

**CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART N**

**MH RESIDENTIAL 1, LLC,
MH RESIDENTIAL 2, LLC, and
MH COMMERCIAL, LLC,
As Tenants in Common,**

Petitioner-Landlord,

Index No. L&T 75408/06

-against-

DECISION and ORDER

**JOHN G. BARRETT
200 East 66th Street
Apt. E1602
New York, New York 10021**

Respondent-Tenant,

**MICHAEL BARRETT,
"JOHN DOE" and "JANE DOE,"**

Respondents-Undertenants.

DAVID B. COHEN, J.:

I. Introduction and Background

A. Parties

Petitioner-landlord, MH Residential 1, LLC, MH Residential 2, LLC, and MH Commercial, LLC ("MH" or "petitioner") is the owner and landlord of the building known as "Manhattan House" and located at 200 East 66th Street, New York, New York (the "building" or "premises"). Petitioner is the sponsor of a condominium conversion plan of the building.

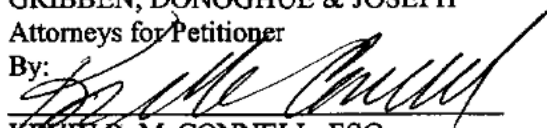
Respondents are tenants residing at the premises, who are holding over beyond the time of their expired, unregulated leases. Thirty-one distinct holdover proceedings brought by petitioner are

5. A facsimile signature shall be deemed an original.

Dated: New York, New York
December 3, 2007

HIMMELSTEIN, McCONNELL,
GRIBBEN, DONOGHUE & JOSEPH
Attorneys for Petitioner

By:



KEVIN R. McCONNELL, ESQ.
15 Maiden Lane, 17th Floor
New York, New York 10038
(212) 349-3000

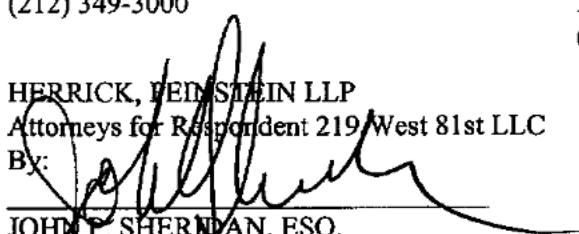
ANDREW M. CUOMO
Attorney General of the State of New York
Respondent Pro Se

By:

LEWIS A. POLISHOOK
Assistant Attorney General
120 Broadway, 24th Floor
New York, New York 10271
(212) 416-8372

HERRICK, FELDSTEIN LLP
Attorneys for Respondent 219 West 81st LLC

By:



JOHN P. SHERIDAN, ESQ.
2 Park Avenue
New York, New York 10016
(212) 592-1510

SO ORDERED:

Hon. Eileen A. Rakower, J.S.C.

currently pending against respondents, with the proceeding against respondents John G. Barrett and Michael Barrett (collectively "Barrett"), having the lowest index number, being designated the lead case.¹

The instant matter is before the court on respondents' motion to dismiss these proceedings pursuant to General Business Law (GBL) § 352-eeee *et seq.* (the "Martin Act"). Because of similar issues of law and fact common to all respondents, the parties have stipulated to the petitioner's prima facie case and have agreed to be bound by this court's decision in the *Barrett* case as to the respondents' motion to dismiss on Martin Act grounds.²

B. Factual Background and Procedural History

Petitioner, as sponsor, is attempting to convert the building from rental to condominium ownership under a non-eviction plan. On or about February 1, 2006, petitioner submitted a proposed offering plan ("the plan") to the New York State Department of Law for review by the New York State Attorney General ("Attorney General"), and provided the tenants with copies of the plan.

