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# Clay2 Ventures v. Vasquez

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| Clay2 Ventures v Vasquez |
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| 2019 NY Slip Op 51603(U) [65 Misc 3d 1214(A)] |
| Decided on October 16, 2019 |
| Civil Court Of The City Of New York, Bronx County |
| Weissman, 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| This opinion is uncorrected and will not be published in the printed Official Reports.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 October 16, 2019

Civil Court of the City of New York, Bronx County

**Clay2 Ventures, Petitioner,**

**against**

**Griselda Vasquez, Respondents.**

L & T 031245/18

Petitioner was represented by: Emmanuelli & Pilotti, Esqs.

Respondent was represented by: Bronx Legal Services

Steven Weissman, J.

Petitioner commenced this summary nonpayment proceeding by a petition and notice of petition dated June 7, 2018, alleging arrears totaling $7,112.33 for a period through June, 2018, at a monthly rate of $959.00. The petition specifically alleges a monthly rent balance of $249.00 for the months of April, 2016 through March, 2018; a balance of $638.33 for April, 2018; and a monthly balance of

$249.00 for the months of May and June of 2018. Respondent interposed an answer while unrepresented by counsel, indicating that the rent or part of the rent, had already been paid to Petitioner.

The proceeding first appeared on the court's calendar on June 21, 2018, at which time the proceeding was adjourned to August 9, 2018, for Petitioner to subpoena SCRIE (Senior Citizen [*2]Rent Increase Exemption) documents from the Department of Finance. The court file also indicates that Respondent was referred to the Assigned Counsel Program (ACP). Bronx Legal Services appeared for Respondent on August 9, 2018, and the proceeding was adjourned by stipulation for Respondent's attorney to review the subpoenaed records. The proceeding was adjourned on September 18, 2018, to October 17, 2018, for possible settlement or trial, and Respondent moved for leave to interpose an amended answer. On October 17, 2018, the proceeding was again adjourned to November 20, 2018, for possible settlement or Respondent's motion. On November 20, 2018, the proceeding was adjourned by stipulation to January 16, 2019, for motion practice. Respondent's motion to amend the answer was granted to the extent that Respondent's amended answer was deemed properly served and filed. The stipulation further stated that Petitioner admitted "it is not in possession of any information or records pertaining to any individual apartment improvements (IAIs) of the subject premises, including any IAI referenced in the lease dated January 10, 2005, between Respondent and Petitioner's predecessor in interest, other than leases and SCRIE applications". Petitioner also admitted, "it is not in possession of any records pertaining to the additional rent increases taken in the lease between Respondent and Petitioner's predecessor in interest dated January 1, 2003 (in the amount of $30.00) or the lease dated January 10, 2005 (in the amount of $15.00)." Additionally, Petitioner agreed, "it is precluded in this and future proceedings from producing or relying on documentation justifying the rent increases described above or testifying or procuring testimony concerning the factual bases for the rent increases." Respondent filed the herein motion returnable January 16, 2019, and the proceeding was adjourned several times for motion practice before argument on the motion was heard before this Court on May 8, 2019.

Respondent moves for an order granting summary judgment dismissal pursuant to CPLR 3212 based on Petitioner's failure to raise a triable issue of material fact as to Respondent's defense that the petition misstates the facts upon which the proceeding is based; and granting such other and further relief as this Court may deem just and proper.

Respondent, Griselda Vasquez, is 78 years old and has lived at the subject premises for approximately 44 years. The premises was last registered with the DHCR as "Apartment 1" in 1996

at a registered rent of $298.85. Thereafter, the premises was registered with the DHCR as "A1" and Petitioner provided Annual Apartment Registrations from 2007 to 2018, annexed to Respondent's motion as Exhibit I. Respondent is a participant in the SCRIE program and her rent has been frozen at $389.33 per month since 2003. Respondent's lease commencing April 1, 2003, after Respondent's entry into the SCRIE program, includes an additional $30.00 in additional rent increases, as well as the two-year lease renewal increase of 4%, bringing the rent to $434.93. Of the additional $30.00 increase, $15.00 was attributed to air conditioning fees, and $15.00 as a lawful rent increase adjustment. In 2005, Respondent's renewal lease included an additional $249.00 above the regular renewal increase. This charge was described as "bathroom renovation and apartment door." This lease, signed by Respondent and annexed as Exhibit C to Respondent's motion, also incorporated the additional $30.00 from the 2003 lease into the base rent, and increased the rent by an additional $15.00 as a Guideline Supplement. The SCRIE program stamped this lease as received on August 7, 2006, and circled the $249.00 charge noting at the bottom of the lease that the program "will not cover individual improvement." The SCRIE program did not provide a tax abatement to cover the $249.00 IAI in subsequent lease renewals [*3]through March 31, 2014, and maintained that Respondent's share of the rent was $389.33. In the lease commencing April, 2014, the rent for the premises was $940.20, and SCRIE increased Respondent's share to $638.33, and Petitioner's tax credit to $301.87. The rent increased to $978.19, and Petitioner's tax credit increased to $339.85, starting April 1, 2018. The increase of Respondent's share appears to incorporate the $249.00 IAI charge into Ms. Vasquez's share. Respondent alleges she did not consent to any IAI, and Petitioner did not have the right to charge that increase. The Annual Apartment Registrations for apartment "A1" for the years 2007 through 2018 list the "Actual Rent Paid" as $389.14 for 2007 and 2008, as $389.33 for 2009 through 2015, and $638.33 in 2017 and 2018 due to SCRIE. Respondent now seeks summary judgment dismissal alleging the petition misstates the facts upon which the proceeding is based, as the petition alleged arrears of $7,112.33 at a monthly rent of $959.00 for a period going back to April, 2016.

