

102-104 Rogers Ave. LLC v Dosouto

2025 NY Slip Op 33491(U)

September 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 521879/2021

Judge: Lisa S. Ottley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

**KINGS COUNTY CLERK
FILED**

2025 SEP 16 A 9 39

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102-104 ROGERS AVENUE LLC,

Plaintiff,

Index # 521879/2021

-against-

Decision and ORDER

LEIA DOSOUTO, ET. AL.,

Motion Seq. #s 4 and 5

Defendants-Tenants,

-and-

ELIZANDRA MCPHERSON, ET. AL.,

Defendants-Guarantors.

-----X
HON. LISA S. OTTLEY, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of Notice of Motion and Notice of Cross-Motion submitted November 25, 2024.

Papers	Numbered
Notice of Motion and Affirmation.....	1&2 [Exh. A-L]
Notice of Cross-Motion and Affirmation	4&5 [Exh. A-P]
Affidavit in Support of Notice of Motion.....	3 [Exh. A-H]
Affirmation/Affidavit in Opposition.....	6
Memoranda of Law in Support of Motion & Cross-Motion.....	7 and 8
Reply Memorandum of Law.....	11

Plaintiff moves for an order of ejection and attorneys' fees against the defendants-tenants and defendants-guarantors due to their failure to pay use and occupancy as per this Court's Order dated March 11, 2024. Defendants cross-move for an order pursuant to CPLR 3212 granting partial summary judgment in their favor limiting defendants-guarantors' potential liability solely to the months a lease was in effect; on their first counterclaim and a declaration that all apartments in the subject building are rent stabilized, and collection of rent being barred pursuant to Multiple Dwelling Law 302 between April 2020 and March 2023.

Mot. Seq. #4

Plaintiff, 102-104 ROGERS AVENUE LLC, is the owner of the building located at 102 Rogers Avenue, Brooklyn, New York pursuant to a deed dated October 22, 1998. Defendants-Tenants LEILA DOSOUTO, MARGARET MAHONEY, JASON GROOM, KIRA BORROWDALE, NINA DADABHOY, TAYLOR LAUESEN, MORGAN GLOVER, KAITLYN MULRY, MARILYN SMITH, SOPHIA CONSTANINO, CHRISTOPHER LILLEY, EMMA GRANT, SAMEEN ZEHRA, CARLEE PRINCELL, LAUREN BAIN, DELANEY TAYLOR, HALEY TABOR, MARYAM GHARAVI, SIMRAN ANKOLKAR, GRACE HAYNER, MICHELLE YEO, PATRICK DOERKSEN, ERICA TAGLIARINO, BROOKE DALBY, BALRAJ SINGH, RYAN MILLER, SABINE SMITH, GAVONTE CARTER, KARINA GRADY, OLIVIA BERNHARD, and LOGAN GUILLORY (collectively the "Defendants" or "Tenants") and Defendants-Guarantors ELIZANDRA McPHERSON, CHARLES MAHONEY, NANCY MAHONEY, MICHAEL LAUESEN, ZAVAREH DADABHOY, COLIN BAIN, MARTINA PRINCELL, SAIMA KHATOON, JAIKUMAR MOORTHY, SANDRA CAMPANELLA, JOHN TABOR, SCOTT MILLER, BRIDGET BARTH, KATHLEEN PETERSON and BENJAMIN BERNHARD ("Defendants" or "Guarantors"). The defendants-tenants herein occupy Apartments 1-8 of the subject building.

Plaintiff commenced this action against the defendants-tenants of the subject premises who occupy apartments 1-8 due to breach of the lease by failing to pay the rent due and owing for each of the subject apartments listed in the complaint, and against the defendants-guarantors of the leases for each apartment, as well as attorneys' fees for breach of the lease. On March 14, 2024, this court heard argument on plaintiff's motion seeking use and occupancy for the subject apartments as listed in the complaint. The court issued an order granting plaintiff's motion and directed that use and occupancy be paid within forty-five (45) days of the subject order to the plaintiff's attorney to be held in escrow by plaintiff's attorneys. On the date that this motion (Mot. Seq. #4) was heard, the defendants-tenants had not complied with this court's order.