¹ In addition to *Barrett*, these proceedings, as set forth by counsel for respondents, are: *MH Residential 1, LLC, MH Residential 2, LLC, and MH Commercial, LLC v Altcheck*, 84811/06; *Burwick*, 75684/06; *Benerofe*, 83671/06; *Bliss*, 76335/06; *Cinque*, 75683/06; *Claps*, 83670/06; *Felske*, 75412/06; *Goldstein*, 84809/06; *McCollom*, 78899/06; *Strife*, 85741/06; *Trnka*, 83676/06; *Horan*, 83673/06; *Nudell/Buxbaum*, 84808/06; *Rosefsky*, 84810/06; *E. Amsterdam*, 75681/06; *Tosk*, 84812/06; *Riesenfelder*, 91890/06; *Bookman*, 95195/06; *Fraser*, 95194/06; *Weintraub*, 95198/06; *Waitman*, 99549/06; *Harland*, 99545/06; *Schaefer*, 101471/06; *Spuches*, 102000/06; *Peterson*, 101470/06; *Bradley*, 102667/06; *McCann*, 104622/06; *Elizondo*, 55811/07; *Fuir*, 69054/07; *Hunt*, 69053/07; *Taggart*, 69052/07; and *Kreisman*, 73773/07 (Resp. Mem. of Law at App. A).

Petitioner disputes that *Burwick*, 75684/06, and *Trnka*, 83676/06, are included in the stipulation governing this motion to dismiss, asserting that the tenant in *Burwick* is deceased and was intentionally omitted from the stipulation, and *Trnka* was excluded based upon a pre-existing agreement between the parties (Pet. Mem. of Law at 1).

² The parties have preserved all other claims and defenses should this court not find the Martin Act affirmative defense dispositive.

Within months after distribution of the plan, a number of tenants, including some respondents, whose leases had expired, received Notices of Petition and Petitions in holdover. When the respondents did not vacate, petitioner commenced these summary holdover proceedings in Housing Court. All are what are commonly known as "no cause" holdover proceedings, based only upon the expiration of respondents' leases and petitioner's claims that their apartments are not subject to rent control or rent stabilization.³

Petitioner seeks a final judgment awarding possession of the apartments, the issuance of warrants of eviction removing respondents from the premise, and an award of use and occupancy.⁴

Petitioner further asserts that renewal lease offers were made to 11 of the respondents in these proceedings.⁵ None of the respondents accepted petitioner's offers.

Petitioner contends the renewal offers were at market rates and, should the court find respondents are protected from eviction for failure to vacate at the expiration of their leases, that as to the 11 respondents who were offered renewal leases, "a hearing is necessary to determine whether those lease renewals offers were made in accordance with the Martin Act" (Pet. Mem. of Law at

³ Although petitioner argues that respondents' failure to vacate the premises upon the expiration of their leases constitutes a breach of their obligations thereunder, petitioner does not allege any other breach of obligations of their leaseholds, such as non-payment of rent, illegal use or occupancy of the premises, or refusal of reasonable access to the owner. As such, the grounds for these "no cause" eviction proceedings are related to the "expiration of tenancy" (*see* GBL § 353-eeee [2] [c] [ii]).

⁴ By stipulation, the parties have agreed that respondents shall pay use and occupancy during the pendency of these proceedings, without prejudice, therefore, such payments shall not create month-to-month tenancies.

⁵ Copies of these renewal lease offers, bearing dates during the period from February 2006 to February 2007, are contained in Exhibit 2 to Petitioner's Memorandum of Law.

19).⁶ Respondents dispute that any such offers, to the extent that they were made, were market rate renewal offers.⁷

By Notice of Motion dated August 25, 2006, prior to issue being joined and prior to the acceptance of the plan for filing by the Attorney General, respondents moved to dismiss the proceedings on the grounds that, among other things, the landlord was barred from evicting them pursuant to GBL § 352-eeee(4). By decision dated March 23, 2007, Judge Marc Finkelstein denied respondents' motion to dismiss (*MH Residential I, LLC v Barrett*, Hous Part, Civ Ct, NY County, Mar. 23, 2007, Finlelstein, J., slip op at 3-4).⁸

On March 31, 2007, a few days after Judge Finkelstein's decision, the petitioner's condominium conversion plan was accepted for filing by the Attorney General as a non-eviction

⁶ For the reasons discussed *infra*, the court finds a hearing unnecessary.

