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

X

73 TRIBECA LLC ,

HON. SABRINA B. KRAUS

Petitioner-Landlord

DECISION & ORDER
Index No.: L&T 61737/2012

-against-

JOANN GREENBAUM
73 LEONARD STREET, Third Floor
NEW YORK, NY 10013,
Respondentt-Undertenant

X

BACKGROUND

This summary holdover proceeding was commenced by **73 TRIBECA LLC** (Petitioner) against **JOANN GREENBAUM** (Respondent), the tenant of record, seeking to recover possession of 73 LEONARD STREET, THIRD FLOOR, NEW YORK, NY 10013, (Subject Premises) based on the allegation that Respondent is a month to month tenant who's term has expired. Respondent asserts that she is a rent stabilized tenant not subject to eviction without cause.

PROCEDURAL HISTORY

Petitioner issued a thirty day notice of termination on February 13, 2012, terminating Respondent's tenancy effective March 31, 2012. The notice asserts that the termination is based on the following facts a) Respondent's 1990 lease was extended through January 2004, and after the expiration of the last extension Respondent continued as a month to month tenant; and b) The building is registered as an interim multiple dwelling (IMD) with the New York City Loft Board, and was removed from rent regulation by a sale of improvements, that was filed with the

Loft Board; and c) at the time Respondent took occupancy the unit was deregulated; and d) Respondent is not a protected occupant under the multiple dwelling law and therefore not entitled to continued occupancy.

The petition is dated April 4, 2012. On April 17, 2012 Respondent appeared through counsel, and filed an answer counterclaim and demand for a verified bill of particulars. Respondent's answer asserted a general denial and a counterclaim for attorneys fees.

The proceeding was originally returnable April 18, 2012. The parties adjourned the proceeding to June 6 for trial, agreed that Petitioner would respond to the demand for a bill of particulars by May 10, 2012, and that both sides would exchange all documents to be used at trial on or before May 15, 2012. Petitioner's response to the bill of particulars asserted that the sale of improvements took place on October 31, 1987.

On June 6, 2012, the proceeding was assigned to Part R for trial. The trial commenced and concluded on June 6. After the trial, the proceeding was adjourned to July 2, 2012 for submission of post trial briefs, and the Court reserved decision.

FINDINGS OF FACT

At the commencement of the trial, the parties stipulated that the sole issue for the court to determine was whether the Subject Premises was governed by Rent Stabilization, and any relief associated with said determination. The parties also stipulated that certain documents would be admitted into evidence. The building is a five story building. The ground floor has an art gallery and the other four floors are occupied by residential tenants.

Timothy M. Tracy (Tracy) was the first witness to testify at the trial. Tracy testified that in 1979 he was living and working at 71 Leonard Street, an IMD and he was a part owner in that

building. 71 Leonard Street is located directly next door to the subject building. Tracy knew the owner of the subject building Nathan Seril (Seril) . Tracy wanted to purchase the subject building from Seril. Seril was not ready to sell the building, but proposed a net lease instead, and Tracy agreed. The net lease was originally pursuant to an oral agreement made between Tracy and Seril in 1979. Seril died shortly thereafter, and on July 26, 1982, Tracy entered into a written net lease agreement with Seril's estate (Exhibit 1). Pursuant to this agreement, Next Door Realty Inc, a d/b/a used by Tracy, was the net lessee for the subject building through July 31, 1997. After 1997, Next Door Realty continued as net lessee on a month to month basis until November 2011, when the rights of Next Door Realty as net Lessee were terminated pursuant to a written agreement (exhibit 6).

On or about March 1983, Next Door Realty filed an IMD Registration Application for the building with the Loft Board (Exhibit C-1). The application asserted that the second, third and fourth floors of the building had been occupied for residential purposes since April 1, 1980, and that by April 1, 1981, the fifth floor was also occupied for residential purposes. A renewal application was filed on August 1, 1983. Annual registrations were filed through and including July 2011 (Exhibits C-2 through C-24). The annual registrations will not reflect a Sale of Improvements pursuant top MDL §286(6), but will reflect any sale of rights pursuant to MDL §286(12) [exhibit 7A].