A party is obligated to comply with a court order, however incorrect the party may consider that order to be, until that order is set aside, either by appeal or otherwise, so long as the court issuing the order had jurisdiction to do so. See, *Gloverman Realty Corp. v. Jefferys*, 29 A.D.3d 858, 815 N.Y.S.2d 687 (2nd Dept., 2006), citing *Matter of Bickwid v. Deutsch*, 229 A.D.2d 533, 645 N.Y.S.2d 539 (2nd Dept., 1996); *Wolstencroft v. Sassower*, 212 A.D.2d 598, 623 N.Y.S.2d 7 (2nd Dept., 1995); *Busters Cleaning Corp. v. Frati*, 203 A.D.2d 409, 610 N.Y.S.2d 558 (2nd Dept., 1994). In their cross-motion (Mot. Seq. #5), the defendants did not address why they have not complied with this Court's order directing use and occupancy to be paid. An award of use and occupancy during the pendency of an action or proceeding is meant to accommodate the competing interests of the parties in affording necessary and fair protection to both. See, *255 Butler Assoc., LLC v. 255 Bulter, LLC*, 173 A.D.3d 651, 102 N.Y.S.3d 259 (2nd Dept., 2019). In the case at bar, the defendants-tenants have been residing in the subject apartments beyond the expiration of their leases and have not paid use and occupancy to the plaintiff-owner. The fact that the defendants-guarantors argue that they should not bear the responsibility of the use and occupancy, does not negate the fact that the court issued an order directing use and occupancy be paid, which has not been complied

with, and should be paid by the defendants-tenants who continue and/or continued to occupy the subject apartments after the expiration of their respective leases.

To establish entitlement to judgment on a cause of action for ejectment, a plaintiff must establish (1) it is the owner of an estate in tangible real property, (2) with a present or immediate right to possession thereof, and (3) the defendant is in present possession of the estate. In an action for ejectment, damages may be recovered for the wrongful withholding of such property, including rents and profits or the value of the use and occupancy of the property. See, *Esposito v. Larig*, __ N.Y.S.3d __ 2025 N.Y. Slip Op. 04704 (2nd Dept., 2025).

Based upon the foregoing, the court finds that the relief sought by the plaintiff is warranted. The defendants-tenants continue to reside in the subject apartments and have not complied with this court's order dated March 14, 2024.

Mot. Seq. #5

In opposition to plaintiff's motion for use and occupancy and attorneys' fees due to defendants' failure to comply with this Court's order dated March 14, 2024, defendants cross-move pursuant to CPLR 3212 for partial summary judgment on limiting defendants-guarantors' potential liability solely to the months a lease was in effect; on their first counterclaim and a declaration that all apartments in the subject building are rent stabilized, and collection of rent being barred pursuant to Multiple Dwelling Law 302 between April 2020 and March 2023.

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. See, *Grassick v. Hicksville Union Free School District*, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996). "Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action or tender an acceptable excuse for his failure and submission of a hearsay affirmation by counsel alone does not satisfy this requirement." See, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

Limiting Defendants-Guarantors' Potential Liability

A guaranty is a promise to fulfill the obligations of another party and is subject to the ordinary principles of contract construction. See, *20 Rewe Street, Ltd. v. Zheng*, 228 A.D.3d 607, 212 N.Y.S.3d 708 (2nd Dept., 2024). In the case at bar, the leases and guarantor agreements for each of the apartments are identical (as to those agreements presented to the court). For example, all eight leases for the subject apartments read as follows:

Paragraph (6) of the defendants-tenants' leases read as follows:

If Tenant fails to deliver possession of the premises to the Landlord at the expiration of the lease, the tenancy shall be governed by this lease on a month-to-month basis. Tenant will thereafter be liable for

the last monthly rent amount plus an additional 10% for each month.

The Guarantor Agreement(s) (Apts. 2, 3, 6 and 7) reads in part as it relates to the guarantor's obligations under the agreement, as follows:

I understand that the rent of the apartment located __102 Rogers Avenue # __Brooklyn, New York 11216 that I am the co-signer acting as guarantor for, is \$ (*amount of rent is inserted for each apartment*) monthly rent. I promise to guarantee the tenant(s) compliance with the financial obligations of the rental agreement.

