

Contempo Acquisition LLC v Dawson

2015 NY Slip Op 32312(U)

November 20, 2015

Supreme Court, New York County

Docket Number: 154267/14

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 58

-----X
CONTEMPO ACQUISITION LLC,

Plaintiff,

- against -

ALLEN DAWSON,

Defendant.

-----X

Index No. 154267/14
DECISION & ORDER
(Motion Seq. 003)

DONNA M. MILLS, J.:

Plaintiff Contempo Acquisition LLC moves, pursuant to CPLR 3212, to dismiss defendant’s affirmative defenses and for summary judgment in its favor on its first and second causes of action. The main issue presented is whether the building where defendant rents an apartment from plaintiff is exempt from rent stabilization pursuant to section 2520.11 (e) of the Rent Stabilization Code (RSC) due to a substantial rehabilitation in or about 2003 and 2004.

FACTUAL ALLEGATIONS

Plaintiff is the owner of an apartment building located at 268 West 132nd Street in Manhattan (the building). Plaintiff acquired the building at a referee’s sale in March 2003 for \$419,582 (Sperber affirmation, Ex. A). According to plaintiff’s principal, Anthony Mehran, “[t]he building was demolished to its studs” prior to its purchase and plaintiff “took possession of an empty shell” (Mehran aff, ¶ 3). Mr. Mehran submits a copy of what he contends is an “FHA 201” loan obtained by the prior owner, which is allegedly “a loan offered by the Federal Housing Administration (FHA) to encourage the rehabilitation of and demolition of damaged property” (*id.*, ¶ 3; Sperber affirmation, Ex. J). As proof that the building was vacant before it was purchased, Mr. Mehran submits documentation of a complaint made to the New York City

Department of Buildings (DOB) on December 4, 2000 by the neighboring building, in which the building is described as “VACANT BLDG, OPEN AND UNGUARDED” (Mehran aff, ¶ 3; Sperber affirmation, Ex. I).

In December 2003, plaintiff’s architect filed an application with the DOB for a building permit to perform rehabilitation work at the building (Sperber affirmation, Ex. B). The purpose of the work was to create four Class “A” apartment units (Mehran aff, ¶ 3).

Prior to obtaining a certificate of occupancy, but after the DOB signed off on the construction work, plaintiff rented apartment # 4 (the apartment) in the building to defendant pursuant to a written lease, dated June 1, 2011, for a one-year term expiring on May 31, 2012 (Sperber affirmation, Ex. C). The lease calls for a monthly rent of \$1,250 (*id.*). It is undisputed that defendant has not paid rent since March of 2012 (Mehran aff, ¶ 6; Dawson aff, ¶ 30 & Ex. J). By order dated April 21, 2015, this court denied plaintiff’s motion for use and occupancy on the ground that the building is a multiple dwelling and that a proper certificate of occupancy is a prerequisite to the recovery of either rent or use and occupancy.

Mr. Mehran avers that he was unaware of the fact that, prior to its interior demolition by the prior owner, the building at some point contained single room occupancy (SRO) units (Mehran aff, ¶ 5). Thus, when plaintiff’s architect applied for a certificate of occupancy in March 2012, it was denied, on or about November 2, 2012, for failure to obtain from the New York City Department of Housing Preservation and Development (HPD) what is known as a certificate of no harassment, a requirement for SRO buildings pursuant to sections 28-107.1 et seq. and 27-2093 of the Administrative Code of the City of New York (*id.*; Sperber affirmation, Ex. E).

Mr. Mehran contends that plaintiff has attempted to legalize defendant's apartment in its current form, but that HPD denied its application for a certificate of no harassment on February 5, 2013 and that another application cannot be filed for three years from that date (Mehran aff, ¶ 7 & Ex. D). However, according to a FOIL request defendant filed with HPD, the application was made sometime prior to February of 2013, and apparently not in response to the DOB's denial of plaintiff's request for a certificate of occupancy (*see* Silagy affirmation, Ex. C at 1). In fact, HPD issued an initial determination on February 5, 2013 "that there is reasonable cause to believe that harassment occurred at the premises during the inquiry period, which commenced on July 13, 2009" (*id.*). A conference before an ALJ was held in March and April of 2013, and the matter was set down for trial commencing on July 30, 2013. However, the trial was adjourned to October at Mr. Mehran's request. On October 1, 2013, Mr. Mehran elected to waive his right to a hearing, elected to accept the February 5, 2013 denial of the certificate of no harassment, agreed that he would not contest the same in court pursuant to CPLR article 78, and further agreed that no application for a certificate of no harassment would be accepted for three years from February 5, 2013 (*id.*).

