CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART R

BRAHIM SINANOVIC,

Petitioner,

INDEX No: 107264/05

-against-

DECISION AND ORDER

RONALD McKAY,

Respondent,

"JOHN DOE" and "JANE DOE"

Respondents.

Lansden, J.

In this owner occupancy proceeding, Petitioner sought to recover the subject apartment for his daughter's use. Respondent asserted that Petitioner was acting in bad faith in seeking to regain the subject apartment.

TRIAL

The parties stipulated to introducing the deed, initial lease and latest renewal lease. Petitioner also offered into evidence the DHCR printout and the Court took judicial notice of the contents of the Department of Housing Preservation and Development website. Petitioner testified that in 2005 when his daughter, [redacted] became engaged they spoke about her and her husband living in an apartment in one of Petitioner's buildings. Shortly thereafter, the instant proceeding was commenced. Petitioner testified that he wanted to regain the apartment, renovate it and then permit his daughter and husband to live there. He did not plan on charging them rent.

Petitioner's daughter, [redacted], testified that in the summer of 2005 she discussed occupying an apartment with her father. She stated that she was married in December 2005 and

but for Respondent failing to vacate the subject apartment, she would be living there as of trial. As it was, she shared a room with her husband next to the garage in her in-laws' home in Staten Island. [redacted] testified that Staten Island has not been ideal given the commute to midtown where she and her husband work. She further stated that living in her in-laws' home has caused tension and/or friction, particularly with her mother-in-law, often resulting in arguments. Many times, according to the testimony, her husband has been caught in the middle of these arguments, which has placed stress on the marriage. She asserted that the relationship with her in-laws was not particularly good and getting worse, the longer she resided in their home.

[redacted] testified that the subject building is in a good neighborhood and located where she and her husband can start a family. The building is closer to Manhattan so she and her husband will have a shorter commute to work and is more convenient to see her friends and shop. [redacted] identified the subject apartment as being on the top floor and providing the best view to Bay Parkway and the park near the building. She did not believe she would have to pay a rent to her father as they had not discussed the topic, but would pay what he asked.

She acknowledged never entering the subject apartment but was generally familiar with the building having worked for her father in his office during prior summers. Also, she had asked her father for a one bedroom apartment and he had suggested the subject apartment. Upon being asked if she would be willing to move into another apartment in the subject building, she stated she would consider another apartment, but thought the subject apartment was more desirable.

Testimony from Petitioner's son in law and other daughter, corroborated [redacted] testimony. [redacted] clearly felt uncomfortable discussing the relationship between his wife and his mother and how often he was "caught in the middle". The Court believed he was generally

credible in his statements relating to residing in the subject apartment and how residing there would improve his marriage and commute to work. After this testimony, Petitioner rested.

Respondent testified that he had resided in the subject apartment since July 1974. He asserted that Petitioner, or a company that Petitioner ran, became the owner in 1996 or 1997. Respondent asserted that the real reason Petitioner wants the subject apartment is to get him out of the building so the apartment can be rented to a tenant who pays more rent. As proof of his claim, Respondent further testified that after becoming involved with the building, Petitioner often told him he paid too little rent and demanded that he leave the subject apartment. Thereafter, every time he saw Petitioner, he would be asked when he was moving out.

In or about 1997, Petitioner simply stopped accepting or cashing his rent checks. After a few months of this, Respondent stopped sending in his payments. In 2001, a nonpayment proceeding was commenced by Petitioner (Index Number 86100/01) seeking all outstanding rent. This proceeding was settled pursuant to a stipulation wherein all back rent was satisfied. According to Respondent, this was the last time he was asked to move out of the apartment or there was any problem with rent not being accepted.

The rent for the subject apartment is the lowest in the building. In fact, Respondent's rent is approximately half of that of the other tenants. Further, most of the apartments in the building are of a similar layout and size. While it was acknowledged there were differences in the kitchens, Respondent put forth that the only real difference between the apartments was the amount of rent being charged and lead Petitioner to focus on his apartment rather than any of the other apartments in the building.

Respondent further testified that he did not believe Petitioner's daughter planned on

moving into the subject apartment. He asserted that other apartments in the subject building had become vacant after the proceeding was commenced and she did not take occupancy.

ANALYSIS

In this proceeding, there is no dispute that Respondent has resided in the subject apartment since July 1, 1974. Respondent initially argues that his eviction is prevented by the Emergency Tenant Protection Act ("ETPA") and the Emergency Tenant Protection Regulations ("ETPR") which were enacted pursuant to the ETPA. §2504.4(a)(2) provides in relevant part that "the provisions of this subdivision shall not apply where a member of the household...has been a tenant in a housing accommodation in that building for twenty years or more...".

