109 Misc.2d 589
Supreme Court, Appellate Term, New York,
First Department.

HUDSON VIEW PROPERTIES, a co-partnership, Petitioner-Landlord-Appellant,
v.
Julia M. WEISS and "John Doe",
Respondents-Tenants-Respondents.

July 17, 1981.

Landlord commenced holdover proceedings to evict tenant on ground that she was violating restriction in lease limiting use of premises to tenant and members of tenant's immediate family. The Civil Court of the City of New York, County of New York, 106 Misc.2d 251, 431, N.Y.S.2d 632, Wilk, J., granted tenant's motion to dismiss petition upon grounds that it failed to state a cause of action, and landlord appealed. The Appellate Term of the Supreme Court, First Department, held that landlord's petition was sufficient to state a cause of action.

Order reversed and motion denied.

Asch, J., dissented and filed memorandum.

Attorneys and Law Firms

***589** ****368** Christopher Hansen, New York City, for respondents-tenants-respondents.

Robert Abrams, Atty. Gen. (Peter Bienstock, Asst. Atty. Gen., of counsel), for intervenor.

Rosenberg & Estis, P. C., New York City (Gary M. Rosenberg and Sherwin Belkin, New York City, of counsel), for petitioner-landlord-appellant.

Before TIERNEY, RICCOBONO and ASCH, JJ.

Opinion

PER CURIAM:

Order entered July 28, 1980, 106 Misc.2d 251, 431 N.Y.S.2d 632 is reversed with $10 costs; the tenant's motion to dismiss the petition (CPLR 3211[a] [7]) is denied.

The record before us is sparse and its principal elements are easily recounted. Landlord served a notice to cure, dated January 24, 1980, upon Julia Weiss "and all other occupants" of the apartment here at issue. That notice to cure stated, "... you are violating a substantial obligation of ***590** your tenancy ..., viz., you are allowing a person who is not a tenant to reside in and occupy the premises." The January 24, 1980 notice afforded tenant 10 days to cure the alleged violation. On February 5, 1980, landlord served upon the tenant a thirty day notice of termination, which purported to terminate the subject tenancy on March 17, 1980, on the ground that the violation set forth in the January 24, 1980 notice had not been cured. The instant holdover proceeding was commenced after the tenant failed to surrender the premises as demanded in the February 5, 1980 notice of termination. ****369** The petition indicates that the premises are subject to rent control.

Tenant Weiss moved to dismiss the petition for failure to state a cause of action. In support of that motion Ms. Weiss submitted an affidavit, dated April 21, 1980, in which she states, upon information and belief, that the unauthorized occupant referred to by the landlord is one Jack A. Wertheimer "... who lives in my apartment, who did not sign the lease, and to whom I am not related by blood or marriage." Ms. Weiss goes on to allege in her affidavit in support of the motion to dismiss, again upon information and belief, that

> "... the landlord through his attorney has stated that if I marry Mr. Wertheimer, he will withdraw his claim that I have violated the lease and will not seek to evict me. If I remain single, this action will continue. I am moving to dismiss on the grounds that these actions violate the State Human Rights Law [Executive Law] § 296(5)(a) and the City Human Rights Law § B1–7.0(5a) which prohibit discrimination in housing on the basis of marital status."

Finally Ms. Weiss notes in her affidavit of April 21, 1980 that she does not believe that the nature of her relationship with Mr. Wertheimer is relevant to her motion. She states, however, that the Court has inquired into that issue, and she

goes on to note that Mr. Wertheimer and I have a "close and loving relationship."

In an affidavit submitted on behalf of the landlord by the managing agent for the subject premises, in opposition to tenant's motion to dismiss the petition, it is stated that Ms. Weiss moved into the apartment at issue on or about February 1, 1967 pursuant to a written lease between the then landlord and her husband, Lawrence Weiss. Ms. ***591** Weiss was never a signatory to that lease. Mr. Weiss subsequently vacated the premises, but it is unknown whether Mr. Weiss and Ms. Weiss are legally separated or divorced (whether Ms. Weiss or Mr. Wertheimer are single or married is not revealed in the record; what is clear is that they are not married to one another). Thereafter and shortly before the commencement of this proceeding an "unauthorized occupant", identified in the caption as "John Doe" (i. e. Mr. Wertheimer) moved into the apartment.

