2023-03-24

Baldwin v. McCarry

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2023 NY Slip Op 50226(U)
Decided on March 24, 2023
Civil Court Of The City Of New York, New York County
Stoller, J.
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Decided on March 24, 2023

Civil Court of the City of New York, New York County

Susan Baldwin, Petitioner,

against

Daniel McCarry, Respondent.

Index No. 305742/2020

For Petitioner: Damon Howard

For Respondent: Daniel McCarry, pro se

Jack Stoller, J.

Susan Baldwin, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Daniel McCarry a/k/a Dan McCarry a/k/a Daniel MacCarry, the respondent in this proceeding ("Respondent"), seeking possession of 452 West 23rd Street, Apt. 1A, New York, New York ("the subject premises") on the basis of a termination of an unregulated tenancy. Respondent, who was pro se throughout this litigation, interposed an answer with, *inter alia*, a general denial. The Court held a trial of this matter on January 27, 2023 and January 30, 2023 and adjourned the matter for post-trial submissions to March 8, 2023.

Respondent moved for a stay prior to trial on the basis that the New York State Division and Housing and Community Renewal ("DHCR") and the Attorney General's Office were investigating whether the building in which the subject premises is located ("the Building") is in fact a cooperative and awaiting documentation of that proposition, in part because of complaint that Respondent had filed with DHCR for Petitioner's failure to renew Respondent's lease. In opposition to that motion, Petitioner annexed a number of exhibits later admitted into evidence a trial concerning the Building's status as a cooperative. The Court denied Respondent's motion for a stay.

The trial record

Petitioner submitted into evidence two certificates of incorporation dated May 1, 1980 and April 24, 1981 of an entity designated as 452 West 23 Owners Inc. ("the Cooperative") and a deed dated September 1, 1981 according to which Petitioner purported to convey the Building to the Cooperative.

Petitioner submitted into evidence a certificate of occupancy ("C of O") for the Building, which shows that there is one apartment in the basement of the Building and two apartments on each of the first to fourth floor of the Building.

Petitioner submitted into evidence a multiple dwelling registration ("MDR") for the [*2]Building with the Department of Housing Preservation and Development of the City of New York ("HPD") pursuant to MDL §325. The MDR identifies Petitioner as the managing agent, a "responsible person," and a person whose share of ownership exceeds 25% if the owner is a corporation. The MDR identifies Merryman Gatch ("the Other Shareholder") as the on-site manager and an additional "responsible person," with the address for the Other Shareholder being the same address for the Cooperative.

Petitioner submitted into evidence an offering plan for the Cooperative dated July 15, 1981. Page 59 of the offering plan identifies Petitioner as the sponsor and states that Petitioner resides in the Building and intends to remain in the Building as a tenant-shareholder. The offering plan also states that someone named Michael P. Sanchirico ("Petitioner's Attorney") is counsel to the Sponsor. Petitioner submitted into evidence the first amendment to the offering plan, dated May 12, 1982, which Petitioner signed as a sponsor that represented that shares allocated to units representing 23% of the units in the Building have been sold. Petitioner submitted into evidence a letter from the Attorney General's office

July 27, 1981 to Petitioner's attorney stating that the plan had been filed.

Petitioner submitted into evidence the second amendment to the offering plan, dated November 12, 1982, the third amendment to the offering plan, dated May 12, 1983, the fourth amendment to the offering plan, dated December 16, 1983, the sixth amendment to the offering plan, dated December 31, 1984, and the tenth amendment to the offering plan, dated June 3, 1988, which all state that shares allocated to two apartments in the Building have been sold while shares allocated to the seven other apartments in the Building remained unsold. Petitioner submitted into evidence the twelfth amendment to the offering plan dated May 8, 1990, the thirteenth amendment to the offering plan, dated July 11, 1991, and the fifteenth amendment to the offering plan, dated July 17, 1991, which all state that three apartments in the Building had been sold and six remained unsold. Petitioner submitted into evidence the fourteenth amendment to the offering plan, dated September 17, 1991, which states that there have been no material changes.

Petitioner testified that she owns several apartments in the Building and that she owns the subject premises.

