25 Broad St. L/Cal LLC v Bransford
2015 NY Slip Op 30873(U)
May 20, 2015
Sup Ct, New York County
Docket Number: 157206/13
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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25 BROAD STREET L/CAL LLC,

Index No.: 157206/13

Plaintiff,

-against-

THOMAS L. BRANSFORD and PATRICIA S. BRANSFORD,

DECISION/ORDER

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

In this action, plaintiff 25 Broad Street L/Cal LLC ("plaintiff" or "25 Broad") seeks a judgment declaring: (1) that defendants Thomas L. Bransford and Patricia S. Bransford (together, "defendants") were month-to-month tenants of a residential apartment owned by plaintiff, known as unit 8I2 (the "Apartment"), located at 25 Broad Street, New York, New York (the "Building"); (2) that defendants' tenancy was properly terminated by plaintiff; and (3) issuing an order ejecting defendants from the Apartment; and (4) awarding plaintiff a monetary judgment for defendants' use and occupancy of the Apartment from the termination of defendants' tenancy until a final determination of the action, as well for plaintiff's legal fees, costs and disbursements.

In motion sequence number 001, plaintiff moves for an order, pursuant to CPLR 3126 (3), striking defendants' answer, dated September 24, 2013 (the "Answer"), based upon their alleged willful and bad faith non-disclosure in contravention of court-ordered discovery; and, upon striking the Answer, setting the matter down for an inquest on a date certain; or, in the alternative, granting a conditional order striking the Answer if defendants fail to comply with

plaintiff's discovery demands and this Court's preliminary conference order, dated February 24, 2014 (the "PC Order"), by a date certain.

In motion sequence number 002, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the action and declaring that defendants are Rent-Stabilized tenants of the Apartment.

Plaintiff's Motion to Strike the Answer (motion sequence number 001)

Plaintiff seeks an order striking the Answer on the ground that defendants willfully failed to comply with its discovery requests. However, after plaintiff filed the instant motion, on May 12, 2014, a compliance conference was held, wherein a compliance conference order was issued which extended defendants' time to respond to discovery in this action to June 12, 2014 (the "Compliance Conference Order"). Thereafter, on June 12, 2014, defendants filed this summary judgment motion (motion sequence number 002), seeking dismissal of the action, as well as a declaration that they are Rent-Stabilized tenants of the Apartment.

Plaintiff's motion for an order striking the Answer is denied. The filing of defendants' summary judgment motion stayed discovery in this action pending a determination of said motion. Defendants were permitted to file their summary judgment motion notwithstanding plaintiff's argument that defendants' filing of said motion was merely a "ploy to avoid court-ordered discovery."

Defendants' Motion For Summary Judgment Dismissing The Action And Declaring That They Are Rent-Stabilized Tenants of the Apartment (motion sequence number 002)

By purchase agreement, dated February 21, 2007, defendants entered into a contract (the "February 21, 2007 Contract") to purchase the Apartment from plaintiff's predecessor-in-interest

(the "Previous Owner" or "Sponsor"). The February 21, 2007 Contract was conditioned upon a plan to convert the Apartment into a condominium. Pursuant to an interim lease agreement, dated October 19, 2007 (the "2007 Interim Lease" or "Initial Interim Lease"), defendants took possession of the Apartment pending closing. The language located at the top of the 2007 Interim Lease stated, "THIS LEASE AND THE APARTMENT ARE NOT SUBJECT TO RENT STABILIZATION, RENT CONTROL OR ANY OTHER RENT REGULATION" (Defendants' Notice of Motion, Exhibit "E," the 2007 Interim Lease). Thereafter, the Previous Owner abandoned the initial offering plan and pursued a new offering plan.

In connection with the new offering plan, defendants signed another contract with the Previous Owner, dated June 3, 2008 (the "June 3, 2008 Contract"). Pursuant to the June 3, 2008 Contract, defendants were required to vacate the Apartment and move into a hotel in the vicinity for a period to last not longer than four weeks. At the end of the vacancy period, defendants were entitled to return to the Apartment as tenants, residing therein pursuant to an interim lease for $1,500 a month for a limited period.

