Drye v American Package Co., Inc.
2019 NY Slip Op 30038(U)
January 4, 2019
Supreme Court, Kings County
Docket Number: 504008/18
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of January, 2019.

PRESENT:

HON. DEBRA SILBER,

Justice.

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MATTHEW DRYE,

Plaintiff,

- against -

AMERICAN PACKAGE COMPANY, INC.,

Defendant.

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DECISION / ORDER

Index No. 504008/18
Motion Seq. # 1 and 2

The following papers numbered 1 to 8 read herein:	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1-2 3-6
Opposing Affidavits (Affirmations)	4-6 7
Reply Affidavit (Affirmation)	7 8

Upon the foregoing papers in this landlord/tenant dispute, defendant American Package Company, Inc. (American) moves for an order, pursuant to CPLR 3211 (a) (7) and (b), dismissing the complaint. Plaintiff Matthew Drye (Drye) cross-moves for an order, pursuant to CPLR 3211 (c) and 3212, granting him partial summary judgment on his first cause of action to the extent that it seeks a declaration that he is a rent stabilized tenant.

Background

The Building

American is the owner of a loft building at 97 Green Street a/k/a 226 Franklin Street in Brooklyn (Building), which has allegedly "contained more than 30 residential units with the knowledge and consent of the owner since at least the early 2000's" (complaint at ¶ 6). According to the complaint, 21 units are registered as interim multiple dwelling (IMD) units

under Multiple Dwelling Law (MDL) § 281 (5), the 2010 Amendments to the Loft Law[1] (*id.*). There is no dispute that the Building, which is located in an M1-2/R6A zoning district, does not have a residential certificate of occupancy.

Plaintiff Drye has been a residential tenant of unit G-52 at the Building since July 2015, pursuant to a June 15, 2015 residential lease, which has expired (*id.* at ¶ 3). According to the complaint, "[t]he apartment was equipped for residential occupancy when [Drye] moved in" (*id.* at ¶ 4). This entire action hinges on the plaintiff's allegation that "[Drye] is a rent stabilized tenant at the Building" under the Rent Stabilization Law of 1969 (RSL) by virtue of the Emergency Tenant Protection Act of 1974 (ETPA).

The prior tenants of unit G-52 were Robert Kocik and Daria Kocik (a/k/a Rachel Daria Fain Kocik), who were denied rent stabilization status for unit G-52, the same unit at issue here, in a prior legal action in this court (*see American Package Company, Inc. v Kocik*, 12 Misc 3d 1166 (A), *affirmed as modified*, 55 AD3d 762 [2008] (Kocik Case); see also *Caldwell v American Package Co., Inc.*, 57 AD3d 15 [2d Dept 2008].)

The Instant Action

Plaintiff Drye commenced this action on February 27, 2018, by filing a summons and a verified complaint asserting four causes of action, for: (1) declarations that: (a) the Building is subject to the RSL and he is a "protected occupant" under the RSL; (b) he is "entitled to a renewal lease at the statutory increase permitted, according to his choice of a one year or two year lease"; (c) American is required to register the Building with the DHCR as a rent stabilized building and to register all residential units occupied with American's knowledge and acquiescence as rent stabilized units; and (d) American is required to register the Building with the New York City Department of Housing Preservation and Development (HPD) as a multiple dwelling "insofar as any residential tenants such as plaintiff are not

[1] The Loft Law was further amended in 2013 and 2015.

subject to the Loft Law"; (2) a permanent injunction: (a) enjoining American and its agents "from terminating [his] tenancy and/or seeking to recover possession of [his] Unit except as authorized under the [RSL]," and (b) enjoining American and its agents "from demanding or receiving any rent in excess of the lawful regulated rent permitted under the [RSL]; (3) "a calculation of [his] correct, legal rent and the amount of rent overcharge imposed upon him, to be refunded by the landlord together with treble damages"; and (4) an award of legal fees, pursuant to RPL § 234.[2]

American's Dismissal Motion

American now moves to dismiss Drye's complaint on the ground that he is barred by collateral estoppel and res judicata from litigating whether unit G-52 is a rent stabilized unit because the court determined in the Kocik Case that unit G-52 was not subject to the RSL. American contends that "[s]ince the Appellate Division already ruled this Unit was not protected by rent stabilization, the fact that Plaintiff now occupies the same unit does not give him the opportunity to re-litigate that issue" because "[t]he ETPA covers and protects units, not individuals."

