To be Argued by:
ERIC C. HAWKINS
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division – Second Department

Docket Nos.:
2011-08610
2011-08630

VINCENT DIGIORGIO, DAVID SCHALLER, HUMBERTO ORTEGA, FREDERICK ANDERSON, ROSS BELK, and KERRY LEWIS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

– against –

1109-1113 MANHATTAN AVENUE PARTNERS, LLC and CIS COUNSELING CENTER, INC.,

Defendants-Respondents,

HARMONY OUTREACH, LLC,

Defendant,

DONNA DECICCO,

Defendant-Respondent.

BRIEF FOR PLAINTIFFS-APPELLANTS

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– and –

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Kings County Clerk's Index No. 8235/11

STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

Appellate Division – Second Department

VINCENT DiGIORGIO, DAVID SCHALLER, HUMBERTO ORTEGA, FREDERICK ANDERSON, ROSS BELK, and KERRY LEWIS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

– against –

1109-1113 MANHATTAN AVENUE PARTNERS, LLC and CIS COUNSELING CENTER, INC.,

Defendants-Respondents,

HARMONY OUTREACH, LLC,

Defendant,

DONNA DeCICCO,

Defendant-Respondent.

1. The index number of the case in the court below is 8235/11.

2. The full names of the original parties are as above. There have been no changes.

3. The action was commenced in Supreme Court, Kings County.

4. The action was commenced on or about April 8, 2011, by the filing of a Summons and Class Action Complaint. The Amended Class Action Complaint was served on or about April 12, 2011.

5. The nature and object of the action is as follows: declaratory judgment on real property.

6. The appeal is from two orders of the Honorable Bernadette F. Bayne, dated August 4, 2011.

7. The appeal is being perfected on a full reproduced record.

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STATEMENT OF QUESTIONS PRESENTED

1. Does the Amended Complaint adequately allege that Plaintiffs-Appellants are permanent tenants of the Single Room Occupancy Hotel in which they reside, and thus entitled to the protections of the Rent Stabilization Laws, by alleging that Plaintiffs-Appellants requested rent stabilized leases, given that such requests create a permanent tenancy as a matter of law?

   The trial court answered in the negative.

2. Does the Amended Complaint adequately allege that the so-called "transitional residency agreements" presented to Plaintiffs-Appellants on a "take it or leave it" basis, and with homelessness often the only alternative, are unenforceable under the rent stabilization laws and common law insofar as they purport to waive non-derogable statutory rights and are unconscionable contracts of adhesion?

   The trial court answered in the negative

3. By pleading in detail, *inter alia*, that Defendants-Appellees threatened Plaintiffs-Appellants with force, threatened to evict Plaintiffs-Appellants without court process, entered Plaintiffs-Appellants' rooms without permission, and threatened to cut off essential services such as heat and hot water, does the Amended Complaint adequately allege unlawful harassment?

   The trial court answered in the negative.

PRELIMINARY STATEMENT

This class action lawsuit was brought because Defendants-Appellees illegally converted nearly 100 rent regulated units of affordable Single Room Occupancy ("SRO") housing by scheming to run a highly profitable so-called "three-quarter house" in violation of the law. The rooms at issue comprise Clay Street House, a section of 1109-1113 Manhattan Avenue (the "Hotel"), which is an

SRO hotel in Brooklyn. Defendant-Appellee Manhattan Avenue Partners ("MAP") is the fee owner of the Hotel, and Defendant CIS Counseling Center, Inc. ("CIS") leased the rooms in question from MAP at many times the lawful rent for the improper purpose of supplying captive clientele for its substance abuse treatment program and thus maximizing its recovery from public funding sources.

As alleged in detail in the Amended Complaint, Defendants carefully orchestrated this scheme in which they sought to profiteer in violation of both the Rent Stabilization Laws (the "RSLs") and the Mental Hygiene Law ("MHL"). Defendants recruited vulnerable individuals from homeless shelters and substance abuse treatment facilities to reside at Clay Street House. Prospective tenants were compelled to sign contracts of adhesion purportedly waiving their legal rights under the RSLs as a condition to obtaining housing, including their right to permanent tenancy and to be free from eviction without legal process. Once at Clay Street House, tenants were forced, upon threat of eviction, to attend treatment at CIS's outpatient treatment facility -- so CIS could obtain daily government reimbursement payments -- whether they needed such services or not. The MHL and related regulations, however, make participation in chemical dependence treatment voluntary and prohibit coercing any individual to attend such treatment.

The Amended Complaint alleges that MAP sought to benefit in violation of law by receiving from CIS many times the rent-stabilized rent for the SRO rooms

in Clay Street House and that CIS sought to benefit in violation of law by obtaining more than the legally regulated rent by putting two individuals in each tiny room and billing Medicaid for the forced attendance of Clay Street House residents at its Manhattan program. Defendants thus sought to profiteer by violating the rights of Plaintiffs and all members of the putative class and by depriving the City of badly needed affordable, rent regulated housing.

As demonstrated below, the Amended Complaint supports these claims with an abundance of well-pled factual allegations. But in dismissing the action in its entirety, the trial court, the Honorable Justice Bernadette Bayne, never addressed Plaintiffs' actual claims but instead sought to impose her own public policy by veering outside the record and, without any evidence, making the factual finding that Plaintiffs and all putative class members needed the substance-abuse treatment CIS was offering -- without ever addressing the claims asserted and the governing statutes and regulations. For the trial court to make a factual finding against the non-moving party on a motion to dismiss was patently improper. And the finding itself was plainly erroneous: Plaintiffs submitted sworn and uncontested affidavits from five of the named plaintiffs establishing that they were, in fact, attending treatment, but the trial court decided to ignore such affidavits. In any event, as established below, given the well-pleaded factual allegations of the Amended Complaint and applicable law, Plaintiffs have easily stated their claims and the trial

court's ruling must be reversed. Indeed, Plaintiffs' treatment status has no bearing whatsoever on their rights under the Rent Regulation Laws and the MHL.

