Gallagher v Zaloga
2022 NY Slip Op 32786(U)
August 19, 2022
Civil Court of the City of New York, Kings County
Docket Number: Index No. L&T 311505/21
Judge: Sergio Jimenez
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS, HOUSING PART B
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BUSBY M. GALLAGHER

Petitioner-Tenant,

Index No. L&T 311505/21

-against-

DARIUSZ ZALOGA,

DECISION AND ORDER

Respondents-Owners.

-and-

NEW YORK CITY DEPARTMENT OF BUILDINGS ("DOB"), NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"), and NEW YORK CITY DEPARTMENT of HOUSING PRESERVATION AND DEVELOPMENT ("DHPD"),
----------X

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS, HOUSING PART B
----------X

GABRIELLA JORIO, HEE JIN KANG, NORA LIGORANO and ADRIENNE TRINKA,

Petitioners-Tenants,

Index No. L&T 312148-21

-against-

DARIUSZ ZALOGA,

DECISION AND ORDER

Respondents-Owners.

-and-

NEW YORK CITY DEPARTMENT OF BUILDINGS ("DOB"), NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"), and NEW YORK CITY DEPARTMENT of HOUSING PRESERVATION AND DEVELOPMENT ("DHPD"),
----------X

Present: **Hon. Sergio Jimenez**
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of petitioners' motion for twofold relief: of an order to tender permit and other plan documents as well as a protective order preventing respondent from materially altering the premises and any other relief as the court may find appropriate:

Papers	**Numbered**
Order to Show Cause.....	1/4 (NYSCEF 26 -32 / 30-39)
Notice of Motion and Affidavits Annexed	
Answering Affirmations/Affidavits	2, 3/5, 6 (NYSCEF 31, 34-48 /41, 43-57)
Replying Affirmations.....	3/7 (NYSCEF 49-54 / 59-66)
Exhibits	
Memorandum of law.....	

Petitioners commenced these two interrelated HP proceedings against respondent alleging that repairs are needed following a fire in the building located at 67 Devoe Street, Brooklyn, New York 11211 ("premises") – Gallagher in apartment 2R, Jorio in Apartment 2L, Kang in apartment 4L, Ligorano in apartment 1 and Trinka in apartment 4R. The procedural posture of this proceeding is recounted in the April 5, 2022 Decision/Order. The petitioners brought orders to show cause seeking an order from the court enjoining the respondent from materially changing the composition of subject premises. The court heard arguments on the fully briefed motions on June 21, 2022 and reserved decision.

Motion to compel document production and seeking an injunction against material alterations

Petitioners move for an order requiring respondent to provide petitioners with documentation dealing with architect plans and permits as well as a protective order preventing the respondent from materially altering the subject premises, including altering the size and layout of the apartments in question.

Respondent opposes on the grounds that they had a falling out with their employee which led to an unavailability of any of the documents and that the changes are required by Department of Buildings regulations.

The moving party, short of presumptions, always has the burden of proof with regard to the relief they are seeking (See *Gravel v. Cicola*, 297 AD2d 620 [App Div 2d Dep't, 2002]; *Matter of Stop & Shop Cos. Inc. v. Assessor of the City of New Rochelle*, 32 Misc.3d 496 [Sup. Ct. Westchester Co, 2011]). Here, through petitioners' affidavits, there is an undisputed pattern of unavailability of documentation. Further, on the record, accepted by both parties were statements (following a tardy provision of some plans) that the apartments would be changed. The question before the court is: do the changes alleged by the parties (which are not in dispute) constitute a material change or a *de minimis* change? Illegal alteration cases are an appropriate analogy for guidance in answering this question (*Starrett City v. Grantham*, 13 Misc3d 140 [App Term 2d Dep't 2006]). Specifically, changes such as replacement of old appliances, installation of drape hardware, installation of mirrors have all been found to be insubstantial changes (See *Ram I, LLC v. Stuart*, 248 AD2d 255 [App Div 1st, Dept, 1998]; *Harmil Realty Co. v. Feld* NYLJ, March 11, 1987, at 15, col 3 [App Term 1st Dept]; *Solow v. Lubiner* NYLJ, June 6, 1990, p. 21, col. 2 [App Term 1st Dep't]). While replacement of kitchen cabinets or removal of dumb waiter shafts have been found to be material changes (*Britton v. Yazicioglu*, 189 AD2d 734 [App Div 1st Dep't 1993]; *286 FW Inc. v. Maldonado*, 63 Misc3d 1209[A][Civ Ct New York Co).