Respondent argues she should be allowed to challenge the prior rent increases beyond the four year base date alleging Petitioner is engaged in a fraudulent scheme to destabilize the apartment. Respondent contends that she has paid $389.33 consistently, has never agreed to an IAI and disputes that any such improvements were made, Petitioner has no documentation supporting work entitling it to an IAI increase, and Petitioner has never sought the IAI increase until this proceeding. Petitioner opposes Respondent's motion for summary judgment alleging triable issues of fact remain. Petitioner asserts that if Respondent wishes to challege a rent increase beyond four years, it is Respondent's burden to prove fraud, and as the rent is well below the high rent vacancy decontrol threshold,

Respondent's argument has no merit. It is Petitioner's position that Respondent did not contest the IAI during the four year review period, and Petitioner does not have any documentation regarding the IAI from the prior owner.

Summary judgment is a drastic remedy, and should not be granted lightly. As the Court of Appeals stated in *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 (CANY, 1980), at 562: "To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212[b]), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212[b]). Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, **may** be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form**."** Citations omitted. The Court continued: "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." Citations omitted. See also *North Central Mechanical, Inc. v. Hunt Construction Group, Inc.*, 43 AD3d 1396, 843 NYS2d 894 (AD, 4th Dept., 2007); *Ochoa v. Walton Management, LLC*, 19 Misc 3d 1131(A), 2008 WL 1991486 (NY Sup, 2008).

The Supreme Court in *Ochoa v. Walton Management, LLC*, supra, succinctly stated the [*4]requirements for opposing a motion for summary judgment. There, the Court said: "Once movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (citing *Zuckerman,* supra*).* The burden ... always remains ... with the movant ... 'if the evidence ... is evenly balanced, the party that bears the burden must lose' (citations omitted). It is worth noting ... that while the movant's burden ... is absolute, the opponent's burden is not. ... to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue ... The rule ... to defeating ... summary judgment ... is more flexible, ... the opposing party, ... contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. ... [G]enerally, the opponent ... seeking to have a court consider

inadmissible evidence must proffer an excuse for proffering the inadmissible evidence in inadmissible form. ... **[**T]he Court's function ... is issue finding and not issue determination. ... summary judgment ... should never be granted when there is any doubt as to the existence of a triable issue of fact. When the existence ... is even debatable, summary judgment should be denied." Citations omitted.

Even under the prior Civil Court Act, the rule was the same. As it was stated by the Court of Appeals in *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 (CANY, 1957): "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is 'arguable'; 'issue-finding, rather than issue- determination, is the key to the procedure'". Citations omitted.

The Court's role in deciding a motion for summary judgment is one of issue finding, not issue determination. After consideration of all of the "evidence" submitted by both sides, and taking into account the fact that the burden never truly shifts from the party seeking summary judgment, and the clear admonition of the Court of Appeals that summary judgment should never be granted when there is any doubt as to the existence of a triable issue of fact, and that even when it's existence is debatable, summary judgment should be denied, this Court finds that no triable issue of fact exists, and grants summary judgment to Respondent. It is clear to this Court that there is an issue of waiver as to the IAI increase. Though the IAI was included in the 2005 lease immediately after the IAI was granted, the prior owner never sought or collected this amount from Respondent. Petitioner, the current owner of the premises, purchased the property in 2010, then waited eight years to bring this proceeding wherein it is solely seeking the IAI portion of the rent dating back to April, 2016. Courts have found waiver of IAIs and MCIs due to the owners' failure to include these increases in the lease or charge these increases to tenants. The First Department upheld a decision of the Supreme Court in *Apar Realty Co. v. State Div. Of Hous. & Cmty. Renewal*, 286 AD2d 274 (1st Dept. 2001), which denied and dismissed a petition brought pursuant to CPLR Art. 78 to annul a determination of the DHCR that found petitioner's failure to collect Major Capital Improvement (MCI) increases constituted a waiver of such increases. The court noted that, "although the agency had previously authorized petitioner's inclusion of MCI increases in the base rent, petitioner's rent ledger does not indicate that such increases were actually collected. While petitioner's ledger indicates deficits in the tenant's rent payments, none of these deficits correspond to the authorized MCI increases. Nor is there any indication in the record that petitioner notified the tenant that he was in arrears for not paying [*5]additional amounts to satisfy the MCI increases." In *1652-20 LLC v. Reynoso*, 2017