In 1980, the tenant of the Subject Premises was John Seery (Seery). Seery executed a written lease agreement dated October 20, 1980 for a term through October 31, 1983 (Exhibit L). The lease provided for rents from $550 per month to $625 per month, and provided that the

premises was rented for use as an artist's studio. Seery's signature on the lease was witnessed by Michael McFadden (McFadden). The last page of the Lease provided:

> The tenant as agreed is entitled to remuneration for improvements from landlord in the amount of $2,000.00 Two Thousand Dollars, to be paid off through a predetermined schedule of rent reductions with any balance to be paid in full upon termination of the lease OR for the entire amount to be paid in full upon the termination of this lease, whichever option the landlord so chooses to elect.

Seery paid rent pursuant to his lease, however he did not pay consistently on time. Seery and McFadden occupied the Subject Premises together (exhibit 2E). McFadden was occupying the Subject Premises more regularly then Seery. By 1983 Seery was no longer occupying the Subject premises having moved to Massachusetts and McFadden started paying rent directly to the landlord. Eventually McFadden asked Tracy for a lease in his own name.

On May 18, 1987, Tracy sent Seery a letter terminating his tenancy, because of failure to maintain the Subject Premises as his primary residence (Exhibit 4). The letter recites that Seery's arrears through May 1987 totaled $5825. Tracey also advised Seery in said letter that he had offered a new lease for the Subject Premises to McFadden. Finally, the letter advised that two thousand dollars of the arrears due was being deducted as payment for the fixtures pursuant to the rider of the lease.

Also on May 18, 1987, Tracy sent a letter to McFadden (Exhibit 5) which provided:

Enclosed is a copy of my letter to John Seery advising him that his tenancy is terminated on the third floor and that you have been offered a lease as primary tenant.

The locks will be changed on the third floor entry door and on the street entry door as I am advised by legal counsel to hold any personal property of John Seery's against settlement of his rent arrears. Although I anticipate a friendly resolution of this matter with John, please do not provide him with access to the third floor until you receive further notification from me.

Seery never paid any of the remaining arrears sought. The improvements Seery had made remained in the Subject Premises. On or about October 12, 1988, Tracey prepared and filed a document with the Loft Board labeled "Improvements Sales Record" (Exhibit M). The document provides the name of landlord and Seery, Seery's Massachusetts address, McFadden's information as Seery's subtenant and a date of sale of October 31, 1987. McFadden's address is listed as being in New Jersey, and in the space where the rent of the new tenant is to be listed Tracey inserted "Unchanged Until such time that sub-tenant's sub sub tenant vacates the 3rd floor/as original sub-tenant now has primary residence in New Jersey."

By 1987, McFadden had married, had a child and moved to New Jersey with his family. When McFadden moved out, he let his former babysitter remain in the Subject Premises. During this period many unidentified individuals were occupying the Subject Premises (testimony of Tracy and exhibits 2C, 2D, and 2E). The increased traffic of individuals to and from the Subject Premises disturbed other occupants of the building at the time.

In late 1988, Tracy spoke with McFadden about the issues with occupants of the Subject Premises and the fact that McFadden wasn't living there anymore. McFadden requested to be paid for improvements to the Subject Premises in exchange for a surrender. McFadden asserted that he had made additional improvements to the Subject Premises beyond those put in place by Seery.

On July 28, 1989, McFadden filed a coverage application with the Loft Board (Exhibit H) the application sought a determination that Michael and Doris McFadden were residential occupants qualified for protection of Article 7-C and that they had been harassed by Next Door Realty Inc.

Tracy filed a response to the application which detailed negotiations between Seery and McFadden regarding a buy out (Exhibit 2B).

On or about June 29, 1989, Tracey served McFadden with a thirty day notice of termination terminating his month to month tenancy (exhibit J). The notice asserted that the Subject Premises had been "removed from coverage pursuant to multiple dwelling law Article 7-C ... because the building contains fewer than six (6) residential units and the landlord purchased the prior tenant's fixtures and rights and registered the sale with the New York City Loft Board." A petition was issued in that proceeding on or about September 12, 1989 under Index Number 98239/89. The proceeding was discontinued by Petitioner on the initial return date of September 27, 1989.

On or about September 20, 1989, Next Door Realty served McFadden with a second thirty day notice of termination (Exhibit K-2). The notice asserted the Subject Premises were exempt from rent regulation because the building was an IMD which had been duly registered with the New York City Loft Board. The notice further provided :

PLEASE TAKE NOTICE, that the landlord is giving you this notice because your lease, in or about 1982, has expired, and you were not entitled to remain in possession because you have not maintained the premises as your primary residence as explained more fully in the rider. Therefore under MULTIPLE DWELLING LAW ARTICLE 7-C and the rules and regulations promulgated by the New York City Loft Board, the Rent Stabilization Law as Amended, the landlord is entitled to terminate your tenancy, and the landlord intends to commence proceedings to recover possession should you fail to vacate and surrender."

The petition for that proceeding under index No 115455/89 issued in November 1989. The proceeding was resolved pursuant to a stipulation of settlement so-ordered by the Court on January 16, 1990 (Exhibit K-3). Both parties were represented by counsel. McFadden consented to the entry of a final judgment of possession and the forthwith issuance of the warrant of eviction and agreed to surrender possession of the Subject Premises, by July 20, 1990, in exchange for payment of $5000, plus a waiver of past due use and occupancy. McFadden had stopped paying rent in September 1989. The stipulation was silent as to the issue of a purchase of rights under the Loft Law. McFadden surrendered the Subject Premises leaving improvements made in place. At the time McFadden's tenancy ended he was paying approximately $675 per month in rent.

The docket number for McFadden's Loft Board Application was TR-569. On March 1, 1996, Administrative Law Judge Ray Fleischhacker sent a letter to the parties counsel indicating that the application of McFadden was being withdrawn based on a stipulation "... disposing of the applicant's occupancy rights in the unit (Exhibit 3)." The letter confirmed that the pre-trial conference and trial dates previously set were thus cancelled. On March 14, 1996, Howard Friedman, Director of Hearings for the Loft Board sent a letter stating that McFadden's application was "deemed withdrawn with prejudice and the case is closed. (Exhibit I)."

After McFadden's surrender, Tracy rented the Subject Premises to Respondent and Ira Kaufman, Respondent's former spouse. Next Door Realty entered a lease with Respondent and Ira Kaufman for the Subject Premises on February 1, 1990 for a term through and including January 31, 1992, at a monthly rent of $1500 (Exhibit A1). The tenancy was extended by

execution of three additional written agreements through and including January 31, 2004 (Exhibits A-2, B-1, and B-2). The monthly rent on the last extension was $1745.

Mr. Adi Shabli testified as the next witness for Petitioner. Mr. Shabli is a managing member of the Petitioner. Mr. Shabli first visited the subject building, with a real estate broker, in 2009. Petitioner paid two point nine million dollars for the subject building in 2011. Mr. Shabli did due diligence prior to the purchase, and reviewed documentation from the Loft Board pertaining to the building. One of the documents Mr. Shabli reviewed was The Improvement Sales Record for the Subject Premises (Exhibit M). At the time of purchase the rents on the second, fourth and fifth floor were in the range six to seven hundred dollars.

After Mr. Shabli's testimony Petitioner rested, and Respondent testified on her own behalf. When Respondent first saw the Subject Premises, in late January or early February 1990, there was a lot of paint on the floor in the part of the premises Respondent uses as her studio. The toilet, sinks and oven were all worked. There was also a water heater in the Subject Premises, and a few partitions dividing the space. There was a separate bathroom with a sink, toilet, shower cabinet and mirror. There was also a sleeping loft. There was a kitchen with an oven and cabinets.

