Dep't of Housing Preservation and Development v. Havriliak

OATH Index No. 1135/05 (Jan. 13, 2006)

Petitioner failed to prove that respondents and previous owner engaged in harassment of lawful tenants within the meaning of section 27-2093 of the Administrative Code. Thus, respondents' application for a certificate of no harassment should be granted.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT
Petitioner
- against -
BARBETTE HAVRILIAK and TOBIAS EVERKE
Respondents

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

The Department of Housing Preservation and Development commenced this proceeding pursuant to section 27-2093 of the Administrative Code. Respondents, Barbette Havriliak and Tobias Everke, are owners of a building at 347 West 121st Street, New York County. The Department alleges that respondents and the previous owner of the building committed acts of harassment against the building's tenants during the inquiry period from April 15, 2001 to April 15, 2004, and it seeks denial of respondents' application for a certificate of no harassment pursuant to section 27-198 of the Administrative Code.

At a hearing held on December 14, 2005, the Department relied upon documentary evidence and the testimony of one of its investigators. Respondents relied upon documentary evidence, including stipulations from lawful tenants averring that they had not been harassed. I find the evidence failed to prove that lawful tenants were harassed and I recommend granting of the application for a certificate of no harassment.

ANALYSIS

The building at 347 West 121st Street is a three-story structure with nine single-room occupancy (SRO) units (Pet. Ex. 2). On March 2, 2004, respondents signed a contract to purchase the building and, on April 15, 2004, they applied for a certificate of no harassment (Pet. Exs. 3 and 4). Before issuing such a certificate, the commissioner must certify that there has been no harassment of the lawful occupants of the premises within the 36 months preceding respondents' application. Admin. Code § 27-2093(c) (Lexis 2006).

Under section 27-2093(a) of the Administrative Code, harassment is defined as:

> (1) the use or threatened use of force which causes or is intended to cause [a lawful occupant] to vacate his or her unit or surrender or waive any rights therein; (2) the interruption or discontinuance of essential services which (i) interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of a [lawful occupant] in the use or occupancy of such dwelling unit and (ii) causes or is intended to cause [a lawful occupant] to vacate such unit or to surrender or waive any rights in relation to such occupancy; (3) the failure to comply with the provisions of [a vacate order] which causes or is intended to cause [a lawful occupant] to vacate such unit or waive any rights in relation to such occupancy; or (4) any other conduct which prevents or is intended to prevent any person from the lawful occupancy of such dwelling unit or causes or is intended to cause [a lawful occupant] to vacate such unit or to surrender or waive any rights in relation to such occupancy . . . .

Any acts of harassment during the 36-month inquiry period are attributed to the current owner, even those acts committed by prior owners. *See Dep't of Housing Preservation & Development v. Freid*, OATH Index No. 1567/04 (Feb. 3, 2005); *Dep't of Housing Preservation & Development v. Fenelon*, OATH Index No. 1525/04 (Oct. 6, 2004); *Dep't of Housing Preservation & Development v. Serradilla*, OATH Index No. 1802/01 (July 18, 2001). Moreover, section 27-2093(b) of the Administrative Code creates a rebuttable presumption that, if an act of harassment is proven, "such acts or omissions were committed with the intent to cause a [lawful occupant] to vacate such unit or to surrender or waive a right" to lawful occupancy.

Here, the Department alleges that respondents: failed to provide electricity, water, and telephone lines on June 28, 2004; failed to comply with a vacate order issued on September 29, 2004, due to a lack of electricity, water, or gas; failed to correct over 249

housing maintenance code violations; failed to make immediate repairs for hazardous violations; and generally interrupted or discontinued and decreased essential services and repairs with the intent to have the tenants vacate (Petition at ¶¶ 9, 12).

At the hearing, the parties stipulated that the registered owner and managing agent from December 12, 2000, to June 3, 2005, were Jeffrey Redd and Trevor Archer; respondents became owners of the building on June 3, 2005; and the only lawful occupants of the building were Lakeesha Tyler and Deborah Ashby, both of whom signed settlement agreements (Tr. 11-13; ALJ Ex. 2). Petitioner noted that it had no basis to believe that there were, or were not, other lawful tenants (Tr. 13).

Department investigator Felix Onukwughi testified that he visited the property on July 6, 2004, and the building was vacant (Tr. 40). He met with Ms. Tyler and Ms. Ashby (Tr. 40). Ms. Tyler told him that she had moved to Rochester and was in the process of returning to New York City (Tr. 40-41). Ms. Ashby told him that she no longer lived in the building and it was not habitable. She was staying with a friend across the street and stopped by the building "once every now and then to pick up her stuff" (Tr. 40-41). Mr. Onukwughi offered no other details concerning his conversations with Ms. Tyler and Ms. Ashby (Tr. 43).