STATEMENT OF THE CASE

A. Facts

1. The Parties

Plaintiffs and members of the putative class are recently homeless and otherwise at-risk individuals who are, will be, or were residents of the so-called Clay Street House. R.61 (¶3). Clay Street House is a section of rooms located within the Hotel, which is an SRO hotel located in Brooklyn. R.64-65 (¶¶21, 23). The Hotel is a class B multiple dwelling unit that contains approximately 193 sleeping rooms -- *i.e.*, 193 SRO rooms. R.68 (¶40). All portions of the Hotel, including Clay Street House, are subject to rent regulation. R.61 (¶2). SROs are the most basic form of housing available in New York City: small single rooms with a shared bathroom. R.60 (¶1). SROs provide a much needed form of stable, regulated, and affordable housing for individuals living in poverty. Id.

Defendant MAP is the fee owner of the Hotel. R.64 (¶20). Defendant CIS leased the rooms that make up Clay Street house from MAP for many times the lawful regulated rent, for the purpose of supplying clients for CIS's outpatient program. R.68 (¶42), 69 (¶49). Defendants Harmony Outreach, LLC

("Harmony") and Donna DeCicco ("DeCicco") operated Clay Street House on behalf of MAP and/or CIS. R. 65 (¶¶ 25-26), 69 (¶44).

2. Defendants' Scheme

MAP, CIS, Harmony, and DeCicco (collectively, "Defendants") engaged in a scheme to try to de-regulate a portion of the Hotel, Clay Street House, by private contract, in violation of New York law. Specifically, MAP entered into an agreement with CIS under which it leased to CIS a section of approximately 89 rent-stabilized rooms at the Hotel. R.65 (¶23). In or about July 2010, Defendants began operating a so-called "three-quarter house" in the leased portion of the Hotel. R.68-69 (¶43). Defendants labeled it a "three-quarter house" because they claimed that they offered a "program" for substance abuse treatment and not permanent housing, notwithstanding the Hotel's rent-stabilized status, even though they had no license to run a treatment facility at that location. Id.

Defendants sought out tenants for Clay Street House from homeless shelters and inpatient and outpatient substance abuse programs. R.69 (¶50). Defendants, however, then required prospective tenants to agree to a series of waivers, agreements, and rules (hereinafter collectively, the "Transitional Residency Agreements") as a condition of residing at Clay Street House. R.69-70 (¶51). Prospective tenants would not be given a room -- *i.e.*, shelter -- until they signed such agreements, which included provisions that attempted to end-run housing

laws by providing that Clay Street House is a "temporary residence", that each "client" is limited to a stay of "6 to 9 months", that residents are required to attend CIS's outpatient treatment program while living at Clay Street House, and that residents can be "discharged immediately" if they fail to attend CIS's program or violate other "house rules" without any due process of law. Id.

Such contracts were presented to prospective tenants strictly on a take-it-or-leave-it basis; for many prospective tenants, the only alternative was homelessness, so they had no bargaining power whatsoever. R.76-77 (¶¶ 103, 108-109).

Through this scheme, Defendants sought to reap financial benefits far in excess of what they could earn operating the Hotel within the law as a rent-regulated SRO. R.70-71 (¶¶53-55). The lawful regulated rent for each room at the Hotel, including Clay Street House, is approximately $215 per month. R.71 (¶55). CIS, however, placed two tenants in each tiny room in Clay Street House and thus collected approximately $430 in rent per room. Id. CIS paid MAP approximately $1,225 per room in rent, nearly six times the lawful regulated rate. Id. CIS thus needed to bill Medicaid for the outpatient sessions it unlawfully compelled residents to attend to make its profit: CIS received approximately $77 for each patient visit to its outpatient facility from Medicaid. R.70 (¶53). Clay Street House residents were compelled to attend as many as five CIS sessions per week. R.70 (¶53).

Even while making these illegal profits and contrary to Defendants' claims of being do-gooders, the Amended Complaint alleges with detailed factual allegations that Defendants subjected Plaintiffs and members of the putative class to an ongoing campaign of harassment, including actual and threatened unlawful evictions. R.72, 75-76 (¶¶ 67, 92-97). Each resident of Clay Street House was forced to double up with another resident; the cramped space in these rooms, which do not have locking doors, completely deprived the tenants of privacy and security. R.73, 78 (¶¶ 78, 115). Defendants unlawfully told tenants that their residency was limited to six or nine months and that they would be forced to leave even sooner if they did not attend treatment at CIS's program (even if they did attend treatment elsewhere). R.61, 74 (¶¶ 5, 86, 86). Tenants who did not comply with these and other "house rules" were illegally evicted without court process. R.61, 72, 74-76 (¶¶ 5, 67, 83-86, 91-96).

3. The Current Status Of Defendants' Scheme

According to representations made by counsel for CIS and DeCicco to the trial court, CIS -- apparently because this lawsuit disrupted its profiteering scheme -- is going out of business and has surrendered its license. R.642 (36:19); R.643 (37:4-5). Counsel for MAP, however, represented to the trial court that it was not giving up: MAP intended to lease Clay Street House to a new prime tenant, and

wanted to throw all current tenants out on the street so as to be able to deliver the premises to the new prime tenant with unoccupied rooms. R.697 (91:12-16).