Landlord, through its managing agent's affidavit in opposition to tenant's motion to dismiss the petition, professes no concern as to the nature of the relationship between the unauthorized occupant of the apartment and Ms. Weiss, other than that he is not a member of the immediate family of the tenant. Landlord notes however, that were he (the unauthorized occupant) a member of the tenant's immediate family, there would be no basis for the proceeding.

Although the lease underlying Ms. Weiss' tenancy has not been included in the record on appeal, the lease, as quoted in the opinion of the Court below, contains a restrictive covenant that "... the demised premises and any part thereof shall be occupied only by tenant and members of the immediate family of tenant...." The occupancy of Ms. Weiss—she not having been a party to the original lease—was sanctioned by virtue of her status as a member of the original tenant's immediate family. The New York State Attorney General intervened in this proceeding and, in both the Court below and on this appeal, has joined with the tenant in arguing that the petition fails to state a cause of action (citing State Human Rights Law [Executive Law] § 296[5][a]).

Section 296(5)(a) of the State Human Rights Law [Executive Law] provides that:

> It shall be an unlawful discriminatory practice for the owner ... or managing agent of, or other person having the right to sell, rent, or lease a housing accommodation ... or any agent or employee thereof:
>
> (1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons such a ***592** housing accommodation because of the ... marital status of such person or persons [L. 1975 ch. 803, eff. on the 60th day after August 9, 1975].

****370** § 296(5)(a)(2) contains an identical provision prohibiting discrimination "in the terms, conditions, or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith."

§ B1–7.0(5a) of the Law on Human Rights of the City of New York is identical to State Human Rights Law [Executive Law] § 296(5)(a) and § B1–7.05(a)(2) is identical to § 296(5)(a)(2).

[1] A motion to dismiss for failure to state a cause of action may lie if the pleading is defective on its face, or, even if the claim is perfectly pleaded, if, upon affidavits and other permissible proof, the movant is able to go behind the pleading and establish that it lacks merit (Siegel, New York Practice, Section 265; *Kelly v. Bank of Buffalo*, 32 A.D.2d 875, 302 N.Y.S.2d 60). "[I]n order to succeed on such a motion, the defendant must convince the court that nothing the plaintiff might reasonably be expected to prove would help him; that the plaintiff simply does not have a claim" (Siegel, New York Practice, Section 265).

[2] The pleading at issue is not defective upon its face. Landlord seeks to enforce a restrictive covenant contained in the lease executed at the inception of the subject tenancy. In the case of a statutory tenancy—such as that of the tenant Weiss—"... with the exceptions of the duration of the term, and the amount of rent payable, the rule established by the weight of authority is that insofar as the provisions of a lease which has expired are not in conflict with the then prevailing emergency rent statutes, and are not confined to the period of the expired lease, they are projected into the statutory tenancy, and will continue in effect during the term of the statutory tenancy." (Rasch, New York Landlord and Tenant, 2d Ed., Section 286; see also: *Barrow Realty Corp. v. Village Brewer Restaurant*, 272 A.D. 262, 70 N.Y.S.2d 545; *Cecere v. Pegler*, Sup., 90 N.Y.S.2d 528 [AT 1] [NOR]).

