

**506 W. 150 St., LLC & Eton 102 LLC as Tenant in
Common v Keondra Prier**

2012 NY Slip Op 31646(U)

June 22, 2012

Supreme Court, New York County

Docket Number: L&T 062761/12

Judge: Sabrina B. Kraus

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R

506 WEST 150TH STREET, LLC &
ETON 102 LLC AS TENANT IN COMMON

HON. SABRINA B. KRAUS

Petitioners-Landlord

-against-

KEONDRA PRIER
510 WEST 150TH STREET 6-D
New York, NY 10031

Respondent-Tenant

X

DECISION & ORDER
Index No.: L&T 062761/12

BACKGROUND

This summary nonpayment proceeding was commenced by **506 WEST 150TH STREET, LLC & ETON 102, LLC AS TENANTS IN COMMON** (Petitioner) and seeks to recover possession of Apartment 6D at 510 WEST 150TH STREET (Subject Premises) based on the allegation that, **KEONDRA PRIER** (Respondent) the tenant of record, has failed to pay rent for the Subject Premises.

PROCEDURAL HISTORY

Petitioner issued a three day demand, dated April 3, 2012, seeking \$4108 in arrears at a rental of \$1475 per month. The demand was served by personal delivery on April 10, 2012 and required payment by April 15, 2012. On April 16 a verified petition was executed asserting that the demand amount plus additional legal fees remained due. The petition also asserts that the Subject Premises are subject to Rent Stabilization, and that the rent demanded is the legal

registered rent. The petition further asserts that Respondent is in possession pursuant to a written agreement wherein she agreed to pay \$1475 per month.

Respondent appeared and filed an answer on April 26, 2012. The answer asserts that the rent, or a portion thereof, had already been paid, that there are conditions requiring repair in the premises and that Respondent disputed the amount sued for. The proceeding was originally returnable in Part F on May 4, 2012. It was adjourned from May 4 to May 21 on Respondent's application to afford her an opportunity to seek counsel.

On May 21, 2012, Respondent's answer was deemed amended by the Court, as noted on the Court file, and Respondent paid \$1237 without prejudice. Trial was scheduled for June 18, 2012. On June 18, 2012, Petitioner's application was denied and the proceeding was assigned to Part R for trial. The trial commenced on June 18, 2012 and continued on June 19, 2012. At the close of Petitioner's case, Petitioner moved to conform the pleadings to the proof and to amend the petition to date. The Court reserved decision on the motions and stayed the balance of the trial pending issuance of a decision on these motions.

DISCUSSION

Petitioner attempted to prove facts at trial that contradict the allegations in the petition. Specifically, at trial Petitioner took the position that the Subject Premises is exempt from Rent Stabilization based on the allegation that the legal rent had exceeded \$2000 and a subsequent vacancy. Additionally, contrary to the allegation in paragraph two of the petition it was conceded by Petitioner that no written lease agreement had been executed by Respondent for a monthly rent of \$1475, but Petitioner asserted a month to month tenancy had been created after the expiration of the last lease agreement by the payment and acceptance of \$1475 per month.

RPAPL § 741 requires that a proceeding state the facts upon which it is based. This generally includes a requirements that the petition assert whether the Subject Premises is governed by rent regulation, or the basis for any alleged exemption (*Villas of Forest Hills Co v Lumberger* 128 AD2d 701). Generally pleadings are subject to liberal amendment absent surprise or prejudice. Respondent opposed Petitioner's motion to amend the pleadings by asserting unfair surprise, that she had not looked into the issue of the premises being exempt from regulation and was unprepared to address Petitioner's oral motion to amend at trial. In order to prevail on a motion to amend, Petitioner bears the burden of showing that the proposed amendment has merit.

Notwithstanding the liberal standard for the amendment of pleadings at trial, the Court finds that Petitioner's motion to amend must be denied because Petitioner failed to establish the merits of the proposed amendments at the close of its *prima facie* case, and for reasons further elaborated on below.