It should be noted that, for the first time in their reply, defendants put forth an unsigned and undated 2008 interim lease and rider (the "2008 Interim Lease"). At the top of the 2008 Interim Lease, it is stated that "THIS LEASE AND THE APARTMENT ARE NOT SUBJECT TO RENT STABILIZATION, RENT CONTROL OR ANY OTHER RENT REGULATION" (Defendants' Reply, Exhibit "A," the 2008 Interim Lease).[1]

[1] In a stipulation, dated October 27, 2014, the parties stipulated that "[defendants'] presentation of [the 2008] interim lease annexed as Exhibit A to [defendants'] reply affirmation dated 7/11/14 does not result in a procedural dismissal [without] prejudice for failure to annex said document on initial moving papers . . .. Mr. Kassenoff's supplemental reply dated 7/15/14 is accepted as further opposition to [defendants'] summary judgment motion."

Eventually, the Previous Owner abandoned the second offering plan. As such, defendants were never able to purchase the Apartment, although they remained in possession of the Apartment as tenants. In 2011, Thomas D. Gagliano, a receiver who managed the Building for the Previous Owner (the "Receiver"), registered the Apartment as Rent-Stabilized with the Division of Housing and Community Renewal (the "DHCR"), inasmuch as the Building was subject to real estate tax abatement benefits under the Real Property Tax Law § 421-g program. It is undisputed that the Building and the Apartment were subject to Rent Stabilization at the time the Sponsor and defendants entered into the October 19, 2007 Interim Initial Lease due to receipt of said tax abatements (Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, at p.4, footnote 2). Plaintiff took ownership of the Apartment by a deed, dated May 23, 2012.

By a "THIRTY (30) DAY NOTICE OF TERMINATION," dated May 21, 2013 (the "Notice of Termination"), plaintiff notified defendants that it was electing "to terminate defendants' month-to-month tenancy and all other rights of occupancy of the Premises now held by [them] under monthly hiring" (Defendants' notice of motion, Exhibit "H," Notice of Termination). The Notice of Termination also stated:

> "**PLEASE TAKE FURTHER NOTICE,** that unless you quit, vacate and surrender possession of the Premises to the Landlord on or before **June 30, 2013**, the day on which your term expires, that being at least thirty (30) days from the date of service of this notice upon you, the Landlord will commence an action or summary proceedings to remove you from the Premises for the holding over after the expiration of your term, and will demand the value of your use and occupancy of the Premises during such holding over"

(*id.*).

Summary Judgment Standard

The movant has the initial burden of proving entitlement to summary judgment. (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985].) Once the movant has provided such proof, in order to defend the summary judgment motion the opposing party must "show facts sufficient to require a trial of any issue of fact." (CPLR § 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Freedman v Chemical Construction Corp.*, 43 NY2d 260 [1977]; *Spearmon v Times Square Stores Corp.*, 96 AD2d 552 [2d Dept 1983].) "It is incumbent upon a [litigant] who opposes a motion for summary judgment to assemble, lay bare and reveal [his, her, or its] proof, in order to show that the matters set up in [the complaint] are real and are capable of being established upon a trial." (*Spearmon*, 96 AD2d at 553 [quoting *Di Sabato v Soffes*, 9 AD2d 297, 301 (1st Dept 1959)].) If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of fact exists. (*Kuehne & Nagel, Inc. v F.W. Baiden*, 36 NY2d 539, 543-544 [1975].)

Abandonment of the Offering Plan

Defendants move for summary judgment seeking to dismiss this action and for a declaration that they are Rent-Stabilized tenants of the Apartment. Initially, it should be noted that defendants took possession of the Apartment under an Initial Interim lease pending the Previous Owner's condominium offering plan being declared effective. It is undisputed that the Previous Owner abandoned the offering plan. Pursuant to Rent Stabilization Code § 2522.5

(h) (4) (ii), when the offering plan was abandoned, defendants would remain Rent Stabilized tenants if the Apartment was otherwise subject to the Rent Stabilization Code.

