

**Matter of Ross v New York State Div. of Hous. &
Community Renewal**

2012 NY Slip Op 32622(U)

October 12, 2012

Supreme Court, New York County

Docket Number: 102506/12

Judge: Alexander W. Hunter Jr

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

PRESENT: ALEXANDER W. HUNTER JP
Justice

PART 33

Ross, David

INDEX NO. 102506/12

MOTION DATE _____

- v -

NYS Div. of Housing

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Staying Housing Court Proceeding

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-7
8-11; 12
13

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

See memorandum decision and judgment annexed hereto.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/12/12

[Signature]
ALEXANDER W. HUNTER JP J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X
In the Matter of the Application of
David Ross and Helen Werngren-Ross

Index No.: 102506/12

Petitioners,

Decision and Judgment

-against-

New York State Division of Housing and
Community Renewal, Arthur Brandt, and Hayim Grant

Respondents.

UNFILED JUDGMENT

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and notice of entry cannot be served based hereon. To
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appear in person at the Judgment Clerk's Desk (Room
141B).

-----X
HON. ALEXANDER W. HUNTER, JR.

The application by petitioners for an order pursuant to C.P.L.R. 5519(c) staying the holdover proceeding, *Hayim Grant and Danielle Grant v. Helen Werngren Ross and David Ross*, Index No. 99237/05, pending a final determination of the petitioners' Article 78 petition, is denied.

Petitioners are the occupants of apartment 2A ("subject apartment") located at 170 East 75th Street, New York, NY ("subject building"). Respondent Arthur Brandt was the former owner of the subject building. Respondent Hayim Grant is the current owner of the subject building. Respondent New York State Division of Housing and Community Renewal ("DHCR") is the agency which regulates rent stabilized housing in New York State.

On April 1, 2005, petitioners filed an overcharge complaint after respondent Brandt refused to renew their lease. In their complaint, petitioners disputed respondent Brandt's assertion that the subject apartment was exempt from rent stabilization. On May 12, 2006, the DHCR Rent Administrator ("RA") issued an order determining that petitioners' apartment was not rent stabilized. Based upon the Certificate of Occupancy, the RA determined that the subject building had a total of only five residential units.

Thereafter, petitioners filed a Petition for Administrative Review ("PAR") challenging the RA's determination. Petitioners alleged that the RA had failed to fully consider the documentary evidence. At petitioners' request, DHCR reopened the proceeding for further review and to conduct an inspection of the subject building. On February 16, 2007, the RA issued an order affirming DHCR's previous order finding that the subject building was exempt from the Rent Stabilization Law because the building contained fewer than six residential units.

For further fact finding, DHCR directed the parties to appear for a hearing before DHCR's Administrative Law Judge ("ALJ") Alan G. Polak to determine if the subject apartment is subject to the Rent Stabilization Law and Code. The notice of the hearing further directed the

parties to submit evidence regarding whether six apartments in the subject building were rented or occupied on or after June 30, 1974. The hearing was held over the course of sixteen days beginning on September 9, 2008. Both parties were represented by counsel. At the close of the hearing, the ALJ determined that apartment 1A was either vacant, used separately for commercial purposes, or used in conjunction with the garden level duplex. The ALJ also found that apartment 1A may have been used as a residence from August 1987 to November 1988, without the owner's consent. Consequently, the ALJ recommended that the DHCR's Commissioner find that there were only five residential units in the subject building.

On February 19, 2012, DHCR's Commissioner issued a PAR order adopting the ALJ's findings and recommendation. DHCR's PAR order determined that the subject apartment was not subject to rent stabilization and petitioners' PAR was denied.

Petitioners argue that they are entitled to a stay because: 1) petitioners have a strong likelihood of success on the merits of the "Article 78 appeal"; 2) petitioners will suffer irreparable harm if the stay is not granted; 3) respondent Grant will not be unduly prejudiced if a stay was granted; and 4) the Article 78 proceeding will have been fully submitted by August 17, 2012.

Petitioners assert that they will likely succeed on the merits because DHCR's final determination was arbitrary and capricious and was not supported by substantial evidence. Petitioners further assert that the hearing violated their due process rights since material evidence was improperly excluded, improper hearsay evidence was admitted and their request to have altered evidence examined by an expert was improperly denied.