Mr. Mehran contends that defendant's apartment, in its current form, is illegal and since he is occupying a Class "A" apartment without a certificate of occupancy and pursuant to an expired lease, the apartment must be vacated. Mr. Mehran also contends that defendant is subjecting plaintiff to serious fines by remaining in the apartment (Mehran aff, ¶ 9).

Plaintiff commenced this action on May 1, 2014. The first cause of action seeks an order of ejection on the ground that the apartment is not subject to rent stabilization, defendant's lease has expired, defendant refuses to pay rent and/or vacate the apartment, and there is no valid certificate of occupancy, and, thus, his continued occupancy is illegal. The second cause of

action seeks a declaratory judgment that, by virtue of the building having been vacant at the time of purchase and thereafter substantially rehabilitated, the building is not subject to rent stabilization.

Defendant filed a verified answer on July 16, 2014, by which he asserts five affirmative defenses and five counterclaims.¹ Defendant's first affirmative defense is that the apartment is subject to rent stabilization. The third affirmative defense and first counterclaim alleges that plaintiff is using its failure to obtain a proper certificate of occupancy as a means to evict defendant and, alternatively, has failed to offer defendant alternative housing while it procures a legal certificate of occupancy for the apartment and the building. The fourth affirmative defense and second counterclaim alleges a breach of the warranty of habitability. The fifth affirmative defense and third counterclaim alleges that plaintiff has engaged in a form of harassment in an effort to force defendant from his rent-stabilized apartment. The fourth counterclaim alleges that plaintiff's employees illegally used \$1,000 of defendant's electricity. The fifth counterclaim seeks the recovery of legal fees pursuant to Real Property Law § 234.

In opposition to plaintiff's motion for summary judgment, defendant argues that the motion must be denied due to the lack of a certificate of occupancy for the building, the likelihood that the building is rent-stabilized and he has been substantially overcharged, and the deplorable condition in which plaintiff has maintained the building.

Defendant alleges that the building was built in 1910 (Dawson aff, ¶ Ex. B).² According to HPD's records from 2012, the building consists of zero "A Units" and eight "B Units" (Dawson aff, ¶ 7 & Ex. C). However, defendant claims that HPD inspectors told him that the

¹ Defendant has since withdrawn his second affirmative defense based on improper service of process (*see* Silagy affirmation at 9 n 3).

² Defendant relies on his affidavit dated March 31, 2105, submitted in opposition to the prior motion for use and occupancy (*see* NYSCEF Doc. 34-44).

building used to have at least six apartments, but was reduced to four after the landlord did the construction work and currently there are four units (*id.*). The building has three floors and a basement, with an apartment on each floor (*id.*, ¶ 8). Defendant's apartment, #4, is on the third floor (*id.*).

From the outset, defendant contends that the landlord has kept the apartment "in a deplorable condition," and has harassed him and other tenants in retaliation for asserting their legal rights (Dawson aff, ¶ 10). On January 15, 2012, the city issued a vacate order because "the "secondary means of egress (sprinkler system) has been removed throughout in public hall" (*id.*, Ex. C). Defendant claims that, as a result, he was forced to move out of the apartment and live elsewhere, at a substantial expense, and the landlord never offered to reimburse his expenses (*id.*, ¶ 12).

When defendant moved back in, matters allegedly got worse (Dawson aff, ¶ 13). He contends that there were and still are massive ceiling leaks from the roof, and that his apartment is plagued with heating and electrical problems (*id.*). A hole in the wall behind the refrigerator allegedly existed for two years, and currently there is a hole in the floor in the front room (*id.*).

Defendant maintains that he was forced to bring two proceedings before HPD in 2012 and 2013, because plaintiff was refusing to do necessary repairs (Dawson aff, ¶ 14). In both instances, despite plaintiff agreeing to cure the outstanding violations in consent orders (*id.*, Exs. D & E), defendant alleges that it was the City who had to repair the conditions (*id.*, ¶ 15). As of March 25, 2015, there were 23 outstanding violations against the building according to HPD records, including a broken or defective intercom system, leaking roof, broken stair treads, defective plaster walls, a broken or defective front door lock, and inadequate front door lighting (*id.*, ¶ 16 & Ex. F).

Defendant contends that since he paid at least 16 months of market rate rent pursuant to an allegedly illegal deregulated lease, he has been substantially overcharged (Dawson aff, ¶ 30). He further avers that he has filed an overcharge complaint with DHCR which is currently pending (*id.*).

