

Dixon v 105 W. 75th St. LLC

2015 NY Slip Op 30529(U)

April 13, 2015

Supreme Court, New York County

Docket Number: 159846/2014

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ Justice

PART 13

BENJAMIN DIXON, Plaintiffs, INDEX NO. 159846/2014, MOTION DATE 04-01-2015, MOTION SEQ. NO. 001, MOTION CAL. NO.

105 WEST 75TH STREET LLC, NUNZIO RUGGIERO, RUGGIERO REALTY MANAGEMENT CORP., ANGELA RUGGIERO, GINA PATE and DIME SAVINGS BANK OF WILLIAMSBURGH, Defendants.

The following papers, numbered 1 to 5 were read on this motion to dismiss.

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] No

Upon a reading of the foregoing cited papers, it is ordered that this motion to dismiss the Complaint as against the moving defendants is granted.

This is an action for a declaratory judgment, injunctive relief, lease reformation, rent overcharge, fraud and attorney's fees. Benjamin Dixon rented apartment 5B (herein "apartment") at 105 West 75th Street, New York, N.Y. (herein "Building") from defendants 105 West 75th Street LLC, Nunzio Ruggiero, Ruggiero Realty Management Corp., Angela Ruggiero and Gina Pate (herein "Moving Defendants") pursuant to a lease dated April 4, 2013 (herein "Lease").

Prior to renting the Apartment to plaintiff, the Moving Defendants rented the Apartment to Melly Garcia pursuant to a two-year rent stabilized lease in August 1992. Garcia renewed the lease seven times, and vacated the Apartment in July 2002, and the Apartment remained vacant throughout 2003. The adjoining apartment also became vacant in September 2003. The Moving Defendants decided to make an addition to both the Apartment and the adjoining apartment thereby making both apartments duplex apartments.

A new Certificate of Occupancy (herein "C of O") was issued by the New York City Department of Buildings (herein "DOB") on May 2, 2007, but the new C of O incorrectly listed that the Building had nine (9) residential units instead of ten (10) units as the

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

Building had always contained ten (10) units. After submitting the necessary papers to the DOB, the DOB issued a new C of O on November 3, 2014. The Moving Defendants failed to file an exit registration with the New York State Division of Housing and Community Renewal (herein "DHCR") indicating that the Apartment was no longer subject to rent stabilization. On August 14, 2014, the Moving Defendants filed an Annual Apartment Registration Form with the DHCR for the year 2005 indicating that the Apartment had been rented at fair market value from May 21, 2004 through May 31, 2005. The Moving Defendants stated on the Registration Form that they conducted Major Capital Improvements (herein "MCI") on the Apartment and that the Apartment was a "new duplex apartment" due to a penthouse and terrace being "added to the apartment making it a new duplex apartment with terrace entitling owner to a first rent" (see Moving Papers, Exhibit P).

Dixon alleges that the Apartment is still governed by the rent stabilization laws due to the 2007 error in the DOB C of O and the Moving Defendants' failure to properly file the necessary paperwork with the DHCR, thereby removing the Apartment from rent stabilization regulations. Dixon seeks the difference between the fair market value rent and the rent stabilized rent from the commencement of the Lease, treble damages, legal fees and costs, that the Apartment be declared rent stabilized and that the Lease be reformed to reflect the rent stabilized monthly rent of \$1,117.00.

The Moving Defendants move, pre-answer, pursuant to CPLR 3211(a)(1) to dismiss the complaint based on a defense founded upon documentary evidence. In support, the Moving Defendants annex the Lease; the Garcia lease and lease renewals; the DHCR Annual Apartment Registration Forms from 1993 through 2003; a report from the DHCR listing the Apartment as vacant from 2005 through 2014; the architectural drawings for the proposed addition to the Apartment approved by the Landmark Preservation Commission; the work permit issued by the DOB; the invoices paid by the Moving Defendants to the general contractor and plumber along with cancelled checks reflecting said payments; the 2007 and 2014 C of O's issued by the DOB; the "No Work" work permit issued by the DOB in 2014 showing the proposed correction of the C of O to reflect ten (10) apartments along with the corrected C of O; and the 2014 late filing of the DHCR Annual Apartment Registration Form for the year 2005.

