2021-08-19

350 Cent. Park W. Assoc. LLC v. Udo

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350 Cent. Park W. Assoc., LLC v Udo
2021 NY Slip Op 50812(U)
Decided on August 19, 2021
Civil Court Of The City Of New York, New York County
Capell, J.
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Decided on August 19, 2021

Civil Court of the City of New York, New York County

350 Central Park West Associates, LLC, Petitioner,

against

Augustine Udo, Respondent.

Index No. L & T 71196/18

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Heela D. Capell, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of petitioner's motion to reargue this court's December 13, 2019 decision, respondent's cross-motion to reargue the decision and petitioner's cross-cross-motion to renew the court's decision.

Papers	Numbered
Notice of Motion & Affidavits Annexed	1
Order to Show Cause & Affidavits Annexed	
Notice of Cross-Motion and Affidavits Annexed	2, 3
Answering Affidavits	
Replying Affidavits	4
Exhibits	
Memorandum of law	

After submission of the foregoing cited papers, petitioner's motion and cross-cross-motion and respondent's cross-motion, are consolidated for disposition purposes only and decided jointly as follows:

In this nonpayment proceeding, the court issued a decision and order dated December 13, 2019 ("Decision"),[FN1] which denied Petitioner's motion to dismiss Respondent's first affirmative defense and counterclaim seeking to employ the default formula in determining the rent for the Premises. Before this court are two motions by Petitioner [FN2] to reargue and renew the portions of the Decision denying dismissal of the first affirmative defense and counterclaim and awarding Respondent additional discovery after the enactment of HSTPA.[FN3]

In the Decision the court found, *inter alia* that pursuant to HSTPA, Respondent was permitted to review rent registrations for the Premises at least six years prior to the date he asserted his overcharge claim in 2018. A review of these registrations revealed that Petitioner did not file updated registrations for the Premises from 2001, when it removed the Premises from rent control, nor from 2005 through 2012, when the building was receiving a J-51 tax credit. Petitioner did register the rent

for the Premises, as well as its rent stabilized status, from 2014 forward.[FN4] Pursuant to HSTPA, in an overcharge claim without a reliable registration, the court "shall consider all available rent history which is reasonably necessary to make such determination[s]" (NYC Administrative Code § 26-516[a]). Accordingly, the court declined to dismiss Respondent's first affirmative defense and counterclaim and to examine the rent registrations for the Premises in effect prior to the Petitioner's deregulation of the Premises.

Petitioner's renewal motion rests on the holding by the Court of Appeals in *Regina Metropolitan v DHCR* (35 NY3d 332 [2020]), decided after the Decision. In *Regina*, the Court of Appeals clarified that with respect to overcharge claims pre-dating HSTPA, under most circumstances, the base date rent for the purposes of calculating an overcharge was the rent actually charged four years prior to the overcharge claim (*id.*) The Court specifically found:

"where the apartment had been deregulated more than four years prior to the filing of an overcharge complaint, and the tenant failed to promptly challenge the deregulated status of the apartment, there might be no rent registration on file for the base date or indeed, any time within the four-year lookback period . . . '[t]he legal regulated rent for purposes of determining an overcharge shall be deemed to be the rent charged on the base date, plus in each case any subsequent lawful increases and adjustments' (RSC § 2526.1[a][3][i] [emphasis added]; *see also id.* § 2520.6[e]). Under the pre-HSTPA law, the base date rent was therefore the rent actually charged on the base date - i.e., four years prior to the overcharge complaint - even if no registration statement had been filed reflecting that rent (*Regina* 35 NY3d at 354)."

Given that there was a rent charged for the Premises on the base date, reargument and renewal is warranted here and the court reconsiders the Decision in light of the holding in *Regina*.

By limiting the "lookback period" in rent overcharge claims filed before HSTPA was enacted, the Court of Appeals reinstated and refined the pre-HSTPA four-year statute of limitations for examining rent histories in rent overcharge claims (former RSL § 26-516[a][2]; see former CPLR § 213-a). Before HSTPA, a tenant was only permitted to examine the rent history more than four years prior to filing an overcharge complaint for the purpose of determining whether there was a "colorable claim of fraud" on the part of the landlord to remove the apartment from rent regulation (*Matter of Grimm v State of NY Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366-376 [2010], *Conason v Megan Holding, LLC*, 25 NY3d 1 [2015]). In *Regina*, however, the Court of Appeals, barred the examination of the rental history for the purpose of "reconstructing" what the base date rent should have been (*Regina*, 35 NY3d 332, 358, citing *72A Realty Assoc. v Lucas*, 101

AD3d 401 [1st Dept 2012]). *Regina* rephrased and tightened the rule for when it is appropriate to examine the rental history outside the four year lookback period as follows:

> ...[R]eview of rental history outside the four-year lookback period was permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate and, even then, solely to ascertain whether fraud occurred — not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations (*Grimm*, 15 NY3d at 367). In fraud cases, this Court sanctioned use of the default formula to set the base date rent. Otherwise, for overcharge calculation purposes, the base date rent was the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges were to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period. Tenants were therefore entitled to damages reflecting only the increases collected during that period that exceeded legal limits."

(*Regina*, 35 NY3d 332, 355-356 [2020].)

