

**Ecumenical Community Dev. Org., Inc. v GVS Props.
II, LLC**

2014 NY Slip Op 30021(U)

January 6, 2014

Supreme Court, New York County

Docket Number: 156405/2012

Judge: Ellen M. Coin

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NYSCEF DOC. NO. 25

RECEIVED NYSCEF: 01/07/2014

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

PRESENT: Coin
Justice

PART 63

Elemental Community Development
Organization
- v -
GUS Programs II

INDEX NO. 156405/12
MOTION DATE _____
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answering Affidavits – Exhibits _____
Replying Affidavits _____

| PAPERS NUMBERED | |
|-----------------|--|
| 1 | |
| 2 | |
| 3 | |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ANNEXED DECISION
AND ORDER.**

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

Dated: 1/6/14

Em
HON. JUDGE M. COUS.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 63

-----X
 ECUMENICAL COMMUNITY
 DEVELOPMENT ORGANIZATION, INC.,

Plaintiff,

Index No.:
 156405/2012

-against-

GVS PROPERTIES II, LLC, ALMA REALTY
 CORP., BPII-3915 BROADWAY LLC,
 VANTAGE MANAGEMENT SERVICES, LLC
 and BROADWAY PORTFOLIO I
 OWNER LLC,

Defendants.
 -----X

ELLEN M. COIN, J.:

Proposed intervenor Ruth Walton (Walton) seeks to intervene as a plaintiff in the underlying declaratory judgment action and to interpose a complaint against defendants GVS Properties II, LLC, Alma Realty Corp., BPII-3915 Broadway LLC, Vantage Management Services, LLC and Broadway Portfolio I Owner LLC (defendants). She also seeks a preliminary injunction, enjoining defendants from taking action to evict her from her apartment. In her proposed complaint, among other relief, Walton is seeking a declaration that her current apartment is rent-stabilized and that she is the tenant of the premises.

BACKGROUND AND FACTUAL ALLEGATIONS

Walton currently resides at the subject apartment (the Apartment), located at 3915 Broadway, a/k/a 600 West 164th

Street, New York, New York. Walton lives in the Apartment with her two adult daughters, two grandsons, and the father of her children. One of her daughters is disabled and wheelchair-bound.

Walton and her family have been living in the Apartment since November 3, 2008, when Walton was placed there pursuant to a temporary relocation agreement with non-party ECDO Management Inc. (ECDO Management) while her own residence underwent rehabilitation. On or about November 5, 2008, plaintiff Ecumenical Community Development Organization (ECDO) entered into a lease agreement for the Apartment with Broadway Portfolio I Owner LLC, landlord at the time. The lease agreement was for one year and sixteen days, at a monthly rate of \$2,565.00. Defense counsel contends that the Apartment had been rent-stabilized prior to 2008, but became deregulated in 2008, when the rent reached \$2000.00 per month.¹

Under the temporary relocation agreement between Walton and ECDO Management, Walton was to pay \$286.00 of the monthly rent and ECDO would pay the balance. Walton alleges that the Apartment was not renovated when she moved in.

In May 2010, after the repairs to Walton's prior residence were complete, ECDO stopped paying rent on the Apartment,

¹Pursuant to Administrative Code of the City of New York §26-504.2(a), housing accommodations which became vacant between 1997 and March 31, 2012 with a legal regulated rent of \$2,000.00 or more per month are not subject to rent-stabilization laws.

maintaining that Walton and her family should move back to her prior apartment since the repairs were complete. However, Walton refused to move back to her prior apartment, alleging that ECDO Management had failed to provide the requested accommodation for Walton's daughter of a wheelchair ramp for access to the apartment. She further maintains that in lieu of her original three-bedroom residence, she was offered two, two-bedroom apartments on different floors. Walton did not want to split up her family and to raise her cost of living by paying for two apartments.

According to ECDO, in July 2010, ECDO requested that defendants reassign the lease for the Apartment to Walton. Defendants refused to do so, claiming that Walton did not meet the income requirements. Nonetheless, Walton remained in the Apartment after ECDO stopped paying rent. Since August 2010, she continued to pay defendants \$250.00 a month. She states that defendants "recognized my tenancy by providing me repairs and recognizing my requests for repairs made to the building super." Aff of Ruth Walton, ¶ 9.

