

Estate of Bikman v 595 Broadway Assoc.

2012 NY Slip Op 31993(U)

July 23, 2012

Supreme Court, New York County

Docket Number: 110942/11

Judge: Joan A. Madden

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. Joan A. Wadden
Justice

PART II

Index Number : 110942/2011
ESTATE OF MINDA BIKMAN
vs.
595 BROADWAY ASSOCIATE
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) _____
Answering Affidavits — Exhibits _____ | No(s) _____
Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the attached memorandum Decision & Order*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUL 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 23, 2012

J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

THE ESTATE OF MINDA BIKMAN, Deceased,
By its Administratrix, CHARLA BIKMAN,

Plaintiff,

Index No. 110942/11

-against-

595 BROADWAY ASSOCIATES,

Defendant.

FILED

JUL 27 2012

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Joan A. Madden, J.:

NEW YORK
COUNTY CLERK'S OFFICE

This action involves the efforts of Charla Bikman, as Administratrix of the estate of her deceased sister, Minda Bikman (Estate), to recover the cost of improvements made to a loft apartment by Minda Bikman from the loft building's owner, defendant 595 Broadway Associates (595 Broadway), pursuant to the Loft Law. In this motion, 595 Broadway moves, pursuant to CPLR 3211 (a) (2) and (7), for an order dismissing the complaint.

I. Background

These matters have traveled a tortuous path. Minda Bikman was a rent-regulated tenant in a loft building owned by 595 Broadway, commencing in 1974. It is alleged that she made improvements to the property that plaintiff maintains are valued at over \$46,000.

Minda Bikman died in 1997. Charla Bikman, Minda's sister,

who is an attorney, commenced residence in the loft apartment,¹ signing her sister's name to rent checks. At some point, 595 Broadway became aware of this illegal arrangement, and brought a proceeding in housing court to oust Charla Bikman.² 595 Broadway obtained a final judgment of possession of the loft, dated May 11, 1999. Not. of Mot., Ex. A. 595 Broadway was also granted a judgment of use and occupancy through April 30, 1999. The proceedings which followed involved Charla Bikman in her individual capacity as putative occupant of the loft.

Charla Bikman appealed the May 11, 1999 judgment. The Appellate Term, First Department, by an order dated May 20, 1999, granted her request for a stay of eviction, predicated on the continued payment of use and occupancy. Based on this order, 595 Broadway moved to restore the holdover proceeding to obtain a determination of the amount of use and occupancy it was due. A hearing was held on July 30, 1999.

Following a hearing, the Housing Court determined, in a decision dated July 30, 1999, and that the fair market value of the loft was \$4,800 per month. *Id.*, Ex. C. The decision was affirmed by the Appellate Term, First Department, in June 2000.

¹It is unclear whether she lived there prior to Minda's death.

²Charla Bikman was eventually suspended from the practice of law for her subterfuge.

Id., Ex. D.³ The decision of the Appellate Term was subsequently affirmed by the Appellate Division, First Department. *Id.*, Ex. E. The loft has since been completely gutted and renovated, and has been rented to a new tenant, presumably at the newly determined legal rent.

595 Broadway obtained a money judgment against Charla Bikman in the sum of \$159,483.90, for back use and occupancy, based on her occupancy of the loft after her sister's death, in light of the fair market value which had been determined for the loft. *Id.*, Ex. F. The sum was later modified by the Civil Court to \$145,346.88, in an October 31, 2003 order. *Id.*, Ex. G. This judgment remains unpaid.

Charla Bikman commenced a declaratory judgment action in Supreme Court, New York County, in 2009, seeking to overturn the October 31, 2003 Civil Court judgment. 595 Broadway moved for summary judgment dismissing the complaint in the action. The complaint was dismissed, and, in decisions dated May 19, 2010, a related motion brought by Charla Bikman in opposition was denied, upon her default, when she failed to appear on the motion. In these decisions, Justice Louis B. York, of this court, also determined that Charla Bikman should not be allowed to bring any further motions regarding these issues without prior judicial

³The Appellate Term, First Department, found no evidence that Charla had ever resided in the loft prior to Minda's death.

approval from the administrative judge. *Id.*, Ex. J.