[3] [4] *593 The law favors free and unrestricted use of property, and all doubts and ambiguities in a lease will be resolved in favor of the natural right to free use and enjoyment of premises against restrictions (*Eagle Spring Water Co. v. Webb & Knapp Inc.*, 236 N.Y.S.2d 266; *Arrathoon v. Pergament Oceanside Corp.*, 53 Misc.2d 959, 281 N.Y.S.2d 263, aff'd 27 A.D.2d 626, 272 N.Y.S.2d 1004, aff'd 19 N.Y.2d 923, 281 N.Y.S.2d 333, 228 N.E.2d 392). A landlord, however, does have the right to limit a tenant's use of the premises (*Lyon v. Bethlehem Eng. Corp.*, 253 N.Y. 111, 170 N.E. 512; *Phillipse Towers, Inc. v. Ortega*, 61 Misc.2d 539, 305 N.Y.S.2d 546), and where covenants restricting the use of property are reasonable and not contrary to public policy, they will be enforced by the courts. Indeed it has long been held that parties to a lease may, by express provision therein, restrict the uses to which the lessee may put the demised premises (148 A.L.R. 583, 587, et seq.), and lease provisions restricting the use of premises to "tenant and members of tenant's immediate family"—the very provision here sought to be enforced by the landlord—have consistently been sustained (*Jema Props. v. McLeod*, N.Y.L.J. June 7, 1976, p. 8, col. 1 [AT 1]; *One-Two East 87th Street Corp. v. Rees*, 35 Misc.2d 158, 232 N.Y.S.2d 292 [AT 1]; *Irweis Holding Corp. v. Glenn*, 2 Misc.2d 804, 153 N.Y.S.2d 281; *Mideast Holding Corp. v. Tow*, 60 Misc.2d 422, 302 N.Y.S.2d 706; cf. *Fraydun Enterprises v. Arlan Ettinger*, 91 Misc.2d 119, 397 N.Y.S.2d 301 [AT 1]; *Matter of Herzog v. Joy*, 74 A.D.2d 372, 428 N.Y.S.2d 1). Tenant alludes to no judicial or statutory authority which expressly proscribes or declares it to be against public policy for landlord to limit the use of demised premises to the tenant or tenants and members of his or their immediate family.

[5] Believing as we do that the pleading is sufficient on its face, the record must be examined to determine whether the tenant has offered evidence sufficient to establish that the landlord does not have a cause of action. Tenant sought to establish upon her motion to dismiss the petition, and the Court below concluded, that the attempt of the landlord to enforce the restriction in the **371 lease limiting the use of the premises to tenant and members of the tenant's immediate family constituted unlawful discrimination against the tenant upon the basis of her "marital status" (State Human Rights Law [Executive Law] § 296[5][a]).

*594 We are cognizant that § 300 of the State Human Rights Law [Executive Law] provides that "the provisions of this article [including of course § 296(5)(a)] shall be construed liberally for the accomplishment of the purposes thereof" and that § B1–11.0 of the City Law on Human Rights similarly so provides (see also *City of Schenectady v. State Division of Human Rights*, 37 N.Y.2d 421, 428, 373 N.Y.S.2d 59, 335 N.E.2d 290). There is nonetheless little in this sparse record to suggest that the landlord, in seeking to enforce the restrictive covenant in the lease limiting occupancy to the tenant and members of tenant's immediate family, had any interest in the marital status of the tenant Weiss or the occupant Wertheimer, other than that Wertheimer was not a member of Weiss' immediate family. An interest in ascertaining whether an occupant qualifies for occupancy of a demised premises, under a lease provision authorizing occupancy by tenant and members of tenant's immediate family (i. e., whether the occupant is a spouse, son, parent or other relation within the scope of "immediate family") does not ipso facto connote discrimination on the basis of "marital status"; thus we are not persuaded by this sparse record that there has been a showing of discrimination by the landlord against the tenant upon the basis of her "marital status". While clearly no cause of action lies under a restrictive covenant in a lease limiting occupancy to the tenant and members of tenant's immediate family, where the tenant has married a newly arrived occupant, it does not follow that a landlord is automatically precluded by § 296(5)(a) from enforcing such a restrictive covenant where the tenant and the new occupant are, for whatever reason, unmarried. In summary, landlord's cause of action predicated upon the covenant in the specified lease restricting occupancy of the subject premises to the tenant and members of tenant's immediate family does not appear to us to constitute discrimination per se on the basis of tenant's "marital status." In concluding that tenant failed to demonstrate that she is entitled to a dismissal of landlord's petition pursuant to CPLR 3211(a)(7), we do not, however, foreclose the tenant from offering proof at the time of trial that she is entitled to prevail in this proceeding because the landlord in maintaining this proceeding *595 is indeed unlawfully discriminating against her on the basis of her "marital status" (State Human Rights Law [Executive Law] § 296 [5][a]). Contrary to the argument made by the landlord, the proscription set forth in State Human Rights Law [Executive Law] § 296(5)(a) do not only apply to circumstances existing at the inception of a landlord-tenant relationship. A landlord's conduct during the course of a tenancy may be shown to violate the provisions of § 296(5)(a).

TIERNEY and RICCOBONO, JJ., concur.

ASCH, J., dissents in the following memorandum.