⁷ Each of the extensions is for no more than twelve months: one is for three months, another for six months, and one "extension" for only a month for the tenant to relocate, is not a lease renewal offer at all. Respondents point out that the rents sought for these few months' extensions are substantially higher than the rents paid by these unregulated tenants who were already paying market rates for their apartments just prior to the offer of the extensions; in some instances, the rents are nearly doubled. In addition to paying higher rents, respondents were required to make additional security deposits corresponding to the higher monthly rents. Nearly all of the extensions give the landlord the right either to terminate the extensions upon only 15 days' notice, or to compel the tenant to relocate to another "comparable" apartment at the same rent, regardless of the new apartment's size, location or condition, or both. Respondents therefore argue that these offers of lease renewal are unjust and unreasonable and do not meet the obligation of good faith and anti-harassment mandated by the Martin Act.

⁸ Judge Finkelstein specifically ruled that a key factor in his decision was that the status of the condominium conversion was that it was at the "red herring" stage. Judge Finkelstein noted that his decision "does not stand in opposition to the subsequent decision of Housing Court Judge David Cohen which is based upon the plan having been accepted for filing. 322 West 57th Street Owner, LLC v. Penhurst Productions, Inc. 2007 Slip Op. 50515(U) Civ Ct, NY County, March 19, 2007" (*MH Residential I, LLC v Barrett*, Hous Part, Civ Ct, NY County, Mar. 23, 2007, Finlelstein, J., slip op at 4 n 6).

plan. Thereafter, respondents appeared and answered, and included in each answer the affirmative defense that they are protected from eviction by virtue of the Martin Act, GBL § 352-eeee. These proceedings were referred to Housing Part N for trial.

Respondents allege as a defense and counterclaim that the proceedings should be dismissed pursuant to General Business Law (GBL) § 352-eeee *et seq.* (the "Martin Act") because respondents are protected from eviction pursuant to GBL §§ 352-eeee (2) and (4) as the Attorney General has accepted petitioner's non-eviction condominium conversion plan for filing.⁹ Respondents assert that they have been awaiting the final offering plan so that they "may have the opportunity to purchase [their] apartment[s]."¹⁰

At this point, no final judgments of possession nor warrants of eviction have been issued and respondents remain in possession of their apartments.¹¹

⁹ Respondents had alleged a number of other defenses and counterclaims, such as: (1) the proceedings were commenced in retaliation for respondent's participation in the tenants' association, and should be dismissed pursuant to section 223-b of the Real Property Law and common law, and for damages; (2) respondent is the lawful tenant because only a court can terminate a tenancy; and (3) the use and occupancy sought exceeds the fair market value of the premises, and that, in any event, respondent is entitled to an offset for conditions at the subject premises which it claims violate the warrant of habitability; (4) there were procedural defects in the Notice of Petition and Petition; and (5) the landlord's waiver by way of accepting and retaining respondents' rent checks (*see e.g.*, Answer of Michael D. Barrett).

¹⁰ (*See e.g.*, Aff. of Michael D. Barrett, ¶ 10 [Aug. 24, 2006], attached to Resp. Motion to Consolidate and Dismiss Petition [Aug. 25, 2006]). The affidavits of 15 additional respondents attached to Respondent's Motion make the same assertion.

¹¹ This matter was set down for trial in Part N on September 11, 2007. The parties agreed to submit memoranda to this court to determine, as a threshold issue, whether petitioner can maintain these proceedings in light of respondents' Martin Act defenses, inasmuch as a resolution of this issue may render any fact-finding unnecessary.

II. Legal Analysis

This court once again is asked to decide substantially the same question as presented in the case of *322 West 57th Owner LLC v Penhurst Productions, Inc.* (15 Misc 3d 1105 [A], 2007 NY Slip Op 50515 [U] [Hous Part, Civ Ct, NY County, Cohen, J.]) ("*Penhurst*"), that is, whether unregulated holdover tenants may invoke the protection of the Martin Act to avoid eviction by the sponsor of a non-eviction condominium conversion plan, which has been accepted for filing by the Attorney General. *Penhurst* answered that question in the affirmative.

