

177 Misc.2d 956, 679 N.Y.S.2d 519, 1998 N.Y. Slip Op. 98560

(Cite as: 177 Misc.2d 956, 679 N.Y.S.2d 519)



Supreme Court, Appellate Term, New York,  
First Department.

MERWEST REALTY CORP., Appellant,

v.

Fran PRAGER, Respondent, et al., Respondents.

Aug. 5, 1998.

Landlord brought summary holdover proceeding. The Civil Court, New York County, Friedman, J., granted tenant's motion for summary judgment, 173 Misc.2d 868, 662 N.Y.S.2d 405. Landlord appealed. The Supreme Court, Appellate Term, First Department, held that private agreement requiring tenant to surrender rent-controlled apartment was void ab initio.

Affirmed.

McCooe, J.P., filed a dissenting memorandum.

#### West Headnotes

#### [1] Landlord and Tenant ↪296(1)

233k296(1) Most Cited Cases

Private agreement requiring tenant to surrender possession of rent-controlled apartment was void ab initio and could not serve as a predicate for eviction under landlord's holdover petition. New York City Administrative Code, § 26-408, subd. a.

#### [2] Landlord and Tenant ↪296(1)

233k296(1) Most Cited Cases

Landlord could not have relief from Rent Control Law or estop 30-year tenant from asserting her statutory rights on the basis of any modest rent defaults attributed to tenant, or otherwise. New York City Administrative Code, § 26-408, subd. a.

\*\*519 \*956 Belkin Burden Wenig & Goldman, L.L.P., New York City (Sherwin Belkin, Magda L.

Cruz and Jay H. Berg, of counsel), for appellant.

**Himmelstein**, McConnell, Gribben & Donoghue, New York City (Samuel J. **Himmelstein**, of counsel), for respondent.

Before McCOOE, J.P., and FREEDMAN and GONZALEZ, JJ.

\*957 PER CURIAM.

Order entered August 15, 1997 (Marcy Friedman, J.) affirmed, with \$10 costs.

[1][2] Adopting the analysis of Judge Marcy Friedman at the Civil Court (173 Misc.2d 868, 662 N.Y.S.2d 405), we agree that the parties' private agreement requiring the tenant to surrender possession of her rent controlled apartment was void *ab initio* and cannot serve as a predicate for eviction under this holdover petition (*see*, New York City Rent and Rehabilitation Law [Administrative Code] § 26-408[a]; New York City Rent and Eviction Regulations [9 NYCRR] § 2200.15). We would add that the landlord cannot have relief from the Rent Control Law or estop this long-term (30 year) tenant from asserting her statutory rights on the basis of any modest rent defaults attributed to tenant, or otherwise (*see* generally, *Draper v. Georgia Props., Inc.*, 230 A.D.2d 455, 660 N.Y.S.2d 556, *appeal dismissed* 91 N.Y.2d 849, 667 N.Y.S.2d 684, 690 N.E.2d 493; *Urban Assocs. v. Hettinger*, 177 A.D.2d 439, 576 N.Y.S.2d 282; *lv. denied* 79 N.Y.2d 759, 584 N.Y.S.2d 447, 594 N.E.2d 941).

McCOOE, Justice Presiding, dissenting.

I respectfully dissent. The issue is whether the parties' surrender agreement is valid. The Majority finds that it violates Rent and Rehabilitation Law § 26-408(a), which provides in pertinent part:

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"No tenant, *so long as he or she continues to pay the rent to which the landlord is entitled*, shall be removed from any housing accommodation which is subject to rent control under this chapter ... notwithstanding any contract ... entered into which provides for surrender of possession, ..." except on grounds not relevant. (Emphasis supplied).

After initiating negotiations with the Landlord concerning potential "arrangements" for her anticipated "relocation" and upon advice of counsel, the Tenant agreed to surrender possession of her rent controlled apartment in exchange for substantial monetary consideration, including the landlord's forgiveness of eight months of rent arrears concededly **\*\*520** owed. The Tenant has reneged on the Agreement.

