

CITY COURT OF THE CITY OF WHITE PLAINS
COUNTY OF WESTCHESTER

-----X
JOHN MCFADDEN

Index #SP1502/07

*** Petition,

-against-

**PETITIONER'S
REPLY AND OPPOSITION
TO CROSS-MOTION**

ELENA SASSOWER

Respondent.

-----X

Leonard A. Sclafani hereby affirms under the penalty of perjury as follows:

1. I am an attorney duly admitted to practice law before the Courts of the State of New York. I am a member of the firm of Leonard A. Sclafani P.C., attorneys for petitioner. As such, I am fully familiar with the facts and circumstances surrounding this matter and hereinafter set forth.

2. I submit this affirmation in opposition to respondent's cross-motion: seeking to have this matter referred to the Division of Housing and Community Renewal for determination as to whether respondent is a protected tenant under the Emergency Tenant Protection Act (the "Act") or other regulation; granting judgment dismissing the petition under various sections of CPLR

§3211(a); granting summary judgement to respondent, granting costs and sanctions as against your affirmant and referring your affirmant to the Appellate Division's Disciplinary Committee. I also submit this affirmation in further support of petitioner's motion herein and in reply to respondent's opposition to it.

The Premises Are Not Regulated Under The EPTA;
No Referral To The DHCR Should Be Made

3. There is no question that the premises herein are not subject to the Emergency Tenant Protection Act; nor is there any question that respondent is not protected thereunder or under any other rent regulatory statute.

4. As set forth in the petition herein, at paragraph 13 thereof, the premises in question are not subject to the Emergency Tenant Protection Act, rent control or to the Rent Stabilization Law of 1969, as amended, or to any other rent regulation because the premises is a coop apartment, the shares in the coop corporation that owns the premises and that are appurtenant thereto having been sold by the coop's sponsor in an arms length sale to petitioner, who was, at the time, a bona fide purchaser, as and for petitioner's actual residence.

5. Annexed hereto as Exhibit "A" is a copy of a Resolution adopted by the Common Council of the City of White Plains, New York on September 9, 1992 entitled "Resolution Removing Owner-Occupied Condominium and Cooperative Units from Regulations under the Emergency Tenant Protection Act of 1974."

6. The Common Council of the City of White Plains was empowered to determine what housing accommodations would be subject to the Emergency Tenant Protection Act or other rent regulations pursuant to the Act.

7. As the Resolution makes clear, the Common Council of the City of White Plains determined that:

[W]ith the exception of units leased to tenants who are income eligible under the federal Section 8 Rental Subsidy Program, the regulation of rents for owner that occupy cooperative and condominium housing accommodations pursuant to the Emergency Tenant Protection Act of 1974 does not serve to abate the emergency declared by the Common Council on July 29, 1977 and therefore, the Common Council hereby permanently removes owner occupied cooperative and condominium housing accommodations from regulation under the Act with the exception units leased to tenants who have been certified by the White Plains Section 8 office as being income eligible under the federal Section 8 income eligibility requirements which certification shall be made annually. (Emphasis added)

8. The Resolution defines an "Owner-Occupied Condominium and Cooperative Unit" as:

Any condominium or cooperative dwelling unit which has been or is occupied or intended to be occupied by an owner, proprietary leasee or shareholder as his/her primary residence, which unit has been the subject of a closing under a cooperative or condominium offering plan, which closing occurred after the plan was declared effective by the Attorney General and which is now or may be rented to a tenant after the effective date of the cooperative or condominium plan, and in which tenant is not covered as a non-purchasing tenant under General Business Law §352-eee.

9. The Resolution also defines the terms "Owner" and "Proprietary Leasee", respectively, as follows:

Any person who is the purchaser, owner or grantee of a condominium deed or the shareholder of a cooperative corporation (or the Proprietary Leasee of any unit in a building owned by such corporation) and who occupies or intends to occupy a condominium or a cooperative unit as his/her primary residence or the immediate family of such person as defined in the EPTA;

and

Natural person(s) named as such in the proprietary lease to a cooperative unit and all natural person who are legally entitled to occupy the cooperative unit without Board of Director approval under the terms of the proprietary lease.

10. In the case here, petitioner occupied the premises in question, Unit 2C at 16 Lake Street, White Plains, New York, as his primary residence and as the primary residence of his family

before he purchased the apartment from the sponsor, Hale Apartment Corp., on August 2, 1983, in an arms length sale, pursuant to the cooperative offering plan for the conversion of 16 Lake Street to cooperative ownership, that was accepted for filing by the Attorney General on January 17, 1983, and after the plan was declared effective.