According to Mr. Onukwughi, there was no ongoing work in the building, it did not have a certificate of occupancy, and he was unable to locate any other tenants (Tr. 42-43). He checked the Department's records and found no violations (Tr. 42-43). A May 20, 2004, memorandum from a supervisor in the Department's SRO Compliance Unit, noted that, according to its records, there was "no information to indicate that harassment took place within the inquiry period" (Resp. Ex. I).

Petitioner introduced summary reports of open and closed violations as of September 26, 2005 (Pet. Exs. 6 and 7). From the beginning of the inquiry period to the date of the report, there were 117 open violations and 41 closed violations. The open violations ranged in severity from a leaky faucet to 35 more serious, class C violations (Pet. Ex. 6). Most of the open violations pertained to specific units in the building. Many of the major violations that affected the entire building, such as the complete lack of water or electricity, were not reported until September 2004, after the building had been vacated (Pet. Ex. 6, at 20-21). There were 16 class C closed violations. Most of the

closed violations were remedied by the landlord, but several violations were dismissed only after the Department made emergency repairs (Pet. Ex. 7). Only one closed violation, for painted sprinkler heads in the public halls, referred to Ms. Ashby as the tenant (Pet. Ex. 7, at 6). None of the other open or closed violations identified any tenant by name.

It was stipulated that a vacate order, issued by the Department on September 29, 2004, was erroneously mailed to someone who had no connection to the premises (Tr. 11; ALJ Ex. 2). The vacate order was issued based upon an inspector's certification that the building was uninhabitable due, in part, to a lack of electricity and water (Pet. Ex. 8). Respondent presented extensive documentary evidence concerning its efforts to remedy the conditions identified in the September 2004 order. For example, they retained a repair company to restore heat, but the company determined that it could not restore heat because of serious damage to the water and natural gas lines. Respondent hired an architect who met with petitioner and the Department of Buildings to discuss "the most efficient and legal means towards achieving a safe building for future tenants" (Resp. Ex. H). After considerable expense and effort, the unsafe conditions were remedied and the Department re-inspected the premises on June 16, 2005. On July 8, 2005, the Department rescinded the order to vacate (Resp Ex. E).

The settlement agreements entered into by Ms. Tyler and Ms. Ashby included their sworn representations that they had "never been harassed by the respondents or any prior owners of the building" (Resp. Ex. B, ¶ 3; Resp. Ex. C, ¶ 8). Petitioner denied that it represented the tenants in the settlement negotiations, but it conceded that it facilitated the settlement between the respondents and Ms. Tyler (Tr. 37-38; Resp. Exs. B and C).

Respondents presented evidence that Mr. Redd, who owned the property during the inquiry period, purchased the premises in December 1999 following a foreclosure proceeding. When he took possession of the building in 2000, there were five residents who were eventually evicted, following court proceedings, for non-payment of rent (Resp Ex. A). A foreclosure action was eventually commenced against Mr. Redd and he wrote to his mortgage company on March 22, 2004, stating that he had incurred "insurmountable losses" since he purchased the property because he had not received any rental income and had incurred significant legal expenses to evict non-paying tenants. He

also noted that he had great difficulty with squatters and that building residents had not paid rent to the previous owner for three years (Resp. Ex. O).

According to an affidavit from Trevor Archer, who managed the building for Mr. Redd from 2000 to 2004, he had been unable to collect any rent from tenants, except for some public assistance paid on behalf of Ms. Ashby. He also noted that Mr. Redd's predecessor reportedly had difficulty collecting rents (Resp. Ex. K).

Petitioner argued that based upon the number of violations, the vacate order, and the Department's emergency repairs, there was sufficient evidence to find that the lawful tenants were forced out of the premises because of harassment (Tr. 35). Respondents countered that the vacate order was not properly served upon an owner or managing agent for the property and there was no evidence that a lawful tenant had been harassed (Tr. 35).

There is no dispute that the now vacant building at 347 West 121st Street has a history of housing maintenance code violations. Conditions were so hazardous that the Department issued an emergency order to vacate in September 2004. Although the order was issued after respondents applied for a certificate of no harassment, the need for issuance of such an order may, in an appropriate case, be considered as proof of intent to engage in harassment during the inquiry period. *See, e.g., Dep't of Housing Preservation & Development v. Mamudoski*, OATH Index No. 771/01 (Feb. 21, 2002).

Ordinarily, the numerous violations and the vacate order would be sufficient to create a presumption that there was an intent to cause lawful occupants to waiver or surrender their occupancy rights. Here, however, petitioner failed to prove that "lawful occupants" were harassed during the inquiry period and, moreover, respondents' evidence rebutted the presumption of intentional harassment.

Section 27-2093(a) of the Administrative Code specifically defines harassment as those acts or omissions adversely affecting persons "lawfully entitled to occupancy." Petitioner conceded that Ms. Ashby and Ms. Tyler were the only two lawful occupants. Yet neither Ms. Ashby nor Ms. Tyler testified. Instead, there was brief testimony from an investigator concerning his conversations with Ms. Tyler and Ms. Ashby in July 2004, when they were no longer residing in the building. He recalled that Ms. Ashby said the building was not habitable and that she occasionally went by "to pick up her stuff." Ms.