In May 2013, defendants commenced a nonpayment proceeding against ECDO and Walton, alleging arrears of over \$100,000.00 from May 2010 through May 31, 2013. The action was discontinued on October 10, 2013, when ECDO surrendered its right to possession of the Apartment without prejudice to defendants'

right to commence a holdover action to evict Walton.

ECDO commenced this action against defendants, claiming that defendants overcharged it for rent. ECDO argues that the Apartment is subject to rent regulation. As of 2008, records at the New York State Division of Housing and Community Renewal (DHCR) disclosed that the Apartment was rent-stabilized with a monthly rent of \$1,265.33. When the tenants moved out in 2008, the Apartment was then registered with DHCR as "high rent vacancy." ECDO alleges that defendants wrongfully removed the Apartment from rent-stabilization status. The Apartment's current classification, according to ECDO, is fraudulent, and the Apartment should still be subject to the rent-stabilization laws. According to ECDO's complaint, defendants did not perform any renovations to the Apartment and its increase in the monthly rent from \$1,265.33 to \$2,565.00 constitutes an overcharge.

ECDO's complaint contains four causes of action. The first cause of action seeks a declaration of the maximum rent-stabilized rent on the Apartment and declaring that ECDO is the lawful rent-stabilized tenant of the Apartment. The second cause of action seeks a judgment against the defendants for the rent overcharges. The third cause of action is for a declaration that the defendants' refusal to reassign the lease to Walton was unreasonable, and that ECDO should be released from any obligations of its tenancy as of the date of the request to

reassign the lease. The fourth cause of action is for attorneys' fees.

Walton now seeks to intervene as a plaintiff herein and to file a complaint against defendants. She argues that her proposed intervenor complaint shares issues of law and fact with ECDO's complaint. As the tenant of the Apartment, she also has a direct and substantial interest in the outcome of the action. Additionally, she argues that ECDO may not be able to represent her interests adequately since the parties may have inconsistent interests in the Apartment after August 2010.

In her proposed intervenor complaint, Walton is seeking a declaration that the Apartment is rent-stabilized, that she is its tenant, and of the legal regulated rent. In addition, she seeks an injunction directing defendants to offer her a lease at the legal regulated rent and to withdraw the allegedly false registrations with DHCR and file accurate statements incorporating the Apartment's rent-stabilized status.

In addition to seeking intervention, Walton moves for a preliminary injunction staying all actions by defendants to evict her. Walton alleges that if defendants are allowed to go forward with filing a holdover eviction proceeding, her name will be on a tenant "blacklist" and it will be more difficult for her to find a place to rent. More importantly, Walton would be evicted from her home and, since her daughter is severely disabled and

requires wheelchair accessible housing, eviction would cause Walton particular harm.

Walton believes that as proposed intervenor, she is likely to succeed on the merits of her claims that the premises are subject to rent regulation and should be registered as such with DHCR; that she is the tenant of record; and that she should be offered a rent-regulated lease for the Apartment. In support of her contentions, Walton provides the rent history for the Apartment. According to Walton, the Apartment had been registered with DHCR as of 2008 as rent-stabilized, with the last tenants on record paying \$1,265.33 a month. Walton contends that assuming the \$1,265.33 rent was valid, defendants would, at most, have been entitled to a 16% increase, thereby bringing the rent to \$1,467.78.² Although defendants may be entitled to a rent increase if they made certain improvements, as classified by the Rent Stabilization Code, it is defendants' burden to document

² Counsel for Walton provides the following analysis: "The Rent Stabilization Code...allows for an increase upon vacancy of 20% of the previous legal regulated rent if the new lease is for a term of two years or 20% less the difference between the one and two year lease renewal rent increases promulgated by the rent guidelines board if for a term of one year. [W]hen [ECDO] leased the premises [f]or approximately one year, the difference between the one year and the two year renewal rent increases was 4%. [T]herefore, Defendants would have been eligible for a 16% vacancy increase." Proposed Intervenor's Memorandum of Law at 12.

such improvements with detailed invoices.³ Walton reiterates that the apartment was not renovated when she moved in.

Walton believes that she will succeed on her claim that she is the tenant in the Apartment since defendants continued to accept her partial rent payment, and make repairs to her Apartment when she requested them. Since August 2010 direct payments were made to defendants from Walton's Department of Social Services shelter allowance after ECDO unsuccessfully attempted to reassign the lease to her and stopped making rent payments.

