

Illegal Apartments and the Collection of Rent

Real Estate In-Depth February, 2013

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This article addresses the recent decision in the Civil Court in the City of New York (Richmond County) (Staten Island) issued by Judge Philip S. Straniere, dated September 19, 2012. The case involves a not unusual circumstance, the rental of an illegal apartment by a Landlord and the consequences to the Landlord and Tenant of such illegality.

Mary Beth Acquino, Plaintiff, v. Gilbert Ballester, Defendant

2012 NY Slip OP 22267

Background

On May 11, 2007, the Defendant, Gilbert Ballester, purchased a two-family house at 45 Elm Street, Staten Island, New York. The mortgage executed at closing clearly indicates that the premises was "improved by a one or two family dwelling." Evidence adduced at trial indicated that the Landlord had created illegal apartments in the basement and attic of the building. The Plaintiff, Mary Beth Acquino, observed that there were four apartments in the building, rented the basement apartment and indicated that she believed that the Defendant, Gilbert Ballester, lived in the attic.

In June, 2011, Mary Beth Acquino rented the basement apartment and entered into occupancy on July 15, 2011. She gave to the Landlord a \$1,400.00 security deposit, of which \$200.00 was subsequently returned to her. The agreed upon rent was \$1,200.00 and she paid same faithfully for one year. The Tenant found the apartment through a broker, Virtual Real Estate, an entity with an office in Brooklyn, New York and paid to the real estate broker, a fee of \$1,400.00 for locating the apartment. Ms. Acquino's church gave her \$700.00 toward the first month's rent.

In June, 2012, Ms. Acquino was notified by the Marshal of the City of New York and Brooklyn Union Gas Company, that the apartment was illegal and that they had come to remove the first floor apartment gas meter. The Plaintiff, Mary Beth Acquino, was forced to move and expended \$4,400.00 in relocating to a new apartment on short notice.

The Tenant Sues the Landlord

Plaintiff Acquino then commenced a lawsuit in the Civil Court in Staten Island seeking to recover from Gilbert Ballester, the Landlord, the entire year's rent that she had paid as well as her moving costs of \$4,400.00 and her security deposit of \$1,200.00. The Court noted that the Defendant answered the Complaint of the Tenant and filed a counterclaim indicating that Ms. Acquino had damaged the property. The Defendant Landlord raised various defenses which the Court found "less than credible." Mr. Ballester asserted that he only rented out the two legal apartments. The records of the Court indicated that he had previously evicted another tenant from the illegal

apartment in the basement in 2009. The records of the Building Department of the City of New York disclosed that there was no Certificate of Occupancy for the entire building. The Court discerned from that circumstance that either the premises was totally illegal or the building was constructed prior to the requirements for Certificates of Occupancy which requirement began on January 1, 1938. The Plaintiff Acquino showed that she received an order on July 12, 2012 to vacate the premises because the apartment in the basement was illegal.

Can a Landlord Collect Rent for an Illegal Apartment?

The Court noted in its opinion that “no landlord-tenant relationship can exist where there is an illegal apartment.” The Court cited the case of *Fazio v. Kelly*, 2003 WL 22227363. Moreover and directly relating to the apartment rented to Ms. Acquino, the Court noted that “no owner...of any building shall permit any person to occupy a cellar as defined in Multiple Dwelling Law §4(37) for living purposes unless a permit has been issued...”. The Court noted that there was no showing as to whether the apartment was in a cellar or a basement. In either event, a special permit is needed to make occupancy legal. Because the apartment was illegal, the Court noted that the “court will not enforce an illegal contract.”

The Court then decided that because of the illegal occupancy, the contract between the parties (the lease) is “unenforceable”. The Court referred to the Multiple Dwelling Law of the State of New York §302(1)(b) which provides “No rent shall be recovered by the owner of such premises for such period, and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent.”

Private Dwellings vs. Multiple Dwellings

Section 4.6 of the Multiple Dwelling Law defines a “private dwelling” as “any building or structure designed and occupied exclusively for residence purposes by not more than two families.”

Section 4.7 then defines “multiple dwelling” as a “dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied as the residence or home of three or more families living independently of each other”.