The instant proceedings are factually and legally similar in all material respects to that of *Penhurst*, decided by this court on March 19, 2007. Thus the result in the present case is governed by this court's previous decision and order in *Penhurst*.¹²

In *Penhurst*, this court extensively discussed the provisions of the Martin Act, its legislative history, and the protections it affords tenants in buildings undergoing a plan of conversion. As discussed in *Penhurst*, tenants in occupancy on the date the Attorney General accepts a non-eviction plan for filing are entitled to receive a purchase offer from the sponsor in a non-discriminatory manner (GBL § 352-eeee [2] [c] [i]).¹³ The sponsor of a non-eviction plan is permanently barred

¹² Petitioner has asked the court to reverse itself on *Penhurst*, claiming that the case was wrongly decided. The court has considered petitioner's arguments and has found them unpersuasive.

¹³ "As to tenants who were in occupancy on the date a letter was issued by the attorney general accepting the plan for filing, the purchase agreement shall be executed and delivered pursuant to an offering made without discriminatory repurchase agreements or other discriminatory inducements" (GBL § 353-eeee [2] [c] [i]). The sponsor must obtain written purchase agreements for 15% of the dwelling units from "bona fide tenants in occupancy" or from "bona fide purchasers who represent that they intend . . . [to] occupy the dwelling unit when it becomes vacant" before a "non-eviction plan" may be declared effective (*id.*).

under the Martin Act from evicting "non-purchasing tenants" based on "expiration of tenancy"¹⁴ and from subjecting such tenants to unconscionable rent increases (GBL § 352-eeee [2] [c] [ii], [iv]; see generally *Langdale Owners Corp. v Lane*, 166 Misc 2d 439, 441-443 [App Term, 2d Dept 1995]; *Paikoff v. Harris*, 185 Misc 2d 372, 377 [App Term, 2d Dept 1999]).¹⁵ Upon review of the relevant legislative history of the Act, this court in *Penhurst* declined to adopt a narrow reading of the term "non-purchasing tenant" in GBL § 353-eeee [2] [c] [ii], holding that the prohibitions against "no cause" evictions in that section must apply to "tenants in occupancy" at the date of the offering plan's acceptance.¹⁶

Further, GBL § 352-eeee (4) prohibits "any person" from engaging in conduct which "substantially interferes with or disturbs the comfort, repose, peace or quiet of *any tenant* in his use or occupancy of his dwelling unit" (GBL § 352-eeee [4]).¹⁷ The court found this provision, which

¹⁴ "No eviction proceedings will be commenced *at any time* against non-purchasing tenants for failure to purchase or any other reason applicable to expiration of tenancy; provided that such proceedings may be commenced for non-payment of rent, illegal use or occupancy of the premises, refusal of reasonable access to the owner or a similar breach by the non-purchasing tenant . . ." (GBL § 353-eeee [2] [c] [ii] [emphasis added]).

¹⁵ GBL § 352-eeee (1) (e) defines a "non-purchasing tenant" as: "A person who has not purchased under the plan and who is a tenant entitled to possession at the time the plan is declared effective or a person to whom a dwelling unit is rented subsequent to the effective date. A person who sublets a dwelling unit from a purchaser under the plan shall not be deemed a non-purchasing tenant."

¹⁶ As stated in *Penhurst*, "[i]t defies logic to suggest that tenants who possess the right to *purchase* their apartments, upon the acceptance of the plan, may at the same time be *evicted* from their apartments, cutting off their right to purchase. Such a result is inconsistent with and would frustrate the legislative purpose an intent of the Act" (15 Misc 3d 1105 [A], 2007 NY Slip Op 50515 [U], *4).

¹⁷ GBL § 352-eeee (4) provides:

It shall be unlawful for any person to engage in any course of conduct,

protects tenants subject to a conversion plan from harassing conduct such as interference with essential services, sufficiently broad to also provide protection from evictions.

Thus, two provisions of the Martin Act, GBL § 352-eeee (2) (c) (i), (ii) and § 352-eeee (4), protect tenants in occupancy in a building undergoing conversion, upon acceptance of the offering plan, from eviction or removal absent some good cause shown, such as nonpayment of rent or similar breach.