B. **Procedural History**

Plaintiffs commenced this action on April 8, 2011, by filing a summons and complaint and by seeking an order to show cause with temporary restraints, which order was entered that same date (the "TRO"). R. 116-119. The TRO, among other things, temporarily enjoined Defendants from (i) evicting any Plaintiff without a court order; (ii) threatening to cut off essential services such as heat, hot water, access to bathrooms, and electricity; and/or (iii) compelling Plaintiffs to attend CIS's outpatient program against their will, and directed Defendants to show cause why a preliminary injunction should not be issued and why a class of all individuals who reside, have resided, or will reside at Clay Street House and who are, were, or will be subjected to the unlawful conduct alleged in the Complaint should not be certified. Plaintiffs sought the order without notice pursuant to Uniform Trial Court Rule 202.7(f) because they faced a very real threat of retaliation from Defendants, in the form of further harassment and unlawful eviction, for bringing this action if Defendants became aware of the lawsuit before a TRO enjoining such actions was in place.

Plaintiffs filed an Amended Complaint on April 13, 2011 (the "Amended Complaint"). R.60-103. The Amended Complaint, which was substantially the

same as the original complaint, sought declaratory and injunctive relief and certification of a class of all individuals who reside, have resided, or will reside at Clay Street House and who are, were, or will be subjected to the unlawful conduct alleged in the Amended Complaint. R.66 (¶32). The Amended Complaint includes counts for declarations and injunctive relief based on violations of rent regulations (first and sixth counts), illusory tenancy (second count), harassment in violation of the Tenant Protection Act (third count), violations of the Mental Hygiene Law and patients' rights regulations (fourth count), violations of illegal eviction laws (fifth count), violations of the common law prohibition of contracts that contravene public policy and/or constitute contracts of adhesion (seventh and eighth counts), and violations of the housing maintenance code (ninth count).

The Amended Complaint sought a judgment declaring, *inter alia*, that the rooms that make up Clay Street House are subject to rent regulation, that CIS's lease with MAP creates an illusory tenancy in CIS, that the tenants of Clay Street House, including Plaintiffs, are the prime tenants of their respective rooms, that Defendants unlawfully harassed Plaintiffs and members of the putative class in violation of New York City Administrative Code § 27-2005(d), and that any agreements entered into by Plaintiffs and members of the putative class purporting to waive rights under the RSLs are void and unenforceable pursuant to Rent Stabilization Code ("RSC") § 2520.13 and under common law. The Amended

Complaint also sought an order enjoining Defendants from committing additional acts of the unlawful conduct alleged therein, including, *inter alia*, further acts of harassment and unlawful eviction.

On May 23, 2011, Defendants (except Harmony, which defaulted) filed papers in opposition to the motions for preliminary injunctive relief and class certification and filed cross motions to dismiss. Plaintiffs filed responsive papers on June 1, 2011. The trial court held hearings or conferences on June 3, June 6 (at which hearing the court lifted the TRO), June 23, July 1, and August 4. On August 4, 2011, without ever having addressed the legal merits of the claims for relief in the Amended Complaint or the elements for the issuance of injunctive relief and for class certification, the trial court denied the preliminary injunction and class certification motions and granted the motions to dismiss. R.5-13. The trial court signed two orders, the first of which (in language supplied by Defendants' counsel) provided:

> Upon papers submitted and after oral argument, [MAP's] cross-motion to dismiss Plaintiffs' Complaint is granted in all respects, and it is ordered as a matter of law that the remaining occupants of the premises leased by [MAP] to [CIS] are deemed licensees of CIS and are not tenants of the subject premises; and [MAP] is directed to proceed in landlord tenant court with summary eviction proceedings accordingly (the "MAP Order").

The MAP Order was entered by the Clerk on August 16, 2011. R.5.

The second order provided (in language also supplied by Defendants' counsel): "Based upon all prior pleadings, proceedings and motions herein, it is hereby ORDERED that all claims herein as against defendants [CIS] and . . . DeCicco are hereby dismissed, with prejudice" (the "CIS Order"). The CIS Order was entered by the Clerk on August 17, 2011. R.11.

Throughout the course of proceedings, the trial judge, Justice Bayne, demonstrated an unmistakable bias against Plaintiffs and their counsel and a complete disregard for applicable law. Instead of hearing argument on the merits, the trial court, at hearing after hearing, demanded "proof" that the residents of Clay Street House were receiving substance abuse treatment, despite the fact that Plaintiffs' medical conditions were irrelevant to the case. See, e.g., R.496 (72:14-15) ("Show me where the men are receiving treatment"); R.494 (70:17-18) ("You have not one iota of proof. Where is your proof?").

Although not relevant, Plaintiffs' counsel nevertheless ultimately provided affidavits describing the treatment Plaintiffs were receiving; although these affidavits were uncontested, the court summarily refused to credit them, stating, "I don't want affidavits. I want proof." R.525 (24:1-2). The court even went so far as to dictate the precise form of "proof" it was demanding: "I want to see on the letterhead of the facility. I want to see an attendance sheet. . . . I would want to

see whoever is in charge there, if it's a medical doctor, whomever, I want to get their affirmation to say that these men . . . are doing well." R.613 (7:11-19).