11. Mr. McFadden and his family resided in the premises as their principal residence from before he purchased the premises until shortly before he determined to sell the premises to respondent in 1986.

12. Annexed hereto as Exhibit "B" are copies of petitioner's stock certificate, the petitioner's proprietary lease for the premises, and other related documents which evidence the foregoing.

13. Annexed hereto as Exhibit "C" is a copy of the Fifth Amendment to the coop Offering Plan that certifies that the Plan was accepted for filing as above set forth.

14. Respondent makes no claim that she was, or is, certified

as income eligible under the Federal Section 8 Rental Subsidy Program; nor has she ever been.

15. Under these circumstances, there can be no question that the premises is not subject to the EPTA or other rent regulatory statute; nor does respondent identify any authority under which she could claim rent regulatory protection.

16. Respondent's cross-motion insofar as it seeks a referral of this matter to the DHCR to determine whether the premises is subject to the EPTA or other rent regulation is disingenuous at best.

17. Respondent made application to the DHCR upon receipt of the petition herein seeking an order determining that the premises are subject to rent regulation.

18. By decision dated August 28, 2007 (Exhibit "H" of respondent's cross-motion), the DHCR declined to do so. Instead

it ruled:

The matter referred to in your application does not come under the jurisdiction of this office, but you may wish to refer your complaint to a court of competent

jurisdiction. The complaint will not be addressed by this office since a court of competent jurisdiction is now reviewing [respondent's] case.

. . .

19. Respectfully, the appropriate forum for the determination that respondent seeks is this Court and the appropriate determination on the issue that respondent attempts to raise is that the premises is not subject to the EPTA or other rent regulation.

Petitioner's Application For a Default Judgment

20. Petitioner withdraws his application for a default judgment on the grounds that respondent has not timely answered the petition herein.

21. At the time that petitioner made his motion, neither he nor your affirmant was aware that the Court had granted respondent's request for an extension of time to answer the petition.

22. A recent review of the Court's records reveals that it had.

Petitioner Did Not Receive and has Not Received
Payment of June's and July Use And Occupancy

23. Respondent, apparently, does not appreciate the difference between one's receipt of a check and one's receipt of payment thereunder.

24. As reflected in the transcript of the proceedings on July 16, 2007, (Exhibit "I" to respondent's cross-motion) petitioner never denied receipt of the checks sent by respondent for rent for the months of June and July, 2007. Rather, petitioner asserted that he did not receive "payment" of rent or use and occupancy for those months because he, through your affirmant, promptly returned to respondent the checks that she had sent to petitioner as evidenced by the documents annexed to petitioner's within motion at Exhibit "C" thereof.

25. Moreover, the transcript plainly evidences the Court's direction that respondent stop payment on the two checks that she had sent to petitioner (the return of which she has denied

receiving) and send new checks that petitioner could accept without prejudice.

26. Respondent failed to do so as of the August 27 adjourn date of the proceedings but misrepresented to the Court that she had.

27. In court on August 27, 2007, upon the Court's direct inquiry, respondent insisted that in compliance with the July 16, 2007 Order, she had already sent new checks to petitioner for June's and July's rents. She did so at the same time that she was seeking an extension of time to respond to petitioner's motion herein and in order to secure it.

28. The Court granted the extension but expressly conditioned that grant on respondent's providing of proof on the adjourn date; September 6, that, as of the date of the August 27, 2007 proceeding, she had complied with the July 16, 2007 order and had, by then, tendered new checks to petitioner as use and occupancy for June and July, 2007.

29. Respondent has provided no proof that she did so, and

cannot provide such proof because she did not.

30. Her representation to the Court in order to induce it to grant her the extension of time that she sought was false.

31. By fax received from respondent on August 31, 2007 (Exhibit "D"), respondent wrote to your affirrant stating that she was, then, sending petitioner two checks replacing her earlier two but was deducting \$30.00 from each of the two checks as bank charges that she claims to have incurred for stopping payment of her earlier checks.

32. Petitioner has advised that, as of today's date, he has not received respondent's alleged two new checks or, obviously, any part of the payments that were due for use and occupancy for July and August, with or without deduction.

33. Even if Petitioner had received such checks, respondent would have failed to have tendered the appropriate amounts and would not have paid any part of those amounts as of the date that she represented to the Court that she had already tendered her new checks.

34. Accordingly, respondent's cross-motion and opposition to petitioner's motion must be stricken and petitioner's motion herein must be granted on respondent's default.

