670 N.Y.S.2d 678
175 Misc.2d 503, 670 N.Y.S.2d 678, 1998 N.Y. Slip Op. 98119
(Cite as: 175 Misc.2d 503, 670 N.Y.S.2d 678)

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Supreme Court, Appellate Term, New York, First Department.
PRIMROSE MANAGEMENT CO., Appellant,
v.
Nancy DONAHOE et al., Respondents.

Nov. 24, 1997.

Landlord filed petition to evict sublessee from rent controlled apartment. The Civil Court, New York County, Rashford, J., dismissed petition. Landlord appealed. The Supreme Court, Appellate Term, held that illusory tenancy existed, such that sublessee should be deemed bona fide tenant.

Affirmed.

McCooe, J., filed dissenting opinion.

West Headnotes

[1] Landlord and Tenant ⇐278.4(6)
233k278.4(6) Most Cited Cases
"Illusory tenancy" is residential leasehold created in person who does not occupy premises for his or her own residential use and subleases it for profit.

[2] Landlord and Tenant ⇐278.4(6)
233k278.4(6) Most Cited Cases
Finding that landlord profited from tenant's actions in subleasing rent controlled apartment or that landlord colluded with tenant is not prerequisite to determination that tenancy is illusory.

[3] Landlord and Tenant ⇐278.4(6)
233k278.4(6) Most Cited Cases
Prime tenant who did not reside in rent controlled for over 20 years and who sublet apartment at rate in excess of legal maximum was "illusory tenant," such that sublessee should be deemed bona fide tenant, even though there was not evidence that landlord profited from tenant's actions or that landlord colluded with tenant.

****678 *503** Borah, Goldstein, Altschuler & Schwartz, P.C., New York City (Jeffrey R. Metz and Steven L. Schultz, of counsel), for appellant.

Collins & Dobkin, New York City (Stephen **Dobkin**, of counsel), for respondent.

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

PER CURIAM.

***504** Final judgment entered September 27, 1996 affirmed, with $25 costs.

Civil Court properly dismissed the holdover petition after trial upon its finding of an illusory tenancy extending over a period of 20 years. The rent controlled tenant, who took occupancy in 1963, permanently relocated to California in 1974 but continued to retain dominion and control over the premises by a pattern of long-term subletting. Following a fourteen-year occupancy by a prior subtenant, respondent herein entered into possession in January 1990 and was charged a rent approximately $300 above the legal maximum by the "prime tenant". It is demonstrated on this record that respondent was the true primary resident of the premises and that the tenant of record's "occupancy" since 1974 was purely fictitious.

[1][2][3] "An illusory tenancy is defined generally as a residential leasehold created in a person who does not occupy the premises for his or her own residential use and subleases it for profit ... [s]uch tenancies are condemned because they permit the unscrupulous to use the provisions of the rent [control] laws for financial gain, at the expense of those entitled to the laws' protections to obtain living quarters at reasonable cost, and thereby frustrate the laws' purposes" (*Matter of Badem Build-*

ings v. Abrams, 70 N.Y.2d 45, 52-53, 517 N.Y.S.2d 450, 510 N.E.2d 319). While there is no evidence that landlord profited from its tenant's actions or that landlord colluded with the tenant, such a finding is not a prerequisite to a determination that the tenancy is illusory (*Avon Furniture Leasing, Inc. v. Popolizio,* 116 A.D.2d 280, 285, 500 N.Y.S.2d 1019). Given the number of years tenant was out of physical possession, which is a "salient consideration" (*Bruenn v. Cole,* 165 A.D.2d 443, 448, 568 N.Y.S.2d 351), it strains credulity that neither landlord nor its agents lacked knowledge that third parties other than the tenant ****679** were residing in the premises. In this fact pattern, respondent should be deemed the *bona fide* tenant of the apartment and accorded protection from eviction.

McCOOE, Justice, dissenting.

