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Civil Court, City of New York,
Kings County, Housing Part 36.
1202 REALTY ASSOC., Petitioner-Landlord,
v.
Dave EVANS, Freida Bready, Janice Adams, Almania Ferebic, Louise Howard, Virginia Downs, Mary May, Florence Roberts, John Brown, Jacinta Atherly, Emma Wheaton, Ceciela Lewis, Sondra Johnson, Dilicia Holder, Y. Longchamp, Helen Hyman, Mildred Ellison, Ronald Carthen, L. Longchamp, Megertha Adams, Emma Murray, Marcella Crafton and Julian Robinson, 1202 Avenue K, Brooklyn, New York, Respondents-Tenants.

July 25, 1984.

In proceedings for nonpayment of rent, tenants moved to consolidate proceedings and landlord cross-moved to strike tenants' jury demand. The Civil Court of the City of New York, County of Kings, Housing Part 36, Margaret Cammer, J., held that: (1) proceedings were ripe for consolidation, and (2) landlord was not entitled to have tenants' jury demand struck on ground that tenants had signed leases containing jury waiver clauses.

Order accordingly.

West Headnotes

[1] Trial 2
388k2 Most Cited Cases
Where several actions involving common question of law or fact are pending before court and no substantial right would be prejudiced, court has discretion to order consolidation. McKinney's CPLR 602(a); McKinney's N.Y.City Civ.Ct.Act § 110(b).

[2] Trial 2
388k2 Most Cited Cases
Proceedings for nonpayment of rent would be consolidated, where all respondents were tenants in same building, were all being sued for alleged arrears in rent involving same time period, and all had raised identical defenses. McKinney's N.Y.City Civ.Ct.Act § 110(b).

[3] Jury 28(17)
230k28(17) Most Cited Cases
Knowing and intentional jury waiver in lease will be upheld in summary proceedings for nonpayment of rent.

[4] Jury 28(15)
230k28(15) Most Cited Cases
Because right to trial by jury is fundamental, courts indulge every reasonable presumption against finding of waiver.

[5] Jury 28(15)
230k28(15) Most Cited Cases
Burden of proving waiver of right to trial by jury rests upon party seeking to enforce it.

[6] Jury 28(17)
230k28(17) Most Cited Cases
Where landlord fails to offer renewal lease as required under Rent Stabilization Code, landlord may not rely upon jury waiver clause in that expired contract as ground for striking tenants' jury demand. City Rent Stabilization Code, § 60, McK.Unconsol.Laws.

[7] Jury 28(15)
230k28(15) Most Cited Cases
Landlord was not entitled to have tenants' jury demand struck absent lease agreements or other evidence to show that tenants waived their right to jury trial.

[8] Trial 2

388k2 Most Cited Cases
Action triable by jury may be consolidated or tried jointly with one triable without jury, even where some of the parties have waived their right to jury trial.

[9] Jury 26
230k26 Most Cited Cases
Payment of one jury fee in consolidated action is sufficient to entitle all respondents to jury trial.
****208 *99** Karen B. Yellen, Brooklyn, for petitioner-landlord.

Lansner & Wendt by Samuel J. **Himmelstein,** New York City, for respondents-tenants.

****209** DECISION AND ORDER

MARGARET CAMMER, Judge:

Respondents move to consolidate twenty-three (23) non-payment proceedings for trial, pursuant to CPLR 602(a) and NYCCCA Sec. 110(b). Petitioner cross-moves to strike respondents' jury demand on the ground that certain of these tenants have signed leases containing jury waiver clauses.

[1] Consolidation or joint trial not only saves time, trouble and expense, but also may prevent contradictory decisions based on the same facts. (See Weinstein, Korn & Miller, *N.Y. Civil Practice*, Vol. 2, par. 602.04; *Shlansky & Bro., Inc. v. Grossman,* 273 A.D. 544, 78 N.Y.S.2d 127). Where several "actions involving a common question of law or fact are pending before a court" (CPLR Sec. 602(a)) and no substantial right would be prejudiced (see *Lee v. Schmeltzer,* 229 A.D. 206, 242 N.Y.S. 34; *Denton v. Koshfer,* 201 Misc. 394, 106 N.Y.S.2d 385), the court has discretion to order consolidation. Further, and more specifically applicable to ***100** the instant motion, NYCCCA Sec. 110(b) requires that the court, on application of any party, "*shall,* unless good cause is shown to the contrary, consolidate all actions and proceedings pending ... *as to any building.*" (Emphasis supplied).

