2022-01-20

Segall v. 290 W12 LLC

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2022 NY Slip Op 30165(U)
January 20, 2022
Supreme Court, New York County
Docket Number: Index No. 155879/2020
Judge: Frank P. Nervo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART IV
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DWIGHT SEGALL,

Plaintiff,

-against-

290 W12 LLC,

Defendant.

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DECISION AND ORDER

Index No. 155879/2020

Mot. Seq. 001

HON. FRANK P. NERVO, J.S.C.

Defendant landlord moves for summary judgment dismissing the rent overcharge and fraud actions against it. Plaintiff opposes contending issues of fact preclude summary judgment and that the instant motion is premature, having been filed prior to completion of discovery.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]).

"Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact" (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a "feigned issue of fact" will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alverez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

As the movant, defendants bear the burden of establishing, as a matter of law, its entitlement to dismissal of the action (*supra*). Defendant concedes that it does not have records related to the initial improvements undertaken in 2006, which form the initial basis for the luxury decontrol of the subject apartment (*see e.g.* NYSCEF Doc. No. 14 at ¶ 6, 7, and 56). Although a landlord is not required to keep records beyond the four-year lookback period (*Matter of Regina Metro. Co. v. DHCR*, *infra*) where a landlord has disposed of such records, the records will be unavailable to establish a landlord's entitlement to summary judgment as a matter of law. Consequently, to the extent that defendant seeks summary judgment in its favor on the basis of improvements performed in and

about 2006, defendant has failed to establish same, as a matter of law.

Notwithstanding, defendant has records related to the subsequent improvements, totaling $70,490.51, performed in 2015-2016, two year before plaintiff became a tenant. The 2015-2016 improvements are significant enough that the apartment would be removed from rent stabilization, irrespective of the 2006 improvements/renovations (NYSCEF Doc. No, 23-24). Plaintiff has failed to raise an issue of triable fact regarding these renovations.

To the extent that plaintiff contends additional discovery is necessary, the Court is mindful that the instant litigation is at an early pre-discovery stage. Generally, parties should be "afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment" (*Amico v. Melville Vol. Fire Co., Inc.*, 39 AD3d 784 [2d Dept 2007]; CPLR § 3212[f]). CPLR § 3212(f) provides,

> "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

However, the mere hope that additional discovery will uncover evidence in

opposition to summary judgment is insufficient to deny summary judgment as premature (*see Kent v. 534 E. 11th St.*, 80 AD3d 106, 114 [1st Dept 2010]). Notwithstanding, where admissible evidence has been submitted on a pre-discovery motion for summary judgment, and such evidence establishes a party's entitlement to judgment as a matter of law, summary judgment is appropriate (*Griffin v. Pennoyer*, 49 AD3d 341 [1st Dept 2008]). This is precisely the case at bar, defendant has submitted documentary evidence establishing the 2015 renovations occurred and the deregulation of the apartment on that basis was proper; plaintiff's contention that an issue of fact exists as to whether these renovations actually occurred amounts to mere hope that additional discovery will uncover evidence contradicting that of defendant's.

Alternatively, and to the extent that defendant contends plaintiff has failed to plead claims of fraud with sufficient particularity to extend the "lookback" beyond four years, the Court agrees. As recently clarified by the Court of Appeals, examination of the rental history of stabilized, or previously stabilized, housing is limited to the four-year period preceding the commencement of the overcharge action, commonly referred to as the "lookback" period (Rent Regulation Reform Act of 1997; *Matter of Regina Metro. Co. v. DHCR*, 35 NY3d 332 [2020]). A limited exception exists to this four-year

lookback period, in order to prove the owner engaged in a fraudulent scheme to deregulate the subject housing (*id.*). Here, plaintiff's allegations of fraud are conclusory and without support in the record. Plaintiff has not met the heightened pleading requirements of CPLR § 3016(b) (*see generally*, *Small v. Lorillard Tobacco Co.*, 94 NY2d 43 [1999]), as allegations of fraud, and increases in rent, standing alone, are insufficient (*see generally Matter of Grimm v. DHCR*, 15 NY3d 358 [2010]). Therefore, the complaint, alleging fraud, is dismissed for failure to comply with CPLR § 3016(b).

Accordingly, it is

ORDERED that the motion is granted; and it is further

ORDERED and ADJUDGED that defendant 290 W12 LLC shall have judgment in its favor and the complaint against it is dismissed.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

DATED: January 20, 2021 E N T E R:

Hon. Frank P. Nervo, J.S.C.