The court summarily determined, with no evidentiary basis (much less an individualized showing as to each resident) that "the men at Clay Street . . . need treatment" for substance abuse (R.512 (11:15-16)), and that they were not receiving it (R.483 (59:5-7) ("They are not going to counseling. They are not seeking treatment"); R.659-60 (53:25-54:1) ("Now, they are not going to any treatment")). The court made this broad-brush finding despite the explicit admission by counsel for MAP that Plaintiff Ortega "never needed treatment." See R.542 (41:12-13).[1]

The IAS court virtually never would allow counsel for Plaintiffs to present their legal arguments in support of the motions for preliminary injunctive relief or class certification, but rather insisted on lecturing counsel about the Court's belief as to what treatments Plaintiffs needed. By way of example only, the trial court

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[1] In marked contrast to its refusal to credit Plaintiffs' uncontested affidavits about their ongoing treatment, the court accepted as true unsubstantiated statements by defense counsel that Plaintiffs and other residents of Clay Street House were behaving illegally and creating a "chaotic" environment in the building. See R.467 (43:3-9) ("MR. COHEN [counsel for CIS and DeCicco] : . . . . It is chaotic, your honor. They are not following the rules. . . . They are inebriated. They are walking down the walls [sic] drunk and otherwise intoxicated. There needs to be some control some order. Some rules. And right now there are none."); R.493 (69:2-4) ("THE COURT: . . . I saw the deterioration when the TRO was in place. Now, I want to compare it with the TRO being lifted.").

suggested that Plaintiffs should all be isolated on an island: "You know, I believe that the richest country in the world, there should be facilities for men like your clients. I believe we should have maybe Ellis Island." R.473 (49:2-5).

The court also displayed an astonishing level of bias against Plaintiffs' counsel, repeatedly yelling at them, "[y]ou don't care about your clients. You don't care about the welfare of the men" (R.535 (34:10-12)); and "[a]ll you are concerned about is making a name for yourself on the backs of the men." R.518 (17:6-7); see also R.521 (20:20-23); R.522 (21:17-19); R.526 (25:17-18); R.527 (26:6-7); R.536 (35:5-9); R.602 (50:2-3) ("It seems to this Court that you do not care about the welfare of the men"); R.605 (53:9-10) ("all you want to do is just make a name for yourself").

The IAS Court went so far as to speculate that counsel's defense of Plaintiffs' legal rights could actually result in the death of their clients. Specifically, the trial court suggested that the legal questions at issue -- concerning rights to shelter and protection against illegal eviction -- are secondary to whether the clients are receiving treatment, an issue not before the court:

> COURT: If you are evicted, whether it's legally or illegally, at least you are not found dead. If you don't go for your treatment, your alcoholic treatment, your mental treatment or any other treatment, you either going to be found dead or back to prison or back to the mental institution. . . . You know why I said you didn't do it, because I have asked you time and time and time again to give me an alternative plan. Give me an alternative plan. I have been thinking of a plan, and I was thinking of to get the Habitat for Humanity, get

them involved. See how we can help them. I have been doing that. You should be doing that, Counsel, if you care.

MR. SULLIVAN: Your Honor, it's not --

THE COURT: You are not just going to come before this Court just to make a name for yourself.

MR. SULLIVAN: Your Honor, it's not our decision as to where these men should go for treatment. It's their decision, and as the submitted affidavits demonstrate, they are making responsible decision. They are going to treatment. They are going to the 12-Step program.

THE COURT: All right, you told me all I need to know. Your motion is denied.

R.681-82 (75:6-11, 75:16-76:7).

The court also repeatedly demanded to know why Plaintiffs' counsel, attorneys from a public interest law firm and a major corporate law firm handling the matter on a *pro bono* basis, did not provide for housing and treatment services for Plaintiffs instead of worrying about Plaintiffs' legal rights under housing laws "when they were coming out of the prisons" and "when they were in the shelters," and chastised counsel for not having done this. See R.520 (19:14-15); R.524 (23:2-9) ("Where were you when they were coming out of the prisons, when they were coming out of the mental institutions, when they were in the shelters, where were you then? Why didn't you go and talk to them and work with them, the defendants to see how you can get permanent housing and treatment . . . ."); R.566 (14:11-15) ("You did not provide for a place for them to go when they were getting

out of prison and you were not there when they threw them out of the shelters because they were breaking the rules").[2]

* * * *

Given this record, we respectfully suggest that the Court's ruling below should not be given any weight, its dismissal of the Amended Complaint and denial of the preliminary injunction and class certification motions should be reversed, and the case should be remanded to a different I.A.S. judge.

ARGUMENT

I. Standard Of Review

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" and a court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88, 638 N.E.2d 511 (1994). "Upon a motion to dismiss, the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at

[2] The basis for the court's assertion is unknown. There is nothing in the record regarding any Plaintiff being thrown out of a shelter for breaking rules or for any other reason.

law." U.S. Bank Nat'l Assoc. v. Stein, 81 A.D.3d 927, 928, 917 N.Y.S.2d 669, 669 (2d Dep't 2011).

Here, the Amended Complaint clearly states causes of action and alleges facts sufficient to support them. The trial court made no effort to consider whether the facts alleged stated claims for relief, but instead made up its own factual findings and ignored the legal issues presented.

II. The Amended Complaint Adequately Alleges That Plaintiffs Are Permanent Tenants Under the Rent Stabilization Laws

Count one of the Amended Complaint seeks a declaration that the rooms constituting Clay Street House are subject to rent regulation and that the residents of Clay Street house who have resided there for more than six months, or requested a six-month rent stabilized lease, are permanent tenants entitled to the full protections of the RSLs. The Amended Complaint further alleges that Defendants violated Plaintiffs' rights under the RSLs in numerous ways, including by failing to notify them of their rights under the RSLs, attempting to prevent them from becoming permanent tenants, and threatening to evict and/or actually evicting them without legal process. R.61 (¶5), 72 (¶¶63-67); see RSC §§ 2522.5(a)(3), 2522.5(c)(2), 2524.1-5.

In moving to dismiss, Defendants did not dispute that the Hotel is subject to rent regulation, or that they engaged in the conduct described above and in the Amended Complaint. Instead, they claimed that Plaintiffs are not permanent

tenants who enjoy the protection of the RSLs, but rather mere licensees who waived their right to permanent tenancy (and other rights) by signing the Transitional Residency Agreements. As demonstrated below, these arguments are without merit: the mere making of a request for a lease has the effect of making the requestor a permanent tenant; SRO occupants cannot, as a matter of law, waive their right to become permanent tenants; and the prime lease underlying the purported license agreement in question is an unlawful illusory tenancy. Thus, Supreme Court erred as a matter of law in dismissing this claim.

