

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

LOUIS B. YORK
J.S.C. Justice

FILED

PART 2

PRESENT: _____

JUN 05 2013

Index Number : 110098/2011
EXTELL BELNORD LLC
vs.
UPPMAN, JEAN SEWARD
SEQUENCE NUMBER : 002
DISMISS

COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, It is ordered that this motion is

MOTION IS DECIDED WITH ACCOMPANYING MEMORANDUM DECISION

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/31/13

Ley, J.S.C.
LOUIS B. YORK

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
EXTELL BELNORD LLC,

Plaintiff

- against -

Index No. 110098/2011
DECISION AND ORDER

JEAN SWEARD UPPMAN; JONATHAN
VINCENT; RICHARD BERGERON; JILL
SUSAN; LAURIE SCHUMAN; "JOHN DOE"
AND "JANE DOE,"

FILED

JUN 05 2013

Defendants.

-----X
COUNTY CLERK'S OFFICE
NEW YORK

LOUIS B. YORK, J.:

Motion sequence numbers 4 and 2 are consolidated for disposition and resolved as follows:

In this action plaintiff, the owner and landlord of a building located at 201 West 86th Street (the building), claims that defendant Uppman's apartment in the building was deregulated, and that defendant Jean Seward Uppman ("Ms. Uppman") remains tenant of record. It contends that her grandson, defendant Jonathan Vincent ("Mr. Vincent") and any other tenants residing at the apartment are bound by the deregulation order and the subsequent rental agreement between Ms. Uppman and plaintiff. Plaintiff demands an order directing Mr. Vincent and any other tenants to vacate the apartment, to pay the difference between the rent paid and the proper use and occupation, to pay attorney's fees.

In response, Mr. Vincent argues that because he continued to pay, and plaintiff continued to accept, the monthly rent, he is the tenant of record. Moreover, he states that plaintiff agreed to accept the rental rate he paid when it accepted his checks. He also claims this status based on his

residency at the apartment, allegedly since 2005. In addition, he challenges the 2006 ruling of the DHCR which deregulated the building because according to Mr. Vincent, plaintiff's decision to accept J5-abatements after the deregulation order went into effect nullifies that order. He finally states that the apartment was only to be deregulated if the residents of the apartment have a total income exceeding \$175,000, and his income is far less than that.

Ms. Uppman's guardian states that Ms. Uppman suffers from advanced Alzheimer's disease and has not lived at the apartment for quite some time. Mr. Vincent concurs, and plaintiff acknowledges that, at least, she resides in a nursing home. However, the issue of her status with respect to the apartment is in dispute. Plaintiff also challenges Mr. Vincent's ability to challenge the deregulation of the apartment or its rent, based on the Article 78 statute of limitations.

Currently, Ms. Uppman, through her guardian, moves to dismiss the complaint as against her. Plaintiff separately moves for partial summary judgment dismissing several of defendant affirmative defenses and counterclaims, and defendant Mr. Vincent cross-moves to dismiss co-defendants Richard Bergeron, Jill Susan, and Laurie Schulman from the action and to grant summary judgment in his favor. The Court grants plaintiff's motion to the extent that it seeks dismissal of the first counterclaim/sixth affirmative defense, and the first and fourth affirmative defenses, and otherwise denies all three motions.

The background of this lawsuit, in brief, is set forth immediately below:

I. Rent decontrol, agreement and lease with Ms. Uppman:

Since 1962 Theodore Uppman, the deceased husband of defendant Jean Seward Uppman lived in an apartment ("the apartment") in The Belnord, a building located at 201 West 86th Street in Manhattan ("the Belnord"). Plaintiff Extell Belnord LLC ("Extell") is owner and

landlord of the Belnord. Many of the apartments in the building were subject to rent regulation, but by DHCR order dated November 15, 2006, Ms. Uppman's apartment and others were deregulated. The tenants had approximately 35 days to file a Petition for Administrative Review (PAR) that challenged the order, and Ms. Uppman did not do so.

Instead, on May 8, 2006, Extell entered into an agreement with various tenants, including Ms. Uppman, which revised the agreement which had been in place prior to the deregulation order ("the agreement"). The agreement commenced prior to May 8, on January 1, 2006. The agreement acknowledged that the apartments in question were deregulated and noted that any PAR challenges would remove the challengers from the list of signatories to the agreement. The agreement applied to the settling tenants and to the potential successor tenants – which, under paragraph 27, provision c, included defendant Jonathan Vincent, Ms. Uppman's grandson.¹ The successor tenant had to satisfy

the criteria, requirements, co-occupancy period (generally, co-occupying the apartment as a joint primary residence with the Settling Tenant for the two years immediately preceding the Settling Tenant's vacatur . . . from [the apartment], and evidentiary burdens normally used in so[-] called "rent controlled" contests pertaining to succession rights as exist on May 1, 2005, shall apply, except that those procedures involving the forms and notice to DHCR shall not apply.

Agreement, ¶ 28.