American also argues that dismissal is warranted under *Wolinsky v Kee Yip Realty Corp.*, 2 NY3d 487 (2004), in which "the Court of Appeals recognized and held that where a building or a unit does not qualify for Loft Law protection, it will also not otherwise qualify for rent stabilization protection." American asserts that Drye, who failed to apply for Loft

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[2] RPL § 234 provides, in relevant part:

> "Whenever a lease of residential property shall provide that in any action . . . the landlord may recover attorneys' fees . . . incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease . . . there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees . . . incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease . . ."

Law protection within the available time-frame,[3] and admits he did not convert unit G-52 from commercial to residential use,[4] is precluded from seeking protection under the RSL. Based on *Wolinsky*, American asserts that "[t]o give a tenant (like the Plaintiff) rent stabilization protection now, before a certificate of occupancy is obtained for residential use under the Loft Law, defeats the prime objective of the Loft Law, and gives that tenant more rights than all of the other IMD tenants in the Building have."

American further argues that Drye's unit is exempt from rent stabilization protection under the Rent Regulation Reform Act (RRRA), which amended the RSL to exclude "high rent" apartments, like Drye's unit, from rent stabilization. American asserts that Drye's initial monthly rent under his 2015 lease was $4,350, which was well above the $2,700 minimum threshold for exemption from rent stabilization protection, effective in 2015.

Based on the foregoing, American asserts that dismissal of the first, second and third causes of action is warranted because Drye's unit is not subject to rent stabilization. American also argues that the branch of Drye's first cause of action seeking a declaration requiring American to register the Building with the HPD as a multiple dwelling is also subject to dismissal because the Building is already registered with the Loft Board, pursuant to MDL §§ 284 (2) and 325. American submits the affidavit of Martin C. Kofman, its president, who attests that "[t]he IMC Number assigned to the Building by the New York City Loft Board is 30077." American further argues that dismissal of the fourth cause of action seeking an award of legal fees, pursuant to RPL § 234, is warranted because Section

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[3] The deadline for filing an application for coverage under the 2010 Amended Loft Law was June 2017.

[4] *See* complaint at ¶ 4, in which Drye alleges that "[t]he apartment was equipped for residential occupancy when plaintiff moved in."

19 (A) (e) of Drye's lease[5] only permits the owner to recover legal fees in a lawsuit regarding tenant's default under the lease, and this action does not involve a default under the lease.

Drye's Partial Summary Judgment Cross Motion

Drye argues that his unit "completely and without question meets the requirements for de facto rent stabilization" and "[t]he fact that a unit could have qualified for Loft Law status does not mean it cannot be rent stabilized where, as here, it meets the requirements." Specifically, Drye argues that he "meets Second Department requirements as a de facto rent stabilized unit . . . because:

> "[t]here are six or more residential units in the Building. Plaintiff is the residential tenant of his Unit. Defendant landlord clearly knows of and acquiesces in the residential use of the Unit, in view of its long history of residential occupancy, and as he leased it to plaintiff with a residential lease. *Plaintiff participated in the cost of the conversion of the Unit by adding kitchen fixtures and a supplemental heater*. The Building is zoned for residence. The owner has its own pending legalization plans for the Unit, intending to make it a legal residence" (emphasis added).

Drye contends that he is not collaterally estopped by the court's prior denial of rent stabilized status for unit G-52 in the Kocik Case because "[h]e is not a party or [in] privity to a party so as to be collaterally estopped, and he never litigated the present issues before."

