

**Soskin v D. Camilleri, LLC**

2011 NY Slip Op 30094(U)

January 12, 2011

Supreme Court, New York County

Docket Number: 106739/10

Judge: Eileen A. Rakower

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

PRESENT: **HON. EILEEN A. RAKOWER**

PART 15

*Justice*

Index Number : 106739/2010  
**SOSKIN, REBECCA**  
 vs.  
**D.CAMILLERI LLC**  
 SEQUENCE NUMBER : 001  
 PARTIAL SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

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

**FILED**  
 JAN 18 2011  
 NEW YORK  
 COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH  
 ACCOMPANYING DECISION / ORDER**

Dated: 1/13/11

  
**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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 15

-----X  
REBECCA SOSKIN,

Index No.  
106739/10

Plaintiff,

**DECISION  
and ORDER**

- against -

D. CAMILLERI, LLC

Mot. Seq.  
001

**FILED**

JAN 18  
Defendant 2011

-----X  
HON. EILEEN A. RAKOWER

NEW YORK  
COUNTY CLERK'S OFFICE

According to the complaint, Plaintiff is the resident of Unit 5A (“the unit”) of the building known as 40 Morton Street in New York County (“the Building”), which is owned by D. Camilleri, LLC (“Defendant”). Plaintiff has occupied the unit pursuant to consecutive one-year leases since June 1, 2006<sup>1</sup>. Plaintiff states that her monthly rent was \$3,600 in 2006-07; \$3,700 in 2007-08; \$4,300 in 2008-09; and \$4,150 in 2009-10. Plaintiff alleges that her unit was originally configured as a one-bedroom apartment, but has been illegally converted into a three-bedroom apartment by Defendant. According to Plaintiff, “[t]he construction performed by the Defendant was shoddy and was done without the issuance of proper permits and without obtaining a necessary certificate of occupancy.”

In addition to allegedly performing illegal construction work in her unit, Plaintiff alleges that Defendant has fraudulently registered the subject unit with the New York City Department of Housing and Community Renewal (“DHCR”) as exempt from applicable rent stabilization rules and regulations. Specifically, Plaintiff alleges that, in 1996, Defendant registered the subject unit as being rent stabilized, with a lawful rent of \$786.41. In 1997, according to Plaintiff, Defendant listed the unit as having been deregulated with a monthly rent of \$2,000, and has registered the unit as exempt from rent stabilization each year thereafter. Plaintiff states that the

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<sup>1</sup>In addition, Plaintiff states that she had occupied the unit as the roommate of the prior tenant during the one-year period leading up to her first lease.

rēgistrations from 1997 onward have been fraudulent, as Defendant and its predecessor in interest were recipients of J-51 tax abatements.

Presently before the court is a motion by Plaintiff pursuant to CPLR §3212

(a) granting summary judgment on her first, second and fourth causes of action (seeking a declaratory judgment that the subject apartment is illegal; an affirmative injunction directing that Defendant render the apartment legal; and a declaratory judgment that the unit is rent stabilized based on the receipt of J-51 benefits, respectively);

(b) granting partial summary judgment on her third, fifth, and sixth causes of action (seeking a declaratory judgment that the subject unit is rent stabilized based upon fraudulent registrations with DHCR; a money judgment for rent overcharge and treble damages; and attorneys fees, respectively); and

(c) dismissing Defendant's first through third counterclaims (seeking judgment of possession against Plaintiff plus use and occupancy of the unit based upon Plaintiff's remaining in the unit following expiration of Plaintiff's lease; alternatively, quantum meruit for the reasonable rental value of the unit; and a declaration that the subject apartment is not subject to rent stabilization, or alternatively, that the legal regulated rent is no less than \$4,150, respectively)

Plaintiff provides her affidavit, an attorney's affirmation, and a memorandum of law in support of her application. In support of her claim that the subject unit is an illegal apartment, Petitioner annexes the affidavit of licensed architect Michael Zenreich. Zenreich opines that the subject unit is illegal for several reasons. First, he states the unit has two rooms which both contain storage lofts that were not contained in plans which were submitted by Defendant to the New York City Department of Buildings ("DOB"). Second, Zenreich states that a spiral staircase, penthouse, and a two-fixture bathroom were built on the roof of the subject unit. Zenreich opines that these additions violate the Multiple Dwelling Law because they exceed 10% of the roof area of the Building. Third, Zenreich claims that the Building does not have a Certificate of Occupancy ("CO"). Fourth, Zenreich states that while the alteration to the subject unit was filed as a "non-enlargement application," the installation of the

bathroom in the roof area constituted an enlargement. Fifth, Zenreich claims that Defendant violated Building Code §26-22 by failing to obtain a CO for an altered portion of the building. Sixth, since the bathroom was not contained in the plans submitted to DOB, it was built without a permit. Lastly, Zenreich states that the bathroom built on the roof/penthouse level was constructed without mechanical ventilation.

Plaintiff states in her affidavit that her apartment is rent stabilized as a matter of law because Defendant has accepted, and continues to accept J-51 tax benefits, as evidenced by printouts from the New York City Department of Finance. However, Plaintiff states that the actual amount of the overcharge remains an issue of fact.

Defendant opposes the motion and cross-moves for an order awarding it use and occupancy, *pendente lite*, without prejudice to any rights or claims of any party; and granting it leave to amend its answer to add a statute of limitations defense.