I respectfully dissent. The issue is whether an illusory tenancy was created. An "illusory tenant" is defined in *Hutchins v. Conciliation & Appeals Bd.,* 125 Misc.2d 809, 811, 480 N.Y.S.2d 684 (1984), as "a lessee of a residential premises who does not occupy the premises for his own residential use and who subleases it for profit, not because of necessity or other legally cognizable reason." (See also, *Badem Bldgs. v. Abrams,* 70 N.Y.2d 45, 52, 517 N.Y.S.2d 450, 510 N.E.2d 319 [1987].) According to the *Hutchins* court, the term "illusory tenant" has been used to describe two situations. ***505** The first "involves a strawman, a "tenant", real or imaginary, who, as the alter ego of the landlord, subleases the apartment as a means of permitting the landlord to circumvent or evade his obligations under the rent laws." (*Hutchins,* supra, at 813, 480 N.Y.S.2d 684.) The second "involves a prime tenant who rents stabilized or controlled apartments and then subleases them as a business." (Supra, at 814, 480 N.Y.S.2d 684.) An example of the first situation may be found in *Badem Bldgs. v. Abrams,* supra, while the second situation parallels *Avon Furniture v. Popolizio,* 116 A.D.2d 280, 500 N.Y.S.2d 1019 (1986). This case parallels neither of the two situations described in *Hutchins* and the Majority is creating a third situation.

It is undisputed that the prime tenant Spielberg actually occupied the apartment from the commencement of the lease in 1963 to approximately August or September of 1974 when his acting career took him to California and an illegal sublet was entered into with the Murneys. It is also undisputed that Spielberg was not acting as the alter ego of the present or former landlord. The present Landlord did not become the owner of the premises until 1991 or 1992.

Spielberg entered into an illegal sublet with the Murneys at a monthly rental of $425 who resided in the subject premises until March 1989. During their occupancy all rent payments were mailed to Spielberg in California. In January of 1990 Spielberg entered into a month-to-month sublet with respondent Nancy Donahoe at a purported rent of $900 per month which increased over time to $1,080. Donahoe also made all payments by mail to Spielberg in California. She testified that she had various roommates with whom she split the rent but was able to produce only eighteen money order receipts (out of 65 months) in the amounts of $490 and $513 which purportedly represented her share of the rent payments mailed to Spielberg in California. None of the receipts bear any notations as to the reason for the payments nor do they exceed the legal rent. One of Donahoe's former roommates from December 1992 to December 1994 produced three checks to Spielberg's order which are represented to be rent payments but bear no notations. Two of the checks, each in the sum of $1,028 are dated 10/1/94 and 11/1/94. The third check, in the sum of $650, is dated 1/1/94. The correct date from the clearance house stamp appears to be 1995, which is one month after he ceased living in the apartment.

Applying the legal criteria for creating an illusory tenancy the defining elements are not present. We

are actually dealing ***506** with an illegal long term sublet. This fact pattern parallels several decisions of this court where it held that the facts neither supported an illusory tenancy nor warranted application of that doctrine so as to confer independent tenancy status on the subtenant, especially where as here, the Landlord neither consented to the tenancy nor took any affirmative acts to accept the subtenant as tenant in her own right. (*See West 46 Equities, Inc. v. Henry,* N.Y.L.J., Sept. 8, 1997, at p. 26, col. 6 [App. Term, 1st Dept.]; *390 West End Assocs. v. Kornbluth,* N.Y.L.J., Nov. 16, 1990, at p. 24, col. 6 [App. Term, 1st Dept.]; *Blum v. Curtis,* N.Y.L.J., May 26, 1989, at p. 21, col. 1 [App. Term, 1st Dept.]; *Azadour Realty Corp. v. Chavijo,* N.Y.L.J., Sept. 15, 1988, at p. 17, col. 6 [App. Term, 1st Dept.].)

The Tenant's principal argument for affirming the finding of an illusory tenancy is that Spielberg was engaged in profiteering. This court held in *Blum v. Curtis,* supra, that not every case which has elements of rent overcharge necessarily requires a finding of ****680** illusory tenancy or a finding that the subtenant should be accorded stabilized status.

The evidence as to profiteering by Spielberg should be examined. The Murneys resided in the subject apartment from September 1974 to March 1, 1989 at a rental of $475 per month. The Division of Housing and Community Renewal registration shows the maximum collectible rent for the subject apartment on January 1, 1989 as $500.90 and the Landlord's records establish that Spielberg paid this amount. Why would a person allegedly interested in profiteering only charge $475 per month and continue with this subterfuge unless he, an actor, harbored some expectation, fanciful or not, of returning to New York. The rent was increased for the new subtenant Donahoe who took the apartment on a month to month basis and shared the apartment with numerous roommates. The documentary proof is inadequate as to how much she actually paid as rent although she testified that she was initially charged $900 per month although the maximum collectible rent was approximately $712.