The settling tenants also entered into lifetime lease agreements with Extell. Extell entered into a lifetime lease with Ms. Uppman and her daughter Margot Vincent, who has power of attorney for her mother, on March 16, 2007 ("the lease"). The lease set a base rent for the apartment of \$1330.74 through December 31, 2006; \$1596.89 from January 1, 2007 through

¹ Under this clause, successor tenants included grandchildren who resided in the apartment on the date of the new agreement, and whose name was set forth in Exhibit C to the agreement. Mr. Vincent is listed in Exhibit C.

December 31, 2008; \$1729.96 from January 1, 2009 through December 31, 2009; and 5% annual increases thereafter. The lease also acknowledged that the apartment was deregulated.

Successor tenants, on the other hand, only had a right to term leases which expired at the end of the settling tenants' leases. Successors under 25-years-old were entitled to leases that would end on their 36th birthdays. Other successor tenants, upon application, were entitled to 10-year leases which would commence when the settling tenant permanently vacated the apartment. At the end of their leases, the successors would have no further rights to occupy the apartment unless Extell decided to offer these rights to them.

As indicated above, both the settling and the successor tenants had to maintain the apartments as their primary residences. The agreement stated that rent stabilization requirements regarding notice did not apply to these apartments regarding this issue. However, the tenants had a right to mediate or arbitrate any disputes prior to an attempt to terminate their tenancies on this basis – once during each ten years of the tenancy, with a maximum of two challenges.

As plaintiff points out, Mr. Vincent signed the agreement as well.² He signed as one of the “other adult tenants with rent regulated rights “who may have rights under rent control or rent stabilization rules that are terminated by this [a]greement.” Also, he “waive[d] those potential rights and acknowledge[d] this agreement.” Agreement, p. 61.

II. Status of Ms. Uppman and Mr. Vincent with respect to the apartment:

Ms. Uppman had lived in the apartment for many years when she signed the lease in March of 2007 and the agreement in May of 2006. The Court does not know exact progression of her illness but notes that she signed in May 2006 on her own behalf and that her daughter

² The Court notes that in their pleadings, both plaintiff and Mr. Vincent stated that he did not sign the agreement.

either signed or co-signed the 2007 lease using her power-of-attorney. Mr. Vincent testified at deposition^{to} that .

Ms. Uppman's health continued to deteriorate until she moved into a retirement community in Maryland and then transferred to the retirement community's extended care facility. According to a caseworker's letter, submitted in support of Mr. Vincent's motion, Ms. Uppman moved to the residence community on September 17, 2009 and to the extended care facility on November 6, 2009. The letter does not indicate the basis of the case worker's relationship with Ms. Uppman and the source of her knowledge, but it is undisputed that she has not resided at the apartment in a while.

The facts are less clear with respect to the critical issue of Mr. Vincent's residence at the apartment. In his deposition, he indicates that he moved to his present address, the apartment at the Belnord, in July 2005 when his grandmother's condition worsened. During this period, from the summer of 2007 until perhaps 2009, he spent several days per week away from the apartment in order to work in the D.C. area. He also spent some nights at his ex-girlfriend's apartment while they were still together. However, he claims that he viewed the apartment as his primary residence. Some of his mail went to the apartment, but he readily acknowledges that his parents and his then-girlfriend also received mail on his behalf. He explains that he had his mail redirected because of his grandmother's dementia; she frequently threw away his mail or misplaced it. Once his grandmother moved, he states, much of his mail was redirected to the apartment.

In addition, at some unspecified point, Mr. Vincent's current girlfriend and at least one friend moved into the apartment. According to Mr. Vincent, his friend pays half of the rent and he pays the rest. He contends in his pleadings that since his grandmother moved out he has paid

the monthly rent to plaintiff, which accepted his rent and thus his tenancy. However, he did not pay directly. Instead, his friend's and his own money were deposited into an account controlled by Ms. Uppman's attorney, and the rent was paid to plaintiff from that account.

Tax returns from the pertinent years 200xxxxxx, which list the apartment as his residence, support Mr. Vincent's position but do not resolve the issue. Plaintiff's representative at deposition acknowledged that the office received undated notifications concerning (1) Mr. Vincent's move to the apartment to take care of Ms. Uppman, and (2) Ms. Uppman's initial stay at the retirement community (it is not clear if or when they became aware that her residency there turned permanent). It also is not clear whether plaintiff made any effort to verify the situation between 2009 and 2011, when it commenced this action. Plaintiff points to the agreement, which gives it "sole and arbitrary" discretion to determine whether Mr. Vincent is a successor tenant, and notes that Mr. Vincent signed the agreement.

In response, Vincent argues that because he continued to pay, and plaintiff continued to accept, the monthly rent, he is the tenant of record. Moreover, he states that plaintiff agreed to accept the rental rate he paid when it accepted his checks. He also claims this status based on his residency at the apartment, allegedly since 2005. In addition, he challenges the 2006 ruling of the DHCR which deregulated the building because according to Vincent plaintiff's decision to accept J5-abatements after the deregulation order went into effect nullifies that order. He finally states that the apartment was only to be deregulated if the residents of the apartment have a total income exceeding \$175,000, and his income is far less than that.

