2023-03-15

Diamond Back L VL LLC v. Reynolds

[*1]

Diamond Back L VL LLC v Reynolds
2023 NY Slip Op 50195(U)
Decided on March 15, 2023
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on March 15, 2023

Civil Court of the City of New York, Bronx County

Diamond Back L VL LLC, Petitioner,

against

Andrea Reynolds, Respondent-Tenant.

Index No. 326977-2022

For Petitioner: Joseph Alan Altman
654 N Terrace Ave
Fleetwood, New York 10552-2702

For Respondent: DC 37 Municipal Employees Legal Services
55 Water Street, 22nd Floor
New York, New York 10041
By: Alison Smith, Esq.

Shorab Ibrahim, J.

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION BY THE RESPONDENT FOR SUMMARY JUDGMENT: NYSCEF Documents 12 through 29 [Motion With Affidavits, Affirmation and Exhibits, Affirmation in Opposition, and Reply Affirmation].

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

PROCEDURAL POSTURE

The petition in this matter alleges that the subject apartment is in a building containing less than six (6) units and thus not subject to rent regulation. (*see* NYSCEF Doc. 1 at par. 7).

Respondent moves for summary judgment alleging that the premises *are* subject to rent stabilization because there exists or have existed at least six (6) separate dwelling units and that the building was constructed prior to 1974. (see NYSCEF Doc. 15 at par. 4, 6). The motion is fully briefed, and decision was reserved on March 2, 2023.

THE ARGUMENTS

The motion is supported with affidavits from the named tenant (*see* NYSCEF Doc. 13), her daughter Tariah Reynolds (*see* NYSCEF Doc. 14), and numerous exhibits. The affidavits essentially track each other and allege the existence of seven (7) distinct units, two each on the first floor and second floor, along with two in the basement and one in the boiler room. The affiants allege they observed the occupants coming and going to and from the living spaces. Respondent alleges she personally observed the boiler room being used as a living space (NYSCEF Doc. 13 at par. 10). She also describes and names one family that used to live in a basement unit and alleges the other basement unit is still occupied. (*id.* at par. 13-17). Tariah Reynolds states that she observed doors leading to two basement apartments. (see NYSCEF Doc. 14 at par. 7). She alleges one family moved out of the basement about five years ago after the fire department investigated the building's conditions. (*id.* at par. 8). She also alleges that from 2011 up until a few years ago, various men lived in the boiler room. *(id.* at par. 9). She alleges [*2]she observed a bed and other personal belongings in the boiler room area about five years ago. (*id.* at par. 11).

In addition to the certificate of occupancy, which notes four total units on floors one and two, (*see* NYSCEF Doc. 20), respondent submits, *inter alia*, the following certified records:

1. Department of Buildings (DOB) Summonses noting that on April 18, 2018 an inspector found "work without permit" at "cellar" dividing "one apt creating it two." [sic] (*see* NYSCEF Doc. 23).

2. Office of Administrative Trials and Hearings (OATH) decisions finding the owner of subject premises liable under each DOB summons. (*see* NYSCEF Doc.

22 and 23).

3. An April 19, 2018 DOB Vacate Order for the "cellar SRO by oil tank room." (*see* NYSCEF Doc. 21).

Respondent argues that her submissions establish that there are or were at least six distinct units and, as such, the premises are subject to rent stabilization. If so, this holdover is improperly brought because rent stabilized tenants may only be evicted for specified grounds.

In opposition, petitioner argues that the certificate of occupancy is *prima facie* proof that there are just four units in the building and since the certificate of occupancy is dated in 1986, there is no proof that the building was constructed prior to 1986. Petitioner argues that these allegations create issues of fact on whether the building is, in fact, subject to rent stabilization. (*see* NYSCEF Doc. 27 at p. 2). Petitioner also cites to case law purportedly holding that rent stabilization cannot attach to tenancies that are illegal or incapable of becoming legal. (*id*. at p. 3).

Petitioner further argues that the OATH findings do not have any preclusive effect but that, in any event, OATH only found one additional basement apartment. (*id*. at p. 5).