Defendants do not oppose Walton's request to intervene.⁴ However, they oppose the request for the stay of any Housing Court proceeding unless the rent arrears are paid and/or bonded. They claim that as of November 2013, they are owed \$113,760.00. They maintain that Walton, as occupant of the Apartment, should be required to pay ongoing use and occupancy for the Apartment pending the disposition of this action and that she should also post a bond for the arrears of at least \$100,000.00. Even if the court were to determine that the Apartment is subject to rent regulation, according to defendants, the legal minimum rent would

³ The Rent Stabilization Law differentiates between improvements, which may be eligible as a way to increase the rent, and repairs, which are not.

⁴ ECDO has not taken a position with respect to Walton's motion.

be \$1,528.52, not including any increase for renovations made to the Apartment.

In reply, Walton alleges that there is no viable claim that she owes over \$100,000.00 in arrears since this claim should be as against ECDO, the party that signed the lease at the illegally deregulated rent. She claims that the only agreement between her and defendants was the implied agreement to pay \$250.00 a month. She further argues that in light of her indigent status, she should only be required to give a nominal undertaking.

DISCUSSION

Motion to Intervene:

"Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action." *Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 (1st Dept 2010) (citation omitted). CPLR §1012(a) provides that a party may intervene as of right, in pertinent part, "when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment...." CPLR §1013 gives permission for a party to intervene, in pertinent part, "when the person's claim or defense and the main action have a common question of law or fact." Whether intervention is sought pursuant to either CPLR §1012 or §1013 "is of little practical significance, since intervention

should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings [internal quotation marks and citation omitted]." *Global Team Vernon, LLC v Vernon Realty Holding, LLC*, 93 AD3d 819, 820 (2d Dept 2012).

ECDO commenced this action, requesting the court to determine whether or not the Apartment is rent-stabilized, what the legal amount of rent should be and whether or not defendants' rejection of the lease reassignment was unreasonable. Walton, as the current tenant of the Apartment, clearly has a "real and substantial interest in the outcome of the proceedings." Moreover, defendants do not oppose Walton's motion to intervene. Accordingly, Walton's motion to intervene is granted and her intervenor complaint is deemed filed.

II. Preliminary Injunction:

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005), citing CPLR 6301. "A preliminary injunction is a provisional remedy. Its function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits." *Wellbilt Equip. Corp. v Red Eye Grill*, 308 AD2d 411, 411 (1st Dept 2003) (internal quotation marks and citation omitted). Prior

to the granting of a preliminary injunction, the plaintiff must provide an undertaking in an amount set by the court.

CPLR 6312(b).

In her proposed intervenor complaint, Walton seeks a declaration that the Apartment is rent regulated, that she is the tenant of record, that defendants must register the premises with DHCR and offer her a rent-regulated lease for the premises at the rent set by the court.

As set forth below, Walton has shown a probability of success on the merits that the Apartment is subject to the rent stabilization laws. She has alleged that the Apartment, as of 2008, was registered as rent-stabilized and that defendants were not entitled to improperly deregulate the premises. She argues that the last recorded rent was \$1,265.33, and that even at a 16% increase, the highest amount defendants are entitled to for monthly rent is \$1,467.78.

Defendants have not directly rebutted Walton's contentions. Instead, they submit that the Apartment was leased to ECDO pursuant to a deregulated lease for the amount of \$2,565.00. They have not provided any invoices showing any alleged renovations or improvements to the property which may have entitled them to a rent increase.⁵

⁵ During oral argument counsel for defendants claimed that they have "multiple grounds for saying why [ECDO] wouldn't be subject to stabilization . . ." but provide no evidence.

In 2008 Walton started to reside in the apartment pursuant to a temporary relocation agreement with ECDO Management. When Walton refused to move back to her prior building, ECDO apparently tried to have the lease assigned to her. Defendants refused to do so, citing income requirements. Nonetheless, Walton remained in the apartment and paid \$250.00 a month directly to defendants, which they accepted. They have also allowed Walton to request repairs and have responded to those requests. In response to Walton's motion, it does not appear that defendants oppose Walton as a prospective tenant. Instead, they seek to have Walton either pay the monthly amount of \$2,565.00 pursuant to the old lease, or at least \$1,528.52, not including renovation increases.⁶

Walton will suffer irreparable injury if defendants are allowed to proceed with a holdover proceeding, in that she may be evicted from her home. And, as Walton suggests, if any eviction proceeding is allowed to go forward, any potential relief granted by this court would be rendered meaningless. Similarly, the balance of equities favors Walton, since in the absence of

Transcript at 5.