The last and most important point is the role of the Landlord. There is no support in the Record that the Landlord or its predecessor knew of the illegal sublet, colluded with Spielberg or profited thereby. If it did, Spielberg and the sublessees would not have had to engage in the subterfuge of mailing the rent checks to Spielberg in California who then sent his check in payment for the rent to the Landlord. Pragmatically, what landlord in New York City wouldn't be glad to be rid of a rent controlled tenant?

***507** The question then is whether some collusion or profiteering by the Landlord must be shown in order to find an illusory tenancy. The Majority cites *Avon Furniture Leasing, Inc. v. Popolizio,* 116 A.D.2d 280, 500 N.Y.S.2d 1019 for the proposition that it does not. The landlord Avon was in the business of leasing and subletting apartments and leased at least seven apartments in the subject premises from the owner and signed a letter agreement with the owner that these apartments would not be subject to Rent Stabilization Guidelines. Avon subleased one of the apartments to the tenant at approximately double the rent ($700-$1350) without ever taking occupancy of an apartment with "modest furnishings". Subsequently a coop conversion plan was filed and the issue as to entitlement to the apartment came before the Conciliation and Appeals Board (CAB) on the tenant's complaint. The Appellate Division at p. 284, 500 N.Y.S.2d 1019 found an illusory tenancy "where as here, the "prime tenant" rents an apartment, or apartments, which it never intends to occupy but * * * rents it for the purpose of subleasing for profit or otherwise depriving the subtenant of rights under the Rent Stabilization Law." (Citations omitted). The Court goes on to state at p. 285, 500 N.Y.S.2d 1019 that a finding of collusion between the owner and prime tenant " is not an essential prerequisite to a determination that the tenancy is illusory * * *

While [the] absence of * * * collusion between Avon and the landlord in no way diminishes the validity of the Board's finding of an " illusory tenancy" here, it may parenthetically be noted that the record does, in fact, establish that the owner derived substantial benefits from the scheme and was aware of Avon's activities." The owner received rent in excess of the lawful stabilized rent, inserted a lease clause that the apartment was not subject to Rent Stabilization and waived the right to ownership in the event of a coop conversion.

The distinctions between *Avon* and this case are multiple. *Avon* was an Article 78 proceeding where the Appellate Division affirmed the finding of the CAB that an illusory tenancy was created, although the Board found that there was no collusion. It is clear that the Board was in error and that there was collusion as spelled out by the Appellate Division in its decision. I submit that in view of the clear evidence of collusion and benefit to the owner as found by the Court, the statement that collusion between the owner and tenant was not a prerequisite was dicta. In any event, the Court did find that the owner was aware of the actions of the prime tenant and benefitted thereby. As distinguished from *Avon,* Spielberg was not in the business of renting apartments, resided in the apartment, ***508** initially leased at a rental roughly equivalent to the maximum collectible rent and maintained the lease not for business purposes but for an unrealized possibility ****681** that he might return to New York. Finally as in *Bruenn v. Cole,* 165 A.D.2d 443, 568 N.Y.S.2d 351, the dispute was between two tenants and not a landlord over the right to a cooperative apartment and the equities did favor the sublessee. The facts in *Bruenn* are dissimilar to this case. The subject apartment was in a building owned by the tenant's family and the lease arrangements were negotiated by the tenant's mother, rent was not paid and the tenant moved out and never returned to the apartment. The clear distinction is that the owner knew that the sublessee was not the tenant since the sublease was entered into by the wife of the owner who was the mother of the tenant.

The question is whether there is any legal or equitable basis to find an illusory tenancy here where the landlord never participated in, benefitted from or had knowledge of the illegal sublease and where Spielberg actually took possession and subleased without any intention to profiteer and had at least a possible future need for the apartment.

I would reverse and grant a Judgment of possession to the Petitioner Landlord.