Moreover, in *Penhurst* this court held that the respondents therein, tenants holding over beyond the term of their expired, unregulated leases, were "tenants in occupancy" within the class of individuals protected by the Martin Act. The critical factor in determining the status of such tenants, as of the date of acceptance of the plan by the Attorney General, is whether a final judgment and warrant of eviction has been issued, since "as a matter of law, the landlord-tenant relationship [is] not extinguished until the issuance of the warrant" (*Eight Cooper Equities v Abrams*, 143 Misc 2d 52, 55-56 [Sup Ct, NY County 1989]).¹⁸ In the absence of a judicial determination of the

including, but not limited to, interruption or discontinuance of essential services, which substantially interferes with or disturbs the comfort, repose, peace or quiet of any tenant in his use or occupancy of his dwelling unit or the facilities related thereto. The attorney general may apply to a court of competent jurisdiction for an order restraining such conduct and, if he deems it appropriate, an order restraining the owner from selling the shares allocated to the dwelling unit or the dwelling unit itself or from proceeding with the plan of conversion; provided that nothing contained herein shall be deemed to preclude the tenant from applying on his own behalf for similar relief.

¹⁸ "[W]here a summary proceeding to recover possession of real property has been instituted, the landlord-tenant relationship may only be terminated by actual surrender of the premises" or by "issuance of a warrant of eviction" (*Eight Cooper Equities v Abrams*, 143 Misc 2d at 54 [citations omitted] [under Martin Act warehousing provisions, tenants or subtenants are counted as "bona fide" tenants for purposes of GBL § 352-eeee (2) (e), although summary proceedings had been commenced against them, until such time as there has been a final

propriety of the landlord's rejection of the tenancy or subtenancy, the legality of the tenancy in question "must be presumed" (*id.* at 56).

Similar to the *Penhurst* tenants, the respondents herein are "tenants in occupancy" entitled to invoke the protections of the Martin Act, inasmuch as there has been neither an actual surrender of the premises nor issuance of a warrant of eviction against them, which would have terminated their tenancies. Specifically, respondents, as "tenants in occupancy" at the time of the acceptance of the plan by the Attorney General, are entitled to the opportunity to purchase their apartments (GBL § 352-eeee [2] [c] [i]), and may not be evicted without cause unrelated to the expiration of their tenancies (*see* GBL § 352-eeee [2] [c] [i], [ii] and § 352-eeee [4]). Here the only basis for the eviction of these tenants is the fact that their lease terms have expired and have not been renewed. Consequently, respondents are protected from "no cause" holdover eviction proceedings by the Martin Act (GBL § 352-eeee [2] [c] [ii], § 352-eeee [4]).

The fact that lease renewals were or may have been offered to a number of tenants in no way affects the conclusion that all of the respondents cannot be evicted, as it does not affect their status as tenants in occupancy who have the right to purchase their apartments once the offering plan is accepted for filing (*see* GBL § 352-eeee [2] [c] [i], [ii] and § 352-eeee [4]). Therefore, for the reasons set forth above, and as stated in *Penhurst*, these proceedings must be dismissed.

judgment and warrant of eviction issued]; *cited with approval by Webb v Barskey*, 9 Misc 3d 138[A], 2005 NY Slip Op 51748[U] [App Term, 2d Dept 2005]; *see* 1 Dolan, *Rasch's Landlord and Tenant--Summary Proceedings* §§ 10:8-10:9, at 453-454 [4th ed]" (*Penhurst*, 15 Misc 3d 1105 [A], 2007 NY Slip Op 50515 [U], *7).

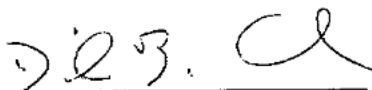
II. Conclusions

In light of the Attorney General's acceptance of the non-eviction plan for the subject building, respondents are protected from "no cause" holdover eviction proceedings by the Martin Act (GBL § 352-eeee [2] [c] [ii], § 352-eeee [4]). Accordingly, the petitioner's holdover proceedings against respondents are dismissed.

This constitutes the decision and order of this court.

The clerk shall serve a copy of this decision and order upon all parties.

Dated: New York, NY
November 28, 2007



DAVID B. COHEN, J.H.C.

To: Richman & Fingerhut, PC
Attorneys for Petitioner-Landlord
67 Wall Street
Suite 1810
New York, New York 10005
by: David L. Fingerhut, Esq.

Himmelstein McConnell Gribben
Donoghue & Joseph
Attorneys for Respondents-Tenants
15 Maiden Lane
17th Floor
New York, New York 10038
by: Kevin R. McConnell, Esq.