2021-09-28

200 Haven Owner LLC v. Drachman

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200 Haven Owner, LLC v Drachman
2021 NY Slip Op 50970(U)
Decided on September 28, 2021
Civil Court Of The City Of New York, New York County
Ofshtein, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on September 28, 2021

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

200 Haven Owner, LLC, Petitioner-Landlord,

against

Chen Drachman, Respondent(s)-Tenant(s).

Index No. L & T 63722/19

Petitioner's attorney: Azoulayweiss by Mr. Weiss, Esq.

Respondent's attorney: MFJ Legal by Mr. Pereira, Esq.

Eleanora Ofshtein, J.

Recitation, required by CPLR § 2219(a), of the papers considered in the review of these motions: Papers Numbered

Respondent's Motion with Affirmation/Affidavit/Memo of Law 1 (NYSCEFNo. 5-23)

Petitioner's Cross-Motion/Opposition with Memo of Law 2 (NYSCEF# 31-53)

Respondent's Reply with Memo of Law 3 (NYSCEF# 24-30)

After argument and upon the foregoing cited papers, the Decision/Order is as follows:

Petitioner commenced this summary holdover proceeding after service of a thirty-day Notice to terminate an unregulated month-to-month tenancy. Petitioner seeks possession of apartment 6R, located at 200 Haven Avenue, New York, NY, stating that the "premises are not subject to rent stabilization or rent control, pursuant to Section 26-504.2 of the Rent Stabilization Law", a section currently repealed which had allowed exclusions of high rent accommodations. After the case first appeared in June 2019, Respondent filed its Verified Answer in August 2019, asserting defenses including a challenge to the regulatory status of the unit and counterclaims for overcharge, retaliation, and legal fees.

Respondent filed this CPLR §3212 motion in November 2019, seeking partial summary judgment pursuant to the defense that the apartment is subject to rent stabilization, and a counterclaim that Petitioner's case is retaliatory. Additionally, Respondent's motion seeks CPLR §408 discovery, including documents and the deposition of Petitioner-corporation, based on Respondent's counterclaim for overcharge. After many consent adjournments by the parties, and the delays caused by the COVID-19 pandemic, the case was not heard again until August 2020, when Petitioner filed its cross-motion, and the parties were provided an opportunity to submit supplemental papers. The motions were argued and submitted, via Microsoft Teams, on November 18, 2020, but the case was further stayed due to the COVID-19 Emergency Eviction [*2]and Foreclosure Prevention Act of 2020 ("CEEFPA"), and its progeny.

Respondent argues that dismissal is proper because deregulation could not have occurred while she remained in possession of the rent-stabilized apartment, even if the rent deregulation threshold was reached. In her affidavit in support of the motion, Respondent explains that she moved into the apartment with a roommate/co-leasee ("Sossover") pursuant to a one-year rent-stabilized lease wherein both tenants were named, for the period April 1, 2013 through March 31, 2014, at a monthly rent of $2107.78 and a preferential rent of $1800. The lease was then renewed, from April 1, 2014, at a monthly rent of $2191.05 and a preferential rent of $1900.

When Sossover vacated, at the end of 2014, Respondent, who continued to live in the apartment, found a new roommate ("Zahavi") who moved in January 2015. When Respondent asked Petitioner to add Zahavi to the lease, Petitioner provided Respondent and Zahavi a new, *unregulated* lease for an eight-month term, but left the monthly rent at $1900. A Rider was provided stating that the apartment was not subject to Rent Stabilization and that the Landlord may elect not to renew the lease.

Respondent explains that the landlord did not inform her that it would be claiming an increase in the registered rent once the eight-month term expired, or that the apartment may be subject to deregulation, and states that she was unaware that she had the option to have a new roommate without adding them to the lease.

Once Zahavi vacated, at the end of 2017, Petitioner executed a renewal lease with Respondent, for a one-year term, from January 2018 through December 2018, at a rent of $2025 per month. The renewal was written on a Rent-Stabilized Renewal Form, which Petitioner's cross-motion claims was done in error.

Respondent's request for discovery, based on her counterclaim for overcharge, includes the following: (Exhibit M) interrogatories regarding an increase in rent in 2009 to 2010, from $773.41 to $1650; (Exhibit L) documents for the period 2008 to the present, which relate to the calculation of the legal registered rent and any construction, renovations or improvements which affected the rent calculations in the unit; and (Exhibit N) the deposition of an unnamed person from the Petitioner-corporation.

Respondent's motion provides two DHCR registration histories for the subject unit. The first registration, from April 2018, indicates the following rent history for the apartment: Rent Control until 2009; a Rent Stabilized tenancy ("Xu/Pan") from 2009 to 2010, at a legal registered rent of $773.41; and then no registrations from 2010 to the present. (Respondent's Motion, Exhibit G). The second rent history, an amended registration from May 2019, reflects Rent Control until 2008; a Rent Stabilized tenancy for Xu/Pan from 2009 through 2012, with rent increases from $773.41 (2009) to $1650 (2010), then to $1667.13 (2011), and then to $1750 (2012); Respondent and Sossover's rent-stabilized tenancy in 2013 at a legal rent of $2106.78 and a preferential rent of $1800, and then a 2014 registration for the same tenants (Drachman/Sossover) at a legal rent of $2191.05 and a preferential rent of $1900; then a 2015 registration indicating "exempt-high rent vacancy", and no registrations thereafter, noted as 'exempt apartment'. (Respondent's Motion, Exhibit I).