Defendant submits an attorney's affirmation, the affidavit of David Camilleri, member of Defendant LLC, and the affidavit of Donal Butterfield, a licensed architect. With respect to the Plaintiff's allegations of an illegal unit without a CO, Defendant provides a CO dated April 9, 1951. In addition, Butterfield states in his affidavit that, since the Building was constructed prior to 1938, and thus no CO was required for the Building. Butterfield states that "[t]he I-Cards for the Building essentially served as the equivalent of a [CO]; and the I-Cards set forth the configuration and use for the Building and for the apartments in the Building." Butterfield further notes that the work performed by Defendant in 1996 (i.e., construction of the subject bulkhead) was approved by DOB. A printout annexed to Defendant's papers showing DOB approval for the following:

REFURBISH TWO EXISTING FRONT FIFTH FLOOR APTS., INCLUDING NEW BATHROOM AN [sic] RELOCATION OF EXISTING KITCHEN IN 5F, PAR TITION [sic] WORK AS INDICATED, INSTALL SPIRA [sic] STAIRS AND BULKHEADS FOR ACCESS TO ROOF DECK. NO CHANGE IN USE, OCCUPANCY AND/OR EGRESS.

Butterfield states that the bedrooms of the subject unit are legal in size, and that the storage lofts "would not even elicit a violation from a building inspector." Butterfield

storage lofts “would not even elicit a violation from a building inspector.” Butterfield further states that there is no penthouse on the roof of the Building, and annexes a printout reflecting that DOB inspected the bulkhead in June 2010 and stated the following: “NO VIOLATION WARRANTED FOR COMPLAINT AT THE TIME OF INSPECTION 2 BULKHEADS ARE OK UNDER PERMIT #101337304.” Butterfield also claims that Zenreich’s conclusion that the subject unit violates the Multiple Dwelling Law is incorrect because the 10% threshold does not apply to an “old law tenement”. Butterfield asserts that Zenreich’s contention that the rooms in the subject unit don’t meet the size requirements of the Multiple Dwelling Law fails for the same reason.

As for Plaintiff’s allegation that the subject unit should be rent stabilized, Defendant argues that it became entitled to charge a “first rent” for the subject apartment by virtue of the 1996 addition of the spiral staircase allowing access to the roof deck from the subject apartment. Defendant also states that it subsequently “installed numerous improvements in the Apartment and made major capital improvements....” Defendant states that it entered into a lease with a prior tenant on November 26, 1996 with a rent of \$3,000 (a copy of the lease is annexed to Defendant’s papers), and annexes a copy of said lease. Defendant states that, in 1998, it filed an Amended 1997 Annual Registration Statement for the subject unit stating that it had become exempt from rent stabilization due to high rent vacancy, and annexes a copy thereof to its papers.

Defendant states that, to the extent that any rent overcharge actually occurred in light of the fact that it was receiving J-51 benefits, it cannot be held to have willfully overcharged Plaintiff because it was following the guidance of DHCR. Specifically, Defendant states that prior to the Court of Appeals’ decision in *Roberts v. Tishman Speyer Properties, L.P.*, 2009 NY Slip Op 7480 [2009]), DHCR took the position that buildings that were previously subject to rent stabilization laws prior to the receipt of J-51 benefits were entitled to luxury decontrol (while buildings that were rent stabilized solely by virtue of receipt of J-51 benefits were not).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue

remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

With respect to Plaintiff's allegations of illegal construction in the apartment, the architect hired by Plaintiff states that a bathroom and a penthouse were constructed on the roof, while Defendant and Defendant's architect state that no such construction took place. This creates an issue of fact which cannot be disposed of by way of a summary judgment motion. Further, because Defendant has not shown the legality of the subject unit as a matter of law, it has not shown entitlement to use and occupancy (*see Hart-Zafra v. Singh*, 16 A.D.3d 143 [1st Dept. 2005]).

With respect to the issue of the proper rent for the subject unit, the court finds that the unit is rent stabilized, since it is undisputed that Defendant has been, and continues to receive J-51 benefits (*see Roberts, supra*). Moreover, Defendant has failed to show entitlement to charge a "first rent", because a landlord is only entitled to this relief upon demonstrating that "the perimeter walls of the apartment have been substantially moved and changed and where the previous apartment, essentially, ceases to exist, thereby rendering its rental history meaningless" (*300 West 49<sup>th</sup> Street Assocs. v. New York State Division of Housing and Community Renewal*, 212 A.D.2d 250, 253 [1st Dept. 1995]). However, neither of the parties has demonstrated how the proper rent for the subject unit should be calculated, much less what the proper rent should be. Issues remain as to how much of a rent increase would lawfully be permitted based upon the 1996 alterations, whether the rent overcharge was willful, and whether Defendant acted fraudulently in removing the apartment from the protections of rent stabilization laws (*see Grimm v. New York State Division of Housing and Community Renewal*, 2010 NY Slip Op 7379).

Lastly, Defendant's cross-motion is granted to the extent that it seeks leave to amend its complaint. Pursuant to CPLR 3025(b), "A party may amend his pleading... at any time by leave of court.... Leave shall be freely given upon such terms as may be just...." "CPLR 3025 allows liberal amendment of pleadings absent demonstrable prejudice" (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]). In the absence of prejudice, leave to amend a pleading

should be denied only when the proposed amendment is plainly lacking in merit (*see Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993]) (*see also Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 2007 NY Slip Op 4179, \*2 [1st Dept. 2007]).

Wherefore it is hereby

ORDERED that Plaintiff's motion is summary judgment is granted to the extent that it is hereby declared that the subject unit is rent stabilized in light of Defendant's receipt of J-51 benefits; and it is further

ORDERED that Plaintiff's motion for summary judgment is denied in all other respects; and it is further

ORDERED that Defendant's motion for leave to amend its answer is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served on defendants upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that Defendant's motion is denied in all other respects. .

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: January 12, 2011

  
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EILEEN A. RAKOWER, J.S.C.

**FILED**  
**JAN 18 2011**  
NEW YORK  
COUNTY CLERK'S OFFICE