

<b>167 8th Ave LLC v Leishman</b>
2012 NY Slip Op 31055(U)
April 20, 2012
Case of the People of the State of New York, New York County
Docket Number: L&T 54471/12
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: HOUSING PART R  
\_\_\_\_\_  
167 8<sup>TH</sup> AVE LLC

**HON. SABRINA B. KRAUS**

Petitioners-Landlord

-against-

**DECISION & ORDER**  
**Index No.: L&T 54471/12**

LEVI WILSON LEISHMAN,  
167 8<sup>th</sup> Avenue, Apt. 5W  
New York, New York 10011

Respondent-Tenant

\_\_\_\_\_  
X

**BACKGROUND**

This summary nonpayment proceeding was commenced by **167 8<sup>th</sup> AVENUE LLC**, (Petitioner) and seeks to recover possession of Apartment 5W, also known as apartment 7, at 167 8<sup>TH</sup> Avenue, New York, New York 10011 (Subject Premises) based on the allegation that, **LEVI WILSON LEISHMAN** (Respondent) the tenant of record, has failed to pay rent for the Subject Premises.

**PROCEDURAL HISTORY**

On or about January 25, 2012, Petitioner issued a three day notice seeking \$6200.00 in arrears at \$3100.00 per month for December 2011 and January 2012. On or about February 7, 2012, a petition issued seeking \$9300.00 through February 2012. Respondent filed an answer on February 24, 2012, alleging the rent sought is not the legal rent, rent overcharge, and disputing the amount sued for. The proceeding was initially returnable on March 5, 2012, and adjourned to March 29, 2012, for Respondent to seek counsel. On March 29, 2012, the proceeding was adjourned to April 12, 2012, and Respondent agreed to pay Petitioner \$3100.00, without

prejudice. Respondent did not make said payment. On April 12, 2012, the proceeding was adjourned to April 19, 2012. On April 19, 2012, Petitioner's application to strike Respondent's answer for failure to pay the agreed use and occupancy was denied by the resolution court (Saunders,J) and the proceeding was transferred to Part X for assignment for trial. The same day, the proceeding was assigned to Part R for trial. The trial commenced and concluded on April 19, 2012. At the conclusion of the trial, the court reserved decision.

### **DOCUMENTARY EVIDENCE**

The following documents were put into evidence at trial: Certified deed showing Petitioner became the owner of the subject building on September 30, 2004 (Ex. 1); and Certified Multiple Dwelling Registration filed March 12, 2012 (Ex. 2); and Certified DHCR rent roll for the subject building from 1984 through 2012 as of April 1<sup>st</sup> 2012.

Three lease agreements between the parties were put into evidence by Petitioner. Exhibit 4A is a lease dated January 31, 2010, for a term from February 1, 2010 through January 31, 2011, at a monthly rent of \$3000.00 per month, and providing for a security deposit of \$4500.00. Exhibit 4B is a lease dated September 1, 2010 for a term September 1, 2010 through January 31, 2011. This lease also provides for a rent of \$3000.00 per month. It is unclear why two leases for overlapping periods were executed by the parties and this was not addressed at trial by either party. Exhibit 4C is a lease dated February 1, 2011 for a period of February 1, 2011, through and including January 31, 2012, at a rate of \$3100.00 per month.

Petitioner also put into evidence documents purporting to be leases for the Subject Premises with prior tenants. Exhibit 5A in evidence is a lease between Petitioner and three tenants identified as Nikki Herst-Zook, Emily Haas Gadsil, and Avra Winograd Hutner. The

lease is dated August 30, 2006 and is for a term from September 1, 2006 through August 31, 2007 at a rental of \$3700.00 per month. Exhibit 5B is a lease allegedly between Petitioner and the same tenants (although all three signatures do not appear the same, and the names of the tenants are written in a different color ink at the top of the document, presumably at a different time, and only has two names listed). This time the tenant's name is listed as Nikky Herst-Cook and Emily Haas-Epsil for a period of September 1, 2008 through August 30, 2009 at a monthly rent of \$3910.00.

Respondent asserts the Subject Premises are subject to Rent Stabilization. Respondent put into evidence a tenant's yellow copy of an annual apartment registration for the Subject Premises for 2006 (Exhibit G), listing the tenants for the Subject Premises as Emily Haas Godsil, Kathere Stein, and Aura Winograd-Hutner . The registration was received by Respondent at the Subject Premises in an envelope with the return address of Petitioner's counsel on or about March 17, 2012 and is post marked March 16, 2012. The registration is only partially completed and indicates that the Subject Premises became permanently exempt on September 1, 2005 based on a high rent vacancy. The last legal regulated rent is listed at \$505.95 per month.