PETITIONER FAILED TO PROVE THE AMOUNT SUED FOR WAS OUTSTANDING

Before granting Petitioner's motion to amend the petition to date, Petitioner must establish that the amount sued for, or a fair approximation thereof, was outstanding at the time the petition issued. Petitioner purchased this building August 24, 2011 (Exhibit 1). The rent history (Exhibit 6) offered by Petitioner in support of its claim for arrears includes some \$2190 carried over from the prior owner. Petitioner's only witness at trial conceded that this sum was not being sought in this proceeding. Additionally, Petitioner offered no assignment of rents to support such a claim. The rent history also includes charges for late fees and legal fees.

Pursuant to the rent history, as of the date of the three day, demand Respondent's arrears

totaled \$4108. However, given that Petitioner withdrew its claim for the \$2190 carried over from the prior owner, the remaining balance is \$1918. Less legal fees that would bring the balance to \$1685. On the date the petition was filed, April 18, 2012, an additional \$1415 had been paid by Respondent and Ms. Johnson, further reducing the balance to \$270, including late fees. Based on Petitioner's own evidence, and putting aside for the moment that there is no agreement, written or otherwise, to pay \$1475 per month, Petitioner failed to establish the amount sought in the petition was due at the time the petition issued, or that the amount sought in the demand was a good faith estimation of the amount actually due.

PETITIONER FAILED TO PROVE A MONTH TO MONTH TENANCY

AT \$1475 PER MONTH

Respondent signed one lease agreement and two renewal leases for the Subject Premises. The last renewal executed was for a term from February 2011 through January 2012 (Exhibit 4B). A subsequent renewal was offered by Petitioner but never accepted by Respondent.

At trial, Petitioner's witness Mr. Kessler testified that Respondent created a month to month tenancy at \$1475 per month by paying that amount after the expiration of the lease and by Petitioner's acceptance of said amount. However, that testimony is not supported by the rent history (Exhibit 6). Respondent never paid \$1475 for any month after the expiration of the lease. Payments were made and received by Respondent and Jessica Johnson¹. Jessica Johnson paid and Petitioner accepted between \$675 per month and \$740 per month after the expiration of the

¹ Although Petitioner was aware of Ms. Johnson's occupancy and was accepting rent from her, Petitioner did not name her or serve her in this proceeding. Ms. Johnson did appear at the trial and indicated she moved out of the Subject Premises in June 2012, and would only be testifying as a witness on behalf of Respondent in support of her warranty of habitability claim.

last lease agreement. Respondent additionally made sporadic monthly payments after the expiration of the lease. Contrary to the testimony of Mr. Kessler, any payments made by Respondent subsequent to the expiration of the lease never exceeded \$740. If Petitioner's theory was that payments accepted directly from Ms. Johnson were to be attributed to Respondent, this allegation was not made at trial, not included in the motion to amend and not addressed by Petitioner.

Petitioner thus failed to prove any month to month tenancy with Respondent at a rate of \$1475 and it is questionable as to whether nonpayment proceeding could be maintained assuming that Petitioner's claim that the premises are exempt from rent regulation had been established [See eg *Krantz & Phillipps LLP* 2003 NY Slip Op 50032(U)(where last lease agreement had expired there was no basis to sue for subsequent rent absent agreement upon rental); *Eshaghian v Adames* 28 Misc3d 1215(A); *1400 Broadway Ass. v Henry Lee & Co* 161 Misc2d 497].

**PETITIONER FAILED TO ESTABLISH THAT THE SUBJECT PREMISES
ARE EXEMPT FROM RENT REGULATION**

The documents offered by Petitioner in support of its motion to amend to allege the Subject Premises are exempt from rent regulation contain irregularities. A building wide printout from DHCR regarding stabilized rents for the building (Exhibit 8) provides the Subject Premises was registered as Rent Controlled in 1984, at a monthly rent of \$136.34, to a tenant of record listed as Delores Ormand. No further registrations were filed until 1990, when the Subject Premises was registered as Rent Stabilized at a rent of \$136.34, listing Goler Ormond as the tenant of record. The identical information is filed with the 1991 registration. No further

registration was filed until 1998, when again the Subject Premises was registered as Rent Stabilized at a rent of \$136.34 per month, with Ormond Goler listed as the tenant of record.