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[5] Article 19 (A) (e) of Drye's leases provides:

"**A.** Owner's Right. You must reimburse Owner for any of the following fees and expenses incurred by Owner. . . .

(e) Any legal fees and disbursements for legal actions or proceedings brought by Owner against You because of a Lease default by You or for defending lawsuits brought against Owner because of your actions. . . ."

Discussion

"In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211 (a) (7) 'the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail'" (*Quinones v Schaap*, 91 AD3d 739, 740 [2012] [quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)]). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" (*Hense v Baxter*, 79 AD3d 814, 815 [2010]).

The Appellate Division, Second Department has held that "[i]n order to obtain the protection offered by the Rent Stabilization Law for illegally converted commercial premises, a tenant must demonstrate that the owner acquiesced in the unlawful conversion *undertaken at the expense of the occupants*, the premises were eligible for residential use by reason of the applicable zoning, and the owner, during the pendency of the proceeding in which the tenants sought Rent Stabilization Law protection, actually sought to legalize the residential use" (*Sheila Properties, Inc. v A Real Good Plumber, Inc.*, 59 AD3d 424, 426 [2009] [emphasis added]; *see also Bennett v Hawthorne Vill., LLC*, 56 AD3d 706, 709-710 [2008]; *315 Berry St. Corp. v Hanson Fine Arts*, 39 AD3d 656, 657 [2007]).

In addition, in *Wolinsky v Kee Yip Realty Corp.*, the Court of Appeals considered the interplay of the Loft Law and ETPA, and held that "illegal conversions do not fall under the ambit of the ETPA" where a tenant previously failed to apply for Loft Law eligibility (2 NY3d at 493). Specifically, in *Wolinsky* the Court of Appeals reasoned that:

> "[r]eading the ETPA and Loft Law together, we agree with the courts below that tenants' illegal conversions do not fall under the ambit of the ETPA. As reflected in the legislative history and intent of the Loft Law, the fixed eligibility period was

> designed to address the public safety and municipal zoning emergency caused by the expansion of illegal conversions at that time. The statute was not intended to foster future illegal conversions or undermine legitimate municipal zoning prerogatives. If the prior-enacted ETPA already protected illegal residential conversions of manufacturing space, significant portions of the Loft Law would have been unnecessary. Thus, although such illegal conversions are not expressly exempted from ETPA coverage, it is evident that the Legislature did not view the ETPA as safeguarding the interests of the 'loft pioneers'" (*Wolinsky*, *id.* [citations omitted]).

The Second Department noted that the *Wolinsky* Court "recogniz[ed] that the Loft Law would have been unnecessary if protection for the residents of such premises was already available under [the] ETPA" (*Caldwell v Am. Package Co.*, 57 AD3d 15, 23 [2008]). The Second Department further noted that the *Wolinsky* Court "concluded on that basis that 'the statute was not intended to foster future illegal conversions or undermine legitimate municipal zoning prerogatives'" (*id.* at 23 [quoting *Wolinsky*, 2 NY3d at 493]; *see also Gloveman Realty Corp. v Jefferys*, 18 AD3d 812 [2005]).

Here, Drye cannot obtain the protection offered by the RSL because he admits in his complaint that Unit G-52 "was equipped for residential occupancy when [he] moved in" (complaint at ¶ 4). While the complaint also alleges that Drye "upgraded" the kitchen in Unit G-52 "at his own expense" (*id.*), the actual *conversion* of Unit G-52 to residential use was admittedly not undertaken at Drye's expense. His lease is a residential lease [Exhibit B to defendant's motion]. For this reason, Drye cannot obtain the protection of the RSL, as a matter of law. Furthermore, there is no dispute that Drye could have, but failed to seek protection under the Loft Law, prior to the June 2017 deadline. Under the holdings of *Wolinsky* and its progeny in the Second Department, Drye is, therefore, precluded from seeking rent stabilization status for unit G-52 under the ETPA.