Respondent also put into evidence certified DHCR records for the Subject Premises as of February 1, 2012 (Exhibits E1 & E2), and April 10, 2012 (Exhibits F1 & F2). The Subject premises was registered annually from 1984 through 2003 with DHCR. The registration for 2003 lists Ysabel Bugueiro as the tenant of record with a registered rent of \$505.95 for a lease running through July 31, 2004. While there was a registration filed for the same tenant in 2004, the amount of the legal regulated rent was left blank. No registrations were filed for the Subject

Premises in the years 2005 through 2010. Apparently, in March 2012 Petitioner filed the 2006 registration listing the Subject Premises as exempt based on a high rent vacancy.

Based on these discrepancies, Respondent filed a claim of rent overcharge with DHCR on March 22, 2012, under docket number AN410011R (Exhibits D-1,D-2,D-4,D-5, and D-6).

### TRIAL

Petitioner's first and only witness, was Vadim Zilberman. Mr. Zilberman is employed by Petitioner as a chief financial officer. Mr. Zilberman testified Respondent is a tenant in the Subject Premises, and that the Subject Premises was deregulated in 2003 or 2004 due to high rent. Mr. Zilberman testified the last payment received from Respondent was in November 2011 and asserted Respondent owed arrears of \$15,500.00 thru April 2012. Mr. Zilberman testified Petitioner is seeking \$500.00 in late fees, at a rate of \$100 a month for December thru April 2012, for a total amount due of \$16,000.00. After Mr. Zilberman's testimony, Petitioner moved to amend the allegation in paragraph 7 of the petition. The petition asserts that the Subject Premises are governed by Rent Stabilization and that the rent sued for is a legal registered rent. Counsel moved to amend the allegation in paragraph 7 to assert that the Subject Premises are exempt from Rent Stabilization based on a post 1997 vacancy and having achieved a legal registered rent of over \$2000.00. The Court reserved decision on Petitioner's motion to amend.

Respondent testified on his own behalf. Respondent stated he began to have financial difficulties and his lease had expired. Respondent testified he could not afford the monthly rent but could not afford to move. Respondent contacted Petitioner seeking a renewal lease and explaining his financial hardship. As noted above, Respondent filed a rent overcharge complaint with DHCR and believes that the Subject Premises are still subject to Rent

Stabilization. Respondent testified the DHCR documents indicate the registered rent for the Subject Premises went from \$505.95 to \$3700.00, without explanation. Respondent rested and Petitioner declined to present a rebuttal case. The Court reserved decision.

### **DISCUSSION**

Pursuant to § 26-504.2 of the Rent Stabilization Law, and § 2520.11 (4) of the Rent Stabilization Code, an apartment will no longer be subject to rent Stabilization if it has become vacant after 1997 and has a legal regulated rent of two thousand dollars or more per month. Legal regulated rent, as defined by the Rent Stabilization Code § 2520.6 (e), is the rent charged on the base date plus subsequent lawful increases and adjustments.

At trial, Petitioner failed to introduce any evidence or explanation as to how the legal regulated rent, as defined in § 2520.6 (e), for the Subject Premises increased from \$505.95 to over \$2000.00. In addition, the Court takes judicial notice of the New York City Department of Finance website ([http://www.nyc.gov/html/pdf/j-51/j51\\_manhattan.pdf](http://www.nyc.gov/html/pdf/j-51/j51_manhattan.pdf)) which lists all residential buildings receiving J-51 benefits, and notes that the Subject Building currently receives a J-51 tax abatement. Therefore, pursuant to *Roberts, et al v. Tishman Speyer Properties, L.P.* (13 N.Y.3d 270, Ct of Appeals 2009) (*properties continue to remain subject to rent regulation as long as they continue to receive J 51 tax abatement and are not eligible for high rent deregulation during this period*) the Subject Premises remains subject to Rent Stabilization.

Based on the foregoing, the Court denies Petitioner's motion to amend the Petition, and holds that the Subject Premises are subject to Rent Stabilization. As Petitioner has failed to establish that the rent sued for is a legal registered rent, the petition is dismissed. The Court does

not reach the issue of determining the legal rent for the Subject Premises, the amount of the overcharge or treble damages. These issues remain to be determined pursuant to the complaint filed by Respondent and currently pending with DHCR. The Court shall forward a copy of this decision to DHCR for consideration.

This constitutes the decision and order of this Court.<sup>1</sup>

Dated: New York, New York  
April 20, 2012

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Hon. Sabrina B. Kraus

TO: CORNICELLO TENDLER & BAUMEL-CORNICELLO, LLP  
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New York, New York 10005-2072

LEVI W. LEISHMAN  
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167 8<sup>th</sup> Avenue, Apartment 5W aka Apt 7  
New York, New York 10011

DHCR - OVERCHARGE COMPLAINT BUREAU  
Gertz Plaza  
92-31 Union Hall Street  
Jamaica, New York 11433  
Re: Docket No. AN 410011 R, Issue Date 2/09/2012

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<sup>1</sup> Parties may pick up copies of exhibits on the second floor of the courthouse within thirty days. After thirty days any remaining exhibits may be shredded in accordance with administrative directives.