Interplay of Tax Benefits and Rent Stabilization

The City of New York provides various programs under the Administrative Code of the City of New York § 11-243, previously called "J-51", and Real Property Tax Law ["RPTL"] § 421, to property owners who must complete certain improvements to multiple dwellings in order to qualify for tax exemptions and abatements (*Gersten v 56 7th Avenue LLC*, 88 AD3d 189, 194 [1st Dept 2011]). "In exchange for receiving such benefits, the landlords subject their properties to the RSL (Administrative Code § 11-243). Accordingly, units not otherwise subject to rent stabilization become rent stabilized [pursuant to the New York City Rent Stabilization Law - NYC Admin. Code § 26-504 (c)]." (*id.*)

The tenants would not remain Rent Stabilized if the landlords provided the tenants with requisite notice in each lease and renewal thereof informing the tenants that the subject premises "will be deregulated upon the termination of the benefit...[pursuant to] Rent Stabilization Code (RSC)[9 NYCRR § 2520.11[o].)" (*id.*) However, if the landlords fail to provide the tenants with the requisite notice in each lease and renewal, the "occupied units remain subject to rent stabilization until a vacancy occurs after the expiration" of the benefits" (*id.*); (*Lomango v DHCR*, 38 AD3d 897 [2d Dept 2007]) ("While the abatement period has now expired, there is no indication that the tenants were given the requisite notice of its expiration, and therefore the apartments are still subject to rent stabilization").

As with J-51 benefits, RPTL § 421-g provides that the "rents of each dwelling unit in an eligible multiple dwelling shall be fully subject to control [rent regulation]... for the entire period

for which the eligible multiple dwelling is receiving benefits...." It continues, "such rents shall continue to be subject to control [rent regulation]... [unless] the landlord has included in each lease and renewal thereof for such unit for the tenant in residence at the time of such decontrol [removal of rent regulation] a notice in at least twelve point type informing such tenant that the unit shall become subject to such decontrol upon the expiration of benefits pursuant to this section." (*id*).

In other words, a landlord has an obligation to include, in each lease and renewal thereof, notice to the tenants advising as to when the apartment shall become deregulated due to the expiration of tax abatement benefits. The failure of such notice results in the tenants in possession remaining subject to rent regulation until said tenants vacate the apartment, notwithstanding the expiration of tax benefits. (*Gersten v 56 7th Avenue LLC*,; *Lomango v DHCR, supra*).

In this case, it is clear that the Building and the Apartment were subject to Rent Stabilization by virtue of receipt of tax exemption and/or abatement benefits under the RPTL § 421-g program prior to the occupancy of defendants. As part of their *prima facie* case, defendants averred that none of the leases or renewals contained the aforementioned requisite language advising them that the Apartment was Rent Stabilized, and would subsequently become deregulated due to the expiration of tax abatement benefits on a date certain as set forth in RPTL § 421-g. Therefore, as argued by defendants, in order for plaintiff to escape the applicability of Rent Stabilization, plaintiff must lay bare and reveal its proof in opposition to the summary judgment motion, and at the very least controvert the defendants' allegations by attesting

to and/or proffering a lease and any renewal thereof that expressly advised defendants that deregulation would occur upon the expiration of the tax abatement period. (*Di Sabato v Soffes*, 9 AD2d 297, 301).

A review of the 2007 Interim Lease and Rider not only demonstrates that the Previous Owner failed to include the above required language, but it unequivocally declared that the Apartment was not subject to Rent Stabilization even though it was clearly regulated by virtue of receipt of tax abatement benefits under the RPTL § 421-g. (See Exhibit "E" to the notice of motion, and Exhibit "C" and "D" to the opposition papers). This initial failure to include the requisite language in the 2007 Interim Lease and Rider effectively subjected the Apartment to Rent Stabilization until such time as defendants voluntarily vacate the Apartment. It is uncontroverted that defendants have been in continuous occupancy of the Apartment except for a brief temporary period as set forth in June 3, 2008 Contract. As further proof that defendants remained in possession of the Apartment after the execution of June 3, 2008 Contract, in 2011 the Receiver registered the Apartment as Rent-Stabilized with the DHCR, and confirmed that defendants were tenants of record from October 1, 2007 with no expiration period.

Defendants also proffered an unsigned and undated 2008 Interim Lease. (Exhibit "A" to Defendants' Reply). As the 2008 Interim Lease is unsigned and undated, it is not effective and has no probative value (*see* NY GOL 5-703 (2); *R.S.A. Distribs. v Milford Plaza Assoc.*, 209 AD2d 329, 329 [1st Dept 1994] [as the lease was not signed by the lessor, it never became effective]). Indeed, plaintiff acknowledged that it does not have in its possession a second 2008 Interim Lease as plaintiff's senior vice-president, Seth Landau ("Landau") averred that a "careful review of the records received by Plaintiff when it purchased the Building does not provide a

second interim lease between Sponsor and Defendants..." (Landau Affidavit, sworn to on June, 2014, at ¶26). Even if the 2008 Interim Lease were effective, it would not negate the fact that the 2007 Interim Lease and Rider did not include the necessary language advising defendants of the deregulation of the Apartment.