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253 A.D.2d 404
253 A.D.2d 404, 676 N.Y.S.2d 585, 1998 N.Y. Slip Op. 07531
(Cite as: 253 A.D.2d 404, 676 N.Y.S.2d 585)

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

PRIMROSE MANAGEMENT CO., Petitioner-Appellant,

v.

Nancy DONAHOE, et al., Respondents-Respondents.

Aug. 27, 1998.

Landlord filed petition to evict sublessee from rent-controlled apartment. The Civil Court, New York County, Rashford, J., dismissed petition, and landlord appealed. The Supreme Court, Appellate Term, 175 Misc.2d 503, 670 N.Y.S.2d 678, affirmed. On appeal, the Supreme Court, Appellate Division, held that: (1) tenant's former subtenancy was illusory tenancy, and (2) tenant was entitled to recalculation of rent based upon rate properly chargeable under Rent Stabilization Law at commencement of her subtenancy.

Affirmed; remanded to agency.

West Headnotes

[1] Landlord and Tenant 233 ⚿278.4(6)

233 Landlord and Tenant
233IX Re-Entry and Recovery of Possession by Landlord
233k278.1 Suspension of Remedies
233k278.4 Persons and Premises Subject to Regulations
233k278.4(6) k. Subtenants, Licensees or Other Persons. Most Cited Cases
"Illusory tenancy" exists where rent laws have been violated in way that has permitted prime tenant to rent apartment for the purpose of subleasing for profit or otherwise depriving subtenant of rights under rent stabilization law. Rent Stabilization Code, § 2520.1 et seq., McK.Unconsol.Laws.

[2] Landlord and Tenant 233 ⚿278.4(6)

233 Landlord and Tenant
233IX Re-Entry and Recovery of Possession by Landlord
233k278.1 Suspension of Remedies
233k278.4 Persons and Premises Subject to Regulations
233k278.4(6) k. Subtenants, Licensees or Other Persons. Most Cited Cases
Subtenancy set up from its inception to permit prime tenant to improperly profit by violating rent regulations was illusory tenancy, entitling subtenant to protection under rent laws, especially where former building superintendent's knowledge or presumed knowledge of subterfuge could be imputed to landlord. Rent Stabilization Code, § 2520.1 et seq., McK.Unconsol.Laws.

[3] Landlord and Tenant 233 ⚿278.4(6)

233 Landlord and Tenant
233IX Re-Entry and Recovery of Possession by Landlord
233k278.1 Suspension of Remedies
233k278.4 Persons and Premises Subject to Regulations
233k278.4(6) k. Subtenants, Licensees or Other Persons. Most Cited Cases
While there should be showing of at least constructive knowledge on part of landlord concerning subleasing arrangement alleged to create "illusory tenancy," there is no requirement that there be evidence of collusion on part of landlord before illusory tenancy will be found.

[4] Landlord and Tenant 233 ⚿200.24

233 Landlord and Tenant
233VIII Rent and Advances
233VIII(A) Rights and Liabilities
233k200.23 Fixation of Reasonable Rent

in General
233k200.24 k. In General; Fair Value of Property. Most Cited Cases
Sublessee deemed prime tenant of rent-controlled property upon determination that subtenancy had been illusory was entitled to recalculation of rent based upon rate properly chargeable under Rent Stabilization Law at commencement of her subtenancy and legally permissible increases since that date. Rent Stabilization Code, § 2520.1 et seq., McK.Unconsol.Laws.
****586** Jeffrey R. Metz, for Petitioner-Appellant.

Stephen Dobkins, for Respondents-Respondents.

Before ROSENBERGER, J.P., ELLERIN, NARDELLI and WALLACH, JJ.

MEMORANDUM DECISION.

***404** Order of the Appellate Term of the Supreme Court, First Department, entered November 24, 1997, affirming the order of the Civil Court, New York County (Eardell Rashford, J.), entered on or about September 27, 1996, which granted tenant's motion to dismiss the holdover petition, unanimously affirmed, without costs, and the matter remanded to DHCR to set the prospective rent of the current subtenant Donahoe based upon the fair-market rent as of the date of respondent Donahoe's initial occupancy of the subject apartment plus any permissible increases since that date.

The apartment at issue in this holdover proceeding, which is located at 150 West 82d Street, was leased in 1963 to Barbara and David Spielberg, who occupied the apartment until 1974, when they moved to California. Thereafter, an illegal sublet was entered into with tenants who resided in the apartment for 14 years, until March 1989. During their occupancy, all rental payments were made to the Spielbergs.