In the event the tenant(s) fail to pay, I understand that I may be required to pay for the following items, including but not limited to, Rent, Utilities, cleaning charges, penalties (late fees etc.), or damages assessments in such amount as are incurred by the tenant(s) under the terms of the agreement.

I further understand that this co-signer agreement will remain in full force throughout the entire term of the tenant(s) tenancy even if the tenancy is extended and/or change in its terms.

There is a Guarantor Letter signed by some of the defendants-guarantors (Apts. 4, 5 and 8) that reads as follows:

In consideration of Landlord agreeing to lease to _____ (Tenant(s) the dwelling unit address _____, as stated in lease dated _____ by and between _____ the landlord and _____ Tenant(s) the undersigned, hereby waiving the obligations of the homestead exemption law as to this lease, jointly and severally if there be more than one undersigned, guarantee the payment of rent and the performance of all the provisions of this lease by Tenant(s), his/her successors and/or assigns, and agree that the mere non-payment of rent and non-performance of said provisions by the Tenant(s) or his/her successors and/or assigns shall create an immediate liability on the part of the undersigned to the Landlord and his/her successors and/or assigns. Landlord needs not first exhaust their legal remedies against the Tenant(s) or his/her successors and/or assigns before proceeding against the undersigned. Landlord is not required to notify the undersigned or Tenant(s) of Tenant's failure to pay rent or perform as aforesaid.

The Guarantor further agrees that this guarantee shall remain in continue in full force and effect as to any renewal, change or extension of the Lease.

Plaintiff commenced this action to recover rent and use and occupancy pursuant to a lease and guaranty agreement between the plaintiff and defendants as tenants and guarantors. A complete, clear and unambiguous agreement must be enforced according to the plain meaning of its terms. See, *PRG Associates Limited Partnership v. Planet Organic*, 205 A.D.3d 1058, 169 N.Y.S.3d 647 (2nd Dept., 2022). The defendants were directed by this court to pay use and occupancy, failed to do so, did not appeal this court's decision and order and offers no excuse as to why there was no compliance with the court's order. Defendants now seek partial summary judgment limiting the amount to be paid solely to those months that the lease was in effect. However, the guaranty agreement is clear that the defendants-guarantors agreed to be liable for those amounts not paid by the tenant(s), such as rent incurred by the tenant(s) under the terms of the lease agreement. Those tenants that remain in possession after the expiration of the lease agreement are "governed by the lease on a month-to-month basis." No new tenancy or modification of the tenancy occurred. This is a holdover by the defendants-tenants which the defendants-guarantors are responsible. See, *PRG Associates Limited Partnership v. Planet Organic, supra*.

Based upon the foregoing, the defendants-tenants/guarantors' request to limit the amount to be paid to the plaintiff solely to those months that the lease was in effect is denied. There is an issue of fact as to whether there is an overcharge, a fraudulent scheme to regulate the apartments, and if a lease was in fact in effect.

Partial Summary Judgment on First Counterclaim
For a Declaration that All apartments in the Subject
Building are Rent Stabilized

The issue as to whether the subject apartments are subject to rent stabilization has been bounced from the DHCR to the court without determination, since the commencement of this case. In fact, the DHCR in response to the Hon. Karen Rothenberg's certified question to the DHCR's Office of Rent Administration, on August 24, 2022, stated that it is the Supreme Court's jurisdiction to render a decision as to the issue of the subject building be rent stabilized under the *Collazo v. Netherland Prop. Assets LLC*, 35 N.Y.3d 987 (2020). The DHCR basically stated that the Court of Appeals' holding states that since the tenants raised the issue of the rent stabilized status of the units and interposed claims of an overcharge and claims that the landlord committed fraud with a scheme to deregulate the apartments, the court must decide the issue, and having the DHCR decide the issue would circumvent the choice of forum by the party who raised the issue of the rent stabilized status of the units which intertwined with their claim of rent overcharges and the fraudulent scheme to deregulate the building. *Collazo v. Netherland Prop. Assets LLC, supra*.