⁶ Defendants' explanation for this amount is as follows: "The legal regulated rent, before the subject premises was deregulated was \$1,265.33. The minimum increase the landlord is permitted is the 16% vacancy for one (1) year lease signed by [ECDO] plus an additional \$60.74 since the last vacancy occurred in 2000 bringing the minimum legal regulated rent to \$1,528.52." Affirmation of Louis Marinos, ¶ 13.

injunctive relief, she may become homeless.

According to defendants, since May 2010 they have not received the full amount of rent for the Apartment.⁷ Defendants allege that if the court grants a preliminary injunction, Walton should be directed to pay at least \$1,528.52 in use and occupancy pending resolution of this action. Walton's counsel maintains that "the rent set by reference to the last rent before deregulation would be at most \$1,467.78, not the \$1,528.52 Defendants allege." Walton's reply memorandum of law at 3. She further avers that any use and occupancy should be set at \$250.00, since this was the parties' implied agreement.

By her own calculations, Walton has effectively conceded that the appropriate regulated monthly rent amount for the Apartment should be at least \$1,467.78. Thus, pending the outcome of this proceeding, Walton shall be directed to pay defendants a monthly amount of \$1,467.78 in use and occupancy. As set forth in *MMB Assoc. v Dayan* (169 AD2d 422, 422 [1st Dept 1991]), "[t]he 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." (internal quotation marks and citation omitted)].

⁷ ECDO's complaint states that it paid the full amount of \$2,565.00 monthly, commencing November 2008 through August 2010.

Defendants maintain that if a preliminary injunction is granted, Walton should post a bond for the arrears of no less than \$100,000.00. In response, among other public policy arguments, Walton claims that she is receiving public assistance and clearly is unable to post a substantial undertaking. The determination of the amount of the undertaking "is a matter within the sound discretion of the Supreme Court" 84-85 *Gardens Owners Corp. v 84-12 35th Ave. Apt. Corp.*, 91 AD3d 702, 703 (2d Dept 2012). In light of Walton's financial status and the requirement to pay use and occupancy going forward, a nominal undertaking is appropriate and is set at \$100.00.

Accordingly, Walton has satisfied her burden to demonstrate that a preliminary injunction should be granted, and defendants are enjoined from commencing any action to evict her while this action is pending. However, as set forth above, Walton must pay \$1,467.78 per month in use and occupancy while this action is pending, and the undertaking is set at \$100.00.

CONCLUSION

Accordingly, it is

ORDERED that Ruth Walton's motion to intervene is granted, and that Ruth Walton is permitted to intervene in the above-entitled action as a party plaintiff; and it is further

ORDERED that the caption in the above-entitled action be amended by adding Ruth Walton as a party plaintiff; and it is

further

ORDERED that the proposed intervenor complaint is deemed served and filed as of the date of this decision and order; and it is further

ORDERED that defendants serve their answer or move with respect to the intervenor complaint within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that the attorney for the intervenor shall serve a copy of this order with notice of entry upon the County Clerk and upon the Clerk of the Trial Support Office, who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that Walton's motion for a preliminary injunction preventing defendants from taking any action to evict her is granted, and it is further

ORDERED that defendants, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendants, are enjoined and restrained, during the pendency of this action, from taking any action to evict Ruth Walton from Apartment #66 at 3915 Broadway, New York, New York, provided that Walton file an undertaking and henceforth pay the use and occupancy as set forth hereinafter; and it is further

ORDERED that the amount of the undertaking required to be

filed by Ruth Walton, pursuant to CPLR 6312(b), is set in the amount of \$100.00; and it is further

ORDERED that Ruth Walton shall file an undertaking in the specified amount on or before January 31, 2014; and it is further

ORDERED that the amount of use and occupancy is set at \$1,467.78 per month beginning on February 1, 2014, pending the outcome of this action; and it is further

ORDERED that the action shall continue; and it is further

ORDERED that a conference will be held on February 5, 2014 in Room 311, 71 Thomas Street, at 2:00 p.m.

Dated: January 6, 2014

ENTER:



Ellen M. Coin, A.J.S.C.