517 W. 212 St LLC v Musik-Ayala
2018 NY Slip Op 30736(U)
March 16, 2018
Civil Court of the City of New York, New York County
Docket Number: 61607/2017
Judge: Jack Stoller

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

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517 WEST 212 ST LLC,

Petitioner,

Index No. 61607/2017

- against -

DECISION/ORDER

ISAIAH MUSIK-AYALA,

Respondent.

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Present: Hon. Jack Stoller
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion.

Papers	Numbered
Notice Of Motion and Supplemental Affirmation Annexed...	1, 2
Notice of Cross-Motion and Supplemental Affirmation Annexed	3, 4
Affirmation in Opposition	5
Reply Affirmation	6

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

517 West 212 St. LLC, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Isaiah Musik-Ayala, the respondent in this proceeding ("Respondent"), seeking possession of 517 West 212th Street, Apt. 3C, New York New York ("the subject premises") on the ground that Respondent's lease expired and that no regulation requires Petitioner to renew Respondent's lease. By an order dated December 1, 2017 ("the Order"), the Court denied Petitioner's motion for summary judgment, granted Respondent's motion for summary judgment, which had the effect of dismissing Petitioner's cause of action against Respondent, and granted Petitioner's motion to dismiss Respondent's counterclaim. Respondent now moves to reargue. Petitioner now moves to reargue and renew. The Court

consolidates these motions for resolution herein.

The Court dismissed Respondent's counterclaim against Petitioner for rent overcharge because the Court found that the evidence on the motion practice showed that Respondent's rent was not higher than the legal regulated rent on the base date. Respondent now moves to reargue on the basis that an increase in rent after the base rent renders the current rent an overcharge. Respondent concedes in his motion papers that the parties never briefed this particular ground upon which to claim an overcharge.[1]

Newly-asserted legal arguments do not constitute proper grounds to reargue pursuant to CPLR §2221. Hyundai Corp. v. Republic of Iraq, 20 A.D.3d 56, 59 n.2 (1st Dept. 2005), *appeal withdrawn*, 6 N.Y.3d 808 (2006). Reargument does not provide opportunity to advance arguments different from those made on original motion. Matter of Setters v AI Props. & Devs. (USA) Corp., 139 A.D.3d 492 (1st Dept. 2016). The Court notes that Respondent was opposing Petitioner's motion for summary judgment, which compels Respondent to "lay bare" his proof opposing the motion, Rodriguez v. City of N.Y., 142 A.D.3d 778, 788 (1st Dept. 2016), thus demonstrating that Respondent should have raised this issue in opposition to the motion. Accordingly, the Court denies Respondent's motion to reargue.

Petitioner similarly makes a number of arguments that it did not make on the original practice, although Petitioner attempts to avoid the prohibition on raising new arguments on a motion to reargue by characterizing them as a part of a renewal motion. However, renewal is a vehicle by which to introduce to facts on a record of motion practice, not new arguments. CPLR

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[1] See Affirmation in Support of Respondent's motion to reargue, paragraph 4.

§2221(e)(2). Renewal is also not a second chance freely given to parties who did not exercise due diligence in making their first presentation. Matter of Setters, supra, 139 A.D.3d at 492, Mike, supra, 56 A.D.3d at 358. Finally, a motion to renew must be supported by a "reasonable justification" for a failure to make a prior submission, CPLR §2221(e)(3), which Petitioner does not provide.

Even if the Court considered Petitioner's new arguments on their merits, however, Petitioner's motion would fail. Petitioner's cause of action against Respondent relies on the proposition that the subject premises is not subject to the Rent Stabilization Law. While the tenant prior to Respondent was subject to the Rent Stabilization Law, Petitioner had taken the position that it effectuated a deregulation of the subject premises by raising the legal regulated rent above a statutory threshold. In the Order, the Court held that the legal regulated rent prior to the vacatur of the prior tenant did not exceed the statutory threshold as required by N.Y.C. Admin. Code §26-511(c)(14) when a landlord charges that prior tenant a preferential rent, as was the case with the prior tenant. Petitioner's motion raises a number of constitutional challenges to the statute and/or the Court's interpretation of the statute.

Petitioner argues that N.Y.C. Admin. Code §26-511(c)(14) violates Article I, Section 10 of the Constitution, which proscribes states from enacting laws impairing contractual obligations. An initial inquiry as to whether a statute runs afoul of this clause contains three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial. Am. Econ. Ins. Co. v. State of N.Y., 30 N.Y.3d 136, 150 (2017). The leases between Petitioner and Respondent demonstrate that the

parties are in a contractual relationship with one another. Vt. Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004). Legislation which adds new terms and conditions to existing contracts impairs the obligation of such contracts. Bon-Air Estates, Inc. v. Bldg. Inspector of Ramapo, 31 A.D.2d 502, 508 (2nd Dept. 1969), Carder Realty Corp. v. State, 260 A.D. 459, 466 (3rd Dept. 1940). As N.Y.C. Admin. Code §26-511(c)(14) adds a new condition to the lease the parties entered into, such as to render Respondent subject to the Rent Stabilization Law, it does "impair" the contractual obligation. What remains for the Court to determine is whether the impairment is substantial.

States may exercise powers for the general good of the public, although contracts previously entered into between individuals may thereby be affected, even to the point of impairment. Grove Hill Realty Co. v. Ferncliff Cemetery Asso., 7 N.Y.2d 403, 409 (1960). If the legislation addresses a legitimate end, such as preventing an "economic wrong," Pecora v. Cerillo, 207 A.D.2d 215, 218-19 (2nd Dept. 1995), and the measures taken are reasonable and appropriate to that end, the statute is constitutional, even though if it interferes with rights established by existing contracts. Crane Neck Ass'n v. N.Y.C./Long Island Cty. Servs. Grp., 61 N.Y.2d 154, 167 (1984), In re Dep't of Bldgs., 14 N.Y.2d 291, 297-98 (1964).