The ETPR affords protection to tenancies commenced between July 1971 and May 1974 which would have otherwise been unprotected or unregulated. Verni v. Owens-Kennedy, NYLJ 4/4/01 21:5 (NY Co., Klein). See also, Kamenoff v Ormaya, NYLJ 11/1/00, 31:2 (Queens Co., Katz) and Byros v. Zupan, NYLJ 1/31/01, 24:6 (Kings Co., Scheckowitz). As such, since Respondent's tenancy did not commence until after the relevant time period, the protections of the ETPR do not apply.

It is well settled that under the Rent Stabilization Code (hereinafter, "RSC"), an owner may recover possession of a rent stabilized unit for the landlord's personal use or for the personal use of a member's of the landlord's immediate family. Pultz v. Economakis, 8 Misc. 2d 1022 (A), 803 NYS 2d 20 2005 WL 1845634 quoting RSC §2524.4(a). The intent to occupy the subject premises must be genuine and not a subterfuge to remove regulated tenants from the premises. Pultz v. Economakis, supra. The purpose of the legislature in establishing the Rent Stabilization Code, as it relates to owner occupancy proceedings, was to prevent "manipulation"

and "schemes" aimed at circumventing the balance between an owner's good faith intent to obtain living accommodations and the tenants' right to remain in their rent regulated apartments. Samuel v. Ortiz, NYLJ 6/7/95, 30:2 (Civ Kings, Callander) citing to Bedford v. DeRosa, 448 NYS 2d 959 (Civ. Queens, 1985).

In an owner occupancy proceeding, the primary issue is whether the landlord or his family member has an honest, good faith intent to use and occupy the subject apartment. Axelrod v. Duffin, 154 Misc. 2d 310, 594 NYS 2d 518 (AT 1st Dep't. 1992) The landlord must demonstrate to the Court, by a preponderance of the evidence, that he has a good faith intent to occupy the premises or that his family member will occupy the premises. Nestor v. Britt, 213 AD 2d 255, 624 NYS 2d 14 (1st Dep't. 1995) Nowhere in the RSC is "good faith" named as a requirement. However, the case law interpreting RSC §2524.(a)(1) has, and still requires, such a demonstration. Id. When determining this issue, the Court must review the totality of facts that weigh on the landlord's credibility. See Basic Holding Corp. v. Gabel, 21 Ad 2d 874, 875, 251 NYS 2d 367 (1st Dep't. 1964); Tauber v. Ruscica, NYLJ 10/14/87, 14:3 (Civ. Ct. NY Co.); Minick v. Park, NYLJ 2/25/99, 29:2 (AT 1st Dep't.) While Courts look at a number of factors, it is up to the landlord to establish his own credibility regarding the intended use of the subject premises in order to prevail in the proceeding. Garner v. Berger, 2002 WL 31015649 (NY Civ Ct.); Delavan v. Spirounias, NYLJ 3/14/01, 19:5 (Civ. Ct. NY Co.) Some cases have held that a landlord's "credited testimony" was sufficient to meet the burden. Horsford v. Bacott, 32 AD 3d 1310 (1st Dep't. 2006). Other cases, have looked to the totality of the circumstances, including but not limited to prior actions of the owner. Garner v. Berger, supra.

After observing the testimony of [redacted] the Court believes that they

intend to reside in the subject apartment for an indefinite period of time. [redacted] was credible when she described the poor relationship she has with her in-laws as a result of having to reside in their home. She was sincere in her statements relating to starting a family and her inability to do so given her current living situation. [redacted] discomfort in describing how his relationship with his parents has diminished and the causes behind it, was highly credible.

The Court believes that Petitioner wants his daughter to live in the subject apartment. It appeared that Petitioner was acting as one would expect a father to act, in providing comfort and security to his daughter. At the same time, Petitioner was clearly concerned with not damaging the profitability of the subject building. The two goals are not mutually exclusive but may co-exist when there is a good faith intent for a family member to occupy the subject apartment.

Respondent argued that the motive behind the instant proceeding was a desire to remove him from the subject apartment as opposed to a good faith desire to regain it for a family member's use. Respondent presented strong evidence to support this position. Between 1997 and 2001, Petitioner's actions were clearly intended to compel Respondent to vacate the subject apartment. Respondent credibly testified to Petitioner continually asking him when he was going to move out and not accepting his rent for four years only to commence a nonpayment proceeding seeking all rents. Cases cited by Respondent support the proposition that evidence of animus or ulterior motive may be sufficient to establish "bad faith". See Fazio v. Joy, 89 AD 2d 604 (2nd Dep't. 1982) Were this proceeding commenced in 2001 or 2002, Respondent might well have proven the type of intent or animus necessary to establish "bad faith".