In reply, respondent points out that the petitioner has not refuted the illegal SRO existed, but only that it should not count toward the required six units that would bring the building under rent stabilization. (*see* NYSCEF Doc. 29 at p. 3). Respondent argues that petitioner relies on stale case law and that other citations support respondent's position.

Respondent further states that OATH sustained the inspector's findings that there were two apartments in the basement. (*id*. at p. 6-7). As to preclusive effect of OATH decisions, respondent argues that collateral estoppel attaches when a party had a full and fair opportunity to litigate the issue. Respondent argues that petitioner had that opportunity at the OATH hearing.

Finally, respondent points out that while her claim about the seven total units, including the two in the basement, is supported with multiple detailed affidavits and certified records, the opposition consists only of an attorney affirmation. (*id*. at par. 26).

As to the certificate of occupancy, respondent points out that it does not establish anything more than there were four legal units in 1986. Furthermore, respondent argues that she has established the requisite age of the building by submitting a deed from 1969. (*id*. at

par. 28).

DISCUSSION

Summary Judgment Standard

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). When deciding a summary judgment motion, the court views [*3]the alleged facts in the light most favorable to the non-moving party. (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

To grant summary judgment it must clear there are no material and triable issue of fact presented. (*see Pirelli v Long Island R.R.*, 226 AD2d 166 [1st Dept 1996]). Summary judgment should not be granted where there is any doubt as to the existence of such issues, ... or where the issue is 'arguable' (*id.*) Failure to establish entitlement to judgment as a matter of law requires dismissal of the motion regardless of the strength of the opposing evidence. (*id.*).

Thus, the court must first determine whether respondent's proof meets a minimum standard before it considers the sufficiency of petitioner's opposition. (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324, 508 NYS2d 923, 925-926 [1986]).

Respondent's Prima Facie

When there are six or more housing accommodations in buildings built before January 1, 1974, those units are subject to Rent Stabilization protections. (*see Robrish v Watson*, 48 Misc 3d 143(A) [App Term, 2nd Dept 2015]). It does not matter *when* the threshold sixth unit is added. (*see Matter of Gandler v Halperin*, 232 AD2d 637, 638 [2nd Dept 1996] (sixth unit added in 1978); *Commercial Hotel, Inc. v White*, 194 Misc 2d 26, 27 [App Term, 2nd Dept 2002] (sixth unit added in 1992)).

Respondent here established the existence of at least six units. The first four units are noted in the certificate of occupancy and are not in dispute. A fifth unit was in the basement in April 2018, as noted by the DOB summons. (*see* NYSCEF Doc. 23). The sixth unit was in the boiler room in April 2018, as noted by the DOB Vacate Order. (*see* NYSCEF Doc. 21).

Violations issued by a city agency are *prima facie* proof that the condition described therein exists. (*see Sanjurjo v Milio*, 70 Misc 3d 1224(A), *4 [Civ Ct, Bronx County 2021]). The certified DOB records provided establish violations of housing maintenance laws. (*see In re Morataya*, 53 Misc 3d 242, 249 [Civ Ct, Kings County 2016] (a court must take judicial notice of violations placed against a building by *any* authorized government agency as prima facie proof of the existence of violations of the housing maintenance laws, at the subject premises) [emphasis added]).

In *Ortiz v Sohngen*, (56 Misc 3d 19 [App Term, 2nd Dept 2017]), the court held that the tenant's certified DOB and Environmental Control Board (ECB) records were *prima facie* proof of the alterations noted therein. (*id.* at 20-21).

As such, there is sufficient evidence that, in or about April 2018, there were at least six housing accommodations in the subject building.[FN1] Respondent also establishes the subject building was constructed prior to 1974 with the 1969 deed. The 1969 deed refers to a property "block" at 3713 and "lot" at 51. (*see* NYSCEF Doc. 16). The 2022 deed, transferring the property to petitioner herein, notes the same "block" and "lot." (*see* NYSCEF Doc. 19). [FN2]

Consequently, the burden shifts to the petitioner to show there are issues of fact requiring a trial. (*see 567 W. 184th LLC v Martinez*, 2017 NYLJ LEXIS 1011, *5-6 [Civ Ct, New York County 2017] ("Once the movant has established that the building contains six apartments, the burden shifts to the opposing party to rebut the prima facie showing by producing evidence that there is some doubt as to whether there is a sixth apartment.")).