Respondent's argument on the record that the alterations included in the plans constituted improvements not alterations is unconvincing as this issue has also been extensively litigated in terms of the legal definition of waste in the context of alterations in rent-controlled apartments and as a substantial breach of lease in rent-stabilized apartments. Without engaging in a discussion as

to the various definitions of waste, the most relevant analogous definition is the one of voluntary waste, which is an affirmative act that extends well beyond the term of the contractual interest in the premises (*Ruminche Corp. v. Eisenreich*, 40 NY2d 174 [1976]). Usually this is reserved for the benefit of the owner, not the tenant. However, in this factual situation, the contractual relationship, that of a rent-regulated tenancy, has an indefinite end date which may or may not include successor tenants. As such, it would be the owner's temporary interest in effectuating the repairs which would impinge upon the estate of the tenant. Any alteration which materially changes the nature and character of the premises may constitute waste (*Harar Realty Corp v. Michilin & Hill, Inc.*, 86 AD2d 182 [App Div 1st Dep't, 1982]). Waste, while generally only discussed in the context of rent controlled tenancies, is an apt analogy for this type of situation. Waste may be even positive improvements and still be considered inappropriate (*Freehold Inv. v. Richstone*, 34 NY2d 612 [1974]). Removability of installations is a significant factor in identifying waste. Here the reduction of bedrooms would constitute a waste and/or a substantial violation of the lease. It would be an unfair result for this court to uphold contractual rights for one party, but not the other. Under this set of facts, the court finds that the material change proposed (and the presence of undisputed plans by the parties) in the apartments would constitute a substantial violation of the lease. Further, respondent's argument that plans approved, even preliminarily so, by DOB are per se legal is unconvincing as the providence of the DOB is to analyze whether, in a vacuum, plans adhere to the various zoning/residential regulations and codes, not whether they conform to the requirements of the lease agreement. Here, petitioners claim that the change in the makeup of the apartments would result in material alteration pursuant to the leasehold, not that they are violative of DOB regulations.

In most situations the court would have to hold an evidentiary hearing as to the exact

changes, however, since there are not facts in dispute, the court can make a legal finding dispensing with the hearing. The court is also bolstered in this ability by the wide discretion granted to it by the Civil Court Act §110(c). The court finds that the facts as presented are undisputed and, that respondent has violated and seeks to violate the April 2022 court order.

Conclusion

The court grants the motion to the extent of requiring respondent to provide any and all plans within seven (7) business days of their submission to the Department of Buildings or other authorizing bodies, including any underlying papers. Respondent is also ordered to not materially change the premises from their original construction, this includes, but is not limited to, a reduction in square footage of more than 10 square feet, the removal or addition of bathrooms, or the reduction of rooms. Though the court does note that this branch of the order is only with regard to the current plans, as discussed on the record during oral argument, the court cannot divine what future plans may look like and does not levy an open-ended injunction upon the respondents, who do have a right and interest in completing the work expeditiously and in conformity with the various local and state laws and regulations. While petitioners did not move for contempt of the court order, nothing in this order should be interpreted in such a way as to prejudice the timely seeking of that relief. Petitioners may continue to move for court intervention should they believe that the apartments are going to be materially changed, though, again, the court notes that this request is for the current plans and acknowledges that the court may not have the ability to grant the wide relief being sought by the petitioners. This order is also without prejudice to the any claims made at DHCR for permission to change the apartments or as reduction of services. Nothing is this order should be construed as a curtailing of the parties litigating a more general injunction/declaratory judgment in Supreme Court. This Order is further without prejudice to

respondent moving to extend the time to correct violations, which the Court will entertain on good cause. Both proceedings are marked off calendar.

This constitutes the Decision/Order of the Court, which is uploaded to NYSCEF.

Dated: Brooklyn, New York
August 19, 2022

Sergio Jimenez
Judge, Housing Court

Hon. Sergio Jimenez
J.H.C.

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