However, those actions were four years prior to the commencement of this proceeding. Further, Respondent acknowledged that after the nonpayment proceeding was settled, he has had

little or no contact with Petitioner. His rent was accepted and there were no requests for him to vacate. For better or worse, the landlord tenant relationship between the parties, during this time was normal. This four year period, during which Respondent was unable to allege any incidents or malfeasance by Petitioner, served to "rehabilitate" Petitioner's credibility as to why he seeks possession of the subject apartment. The facts in this proceeding where there were inappropriate actions taken when Petitioner first became connected to the building, followed by a four period of "peace", do not parallel those cases cited by Respondent wherein "bad faith" was established. Those cases showed an ongoing, prevailing pattern of conduct on the part of the landlord up to the commencement of the proceeding. See Fazio v. Joy, supra.

There did seem to be conflicting testimony by Petitioner and his daughter relating to whether or not access to the subject apartment had been obtained. Whether this stemmed from the trial occurring three years after discovery was conducted is unclear. Further, Petitioner's daughter did not convince the Court that there were financial reasons she needed the subject apartment. Both she and her husband were working, though in today's economy, that may have changed. Presumably, despite the debt they incurred from their wedding, they could afford to rent an apartment. However, while creating an issue, these inconsistencies were not enough to discount their testimony as being disingenuous.

At trial, Respondent did little to establish the pattern of behavior or type of animus necessary to find that bad faith or an ulterior motive existed as the purpose behind this proceeding. At no time did the Court observe any personal animosity towards Respondent from Petitioner. This is not to say that the Court did not conclude Petitioner saw a fringe benefit to regaining the subject apartment for his daughter's use, namely, providing a suitable space for his

daughter, son-in-law and future grandchildren to live without damaging the rent roll and profitability of the subject building.

It is true that Respondent has the lowest rent in the building and that such a fact is relevant to this proceeding. Yet, this alone will not suffice to establish "bad faith". Malfi v. Shannon, NYLJ 5/29/02, 23:4 (Civ. Ct. Kings Co.) In Matter of Berlinrut v. Leventhal, 43 Ad2de 522 (1st Dep't. 1973), the court held that an owner is not required to occupy an apartment that is not controlled and thus diminish his income. By inference, neither is an owner required to seek market or high rent apartments for his immediate family. Further, since Petitioner testified he did not plan on charging his daughter rent, it would be reasonable to seek an apartment with a low rent as opposed to a higher or market rent. Petitioner is not required to damage the financial viability of investment property in order to establish good faith.

There is no dispute that other apartments in the building became vacant after the commencement of this proceeding. Again, while relevant, this fact is not determinative of whether or not Petitioner is acting in good faith. Timko v. O'Mara, NYLJ 10/27/87, 16:3 (App term 2nd and 11th Jud. Dists.) See Santos v. Staples, 8 Misc 3d 138(A)(App. Term 2nd and 11th Jud. Dists. 2005) Petitioner's daughter had made clear what she considered to be important factors for the apartment she wanted to reside in and none of the other apartments which became available matched these requirements. The daughter did acknowledge if she had been told of these other apartments, she would have considered them given her current living circumstances but was clear that the subject apartment was her first choice.

Since it appears most of the apartments are similar in size, characteristics such as the view and the floor where the apartment is located, might be significant. They are in renting an

apartment, so it stands to reason that it would be so in this case.

This Court is reluctant to place great weight on the availability of other apartments, after the commencement of a proceeding, as an indication of bad faith. This would imply that landlord's and their family members have little or no choice in determining which apartment they wish to reside in or find more appropriate for their circumstances and encourage tenants to prolong and delay proceedings in the hopes that some other apartment becomes vacant so as to "force" landlords to seek a different accommodation. This was not the intent of the statute.

CONCLUSION

Based on the foregoing, Petitioner is awarded a final judgment of possession. A warrant of eviction shall issue forthwith but execution shall be stayed through June 30, 2009 on condition that Respondent tender any outstanding use and occupancy within ten (10) days of receipt of a copy of this decision/order with notice of entry and current use and occupancy by the tenth (10^{th}) of each month commencing January 2009 and ending June 2009.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 9, 2008

John S. Lansden, J.H.C.

HON. JOHN S. LANSDEN