Specifically, petitioners aver that six credible and disinterested witnesses testified that apartment 1A was occupied residentially at various times during 1975 to 1993. Petitioners maintain that Brandt's witnesses failed to rebut the evidence which established that apartment 1A was used residentially. It was also established that Jane Demetro responded to a newspaper advertisement placed by Brandt for a "live-work" space and resided in apartment 1A from August 1987 through November 1988 and utilized the unit as a "live-work" space. However, petitioners assert that the ALJ inexplicably found that Ms. Demetro's use of apartment 1A was without Brandt's knowledge or consent.

Petitioners argue that if a stay is not granted, they will be irreparably harmed in the following ways: 1) their names will appear on the "Tenant Screening Bureau"; 2) a "final judgment" will be listed on their credit reports; 3) they will lose the subject apartment; and 4) they will lose their right to appeal. In addition, petitioners assert that neither respondent Grant or respondent Brandt will suffer any prejudice since petitioners have continued to pay use and occupancy. As to respondent Grant, petitioners argue that he will not be unduly prejudiced since he has previously indicated that he cannot begin renovations until after two remaining commercial tenants vacate the subject building on November 30, 2012.

Due to the fact that respondent Grant cannot commence renovations to the subject building until after the expiration of two remaining commercial leases, petitioners maintain that there is no need to post a bond. In fact, petitioners assert that respondent Grant is benefitting from the continued receipt of use and occupancy payments from petitioners pending the determination of the Article 78 petition. Therefore, petitioners argue that the undertaking should be set at the amount of use and occupancy payments being paid to respondent Grant.

Respondent DHCR neither opposes nor consents to petitioners' application to stay the related holdover proceeding pending a final determination of the Article 78 proceeding. However, DCHR asserts that its PAR order determining that the subject apartment is not rent stabilized was rational and supported by the substantial evidence in the record.

Respondent Grant argues that petitioners erroneously moved for a stay pending an appeal pursuant to C.P.L.R. 5519(c) instead of moving for a preliminary injunction to stay proceedings in an action to recover real property pursuant to C.P.L.R. 6312(a) and (b)(2). As such, respondent Grant asserts that petitioners' application is defective and should be denied in its entirety.

Respondent Grant also asserts that petitioners have failed: 1) to show that it is likely to succeed on the merits of its underlying Article 78 claim; 2) to show how it will be harmed without the granting of injunctive relief; and 3) to show that the balance of the equities tips in its favor. Respondent Grant argues that DHCR's determination was based upon a thorough evaluation of substantial evidence in the area of its expertise. Therefore, DHCR's determination is to be afforded great deference and weight. Furthermore, the irreparable harm that petitioners claim that they will suffer is speculative and not imminent. Finally, respondent Grant has been harmed and will continue to suffer harm if petitioners are permitted to further delay the holdover proceeding.

As to the posting of a bond, respondent Grant argues that C.P.L.R. 6312(b) reads in pertinent part that: "...prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court." In his affidavit, respondent Grant asserts that if the housing court proceeding is stayed, he and his wife will incur damages in the amount of \$209,000.00, which includes carrying charges for the subject building, the difference between the use and occupancy charges being paid by petitioners and the current market rent for the subject apartment, and attorney's fees. Therefore, respondent Grant argues that petitioners should be required to post a bond in an amount no less than \$209,000.00.

In reply, petitioners assert that contrary to respondent Grant's arguments, he cannot begin renovations to the subject building until after the two commercial tenants vacate the subject building. Moreover, respondent Grant would incur carrying charges regardless of whether the stay is granted. As such, there would be no prejudice to respondent Grant if the stay was granted. Petitioners also argue that an Article 78 proceeding is an appeal of an administrative determination and respondent Grant has offered no support for his claim that petitioners' motion

[* 5]
pursuant to C.P.L.R. 5519(c) is defective.

This court received no papers in opposition from respondent Brandt.

A hearing was held before this court on September 6, 2012. All parties appeared on that date for oral arguments concerning the merits of petitioners' application for a stay as well as the instant Article 78 petition. After extensive arguments, this court issued a directive stating that the housing court proceeding should continue subject to a stay of execution of the warrant. This court further indicated that a stay of the housing court proceeding, which has been ongoing for the past seven years, would be prejudicial to respondent Grant.

Accordingly, it is hereby

ADJUDGED that petitioners' application for an order staying the related holdover proceeding is denied.

Dated: October 12, 2012

ENTER:



J.S.C.

ALEXANDER W. HUNTER JP

UNFILED JUDGMENT

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