Regina makes it clear that where, as here, there is an ascertainable base date rent four years prior to the date of the overcharge claim, this base date rent must be used to calculate and determine the overcharge claim. Respondent argues that despite the holding in *Regina* he can challenge the first rent set by the Petitioner in 2001 because Petitioner "engaged in fraud." In support, Respondent maintains that the Petitioner did not serve an RR-1 when it deregulated the Premises in 2001, as required by 9 NYCRR § 2522.3 (*see also* Fact Sheet No.6, Fair Market [*2]Rent Appeals, New York State Division of Housing and Community Renewal, https://hcr.ny.gov/system/files/documents/2020/11/fact-sheet-06-08-2020.pdf [last updated August, 2020]). However, Respondent's argument is unpersuasive. Pursuant to 9 NYCRR § 2522.3, a tenant's right to challenge a first rent is barred by a 90 day statute of limitations if the landlord served an RR-1 and a 4 year statute of limitations if the landlord did not. This statute does not carve out an exception in instances of alleged fraud. In the Decision, the court held that HSTPA permitted the Respondent to challenge the rent registrations from the time of decontrol on the grounds that the Petitioner never filed an exit registration, or registrations subsequent to the decontrol, and therefore the registration was "unreliable." However, after *Regina* this challenge is impermissible because Respondent's overcharge claim pre-dated HSTPA.Moreover, Petitioner is correct in that it was not required to file an exit registration at the time of decontrol based upon DHCR's Fact Sheet No.: 36 and the related printout from its website, confirming that the requirement for an exit registration did not exist until 2014 (*see* Fact Sheet #36 Historical Deregulation Rent and Income Thresholds, New York State Division of Housing and Community Renewal,

https://hcr.ny.gov/system/files/documents/2020/11/fact-sheet-36-02-2020.pdf [last updated February, 2020; https://hcr.ny.gov/rent-stabilization-and-emergency-tenant-protection-act at frequently asked questions number six [6]).

Respondent maintains that Petitioner should have regulated the Premises in 2001 as it was not permitted to remove the Premises from rent control and treat it as if it were unregulated. However, Respondent has not cited any cases in support of this position. Moreover, the statute in effect at the time of decontrol is clear that if the rent amount for an apartment was above the luxury deregulation threshold, which at the time was $2,000.00, the apartment became deregulated (RSL § 26-504.2[a] and NYCRR § 2522.3). Here, based upon RGB 33, in effect in 2001, the rent lawfully increased from $1,409.44 to $3,523.60. In *Matter of Park v NY State Div. of Hous. & Community Renewal*, (150 AD3d 105 [1st Dept 2017] *lv denied* 30 NY3d 961 [2017]), a tenant's challenge to the decontrolled rent was dismissed although the landlord removed the apartment from rent control and never stabilized the apartment prior to renting it as free market. As here, the landlord in *Park* never regulated the Premises because the rent exceeded $2,000.00 when it removed the apartment from rent control (*id*). Accordingly, Petitioner was permitted to remove the Premises from decontrol to free market and doing so does not constitute a "fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization" as contemplated by *Grimm* and its progeny (*Grimm* at 367).

Notably, in the Decision, this court contrasts the facts in *Park* from the facts in this case because in *Park*, the landlord retroactively filed registrations with DHCR after the building began receiving J-51 benefits. In *Park*, the registrations were belatedly filed through the base date, whereas here, Petitioner only filed amended registrations dating back four years prior to the filing of the overcharge claim. At the time of the Decision, the base date was thought to be at least six years prior to the date of the overcharge claim pursuant to HSTPA. However, given the holding in *Regina*, the base date in this case is 2014, rather than 2012, and the distinction in *Park* no longer applies. Therefore, Respondent's argument that the landlord engaged in fraud when it failed to regulate the Premises once the building began receiving J-51 benefits in 2005 fails for the same reasons stated in *Park*. Furthermore, Petitioner established that the rent for the Premises from 2005 through 2014 was increased by the permitted RGB increases at the time, with the exception of 2016 through 2017, which is included in the four year lookback period. As Respondent has not met the standard set out in *Regina*, the purported overcharge does not permit [*3]Respondent to consider the rental history beyond the four year base date as the only overcharge occurred within the four year period prior to Respondent's overcharge claim.

The court grants renewal and reargument and upon same, dismisses Respondent's first affirmative defense and counterclaim seeking to employ the default formula for purposes of setting the rent. The portion of the Decision granting additional discovery to Respondent is amended to reflect that Respondent may seek discovery from 2014 forward. The Decision remains the same with respect to the court's ability to hold an *in camera* review of any bank documents tendered pursuant to Respondent's subpoenas, in order to determine the willfulness of an overcharge, if any.

The proceeding is restored to the calendar pursuant to Administrative Order 245. The parties will receive a new court date separately.

This constitutes the decision and order of the court.

Brooklyn, New York
August 19, 2021
HON. HEELA D. CAPELL
J.H.C.

Footnotes

Footnote 1: The Decision contains a full recitation of this proceeding's facts and procedural history, which will not be reiterated. All of the defined terms in the Decision remain the same here.

Footnote 2: Respondent's cross-motion was settled by stipulation dated December 4, 2020 and will not be addressed in this decision and order other than for disposition purposes.

Footnote 3: On December 28, 2020, the Governor signed the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 into law, which, as is relevant here, stayed this eviction proceeding for 60 days. (COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, L 2020, ch 381, Part A § 2.) Subsequently, Respondent filed a Hardship Declaration pursuant to this law, which stayed this case until May 1, 2021. (*Id*.) The stay was later extended to August 31, 2021 by the Legislature. (2021 NY SB 6362.) The United States Supreme Court enjoined the enforcement of Part A of the COVID-19 Emergency Eviction and Foreclosure Prevention Act on August 12, 2021, thereby vacating the stay. (*Chrysafis v Marks*, 594 US___ [2021].)

Footnote 4: As explained in Jacob Weinreb's April 18, 2019 Affidavit, Petitioner acknowledges that "for the purpose of progressing this litigation we have decided to concede the issue as to the Rent Stabilized status of [Respondent's] tenancy."

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