C

Supreme Court, Kings County, New York,
IAS Part 26.
JORDAN MANUFACTURING CORPORATION, previously known as Seagoing Uniform Corporation, Plaintiff,
v.
Manuel LLEDOS and Debra Tadevich, Defendants.
JORDAN MANUFACTURING CORPORATION, previously known as Seagoing Uniform Corporation, Plaintiff,
v.
Mohammed GHONOUDIAN, Defendant.
JORDAN MANUFACTURING CORPORATION, previously known as Seagoing Uniform Corporation, Plaintiff,
v.
Margaret CARTER and John Knight, Defendants.
JORDAN MANUFACTURING CORPORATION, previously known as Seagoing Uniform Corporation, Plaintiff,
v.
Jim VAN ETTEN and Joyce Van Etten, Defendants.
Jan. 17, 1992.

Landlord brought action against tenants to obtain possession. On landlord's motion for summary judgment, the Supreme Court, Kings County, Hurowitz, J., held that: (1) rent stabilization law applies to premises when sixth dwelling unit is added in building, unless building is exempt from regulation on some other ground, regardless of whether sixth unit is added after effective date of statute exempting from regulation premises with less than six units, and (2) issue of material fact as to whether landlord or tenants bore cost of substantial rehabilitation of building precluded summary judgment for landlord on his claim that building was exempt from rent stabilization.

Motion denied.

West Headnotes

[1] Judgment 653
228k653 Most Cited Cases
Prior judgment in landlord's action to obtain possession of apartments from tenants, which granted summary judgment to landlord based on determination that tenants' conclusory assertion of defenses were insufficient to rebut acts asserted in landlord's moving papers, did not collaterally estop other tenants from defending against landlord's possession motion on substantive grounds.

[2] Landlord and Tenant 200.44
233k200.44 Most Cited Cases
(Formerly 233k200.43)
Rent stabilization law applies to premises when sixth dwelling unit is added in building, unless building is exempt from regulation on some other ground, regardless of whether sixth unit is added after effective date of statute exempting from regulation premises with less than six units. McK.Unconsol.Laws § 8625, subd. a(4)(a).

[3] Landlord and Tenant 200.44
233k200.44 Most Cited Cases
(Formerly 233k200.43)
Renovation of building which changed purely commercial space into purely residential space constituted substantial rehabilitation, for purpose of determining whether building was exempt from rent stabilization. McK.Unconsol.Laws § 8625, subd. a(5).

[4] Judgment 181(24)
228k181(24) Most Cited Cases
Issue of material fact as to whether landlord or tenants bore cost of substantial rehabilitation of building precluded summary judgment for landlord on his claim that building was exempt from rent stabilization. McK.Unconsol.Laws § 8625, subd. a(5).
***297 **546** Levy Sonet & Siegel, New York City,

for plaintiff.

Himmelstein & McConnell, New York City, for defendants, Van Etten, Ghonoudian, Carter, Lledos & Tadevich.

BARRY HUROWITZ, Justice.

Plaintiff's motion for an order consolidating the captioned cases and for summary judgment awarding plaintiff possession of ****547** the apartments in which defendants reside, and dismissing the counterclaims is granted to the extent that the cases are consolidated under the caption listed on the moving papers and under index number 32228/91.

Plaintiff herein owns a four-story loft building located at 24 Sixth Avenue, Brooklyn, New York. The building is zoned for commercial use only. In 1983 open raw loft space on the third and fourth floors of this building were renovated for residential use, seven units were created. Several defendants entered into leases for the units and one did not have a lease. Plaintiff did not renew any of the leases. Plaintiff has served defendants with 30-day Notices of Termination.

The plaintiff commenced actions against various tenants to obtain possession of their apartments as well as other relief. Plaintiff has moved for consolidation of these actions and for summary judgment on the issue of possession of the units and dismissal of defendants' counterclaims. The motion is granted as to consolidation since the same issues are involved in each of these proceedings. Summary judgment and dismissal of the ***298** counterclaims cannot be granted since issues of fact exist as set forth below.

Plaintiff contends that the defendants are collaterally estopped from defending this action due to the Second Department's decision in *Jordan Manufacturing Corp. v. Zimmerman*, 169 A.D.2d 815, 565 N.Y.S.2d 184 [1991]. The Court disagrees.

