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### De La Cruz v. 676 Miller Ave LLC

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**De La Cruz v 676 Miller Ave LLC**

2023 NY Slip Op 32895(U)

August 17, 2023

Supreme Court, Kings County

Docket Number: Index No. 505331/2021

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 505331/21  
Motion Date:  
Mot. Seq. No.: 1-2

-----X  
DULCE DE LA CRUZ and ARISSA IFILL,

Plaintiff,

-against-

**DECISION/ORDER**

676 MILLER AVE LLC, PRIME PROPERTY  
MANAGEMENT LLC, CHAIM SCHWARTZ, and  
NACHMEN NEUHAUS,

Defendants.  
-----X

Upon the following e-filed documents, listed by NYSCEF as item numbers 14-117, the motions are decided as follows:

In this action seeking, *inter alia*, declaratory relief, in Motion Sequence # 1, the defendants move for an Order: (i) directing that the plaintiffs pay use and occupancy/rental arrears due and owing through October 2021 and payment of rent pendente lite; and (ii) dismissing so much of the complaint as its seek relief against against defendant Nachmen Neuhaus individually, pursuant to CPLR 3211 (a); and (iii) against defendant Chaim Schwartz individually, pursuant to CPLR 3211 (a); and (iv) for such other, further and different relief the Court deems just and proper.

In Motion Sequence # 2, the plaintiffs move pursuant to CPLR 3212 for an award granting them partial summary judgment: (i) Granting Plaintiffs a declaratory judgment that Plaintiffs' apartments and/or units are and have been at all times subject to the Rent Stabilization Law and Code; (ii) setting this matter down for a hearing to determine the legal regulated rent for the subject units; (iii) denying defendants' motion for use and occupancy and dismissing defendants' counterclaim for use and occupancy; (iv) denying defendants' motion to dismiss the individually named defendants; and (v) granting such other and further relief as this Court may deem just, proper, and equitable. The two motions are consolidated for disposition.

**BACKGROUND:**

Plaintiffs commenced this action seeking: (i) a declaratory judgment that their apartments are rent stabilized and that they are rent stabilized tenants; and (ii) a declaratory judgment determining the amount of the monthly legal regulated rent for the subject apartments and directing the defendant to issue plaintiffs a rent stabilized renewal lease for the subject apartments; and (iii) a finding that defendants have engaged in harassment and an order enjoining defendants from engaging in harassing behavior, and civil penalties; and (iv) attorney's fees. Defendant 673 Miller Ave LLC counterclaimed for past due rent and/or use and occupancy.

Plaintiff Dulce De La Cruz claims that she is a tenant of Apt. 5 in a building located at 673 Miller Avenue, Brooklyn, New York (the "building") and that in 1998, she entered into a lease for the apartment with the former owner, Lyndon Whiteman, for a monthly rent of \$500.00. Mr. Whiteman passed away on or about April 3, 2015.

The defendants deny that Ms. De La Cruz is a tenant and in opposition to plaintiffs' motion, they submitted the affidavit of Neuhaus (Exhibit "A") and photographs from the building's security cameras which allegedly show her vacating the subject premises in October 2020 with furniture, packing boxes and her possessions. The defendants also submitted evidence that in a televised interview with Tamron Hall on the Tamron Hall Show, which Ms. De La Cruz posted on her Facebook page on May 2, 2020, in which Ms. Hall stated that "David is joining us from his home in Atlanta, Georgia". On the screen, it states "Atlanta, Georgia" under his video box (Exhibit "B").

Plaintiff Irissa Ifill alleges that she is a tenant of Apt. 4 and resides there with Orville Best. She maintains that she and Mr. Best entered into a lease with the former owner, beginning November 1, 2014 and ending on October 31, 2015, for a monthly rent of \$1,200.00.

Defendant 676 Miller Ave LLC is the current owner and purchased the building from Lyndon Whiteman on or about August 14, 2018. Defendant Prime Property Management LLC is the sole management company for 676 Miller Ave LLC, defendant Nachmen Neuhaus is a corporate officer of defendant 676 Miller Ave LLC, and defendant Chaim Schwartz is an employee of defendant Prime Property Management LLC.

Defendants contend that plaintiff De La Cruz has not paid any rent or use and occupancy to them since 676 Miller Ave LLC purchased the and that she never paid rent or use and occupancy to the prior owner from at least April 3, 2015. Defendants maintain that plaintiff Arisa Ifill has not paid rent or use and occupancy to the defendants since August 14, 2018.

Plaintiffs contend that the building has six or more residential units and therefore, the Rent Stabilization Laws apply. Plaintiffs submitted admissible proof that the basement was partitioned into multiple rooms for individual use and also had a kitchen and bathroom for the shared use of the basement occupants (David Aff. ¶ 4; Ifill Aff. ¶ 5) and that at least one basement occupant has continuously occupied the same basement room for almost ten years (David Aff. ¶¶ 5-6) and that the basement unit still has a bathroom and electricity (Ifill Aff. ¶¶ 8-9). Plaintiffs claim that basement was not cleared of living spaces until after defendants purchased the subject building in 2018 (David Aff. ¶¶ 7-9). Because of the basement unit or units, the subject building contained at least six units.

Plaintiffs also submitted proof that at least one unit in the subject building was converted into three SROs (. David Aff. ¶¶ 10-13; Ifill Aff. ¶¶ 13-14). They claim that apartment 2L on the second floor of the subject building was originally a two-bedroom unit (David Aff. ¶ 10; Ifill Aff. ¶ 11) and that Mr. Whiteman converted Apartment 2L into three SROs by partitioning the living room to create a third living space, putting a door in the partition, and installing an individual lock on that door and on each of the bedroom doors (David Aff. ¶ 11; Ifill Aff. ¶ 13; Costa Aff. ¶ 9). They maintain that Mr. Whiteman then rented each of the three SROs to individuals with no connection to or prior knowledge of each other (David Aff. ¶¶ 12 Ifill Aff. ¶ 14; Costa Aff. ¶ 8; Surrender Agreement (Costa Aff., Ex. A). According to the defendants, this arrangement was in place before plaintiff Arissa Ifill moved into the building in 2014 and remained until at least October 2019, when former tenant Kelcey Smith, who lived in one of the SROs in Apartment 2L, surrendered his unit (David Aff. ¶ 12; Ifill Aff. ¶ 15; Costa Aff. ¶ 7). In Mr. Smith's Surrender Agreement, which was negotiated and drafted by counsel, Mr. Smith "represent[ed] that there [were] two other occupants in [Apartment 2L], with whom he has no relationship." (Surrender Agreement (Costa Aff., Ex. A). Plaintiffs maintain that the presence of at least three SROs in Apartment 2L means that there were or are at least four units on the second floor alone.

Defendants maintain the apartments at issue are Free Market apartments and not subject to Rent Stabilization, as the building contains and has always contained less than six (6) units.

### **The Prior Housing Court Proceeding:**

On or about October 2, 2015, the Administrator of the Estate of Lyndon Whiteman initiated a summary holdover proceeding in the Kings County Housing against Angelica Cerneglia entitled *Latiesha Soto, Administrator of the Estate of Lyndon Whiteman v. Angelica Cerneglia et al* [LT-091472-15/KI ]. Angelica Cerneglia was a tenant in Apartment 2R in the building. In the petition, the petitioner alleged that Ms. Cerneglia's apartment was not subject to rent stabilization (Cerneglia Holdover Pet. (Dismore Aff., Ex. J). Ms. Cerneglia moved for summary judgment dismissing the petition on the grounds that the petition improperly pleaded the rental status of the building. The landlord, who was represented by counsel, opposed the motion.

On July 25, 2016, the Hon. Cheryl Gonzales issued an order dismissing the holdover petition determining as follows:

After argument, and upon review of the papers, respondent's motion for an order granting leave to file an amended answer and granting summary judgment is granted. The petition in this matter states that the subject apartment is not subject to rent regulations because it was vacant after 6/30/71 and contains less than 6 apartments. [Ms. Cerneglia] presented competent evidence to show that the building contains more than 6 units and it was constructed before 1974, which would make it subject to rent regulation. . . . Accordingly, the petition is dismissed (see Cerneglia Holdover Dismissal Order (Dismore Aff., Ex. K).

The petitioner did not appeal from the Hon. Gonzalez' order.

### **DISCUSSION:**

#### **1. The Collateral Estoppel Issue:**

The plaintiffs correctly maintain that by virtue of the Hon. Gonzalez 's decision and order in the summary holdover proceeding, 673 Miller Avenue LLC is collaterally estopped from relitigating the issue of whether the building is subject to the rent stabilization laws of New York. Collateral estoppel, or issue preclusion, a narrower species of res judicata, “precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same” (*Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823, 467 N.E.2d 487; see *Highlands Ctr., LLC v. Home Depot U.S.A., Inc.*, 149 A.D.3d at 921, 53 N.Y.S.3d 321). “This doctrine applies only ‘if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the [party to be bound] had a full and fair opportunity to litigate the issue in the earlier action’ ” (*City of New York v. Welsbach Elec. Corp.*, 9 N.Y.3d 124, 128, 848 N.Y.S.2d 551, 878 N.E.2d 966, quoting *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349, 690 N.Y.S.2d 478, 712 N.E.2d 647).

Here, the issue of whether the building contained six or more units was clearly litigated in the Housing Court proceeding and was necessarily decided against the prior owner of the building, who had a full and fair opportunity to litigate this issue. The Court finds unpersuasive defendants’ argument that 673 Miller Avenue, LLC and the Estate of *Lyndon Whiteman* are not in privity (see *33 Prospect St. Corp. v. New York State Div. of Hous. & Cmty. Renewal*, 15 A.D.3d 492, 493, 789 N.Y.S.2d 444 [a subsequent owner of a building found to be in privity with the prior owner and was estopped from re-litigating the issue of whether an apartment occupied by a tenant was subject to the Emergency Tenant Protection Act of 1974]. The fact that the Housing Court proceeding was brought by the administrator of the prior owners the estate is does not negate privity.

Once it was determined that the building contained six or more units, as Hon. Gonzalez found, all of the units in the building are brought under rent stabilization (see *Matter of Gandler v Halperin*, 232 AD2d 637 [1996]; *Beverly Holding NY, LLC v Blackwood*, 63 Misc 3d 160[A], 2019 NY Slip Op 50877[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019]; *Rashid v Cancel*, 9 Misc 3d 130[A], 2005 NY Slip Op 51585[U] [App Term, 2d Dept, 2d & 11th Jud Dists 2005]) and the rent-stabilization status continued even if the number of units was subsequently reduced to fewer than six (see *Beverly Holding NY, LLC v Blackwood*, 63 Misc 3d

160[A], 2019 NY Slip Op 50877[U]; *Rashid v Cancel*, 9 Misc 3d 130[A], 2005 NY Slip Op 51585[U]). Indeed, even if a subsequent owner is unaware at the time the building was purchased that it was subject to Rent Stabilization, its remedy, if any, would lie against the prior owner. A landlord's alleged lack of knowledge does not give rise to an exemption from rent stabilization since landlord acquired the building "subject to those rights and protections enjoyed by the building's tenants at the time of acquisition" (*525 Park Ave. Assoc. v. DeHoyas*, 125 Misc.2d 432 [1984]; see *Elwick v. Howard*, NYLJ, May 16, 1984 [Sup Ct, N.Y. County], *affd* 111 A.D.2d 73 [1985], *affd* 65 N.Y.2d 1006 [1985]; *Friedman v. Babic*, 118 Misc.2d 565 [App Term, 1st Dept 1983] ).