Petitioner's Motion Is Not Defective

35. Respondent claims that petitioner's motion is defective because it is not supported by the affidavit of petitioner.

36. Petitioner's motion is one seeking dismissal of defenses pursuant to CPLR §3211 on the grounds that the respondent's answer raises "defenses" that are deficient as a matter of law and/or based upon respondent's own documentary evidence as she annexes to her cross-motion without the need for the Court to determine the factual issues that respondent attempts to raise in her answer.

37. Additionally, petitioner himself herewith submits his own affidavit in which he attests that all of the statements in your affirmant's affirmations both herein and in support of petitioner's motion are known by him to be true and incorporated by reference therein.

The Pendency of Any Open Proceedings Between
the Parties Herein Does Not Bar These Proceedings

38. As set forth in petitioner's moving papers, any prior proceedings between the parties that remain open as of today's date proceed on facts and grounds other than those that petitioner herein relies upon.

39. Here, petitioner relies in support of his petition upon a state of facts; to wit, an oral agreement, that had been modified over the course of the last fourteen or so years, on several occasions, pursuant to which petitioner agreed to respondent's possession and occupancy of the premises at issue in exchange for monthly payments of rent. This state of facts was, and is, different than and occurred subsequent to, the alleged events supporting the prior proceedings referred to by respondent.

40. Under these circumstances, the prior proceedings are no bar to petitioner's instant proceedings regardless of whether they are open or closed.

41. Here, it should be noted that, if there are open cases

between the parties, respondent's own admissions would actually entitle petitioner to the same relief as he herein seeks under his petition herein.

42. At paragraph "178" of her cross-motion, respondent alleges that "sole basis for [her] occupancy, as set forth by [her] Answer is the October 30, 1986 occupancy agreement pursuant to the contract of sale".

43. If such were, in fact, the case, petitioner would be entitled to eviction of respondent because, as the Court in the proceedings to which respondent refers in support of her defense held, and as is obvious from the express terms of the occupancy agreement itself, the term of that agreement expired upon the denial of the Coop Board of Director's refusal of its approval of respondent's purchase of petitioner's apartment.

44. At paragraph "155" of her cross-motion, respondent states that of the cases on which she relies to support her "First Affirmative Defense" "only 651/89, which was against [respondent] and [her] mother, remains open, the other two cases were dismissed."

45. It appears that case 651/89 has never been formally closed. The status of that case as of 1992 was that there was pending a motion for summary judgement against respondent based upon petitioner's claims that respondent's entitlement under the temporary occupancy agreement contained in the parties' contract had expired when the Coop Board of Directors refused its approval of the sale of the apartment to petitioner.

46. All of the papers necessary for the disposition of the motion had been submitted; however, the Court elected to hold its determination of the motion in abeyance pending a final decision of the federal court in respondent's suit there claiming, inter alia, that the coop Board had illegally discriminated against her in denying her application to purchase the apartment.

47. In its decision dated December 17, 1991, in the 651/89 City Court case, upon petitioner's motion for summary judgment, the Court expressly ruled that, because the outcome of respondent's appeals of the jury verdict and judgement of the federal court against her would be dispositive of petitioner's motion for summary judgment under the doctrines of res judicata, collateral estoppel and issue preclusion, the Court would stay

determination of petitioner's summary judgment motion until respondent's federal appeals were finally determined

48. In so ruling, the Court stated that, if respondent failed to succeed in her appeals of the federal jury verdict and judgment against her, "principals of res judicata, collateral estoppel and issue preclusion would apply" and "[i]n that situation we would grant the instant motion for summary judgment forthwith."

49. The Court also found that all of the papers on petitioner's motion for summary judgment had been submitted and denied respondent's request to supply additional papers in opposition to the motion. A copy of the December 17, 1991 decision of the City Court in case 651/89 is annexed hereto as Exhibit "E".

50. Respondent's own papers demonstrate that she has exhausted all of her appeals of the judgment and verdict against her in her federal litigation and that she prevailed on none of them.

51. To the extent that respondent claims that this Court should decide the open prior case against her, petitioner joins in that application and requests that, in accordance with its December 17, 1991 decision above identified, the Court grant summary judgment to petitioner on his petition seeking a warrant of eviction against respondent from the subject premises.

52. Respondent can not be heard to complain that subsequent agreements or events should alter this result since she now affirmatively asserts that she remains in occupancy of the premises at issue under the temporary occupancy agreement that was the subject of the proceedings in the 651/89 case and not under any subsequent agreement, express or implied, written or oral, between the parties herein.