[2] These proceedings are ripe for consolidation. All the respondents are tenants in the same building, located at 1202 Avenue K in Brooklyn. All the proceedings are for non-payment of rent and allegedly involve building-wide defective conditions, including lack of heat and hot water, leaks and lack of painting and plastering. All respondents are being sued for alleged arrears in rent involving the same time period, and all have raised identical defenses, including breach of the warranty of habitability, repair and set-off, payment, res judicata and collateral estoppel. Put simply, these twenty-three (23) respondents are apparently engaged in a concerted rent-withholding action, better known as a "rent strike". The conclusion that these proceedings involve "a common question of law or fact" (CPLR 602(a)) in "all actions and proceedings pending ... as to any building" (NYCCCA Sec. 110(b)) is thus inescapable.

[3][4][5] Notably, petitioner does not dispute consolidation in its answering papers but instead cross-moves to strike respondents' jury demands. To support its position, petitioner has produced copies of written leases for eleven (11) of the twenty-three (23) respondents, ten (10) of which plainly contain jury waiver clauses. [FN*] As petitioner points out, it is settled law that a knowing and intentional jury waiver in a lease will be upheld in summary proceedings for non-payment of rent. (*Avenue Assoc., Inc. v. Buxbaum,* 83 Misc.2d 719, 373 N.Y.S.2d 814). However, because the right to trial by jury is fundamental, courts indulge every reasonable presumption against a finding of waiver. (*Aetna Insurance Co. v. Kennedy,* 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177). The burden of proving a waiver rests upon the party seeking to enforce it. (*Williams v. Mascitti,* 71 A.D.2d 813, 419 N.Y.S.2d 404; *L.G.J.K. Realty Corp. v. Hartford Fire Insurance Co.,* 48 A.D.2d 670, 367 N.Y.S.2d 564; *Holrod Assoc. v. Tomanovitz,* 117 Misc.2d 371, 458 N.Y.S.2d 156).

> FN* It is unknown whether the eleventh lease contains such a clause, since a large portion of the annexed lease copy is obscured and the legible portion does not reveal any jury waiver provision.

Three of the leases relied on by petitioner to vitiate the jury demands herein expired before the commencement of these proceedings and each covers a rent stabilized apartment. This Court is aware of the substantial body of case law holding that the termination of a lease does not nullify a jury waiver clause in that lease. (See, e.g., *Spevack v. Breitman,* Sup., 68 N.Y.S.2d 663; *Clayman v. Moelis,* Sup., 28 N.Y.S.2d 196; ***101***Berdam Holding Corp. v. Lieberman,* Sup., 21 N.Y.S.2d 626). Based on this principle, jury waiver clauses in expired leases have been projected into various types of holdover tenancies (see, e.g., ****210** Lera Realty Co. v. Rich,* 273 A.D. 913, 77 N.Y.S.2d 658; *Fowler Ct. Tenants, Inc. v. Young,* 119 Misc.2d 492, 463 N.Y.S.2d 686), including those created by statute. (See, e.g., *Jamaica Investors v. Blacharsh,* 193 Misc. 949, 87 N.Y.S.2d 807; *130 West 57 Corp. v. Hyman,* 188 Misc. 92, 66 N.Y.S.2d 332; *Continental Mdse. Co. v. Harris,* Sup., 76 N.Y.S.2d 613). While most of the reported cases involving jury waivers have arisen under rent control, the Rent Stabilization Law, applicable here, contains no explicit prohibition against projecting the terms of an expired lease into a statutory tenancy. (Cf. *Pierre v. Williams,* 106 Misc.2d 81, 431 N.Y.S.2d 249).

However, under Section 60 of the Code of the Rent Stabilization Association of New York City, Inc., by which petitioner is bound, a landlord is required, before the expiration of a tenant's lease, *to*

> *offer to renew* the lease at a rent not in excess of the stabilization rent permitted ... and otherwise *on the same conditions* as the expiring lease ... *provided, however* [that] ... (b) *upon the request of and with the consent of the tenant, the terms and conditions* of a renewal lease entered into after November 1, 1978, *may be re-written* ... (Emphasis added).

This language confers both a duty on the landlord to offer a renewal lease and a right in the tenant to request and consent to changes in the terms of that renewal lease. The tenant's right can only be preserved if the landlord complies with its statutory responsibility. Thus, where a landlord fails to offer the tenant a renewal lease, the tenant is prevented from exercising its right to bargain for modification of the lease agreement.

