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Decision of Interest

TENANT GRANTED DISMISSAL OF HOLDOVER PROCEEDING; LANDLORD FAILS TO SATISFY
STATUTORY REQUIREMENTS

New York County Civil Court

Judge McClanahan

DOOLING v. O'CONNOR, 85297/04 --

The Attorneys for the Petitioner were Borah, Goldstein, Altschuler, Schwartz & Nahins, P.C.

The Attorneys for the Respondent were Himmelstein, McConnell, Gribben, Donoghue & Joseph

Petitioner commenced these summary holdover proceedings seeking to recover possession of the rent stabilized subject apartments for their own personal use and occupancy. The apartments are rent-stabilized. The respondent, Michael **O'Connor**, contends that the proceeding against him should be dismissed because petitioner failed to offer him an 'equivalent or superior housing accommodation in a closely proximate area at the same or lower regulated rent.' See [Rent Stabilization Code \(hereinafter, the 'RSC'\) § 2524.4\(a\)\(2\)](#).

The parties agree that the respondent is a senior citizen as defined by the RSC. See Decision/Order dated November 7, 2005 (Lansden, J.). The question before this Court is one of seemingly first impression: does the offer of a housing accommodation that does not yet exist satisfy the requirements of the RSC?

In a letter dated March 10, 2005, petitioner proposed to create '... a new and better apartment for Mr. O'Connor on the fifth (5th) floor of the building. The apartment will be more than an equivalent apartment....' In April, petitioner faxed to respondent sketches and a proposed layout for the new apartment. Petitioner concedes that the proposed apartment is contingent on obtaining a Certificate of Non-Harassment from the New York City Department of Housing Preservation and Development ('HPD') and the filing and approval of plans with the Department of Buildings ('DOB'). Furthermore, the amount of the rent for the proposed apartment has not been set and there is no indication as to whether the apartment would be rent regulated.

The legislature worked very hard to establish a balance between the legitimate interest of an owner in seeking recovery of a rent regulated apartment for his/her personal use and the hardship placed on elderly tenants, noting that:

'Eviction is a serious hardship for senior citizens, long term tenants, and the disabled. Moving often means harmful amounts of physical effort for senior citizens and may be nearly impossible for the disabled. In the present housing market, renting a new apartment can be financially devastating to a person on a retirement or limited income. Yet, these people are often singled out by landlords for eviction because they often have been in the apartment for many years and thus pay lower rents... It would not prevent a landlord from obtaining an apartment, but would merely bar him from doing so at the expense of senior citizens, disabled persons and long term residents.'

(Publication page references are not available for this document.)

See New York State Assembly Memorandum for Bill 3586-B.

As held by one court, '[i]t is clear that the intent of the enactment of the statute was to prevent senior citizens from being ousted from their apartments without having been offered comparable housing. As a result of the housing shortage and consequently large increases of rents, this becomes extremely important.' [Schreier v. Albrecht, 126 Misc2d 336 \(Civ Ct Queens Co 1984\)](#). In considering the legislative intent and the persistent housing shortage in New York City, this Court holds that, as a matter of law, the offer of a non-existent apartment does not satisfy the requirements of the RSC.

The right of informed consent of the senior citizen tenant is fundamental to the balance struck by the legislature and prevailing case law. The tenant must be able to evaluate an existing apartment, assessing whether the location, layout, regulatory status and rental rate are equal to or superior to the apartment sought by the landlord. When the apartment is in the planning stages, the tenant's assessment is reduced to the fruitless act of speculation.

Were the court to find that the proposed apartment is equivalent or superior, it would require the issuance of a judgment of possession in favor of the landlord and against the tenant, severing the landlord/tenant relationship based on, at best, sworn testimony that the proposed apartment would be built and meet the specifications provided in the plans.

The inappropriateness of the foregoing is borne out by simple consideration of the unknowns involved in such a situation.

First, there is no assurance that the proposed plans would be approved by the DOB before entry of judgment. The approval process can drag on for months even with a paid expediter. Second, there is no guarantee that the current plans will be approved by the DOB without modifications. Any changes would certainly impact the Court's factual assessment of whether the proposed apartment satisfied the statutory requirements. Third, there is no guarantee that the construction will take place. Some unforeseen event could render the petitioners financially unable to complete construction.

Petitioner responds that safeguards in a carefully drafted contract could provide for any of these contingencies. Yet, breach of contract claims are the stuff of legend. Lawsuits can take years to resolve and are costly to both sides. Many senior citizens have neither the time nor the finances to expend in defending their statutory and contractual rights.

In reviewing the architectural plans, the Court has serious doubts as to whether the proposed apartment is equivalent or superior to the subject premises. The proposed apartment will be located on the fifth floor. Currently, the respondent resides on the third floor. This difference is very significant given the respondent's age. The subject premises faces the rear of the building with a view of the adjacent gardens. According to the plans, the proposed apartment will face West 81st Street, a busy thoroughfare. As noted earlier, the rent has not been set for the proposed apartment. This omission is fatal to a finding that the proposed apartment satisfies the statutory requirements.

Based on the foregoing, the Court finds that the petitioners have not complied with the requirements of RSC [§ 2524.4\(a\)\(2\)](#) by failing to offer to the respondent an equivalent or superior housing accommodation. Accordingly, the proceeding against the respondent, Michael **O'Connor**, is hereby dismissed with prejudice.

Furthermore, based on the dismissal of the one proceeding, the Court grants petitioner's motion and severs proceeding bearing L&T Index No. 85298/04 from the proceeding bearing L&T Index No. 85297/04. The other motions and cross-motions are hereby denied.

The proceeding James and Karen **Dooling** v. Geley is hereby restored for trial on January 8, 2007, in Part H, Room1164B, at 9:30 A.M. The Court shall mail courtesy copies of its decision/order to counsel.

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