Petitioner Does Not Raise Issues of Fact

The court first addresses petitioner's argument that rent stabilization "does not extend to tenancies that are illegal and incapable of becoming legal." (*see* NYSCEF Doc. 27 at par. 10, *quoting Wolinsky v Kip Yee Realty Corp.*, 2 NY3d 487, 491 [2004]).

First, the court notes that the respondent here resides in what is apparently a *legal* unit. In any event, the court disagrees with petitioner's premise.

In *Joe Lebnan, LLC v Oliva*, the Appellate Term held that "*Wolinsky* is limited to the illegal conversion of lofts." (39 Misc 3d 31, 33 [App Term, 2nd Dept 2013]); The Court of Appeals has also recently remarked that "[a]s we held in *Wolinsky*, illegal loft conversions are

not covered by the ETPA." (*Aurora Assocs. LLC v Locatelli*, 38 NY3d 112, 123 [2022]).

Indeed, case law has been remarkably consistent that, outside of loft conversions, it hardly matters, for purposes of rent stabilization, whether the units are illegal or even capable of being legalized. In *Matter of Gracecor Realty Co. v Hargrove*, the Court of Appeals noted that "housing accommodation" is defined by the Rent Stabilization Code as "'part' of any building or structure, which is occupied, or intended to be occupied as, *inter alia,* a home, residence or dwelling unit." (90 NY2d 350, 356-357 [1997]). The court held that this definition "is not limited by any physical or structural requirements, such as minimum square footage." (*id.* at 355); *see also Rosenberg v Gettes*, 187 Misc 2d 790, 791 [App Term, 1st Dept 2000]).

"Whether or not the building is capable of being legally used as a six or more unit dwelling or whether the units in existence meet applicable code is not a question that trumps the question of coverage under rent stabilization." (*Rivas v Conty*, 57 Misc 3d 986, 989 [Civ Ct, Queens County 2017] *citing 124 Meserole LLC v Recko*, 55 Misc 3d 146(A), *2 [App Term, 2nd Dept 2017] ("the units need not be legal or in conformity with building-code or other requirements"); *see also Duncan v Caldwell*, 64 Misc 3d 1229(A), *2 [Civ Ct, Bronx County 2019]).

For example, in *567 W. 184th LLC v Martinez*, summary judgment was granted for failure to state that premises are rent regulated because the landlord did not refute proof of a violation placed by DOB establishing that a *storage area* was being used as a sixth housing accommodation (2017 NYLJ LEXIS 1011 at *6-7); *see also 2042a Pac LLC v Kelley*, 2017 NYLJ LEXIS 2611 [Civ Ct, Kings County 2017] (summary judgment granted where respondents' exhibits "overwhelmingly" established two family home converted to 10 separate units). Even windowless cubicles have counted toward the stabilization threshold. (*see White Knight Ltd. v Shea*, 10 AD3d 567 [1st Dept 2004]).

Petitioner's reliance on *Balay v Manhattan 140 LLC*, (204 AD3d 491 [1st Dept 2022]), is misplaced. The *Balay* court approvingly cites to those cases holding that "[t]he issue of whether [*4]a building is subject to rent stabilization turns on the function of the units as housing accommodations not the 'legality' of their usage in the absence of a certificate of occupancy." (*id.* at 493) [citations omitted]).

Petitioner's citation to *Arrow Linen Supply Co., Inc. v Cardona*, (15 Misc 3d 1143(A) [Civ Ct, Kings County 2007]), is likewise improper. *Cardona* "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." (*Joe Lebnan LLC v Oliva*, 26 Misc 3d 1226(A), *2 [Civ Ct, Kings County 2009], *aff'd* 39 Misc 3d 31; *see also Consulting SS Inc. v McKellar*, 2022 NY Misc. LEXIS 5430, *6 [Civ Ct, Kings County 2022] ("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.")).