53. She also seeks on her cross-motion and through her Answer to preclude this Court from ruling on matters the subject of the subsequent events.

54. In any case, whatever the Court may determine that it should do with respect to the "open" prior case between the parties, if it is in fact, still "open", the Court is not

precluded from adjudicating the instant proceedings and should do so.

This Court has Subject Matter Jurisdiction Over These Proceedings

55. Respondent contends that her "Third Affirmative Defense" of the lack of subject matter jurisdiction should not be stricken based upon her claim that, by the parties' contract of sale, they agreed that the temporary occupancy agreement included therein would not create a landlord-tenant relationship.

56. As is stated in petitioner's within motion, petitioner herein seeks eviction of respondent as a holdover on oral agreements pursuant to which respondent occupied the subject premises as petitioner's tenant subsequent to the cancellation of the contract of sale and the expiration of the term of temporary occupancy agreement contained therein.

57. That respondent denies that such was, or is, the case is irrelevant to the question of the Court's jurisdiction over these proceedings. Petitioner is the master of his petition.

58. Moreover, despite respondent's bald denials, the documentary evidence that she submits as part of her own answer; to wit, the contract of sale and various correspondence between her and petitioner, plainly establishes both that the term of the temporary occupancy agreement had expired upon the denial of the coop Board of Directors's refusal to approve the sale of the premises to respondent and her mother, and that, subsequently respondent agreed to pay, and did pay, monthly rent to petitioner in various amounts as the parties from time to time agreed in consideration for respondent's exclusive possession and occupancy of the subject premises.

59. In the face of this evidence, there can be no issue that there was, in fact, a landlord-tenant relationship between petitioner and respondent subsequent to the expiration of the term of the temporary occupancy agreement.

60. As respondent submitted the evidence as part of her own pleading and in support of her defenses and counterclaims, she is estopped from disputing the validity and substance of the evidence.

61. Even if such were not the case, this Court would still have jurisdiction over these proceedings on other grounds as petitioner has set forth in his motion herein.

Petitioner Has Joined All Necessary Parties

62. Respondent admits at paragraph "76" of her affidavit in support of her Cross-Motion that her mother, Doris, "does not now and did not in the past live in the apartment".

63. Since respondent's mother was not a party to the agreement between petitioner and respondent upon which the petition is based and is not in possession or occupancy of the premises in question, she is not a necessary party to these proceedings.

Respondent's "Fifth", "Sixth", "Seventh", "Eighth", "Ninth" and "Tenth" "Affirmative Defenses" and "First", "Second", "Third" and "Fourth" "Counterclaims" Are Meritless

64. Petitioner respectfully submits that the papers submitted by respondent in support of her cross-motion and in opposition to petitioner's motion relating to her "Fifth",

"Sixth", "Seventh", "Eighth", "Ninth" and "Tenth" "Affirmative Defenses" and "First" "Second", "Third" and "Fourth"

"Counterclaims" add nothing of substance to the question as to the sufficiency of those defenses and counterclaims but simply rehash the same meritless assertions as respondent raised in her Answer and as petitioner has addressed in his moving papers herein.

65. For the reasons set forth in petitioner's motion, those "Affirmative Defenses" and "Counterclaims" must be dismissed.

Respondent is Not Entitled to Summary Judgment

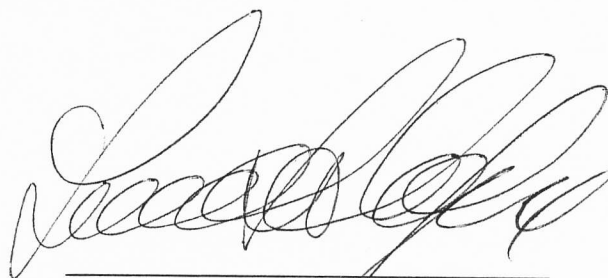
66. Respondent's claims that she is entitled to costs and sanctions and that your affirmant should be referred to the Appellate's Division's Disciplinary Committee are frivolous *per se* and not worthy of any response.

67. If sanctions, costs or attorneys fees are to be issued in this matter they should be issued against respondent for obvious reasons.

68. Respondent's papers offer nothing upon which summary judgment could, or should, be granted to her dismissing the petition herein or otherwise.

69. Respondent's cross-motion must be denied in its entirety.

Dated: September 5, 2007
New York, New York

A handwritten signature in black ink, appearing to read 'Leonard A. Sclafani', written in a cursive style. The signature is positioned above a horizontal line.

LEONARD A. SCLAFANI