[1] In *Jordan* (*supra*), the plaintiff, who is the same plaintiff as in the case at bar, brought an action to obtain possession of apartments from other tenants in the building at issue before this Court. The Second Department reversed the Supreme Court's denial of plaintiff's motion for summary judgment and granted the plaintiff possession because defendants, who occupied the apartments without leases, made only unsubstantiated claims that the plaintiff, through an agent, promised them leases and promised to obtain a certificate of occupancy for the building (*supra*, at 816, 565 N.Y.S.2d 184). The Court found these assertions to be conclusory and insufficient to rebut the facts asserted in the landlord's moving papers. Thus, it does not collaterally estop the defendants herein from defending against this motion on substantive grounds.

The issue before this Court on that part of the motion seeking summary judgment and dismissal of the counterclaims is whether the defendants' tenancies are protected by the rent stabilization law, or whether these units are exempt from rent stabilization by virtue of the Emergency Tenant Protection Act of 1974 (McKinney's Uncons.Laws § 8625(a)(4), (5) [L.1974, ch. 576, § 4 (§ 5[a][4], [5])]).

[2] Unconsolidated Laws § 8625(a)(4)(a) exempts premises with less than six dwelling units from the rent stabilization laws. Plaintiff contends that this statute should be read as exempting any premises where six dwelling units did not exist prior to or on January 1, 1974, the effective date or base date of the statute, even if six dwelling units were created or the number of existing units was increased to six or more after the base date. The First Department, however, disagrees.

In *Wilson v. One Ten Duane Street Realty Co.*, 123 A.D.2d 198, 510 N.Y.S.2d 603 [First Dept.1987], the Court explicitly rejected this base date argument and held that rent regulations go into effect whenever a sixth dwelling unit is added in a building unless the dwelling is exempt from regulation on some other grounds. The Court stated:

The purpose of the ETPA being to extend the

> protection of rent stabilization in the face of a declared emergency brought about by housing shortages and their ***299** attendant problems * * *, it is best served by following the plain language of the statute and refraining from supplying an uncalled for base date that would only restrict its purpose (*supra,* at 201, 510 N.Y.S.2d 603).

This Court is bound by the First Department's decision (*Mountain View Coach Lines v. Storms,* 102 A.D.2d 663, 476 N.Y.S.2d 918 [2d Dept.1984]). Thus, summary ****548** judgment cannot be granted based upon Unconsolidated Laws § 8625(a)(4)(a).

Plaintiff also argues that summary judgment should be granted on the grounds that the dwelling is exempt from rent stabilization pursuant to Uncons.Law § 8625(a)(5). This section exempts "housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January first, nineteen hundred seventy four."

In order for this exemption to apply, the Court must determine two issues. One, whether the building was substantially rehabilitated (*Pape v. Doar,* 160 A.D.2d 213, 553 N.Y.S.2d 344 [1st Dept.1990]), and two, whether it was the owner, as opposed to the tenants, who paid for the rehabilitation (*Wilson v. One Ten Duane Street Realty Co., supra*).

In defining the term substantially rehabilitated, the Court in *Pape v. Doar* (*supra*), held that Uncons.Laws § 8625(a)(5) must be strictly construed and should be interpreted "in conjunction with provisions entitling owners of rent-stabilized buildings to rent increases for major capital improvements" (*supra,* 160 A.D.2d at 215, 553 N.Y.S.2d 344). Prior to its renovation, the five-story building in *Pape* (*supra*) consisted of a cellar used for storage, a ground floor consisting of an unused open space and apartment units on the remaining three floors. After the renovation, the building's two bottom floors were renovated for office space. All of the apartments and the major building systems were replaced. The Court found that the building did not meet the definition of substantial rehabilitation.

