2019-07-19

3440 Broadway BCR LLC v. Greenfield

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3440 Broadway BCR LLC v Greenfield
2019 NY Slip Op 51194(U) [64 Misc 3d 1217(A)]
Decided on July 19, 2019
Civil Court Of The City Of New York, New York County
Capell, J.
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Decided on July 19, 2019

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

3440 Broadway BCR LLC, Petitioner,

against

Channon Greenfield, Respondent, "JOHN DOE" AND/OR "JANE DOE," Respondent-Undertenant(s).

51457/19

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Heela D. Capell, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the Respondent's motion for discovery:

Papers Numbered
Notice of Motion & Affidavits Annexed 1
Notice of Cross-Motion and Affidavits Annexed
Answering Affidavits 2
Replying Affidavits 3
Exhibits
Stipulations
Memorandum of law

3440 Broadway BCR LLC ("Petitioner") commenced this holdover proceeding against Channon Greenfield ("Respondent") on the ground that the month to month tenancy, of the deregulated apartment, 3440 Broadway, Apartment #6-F New York, NY 10031 ("Premises"), expired. The petition asserts that the Premises is exempt from rent regulation due to high rent vacancy deregulation. Respondent retained counsel and interposed an answer dated April 12, 2019, which provided *inter alia*, an affirmative defense of improper deregulation and a counterclaim for rent overcharge. Respondent now seeks leave to conduct document disclosure from Petitioner and seeks documents from 2001 to the present related to aforementioned defense and counterclaim pursuant to CPLR §408.

In the seminal case of *New York University v Farkas*, the court articulated a six pronged test to determine whether discovery is warranted, including whether the pleading states a cause of action, whether the information sought is directly related to the action, whether any prejudice would arise from granting discovery, whether the party seeking discovery established "ample need" for the information, and whether the request was "narrowly tailored" to the information sought (*NY Univ. v Farkas*, 121 Misc 2d 643 [Civ Ct, New York County 1983]).

Petitioner maintains that Respondent is not entitled to the discovery sought herein on two grounds. First Petitioner argues that Respondent has failed to raise a "substantial indicia of fraud" on the part of the landlord which warrants an examination of the rental history beyond the four preceding years from the date of the overcharge claim. (*see Matter of Grimm v State of NY Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358 [2010]) In support of this argument, Petitioner also cites a former version of CPLR §213-a which was amended on June 14, 2019 when

the New York State Legislature enacted the Housing Stability and Tenant Protection Act of 2019.[FN1] Alternatively, Petitioner states Respondent is not entitled to discovery in this proceeding because the defenses and counterclaims raised in the answer fail to satisfy the first prong of the *Farkas* analysis insofar as they do not raise sufficient legal challenges to the rent history for the Premises filed with the New York City Department of Housing Conservation and Renewal ("DHCR").

The rent history reflects the following:

From 1995 to 2002 Sonia Osorio is listed as the rent stabilized tenant of the Premises. Between 1994 and 1996, the legal regulated rent is registered as $704.50; from 1996 to 1998, the [*2]legal regulated rent is registered as $732.68; from 1998 to 2000 the legal regulated rent is registered as $761.99. From June 1, 2000 to May 31, 2002, Sonia Osorio's legal regulated rent is registered as $792.47. The rent history reflects that the apartment was vacant in 2002 and lists the legal regulated rent at $1292.55. The entry below the reason for the change in rent amount is stated as "IMPRVMNT." For 2003, the rent history lists a new tenant, Stacey Corr, at a legal regulated rent of $1460.85, with a lease term of May 1, 2002 to April 3, 2003. The reason for the increase is listed as "PREF RENT VAC/LEASE IMPRVMNT." The registration reflects Stacey Corr's rent in 2004 and 2005 as $1519.28. In 2006 Danielle Tildon is listed as the tenant, at a legal regulated rent amount of $1843.69. From 2007 to the present, the registration states that a registration is not found for the Premises.

With respect to Petitioner's first argument, the Housing Stability and Tenant Protection Act of 2019 enacted on June 14, 2019, authorizes the court to examine "all available rent history which is reasonably necessary" to determine the legal regulated rent and investigate overcharges (NYC Administrative Code §26-516[h]). These new regulations permit the court to consider "any rent registration or other records filed with the state division of housing and community renewal, or any other state, municipal or federal agency, regardless of the date to which the information on such registration refers." (*Id.*) The regulation further provides:

> [n]othing contained in this subdivision shall limit the examination of rent history relevant to a determination as to: (i) whether the legality of a rental amount charged or registered is reliable in light of all available evidence including but not limited to whether an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the housing accommodation, rendered such rent or registration unreliable.

NYC Administrative Code §26-516(h)

The legislation specifically provides that such amendment to the law "shall take effect immediately and shall apply to any claims pending or filed on or after such date" (2019 Bill Text NY S.B. 6458). Courts have applied this new, broader standard to award discovery whether or not it would have been granted under the prior statute or body of case law (*See SF 878 E. 176th LLC v Grullon*, 2019 NY Slip Op 29201 [Civ Ct, Bronx County 2019]; *699 Venture Corp. v Zuniga*, 2019 NY Slip Op 29200 [Civ Ct, Bronx County 2019]). Accordingly, the court finds that pursuant to the Housing Stability and Tenant Protection Act of 2019, the scope of Respondent's discovery request is not limited by the statute of limitations in CPLR §213-a, nor the prior body of case law requiring a sufficient showing of fraud.