Critically, petitioner fails to offer any evidence from individuals with personal knowledge of the building's use during the time in question. Consequently, respondent's and her daughter's affidavit, as well as the DOB records, stand unrefuted. As there is no controversy that there was at least one basement apartment and that the boiler space was used as an SRO, respondent has established at least six units.

Respondent also clearly established a *second* basement apartment. Summons No.35316613L specifically alleges that *two* apartments existed in the basement. (*see* NYSCEF Doc. 23 ["subdivided one apt creating it to two"]). Although petitioner points to the OATH decision on that summons stating, "*an* apartment," this court credits that same decision finding "respondents in violation *as alleged*." (*see* NYSCEF Doc. 22, 24 [emphasis added]). Furthermore, if petitioner created "an *additional* apartment," common sense dictates that one must have already been there. (*see* NYSCEF Doc. 23 ["Work noted, at cellar (ineligible)/ created a aptmn. with electrical stove, 3 piece bathroom, residential sink and erected full height partitions *sub divided one apt creating it to two*. Installation of water and waste line."] (emphasis added)).

Petitioner's argument that the court should not credit the OATH decision because OATH rules allow for hearsay evidence is of no import. The seven units have been established through the certified summons and certified vacate order. Petitioner has not disputed those summonses. In fact, in submitting only an attorney affirmation, petitioner has not put forth any evidence undermining respondent's certified exhibits or affidavits attesting to their personal knowledge of the building's configuration. An attorney affirmation is afforded no weight as to factual issues she has not personal knowledge of. (*see Thelen LLP v Omni Contracting Co.*, 79 AD3d 605, 606 [1st Dept 2010]; *Onewest Bank, FSB v Michel*, 143 AD3d 869, 871 [2nd Dept 2016] (attorney affirmation afforded no probative value)).

In any event, petitioner does not point to any hearsay evidence used at the OATH hearing where, it must be noted, the landlord appeared with an attorney, had multiple

witnesses testify on its behalf, was able to introduce its own evidence, and was able to cross-examine DOB's witnesses. (*see* NYSCEF Doc. 22).

Consequently, the court finds that respondent established at least seven housing accommodations at the subject building. As to when the subject building was constructed, respondent attached the 1969 deed as an exhibit to the initial motion. That deed is not refuted in the opposition. As such, respondent has established that the subject premises were built prior to [*5]1974. (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975] (Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted]; (*Tortorello v Carlin*, 260 AD2d 201, 206 [1st Dept 1999]).

CONCLUSION

Based on the above, the court grants the motion for summary judgment and finds that the subject premises are subject to rent stabilization. Tenants subject to rent stabilization "can be evicted only 'upon one of the grounds set forth in section 2524.3 of the RSC [9 NYCRR] and only after being served with the notices required under section 2524.2 of the code.'" (*124 Meserole, LLC v Recko*, 55 Misc 3d 146(A) at *3).

Accordingly, the petition must be dismissed for failure to serve the required notices. (*see Robrish v Watson*, 48 Misc 3d 143(A) at *2). Judgment dismissing the petition shall enter in the respondent's favor. This constitutes the Decision and Order of the court. It will be posted on NYSCEF.

Dated: March 15, 2023
Bronx, New York
SO ORDERED,
/S/

HON. SHORAB IBRAHIM
Judge, Housing Part I

Footnotes

Footnote 1: The court notes that the affidavits of respondent and her daughter, which allege seven total units in use as far back as 2011, (see NYSCEF Doc. 14 at par. 4), are not refuted by the petitioner with an affidavit from anyone with personal knowledge.

Footnote 2: The court notes that the petition also seems to confirm construction prior to 1974. (*see* NYSCEF Doc. 1 at par. 7 [The Premises are not subject to rent control or the Rent

Stabilization Law of 1969, as amended by Chapter 576, Laws of 1974, as amended by Chapter 403, Laws of 1983, as amended by Chapter 36, Laws of 2019, by reason of it being in a building with fewer than six (6) apartments, and vacant after 8/1/70]).

Return to Decision List