2019-10-25

3225 Holdings LLC v. Imeraj

[*1]

3225 Holdings LLC v Imeraj
2019 NY Slip Op 51763(U) [65 Misc 3d 1219(A)]
Decided on October 25, 2019
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
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Decided on October 25, 2019

Civil Court of the City of New York, Bronx County

3225 Holdings LLC, Petitioner,

against

Gezim Imeraj, Respondent-Tenant.

4568/19

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Shorab Ibrahim, J.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion.

Papers/Numbered

Notice of Motion [With Exhibits A-N] 1

Affirmation in Opposition 2

Reply Affirmation 3

After oral argument held on October 9, 2019, and upon the foregoing cited papers, the decision and order on this motion is as follows:

FACTUAL AND PROCEDURAL HISTORY

In this non-payment summary proceeding, 3225 Holdings LLC ("petitioner") represents that the subject apartment is "not rent stabilized because of high rent vacancy."[FN1] This matter first appeared on calendar on February 13, 2019 at which time Gezim Imeraj ("respondent") obtained counsel through the Universal Access to Counsel ("UAC") program. By motion dated May 29, 2019, respondent moved for leave to file an amended answer and for leave to conduct discovery. On June 14, 2019 the 2019 Housing Stability and Tenant Protection Act ("2019 HSTPA"), [*2]became law, fundamentally altering housing law throughout the state of New York. Relevant to this matter, the HSTPA greatly expanded a tenant's right to interpose overcharge defenses and counterclaims in summary proceedings. Given enactment of the HSTPA, respondent's motion was withdrawn "without prejudice to refile with new law arguments."[FN2] *Respondent moves again for leave to file an amended answer and leave to conduct discovery. Petitioner opposes the motion in all respects.*

DISCUSSION

The Amended Answer

CPLR 3025(b) provides that leave to amend a pleading shall be freely given upon such terms as may be just. (*Norwood v City of New York*, 203 AD2d 147, 148-149, 610 NYS2d 249 [1st Dept 1994]). Amendment can be at any time, especially where there is not significant prejudice to the opposing party. (*National Union Fire Ins. Co. v Schwartz*, 209 AD2d 289, 290, 619 NYS2d 542 [1st Dept 1994]). Further, the proposed amended answer contains meritorious defenses, (*Thomas Crimmins Contracting Co. v New York*, 74 NY2d 166, 170, 544 NYS2d 580 [1989]), including that respondent has been overcharged and that the premises are subject to rent-stabilization.[FN3]

The court cannot credit petitioner's claims of prejudice. Prejudice in this context is shown where the nonmoving party is "hindered in the preparation of his case or has been prevented from taking some measure in support of his position." (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, 444 NYS2d 571 [1981]; *Jacobson v McNeil Consumer & Specialty Pharmaceuticals*, 68 AD3d 652, 654-655, 891 NYS2d 387 [1st Dept 2009] (prejudice does not occur simply because a defendant is exposed to greater liability or because a defendant has to expend additional time preparing its case) [internal citations omitted]). Petitioner's non-specific allegations of prejudice are unsupported.[FN4] Consequently, the proposed Amended Answer attached to respondent's motion as exhibit 'D' is deemed served and filed.[FN5]

Discovery

As an initial matter, this court declines to grant discovery dating back to 1986 as requested by respondent.

Though it appears the HSTPA provides little, if any, temporal limitations when determining the legal regulated rent *or* in investigating overcharge complaints, *or* in determining whether the premises is subject to Rent Stabilization, (see Part F(9)), in this court's view, it would be patently unfair, unreasonable and prejudicial to petitioner to have to justify rent increases taking place up to

33 years ago (and up to 20 years prior to petitioner's purchase),[FN6] when they, and prior owners, were under no obligation to maintain records relating to those increases.[FN7]

The court also finds the rent increases in 1996 and 2001 are not inherently unreliable and, as they predate petitioner's ownership by five and 10 years respectively, and pre-date respondent's claims by 18 and 23 years respectively, it would be highly prejudicial to petitioner to have to justify those relatively small increases.[FN8] Those records, were they available, are not "*reasonably necessary"* for this court to determine the central issues here—whether respondent has been overcharged in the last six years or whether the premises were improperly deregulated. (*see Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968] (what is discoverable is left to the sound discretion of the court and the court must determine what information is material and necessary measured against usefulness and reason); *Andon v 302-304 Mott Street Associates*, 94 NY2d 740, 747, 709 NYS2d 873 [2000] ("[u]nder our discovery statutes and case law, competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party.") (internal citations omitted)).

One final thought on what constitutes prejudice as it related to discovery in this area. Given the relative infancy of the HSTPA, this court is not aware of any bright line rule on what constitutes prejudicial discovery now that DHCR rent registrations can be reviewed from the beginning of time, nor does it seek to create one. One expects our appellate courts will soon offer further guidance. In the meantime, however, the court recalls *Jacobellis v State of Ohio* wherein Justice Potter Stewart famously opined that though he could not intelligibly define that which might be considered obscene, "I know it when I see it " (378 US 184, 197, 84 S. Ct 1676 [*3][1964]).[FN9] Similarly, this court cannot say with certainty what prejudice under current law is, but it knows it when it sees it.

