

D. Camilleri, LLC v Burgess

2011 NY Slip Op 31682(U)

June 17, 2011

Supreme Court, New York County

Docket Number: 107432/10

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

D. CAMILLERI, LLC,
Plaintiff,

Index No.: 107432/10

Motion Date: 10/20/10

- v -

Motion Seq. No.: 01

JENNIFER BURGESS, AARON LINDSKOG,
JEFFREY MACKIN and ELISA JACOBS,
Defendants.

The following papers, numbered 1 to 4 were read on this motion for use and occupancy.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s)	1
Answering Affidavits - Exhibits	No(s)	2
Replying Affidavits - Exhibits	No(s)	3, 4

FILED

JUN 23 2011

Cross-Motion: Yes No

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COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion of the
Plaintiff-landlord in this action for ejectment and rent
moves for use and occupancy pendente lite pursuant to RPL 220 and
to compel defendants to remove certain fixtures that are
allegedly not permitted by the building's certificate of
occupancy. Defendants argue that plaintiff is not entitled to
the relief it seeks because the apartment is subject to rent
regulation based upon the plaintiff's receipt of certain tax
benefits.

"Consistent with Real Property Law § 220, it has long been

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

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .. MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

held that a dispute concerning the amount of rent owed is no reason to allow a tenant to occupy the landlord's real property gratis." Levinson v 390 West End Associates, L.L.C., 22 AD3d 397, 403 (1st Dept 2005); MMB Associates v Dayan, 169 AD2d 422 (1st Dept 1991) ("The award of use and occupancy during the pendency of an action or proceeding accommodates the competing interests of the parties in affording necessary and fair protection to both and preserves the status quo until a final judgment is rendered"). Plaintiff's argument that MDL 302 bars the relief sought on this motion is incorrect because the relief here is sought pendente lite. Any statutory restriction imposed by MDL 302 requires ultimate resolution of the issues raised in this litigation. The court also determines that plaintiff is entitled to past use and occupancy from October 2009. Levinson, supra 22 AD3d at 402-403.

The relief granted on this motion is applicable against defendants Jennifer Burgess, Jeffrey Mackin and Elisa Jacobs, as it is not refuted that each continues in occupancy of the real property. Plaintiff states that no relief is sought against defendant Aaron Lindskog asserting that such defendant has vacated the premises.

Having determined that defendants Jennifer Burgess, Jeffrey Mackin and Elisa Jacobs shall be liable for use and occupancy past and pendente lite, there remains the matter of the amount

that is due. On that issue, defendants argue that the formula enunciated in Levinson should apply. In Levinson, supra, the Court held that where an apartment had been improperly removed from rent regulation, it is appropriate for the court to grant retroactive and prospective use and occupancy "determined by use of the Thornton formula, i.e., the lowest rent charged for a rent-stabilized apartment with same number of rooms in the same building on the relevant base date. We see no reason not to use the same formula to derive a rate for the payment of use and occupancy pendente lite." Levinson, supra, 22 AD3d at 402 citing Thornton v. Baron, 5 NY3d 175, 180-181 (2005) ("the default formula used by DHCR to set the rent where no reliable rent records are available was the appropriate vehicle for fixing the base date rent").

Plaintiff counters that Levinson is distinguishable on its facts since the case at bar involves no concession that the initial rent was set at a rate in excess of what was permissible under the Rent Stabilization Code. This court agrees with that analysis. As there is no evidence that plaintiff landlord was engaged in a scheme to avoid the rent stabilization rules in this case, the default formula set forth in Thornton is inapplicable to the action at bar. Therefore to the extent that defendant Burgess alleges overcharge, this court concurs with plaintiff that the examination of the rent history for the purpose of

setting the legal rent is limited to the four year period preceding the filing of the rent overcharge complaint, i.e. the four year period prior to the counterclaims interposed by defendants on July 28, 2010. See Rich v East 10th Street Associates LLC, 2010 NY Slip Op 06221, WL 2899285 (1st Dept).

The court notes that in an ongoing case involving a separate apartment in the same building and on the same floor as the apartment at issue here, another Justice of this court has held that "the court finds that plaintiff's apartment is subject to rent stabilization because the building in which it is situated is receiving J-51 tax benefits." Garcia v. D. Camilleri, LLC, 2011 NY Slip Op 30053(U), 2011 WL 128125 (Sup Ct, NY County, York, J., Index No.: 116368/2009, January 6, 2011). However, at this stage of the litigation this court is unable to determine the rights of the parties concerning the premises. However, for purposes of setting the interim relief of use and occupancy without prejudice to the rights of the parties, precedent dictates that the court set the rent at the rate reserved in the lease between plaintiff and defendants Burgess and Jacobs as of July 2006, which was \$4,100. Eli Haddad Corp. v Cal Redmond Studio, 102 AD2d 730 (1st Dept 1984).

With respect to the other relief sought by plaintiff concerning the bed and other furniture in the recreation area, the court declines on the limited record before it to direct such

affirmative relief. Moreover, there is no precedent for granting such an interim injunction that amounts to the ultimate relief sought in the complaint where plaintiff has not established a likelihood of success on the merits in contradiction to defendants' contention that plaintiff ought to be compelled to make an expeditious conversion of the recreation area to permit its use as a bedroom. See Sima Realty LLC v Phillips, 282 AD2d 394 (1st Dept 2001).

Accordingly, it is

ORDERED that plaintiff's motion is GRANTED, all without prejudice to any parties' position concerning the legal stabilized rent or the legal rent at the present or future time, to the extent of directing the prospective payment of use and occupancy pendente lite by defendants Jennifer Burgess, Jeffrey Mackin and Elisa Jacobs beginning after the date of this order at the rate of \$4,100 per month; and it is further

ORDERED that plaintiff's motion is also GRANTED to the extent that within 20 days of service of a copy of this order with notice of entry, defendants Jennifer Burgess, Jeffrey Mackin and Elisa Jacobs shall post a bond in the amount of \$84,100 as security for their potential liability for past use and occupancy (at the rate of \$4,100 per month) during the 21-month period from October 1, 2009 to June 30, 2011; and it is further

ORDERED that the balance of the motion is DENIED; and it is further

ORDERED that the parties shall appear in IAS Part 59, Room 103, 71 Thomas Street, New York, New York 10013 on August 30, 2011 at 9:30 A.M. for a Status Conference.

This is the decision and order of the court.

Dated: June 17, 2011

ENTER:

~~Debra A. James~~
J.S.C.
DEBRA A. JAMES

FILED

JUN 23 2011

**NEW YORK
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