However, on July 11, 2024, the DHCR issued a determination under Docket LN210003UC, which denied the plaintiff-landlord's application for exemption from regulation based on a substantial rehabilitation completed after January 1, 1974. In doing so, the DHCR's order and determination requires the landlord to offer regulated leases to all tenants and file annual registrations with the DHCR. Defendants raised the argument as to whether there was a substantial rehabilitation of the subject building, which has been

determined by the DHCR. Therefore, the court need only address the issue of the defendants' claims of a rent overcharge and the fraudulent scheme to deregulate the subject building. The defendants have not submitted sufficient evidence to establish their entitlement to summary judgment as a matter of law on these two remaining arguments. The defendants failed to establish, prima facie, that the defendant "knowingly engaged" in a fraudulent scheme to deregulate the apartments. See, Gunther v. 29th Street PVP, LLC, 238 A.D.3d 859, 235 N.Y.S.3d 330 (2nd Dept., 2025). Fraud in the regulatory context generally means "consciously and knowingly charging improper rent. See, Alenka v. 207-217 West 110 Portfolio Owner, LLC, et. al., ___ N.Y.S.3d ___, 2025 N.Y. Slip Op. 04693 (1st Dept., 2025), citing, Matter of Regina Metro. Co., v. New York State Div. of Housing & Community Renewal, 332, 130 N.Y.S.3d 759 (2020).

As such and considering the determination by the DHCR that the landlord is required to file annual registrations with the DHCR, the court finds that there are issues of fact which preclude summary judgment from being granted. Under the holding in Matter of Regina Metro, supra, a review of the rental history, which has not been fully established in this case, can be taken into consideration. See, Casey v. Whitehouse Estates, Inc., 39 N.Y.3d 1104, 186 N.Y.S.3d 599 (2023), which held that the records were unclear by either party to provide enough information to determine the base rent for any of the subject apartments.

Partial Summary Judgment re MDL 302 re April 2020 and March 2023

Defendants-tenants argue that the landlord is barred from collecting rent and/or use and occupancy pursuant to Multiple Dwelling Law Section 302. Specifically, the defendants point out that there were two violations issued which show that the building was occupied at variance with its Certificate of Occupancy. In opposition to defendants' motion, the plaintiff argues that the defendants-tenants, who were in occupancy at the commencement of this lawsuit (August 2021) have not paid rent since February 2020 and collectively owe \$1,434,561.96 through March 2024, which was the subject of this court's order dated March 11, 2024, directing them to pay. As stated above, the order remains in effect. Plaintiff further argues that the relief sought under Mot. Seq. #4, is for a possessory judgment against defendants-tenants due to their failure to pay rent and abide by the Court's Order and does not seek relief against the defendants-guarantors; therefore, the scope of defendants-guarantors' liability has no bearing as to the propriety of a judgment of possession being entered against the defendants-tenants' who failed to comply with the court's order of March 11, 2024.

Pursuant to MDL 302, an owner of a de facto multiple dwelling who fails to obtain a proper certificate of occupancy or comply with the registration requirements of the Multiple Dwelling Law cannot recover rent or use and occupancy. See, Multiple Dwelling Law 302[1][b]; Malden v. Wykoff S.P., LLC, 192 A.D.3d 1002, 146 N.Y.S.3d 143 (2nd Dept. 2021). There is an issue of fact as to whether the subject building's certificate of occupancy was in existence when this lawsuit was commenced, and whether the violation issued was created by one of the defendants-tenants.

Based upon the foregoing,

IT IS HEREBY ORDERED that plaintiff's motion for a possessory judgment against the defendants-tenants is hereby granted due to their failure to comply with this Court's order dated March 11, 2024, and it is further

ORDERED that this court's order dated March 11, 2024, remains in effect, and it is further

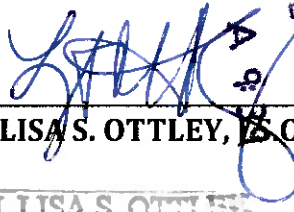
ORDERED that defendants' motion for partial summary judgment is denied in its entirety, and it is further

ORDERED that an award of attorneys' fees is to be determined at the conclusion of this action.

This constitutes the decision and order of this Court.

Brooklyn, New York
September 8, 2025

2025 SEP 16 11 49 AM
 KINGS COUNTY CLERK
 FILED



 HON. LISA S. OTTLEY, J.S.C.

 HON. LISA S. OTTLEY