Charla Bikman moved to vacate the orders on June 9, 2010. While Justice York found that her default was not willful, he nevertheless denied the motion to vacate. Again, Justice York found that it was "appropriate to enjoin [Charla Bikman] from bringing any further actions in the New York State Unified Court System against 595 Broadway with respect to these issues and claims without prior approval of the appropriate administrative judge or justice." *Id.*, Ex J, at 12. This order was affirmed by the Appellate Division, First Department, in a decision dated October 4, 2011. *Id.*, Ex. K.

A separate branch of proceedings, directly related to the within action, involves Charla Bikman as Administratrix of the Estate. While the above actions and motions were proceeding, 595 Broadway, in 2001, brought an abandonment application before the Loft Board, as a result of Minda Bikman's death, which would result in the deregulation of the apartment. The Loft Board, in an order dated January 9, 2003 (*id.*, Ex. M), granted the order of abandonment, but denied any right claimed by Charla Bikman, as the Administratrix of the Estate, to be reimbursed for the value of the improvements to the property which had been made by her sister 30 years previously. The order was affirmed by the Loft Board, in a decision dated May 18, 2006. *Id.*, Ex. N.

The Estate brought an Article 78 proceeding in this court to

[* 6],
vacate the Loft Board ruling. In an order dated March 28, 2007, Justice Emily Jane Goodman, of this court, annulled the decision of the Loft Board, upon a finding that the Estate was entitled to be recompensed for the costs of the improvements to the loft. Reply Aff., Ex. A. Of importance to the present action, Justice Goodman remanded the matter to the Loft Board "for an appraisal of the fixtures and improvements installed and made by the late Minda Bikman in the subject premises." *Id.* at 5.

Judge Goodman's decision was affirmed by the Appellate Division, First Department, and then by the Court of Appeals. In the decision of the Court of Appeals, *Matter of Bikman v New York City Loft Board* (14 NY3d 377 [2010]), the Court ruled, in affirming Justice Goodman, that Multiple Dwelling Law § 286 (6) "permits the estate of a deceased tenant to recoup the value of fixtures and improvements made to the property." *Id.* at 381. Although Justice Goodman had called for the remand of the matter of the value of the fixtures to the Loft Board, the matter was never re-presented to the Loft Board by the Estate, and so, the Loft Board has rendered no opinion on the subject to date.

Instead of bringing the matter back to the Loft Board for consideration, as called for by Justice Goodman, the Estate brings the present action against 595 Broadway, alleging two causes of action, for specific performance, and for interference with contract. 595 Broadway now moves for an order dismissing

this action.

The Estate maintains that it need not bring the matter before the Loft Board, since 595 Broadway has forfeited any right it might have had to challenge the Estate's valuation of the fixtures when 595 Broadway allegedly failed to respond to a document called a Sale of Improvements Disclosure Form (Disclosure Form), which was filed by the Estate with the Loft Board in June 2011.⁴ Opposition, Ex. B. 595 Broadway claims that it requested further documentation from the Estate concerning the method of valuation in the Disclosure Form, in a letter dated June 28, 2011 (Not. of Mot., Ex. Q), but that the Estate never responded. The Estate claims that 595 Broadway asked the Loft Board to reject the Disclosure Form, but that the Loft Board refused.

The Estate now claims that "[t]here is nothing more for the Loft Board to do," as the Estate followed Loft Board regulations by filing the Disclosure Form (Aff. of Bikman, at 5), and 595 Broadway failed to properly respond. The Estate claims that its right to the full \$46,500 that it claims the fixtures cost in the Disclosure Form is now fully "vested" (*id.*), and that there need be no valuation proceeding anywhere. Charla Bikman, as Administratrix, claims that she has the immediate right to the

⁴In the Disclosure Form, Charla represents herself as the "prospective tenant." Opposition, Ex. B, at 4.

[*8]
\$46,500, or that she should be presented with the keys to the loft, in order to purchase the fixtures from the "incoming" (presumably current) occupant, pursuant to Multiple Dwelling Law 286 (6), and Loft Board regulations.