In order to dismiss an action on documentary evidence, the documentary evidence must unequivocally contradict plaintiff's factual allegations and conclusively establish a defense as a matter of law, resolve all factual issues and conclusively dispose of plaintiff's claim (*Goshen v. Mutual Life Insurance Company of New York*, 98 N.Y.2d 314, 774 N.E.2d 1190, 746 N.Y.S.2d 858[2002]; 511 West 232nd Owners Corp., v. Jennifer Realty Co., 98 N.Y.2d 144, 773 N.E.2d 496, 746 N.Y.S.2d 131 [2002]; *Fortis Financial Services v. Fimat Futures USA*, 290 A.D.2d 383, 737 N.Y.S.2d 40 [1st. Dept. 2002]).

"[W]here an owner substantially alters the outer dimensions of a vacant housing accommodation, which qualifies for a first rent equal to or exceeding the applicable amount qualifying for deregulation, as provided in this subdivision, exemption pursuant to this subdivision shall apply" (see Section 2520.11(r)(10) of Rent Stabilization Code). A housing

accommodation that becomes vacant on or after June 19, 1997 but before June 24, 2011, with a legal regulated rent of \$2,000 or more per month is no longer regulated under the Rent Stabilization Code (see Section 2520.11[r][4]). An exemption applies regardless of whether the next tenant in occupancy or any subsequent tenant in occupancy is charged or pays less than the applicable amount qualifying for deregulation (see Section 2520.11[r][6]).

Section 2522.4(a)(1) entitles the owner to a rent increase due to an increase in dwelling space or improvements to the dwelling. Consent of the tenant shall not be required where the subject housing accommodation is vacant. Subdivision (4) states that “[p]rior to September 24, 2011, the increase in the monthly stabilization rent for the affected housing accommodations when authorized pursuant to paragraph (1) of this subdivision shall be 1/40 th of the total cost, including installation but excluding finance charges.

The documentary evidence annexed by the Moving Defendants utterly refute the assertions made by Dixon in the Complaint. The Moving Defendants have shown that the Apartment was vacant prior to the renovations, and was a newly created duplex apartment which did not previously exist. The C of O prior to the work being conducted shows that no roof-top livable space existed, nor was there a duplex apartment. The DOB work permits and subsequent C of O’s show that the Moving Defendants created additional livable space. This newly created Apartment entitled the Moving Defendants to “first rent” without rent stabilization restrictions.

Further, the invoices and cancelled checks made payable to the general contractor and plumber show that the Moving Defendants spent approximately \$200,000.00 in renovation costs. These renovation costs entitled the Moving Defendants to increase the rent by one-fortieth of the total renovation costs per apartment. This increase raised the legal rent in the Apartment to well over \$2,000 per month which is the threshold amount required to remove the Apartment from rent stabilization restrictions.

Section 19(A)(5) of the Lease entitles the Moving Defendants to reimbursement of any legal fees and expenses incurred in defending this action (see Moving Papers, Exhibit R).

Accordingly, it is hereby ORDERED, that this motion by defendants 105 West 75th Street LLC, Nunzio Ruggiero, Ruggiero Realty Management Corp., Angela Ruggiero and Gina Pate is granted in its entirety, the Complaint is dismissed as against these defendants, and it is further,

ORDERED, that the causes of action asserted by plaintiff against defendants 105 West 75th Street LLC, Nunzio Ruggiero, Ruggiero Realty Management Corp., Angela Ruggiero and Gina Pate are hereby severed and dismissed, and it is further,

ORDERED, that within 10 days from the date of entry the moving defendants serve a copy of this Order with Notice of Entry upon all parties, and upon the General Clerk's Office (Room 119), and it is further,

ORDERED, that there be an inquest at the time of trial as to the amount of reasonable costs and attorneys fees owed by plaintiff Benjamin Dixon to the moving defendants 105 West 75th Street LLC, Nunzio Ruggiero, Ruggiero Realty Management Corp., Angela Ruggiero and Gina Pate in defending this action, and it is further,

ORDERED, that within thirty (30) days from the date of service of a copy of this Order with Notice of Entry, defendant Dime Savings Bank of Williamsburgh serve and file an Answer to the Complaint, and it is further,

ORDERED, that the Clerk of the Court enter judgment accordingly.

ENTER: **MANUEL J. MENDEZ**
J.S.C.

Dated: April 13, 2015



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE