CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART P
----------X

IRVING STARR, LLC

Petitioner

-against-

DECISION/ORDER
Index No. 100842/15

MARIAH BARETTA, ALISON PRINZ,
JOHN DOE, JANE DOE

Respondents

----------X

Petitioner commenced this holdover proceeding on December 3, 2015 after serving respondents with a thirty-day notice of termination. The termination notice states that petitioner terminated their tenancy held by monthly hiring effective November 30, 2015. Respondents interposed an answer dated May 24, 2016 asserting three affirmative defenses: failure to state a cause of action, retaliatory eviction and breach of the warranty of habitability/partial eviction. In addition, respondents counterclaimed for rent overcharge, reimbursement for electricity charges and legal fees.

At trial, Mr. Joel Jacobowitz, a member of petitioner's LLC testified that three of the eight units were occupied when petitioner purchased the building in 2011, and the subject apartment was vacant. Mr. Jacobowitz described the configuration of Apartment #1L at the time of purchase as a railroad apartment with two bedrooms in the front and the bathroom, kitchen and living room at the rear of the apartment. The apartment, after a complete renovation, now consists of three bedrooms with a kitchenette and part of the cellar is included in the apartment which makes it a duplex apartment. According to Mr. Jacobowitz, the plumbing, electrical and heating systems were replaced.

On cross-examination, Mr. Jacobowitz acknowledged that petitioner did not apply for any permits and no permits were granted to petitioner to complete this renovation work. In addition, Mr. Jacobowitz testified that the certificate of occupancy does not show the basement as residential space and petitioner did not apply for a change in the certificate of occupancy.

Richard Boll, the managing member of J. Segreti & R. Boll LLC, the owner of the building prior to its sale to petitioner, testified that the subject apartment was vacant at the time of closing. Ms. Rivera was the last tenant of record who resided in Apartment #1L. Ms. Rivera's last rent regulated lease renewal is dated August 9, 2000. Ms. Rivera had a preferential rent of $660.00, and the legal regulated rent was $751.19. Ms. Rivera vacated the apartment after the landlord commenced a non-payment proceeding. Mr. Boll also testified that he was responsible

for filing the rent registrations with DHCR, and he registered the apartment with DHCR in 2008 in error as the tenant had already vacated the apartment.

Petitioner presented a lease dated April 23, 2012 for the subject apartment which names the tenants as Mariah Baretta and Benjamin Haft. The lease term began on May 8, 2012 and ended on April 30, 2013. The monthly rent was $3,000.00. A subsequent lease for a term beginning on May 1, 2014 and ending on June 30, 2015 names the tenants as Mariah Baretta and Alison Printz. The monthly rent was $3,150.00. Neither lease is subject to rent stabilization.

The parties stipulated that the apartment was vacant since Ms. Maybelline Rivera, the last tenant of record prior to respondents, vacated the apartment.

Respondent, Alison Printz, testified that she moved into the apartment in April 2013. Ms. Printz testified that there have been 8-10 floods in the lower level of the apartment and when it floods the water would remain in the apartment for approximately one week. There have also been floods on the upper level. A mold problem has developed because of the floods. In addition, Ms. Pritz testified that the lower level is unusable in cold weather because of the lack of heat.

Respondents filed an HP proceeding against petitioner, under Index No. 6674/15, and the parties subsequently entered into a consent order. Petitioner was later found in contempt for failing to comply with the consent order which directed petitioner to provide heat, and a judgment of $62,000.00 was entered against petitioner on March 17, 2017. Ms. Printz stated that the conditions petitioner was ordered to repair remain uncorrected.

Respondent, Mariah Baretta, also testified about the lack of heat in the apartment and their electric bills which exceed $1,000.00 per month. In addition, Ms. Baretta stated that 50% of the apartment is unusable due to the conditions caused by the floods.

Respondents challenge petitioner's claims for rent and the deregulation of the apartment based on the renovations of the apartment. Petitioner admits that the renovations were completed without the required permits and the certificate of occupancy has not been changed to add residential space in the basement.

MDL § 300 makes it unlawful to alter a multiple dwelling without the required permits; which makes the renovations completed by petitioner illegal.

Further, New York City Administrative Code § 27-2081 (e) proscribes occupancy of cellars and basements which do not comply with all of the applicable requirements of the multiple dwelling law. MDR § 301(1) requires a certificate of occupancy for all residential spaces. Petitioner concedes its failure to obtain a certificate of occupancy for the cellar, and its rental of the basement as residential space is also illegal.