595 Broadway, in moving to dismiss the matter, raises several arguments. It argues (1) that Charla Bikman lacks standing as Administratrix to bring the action; (2) that she failed to obtain permission to bring the present action, as allegedly required by Justice York; (3) that the Loft Board has exclusive jurisdiction over the matter, which cannot be determined here; and (4) that the complaint fails to state a cause of action. 595 Broadway also suggests that any money the Estate obtains in valuation of the fixtures should be set off from the significantly greater judgment 595 Broadway has obtained against Charla in her individual capacity. 595 Broadway also urges that the valuation of the fixtures would take into account depreciation, rendering the value of the no-longer-existing fixtures to zero.

II. Discussion

As a preliminary matter, 595 Broadway assertion that the Estate lacks standing to bring this action based on Charla Bikman's failure to file annual accounts for the Estate, pursuant to the Estates, Powers and Trusts Law (EPTL) is unavailing. The Estate has been recognized as a valid entity, capable of pursuing

an action at law, by several courts, and will not be stripped of that right here. There is no indication that the EPTL prohibits corrective filings of past accounts.

595 Broadway also maintains that Charla Bikman claims to have transferred the Estate's right to the valuation amount from the Estate to herself. There is, however, no proof that this has happened, or that it could be effectuated by Charla Bikman, in any event.

595 Broadway next charges Charla Bikman to account for her failure to obtain permission from the court to bring the current action. However, Justice York's admonition applied to Charla Bikman personally and the action is properly brought in the person of the Estate, against which there has been no prohibition. Therefore, the Estate did not have to seek permission to commence the present action.

595 Broadway next argues that the Loft Board has exclusive jurisdiction over the issues raised herein, as Multiple Dwelling Law § 282 specifies that the Loft Board's jurisdiction includes the "determination of controversies arising over the fair market value of a residential tenant's fixtures or reasonable moving expenses." Thus, 595 Broadway argues that this court has no jurisdiction over the valuation issue. Finally, 595 Broadway references Justice Goodman's decision as the basis for remanding this matter to the agency, as was her specified instruction,

affirmed at both appellate levels.

This court agrees that the Loft Board is the proper forum for the resolution of this dispute. However, it does not agree that the Loft Board has exclusive jurisdiction over the matter. Courts have concurrent jurisdiction with the Loft Board in many particulars. See e.g. *O'Flaherty v Schwimmer*, 158 Misc 2d 420, 423 (Sup Ct, NY County 1993) (“[a] court of competent jurisdiction has concurrent jurisdiction with the Loft Board to hear issues with respect to the Loft Law ...”); see also *Little West 12th Street Realty L.P. v Inconiglios*, 19 Misc 3d 508 (Civ Ct, NY County 2008), *affd* 23 Misc 3d 28 (App Term, 1st Dept 2009). Indeed, it is a general rule that “[u]nless the Legislature has expressed an explicit intention to vest exclusive original jurisdiction in the administrative agency, the court will be held to have concurrent jurisdiction.” *County Dollar Corp. v Douglas*, 160 AD2d 537, 537 (1st Dept 1990). Therefore, this court is not estopped from determining the issues involved herein.

Regardless, the matter should be heard, in the first instance, by the Loft Board. The issue is one of primary jurisdiction.

“The doctrine of primary jurisdiction is intended to coordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective the statutes with which both are concerned ...

[internal quotation marks and citation omitted]." *Wong v Gouverneur Gardens Housing Corp.*, 308 AD2d 301, 303 (1st Dept 2003). "[W]hile concurrent jurisdiction does exist, where there is an administrative agency which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort to a judicial tribunal should be withheld pending resolution of the administrative proceeding.'" *Id.*, quoting *Davis v Waterside Housing Co.*, 274 AD2d 318, 318-319 (1st Dept 2000). The doctrine "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body" *Matter of Neumann v Wyandanch Union Free School District*, 84 AD3d 816, 818 (2d Dept 2011), quoting *Staatsburg Water Co. v Staatsburg Fire District*, 72 NY2d 147, 156 (1988).

The Loft Board is such an administrative body. In fact, the Appellate Division, First Department, has expressly stated that the "fair market value of improvements is a question within the peculiar competence of the Loft Board." *Matter of Perlrose Realty Co. v New York City Loft Board*, 145 AD2d 159, 163 (1st Dept 1989), *affd* 74 NY2d 783 (1989); *see also Matter of Jo-Fra Properties, Inc.*, 27 AD3d 298, 299 (1st Dept 2006) ("[a]ssuming judicial jurisdiction concurrent with the Loft Board, resort to the courts should be withheld in deference to the Loft Board's expertise").