Plaintiff is currently in litigation with other tenants in the building, Jeffrey and Brooke Ruskaup, who rented apartment # 1 for a term commencing November 1, 2012 and October 31, 2013 (*see Jeffrey and Brooke Ruskaup v Contempo Acquisition LLC*, index No. 100131/13 [Sup Ct, NY County]; *Contempo Acquisition LLC v Jeffrey and Brooke Ruskaup*, index No. 151104/14 [Sup Ct, NY County] (the Ruskaup Action). On October 10, 2014, Justice Barbara Jaffe denied a motion for summary judgment by plaintiff and against the Ruskaups, ruling: “whether the Ruskaups’s tenancy is or should be considered rent-stabilized must be resolved by [DHCR]” (*Ruskaup v Contempo Acquisition*, 45 Misc 3d 1226[A], 2014 NY Slip Op 51715[U] [Sup Ct, NY County 2014]).

DISCUSSION

As a preliminary matter, defendant argues that this summary judgment motion must be denied under the doctrine of collateral estoppel, because the issue was already decided against plaintiff in the Ruskaup Action. Collateral estoppel requires a showing that the same legal or factual issue has been decided in the Ruskaup Action and that plaintiff had a full and fair opportunity to litigate the issue (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]). That doctrine is not applicable here. Justice Jaffee did not decide whether the building was substantially rehabilitated after 1974 and, thus, exempt from RSC § 2520.11 (e). Rather, Justice Jaffee ruled only that the issue of whether the Ruskaups could be ejected from their apartment for failure to pay rent since December 2012 pivoted on whether their tenancy was subject to rent

stabilization, and that “the nature of the Ruskaups’ tenancy” must be resolved by DHCR.

Notably, there did not appear to be any proceeding pending before DHCR regarding the Ruskaups’ lease or tenancy. Rather, both plaintiff and the Ruskaups had sought a declaratory judgment in their favor from the Supreme Court on the rent stabilization issue. Thus, this court is not bound by Justice Jaffee’s deferment to DHCR, and, for the following reasons, the court respectfully disagrees with her ruling.

RSC § 2520.11 (e) provides, in pertinent part:

“This Code shall apply to all or any class or classes of housing accommodations made subject to regulation pursuant to the RSL or any other provision of law, except the following housing accommodations for so long as they maintain the status indicated below:

* * *

(e) housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January 1, 1974, except such buildings which are made subject to this Code by provision of the RSL or any other statute that meet the following criteria, which, at the DHCR's discretion, may be effectuated by operational bulletin”

Defendant argues that a rent-stabilized building does not lose its rent regulatory status unless and until plaintiff applies to DHCR to deregulate the building and DHCR issues an order of deregulation on this basis, which has not been done.

In reaching her decision that DHCR must be the initial arbiter of whether the Ruskaups’ tenancy is protected by rent stabilization, Justice Jaffe cited *Sohn v Calderon* (78 NY2d 755 [1991]). In that case, the owner of a fire-damaged building applied to the Supreme Court for a declaratory judgment, pursuant to RSC § 2524.5 [a] [2]), that he was entitled to: demolish the building; evict his rent-controlled tenants; and refrain from offering renewal leases to his rent-stabilized tenants. The tenants argued that the court lacked subject matter jurisdiction. DHCR also moved to intervene in the action, arguing that it has exclusive primary jurisdiction over the

dispute. The Supreme Court rejected DHCR's argument, "concluding that, as a court of unlimited equitable jurisdiction, it had concurrent authority to determine the dispute" (78 NY2d at 762). The Court of Appeals ruled that the issue is whether the Legislature intended for the adjudication of this dispute by DHCR in the first instance (*id.* at 766), and concluded that the answer was yes, because the particular language of RSC § 2524.5 (a) (2) required that an application be filed with DHCR for its approval prior to demolition, and even provides for the continued jurisdiction of DHCR in disputes with tenants over moving expenses, stipends and relocation requirements.

The language of RSC § 2520.11 (e) is very different. Notably, subdivision (e) (8) of this section provides only that applications "may" be filed with DHCR for an "advisory opinion" prior to performance of the work. There is nothing in the language of RSC § 2520.11 (e) that makes the issue of whether a building is exempt from the rent stabilization law due to a substantial rehabilitation the exclusive primary jurisdiction of DHCR. "[T]here is no requirement that an application be made to DHCR to confirm a building's deregulation. Section 2520.e [sic] of the Rent Stabilization Code merely eliminates properties substantially rehabilitated after January 1, 1974, from DHCR's jurisdiction" (*Matter of Trabucchi v New York State Div. of Hous. & Community Renewal*, 2009 WL 2207521, at *5 [Sup Ct, NY County July 10, 2009]). Indeed, the issue of whether buildings have been substantially rehabilitated, and, thus exempt from rent stabilization pursuant to RSC § 2520.11 (e), is one that the Civil and Supreme Courts of this city routinely decide (*see e.g. 22 CPS Owner LLC v Carter*, 84 AD3d 456 [1st Dept 2011] [declaratory judgment action in Supreme Court to declare a penthouse apartment exempt from rent stabilization following substantial rehabilitation of the building]; *Pape v Doar*, 160 AD2d 213 [1st Dept 1990] [issue decided in a holdover proceeding brought in