In 2005, the Subject Premises is registered as Vacancy Decontrol with a rent of \$1375 to Katie Mueller for a term from April 2005 through March 31, 2006. In 2006, the registration lists Pedro Morales as the tenant of record, pursuant to a lease term starting September 2005 through August 2006 with a legal rent of \$1608.75 and a preferential rent of \$1370.00. Pursuant to §2522.5(a)(1) of the Rent Stabilization Code in a Rent Control apartment which becomes vacant after 1984 “... the owner may not increase the rent charged in the initial lease or other rental agreement pursuant to annual guidelines for a period of one year or until the expiration date of the initial lease or rental agreement.” However, in this case Katie Mueller was listed as the initial tenant with a lease for a term from April 1, 2005 through March 31, 2006, yet just five months later the owner increased the legal rent from the \$1375 charged to Katie Mueller to \$1608.75 for Pedro Morales with a lease starting September 1, 2005. That increase and the subsequent rents based upon that increase appear to be in direct violation of the statute, and if the increases are invalid that would mean the Subject Premises remain subject to Rent Stabilization.

Consideration of the registrations from 1984 forward, and particularly from 2005 forward is permissible to determine whether the Subject Premises are subject to Rent Stabilization (*East West Renovating Co. v DHCR* 16 AD3d 166).

The 2007 registration lists the legal rent as \$1886.26 with Michael Jones as a new tenant and a preferential rent of \$1480.00. The only leases offered into evidence were pertaining to Michael Jones. The monthly rent on the initial lease for Michael Jones (Exhibit 7A) is written in as \$1480.00 per month. In different ink, and what looks to be a different handwriting, \$1886.26

is written in as the legal rent. The lease is in the name of two tenants Michael Jones and Zachary Couch. The signatures for Michael Jones on the initial lease and renewals (Exhibits 7 & 7B) do not match. The last renewal is only signed by one tenant. None of the signatures were identified by Mr. Kessler, who could only testify that these are the documents that were turned over by the prior owner. In fact, Petitioner offered no evidence that the final renewal (Exhibit 7B) was ever fully executed, or if rent was paid pursuant to that renewal. It is clear that Mr. Jones vacated well before the end of that term as Respondent's lease (Exhibit 3) commenced in February 2009, some eight months before the expiration of Mr. Jones last renewal.

Moreover, the initial lease for Michael Jones does not comply with §2522.5(c)(1)(I) of the Rent Stabilization Code in that it fails to include notice of the prior legal rent and an explanation of how the rent had been computed.

Finally, there was no explanation provided by Petitioner as to why the allegations in the petition differed so substantially from the proof offered at trial [*546 West 156th Street v Smalls* 43 AD3d 7 (*reason for misstatements shall be considered by the Court on a motion to amend and shall determine the standard to be applied in determining the motion*)].

CONCLUSION

Based on the foregoing, the Court finds that Petitioner failed to meet its burden to establish that its motion amend at the close of the *prima facie* case to assert that the Subject Premises are exempt from Rent Stabilization or to assert the creation of a month to month tenancy at \$1475 per month had merit. As such the motion is denied and the proceeding is dismissed without prejudice. Respondent's claims for a rent abatement are also severed without prejudice

As of May 2012 Respondent asserted that two repairs remained outstanding in the Subject Premises, one was for the replacement of missing valves on the radiator and the second was for the repair of window balances throughout the Subject Premises. If these conditions have not already been addressed, Petitioner is directed to repair them as required by law.

This constitutes the decision and order of this Court.²

Dated: New York, New York
June 22, 2012

Hon. Sabrina B. Kraus

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² Petitioner may pick up its exhibits within thirty days from Window 9 on the second floor of the Courthouse. After said date the exhibits may be shredded in accordance with administrative directives.