The anomaly in the Multiple Dwelling Law occurs at §302-a(3)(d) which states:

“d. If a resident voluntarily pays rent or an installment of rent when he would be privileged to withhold the same under subparagraph a, he shall not thereafter have any claim or cause of action to recover back the rent or installment of rent so paid. A voluntary payment within the meaning hereof shall mean payment other than one made pursuant to a judgment in an action or special proceeding.”

The Court Applies the Law

The Court goes on to note that there is no statute prohibiting the collection of rent from an illegal one or two family dwelling. Because the contract is illegal, no rent is recoverable. The reason is that the apartment is presumably unsafe because it is not built to code. The Court however, determined that the Multiple Dwelling Law is not the “tenant rent relief” act. It is merely a safety statute designed to ensure compliance with the building and safety codes. The Court further notes that the New York City Administrative Code (26NYCAC §125) makes the failure to comply with the building code subject to criminal penalties and civil fines. Judge Straniere makes it clear that the Landlord cannot collect rent on an illegal apartment.

Rent Previously Paid

The Court then addressed whether or not the Tenant Acquino can recover the rent previously paid. Judge Straniere states “the law has to be that the tenant must vacate the illegal unit as soon as possible, immediately if a vacate order is issued, and the landlord is prohibited from collecting any rent.” ... “Because the apartment is illegal, the plaintiff (Mary Beth Acquino) cannot recover rent paid to the defendant (the landlord, Gilbert Ballester).”

Applying what is virtually a “tenant beware” approach, the Court stated that the Tenant had “constructive notice of the legality of the premises. She had the ability to check out the legality of the premises prior to entering into occupancy.” The Court refers to the website of the Department of Housing and the Buildings Department where the Tenant could have found out about the illegality of the basement apartment and if any violations had been assessed against the premises by other agencies.

Sue the Broker

Judge Straniere then asserts that the Tenant can sue the broker. In what is an unusual aspect of this decision, the Court virtually provided legal advice to the Plaintiff Tenant by indicating that the Plaintiff can seek damages against the broker. The following is quoted from the decision:

“Although the plaintiff cannot recover the rent she paid to the defendant from the defendant, she can commence an action against the real estate broker who placed her in the apartment. Plaintiff was assisted in locating this apartment by a real estate broker, Virtual Real Estate, 693 5th Avenue, Brooklyn, New York. As a broker he is a “licensed professional” charged with having greater knowledge of the real estate industry than the general public and has a professional obligation to check these governmental websites to insure that the representations of the landlord or seller are accurate and the premises are legal and can be used for the purpose their client is seeking their advice and assistance.”

“This court has held licensed real estate brokers to a higher standard than their uninformed clients [*Olukotun v Reiff*, NYLJ 8/18/04, p. 19, col. 1]. As noted in that case, Real Property Law §441(1)(b) provides that the holder of a real estate license should have “competency to transact the business of real estate broker in such a manner as to safeguard the interests of the public”.”

Court Assesses Damages Against Defendant-Landlord

The Court then ordered the return of the entire security deposit of \$1,200.00 because “the defendant is not entitled to keep it when the apartment is illegal and so unsafe that a vacate order had to be issued.”

The Court also ordered the Landlord to pay damages to the Plaintiff Tenant in the amount of \$4,400.00 for her relocation expenses which she would not have had to incur except for the illegality of the apartment in question.

What Can We Learn From This Case?

It is clear that when a person goes before the Court, results can be unpredictable. Most lawyers and brokers would have asserted that the Landlord should not be able to keep rent derived from an illegal apartment. Judge Stranieri’s decision indicates that once the rent was paid, the Multiple Dwelling Law controls. The Tenant cannot seek to recover the rent already paid. If the Tenant had not paid the rent, it is clear from the opinion that the Judge would not have permitted the Landlord to collect rent from the Tenant.

The broker in this instance was not a party to the action between the Tenant and the Landlord. Gratuitously, the Court suggests that there are damages which may be recoverable from the real estate broker who is held to a higher standard of conduct than a mere member of the public. A real estate licensee who does not verify the legal status of an apartment offered for rent to a prospective tenant, does so at his or her peril. The standard applied in this instance by the Court places upon the broker an affirmative obligation to investigate and inform a prospective tenant regarding the legality or illegality of the apartment.

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