Petitioner opposes the motion and filed a cross-motion seeking summary judgment or, in the alternative, use and occupancy *pendente lite*. Petitioner explains the rents charged as follows: Xu/Pan, the first rent-stabilized tenants after the rent controlled tenants vacated, were provided a rent-stabilized lease and a rider which informed them that they were the first stabilized tenants, with a rent of $1650 (Petitioner's Cross-motion, Exhibit H [sub-exhibit D]). On this issue, Petitioner relies on *3505 BWAY Owner LLC v McNeely*, 72 Misc 3d 1 (App Term, 1st Dept [*3]2021) which holds that "(o)rdinarily, when a rent-controlled apartment is vacated, it becomes subject to rent stabilization and 'the initial legal regulated rent shall be the rent agreed to by the owner and the tenant and reserved in a lease'...subject to a tenant's right to a Fair Market Rent Appeal " (internal citations omitted). The Court agrees that since it does not appear that a FMRA was filed, Respondent is no longer able to reopen the rent set at $1650 for Xu/Pan in 2009-2010.

After the initial lease with Xu/Pan, Petitioner issued a renewal for the period November 2010 through October 2011, which indicates a 2.25% increase for a one-year lease, to $1687.13.[FN1] The next renewal for Xu/Pan, for the period November 2011 through October 2012, indicates a 3.75% increase for a one-year lease, to $1750.40. The last renewal lease with Xu/Pan, for the period November 2012 through October 2013, indicates a 2% increase for a one-year lease, to $1781.41.[FN2] After Xu/Pan vacated, Petitioner applied a vacancy increase and offered Respondent (Drachman/Sossover) a rent-stabilized lease at $2106.78, with a preferential rent of $1800, for the period April 2013 to March 2014, and later renewed the lease, and increased the rent, in April 2014, to $2191.05, with a preferential rent of $1900.

Around December 2014, after Sossover vacated, Petitioner claims, and Respondent does not contest, that Respondent asked for a new lease with a new co-leasee. Based on Respondent's request, Petitioner offered, and Respondent accepted, an *unregulated* lease for Drachman/Zahavi for an eight-month period, January 2015 through August 2015, at a monthly rent of $1900.

On this issue, Petitioner argues that the word "vacancy", in the context of rent stabilization, is not literal, but rather a term of art that is used to describe a change in tenancy. Although lacking an affidavit from someone with personal knowledge, Petitioner's attorney's affirmation states that Respondent's request for a lease with a new co-leasee created a new tenancy, and that Petitioner offered the new deregulated lease because the additional 18% vacancy increase raised the rent beyond the threshold amount for deregulation, which was allowed by the law then in effect for rents reaching $2500. Additionally, Petitioner explains

that the new lease, commencing January 1, 2015 and ending August 31, 2015 at $1900.00 per month, contained a "Deregulation Rider for First Unregulated Tenants", which provided Respondent and Zahavi with an explanation about the new lease and tenancy. Petitioner later renewed the lease from September 2015 through August 31, 2017 at $2000 per month, and upon its expiration, offered Respondent a renewal lease in her own name. Additionally, Petitioner explains that the new lease offered to Respondent in 2017 was erroneously offered on a stabilization renewal form.

Additionally, Petitioner argues that this Court should not entertain Respondent's claim of overcharge since she has chosen her forum by initially filing with the DHCR. However, Respondent's initially-filed complaint with the DHCR for overcharge in July 2018, and for failure to provide a renewal lease, in February 2019, were both withdrawn in October 2019, after Respondent received the Notice of Termination. (Respondent's Motion, Exhibit K).

In its opposition to discovery, Petitioner argues that the documents demanded by Respondent were already submitted to DHCR in response to Respondent's initial DHCR complaints, and that those documents explained the setting of the first stabilized tenancy rent, for Xu/Pan, at the monthly rate of $1650. (Petitioner's cross-motion, Exhibit G).

It is well settled that "the proponent of a summary judgment motion must make a prima [*4]facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact". *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986). The failure to make such a presentation requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Winegrad v New York Univ Med Ctr*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial. (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Therefore, when deciding a motion for summary judgment, the court's function is issue finding rather than issue determination. (*See Kershaw v Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]; and *Pantote Big Alpha Foods v Schefman*, 121 AD2d 295, 296 [1st Dept 1986]).

Based on this record, the Court finds that Respondent continually lived in the apartment since 2013, and that she asked her landlord to add her new roommate to the lease, resulting in a new lease allowing for an increase in rent. The Court further finds that the calculations presented by Petitioner, at least up until the deregulated lease was offered to Respondent, appear to comply with rent stabilization guidelines.