Civil Court]; *Wilson v One Ten Duane St. Realty Co.*, 123 AD2d 198 [1st Dept 1987] [declaratory judgment action in Supreme Court by tenants]; *81 Russell St. Assoc. v Scott*, 163 Misc 2d 984 [App Term, 2d Dept 1995] [nonpayment proceeding in Civil Court]; *Bartis v Harbor Tech, LLC*, 2014 NY Slip Op 31612[U], 2014 WL 2861558 [Sup Ct, Kings County 2014] [tenants applied to Supreme Court for a declaratory judgment that their building was rent stabilized]; *Jordan Mfg. Corp. v Lledos*, 153 Misc 2d 296 [Sup Ct, Kings County 1992] [action by landlord in Supreme Court to obtain possession]).

Neither of the three other decisions cited by Justice Jaffe concerned the substantial rehabilitation exemption provided in RSC § 2520.11 (e). *Olsen v Stellar W. 110, LLC* (96 AD3d 440 [1st Dept 2012]), was a rent overcharge matter. Although noting that the Supreme Court had jurisdiction, the First Department ruled that the matter should be determined by DHCR, given its expertise in rent regulation, particularly the issue of determining a base rent for a rent-stabilized apartment. And, in *Davis v Waterside Hous. Co.* (274 AD2d 318 [1st Dept 2000]), the issue was whether certain buildings, upon their withdrawal from the Mitchell-Lama housing program, would devolve to rent stabilization status. Notably, there were pending proceedings before DHCR that the tenants sought to enjoin, while it was the owner that preferred the issue to be resolved by DHCR in the first instance. Likewise, in *Eli Haddad Corp. v Redmond Studio* (102 AD2d 730 [1st Dept 1984]), a landlord's action for ejectment of a tenant was stayed in view of the fact that another tenant had filed an omnibus application with the Loft Board seeking a ruling that all of the building's tenants were entitled to the protection of the Loft Law.

In *Katz 737 Corp. v Cohen* (104 AD3d 144 [1st Dept 2012]), the First Department held that DHCR had “exclusive original jurisdiction” to determine whether luxury decontrol of individual apartments pursuant to sections 26-504.1 and 26.504.3 of the Rent Stabilization Law

was permitted. However, both of these sections specifically provides that an “order of deregulation” from DHCR is needed (*see also* RSC § 2520.11 [s], regarding high rent decontrol of apartments, specifically provides that such apartments are only exempt “[u]pon the issuance of an order by the DHCR”). And, in fact, the owner had sought, for four consecutive years, to obtain such an order from DHCR, and was denied each time. Thus, the landlord’s Supreme Court action was really “an attempt to relitigate issues administratively determined and to circumvent the jurisdiction of DHCR to decide such matters” (*Katz 737 Corp. v Cohen*, 104 AD3d at 149).

Sohn, Olsen, Davis, Eli Haddad Corp. and Katz 737 Corp. are all distinguishable on the facts and the law. Although defendant maintains that he filed a rent overcharge complaint with DHCR (*see Dawson aff*, ¶ 30), he offers no details regarding the timing and current status of that proceeding. There is no evidence that, at the time this lawsuit was commenced, there was any pending proceeding or application before DHCR regarding the building at issue, either filed by plaintiff, defendant or any other tenant in the building. Thus, there is no basis to defer to DHCR on the issue of whether the building is exempt from rent stabilization as a result of a substantial rehabilitation. Nevertheless, for the following reasons, plaintiff has not established its entitlement to summary judgment on this issue and the motion must be denied.