Petitioner submitted into evidence a proprietary lease for the subject premises dated June 16, 1982, which Petitioner signed as both the president of the Cooperative and as the shareholder. Petitioner submitted into evidence proprietary leases for two apartments in the Building that Petitioner signed on behalf of the Cooperative that the Other Shareholder signed as a shareholder for. Petitioner submitted into evidence minutes of a meeting of the Cooperative that took place on July 15, 1981. The only two attendees of the meeting were Petitioner and Petitioner's Attorney, both of whom were named directors.

Petitioner testified that she asked Respondent to move out many times; that she did not recall when she met Respondent; that she did not know when he moved in; that it is possible that she spoke with him in 2018; that a friend of Respondent asked her to have Respondent sleep in the subject premises; that Respondent was not a tenant then; that she did not make an arrangement with Respondent but she received $1,000 from Respondent's roommate; that no one was living in the subject premises in 2018 because she had not found a tenant for that apartment; and that she had a plan for her daughter's cousin to live in the subject premises or to rent it out at a market rate.

Petitioner testified on cross-examination that the Other Shareholder owns two apartments [*3]on the second floor of the Building; that Katherine Baldwin, her daughter ("Petitioner's Daughter"), owns an apartment on the fourth floor of the Building; that

Petitioner owns the other six units; that Petitioner's Daughter is not a manager of the Cooperative; that she is the manager of the cooperative; that the Cooperative meets annually; she is the president; that she pays maintenance from one account she controls to another; and that the Other Shareholder pays her maintenance.

Nikolas Maounis ("Respondent's Partner") testified that he lives on 14th Street; that he knows Respondent because Respondent is his partner; that Respondent found Apartment 3A at the Building; that they got a sublease for eleven years; that there was a long period of time, maybe a year, that they did not have a lease; that Petitioner was the person who rented that apartment to him; that he has not seen Petitioner for maybe five years; that he does not remember the name of a building manager; that Petitioner asked him if he wanted to buy an apartment in the Building; and that living in the Building was congenial and informal.

Respondent's Partner testified on cross-examination that he inquired as to whether an apartment was for sale; that he suggested a price; and that the answer was no. Respondent submitted into evidence an email from Petitioner offering to have Respondent's Partner move into an apartment in the Building.

The Other Shareholder testified that Petitioner's Daughter has been the building manager for many years now; that she is unaware of Petitioner's Daughter being fired; that she assumes that Petitioner's Daughter is on the board; that Petitioner's Daughter is in charge of deciding what repairs are needed, what has to be done to the Building, and who has a lease in the Building; that she lives in one apartment on the second floor of the Building and rents out the other apartment on the second floor; that someone named "Karen" moved into an apartment on the third floor with a boyfriend; that someone named "Harrison" moved into another apartment on the third floor of the Building; that when there was a leak she got help from Respondent; that for most of the time Respondent was an excellent, helpful tenant; that once the quarrels started with Petitioner and Petitioner's Daughter there have been several things that she did not consider helpful; that Respondent asked her if Respondent could take charge of the garden; that Respondent dealt with another tenant of Petitioner in the Building; that Respondent had cleaned up after junkies who had come into the Building; and that Respondent made remedial efforts to address problems in the Building after Superstorm Sandy.

The Other Shareholder testified in response to the Court's questions that since 1982, a real estate office said to buy two apartments, live in one, and rent out the other; that she bought shares in the Cooperative at the time that it was formed; that Petitioner owns the rest

of the apartments in the Building, with the exception of one apartment owned by Petitioner's Daughter; that Petitioner has always been subletting; that subletting is allowed; that the whole purpose of her purchase of more than one unit was so she could sublet; that the Cooperative has never held an election; that Petitioner's Daughter refers to herself as a manager; that Petitioner brought Petitioner's Daughter in to do the work; that she has all keys to all the units; that she deals with inspections; that she puts in the rents; that she consults with Petitioner's Daughter to hire people; that she makes deposits in maintenance as directed by Petitioner; that Petitioner unilaterally decided to raise the maintenance and informed her of the increase; that there was a mortgage on the building when she moved in; that Petitioner consulted with her about whether to pay off the mortgage and she said to pay it off; that Petitioner pays the property taxes; and that Petitioner buys heating oil.

The Other Shareholder testified on direct examination that the Cooperative has an accountant who works with Petitioner; that she had not met Petitioner when she bought the unit; and that she did not get a special deal when she bought the units.