Respondent testified that when she signed a lease, in addition to the deposit, she was asked to pay a "fixture fee" of five thousand dollars which she paid Respondent understood that she had to pay that fee because that is what the landlord had to pay to the McFaddens to leave. Respondent has no documentary evidence of said payment, did not get a receipt for said payment, and said payment is not referenced in the lease Respondent signed for the Subject Premises. The Court does not credit Respondent's testimony regarding the $5000 payment.

After Respondent signed her initial lease for the Subject Premises, she did some "cosmetic" improvements and moved in. Respondent moved in within four weeks of signing the lease. Respondent knew prior to moving in that her rent was substantially higher then the other tenants in the building.

Respondent had been to the Loft Board on June 13, 2005 for a narrative statement conference. Respondent's handwriting is on the bottom portion of an attendance sheet for said conference (Exhibit E). Respondent also signed a waiver of her right to participate in the narrative statement process on February 26, 2008 (Exhibit F). As an IMD tenant, Respondent received correspondence regarding the legalization in May 2005 (exhibit D) and in March 2008 (Exhibit G).

DISCUSSION

The Loft law was enacted in 1982 . "The statute is designed to integrate ... unregulated residential units, converted from commercial use, into the rent stabilization system in a manner which ensures compliance with the Multiple Dwelling Law and various building codes (*Blackgold Realty Corp. v Milne* 119 AD2d 512, 515)." The statute sets forth a schedule for an IMD to become a legal residential dwelling and upon the completion of the legalization process the protected occupants are offered leases subject to Rent Stabilization. It is undisputed that the Subject Premises is in an IMD and remains subject to the Loft Law regulations.

Multiple Dwelling Law § 286(6) provides in pertinent part:

> ... a residential tenant qualified for protection pursuant to this chapter may sell any improvements to the unit made or purchased by him ... to the owner for an amount equal to their fair market value**.** Upon purchase of such improvements by the owner, any unit subject to rent regulation solely by reason of this article ...shall be exempted from the provisions of this article requiring rent regulation if such building had fewer than six residential units as of the effective date ...

Multiple Dwelling Law § 286(12) provides:

> No waiver of rights pursuant to this article by a residential occupant qualified for protection pursuant to this article made prior to the effective date of the act which added this article shall be accorded any force or effect; however, subsequent to the effective date an owner and a residential occupant may agree to the purchase by the owner of such person's rights in a unit.

The sale of improvements or rights is considered a deregulating event. The owner remains subject to all the requirements of Article 7-C of the MDL, including the legalization requirements.

The Court finds that a constructive purchase of Seery's improvements took place in 1987. In *Moskowitz v Cartwright* (135 Misc.2d 1132) the court held that where negotiations for a sale of improvements are initiated and not completed, and the tenant abandons the premises owing rent arrears, and without availing herself of the right to enforce a fair market price in law, then a constructive sale of improvements has occurred and the premises are no longer subject to rent regulation. Similarly, in *Swing v New York City Loft Board* (180 AD2d 529) the Appellate Division, First Department, held that when the prior tenant abandoned the fixtures and the loft with rent unpaid, in an amount exceeding the fair market value of the fixtures, there was a constructive purchase of fixtures pursuant to MDL § 286(6).

"Prior to the adoption of abandonment rules, the Loft Board deemed an abandonment to be a constructive sales of improvements in cases where unpaid rent equaled a sum greater than the market value of the improvements in the abandoned unit (*Matter of Sansone & Mandara* OATH Index No 1125/96 aff'd Loft Bd. Order No. 1955, 16 Loft Bd Rptr 205)." In *Application of Kinwal Realty Co.*, Order No. 777, 7LBR 105 (June 16, 1988) a constructive sale of

improvements was found where the tenant was evicted for nonpayment of rent and the arrears exceeded the value of the fixtures. In *Kinwal* the opinion provided :

> This case presents an issue of first impression as to whether an owner, who has lost $21,000 in unpaid rent, may deregulate the tenant's vacant unit containing at least $20,000 worth of fixtures. Because any other result would create an unfair deprivation to the owner, the unit must be held to have been effectively removed from rent regulation.