If a landlord of a rent-stabilized apartment wished to evade the Rent Stabilization Law, one way to do so would be to register rents higher than otherwise allowed while only charging tenants a lower "preferential" rent so that a tenant would have no incentive to challenge the rent. 560-568 Audubon Realty Inc. v. Rodriguez, 54 Misc.3d 1226(A)(Civ. Ct. N.Y. Co. 2017), *citing* 656 Realty, LLC v. Cabrera, 27 Misc.3d 1225(A) n.5 (Civ. Ct. NY Co. 2009), *aff'd*, 27 Misc.3d

138(A)(App. Term 1st Dept. 2010). Restrictions on the use of preferential rents to deregulate rent-stabilized apartments, which N.Y.C. Admin. Code §26-511(c)(14) effectuate, therefore constitute a legitimate end of protecting the integrity of the Rent Stabilization Law. The Court counterposes this end against the hardship Petitioner claims.

In determining the extent of the impairment, the Court considers whether the industry the complaining party has entered has been regulated in the past. Am. Econ. Ins. Co., supra, 30 N.Y.3d at 150. Rent regulation in various forms – the Rent Control Law, the Rent Stabilization Law, the Loft Law – has been the law of the land in the City of New York for decades. A deed annexed to the record on this motion practice shows that Petitioner took title to the building in which the subject premises is located on August 30, 2004. A history of registrations of the subject premises with the New York State Division of Housing and Community Renewal ("DHCR") shows that Petitioner had been registering the subject premises pursuant to 9 N.Y.C.R.R. §2528.3 since that time, ten years before Respondent's occupancy, indicia of Petitioner's knowledge of the regulation that already applied to the subject premises before entering into a lease with Respondent. Contracting parties assume the risk of legislative change. Am. Econ. Ins. Co., supra, 30 N.Y.3d at 150. The parties' first lease contains a severability clause,[2] which demonstrates the parties' cognizance that at least some aspect of law could affect the lease.

If the Court credits Petitioner's position, Petitioner assumed when it entered into the

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[2] The clause, right above the signatures on the last page of the lease, states, "[i]f any part of this lease is determined to be unlawful, the remaining provisions of the lease will remain valid and in full force and effect."

initial lease with Respondent that the subject premises was unregulated, compelling the conclusion that the rent that the parties agreed to in that lease was the rent obtainable by an arms'-length transaction, i.e., a market rent. Petitioner points out — correctly — that N.Y.C. Admin. Code §26-511(c)(14) was enacted after the parties entered into the lease. However, as it happens, the Court has determined that this rent would not constitute an illegal overcharge under the Rent Stabilization Law. Thus, the most pressing effect of N.Y.C. Admin. Code §26-511(c)(14) on Petitioner is not to cost Petitioner any money, but to confer upon Respondent rights of rent-stabilized tenants, such as the right to renewal leases and protection from evictions without cause. As a statute that renders a contract less profitable does not substantially impair the contract, Matter of Raynor v. Landmark Chrysler, 18 N.Y.3d 48, 58-59 (2011), then, Petitioner's task of proving a substantial impairment of its lease is that much more difficult. This effect of N.Y.C. Admin. Code §26-511(c)(14) on the lease illustrates a reason for the modest scale of constitutional impediments to retroactive civil legislation. Am. Econ. Ins. Co., supra, 30 N.Y.3d at 149. Given the legitimate end of N.Y.C. Admin. Code §26-511(c)(14), the long-standing regulation of rental housing in New York City in general and the subject premises in particular, and the compromised extent of hardship N.Y.C. Admin. Code §26-511(c)(14) on Petitioner, Petitioner has failed to prove that N.Y.C. Admin. Code §26-511(c)(14) thwarts Article I, Section 10 of the Constitution.

Petitioner also argues that N.Y.C. Admin. Code §26-511(c)(4), and its retroactive application, effectuates a taking of Petitioner's property in violation of the Fifth Amendment of the Constitution. However, states have broad power to regulate the landlord-tenant relationship

without paying compensation for economic injuries that such regulation entails. Dawson v. Higgins, 197 A.D.2d 127, 132 (1st Dept. 1994), *citing* Pennell v. San Jose, 485 U.S. 1 (1988). In order to show a "regulatory taking," Petitioner would have to show that the statute makes it impossible or commercially impracticable for it to profitably engage in business. Sobel v. Higgins, 188 A.D.2d 286, 287 (1st Dept. 1992). As shown above, the rent that the parties entered into was tantamount to a fair market rent even given the Court's finding that the subject premises is subject to the Rent Stabilization Law. Accordingly, Petitioner has failed to show that N.Y.C. Admin. §26-511(c)(14) has violated its rights as per the Fifth Amendment, and the Court does not reach other arguments concerning takings.

Petitioner also argues that the application of N.Y.C. Admin. Code §26-511(c)(14) retroactively violates the Constitutional prohibition on *ex post facto* laws. However, the *ex post facto* doctrine does not apply to nonpunitive civil proceedings. Matter of State of N.Y. v. Nelson, 89 A.D.3d 441, 441-42 (1st Dept. 2011).

Accordingly, the Court denies Petitioner's motion.

This constitutes the decision and order of this Court.

Dated: New York, New York
March 16, 2018

HON. JACK STOLLER
J.H.C.