Respondent submitted into evidence a text that the Other Shareholder sent Respondent saying that Petitioner wants her cash. Respondent submitted into evidence a letter from the New York State Division of Housing and Community Renewal ("DHCR") dated December 10, 2022 that says that DHCR will determine the rent regulatory status of the subject premises as per a prior complaint about a failure to renew a lease and that complaint dated February 18, 2021.

Respondent submitted into evidence an affidavit that Petitioner swore out in this proceeding dated June 30, 2022 according to which she averred that she has often left the subject premises vacant in recent years for family members and guests to occupy. Respondent submitted into evidence a text from the Other Shareholder dated April 4 that stated, "Even though the arrangement with Susan was that I was being paid for manager Katy has decided that she is the manager and I am the super. How the hell can I be the super?? Has any building have a super that's an elderly lady in her eighties?? Of course not. They are fixit guys. On the other hand does any super collect the rents and do the banking. Not that I've ever heard."

Respondent testified on cross-examination that he moved into the Building in 2008; that he lived in Apartment 3A; that he was not named on the lease; that Respondent's partner was on the lease; that he moved into the subject premises in June of 2018; and that he moved into the subject premises in September of 2018.

Discussion

The petition alleged that the subject premises is unregulated on the basis of being a cooperative apartment. While the answer did not raise an affirmative defense in that regard, the answer did include a general denial, which includes a denial of that allegation. A denial of an allegation of the petition imposes upon Petitioner the burden of proving that allegation at trial. *Wayne Cty. Vinegar & Cider Corp. v. Schorr's Famous Pickled Prod., Inc.*, 118 Misc 2d 52, 61 (Civ. Ct. Kings Co. 1983), *Klar v. Associated Hospital Service*, 24 Misc 2d 559, 560-561 (Mun. Ct. NY Co. 1959), *Scherman v. Empire Mut. Ins. Co.*, 11 Misc 2d 980, 981 (City Ct. NY Co. 1957). *Cf. Allis-Chalmers Mfg. Co. v. Malan Const. Corp.*, 30 NY2d 225, 233 (1972), *CNY Mech. Assocs., Inc. v. Fid. & Guar. Ins. Co.*, 212 AD2d 989 (4th Dept. 1995)(where a pleading volunteers an allegation that a party satisfied a condition precedent to obtaining relief, a general denial is sufficient to place the burden on the pleading party to prove that it complied as such).

Respondent's motion for a stay before the trial further clarified to Petitioner the centrality of the rent-regulatory status of the subject premises to this matter, to the point where Petitioner's post-trial memorandum of law correctly stated, "[t]he central issue before this Court at trial was whether, as an apartment owned as a cooperative, the [subject premises] is exempt from rent stabilization ." Accordingly, the Court considers whether Petitioner proved that the subject premises is exempt from Rent Stabilization.

As a formal matter, the offering plan, the amendments to the offering plan, and the acknowledgements from the Attorney General's Office are sufficient to prove as a prima facie matter that the Building is a cooperative. The Rent Stabilization Code exempts from coverage housing accommodations contained in buildings owned or operated as cooperatives on or after June 30, 1974 as provided in GBL §352-eeee. 9 N.Y.C.R.R. §2520.11(l). Tenants who take occupancy of a sponsor-owned apartments after a cooperative conversion do not enjoy the protections of either the Rent Stabilization Law of GBL §352-eeee. Fort I Grp. L.P. v. Suero, [*4]2002 NY Slip Op. 50344(U), ¶3 (App. Term 1st Dept.), Park W. Vill. Assocs. v. Chiyoko Nishoika, 187 Misc 2d 243, 245 (App. Term 1st Dept. 2000).[FN1]

Be that as it may, the peculiar facts of this case raise questions about the viability of Petitioner's claim that the subject premises is located in a bona fide cooperative. In theory, cooperatives operate according to the collective self-determination of the shareholders, who devise their own policies. *930 Fifth Corp. v. King*, 71 Misc 2d 359, 364 (App. Term 1st Dept.

1972),[FN2] *111 Tenants Corp. v. Stromberg*, 168 Misc 2d 1014, 1019 (Civ. Ct. NY Co.). In contrast, the Cooperative operates as it would when one discrete landlord held sole title to the Building. In the forty-plus years since the putative conversion of the Building to cooperative status, the only discernible board members have been Petitioner and, for a time at least, Petitioner's Attorney. The Cooperative has never held an election for board members. Petitioner sets the maintenance on her own according to her own counsel. Aside from the sale of shares to a member of Petitioner's immediate family, a grand total of one other shareholder has purchased shares in the Cooperative. Even the member of Petitioner's immediate family has only bought shares for one other unit.