To be clear, defendant's argument that the Kocik case is binding on plaintiff is unavailing. In that decision, the court found that the unit was not occupied by the plaintiff during the applicable "window period." In this case, the Loft Law was amended in 2015 to open a new "window period" which was applicable to plaintiff, but plaintiff failed to apply for coverage. Thus, this court's decision is not based upon the Kocik decision. The court declines to opine as to whether, had plaintiff made a timely application, the Loft Board would have granted plaintiff IMD status.

Consequently, Drye's first, second and third causes of action, all of which are dependent, in some respect, upon Drye acquiring rent stabilization status for Unit G-52, must be dismissed. Additionally, Drye is not entitled to a declaration requiring American to register the Building with the DHCR as a rent stabilized building, since the Building is registered with the Loft Board as an Interim Multiple Dwelling [Exhibit A to defendant's motion]. Dismissal of Drye's fourth cause of action for an award of legal fees, pursuant to RPL § 234, is also warranted because this action does not involve an alleged default under Drye's lease.

The court must make note of the fact that the plaintiff's occupancy of the premises pursuant to a residential lease is unlawful. Without a residential Certificate of Occupancy, no unit may be rented for residential use unless there is an exception in the law. In this building, the occupants of the approximately twenty to thirty loft units which are IMDs pursuant to the Loft Law are entitled to live there solely because the Loft Law acknowledges that the owner "acquiesced" at some point in the past in allowing "commercial" tenants to install kitchens and bathrooms in premises leased for commercial purposes and as a consequence, the tenants are permitted to join the owner in the (temporary) illegality, as they both participated in the illegality. Plaintiff here did not "convert" the unit to residential use. Instead, he signed a residential lease in 2015 for an illegal residential occupancy. The unit

he rented is not an Interim Multiple Dwelling (IMD), a status that could be either rent regulated or not, as, for example, a "buy out" of the "fixtures" installed by the tenant who converted the unit can remove the unit from rent regulated status but keep it an IMD. (*See Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606 [1st Dept 2012].)

Therefore, the applicable law states that plaintiff is not required to pay any rent for his unit. Multiple Dwelling Law §302(b). There is no indication in the papers that the legalization of the residential occupancy of the building is imminent, or indeed that the property owner defendant has even obtained a building permit to do the work necessary to obtain a residential Certificate of Occupancy. Thus, while plaintiff is not entitled to be rent regulated, as he argues, he is in fact not entitled to live at the premises at all. Therefore, until either the Loft Law is again extended and plaintiff's unit is approved for IMD status, or the landlord obtains a court order of ejectment and a warrant of ejectment and has the plaintiff removed from the premises by a City Marshall, it would seem that plaintiff need not pay any rent. But he is on notice that the City of New York does not think his apartment is safe for residential occupancy. *See Forrester v American Package Co., Inc.*, 55AD3d 787 [2d Dept 2008]; *Caldwell v American Package Co., Inc.*, 57 AD3d 15 [2d Dept 2008]; *American Package Company, Inc. v Kocik*, 55 AD3d 762 [2d Dept 2008], all involving the same building. In the *Caldwell* case, the Appellate Division states clearly:

> [this] matter is remitted to the Supreme Court, Kings County, for the entry of a judgment declaring that the plaintiffs' apartment is not subject to the protections of the Emergency Tenant Protection Act of 1974 (L 1974, ch 576, § 4, as amended [McKinney's Uncons Laws of NY § 8621 et seq.]), the Rent Stabilization Law (Administrative Code of City of NY § 26-501 et seq.), and the Rent Stabilization Code (9 NYCRR 2520.1-2531.9), and that the defendant is not entitled to recover the value of use and occupancy for the duration of the plaintiffs' residency.
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> Accordingly, it is

ORDERED that American's motion to dismiss the complaint is granted and the complaint is hereby dismissed; and it is further

ORDERED that Drye's motion for partial summary judgment on his first cause of action to the extent it seeks a declaration that he is a rent stabilized tenant is denied.

This constitutes the decision, order and judgment of the court.

E N T E R,

Hon. Debra Silber, J.S.C

Hon. Debra Silber
Justice Supreme Court