Plaintiff argues that this Court should ignore the statutory and decisional authority requiring the landlord to provide the tenant with requisite notice in each lease and renewal thereof because defendants had actual notice of the tax abatement expiration period from reviewing the Condominium Offering Plan ("Offering Plan")(Exhibit "A" to the opposition papers). Upon close review of the Offering Plan, there are two different dates specified for two different tax exemption and abatement periods running through fiscal years 2009/2010 and 2011/2012 (*id.* at pp. ix, 134). Even if this Court were to accept plaintiff's argument that the Offering Plan would be a substitute for the requisite language in the lease and renewal, the above confusing and imprecise statements as to multiple expiration periods which would require further due diligence and effort certainly does not suffice as the requisite language to deregulate the Apartment. Plainly stated, a landlord must provide a tenant with a clear and precise date of termination of the tax benefits.

The very purpose behind the statutory notice to the tenant is frustrated when the landlord informs the tenant that the unit is not subject to Rent stabilization when, in fact, it is regulated for the entire period of the tax exemption and abatement[2]. "The purpose of the notice pursuant to

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[2] Plaintiff's argument is internally inconsistent because plaintiff's contend that defendants should have been on notice that the Apartment would be deregulated at the expiration of tax benefits from reviewing the Offering Plan, even though the 2007 Interim Lease incorrectly stated that the Apartment was not Rent Stabilized. If the Apartment was not Rent Stabilized, then no deregulation would be required.

Administrative Code § 26-504 (c) is to alert tenants, before entering a lease or lease renewal for a unit they assume to be rent stabilized, that after the tax benefits to the premises expire, the tenants may be subject to market rents and evicted for reasons prohibited by the rent stabilization law" (*Spaeda v Bakirtjy*, 560, 561 [Civ Ct, NY 2000] *affd* 189 Misc 2d 222 [App Term, 1st Dept 2001). It should be noted that, while there is language in the various interim leases stating that the Apartment is not subject to rent regulation, such language is unenforceable, as it is well settled that the protections of the Rent Stabilization Code cannot be waived (*390 W. End Assoc. v Harel*, 298 AD2d 11, 16 [1st Dept 2002]).

Summary Judgment is Not Premature

Although plaintiff requests that this Court defer its ruling on defendants' summary judgment motion pending the completion of discovery pursuant to CPLR 3212 (f), it has failed to establish that "facts essential to justify opposition may exist but cannot [now] be stated" (*Maysek & Moran v Warburg & Co.*, 284 AD2d 203, 204 [1st Dept 2001] ["(t)he mere hope that further disclosure might uncover evidence likely to help its case did not provide the IAS court a basis to postpone decision of defendants' summary judgment motion pursuant to CPLR 3212 (f)"]; *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000] ["A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence"]).

Plaintiff argues that it needs further discovery regarding the 2008 Interim Lease. As stated above, the 2008 Interim Lease was not considered herein for various reasons, and is unnecessary in light of this Court's ruling concerning the 2007 Interim Lease and Rider. *Assuming arguendo* that 2008 Interim Lease is significant, both defendants and plaintiff have

effectively conceded that they have conducted a diligent search and do not possess such a signed second interim lease obviating any further discovery as to the same.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that plaintiff 25 Broad Street L/Cal LLC's motion (motion sequence number 001), pursuant to CPLR 3126 (3), for sanctions against defendants Thomas L. Bransford and Patricia S. Bransford, including the striking of defendants' answer, dated September 24, 2013, is denied; and it is further

ORDERED that defendants' motion (motion sequence number 002), pursuant to CPLR 3212, for summary judgment dismissing the action and declaring that defendants are Rent-Stabilized tenants of an apartment known as unit 8I2, located at 25 Broad Street, New York, New York, is granted, and the action is dismissed as against defendants; and it is further

ORDERED, ADJUDGED and DECLARED that defendants are Rent-Stabilized tenants of an apartment known as unit 8I2, located at 25 Broad Street, New York, New York, for a period until such time as defendants vacate said Apartment.

The clerk shall enter a judgment accordingly. This order constitutes the decision, order and judgment of the court.

Dated: May 20, 2015

ENTER:

J.S.C.

SHLOMO S. HAGLER, J.S.C.