The Agreement reads in part:

*Re: Termination of Tenancy*

1. I confirm that I am presently in arrears for rent due from June 1996 through January 1997.

2. I hereby terminate my tenancy ...

5. If I vacate on or before March 31, 1997, you will pay me the sum of \$10,000 ...

**\*958** 7. If I am in complete compliance with all of the above terms, and I have vacated the apartment and delivered keys to you within the above specified dates, then you agree to waive all past due rent arrears as in paragraph 1 above, and you agree to waive all use and occupancy charges for periods after this date until March 31, 1997, or if I exercise either of the above options, until May 31, 1997, or June 30, 1997, respectively ...

10. I understand that all dates in this agreement are TIME OF THE ESSENCE, and that you will not agree to any extensions of time whatsoever. *I agree that I will not attempt to file any Orders to Show Cause with any courts, and will not attempt to extend my time to vacate by any means.* (Emphasis supplied).

11. You agree that upon my signing of this agreement, you will immediately advise your attorney, Stuart I. Jacobs, that we have reached an agreement, and will advise him to stop any legal proceedings pending against me.

As the Court of Appeals stated in interpreting a counterpart provision of the former State Residential Rent Law: "The emergency housing legislation ... was passed ... to protect 'tenants' and assure them continued possession if they choose--or, to use the statutory language, so long as they continue--to pay rent. It is a privilege granted the occupant, not a duty forced upon him ..." *United Security Corp. v. Suchman*, 307 N.Y. 48, 54-55, 119 N.E.2d 881. See also *Friesch-Groningsche Hypotheekbank Realty Credit Corp. v. Slabakis*, 215 A.D.2d 154, 155, 626 N.Y.S.2d 124 [nonpayment of rent waives the protection of the Rent Stabilization Laws]; *De Santis v. White Rose Assoc.*, 152 Misc.2d 567, 572, 578 N.Y.S.2d 363 [the protection applies only to those occupants who have not defaulted in payment of rent]. Furthermore, the clear language of New York City Rent and Rehabilitation Law § 26-408(a) by its terms is inapplicable to surrender agreements under recognized principles of statutory construction where a tenant has failed to pay rent. See *Matter of Duell v. Condon*, 84 N.Y.2d 773, 780, 622 N.Y.S.2d 891, 647 N.E.2d 96 (1995) ["When interpreting a statute, the words used by the Legislature are to be given their usual and commonly understood meaning unless the statute plainly indicates that a different meaning was intended"].

Secondly, New York City Rent and Rehabilitation Law Sec. 26-408(a) is inapplicable to an agreement "to surrender possession of the apartment and resolve incidental differences." *Matinzi v. Joy*, 60 N.Y.2d 835, 836, 470 N.Y.S.2d 131, 458 N.E.2d 372. *Matinzi* does not distinguish between in-court and out of court agreements and **\*959** there is no reason shown to do so here. This Tenant initiated the drawing of this agreement when she was in arrears in payment of rent in exchange for a waiver of rent due, additional monetary compensation and halting any pending legal proceeding at a time when she was receiving legal advice. *Mitchell v. New York Hospital*, 61 N.Y.2d 208, 214, 473 N.Y.S.2d 148, 461 N.E.2d 285 (1984); *Blum v. Graceton Estates, Inc.*, 228 A.D.2d 274, 644 N.Y.S.2d 35 (Court upheld tenant's waiver of right to challenge the rent charged in subject apartment due to

177 Misc.2d 956, 679 N.Y.S.2d 519, 1998 N.Y. Slip Op. 98560

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stipulation. The tenants "received exactly what they had bargained for"); *Kent v. Bedford Apartments*, 237 A.D.2d 140, 654 N.Y.S.2d 143 (Unless public policy or other reason to disregard stipulation, court will not disregard choice made with the advice of counsel).

Finally, any defense of duress should be dismissed since the Tenant initiated the contact leading to the subject Agreement which is not shown to be unconscionable and she was receiving legal advice as to its terms. She took no steps to invalidate the Agreement but continued occupancy without paying rent. The same legal principles applicable \*\*521 to setting aside stipulations should govern here and in a comparable case.

I would reverse, deny the motion for summary judgment and remand for trial.

177 Misc.2d 956, 679 N.Y.S.2d 519, 1998 N.Y. Slip Op. 98560

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