A. Plaintiffs Are Permanent Residents Because They Requested Leases

The Amended Complaint alleges that the Hotel, including Clay Street House, is rent stabilized. R.68 (¶41). The Rent Stabilization Code, 9 N.Y.C.R.R. §§ 2520.1, *et seq.* (the "RSC"), provides that a "hotel occupant who requests a lease . . . become[s] a permanent tenant." Id. § 2522.5(a)(2); see also id. § 2520.6(j). Here, it is alleged that each Plaintiff exercised his right to become a permanent tenant by requesting a rent stabilized lease. R.75, 80, 84, 89, 92-93 (¶¶ 90, 129, 155, 172, 193, 213, 224). Because the request itself creates the tenancy, the fact that Defendants have refused to provide Plaintiffs with leases is irrelevant. R.75, 80, 84, 89, 92-93 (¶¶ 91, 129, 156, 173, 194, 214, 224); see RSC § 2522.5(a)(2); id. § 2520.6(j) ("a hotel occupant who requests a lease . . . shall be a permanent tenant . . . ."); cf. Beverly Hotel Assoc. LLC v. De Almeida, 194

Misc. 2d 538, 539 (App. Term, 1st Dep't 2003) (failure to execute lease does not prevent tenant from becoming permanent tenant). A landlord thus cannot negate the legal effect of a lease request by refusing to honor it. Accordingly, the Amended Complaint adequately alleges that Plaintiffs and members of the putative class are permanent tenants.

B. Plaintiffs Could Not And Did Not Waive Their Rights To Permanent Tenancy

Although the RSC clearly prohibits it, the Transitional Residency Agreements purport to waive Plaintiffs' rights under the RSLs, including the right to permanent tenancy. Based on those purported waivers, Defendants argued below, and the trial court apparently agreed, that Plaintiffs and the other residents of Clay Street House are mere licensees who could be evicted without court process. This is incorrect for several reasons.

First, under the RSC, "any person" in possession of an SRO room who is not a permanent tenant is a "hotel occupant." 9 N.Y.C.R.R. § 2520.6(m). And all hotel "occupants" have a *non-waivable* right to convert to a permanent, regulated tenancy. See id. §§ 2520.6(m), 2520.6(j), 2520.13, 2522.5(a)(2), 2522.5(a)(3).

Second, owners of SRO hotels are categorically prohibited from restricting the right of residents to become permanent tenants or from setting aside units for temporary occupancy only. See id. §§ 2522.5(a)(2), (3). As the New York State Division of Housing and Community Renewal ("DHCR") correctly ruled in

connection with an earlier temporary-shelter scheme at the very same Hotel, "[t]he Owner . . . may not rely upon [temporary] rental agreements to prove that an occupant is not a permanent [rent stabilized] tenant." See R.162.[3]

For this reason, the initial terms of an occupant's license -- his "stated purpose in taking occupancy" -- are irrelevant in determining whether or not he has become a permanent tenant. Nutter v. W & J Hotel Co., 171 Misc. 2d 302, 309, 654 N.Y.S.2d 274, 278 (Civ. Ct., N.Y. Cty. 1997), citing Mann v. 125 East 50th Street Corp., 124 Misc. 2d 115 (Civ. Ct., N.Y. Cty. 1984), *aff'd,* 126 Misc. 2d 1016, 488 N.Y.S.2d 1021 (App. Term 1st Dep't 1985). Indeed, even where tenants engaged in deceptive conduct, entered the premises without permission, or failed to ever pay rent, they may become permanent tenants. See Nutter, 171 Misc. 2d at 303-05 (occupant in possession for one-night stay, who had acquired room by lying about address and intended length of stay, had become a permanent tenant); Kanti-Savita Realty Corp. v. Santiago, 18 Misc. 3d 74, 75-76, 852 N.Y.S.2d 579, 580 (App. Term, 2d Dep't 2007) (tenant who moved in as a week-to-week occupant and paid no rent was a permanent tenant; sole test for permanent tenancy is compliance with procedure for a hotel occupant to become a permanent tenant set forth at RSC § 2520.6(j)); Smiley v. Williams, 26 Misc. 3d 170, 174-75, 886

[3] DHCR is the agency responsible for administering and enforcing the rent regulation laws.

N.Y.S.2d 587, 590-91 (Civ. Ct., N.Y. Cty. 2009) (tenant, who landlord maintained entered into possession as squatter, and who subsequently failed to pay rent or "enter into any formal agreement" with landlord, had become permanent tenant).

Third, any finding that Plaintiffs were licensees and not tenants requires acceptance of Defendants' incorrect premise that there was a valid underlying license agreement between MAP and CIS. There was not. The well-pleaded facts, which the Court is required to accept as true at the pleading stage, demonstrate an illegal prime lease between MAP and CIS and a resulting illusory tenancy created by MAP and CIS to deprive Plaintiffs and members of the putative class of their rights under the RSLs.

An illusory tenancy is "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, not because of necessity or other legally cognizable reason." Badem Bldgs. v. Abrams, 70 N.Y.2d 45, 52-53, 510 N.E.2d 319, 322-23 (1987); see also Thornton v. Baron, 5 N.Y.3d 175, 181 (2005); Wright v. Lewis, 21 Misc.3d 1120(A), 873 N.Y.S.2d 516 (Sup. Ct., Kings Cty. 2008). Rather than reside in the dwelling, the prime tenant illegally rents it "for the purpose of subleasing for profit or otherwise depriving the subtenant of rights under the Rent Stabilization Law." Primrose Mgmt. Co. v. Donahoe, 253 A.D.2d 404, 405, 676 N.Y.S.2d 585 (1st Dep't 1998); see also Badem Bldgs., 70 N.Y.2d at 52-53.