In its post trial memorandum, petitioner cites *In the Matter of the Administrative Appeal of Gisela Checo*, D.H.C.R. No. SL410023R in support of its claim that the cost of improvement of the apartment, and not the permits, is the relevant factor in considering whether the apartment was improved pursuant to RSC § 2522.4. However, in *Brown v Roldan*, 307 AD2d 208 [1st

Dept. 2003] the court found that the legal usage of the premises was the determining factor, and affirmed that DHCR was correct in determining that an illegal renovation cannot be used as basis to remove an apartment from rent stabilization, (*see also Loventhal Managment v. DHCR*, 183 A.D.2d 415, 583 N.Y.S.2d 270 [N.Y. App. Div., 2nd Dept., 1992] (illegal conversion cannot be used as a basis for exempting premises from ETPA); *Rosenberg v. Gettes*, 187 Misc 2d 790, 723 N.Y.S.2d 598 [App. Term, 1st Dept., 2000]. There is a public policy interest against illegal renovations or conversions *(see Arrow Linen Supply Co. Inc. Cardona,* 15 Misc 3d 1143(A) [Civ Ct 2007], and petitioner cannot use the illegal renovations to reap a windfall. Renovation work completed without permits implicates safety concerns, and the serious problems in the apartment highlighted by respondents may be causally connected to the work that was done.

Petitioner also claims that the apartment is exempt from regulation since the last tenant of record vacated the apartment in 2001, the legal rent exceeded $2,000.00 and the vacancy commenced prior to June 24, 2011. Petitioner's assertion assumes that the amount of $1,625.00 (1/40 of $65,000.00) that it claims as IAIs would be added to the base rent. RSC § 2522.4 provides for an adjustment of the legal rent when an owner increases space, provides new equipment and makes major capital improvements. This section of the Code grants increases based on improvements to property. In this case, petitioner created an illegal apartment which is a diminishment of the legal apartment it replaced. All the work completed was illegal and resulted in an apartment which has no certificate of occupancy and for which no rent can be charged pursuant to MDL § 302. Even if the court were to consider the changes to the apartment apart from the use of the cellar, use of which is not permitted by the certificate of occupancy, the scope of the work and the documentation provided by petitioner does not itemize the work and no specific amounts can be allocated to the work outside of the cellar. Therefore, there can be no increase in rent which would change the status of the apartment and cause it to be deregulated.

Petitioner also claims that the reconfiguration of the apartment is a basis for removing the apartment from rent stabilization. Neither the Rent Stabilization Code or the Emergency Tenant Protection Act provides for a first rent based on reconfiguration of the apartment. DHCR Operational Bulletin #95-2 outlines the agency's policy regarding substantial renovations, and provides that an owner may be entitled to charge a first rent when the perimeter and dimensions of the apartment are significantly changed, or creates a housing accommodation in a space not previously used for residential purposes. When the structural reconfiguration results in a new unit there is no basis to create the legal rent based on a continuous chain of rental history (see *New York State Division of Housing and Community Renewal v 302 East 3rd Associates, LLC* [1st Dept. 2003].

Petitioner's witness, Nerim Kukic, petitioner's contractor for the renovation work done in the apartment, testified that he demolished the apartment and renovated it. He connected the basement to the first floor and installed new electric, plumbing and sheetrock. Mr. Kukic also testified that he did not obtain any permits or request a change of the certificate of occupancy. Despite all the work completed, petitioner did not create a legal unit for which any rent can be sought and petitioner is not entitled to a first rent.

Petitioner also claims that in the event that the court finds there is an overcharge, under RSC§2526.1(a)(3)(iii) it is entitled to the rent agreed upon by the landlord and the tenant after the vacancy and temporary exemption pursuant to RSC§2520.11 and asserts that the legal rent should be the first rent paid by the tenant. The statute provides that under these circumstances the rent should be regulated (*see M & E Christopher LLC v Godfrey*, 47 Misc3d 1230(A)[Civ Ct 2015], *656 Realty, LLC v Cabrera* 27 Misc 3d 1225(A)[Civ Ct 2009]), and the rent amount of $3,000.00 would make the apartment unregulated. Petitioner's analysis subverts the purpose of the statute and is without merit.

Accordingly based on the foregoing, respondents' motion to dismiss the petition in this matter is granted as the unit remains rent stabilized and petitioner cannot terminate respondent's tenancy as a month to month tenancy.

Respondents claim that this proceeding was brought in retaliation for the defenses they asserted in a prior non-payment proceeding which was dismissed based on petitioner's failure to appear on the trial date. However, there were no findings made on the merits in that case and there is not a sufficient basis on which base a finding of retaliation. Further, respondents filed an HP proceeding under Index No. 6674/15 against petitioner on December 8, 2015, this proceeding was commenced on December 3, 2015 and the HP proceeding also cannot form basis for retaliation. Accordingly, respondent's counterclaim for retaliation is dismissed.

Respondent's remaining counterclaims are set down for a hearing October 12, 2018 at 9:30am in Part P.

This constitutes the decision and order of the court.

Dated: Brooklyn, New York
August 3, 2018

HON. CHERYL J. GONZALES

Cheryl J. Gonzales JHC