Id. The opinion further provided :

The question left unanswered by the statute and regulation is whether an owners' right of first refusal can be thwarted by a departing tenant who not only declines to offer to sell the owner his fixtures but also refuses to pay a good portion of his rent .... Clearly, whether the owner may deregulate in such a scenario requires an analysis of the intent of the fixture sale provisions of Article 7-C.

The purpose of MDL Section 286(6) permitting the owner to decontrol the premises if he purchases an outgoing tenants' fixtures "was to avoid windfall to owners" who might simply seize the fixtures as soon as a unit becomes vacant. *Kraz Peripatie Apanu Stu Krokodrilas Tus Platos Ltd v Dexter*, 124 Misc. 2d 381 ... In addition, by imparting a right of first refusal and the possibility of deregulating the unit to the owner, the same section was also intended to prevent windfalls to present and future tenants who might attempt to assign a unit for profit without the owner's consent... Thus, **where an owner has been forced to evict a tenant whose unpaid rent exceeds the value of the fixtures, it appears to be within the intent of section 286(6) to permit deregulation of the unit in question as a constructive fixture purchase by the owner**.

The opinion concluded by noting that :

The policy reasons for permitting the owner in the instant case to deregulate the fifth floor unit are fully as compelling here as they were in *Moscowitz*. Here, too, unless the unit is deregulated, the owner will lose the unpaid rent ... as well as the difference between the unit's fair market rental value and the stabilized amount. ... To deny this owner the right to deregulate a unit containing (valuable) fixtures after he has lost an equivalent sum in unpaid rent would unjustly enrich the present and future tenants of the unit at the owner's expense.

Id.

In this case, Seery and Tracey agreed in the 1980 lease that the fair market value of the fixtures was $2000 and that the landlord could purchase the fixtures either during the course of the lease or upon termination. Article 7 of the rider to the lease provides:

> The tenant as agreed is entitled to remuneration for improvements from the landlord in the amount of $2,000.00 Two thousand Dollars, to be paid off through a predetermined schedule of rent reductions with any balance to be paid in full upon termination of this lease OR for the entire amount to be paid in full upon the termination of this lease, whichever option the landlord chooses to elect.

(Exhibit L).

Seery abandoned the Subject Premises and owed rent arrears exceeding the $2000.00, as such the Court finds that a constructive purchase of the improvements took place. Respondent is correct in arguing that Seery did not engage in any negotiations in 1987, when the landlord sent Seery a letter confirming the termination of Seery's tenancy (Exhibit 4). However, the agreement to the fair market value of the fixtures and landlord's options regarding the purchase of said improvements were incorporated into the initial lease agreement as indicated above. By 1987, Seery had abandonned the Subject Premises, and it is undisputed that he owed rent arrears at the time which exceeded the agreed upon fair market value of the improvements.

The Court does not find, as argued by Respondent, that the constructive purchase of improvements Tracey in 1987 failed to be a deregulating event because of any alleged occupancy by McFadden. McFadden was aware of the constructive sale of Seery's fixtures to Tracy and raised no objection or claim to coverage in 1987 (exhibits 4 and 5). Moreover, there is no requirement that a prime tenant be primarily residing in the Subject Premises at the time of the sale in order for the sale to take place .

> Nothing in Section 286(6) of the Multiple Dwelling Law suggests that it was intended to apply only to an outgoing tenant who occupies a loft unit as a primary residence. The statute is remedial in nature and is calculated to avoid a windfall to the owner which would result if improvements made by a tenant were permitted to revert to the owner without compensation..... Occupancy of the premises as a primary residence at the time of the sale is simply not germane under the statute, the intent of which is to avoid unjust enrichment.

577 Broadway Real Estate Partners v Giacinto (182 AD2d 374, at 375).

Respondent argues that even if Seery's improvements were purchased, McFadden had independent rights to coverage under the Loft Law pursuant to 29 RCNY § 2-09(b)(2) which provides in pertinent part:

> If the residential occupant in possession of a covered residential unit is not the prime lessee, the lack of consent of the landlord to (the agreement) establishing such occupancy shall not affect the rights of such an occupant to the protections of Article 7-C, provided that such occupant was in possession of such unit prior to June 21, 1982 .....