Here, count two of the Amended Complaint seeks a declaration that Defendants created an illusory tenancy in CIS to unlawfully profiteer by denying Plaintiffs and members of the putative class their rights under the Rent Regulation Laws. See, e.g., R.94-95 (¶¶ 232-235). Specifically, in July 2010, MAP, the fee owner of the rent stabilized Hotel, leased the rooms now operated as Clay Street House to CIS. R.166. CIS is a corporate entity that does not, and cannot, occupy the leased rooms for its own residential use. R.64-65, 73 (¶¶22, 70). Rather, CIS subleased the rooms to Plaintiffs and members of the putative class as purported "program" housing. R.73 (¶71). Plaintiffs, in turn, were required to consent to Transitional Residency Agreements that purportedly waived their rights under the rent regulation laws -- including their rights, *inter alia*, to permanent tenancy and to be free from eviction without court process. R.69, 73, 76-77 (¶¶ 51, 71, 98-100). This scheme generated revenues for Defendants far above the lawful regulated rent for rooms at the Hotel of approximately $215 per month. R.70-71 (¶ 55). Defendant CIS placed two tenants in each single person room, and thus collected approximately $430 in rent per room per month, and CIS paid MAP approximately $1,225 per room per month in rent, nearly six times the lawful regulated rate. Id. CIS funded these payments and earned a very substantial profit by billing Medicaid for the outpatient sessions it (unlawfully) required residents to attend. R.70 (¶53).

The Amended Complaint thus alleges that Defendants created an illusory tenancy in CIS. See Thornton, 5 N.Y.3d at 181 (tenancy is illusory where entered into with a purpose to evade rent stabilization rules and regulations); Avon Furniture Leasing, Inc. v. Popolizio, 116 A.D.2d 280, 284, 500 N.Y.S.2d 1019, 1022 (1st Dep't 1986) (an illusory tenancy exists where "the terms of the sublease establish, without question, the intention to deprive the 'subtenant' . . . of rights under the Rent Stabilization Law").

* * * *

Accordingly, the Amended Complaint properly alleges that Plaintiffs and the members of the putative class are permanent tenants of Clay Street House entitled to the full protections of the RSLs, and the trial court erred in ruling to the contrary.

III. The Amended Complaint Adequately Alleges That The Transitional Residency Agreements Are Unenforceable

Counts six, seven and eight[4] of the Amended Complaint seek declarations that the Transitional Residency Agreements are unenforceable because (i) they purport to waive non-derogable statutory rights, in violation of both the RSC and common law; and (ii) they are unconscionable contracts of adhesion. As

[4] This brief addresses the counts of the Amended Complaint topically, not in order of count number. Counts three is addressed in Part IV, *infra*; count seven is address in Part III.A, *infra*, and count eight is addressed in Part III.B, *infra*.

demonstrated, the Amended Complaint more than adequately alleges facts supporting each of these claims.

A. The Transitional Residency Agreements Unlawfully Purport To Waive Plaintiffs' Rights Under The Rent Stabilization Laws and the Mental Hygiene Law

The sixth count of the Amended Complaint seeks a declaration that the terms of the Transitional Residency Agreements that Plaintiffs were forced to sign are void as non-permitted waivers of rights provided by the rent regulation laws including, but not limited to, the right to permanent tenancy. The Amended Complaint further alleges detailed facts showing that Defendants violated the RSLs in a variety of ways, including by: (i) failing to notify Plaintiffs of their rights under the RSLs at the time they moved in; (ii) acting to prevent Plaintiffs from becoming permanent, rent stabilized tenants; (iii) refusing to provide rent stabilized leases to tenants who request such leases; and (iv) evicting or threatening to evict Plaintiffs for any reason, or through any process, other than that specifically set forth in the RSC. See RSC §§ 2522.5(a)(3), 2522.5(c)(2), 2524.1-5.

Defendants moved to dismiss on the grounds, and argued in opposition to Plaintiffs' motion for a preliminary injunction, not that they did not violate the RSLs (given the factual allegations of the Amended Complaint) but that Plaintiffs waived their rights under the rent regulation laws by entering into the Transitional

Residency Agreements.[5] This argument, however, fails as a matter of law because "[a]n agreement by the tenant to waive the benefit of any provision of the [Rent Stabilization Law or Code] is void." RSC § 2520.13. Moreover, a rent stabilized housing unit cannot be deregulated by "private compact." See, e.g., Draper v. Georgia Props., 94 N.Y.2d 809, 811, 723 N.E.2d 71, 72 (1999); 390 W. End Assocs. v. Baron, 274 A.D.2d 330, 332, 711 N.Y.S.2d 176, 177 (1st Dep't 2000) (similar); see also 390 W. End Assocs. v. Harel, 298 A.D.2d 11, 15, 744 N.Y.S.2d 412 (lst Dep't 2002) (citing Draper, 94 N.Y.2d at 811) ("Deregulation is available only by statutorily specified means and not by private compact as was attempted here—a means expressly forbidden") (internal quotations omitted).

Nor did Plaintiffs and members of the putative class forfeit these rights by virtue of being in a treatment "program." There is no exception to the no-waiver clause of the RSC, even for legitimate substance abuse programs. See RSC § 2520.13; Wright, 2008 N.Y. Slip Op. 52106U at 10-11. And, in any event,

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[5] In the face of these clear violations of the RSLs, defendants also argued below that they fall under the charitable exemption in the statute. However, Rent Stabilization Code § 2520.11[j] only exempts from the RSLs' purview "housing accommodations in buildings operated exclusively for charitable purposes on a non-profit basis." To qualify for the exemption, defendants would have to establish that the subject premises is a "building operated *exclusively* for charitable purposes...." Rent Stabilization Code § 2520.11[j] (emphasis added). Although a portion of the Hotel was leased to Defendant CIS, Defendants cannot credibly argue that operation of the building is exclusively or even principally for a charitable purpose.