The 2002-2005 Rent Increases

The Division of Housing and Community Renewal ("DHCR") rent registration shows a registered "legal regulated rent" of $789.10 for tenants Otto Maldonado and Wendy Reyes in 2002.[FN10] In 2003, the apartment is listed as vacant, but the "legal regulated rent" increased to $968.38. The 2004 registration gives the same information as the 2003 registration. The next registered "legal rent" is for $1336.94 pursuant to a purported lease commencing on June 1, 2005 and ending May 31, 2006. Math informs this court that the increase from $789.10 to $1336.94 constitutes

a 69.426% jump. Though petitioner was likely entitled to a vacancy increase between the tenancies of Maldonado/Reyes and Duval Buford [the 2005 tenant], the increase, outside of a standard vacancy increase, is not explained within the registration. Petitioner's opposition, which does not include an affidavit from someone with personal knowledge, makes no attempt to explain the increase. Consequently, the rent increase from $789.10 to $1336.94, occurring between 2002 and 2005, is facially unreliable and is unexplained. It is this large and unexplained increase that accelerated the eventual deregulation of the premises. (*see, e.g., Mautner-Glick Corp. v Higgins*, 64 Misc 3d 16, 18-19, 101 NYS3d 810 [App Term, 1st Dept 2019]).

Generally, a party seeking discovery in a summary proceeding must show ample need. In determining whether "ample need" has been established the court is to consider the following factors:

> "(1) whether, in the first instance, the petitioner has asserted facts to establish a cause of action. Thus, a fishing expedition utilized by the landlord for the purpose of formulating a cause of action or by the tenant to establish a defense, should never be permitted;
>
> (2) whether there is a need to determine information directly related to the cause of action;
>
> (3) whether the requested disclosure is carefully tailored and is likely to clarify the disputed facts;
>
> (4) whether prejudice will result from the granting of an application for disclosure "

(*New York University v Farkas*, 121 Misc 2d 643, 647, 468 NYS2d 808 [Civ Ct, New York County 1983]).

Petitioner's conclusory protestations of a "fishing expedition" notwithstanding, respondent is entitled to discovery dating back to 2001. 2002, in this court's view, is when the last reliable rent was registered. However, it registers the rent for a lease commencing May 1, 2001.

Part F of the HSTPA states, *inter alia*,

> "(9) The division of housing and community renewal and the courts, in *investigating complaints of overcharge* and *in determining legal regulated rents*, shall consider all available rent history which is reasonably necessary to make such determinations, including but not limited to (a) 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; (b) any order issued by any state, municipal or federal agency; (c) any records maintained by the owner or tenants; and (d) any public record kept in the regular course of business by any

state, municipal or federal agency. *Nothing contained in this paragraph 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;*

(ii) *whether an accommodation is subject to the emergency tenant protection act*;" [emphasis added].

The HSTPA applies to this case. (*see Dugan v London Terrace Gardens, L.P.*, 2019 NY Slip Op 06578, 2019 WL 4439346 [1st Dept 2019]). Furthermore, CPLR §213-a, as amended, states "an overcharge claim may be filed *at any time*" [emphasis added].

Thus, notwithstanding the factors set forth in *Farkas*, the language of the Act in and of itself justifies the discovery sought by respondent. Respondent has demonstrated ample need for disclosure reaching back to 2001 because he has identified and asserted facts, i.e., an unexplained increase in rent resulting in an unreliable registration, to establish his claims for overcharge and improper deregulation. Additional information is necessary and directly related to these claims and defenses, and respondent's request is appropriately tailored. (*see 699 Venture Corp. v Zuniga*, 64 Misc 3d 847, 854-855, 105 NYS3d 806 [Civ Ct, Bronx County 2019]).

Additionally, there is no dispute that respondent herein was charged a "preferential" from the commencement of his tenancy through at least August 2019.[FN11] Whether there has been an overcharge is uncertain. The preferential rents, however, further justify discovery. With the lower rents, respondent had no incentive to earlier challenge the purported "legal" rents and/or deregulation. (*see 560-568 Audubon Realty Inc. v Rodriguez*, 54 Misc 3d 1226[A], 2017 NY Slip Op 50323[U] [Civ Ct, New York County 2017]; *also see* DHCR Fact Sheet No.40, revised 1/14—in effect prior to the 9/19 revision). Furthermore, even before enactment of the HSTPA, an apartment's rent regulation status could be challenged at any time. (*Gersten v 56 7th Ave LLC*, 88 AD3d 189, 199, 928 NYS2d 515 [1st Dept 2011]; *East W. Renovating Co. v New York State Div. of Hous. & Community Renewal*, 16 AD3d 166, 167, 791 NYS2d 88 [1st Dept 2005]; *Mautner-Glick Corp. v Higgins*, 64 Misc 3d 16, 19, 101 NYS3d 810 [App Term, 1st Dept 2019]).