NYLJ LEXIS 200; NYLJ 1/25/17 at 28 (Civ. Ct. Queens Co. 2017), the court held that under DHCR policy, "a landlord must collect an MCI increase from a rent stabilized tenant in the first renewal lease after issuance of the MCI order or the landlord will be deemed to have waived the increase." Similarly, in *Buono v. Hargrove*, NYLJ 6/21/95 33:4 (Civ. Ct. Kings Co. 1995), the court found petitioner's predecessor waived the right to collect the prospective portion of the MCI increase permitted by DHCR determinations, found the predicate notice was defective, and the petition for nonpayment of the MCI portion failed to state a cause of action. The tenant in *Buono* argued the petitioner waived its right to collect the MCI increases when he did not include the increases in the base rent in the renewal lease. The tenant cited the Public Information Manual and Reference Guide promulgated by the DHCR which provides, "If the owner was on notice of the MCI increase, he must include the MCI increase in the base rent for the purpose of calculating renewal lease rents in all upcoming renewal leases. Failure to do so will result in the owner waiving his right to collect the permanent prospective increase. The owner has 90 days or until the renewal lease date, whichever is later, to charge the tenant for the MCI or the owner waives the right to collect the MCI."

Though in the case currently before the court the IAI increase was included in the renewal lease, it was never charged to or sought from the Respondent until the commencement of this case, and Petitioner does not have any record of Respondent's consent to the increase. Further, it has been held that the inclusion of an IAI increase in a lease signed by a tenant without an express written consent from a tenant, was found to be an overcharge. In *Forest Hills Assocs. v. DHCR*, NYLJ 9/7/95, 30:2, (Sup. Ct. Queens Co. 1995), the court found DHCR's order upholding a rent overcharge was neither arbitrary nor capricious. "The owner submitted no evidence or Mr. Sykes' written consent to the rent increase. Mr. Sykes' execution of the lease did not constitute the consent required under the Rent Stabilization Code." As the owner in *Forest Hills* failed to submit the written consent of the tenant to the rent increase, DHCR's determination of rent overcharge had a rational basis. Landlords are required to obtain written consent to the rent increase pursuant to 9 NYCRR 2522.4(a)(1) which provides,"An owner is entitled to a rent increase where there has been a substantial increase, other than an increase for which an adjustment may be claimed pursuant to paragraph (2) of this subdivision, of dwelling space or an increase in the services, or installation of new equipment or improvements, or new furniture or furnishings, provided in or to the tenant's housing accommodation, on written tenant consent to the rent increase. In the case of vacant housing accommodations, tenant consent shall not be required."

In the instant case, discovery was completed through the settlement process and Petitioner was unable to produce any documentation regarding any improvements to Respondent's apartment,

including written consent to the IAI increase, and Respondent denies that any such improvements were made. Petitioner's predecessor may have included the IAI increases in the renewal leases but it never charged or sought the increases from the Respondent during the duration of its ownership. It is this court's opinion that the prior owner waived its right to seek theses increases and Petitioner, the current owner, is bound by that waiver. The court also notes that Petitioner purchased the property and came into ownership of the premises eight years before seeking the increase from Respondent. Though the Petitioner argues it discovered the [*6]discrepancy by chance, it should have had ample time to resolve this discrepancy. Furthermore, as in *1652-20 LLC v. Reynoso*, supra, the current owner is bound by its predecessor's waiver.

This proceeding was commenced solely in pursuit of the $249.00 monthly IAI increase which neither the Petitioner nor its predecessor ever sought to collect prior to this proceeding. It is reasonable to believe Respondent did not challenge the increase during the then four year review period (which has now been expanded by the recent Housing Stability and Tenant Protection Act) as she was never previously asked to pay this amount. Accordingly, as the court finds a clear waiver of the IAI increase by the prior owner, Respondent's motion is granted and the proceeding is dismissed. The court declines to set the rent and refers the parties to the DHCR for a determination of the proper rent.

This is the decision and order of the Court.

Dated: October 16, 2019

Bronx, New York

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STEVEN WEISSMAN, JHC

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