Defendants did not operate a legitimate program: All substance abuse programs operated in New York State must be licensed through the Office of Alcoholism and Substance Abuse Services ("OASAS"). See MHL § 3205(a)(1). Defendants were not licensed to operate a substance abuse program at Clay Street House. R. 69 (¶¶ 46-48).

Beyond the express anti-waiver provisions of the RSC, under the common law any agreement purporting to grant rights, or assign obligations, that contradict the terms of a statute is "illegal and void as against public policy." See Bregman v. 111 Tenants Corp., 30 Misc. 3d 1236(A), 2011 N.Y. Slip Op. 50372(U), 3 (Sup. Ct., N.Y. Cty. 2011); see also Green v. Republic Steel Corp., 37 N.Y.2d 554, 558, 338 N.E.2d 594, 595 (1975) ("public policy proscribes any provision of [a] contract that is in violation of [a] statute"); Spiegel v. 1065 Park Ave. Corp., 305 A.D.2d 204, 204-05, 759 N.Y.S.2d 461, 462-63 (1st Dep't 2003) (contract granting rights in violation of statute is "void as against public policy"). This is particularly the case with regards to statutory rights relating to tenancies, including the rent regulation laws, because they are "not private right[s] between two parties that [are] subject to waiver . . . . Rather, [they] involve[] public policy in the application of a rent regulatory scheme which cannot be changed due to the individual acts of parties." 270 Riverside Drive, Inc. v. Wilson, 195 Misc. 2d 44, 47, 755 N.Y.S.2d 215, 218 (Civ. Ct. Housing Part, N.Y. Cty. 2003); see also

Cvetichanin v. Trapezoid Land Co., 180 A.D.2d 503, 504, 580 N.Y.S.2d 23, 23 (1st Dep't 1992) ("any purported waiver of rent stabilization rights . . . is invalid as a matter of public policy").

Thus, count seven of Amended Complaint seeks a declaration that the Transitional Residency Agreements are void as against public policy insofar as they purport to waive statutory rights. The Amended Complaint sets forth a host of terms in the Transitional Residency Agreements that purport to waive, or that contravene, the statutory rights of Plaintiffs and members of the putative class, such as (1) limiting tenancies to a period of six to nine months; (2) requiring residents to attend CIS's outpatient program; and (3) permitting eviction without legal process if the resident fails to attend CIS's outpatient treatment program or violates other "house rules." R.69 (¶51). These terms violate Plaintiffs' and putative class members' right to permanent tenancy and other affiliated and derivative rights under RSC §§ 2520.6(j) and 2524.1, *et seq*; the right to choice in treatment and prohibitions against the use of coercion and undue influence under MHL § 22.07(B) and 14 N.Y.C.R.R. §§ 815.4(g) and 815.5(a)(15); and the right to due process and prohibitions against self-help evictions under the New York City Administrative Code § 26-521 (the "Illegal Eviction Law"), the Real Property Actions and Proceedings Law ("RPAPL") § 711, and 9 N.Y.C.R.R. § 2524.1(c).

The Amended Complaint thus more than adequately alleges that the Transitional Residency Agreements are void and unenforceable, both under the RSC and at common law, insofar as they purport to waive statutory rights.

B. The Transitional Residency Agreements Are Unconscionable Contracts Of Adhesion

Count eight seeks a declaration that the Transitional Residency Agreements are void and unenforceable as unconscionable contracts of adhesion. A contract of adhesion is one that involves "a necessity of life, drafted by or for the benefit of a party for that party's excessive benefit, which party uses its economic or other advantage to offer the contract in its entirety solely for acceptance or rejection by the offeree." Weidman v. Tomaselli, 81 Misc. 2d 328, 331, 365 N.Y.S.2d 681, 686 (Cty. Ct., Rockland Cnty. 1975); see also Love M'Sheltering v. Cnty. of Suffolk, 33 A.D.3d 923, 924, 824 N.Y.S.2d 98, 99 (2d Dep't 2006).

As fully alleged in the Amended Complaint, the Transitional Residency Agreements concern a necessity of life -- housing; confer excessive benefit on Defendants by facilitating their obtaining revenue many times the allowed rent; were drafted by Defendants, who used their overwhelming positional advantage to induce prospective tenants to sign; and were offered to prospective tenants on a "take it or leave it" basis. R.76-78 (¶¶ 102-114); see Wright, 2008 N.Y. Slip Op 52106U, 8-21, citing Love M'Sheltering, 33 A.D.3d at 924, 824 N.Y.S.2d at 99 (agreement offered by so-called three-quarter house on a "take it or leave it" basis

to indigent prospective residents purporting to waive statutory rights unenforceable contract of adhesion).

Nevertheless, the IAS Court simply refused to consider the allegations in the Amended Complaint on the question of whether a claim had been stated that the Transitional Residency Agreements were contracts of adhesion. Specifically, after counsel for Plaintiffs summarized such allegations at the August 4, 2011, hearing as "[o]ur clients, as you have pointed out, are at a vulnerable stage, they are asked to sign an agreement that they are rushed through that they don't fully understand... [t]hey are asked to waive rights that they are not allowed to waive" (R.620 (14:12-14)), the Court responded angrily:

> THE COURT: "Counsel, you don't know that because you weren't there. When you don't have personal knowledge about something, don't come before this Court and say that. Don't do it. You want to bring in your clients and put them on the stand, that's a different story, but don't ever come before this Court and say that you know something and you don't."