In reaching this conclusion, the Court cited various lower court definitions of substantial rehabilitation. These cases have held that the "building", as opposed to the individual apartment units, must be rehabilitated for residential use (*Goodman v. Ramirez,* 100 Misc.2d 881, 884, 420 N.Y.S.2d 185 [Civ.Ct., NY Co.1979]); that the building's use cannot be "primarily commercial" after the renovation and that the number of dwelling units created must at least double the amount of units existing prior to the renovation ***300**(*Hickey v. Bomark Fabrics,* 111 Misc.2d 812, 815, 445 N.Y.S.2d 681 [Civ.Ct., NY Co.1981] *affd.* 120 Misc.2d 597, 467 N.Y.S.2d 496 [App.Term, First Dept.1983]); and that the renovation has to be more than an "upgrading in the multiple dwelling status of the building" or the "conversion of a commercial or largely commercial structure to multiple dwelling units" since the investment for these renovations may be recouped under the rent stabilization law (Estate of *Romanow v. Heller,* 121 Misc.2d 886, 888, 469 N.Y.S.2d 876 [Civ.Ct. NY Co., 1983]).

If the Court were to apply *Pape* (*supra*), and the cases cited therein to the case at bar, it would appear that summary judgment would have to be granted to the defendants. However, *Pape* (*supra*) must be read in light of the First Department decision in *Wilson v. One Ten Duane Street Realty Co.* (*supra*).

In *Wilson* (*supra*), the upper four floors of a five-story commercial building were renovated as dwelling units. The ground floor retained its commercial use. There the Court did not raise the issue raised in *Pape* (*supra*), but determined that the issue was whether the building owner or the tenants absorbed the major cost of renovation. The First Department found that the exemption was created to "give a landlord the investment incentive of the recoupment of his rehabilitation free of stabilized rent" (*supra,* 160 A.D.2d at 205, 553 N.Y.S.2d 344). The Court notes that the major difference between *Wilson* (*supra*) and *Pape* (*supra*), and its

cited cases is that in all of the cases except *Wilson* (*supra*), the premises had been at least partially used as a dwelling prior to rehabilitation. Thus, *Wilson* (*supra*) and *Pape* (*supra*) must be reconciled using this distinction as a basis.

In cases where the area renovated is divided between commercial and residential use, it would appear that the issue becomes the extent of the *commercial* rehabilitation. Where the building's use remains "primarily commercial", an incentive for recoupment is not required because the landlord is expected to recoup his investment from the commercial use of the building. ****549** In cases where the building was primarily residential, and where rent stabilization existed prior to the renovation, or where units were added so that rent stabilization subsequently applied to the building, an exemption is not required unless renovations are so extensive that they cannot be recouped under the rent stabilization laws. This protects tenants by keeping their apartments regulated while permitting the landlord to make necessary improvements or even add apartments.

***301** [3] *Wilson* (*supra*), and the case at bar, may be distinguished from these cases insofar as in *Wilson* (*supra*) and the case at bar, the renovation served only to change purely commercial space into purely residential space. Under such circumstances, where there has been no renovation to the part of the building maintaining its commercial use, the recoupment for the landlord can only come from the rent charged for the residential units. In addition, there is no need to protect existing tenancies with rent regulation as such tenancies did not exist prior to the renovation. In such cases, the creation of residential units where none existed is a substantial rehabilitation so as to exempt these buildings from stabilization. It is this possibility for quick recoupment which exists as an incentive to commercial building owners to invest in creating apartment units in underutilized commercial space. [FN*] Thus, the building in the case at bar meets the substantial rehabilitation requirement of *Pape v. Doar* (supra).

FN* The Court notes that *Pape v. Doar* (*supra*) does not necessarily accept all of the requirements of the cases it cites. *Pape* (*supra*) explicitly rejects the "doubling" requirement made in *Hickey v. Bomark Fabrics* (*supra*), and based its factual finding on the fact that two of the six floors were renovated for commercial purposes.

[4] Despite this finding, that part of the motion seeking summary judgment and dismissal of the counterclaims must be denied as issues of fact exist as to whether the plaintiff or defendant bore the cost of the rehabilitation. If the Court determines at trial that the landlord bore the costs of the renovation, then he is entitled to the exemption. If the tenants paid for the renovation, then the property is not exempt as to do so would be a "ridiculous perversion" of Uncons.Laws § 8625(a)(5) (*Wilson, supra,* at 201, 510 N.Y.S.2d 603).

153 Misc.2d 296, 581 N.Y.S.2d 546

END OF DOCUMENT