ASCH, Justice, dissenting.
In my opinion, this court should affirm Judge Wilk's dismissal and hold that, under the peculiar facts of this case, to oust Ms. Weiss would be violative of Human Rights Law § 296.

Preliminarily, landlord argues that § 296 has no application to a situation where the marital status of the apartment occupants changes *after* the rental term has begun. Although this position is not entirely untenable. I would hold to the contrary. Adopting landlord's construction would, in my view, be to hew to an overly technical reading of the Human Rights Law. Section 300 of that statute mandates that HRL is to be liberally construed. Therefore, I would opt for an interpretation which would encompass a case where the marital status discrimination occurs after the initial leasing.

Furthermore, the very language of § 296 speaks of a refusal to "sell, rent, lease *or otherwise* to deny to * * * any person * * * **372 because of * * * marital status." (Emphasis added.) These statutory phrases, read in the light of the command that the HRL be liberally construed (see HRL § 300) mean, to my mind, that in a case like the one presented here, where discrimination takes place after the initial leasing the proscriptions of § 296 are fully operative.

Moreover, to adopt landlord's construction of § 296 would leave a gaping and illogical lacuna in the HRL. If (as its sparse legislative history indicates), the purpose of § 296 was to provide unmarried ***596** couples an unimpeded opportunity to obtain housing, it would stand to reason that the legislature would have wanted the protections of that section to remain in force even after the commencement of the lease. Consequently, an attempt to oust a tenant because of a change in the marital status of the partners occupying her apartment should be judged in the same light as would be a threshold refusal to rent.

I find unpersuasive the remonstrances by landlord that the lower court's decision has the effect of nullifying a landlord's right to pass upon and approve those who are to occupy his premises. Certainly, the existing lease clause restricting occupancy to close family members, impinges to a large degree on a landlord's veto over those who are to share in the premises. A close family member may be just as objectionable as an unrelated party deciding to share house with an unmarried mate. But, as the Court noted below, all things being equal, discrimination on the basis of marital status is precisely what HRL § 296 proscribes. In short, that the objectionable occupant is unrelated by marriage to tenant may not, consistent with the Human Rights Law be used as a predicate for ouster.

Landlord's final challenge to the dismissal of its petition focuses on the rent controlled status of the premises in dispute. It was never the intent of the legislature, argues landlord to extend the benefits of those laws to lovers. To the contrary, contends landlord, the statutory structure reveals a clear bias in favor of bestowing rent advantages on the families and spouses of rent control tenants. Prime reliance is placed by landlord on § 56 of New York City Rent and Eviction Regulations which states that where a tenant no longer occupies his apartment, a certificate of eviction may issue, except when the remaining occupant is either the surviving spouse or some other member of the deceased tenant's family. Case law also betrays a pro-tenant bias. (See *Herzog v. Joy*, 74 A.D.2d 372, 428 N.Y.S.2d 1 [1st Dept. 1980] [where tenant of rent controlled unit vacates apartment family members and spouses are entitled to continue reaping benefits of rent control laws]).

***597** While these regulations do show a pro-family bias, they have no role to play under the facts of this case. Tenant Weiss has neither died nor vacated unit 15H. The Human Rights Law permits Wertheimer to occupy the apartment. Hence, he falls within the broad definition of tenant spelled out in § Y51–3.0m of New York City's Rent and Rehabilitation Law and is entitled to continue residing in the apartment. Whether, if Ms. Weiss left the apartment, Wertheimer could maintain his possession is a knotty question which need not be addressed here. For purposes of this case, it is sufficient to note that under § 296 of the HRL, Ms. Weiss and Wertheimer are completely within their rights in staying in apartment 15H.

As a postscript, it should be noted that the grounds for the dissent are fairly narrow. Concededly, the occupants of the apartment "maintain a close and loving relationship." Yet, it is indisputable that the landlord required a formal marriage

as the essential condition for continuing the tenancy. The marriage certificate does not always supply a litmus test for love. Further, under the Human Rights Law, it cannot serve as the key which opens the door to the tenancy of an apartment.

The landlord still has ample discretion to select and reject tenants provided that he does not use categories interdicted under the law, such as, marital status, in screening their suitability.

I would affirm the lower court's dismissal of the petition.

Parallel Citations

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