As the Loft Board has special knowledge as to the administration of its regulations concerning valuation of fixtures, it should be the first forum to review such questions as are raised herein. The matter should be directed to the expertise of the Loft Board.

Further, Justice Goodman clearly remanded the matter to the Loft Board, and no court ever reversed that order. The Estate errs in bringing this action when it has failed to comply with Justice Goodman's order, and has yet to approach the Loft Board with the valuation request. For this reason alone, the complaint should be dismissed.

The Estate's response is to refer the court to the Loft Board regulations concerning the filing of the Disclosure Form (found in 29 RCNY 2-07 *et seq.*), and the events surrounding that filing. The Estate argues that, pursuant to 29 RCNY 2-07 (f) (2), the Disclosure Form it served on 595 Broadway acted as "an offer from the prospective tenant to purchase the fixtures and improvements of Minda Bikman for \$46,500." *Bikman Aff.*, at 12. According to the Estate, section 2-09 (f) (3) gives the owner receiving the Disclosure Form 10 days to request additional information, but that the request must contain an affirmation that the loft is currently registered with the Loft Board, language not contained in 595 Broadway's response to the Disclosure Form. The Estate would have this court find 595

Broadway's response "insufficient to toll the time to accept, reject or challenge the fair market value or the suitability of the prospective tenant pursuant to 2-07 (g)." *Id.* at 13.

The Estate cites to 29 RCNY 2-07 (f) (3) as requiring 595 Broadway to "elaborate the grounds" for its denial of the alleged offer contained in the Disclosure Form (Bikman Aff, at 14), which it did not do. The Estate refers to 29 RCNY 2-07 (g) (iii) as requiring an application and payment fee of \$800 for an appraiser to value the fixtures, which again, 595 Broadway did not do.⁵ As a result, the Estate maintains that 595 Broadway can no longer challenge the valuation of the fixtures, and the Loft Board need not be approached. Charla Bikman came to 595 Broadway's offices on August 4, 2011, expecting to receive either the \$46,500, or the keys to the premises. She was turned away.

The Estate has previously, and clearly, been directed by Justice Goodman to approach the Loft Board with the question of valuation. Justice Goodman was, in effect, affirmed twice. This court finds that the Estate cannot circumvent this order by the mere service of the Disclosure Form. Any question as to the propriety of the Disclosure Form, or 595 Broadway's response to it, should be brought before the Loft Board to determine whether the matter of the valuation of the fixtures is affected by these

⁵The court does not find that requirement within section 2-07 (g) (iii).

events.

In addition, whatever the merits of the Estate's claim, based on a technical reading of Multiple Dwelling Law § 286 (6), that it may compel the purchase of the fixtures from the "incoming tenant," this claim is matter that should be addressed by the Loft Board.

So, too, should the question of whether the apartment is still deregulated. In Justice Goodman's decision, she set forth, in the decretal language, that "pending the sale of the fixtures and improvements, the rent for the third floor front unit in 595 Broadway remains regulated pursuant to Article 7-C of the Multiple Dwelling Law." Reply, Ex. A, at 5. The issue of whether the apartment is to be deregulated does not directly impact the Estate, as it is not a tenant in 595 Broadway's building, and, in any event, the matter should be addressed, if at all, by the Loft Board. Further, whether 595 Broadway has been "unjustly enriched" by the deregulation of the loft, as the Estate claims (Bikman Aff., at 16), is not relevant here.

Lastly, whether the value of the fixtures has been affected by depreciation, as 595 Broadway claims, is a matter to take up with the Loft Board.

III. Conclusion

This court concludes that this action should be dismissed, in deference to the jurisdiction of the Loft Board to determine

the valuation of the fixtures, as ordered by Justice Goodman. Further, the Estate cannot bring a cause of action for interference with contract, there being no contract which was interfered with.

Accordingly, it is

ORDERED that the complaint is dismissed, with costs and disbursements to 595 Broadway Associates, as taxed by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

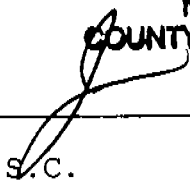
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