In January 1990, the Spielbergs entered into a month-to-month sublease with Maude Chilton and Nancy Donahoe at an ***405** alleged initial monthly rent of $900 that was later increased to $1,080. Both of these amounts were well in excess of the legal rent charged by the landlord to Spielberg under the rent-control law.

Petitioner alleges that it was not the original landlord and assumed ownership of the building in 1992. Although this allegation is not fully supported by the record, it is undisputed that, in 1994, Leo Rivera, who had been superintendent of the building for decades, retired. Shortly thereafter, the newly ****587** hired superintendent of the subject premises reported to petitioner that certain apartments in the building appeared to be occupied by persons who were not the tenants of record.

After an investigation by the owner, a non-primary resident proceeding was initiated in Civil Court against the Spielbergs, who ultimately entered into a surrender agreement with petitioner dated June 30, 1995. Thereafter, Primrose commenced this summary holdover proceeding against Chilton and Donahoe. Only Donahoe answered, alleging that in light of the fact that the Spielbergs' tenancy was illusory, she was entitled to succeed to their status as prime rent-controlled tenant.

The Civil Court, after a non-jury trial, dismissed the proceeding on grounds that the prime tenancy was illusory and the Appellate Term affirmed (Ostrau, P.J., Freedman, J.; McCooe, J. dissenting), finding that Donahoe was "the true primary resident of the premises and that the tenant of record's 'occupancy' since 1974 was purely fictitious." Neither court made a finding as to the precise nature of Donahoe's tenancy.

We affirm.

[1][2] An illusory tenancy exists where the rent laws have been violated in a way that has permitted

the prime tenant to "rent [the apartment] for the purpose of subleasing for profit or otherwise depriving the subtenant of rights under the Rent Stabilization Law" (*Avon Furniture Leasing v. Popolizio,* 116 A.D.2d 280, 284, 500 N.Y.S.2d 1019; *see also, Matter of Badem Buildings v. Abrams,* 70 N.Y.2d 45, 52-53, 517 N.Y.S.2d 450, 510 N.E.2d 319). Here, it is clear that Donahoe's subtenancy was, from its inception, set up to permit the prime tenant to improperly profit by violating the rent regulations. This is the hallmark of an illusory tenancy (*id.*).

[3] Moreover, while there should be a showing of at least constructive knowledge on the part of the landlord of the subleasing arrangement, there is clearly no requirement that there be evidence of collusion on the part of the landlord before an illusory tenancy will be found (*id.*). Here, while the landlord apparently did not benefit, it did know or should have ***406** known of the subterfuge, which was clearly within the knowledge of the former superintendent of the building.

[4] Upon a finding of an illusory tenancy, the subtenant who has been deprived of the protection of the rent laws should be afforded the protection which he or she was wrongfully denied. While we therefore find that Donahoe is now entitled to the protection of the rent laws, we note that we reject her argument that the proper remedy is to permit her to assume the prime tenant's statutory rent-controlled tenancy. Even in the absence of the illusory tenancy, Donahoe, who moved in 1990, would not have been entitled to succeed to the prime tenant's rights in the apartment. Donahoe's argument that she is nevertheless entitled to this benefit is based on her contention that her subtenancy was preceded by a similar subtenancy and that therefore the illusory tenancy has persisted since 1974, when the prior subtenant moved in. We make no finding as to when the illusory tenancy commenced, though we note in this context that, on this record, the prior subtenant appears to have been paying the prime tenant a rent below the legally mandated rent for the apartment. However, regardless of whether the illusory tenancy commenced prior to the current subtenant's occupancy, we see no reason to afford the current subtenant what would constitute an unwarranted windfall.

We also reject landlord's contention that the subtenants' rights under the Rent Stabilization Law are, at best, limited to those they would have were they to take possession now, rather than in 1990. Instead, the subtenant is entitled to the protection that she would have been afforded had the laws been properly applied, and her prospective rent should be set, pursuant to the Rent Stabilization Law, at the fair market rent as of the date she moved in plus any permissible increases since then. [*See,* 175 Misc.2d 503, 670 N.Y.S.2d 678].

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