R.620 (14:18-24).

In other words, in asking for plaintiffs to be put "on the stand", the trial court completely ignored the standards governing a motion to dismiss. Indeed, when told by Plaintiffs' counsel that five unrebutted affidavits had been submitted to the Court attesting to the facts surrounding the execution of these contracts, the trial court did not respond. R.620-622 (14:7-16:2). Later in the hearing, the Court gave

its only other justification for its dismissal of this claim, stating to Plaintiffs' counsel, "you are saying that these men they so poor and illiterate they don't understand anything they sign, and that is not so [sic]." R.656 (50:22-24). To the contrary and as discussed previously, this was not at all the basis of Plaintiffs' claim that the Transitional Residency Agreements were unenforceable contracts of adhesion.

IV. The Amended Compliant Adequately Alleges That Defendants Engaged In Unlawful Harassment

In Count three of the Amended Complaint, Plaintiffs' allege a *prima facie* claim for harassment under the Tenant Protection Act, Section 27-2005(d), *et seq.*, of the Administrative Code of the City of New York. Under the terms of the statute, illegal harassment includes the following:

> a. ... making express or implied threats that force will be used against any person lawfully entitled to occupancy...;
>
> b. ... an interruption or discontinuance of an essential service... of such significance as to substantially impair the habitability of such dwelling unit;
>
> e. removing the possessions of any person lawfully entitled to occupancy of such dwelling unit... [or]
>
> g. other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of such dwelling unit and that cause or are intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy.

Admin. Code § 27-2004(a)(48)(e),(g).

The Amended Complaint alleges facts showing that Defendants violated each of these provisions. *First*, it is alleged that Defendants made implied threats that force will be used against Plaintiffs and members of the putative class who are lawfully entitled to occupancy. R. 73-93 (¶¶ 77-82, 126-34, 147, 167-68, 189, 207-209, 219). *Second*, it is alleged that Defendants threatened the interruption and discontinuance of essential building services, including during "house meetings," such as heat and access to bathroom facilities if tenants did not comply with the oppressive and unlawful "house rules." R. 74, 84, 86 (¶¶ 80, 153, 171). *Third*, it is alleged that Defendants removed and threatened to remove the belongings of Plaintiffs and members of the putative class from their residences. R.79, 82, 83, 92 (¶¶ 126, 147, 151, 211). *Fourth*, it is alleged that Defendants regularly entered Plaintiffs' rooms without permission, refused to provide locks and keys, threatened to evict Plaintiffs if they fail to submit to Defendants' unlawful conduct, threatened to call the police, and at times actually called the police, in an attempt to force Plaintiffs to vacate the premises, and subjected Plaintiffs to verbal abuse, invasions of their privacy, threats of eviction, and illegal evictions. R. 74, 79-82, 86, 89, 91, 93. (¶¶ 79-80, 126, 131-34, 139, 147, 168, 189, 208, 227).

In dismissing the harassment cause of action, the IAS Court asked "how have they been harassed?" and then proceeded to instruct counsel "when you come

before this Court, I don't want conclusory statements. I want you to say they have been harassed because A, B, C, D; that's what I want." See R.615 (9:9-12). The irony, of course, is that is exactly what the Amended Complaint lays out in detail. See, e.g., R.84, 91 (¶¶ 153, 208-209). The I.A.S. Court provided no other basis for dismissal.

In sum, the Amended Complaint pled multiple facts more than sufficient to state a claim for unlawful harassment.

V. The Action Should be Remanded to a Different Supreme Court Justice

"A trial judge should at all times maintain an impartial attitude and exercise a high degree of patience and forbearance." DeCrescenzo v. Gonzalez, 46 A.D.3d 607, 608-09, 847 N.Y.S.2d 236, 238 (2d Dep't 2007) (quotations omitted). Accordingly, where, as here, a Supreme Court Justice has "exhibited bias" against a party, People v. Reynolds, 90 A.D. 3d 956, 935 N.Y.S.2d 97 (2d Dep't, 2011), or where "the appearance of fairness and impartiality has been compromised by the actions of the Justice," remand to a different Justice is warranted. People v. Rampino, 55 A.D.3d 348, 349, 865 N.Y.S.2d 77, 77 (1st Dep't, 2008).

As noted above, the trial court repeatedly demonstrated a severe bias against Plaintiffs and their counsel, even going so far on multiple occasion as to accuse counsel of not "car[ing] about your clients" and being motivated solely by a desire to "mak[e] a name for yourself on the backs of the men." See supra Part I(B).

The trial court also "demonstrated a propensity to admonish the [plaintiffs'] counsel at a substantially more frequent rate than she did the [defendants'] counsel." DeCrescenzo, 46 A.D.3d at 609, 847 N.Y.S.2d at 239 (reversing judgment of Bayne, J. and remanding matter to a different Justice). On this record of open hostility towards one side, one "cannot say that the outcome [below] was not affected by judicial bias." Reynolds, 90 A.D. 3d 956, 935 N.Y.S.2d 97 (reversing and remanding matter to a different Justice). Therefore, Appellants respectfully request that this Court remand this matter to a different I.A.S. Justice.

CONCLUSION

For all of the foregoing reasons, the trial court's August 4 Orders should be reversed, the preliminary injunction should be issued, and the matter remanded to a different I.A.S. part.[6]

Dated: New York, New York
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[6] Plaintiffs do not appeal the dismissal of count five (for violation of the Illegal Eviction Laws) and count eight (for violation of the housing maintenance code). This was done in the interest of judicial economy and narrowing the appeal – Plaintiffs, in no way, concede the lower court was correct to dismiss these causes of action.

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Dated: New York, New York
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