Consulting SS Inc. v McKellar
2022 NY Slip Op 33213(U)
September 26, 2022
Civil Court of the City of New York, Kings County
Docket Number: Index No. L&T 304049/20
Judge: Kevin C. McClanahan
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART F
CONSULTING SS INC.,

Petitioner,

Index Nos.:
L&T 304049/20; 304050-20;
304052-20

DECISION/ORDER

-against-

ANNIE MCKELLAR,

Respondents.

Hon. Kevin C. McClanahan

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this motion to vacate the decision of the court.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS & AFFIRMATION ANNEXED	1-2
CROSS-MOTION AND AFFIRMATION ANNEXED	
ANSWER AFFIRMATION & AFFIDAVIT	3
REPLYING AFFIDAVITS & AFFIRMATION	4
EXHIBITS	5

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

In these holdover proceedings, respondents Raphael Faison (Index Number 304050-20), Annie McKellar (Index Number 304049-20) and Vincent Gorham (Index Number 304052-20) (collectively "Respondents"), make identical motions for a summary judgment pursuant to CPLR § 3212 dismissing the proceedings. Petitioner opposes the motions.

Respondents are the last three tenants in the building located at 232 Stuyvesant in Brooklyn having lived there for over twenty years. The building lacks a certificate of occupancy

or a readily available I-Card, but is registered with the Department of Housing Preservation & Development ("HPD") as a 2-family home. Until late 2018 the building was operated as an SRO with a ground floor Class A full garden/basement apartment with a separate entrance from the street, and with three units on the upper two floors, all accessed via labelled keyed entry doors from a common hallway and with a shared kitchen and bathroom.

The building's seven units were occupied and rented by the prior owners openly, notoriously, and for well over 30 years. In July 2018 Jerry Silver, a prior owner, commenced seven separate holdover proceedings with petitions that alleged use of the building as an SRO, pleading in each proceeding that each respondent was a tenant or occupant of an individual room - 2A, 2B and 2C on the main floor, 3A, 3B and 3C on the top floor - with weekly rental rates of $150-200 per week. Sometime later, certain occupants of the building commenced a harassment proceeding and prevailed. Soon after Mr. Silver sold the building. After the current landlord's acquisition of the premises, two of the remaining five tenants executed out of court buyout agreements, leaving the current respondents as the last occupants of the building.

The Court can grant summary judgment when it is clear "that no material and triable issue of fact is presented...[it] should not be granted where there is any doubt as to the existence of such issues." *Silberman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957).* Courts must view the evidence adduced on a motion for summary judgment in a light most favorable to the non-moving party, who should get the benefit of all possible inferences. *Cruz v. American Export Line Inc.*, 67 N.Y.2d 1 (1986); *Rizzo v. Lincoln Diner Corp.* 215 A.D.2d 546 (1st Dep't 1995). It is not the role of the court on a motion for summary judgment to assess the credibility of the parties. *Rizzo*; supra.

After its review of the papers and briefs, the Court finds *Robrish v. Watson*, 2015 NY Slip Op 51299(U), controlling authority. In that case, the landlord commenced a holdover proceeding to recover the "top floor" apartment of a two-family house. The tenant argued the apartment, not the building, was rent stabilized. The landlord conceded during trial that he had used the house as a "rooming house" and had rented 10 different rooms to 10 different people. The trial court found that the house was a de facto multiple dwelling but ruled the tenancy was not rent stabilized. In reversing the trial court, Appellate Term held:

> "The 10 different tenancies entered into by landlord with 10 different individuals for 10 different rooms in his house rendered the house subject to rent stabilization, as housing accommodations in buildings built before January 1, 1974 containing more than six units are subject thereto (see Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-504.1; Rent Stabilization Code [RSC] [9 NYCRR] § 2520.11). The RSC defines a housing accommodation as "[t]hat part of any building or structure, occupied or intended to be occupied by one or more individuals as a residence, home, dwelling unit or apartment" (RSC [9 NYCRR] § 2520.6 [a]). Under this definition, an individually rented room in a rooming house is a housing accommodation, and therefore, contrary to the Civil Court's decision, a building with six or more individually rented rooms is subject to rent stabilization, regardless of whether any structural changes were made to the premises (see Matter of Gracecor Realty Co. v Hargrove, 90 NY2d 350 [1997]). Nor is it of any consequence that the illegal use of the building has ended (see Rashid v Cancel, 9 Misc 3d 130[A], 2005 NY Slip Op 51585[U] [App Term, 2d & 11th Jud Dists 2005]).

