

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

INDEX NO. 90887/07

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HARRIET & RAY MAYERI,

Petitioners,

-against-

DECISION/ORDER

BEVERLY PENNACCHINI,

Respondent.
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SCHNEIDER, J.

This owner's use holdover proceeding was tried before me in March, April and May of 2009. Both sides were represented by counsel. Both petitioners testified at trial as did their adult daughter and an architect. Respondent also testified. Both sides also submitted documentary evidence. Based upon the credible evidence at trial, I make the following findings of fact.

Petitioners Ray and Harriet Mayeri purchased the building at issue in this case in the spring of 2005. The building is a four storey brownstone on Manhattan's Upper West Side. At the time of the purchase, the building had two rent regulated tenants on the third floor, a rent stabilized tenant and an unregulated tenant on the second floor, a rent regulated tenant and a vacant apartment on the first floor, and a vacant ground floor.

Until 2001, the Mayeris lived in California, in a three bedroom house adjacent to an 11 acre working vineyard. In 1999 or 2000 they purchased a two bedroom condominium apartment

in New York. They rented the condominium to a friend, and used it themselves for occasional visits to New York.

In 2003 the Mayeris sold the condominium and purchased their first four storey brownstone, on West 82nd Street, for \$2.6 million. They placed their California home on the market but were unable to sell it. This first brownstone had a fully renovated garden duplex apartment on the ground and first floors, two studio apartments on the second floor and a single one bedroom apartment on the third floor. Only one of the apartments was occupied. The Mayeris moved in to the duplex.

Just two years later, in 2005, the Mayeris sold the 82nd Street brownstone for \$3.95 million and purchased the building at issue here, on West 92nd Street, for \$1.9 million. They took out a five year mortgage on the 92nd Street property for \$1.1 million. In 2005 the 92nd Street building had a single apartment on the ground floor and two one-bedroom apartments on the first, second and third floors. All of the apartments were occupied except the ground floor and one of the first floor apartments.

The Mayeris hired an architect to prepare plans for a garden duplex apartment for themselves at 92nd Street. The apartment was to be constructed from the ground floor and the vacant half of the first floor, with a contingency plan to expand it to the other half of the first floor when and if the elderly rent regulated tenant in that apartment vacated. In the meantime, the Mayeris declined to renew the lease of the unregulated tenant on the second floor. They moved in to Apartment 2A on the second floor in the summer of 2005 and remained there during construction of their apartment.

While the duplex apartment was under construction, the Mayeris also did other renovation work on the building. Among other things, they installed six new mailboxes and six new

intercom units, one for each apartment including the duplex. They installed six new electrical breaker boxes, one for each apartment. They also replaced windows, installed a new boiler, and improved the basement. They spent about \$900,000.00 on the duplex apartment and about \$150,000.00 on the other work.

In early 2006 the Mayeris moved in to the garden duplex. At about the same time they notified the rent regulated tenants on the third floor, whose leases expired that year, that their leases would not be renewed. The notices to these two tenants stated that one of the Mayeris' siblings would be moving in with them, that their daughter intended to "start a family," and that the Mayeris required extra space for their sibling and for their grandchildren.

Both of the third floor tenants vacated in 2006. The Mayeris did not use their apartments for a sibling, and no sibling has ever joined their household. Harriet Mayeri testified at trial that they no longer intended to have a sibling move in. Nor did they use the third floor spaces for their expected grandchildren. Instead, they began to use the two third floor apartments as offices, one for each of them.

Harriet Mayeri uses Apartment 3B as her office. She removed the kitchen stove and sink, retained the refrigerator and cabinets, and otherwise made no changes in the apartment's configuration. The Mayeris both testified that Ray Mayeri uses the second apartment as his office, although the photographs submitted in evidence convey the impression that this space is used in large part for storage. The kitchen remains in this apartment and no changes were made in its configuration.

Apartment 2A, where the Mayeris stayed during the construction of their current apartment, remains vacant. No changes have been made in the configuration of this apartment.

The Mayeris' adult daughter, pregnant at the time of trial, and her husband, use this apartment

when they visit, as do other family members. The daughter lives with her husband in Stamford, Connecticut, but spends about four days a week in Philadelphia where she is a professor at the University of Pennsylvania Law School. She testified that she and her husband visit her parents and stay in apartment 2A about one weekend a month, and that she visits alone on an occasional weekday.