In three of these cases, petitioner apparently seeks to benefit from the situation just described by moving to deny these tenants' fundamental right to trial by jury in reliance on expired leases containing jury waiver clauses. The moving papers contain no indication that renewal leases were proffered or executed, or that the tenants refused to renew their leases upon demand pursuant to Section 54(C) of the Rent Stabilization Code. Accordingly, this Court can only conclude that no renewal leases were offered and that these tenants have been effectively denied their right to negotiate for a deletion of the jury waiver clauses.

[6] Clearly, the Legislature could not have intended such a result under the Rent Stabilization Law, passed to protect the rights of tenants. The ancient equitable adage that "one may not benefit from his own wrong" still survives and will be applied to achieve the ends of justice. Therefore, this Court holds that where a ***102** landlord fails to offer a renewal lease as commanded by law, he or she may not come into court in reliance upon that expired contract as a ground for striking the tenant's jury demand. (See *Sobel-Halberg v. Foss,* L & T No. 105824/79 (Civil Ct., N.Y.City), *aff'd,* N.Y.L.J., October 29, 1980, p. 5, col. 3 (App.Term, 1st Dept.)).

In accordance with this holding, petitioner's cross-motion to strike the jury demands of tenants M. Adams, Crafton and Holder, being based upon jury waiver clauses contained in expired leases, is denied. Petitioner's cross-motion as to tenants Downs, Murray, L. Longchamp, Ellison, Robinson, Brown and Wheaton, being based upon current leases containing valid jury waiver clauses, is granted.

[7] Petitioner has produced no lease agreements or other evidence to show that the remaining thirteen (13) respondents have waived their right to trial by jury. In fact, petitioner openly admits that when it succeeded the prior owner, it "was unable to secure leases for every tenant in the building." The Court cannot assume, as petitioner suggests, that

unproduced leases exist and are "exactly the same as those in petitioner's possession." To the contrary, there is nothing to indicate or demonstrate that this is so except mere speculation by petitioner, which cannot serve as a basis to sustain petitioner's burden of proving that respondents waived their right to a jury trial. Accordingly, petitioner's cross-motion ****211** is denied as to the remaining thirteen (13) respondents.

[8] Other than its assertion of waiver, petitioner has neither alleged nor shown that any of its substantial rights would be prejudiced if these matters were tried jointly. An action triable by jury may be consolidated or tried jointly with one triable without a jury (*Shlansky & Bro., Inc. v. Grossman, supra; Meuer v. Horowitz,* Sup., 20 N.Y.S.2d 780; Weinstein, Korn & Miller, *supra,* par. 602.11), even where some of the parties have waived their right to a jury trial. (See *Inspiration Enterprises, Inc. v. Inland Credit Corp.,* 57 A.D.2d 800, 394 N.Y.S.2d 701; *O'Brien v. Jefts,* 3 A.D.2d 787, 160 N.Y.S.2d 22). A joint trial is not an organic consolidation and the integrity of each proceeding is preserved, allowing each to retain its separate identity and for entry of a separate judgment in each. (*Import Alley of Mid Island, Inc. v. Mid Island Shopping Plaza,* 103 App.Div.2d 797, 477 N.Y.S.2d 675 (App.Div., 2nd Dept.); *Inspiration Enterprises, Inc. v. Inland Credit Corp., supra; Barbilex Assoc. v. Pesaitis,* 113 Misc.2d 436, 449 N.Y.S.2d 387). However, since all of these proceedings share material questions of law and fact, a joint trial will also serve the interests of judicial economy. (*Import Alley of Mid Island, Inc. v. Mid Island Shopping Plaza, supra; Mideal Homes Corp. v. L & C Concrete Work, Inc.,* 90 A.D.2d 789, 455 N.Y.S.2d 394).

Accordingly, respondents' motion to consolidate is granted to the extent of setting these proceedings down for a joint trial on ***103** August 2, 1984 at 9:30 A.M. Respondents are directed to serve a copy of this Order upon the Clerk of Part 35 of this Court on or before July 30, 1984.

[9] None of the leases annexed to petitioner's motion papers bind the four tenants who paid a jury fee in these proceedings. As petitioner admits, the payment of one jury fee in a consolidated action is sufficient to entitle all respondents to a jury trial. (*Parsoff v. Brograng Realty Corp.,* 1 Misc.2d 657, 147 N.Y.S.2d 582. See also *Donmar Realty Corp. v. Kyle,* L & T No. 29416/76 (Civil Ct., N.Y.City: Danzig, J.)). Accordingly, the jury fee paid by respondents in Proceedings 1-4 is deemed applicable to all respondents eligible for trial by jury in these proceedings.

126 Misc.2d 99, 481 N.Y.S.2d 208

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