I. J-51 Tax Abatements and plaintiff's motion.

The Court agrees with plaintiff that those of Mr. Vincent's counterclaims and defenses that rely on the apartment's rent-stabilized status must be dismissed. Mr. Vincent cannot raise a

direct challenge to a DHCR ruling in the context of this lawsuit. Instead, he must obtain a final determination from the DHCR. If he is not satisfied with the ultimate ruling, he must commence an Article 78 proceeding, after having gone through the requisite administrative procedure.

Gersten v. 56 7th Ave. LLC, 88 A.D.3d 189, 928 N.Y.S.2d 515 (1st Dept. 2011).

Moreover, based on Mr. Vincent's own rendition of the facts, he resided in the apartment as the tenant of record once his grandmother vacated the apartment. There is no indication that he ever took steps to challenge the rent; indeed, in his deposition testimony he acknowledged that he has been paying the rent without objection since sometime in 2009. He is a signatory to the initial agreement as a potential successor, and agreed to waive the J-51 challenge among others in exchange for a greatly reduced rent. Also on this point, plaintiff has submitted evidence indicating that it has not received J-51 benefits in several years. After considering these points and others together, the Court concludes that he cannot challenge the destabilization through a court proceeding at this juncture.

Although the Court grants summary judgment dismissing the affirmative defenses related to these claims, it finds no arguments that are persuasive regarding the remaining affirmative defenses. Therefore, the Court grants the motion only to the extent set forth above.

II. Ms. Uppman's Motion.

The Court denies Ms. Uppman's motion to dismiss. Her guardian argues that because Ms. Uppman has not lived in the apartment for years and is incompetent due to Alzheimer's disease, she should not be part of this litigation. However, he cites to no statutory law or case precedent that supports his position. Moreover, he was appointed Ms. Uppman's guardian for the purpose of this litigation by Justice Marcy S. Friedman's February 16, 2012 order, which made the requisite determination concerning Ms. Uppman's competence. Thus, Justice

Friedman anticipated Ms. Uppman's continued involvement in this lawsuit and expected the guardian to represent her interests. *See also* CPLR ¶ 1201 (guardian ad litem appointed, *inter alia*, to appear in court proceedings in which person is declared incompetent). Although Ms. Uppman's ability to participate directly in the litigation may be limited by her illness, this does not excuse her as a defendant.

In addition, plaintiff argues, Ms. Uppman's and Mr. Vincent's statuses with respect to the apartment is at issue in the lawsuit. The Court agrees that if it dismissed Ms. Uppman from this action partly on the ground that she relinquished her tenancy to her grandson, it would be deciding a critical issue. Finally, plaintiff challenges the level of proof the guardian submits in support of his claim that Ms. Uppman is not competent. This argument lacks merit as Justice Friedman adjudicated the issue when she determined that a guardian was necessary.

III. Mr. Vincent's cross-motion.

There are numerous issues of fact which preclude summary judgment in favor of Mr. Vincent on the issue of primary residence, his status as a successor tenant, and other related issues. Defendants informed plaintiff that Ms. Uppman was being moved to a residential facility at least temporarily, but it is not clear whether and when it learned that she had vacated the apartment on a permanent basis. It appears that no one hid Mr. Vincent's presence in the apartment, and deposition testimony reveals that at least some of the staff may have known he lived there. As plaintiff points out, Mr. Vincent was a signatory to the agreement. This not only shows that he had consented to the settlement of any disputes; it also shows that plaintiff knew he was a potential successor tenant. It is not clear what impact this knowledge, coupled with plaintiff's knowledge that Ms. Uppman had moved out of the apartment at least temporarily, placed on them to determine Mr. Vincent's status in a more timely basis. On the papers before

the Court, it appears that Mr. Vincent was the primary resident, along with his roommate and girlfriend, for quite some time. Also, Mr. Vincent's tax returns list Ms. Uppman's address as his own. Plaintiff is correct that this is not definitive proof of his primary residence, but it certainly carries some weight.

For all these reasons and more, the Court agrees with plaintiff that numerous issues of fact and law remain. The Court finally notes that Mr. Vincent's objection that this matter must be litigated in Housing Court has no merit, as this Court has general jurisdiction, including over housing matters. However, the Court agrees with Mr. Vincent that Housing Court would have been a more appropriate forum, as this Court is much less familiar with the relevant law and standards.

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment is granted in part, and defendant Mr. Vincent's first counterclaim/sixth affirmative defense and his first and fourth affirmative defenses are severed and dismissed; and it is further

ORDERED that defendant Ms. Uppman's motion to dismiss the action as against her is denied; and it is further

ORDERED that defendant Mr. Vincent's cross-motion is denied.

Dated: 5/31/13

ENTER:

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Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

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FILED

JUN 05 2013

**COUNTY CLERK'S OFFICE
NEW YORK**