Tyler reported that she had moved upstate and was in the process of relocating. There was no indication when Ms. Ashby or Ms. Tyler had vacated the building and there was no clarification of their reasons for leaving. Because of its lack of specificity, the investigator's testimony had limited probative value. *See Dep't of Housing Preservation & Development v. Weall*, OATH Index No. 457/05 (Feb. 28, 2005) (discounting an investigator's vague hearsay).

The summaries of the building's housing maintenance code violations, and the order to vacate, did not compensate for the gaps in the investigator's testimony. As petitioner acknowledged, the relevant violations were those that involved lawful occupants (Tr. 34). Other than one closed violation that referred to Ms. Ashby, there were no other violations that identified a lawful occupant. And many of the most serious building-wide violations, which resulted in the order to vacate, were not reported until September 2004, after the building was vacant.

To counter petitioner's evidence, respondents presented sworn stipulations from Ms. Ashby and Ms. Tyler in which they specifically denied that they had been harassed. Of course, respondents paid Ms. Ashby and Ms. Tyler substantial sums of money pursuant to the negotiated settlement agreements. There may be situations where provisions contained in settlement agreements are untrustworthy because they are contrary to proven facts. However, on this record, I am unwilling to ignore sworn statements solely because they were made in the settlement context, especially where petitioner facilitated at least one of those agreements. Based upon the evidence presented, I accept Ms. Ashby's and Ms. Tyler's sworn assertions that they were not harassed.

There was some evidence that other tenants were evicted during 2001 following court actions commenced by Mr. Redd for non-payment of rent. His use of lawful remedies to evict those tenants is not proof of intentional harassment. *See Dep't of Housing Preservation & Development v. McClarty*, OATH Index No. 1602/00, at 15 (Dec. 7, 2000).

Even if it is assumed that petitioner presented sufficient evidence of acts or omissions adversely affecting lawful occupants, respondents rebutted the presumption that it, or the former owner, committed intentional harassment. It is noteworthy that Mr.

Redd, who owned the property throughout the inquiry period, purchased it following a foreclosure proceeding and ended up losing the property four years later after a foreclosure action. This financial hardship appears to have been caused, in large part, by the absence of rental income and it tends to confirm that Mr. Redd lacked sufficient funds to make repairs. *See Dep't of Housing Preservation & Development v. Rice,* OATH Index No. 1838/04, at 18 (Mar. 23, 2005) (loss of building in foreclosure suggested that failure to make repairs was due to lack of funds rather than a desire to harass tenants).

As for respondents, they claimed that they cannot be found liable for failure to comply with the vacate order in a timely fashion, because the Department did not properly serve the order upon the registered owner or agent. *See* Admin Code § 27-2141(a) (emergency order to vacate shall be served, by registered or certified mail, to registered owner or agent). Based upon respondents' subsequent efforts to repair the building, it appears that they eventually received actual notice of the order. Thus, deficiencies in service may have resulted in some delay, but they did not relieve respondents of their obligation to make repairs.

Respondents' stronger claim is that the vacate order was insufficient proof of intent to harass a lawful occupant. When the order was issued, the building was vacant and respondents had entered into a purchase contract. Although respondents did not yet own the building, they hired contractors who made efforts to make necessary repairs. After considerable effort and expense, the repairs were made and the vacate order was rescinded. Respondents' actions were more than sufficient to rebut the notion that it intended to harass. *See Dep't of Housing Preservation & Development v. Weall,* OATH 457/05, at 11-12. All available evidence suggests that respondents are eager to make the building safe and livable for lawful occupants.

In summary, petitioner has failed to prove that there were acts or omissions that occurred at 347 West 121st Street during the inquiry period that constituted harassment of lawful occupants as defined in section 27-2903(a) of the Administrative Code. Even assuming that petitioner's evidence satisfied the statutory definition of harassment, respondents have rebutted the presumption that such acts or omissions were committed with the intent to cause a lawful occupant to vacate an SRO unit or to surrender or waive a right in lawful occupancy.

FINDINGS AND CONCLUSIONS

1. Any interruption or discontinuance of essential services at 347 West 121st Street during the 36-month inquiry period was not intended to cause lawful occupants to vacate or to surrender or waive any rights in relation to their units.

2. Because harassment, as defined by Administrative Code, did not occur during the 36-month inquiry period, the application for a certificate of no harassment should be granted.

RECOMMENDATION

I recommend that respondents' application for a certificate of no harassment be granted.

Kevin F. Casey
Administrative Law Judge

January 13, 2006

SUBMITTED TO:

SHAUN DONOVAN
Commissioner

APPEARANCES:

PHILLIS LU SIMPSON, ESQ.
Attorney for the Petitioner

JOSEPH A. BARBOSA, ESQ.
ROBIN J. SUTTENBERG, ESQ.
Attorneys for the Respondents