Petitioner's persistent ownership of shares for a majority of the apartments in the Building for forty years further calls into question the bona fides of the cooperative's status. As a sponsor of the cooperative conversion, Petitioner undertook a duty in good faith to timely sell as many shares in the Building as necessary to create a fully viable cooperative. 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 NY2d 144, 152 (2002), Croydon Manor Apt. Corp. v. Camelback Realty Holdings, LLC, 2018 NY Slip Op. 30866(U), ¶4 (S. Ct. Queens Co.). Rather than discharge Petitioner's duty as a sponsor, Petitioner has continued to treat the remaining apartments in the Building, a majority of the units in the Building, as rental properties.

Housing Court does not determine questions of title or ownership in summary proceedings. *Gouverneur Gardens Hous. Corp. v. Silverman*, 26 Misc 3d 133(A)(App. Term 1st Dept. 2010). However, Housing Court may determine whether a petitioner in a summary proceeding has met its burden of proving that a dwelling is exempt from Rent Stabilization by virtue of being a cooperative unit. Rapone v. Katz, 30 Misc 3d 132(A)(App. Term 1st Dept.), *leave to appeal from the Appellate Term denied sub nom*. Rapone v. Katz - Simpson, 2011 NY Slip Op 82467(U)(App. Div. 1st Dept. 2011). To put a finer point on it, Housing Court may determine whether a purported cooperative is in reality a de facto for-profit rental building, designated as a cooperative in name only to evade the strictures of rent regulation. Lee v. 191 Edge Water Equity LLC, 2016 NY Slip Op 32228(U)(S. Ct. NY Co.).

If an owner of a Rent-Stabilized property wanted to use an ostensible cooperative [*5]conversion to continue to treat the property as a rental while evading the requirements of the Rent Stabilization Law, it is difficult to imagine how such an owner would act any differently from Petitioner. Such an owner would sell the bare minimum of shares to pass muster with the Attorney General's Office. Such an owner would exercise unilateral control over the operation of the cooperative, just as it would over a regulated rental property. Such

an owner, as the sponsor, would not sell shares of the cooperative, but rather would rent out the units in the building at market rates for decades.

For the narrow purposes according to which the Court may evaluate the viability of the Building as a cooperative, 452 West 23 Owners Inc. is a "cooperative" in the same sense that a Potemkin village is a vibrant metropolis. Petitioner has therefore failed to prove by a preponderance of the evidence that the subject premises is exempt from rent regulation by virtue of being a cooperative apartment.

The Court's lack of jurisdiction to determine property ownership and otherwise issue declaratory relief limit the effect of this decision to a question of whether Petitioner proved an element of her prima facie case. Accordingly, this order shall be without prejudice to the rights, remedies, causes of action, and defenses of the parties in other controversies between them, pursuant to the discretion afforded by the Court by CPLR §5013.

Accordingly, it is

ORDERED that the Court dismisses this proceeding for failure to prove an element of Petitioner's prima facie case, and it is further

ORDERED that the Court does not determine title of ownership in this proceeding, and it is further

ORDERED that this dismissal is without prejudice to rights, remedies, causes of action, and defenses of the parties in other controversies between them, pursuant to the discretion afforded by the Court by CPLR §5013.

The parties are directed to pick up their exhibits within thirty days or they will either be sent to the parties or destroyed at the Court's discretion in compliance with DRP-185.

This constitutes the decision and order of this Court.

Dated: March 24, 2023
New York, New York
HON. JACK STOLLER

Footnotes

Footnote 1: The Court cites the law in the First Department, where the Court sits. The Court

notes that there is a split in the departments as to this question of law. *See* MMB Apartments, LLC v. Guerra, 45 Misc 3d 132(A)(App. Term 2nd Dept. 2014), Paikoff v. Harris, 185 Misc 2d 372 (App. Term 2nd Dept. 1999)(tenants of sponsor units whose tenancies commenced after a conversion are entitled to protections under the law).

Footnote 2: While the dissenting opinion of this case stated this proposition of law, the Court deems the position of the dissent to have eventually prevailed, as the Appellate Division reversed the majority opinion, 40 AD2d 140 (1st Dept. 1972), *appeal dismissed*, 31 NY2d 1046 (1973).

Return to Decision List