There is scant evidence in the record from which the Court can conclude that McFadden rather than Seery was the residential occupant in possession prior to June 21, 1982. At the time the lease was executed by Seery and witnessed by McFadden, it was uncontested that Seery was the tenant of record and in occupancy. That lease was executed October 20, 1980, and ran for a term through October 31, 1983 (exhibit L). The first evidence of McFadden paying rent to the landlord directly is after the expiration of that lease, when McFadden tendered rent for January 1984 (exhibit O).

However this court need not make such a factual determination because, Mcfadden asserted a claim before the Loft Board for a finding that he was a protected occupant and that claim was withdrawn with prejudice. By signing a stipulation of settlement in the subsequent holdover proceeding in Civil Court, and withdrawing his claim for coverage with prejudice before the Loft Board, McFadden acknowledged that he was not a protected occupant under the Loft Law. The legal effect of the discontinuance with prejudice is the same as an adverse determination against McFadden on the coverage application [*Fifty CPW Tenants Corp v Epstein* 16 AD3d 292 (*discontinuance with prejudice is accorded the same res judicata effect as a judgment on the merits*); *Schwartzreich v EPC Carting Co.* 246 AD2d 439]. This principle is no

less applicable to proceedings before the Loft Board then in proceedings before Civil Court. In *Matter of Tilkin* 13 Loft Bd Rptr at 29-30 the Loft Board declared that "... having withdrawn his coverage application with prejudice, (tenant), by operation of *res judicata*, is forever barred from asserting a claim before the Loft Board or any other forum that the premises is covered by Article 7-C. (Tenant's) withdrawal of his application should be treated as the legal equivalent of unsuccessful litigation."

Assuming *arguendo* that there was no constructive purchase of improvements with Seery, the buyout agreed to by McFadden is a purchase of rights and improvements. Pursuant to DHCR Policy statement 89-7 (June 21, 1989) "... when the owner buys the improvements made by the tenant to the Loft space ... or where the owner and tenant ... agree on terms for the tenant to vacate the housing accommodation, such unit ... will not be subject to the RSL."

The fact that the stipulation of settlement with McFadden did not include language specifically stating it was a buy out does not require a different result. The statute provides that deregulation occurs upon the sale, any other requirements regarding the filing of forms or procedural issues may subject the owner to penalties, but do not change the impact of the deregulating event (*Thorgeirsdottir v. New York City loft Board* 161 AD2d 337; *Matter of 103 W. 27th Street Realty Corp*. OATH Index No 1409/99 *affd* Loft Bd Order No. 2420).

Tracy testified credibly that the buyout for McFadden was based on negotiations on the value of the improvements he had added. McFadden's coverage application acknowledges this fact. "It is only when the McFaddens attempted to exercise their rights to sell fixtures and improvements in the Unit pursuant to article 7-C that a principle of next Door realty, Inc., Tim,

Tracey attempted to block this attempt by offering them a price well below market value (exhibit H)."

Respondent argues that this court can not consider the buyout of McFadden to be a deregulating event because that was not pled in the predicate notice and petition. The court disagrees. The court notes that all documents entered into evidence were exchanged by the parties in advance of the trial, pursuant to the June 5, 2012 stipulation between the parties. The fall back position regarding the sale to McFadden is not part of Petitioner's *prima facie* case but is raised in rebuttal to the defense asserted by Respondent that the sale to Seery was not a deregulating event.

CONCLUSION

Based on the foregoing the court finds that Respondent is not a protected occupant under Article 7-C of the Multiple Dwelling Law, that the subject premises are not subject to rent Stabilization and that Petitioner is entitled to a final judgment of possession. Issuance of the warrant shall be forthwith. Execution of the warrant is stayed through September 30, 2012.

This constitutes the decision and order of this Court.

Dated: New York, New York
July 25, 2012

Sabrina B. Kraus, JHC

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