However, on the issue of deregulation, in *132132 LLC v Strasser*, 19 Misc 3d 658 (Civ Ct, NY County 2008, J. Capella), a case with similar facts, the Court found that there are situations where "DHCR permits an owner to take a vacancy increase when a new tenant, who is not a family member, is added to the lease". However, while "a vacancy increase may be permissible even when there is no hiatus in the tenant of record's occupancy; however, this increase, in and of itself, does not remove the apartment from rent stabilization. Quite the contrary, where there is no hiatus in possession or actual physical vacancy of the premises by the original tenant, vacancy decontrol cannot apply. (*Ghignone v Joy*, 55 NY2d 853 [1982]; *Hoy v DHCR*, 233 AD2d 120 [1st Dept1996])." In its affirmance on this issue (modified only as to the legal fees issue), the Appellate Term noted that "(e)ven assuming, without deciding, that landlord, upon an appropriate agency application, may have qualified for a 'vacancy allowance' based upon the addition of (another occupant) as a tenant (*see e.g. Matter of Pikus*, DHCR Administrative Review Docket No. ARL 13169-L, Nov. 28, 1988), any such eligibility would not have served to automatically exempt the apartment from regulation." (*132132 LLC v Strasser*, 24 Misc 3d 140(A) (App Term 1st Dept 2009).

Petitioner's use of *Gavrielov v Unger Consulting Group Ltd*, 173 AD3d 443 (1st Dept 2019), to prove its right to deregulate the unit even while Respondent continued to reside there, is misplaced. In *Gavrielov*, the Appellate Division's reversal of the lower courts was specifically based upon its analysis that a vacancy and new tenancy was created, despite the continued occupancy of the sole owner of the corporate entity, where that owner executed a renewal designating his corporation as the tenant without identifying any occupant of the apartment. The Court cited to *Fox v 12 E 88th LLC*, 160 AD3d 401 (1st Dept 2018), *lv denied* 32 NY3d 911 (2018), where the analysis centered on the fact that a corporate entity that "did not identify as the occupant of the apartment a particular individual with a right to demand a renewal lease, () is not entitled to the renewal of the lease" (internal citations omitted).

In the case at bar, no such facts have been shown. Respondent has neither vacated her rent stabilized apartment, nor requested a change akin to a new corporate tenancy which could have divested her of her rent stabilization rights. Petitioner's deregulation, under these circumstances, runs directly afoul of the protections of rent stabilization and the caselaw behind the parties' inability to contract out of such protections. Petitioner's argument that Respondent [*5]was aware of, or consented to, such deregulation, or that the Rider to her lease provided Respondent with such information, is insufficient to overcome those protections under these circumstances.

It is well-established that "parties to a rent-stabilized lease may not contract out of rent stabilization, even where their agreement bestows obvious advantages on the tenant" (*Gersten v 56 7th Avenue LLC*, 88 AD3d at 189 [1st Dept 2011]). Moreover, "a landlord-tenant relationship under a rent-stabilized lease is principally defined and governed by statute" such that "pursuant to the RSL, the rent-regulated status of an apartment is a continuous circumstance that remains until different facts or events occur that change the status of the apartment". The Appellate Division held that it "considers such legislative mandate so sacrosanct as to be impervious to waiver." *Gersten v 56 7th Avenue LLC*, *id* (*see also Drucker v Mauro*, 30 AD3d 37 [2006], *lv dismissed* 7 NY3d 844 [2006]; and *Riverside Syndicate, Inc v Munroe*, 10 NY3d 18 [2008]).

Based on the record before this Court, no factual issue exists as to Respondent's first and second affirmative defenses, the regulatory status of the unit and the failure to state a cause of action for eviction due to the improper deregulation of the unit during Respondent's continued occupancy. Therefore, Respondent's motion for partial summary judgment is granted and the petition is dismissed.

Additionally, Respondent requests discovery pursuant to CPLR §408, based upon its counterclaim for overcharge. The standard developed for obtaining such leave, now known as 'ample need,' requires an analysis of the factors set forth in *New York Univ v Farkas*, 121 Misc 2d 643 (Civ Ct, NY County 1983). The first two factors ask whether the party seeking discovery has asserted facts to establish a cause of action, and whether there is a need to determine information directly related to that cause of action. However, the issue of overcharge cannot be reached until Petitioner reissues the appropriate rent-stabilized renewal lease for the appropriate term, and recalculates the amounts due, if such recalculation is necessary. Furthermore, based on Respondent's own affidavit, she requested the new lease, and a cursory review of Petitioner's calculations from the resultant 'vacancy increase', as well as the increases taken thereafter, do not appear to indicate an overcharge.

Therefore, Respondent's motion for discovery is denied and Respondent's remaining counterclaims are severed.

This constitutes the decision and order of this Court.

Dated: September 28, 2021

New York, New York

ELEANORA OFSHTEIN,

JHC

Footnotes

Footnote 1: The DHCR registration for this period shows a slightly lower rent was registered: $1667.13.

Footnote 2: This lease renewal does not appear in the DHCR registration history.

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