## 2. The Use And Occupancy Issue:

Under the Multiple Dwelling Law, an owner cannot collect rent for the period during which its building lacks a valid certificate about (see *Matter of GVS Props. LLC v. Vargas*, 172 AD3d 466, 466 [1st Dept 2019]; *West 48th Holdings LLC v. Eliyahu*, 64 Misc 3d 133[A], 2019 NY Slip Op 51066[U], \*2 [App Term, 1st Dept 2019] ), nor can an owner recover use and occupancy from a tenant in the absence of a proper certificate of occupancy (see *Sheila Props., Inc. v. A Real Good Plumber, Inc.*, 59 AD3d 424, 426 [2d Dept 2009]). Although the lack of a proper certificate of occupancy for a rent-controlled apartment precludes a landlord from recovering rent or use and occupancy for that apartment, it does not preclude a landlord from recovering rent or use and occupancy for apartments unaffected by the certificate of occupancy violations (see, *Commercial Hotel, Inc. v. White*, 194 Misc. 2d 26, 752 N.Y.S.2d 779 (App. Term 2002); *Shoretown Realty Corp. v. Kahill*, N.Y.L.J., Oct. 28, 1993 [App.Term, 1st Dept.] [recovery of rent permitted where residential use of basement space did not adversely affect residential occupancy of tenant in sixth-floor apartment]; *Little v. Joseph*, N.Y.L.J., May 24, 1992 [App.Term, 1st Dept.] [alleged nonconforming use on second and third floors did not bar collection of rent from residential tenant on eighth floor]; *50 E. 78th Corp. v. Fire*, N.Y.L.J., Dec. 2, 1991 [App.Term, 1st Dept.] *Milbeck Apts. v. McLeon*, N.Y.L.J., Oct. 9, 1990 [App.Term, 1st Dept.] [addition of illegal units did not bar recovery of rent where tenant occupied a legal unit whose structure was unaffected]; *Bancroft, Inc. v. Brewster*, N.Y.L.J., July 10, 1985 [App.Term, 1st Dep't] ). Here, plaintiffs' apartments are unaffected by the certificate of occupancy violations, if such violations exist.



Since the Court is declaring that the building is subject to Rent Stabilization and the defendant 673 Miller Ave LLC has not registered the premises with the Division of Housing and Community Renewal, a legal regulated rent has not yet been established (Rent Stabilization Law of 1969 [Administrative Code of City of N.Y., tit. 26, ch. 4] § 26-512[e]; *Murray v. Morrison*, 181 Misc.2d 209, 214, 695 N.Y.S.2d 255; *see also, Ramlie v. Soufer Family LLC*, 287 A.D.2d 388, 731 N.Y.S.2d 455). Defendant's cause of action for rent arrears is premature (*see Com. Hotel, Inc. v. White*, 194 Misc. 2d 26, 27-28, 752 N.Y.S.2d 779, 780-81 (App. Term 2002)).

Notwithstanding the above, plaintiffs should not be entitled to continue occupancy of the premises without paying for its use. Balancing the equities, defendant 673 Miller LLC is entitled to the monthly payments for rents or use and occupancy, if only to maintain the status quo until rendition of a final judgment (*see Abright v. Shapiro*, 92 A.D.2d 452, 453-54, 458 N.Y.S.2d 913, 914-15; *Corris v. 129 Front Co.*, 85 A.D.2d 176, 447 N.Y.S.2d 480).

### 3. The Individual Defendants:

The court has reviewed the complaint in this action and finds that it does not state a valid cause of action against the individual defendants.

Accordingly, it is hereby

ORDERED that the branch of Motion Sequence # 1 in which defendant 673 Miller LLC seeks an order directing that plaintiffs pay use and occupancy is granted to the extent that plaintiffs are required to pay to 673 Miller LLC all use and occupancy that became due and owing from the time the motion was filed; and the plaintiffs are directed to pay future use and occupancy, on the first of each month, to the time this action is finally determined; it is further

ORDERED that this matter is referred to as Special Referee to hear and determine the proper amounts for use of occupancy; it is further

ORDERED that the action insofar as it seeks relief against Nachmen Neuhaus and Chaim Schwartz, in their individual capacities is dismissed; it is further

ORDERED that the branch of Motion Sequence # 2 in which the plaintiff Arissa Ifill seeks a declaration that her apartment is subject to Rent Stabilization is granted; it is further

ORDERED that the branch of motion sequence # 2 in which the plaintiff Dulce De La Cruz seeks a declaration that her apartment is subject to rent stabilization is denied, as there are triable issues affect as to whether she abandoned the premises; it is further

ORDRED that an evidentiary hearing will take place at the time trial to determine the legal regulated rents for plaintiffs' apartments.

This constitutes the decision and order of the Court.

Dated: August 17, 2023



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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020