However, assuming *arguendo* that the Respondent does still need a sufficient showing of fraud to look back beyond the statute of limitations, under a separate analysis the court would reach the same result. In (*Grimm v State Division of Housing and Community Renewal Office of Rent Administration,* 15 NY3d 358), the Court of Appeals found the statute of limitations inapplicable because the landlord engaged in a fraudulent scheme to deregulate the apartment, which rendered the rent charged on the base date unreliable. Namely, the tenant's immediate predecessors were charged an illegal rent for the rent stabilized premises, not given a rent stabilized lease rider, nor informed how their monthly rental amount was calculated. Additionally, the landlord failed to register the rents for the apartment with DHCR. Accordingly, the Court of Appeals concluded that DHCR should have examined the rental history beyond the base date four years prior to the overcharge claim to calculate the current rent *Id.*; *see also* (*Gersten v 56 7th Ave, LLC,* 88 AD3d 189 [1st Dept 2011]); (*Conason v Megan Holding, LLC,* 25 NY3d 1 [2015]); (*Altschuler v Jobman 478/480, LLC.*, 135 AD3d 439, 440 [*3][1st Dept 2016], *lv denied* 29 NY3d 903 [2017]).

There is no set formula to determine whether a tenant raised an "indicia of fraud" which was required under *Grimm*. For example, on its own, an allegation of a fraudulent scheme to deregulate the apartment, or a jump in the rent, was insufficient (*Matter of Lowinger v DHCR*, 2018 NY Slip Op 3610 [1st Dept] 2018) (*citing Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014]); (*see also Grimm* 15 NY3d 358). However, the Supreme Court in *Matter of Pehrson v Div. of Hous. & Community Renewal of the State of NY*, following *Grimm*, identified three factors as determinative of such fraud: "(1) the landlord's possible violations of the Rent Stabilization Law and Code besides charging an illegal rent, (2) a fraudulent deregulation scheme, and (3) an inconsistency between DHCR's rent registration history and the lease history" (*Matter of Pehrson v Div. of Hous. & Community Renewal of the State of NY*, 34 Misc 3d 1220[A], [Sup Ct, NY County

2011] citing *Grimm* 15 NY3d at 366).

Here, there are increases in the rent registration that raise an "indicia of fraud" warranting examination of the rent history in 2001 for the purpose of calculating an overcharge. (*see Grimm v State Division of Housing and Community Renewal Office of Rent Administration*, 15 NY3d 358 [2010]). Importantly, two increases were taken back to back, both in 2002 and 2003, without an intervening tenant in between. These two increases resulted in a rent that was 84% over the $792.47 rent charged to the prior tenant in possession. Respondent also challenges the increase in rent between the tenancy of Stacey Corr in 2005, at $1519.28 per month, and Danielle Tildon in 2006 at $1843.69 per month, which is not explained on the rent history. Courts have found that a significant jump in the rent may warrant discovery in similar instances (*see Mautner-Glick Corp. v Higgins*, 2019 NY Slip Op 29129 [App Term 2019]; *2701 Grand Assn. LLC v Morel*, 50 Misc 3d 139[A], 2016 NY Slip Op 50163[U] [App Term 2016]).

Furthermore, the court may look beyond the statute of limitations to determine a challenge to the rent regulated status of an apartment, such as the one Respondent raises here (*E. W. Renovating Co. v NY State Div. of Hous. & Community Renewal*, 16 AD3d 166 [1st Dept 2005]; *Gersten v 56 7th Ave, LLC*, 88 AD3d 189 [1st Dept 2011]). Accordingly, Respondent has established its entitlement to discovery under the *Farkas* analysis with respect to the defense that the Premises were improperly deregulated and counterclaim for rent overcharge (*NY Univ. v Farkas*, 121 Misc 2d 643 [Civ Ct, New York County 1983]).

Respondent's motion is granted to the extent of marking the proceeding off of the court's calendar for the purposes of discovery. Petitioner shall provide Respondent's counsel with responses to Respondent's document demand within forty-five days after service of a copy of this decision and order upon Petitioner's counsel, along with Notice of Entry. To the extent that Petitioner does not have custody or control of the documents, it shall produce an affidavit from its agent claiming same. Respondent also reserves the right to issue trial subpoenas to Petitioner's predecessor(s) in connection with its requests herein. The proceeding may be restored to the calendar by motion or stipulation.

This constitutes the decision and order of the court.

Dated: New York, New York
July 19, 2019

HEELA D. CAPELL
J.H.C.

Footnotes

Footnote 1: The court notes that this motion was originally filed and made returnable prior to the enactment of the Housing Stability and Tenant Protection Act of 2019 which amended CPLR §213-a and various other relevant statutes. Petitioner filed its opposition prior to the enactment of the Act. However, Respondent filed its Reply on June 19, 2019, and relied on the amendment to the statutes. At oral argument, Petitioner was given an opportunity to file supplemental papers addressing the substantial changes to this area of law, but declined to do so.

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