As applied, this Court is constrained to find that respondents' apartments are subject to rent stabilization even if the building's current use contravenes local law. The prior holdover proceedings provide proof that the prior owner used the subject building as an SRO or rooming house. The pictures corroborate this use showing numbered entrance doors for the various rooms which correspond with the petitions that alleged the occupants were paying a weekly rental for the use of these rooms. Petitioner as subsequent purchaser does not possess personal knowledge of this prior usage. Thus, cannot rebut the factual allegations.

Petitioner argues that this Court should extend the holding in *Wolinsky v. Kee Yip Realty Corp.*, 2 NY3d 487 (2004,) to non-loft classes of residential conversions and hold that the subject apartments cannot be covered by Rent Stabilization. Petitioner cites Administrative Code Section 27-2077(a) which provides that no rooming unit may be created "in any dwelling" after May 5, 1954 or converted to such use on or before April 30. Any exceptions contained in the statute, petitioner argues, do not apply to the facts of these proceedings.

However persuasive, the principle underlying this argument has been rejected by appellate authority. In *Joe Lebnan, LLC v. Oliva*, 39 Misc3d 268 (2nd Dept 2013), the Appellate Term held:

> Petitioner has relied extensively on a series of cases that restrict and limit the coverage of the Emergency Tenant Protection Act of 1974 and the Rent Stabilization Law for spaces converted to residential use. Those cases, however, address the conversion to residential use of commercial spaces outside the time frame of Article 7-C of the Multiple Dwelling Law, which regulates the conversion of commercial loft space to residential usage (*See Wolinsky v Kip Yee Realty*, 2 NY3d 487); *Gloveman Realty Corp. v John Jeffreys*, 18 AD3d 812 [2d Dept 2005]). Petitioner further relies on the holding of *Arrow Linen Supply Co. Inc. v Cardona*, 15 Misc 3d 1143[A] [Civ Ct Kings Co 2007]) to support the contention that the principle advanced in *Wolinsky* would be applicable not just to converted commercial spaces to but to the unlawful conversion of a basement space to residential use. This court, however, declines to follow the holding of *Arrow Linen Supply Co. Inc.*, rendered as it was by a court of coordinate jurisdiction, as it fails to reconcile what appears to be clear authority drawing a distinction between the conversion of loft space for residential use, and the modification of extant residential space to increase the number of residential dwellings.

In sum, this Court is bound by *stare decisis* to follow this precedent which rejected extension of the holding in *Wolinsky* to illegal conversions that do not involve residential lofts. The Appellate Term seems to concur with the Court of Appeals ruling in *Gracecor Realty v. Hargrove*, 90 NY2d 350 (1997), which held that a residentially occupied cubicle was covered by

rent stabilization. Notably, the *Wolinsky* court affirmed its ruling in *Gracecor Realty* apparently distinguishing its principle from the one it would establish for loft spaces. The *Wolinsky* court *sub silentio* based the distinction on the interplay of two statutory schemes finding that the Loft Law and its application to loft spaces superseded the ETPA.

Furthermore, the *Gracecor Realty* court articulated a functionality test to determine whether a living space can satisfy the definition of "housing accommodation" and further supports the granting of a summary judgment. One factor is the length of time a landlord permits occupancy. Here, the time frame approximates twenty years on average. For these respondents, they do not appear to have another address and were given complete control over their rooms. Another factor is how the landlord treated the space. The evidence establishes that from the prior owner's standpoint, he knew they were using the rooms as their residence as he charged a weekly rent, demarcated each apartment door, and issued keys to the rooms with permission to live there and store their personal property.

Based on the foregoing, the Court hereby grants the motions for summary judgment finding respondents' apartments/rooms are subject to rent stabilization. Accordingly, the proceedings are dismissed. The Court shall upload this decision/order to NYSCEF.

Dated: September 26, 2022
Brooklyn, NY

Kevin C. McClanahan, J.H.C.

Hon. Kevin McClanahan