“[T]he purpose of the exemption from rent stabilization based on the substantial rehabilitation of a building is to encourage landlords to renovate buildings and add new residential units to the housing stock” (*22 CPS Owner LLC v Carter*, 84 AD3d at 457). “The mechanism by which this is accomplished is to encourage building owners to substantially rehabilitate commercial, or substandard or deteriorated housing stock by permitting them to recoup their expenses free of stabilized rents” (*81 Russell St. Assoc. v Scott*, 163 Misc 2d at 986,

quoting *Matter of Eastern Pork Prods. Co. v New York State Div. of Hous. & Community Renewal*, 187 AD2d 320, 324 [1st Dept 1992]). A rehabilitation that creates units larger in size, and fewer in number, than those previously existing in the same building is not a problem; however, a reduction in the overall residential space may render the exemption inapplicable (*Pape v Doar*, 160 AD2d at 215). Nevertheless, “the exemption is applicable only when deteriorated housing stock is restored to good condition, not when decent housing stock is improved by enlargement, reconfiguration and remodeling” (*81 Russell St. Assoc. v Scott*, 163 Misc 2d at 986).

In order for the exemption to apply to the building, plaintiff must demonstrate certain statutory criteria. The first criteria is that the building, prior to the construction work, “was in a substandard or seriously deteriorated condition” (RSC § 2520.11 [e] [3]). Where at least 80% of the housing accommodations are vacant of residential tenants, there is a presumption that this criteria is met (*id.*). The second criterial is that at least 75% of the building-wide and apartment systems must have been replaced (RSC § 2520.11 [e] [1]). In DHCR’s Operational Bulletin 95-2, it lists these systems as:

1. Plumbing
2. Heating
3. Gas supply
4. Electrical wiring
5. Intercoms
6. Windows
7. Roof
8. Elevators
9. Incinerators or waste compactors
10. Fire escapes
11. Interior stairways
12. Kitchens
13. Bathrooms
14. Floors
15. Ceilings and wall surfaces
16. Pointing or exterior surface repair as needed

17. All doors and frames including the replacement of non-fire-rated items with fire-rated ones.

The third criteria is that all building systems comply with all applicable building codes and requirements, and the owner must provide a copy of the certificate of occupancy before and after the rehabilitation (RSC § 2520.11 [e] [5]).

Plaintiff offers rather sparse evidence regarding the condition of the building at the time of purchase. The DOB reports, which describe the building as “vacant, open and unguarded” are dated December 2000, more than two years prior to plaintiff’s purchase, and January 2005, after construction had begun (*see* Sperber affirmation, Ex. I). Even if the entire building was vacant of tenants, this merely creates a presumption that the building was in a substandard or seriously deteriorated condition. The fact of its vacancy is not enough to prove the exemption applies. For example, in *81 Russell St. Assoc. v Scott* (163 Misc 2d 984, *supra*), the landlord failed to prove at trial that a building containing six residential units and a store, all of which were vacant, was substandard or deteriorated at the time the renovations were done. And in that case, the landlord spent between \$275,000 and \$300,000 on the renovations. Here, it appears that plaintiff spent only \$40,000, a significantly underwhelming amount of money to create four brand new apartments in a building that allegedly was just “a shell.”

The only other evidence regarding the actual condition of the building at the time of purchase and the work performed is Mr. Mehran’s statement that “[t]he building was demolished to its studs” and was “an empty shell” (Mehran aff, ¶ 3) and the job description in the DOB application:

“REHABILITATION WORK - INTERIOR RENOVATION. NON-LOAD BEARING WALLS, FLOORING, CEILING, STAIR AND BATHROOM AND KITCHEN FIXTURES. NO CHANGE IN USE, EGRESS OR OCCUPANCY”

(Sperber affirmation, Ex. B at 3). Assuming that all plumbing, heating, interior stairways, kitchens, bathrooms and floors were replaced, this does not add up to 75% of all building-wide and apartment systems. There is simply no real evidence before the court as to exactly what work was done to this building or even when the work was completed and the condition of the building when plaintiff first began renting out apartments. According to DHCR's Operational Bulletin 95-2, owners must maintain "[r]ecords demonstrating the scope of the work actually performed in the building." Such records include:

"an itemized description of replacements and installations, copies of approved building plans, architect's or general contractor's statements, contracts for work performed, appropriate government approvals, and photographs of conditions before, during and after the work was performed"

(*id.*). Nothing of this nature, other than the DOB application, has been proffered.

Finally, plaintiff has clearly failed to meet the third criteria regarding certificates of occupancy and compliance with the building code. Even accepting the fact that a current certificate is missing, plaintiff fails to offer a satisfactory explanation for the lack of a prior certificate of occupancy and offers nothing to refute defendant's evidence that the building has been the subject of numerous past and current HPD violations.

For these reasons, the court finds that plaintiff has failed to meet its burden, on summary judgment, of making "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied.

Dated: November 20, 2015

ENTER:


J.S.C.

DONNA M. MILLS, J.S.C.