there is an order from DHCR providing that the Subject Premises are governed by Rent Stabilization. The Petition fails to state a cause

of action for the termination of tenancy under Rent Stabilization. The Petition only alleges that the Subject Premises are not governed by Rent Stabilization, and Respondent's lease had expired and that she was offered a renewal with an increase but that Respondent failed to accept said offer.

Petitioner's cause of action depends on this Court ignoring the DHCR ruling that the Subject premises are in fact governed by Rent Stabilization. However, it is well settled that a determination as to regulatory status by DHCR is not subject to collateral attack in a summary proceeding (*London Terrace Gardens v. Grabina* 2004 NY Slip Op 50346[U][App Term, 1st Dept]; see also *Heritage Place LLC v Davis* 2008 NY Slip Op 51271[U][App Term, 9th & 10th Judicial District][*DHCR administrative determinations may not be collaterally attacked in a subsequent court proceeding*]; *Licorish v. Nor-Win Realty Corp* 2006 NY Slip Op 51839[U][App Term, 1st Dept][*prior DHCR orders not subject to collateral attack in civil court action*]).

Based on the foregoing Respondent's motion to dismiss the petition for failure to state a cause of action is granted.

This constitutes the decision and order of this Court.

SABRINA KRAUS

Dated: New York, New York

October 7, 2010

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