To the extent that petitioner can claim prejudice by having to produce documents dating to 2001, the court notes the following: in addition to charging respondent a "preferential" rent for the

[FN12]

last nine (9) years, when petitioner purchased the building in 2006, the rent increase to $968.38 and then to $1336.94 were within four years of the purchase and thus the rents challengeable. (*see Thornton v Baron*, 5 NY3d 175, 180, 800 NYS2d 118 [2005] (the Rent Regulation Reform Act of 1997 clarified and reinforced the *four-year statute of limitations* applicable to rent overcharge claims (*see* Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26—516[a]) by limiting examination of the rental history of housing accommodations prior to the four-year period preceding the filing of an overcharge complaint) (emphasis added)).[FN13] Petitioner's due-diligence at the time of purchase should have identified the almost 70% increase and precautions taken.

Consequently, respondent is entitled to discovery based on his overcharge claim *and* on his challenge to deregulation.

CONCLUSION

Based on the foregoing, it is hereby,

Ordered, respondent's motion for leave to file an amended answer is granted and the "Proposed Amended Answer with Counterclaims" is deemed served and filed;

Ordered that respondent's motion for leave to conduct discovery is granted to the extent that petitioner is directed to comply with the "Document Request" dated July 23, 2019, attached to the motion as exhibit "L." The relevant time period is from 2001 to present.[FN14] The parties are to comply with Article 31 of CPLR.

The proceeding is adjourned to December 17, 2019, 9:30 A.M., Part F, Room 320 for all purposes, including for the court to monitor the status of discovery.

Dated: October 25, 2019

Bronx, NY

SO ORDERED,

SHORAB IBRAHIM, JHC

Footnotes

Footnote 1: See par. 7 of January 22, 2019 Petition.

Footnote 2: See June 27, 2019 Order.

Footnote 3: See Proposed Amended Answer attached to motion.

Footnote 4: The court notes that petitioner has been on notice of the proposed defensed and counterclaims since the prior motion was filed.

Footnote 5: The court also finds that Respondent should have the full benefit of counsel as contemplated by the UAC program, *(see generally*, *2247 Webster Ave. HDFC v Galarce*, 62 Misc 3d 1036, 90 NYS3d 872 [Civ Ct, Bronx County 2019]), and to do so her motion to interpose an amended answer must be granted so that the "right to counsel" is not an empty right. (*See Harlem Restoration Project v Alexander*, 1995 NY Misc LEXIS 783 [Civ Ct, New York County 1995]) (Where a non-lawyer answers *pro se* and subsequently retains counsel, justice and fairness require such leave to amend)).

Footnote 6: At oral argument, petitioner indicated it has owned the subject building since 2006. The court confirmed the same by accessing the ACRIS system.

Footnote 7: See RSL § 26—516 prior to 2019 HSTPA amendment.

Footnote 8: The 1986 registration is not unreliable. The rent increase is $90.11 ($233.26 to $323.37), with approximately $32.65 of the increase via vacancy allowance (7.5%) and two-year lease increase (6.5%). The landlord may also have been eligible for a $15 increase for leases with a monthly rent under $300. The 1996 rent increase is $64.35 ($459.62 to $523.97). $39.07 of the increase is due to a vacancy allowance. Another $9.09 was allowed for the one-year lease entered by the new tenant. The 2001 rent increase is $146.09 ($643.01 to $789.10). $115.74 of that sum is due to a 18% vacancy increase (20% minus difference between 1- and 2-year renewal rates, 4% and 2%). https://www1.nyc.gov/assets/rentguidelinesboard/pdf/history/appendixm.pdf. Last accessed on October 16, 2019. The court accessed this document as it is not part of the record submitted by the parties and respondent's papers refer to the Rent Guideline Board ("RGB") Orders repeatedly.

Footnote 9: The full text of Justice Potter's concurring opinion is as follows: "It is possible to read the Court's opinion in *Roth v. United States and Alberts v. California, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498*, in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, that under the First and Fourteenth Amendments criminal laws in this area are

constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

Footnote 10: See respondent's exhibit "K."

Footnote 11: See respondent's exhibit "F" through "J."

Footnote 12:*560-568 Audubon Realty Inc. v Rodriguez*, 54 Misc 3d 1226[A], 2017 NY Slip Op 50323[U] [Civ Ct, New York County 2017].

Footnote 13:RSL § 26—516 was also amended by the 2019 HSTPA.

Footnote 14: See *Parrallax 109 Partners LLC v Molina*, 2002 NY Slip Op 50296[U] [App Term, 1st Dept 2002]) (court may structure discovery to limit information directly related to the issues before it).

Return to Decision List