Apartment 1B, next to the upper level of the petitioners' duplex, became vacant in 2007 when the rent regulated tenant died. At the time of trial that apartment remained vacant and unused. The Mayeris had not joined the apartment to the duplex.

At some point during their occupancy at 92nd Street, the Mayeris purchased another condominium apartment. In the mortgage documents associated with this purchase they said that the apartment would be their primary residence. Neither they nor any family members have ever lived in this apartment. It is currently rented.

When they purchased the 92nd Street building in 2005, petitioners renewed the respondent's lease for Apartment 2B for two years. They also notified her by letter that when the renewal lease expired, they intended to recover her apartment for "family use." In May 2007 the Mayeris served the respondent with a notice of nonrenewal. The notice stated that the Mayeris intended to use Apartment 2B to expand their residence. It said that they needed the additional space for use by visiting family members. Respondent did not vacate her apartment, and this proceeding followed.

In early 2008, about four months after this case began, Ray Mayeri met with the architect who had designed their duplex apartment to discuss converting the building to a single family home. In February 2008 Ray Mayeri sent the architect a letter "confirming" this meeting. The letter lists the minimal work that would be required to obtain a Certificate of Occupancy for the

building as a single family house, essentially no more than replacement of the apartment doors and removal of the kitchens. It also says that apartment 1B will be joined to the duplex. The architect was not asked to prepare any drawings, plans or applications.

I credit the petitioners' claim that they have lived primarily in New York City, first at the 82nd Street building and then at 92nd Street, since about 2004. Documentary evidence establishes that Harriet Mayeri has attend a gym on the West Side of Manhattan once or twice a week with no breaks of more than a couple of weeks since the middle of 2004. She also registered to vote in New York in 2005. Ray Mayeri's renewal of his California driver's license is insufficient to rebut this evidence of presence in New York.. I credit their testimony that they have visited the California property for only four or five weeks a year since 2004.

However, I do not believe that petitioners intend to occupy the entire building on 92nd Street as a single family home. The evidence simply does not support this claim. In 2005 and 2006, when they say they planned to occupy the whole building, the Mayeris installed six brand new mailboxes in the building lobby, one for each apartment. I credit respondent's testimony that the old mailboxes were functional and did not need to be replaced. The Mayeris also installed six separate intercom units and six separate electrical breaker boxes, one for each apartment, in 2005 or 2006. Even after they had possession of two apartments on the third floor, one on the second floor and one on the first floor, in addition to the duplex, the Mayeris continued to maintain separate utility accounts for each apartment with Consolidated Edison.

After the construction of their own duplex apartment, the Mayeris made no changes at all in the configuration of the other apartments they recovered in the building. This includes the apartment on the first floor immediately adjacent to the upper level of the duplex, which they said they intended to use to expand the duplex. They commissioned no drawings or architectural plans

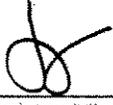
for the conversion of the building to a single family residence.

I also do not credit petitioners' explanation of their decision to sell the 82nd Street building. They testified that the 82nd Street building was not big enough for their needs, and specifically that they did not have private space for Ms. Mayeri's office or a private space for their daughter when she visited. However, they never occupied the other vacant apartments at 82nd Street and they offered no explanation for their failure to do so. Their claimed motivation for the move is simply not credible.

The Mayeris took out only a five year mortgage on the property when they purchased it in 2005. They did not present any evidence at trial of their ability to afford to occupy the entire building. The Mayeris testified that their marketing business earned between \$100,000.00 and \$200,000.00 in the year prior to the trial, and significantly less the year before. They testified that they declared a loss on their California vineyard. They presumably have rental income from the condominium in New York, but they presented no evidence of the amount, or of any other income source. Mr. Mayeri testified that the monthly mortgage payment is \$9200.00 and that the monthly expenses are \$2500.00. The record does not reflect whether or not these figures include the property taxes on the building, but these amounts alone are almost all of petitioners' demonstrated income.

For all of the foregoing reasons, I find that petitioners have not sustained their burden of proving that they intend to occupy respondent's apartment for their own personal use and occupancy. Accordingly the proceeding is dismissed on the merits.

Dated: 2/26/10



J. H. C.