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350 Cent. Park W. Assoc., LLC v. Udo

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350 Cent. Park W. Assoc., LLC v Udo
2019 NY Slip Op 52009(U) [65 Misc 3d 1235(A)]
Decided on December 13, 2019
Civil Court Of The City Of New York, New York County
Capell, J.
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Decided on December 13, 2019

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

350 Central Park West Associates, LLC, Petitioner,

against

Augustine Udo, Respondent.

L & T 71196/18

Attorney for Petitioner:

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Heela D. Capell, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of petitioner's motion to amend the petition and dismiss respondent's affirmative defenses, petitioner's order to show cause to quash subpoenas, respondent's cross-motion to file a sur-reply to petitioner's initial

motion and renew a prior decision of the court, and petitioner's cross-motion for a rent deposit order.

Papers Numbered

Notice of Motion & Affidavits Annexed 1

Order to Show Cause & Affidavits Annexed 5

Notice of Cross-Motion and Affidavits Annexed 8, 9

Answering Affidavits 6

Replying Affidavits 4, 7, 10, 11

Exhibits 3

Memorandum of law 2

After submission of the foregoing cited papers, petitioner's motion, cross-motion and order to show cause, and respondent's cross-motion, are consolidated for disposition purposes only and decided jointly as follows:

350 Central Park West Associates, LLC ("Petitioner") commenced this non-payment proceeding against Augustine Udo ("Respondent") seeking rent arrears for apartment 13A located at 350 Central Park West, New York, NY 10025 ("Premises"). Petitioner commenced this proceeding by notice of petition and petition dated August 23, 2018. Paragraph 4 of the petition demands rent arrears from the Respondent in the amount of $28,950.00 at $9,650.00 per month from June 2018 through August 2018. Paragraph 2 of the petition provides that the rent for the Premises is $10,000.00 per month, and paragraph 7 states that the Premises are not subject to rent stabilization. Respondent initially filed an answer to the proceeding while unrepresented and subsequently obtained counsel through the Universal Access to Counsel Program in this Part.

Procedural History

On January 24, 2019, the Honorable Timmie Erin Elsner granted Respondent's motion to amend the answer filed while he was unrepresented. The amended answer ("Answer") contains four objections in point of law, two affirmative defenses and six counterclaims. In the January 24, 2019

decision, Judge Elsner denied Petitioner's application for a rent deposit order because the request "would be determined following a hearing relating to the ultimate issues to be disposed of by the court."

On March 14, 2019, Respondent moved for discovery regarding his defenses and counterclaims. Petitioner filed a cross-motion seeking a rent deposit order. In a decision and order dated March 14, 2019, this court granted the motion to the limited extent of ordering Petitioner to provide certain documents related to Respondent's defense that the Premises are subject to rent stabilization, and that Petitioner breached the warranty of habitability. This court also denied Petitioner's cross-motion, finding that Judge Elnser's decision denying Petitioner's application for a rent deposit order was law of the case.

On May 9, 2019, Petitioner filed this motion to amend the petition and dismiss Respondent's defenses. The parties entered into a briefing schedule and in the interim Petitioner filed an order to show cause to quash Respondent's subpoenas. Respondent filed a cross-motion to the initial motion to renew his discovery motion due to the enactment of the Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36) ("HSTPA") and to file a sur-reply to Petitioner's motion to dismiss the defenses. Petitioner filed a cross-motion for a rent deposit order. The motion, order to show cause and cross-motions were adjourned due to scheduling conflicts, requests for briefing schedules, and conference with the court. The court took the motion, order to show cause and cross-motions on submission on November 18, 2019.

Recitation of Facts

In the initial motion, Petitioner alleges the following: Carol Pederson was the rent controlled tenant of the Premises from 1971 through 2001. Ms. Pederson's maximum base rent ("MBR") in 1993 was $1,409.44 per month (See 1993 MBR schedule for the building at Pet. Ex. A) and remained $1409.44 through 2001. In or about 2001, Ms. Pederson vacated the Premises. Petitioner increased the rent pursuant to the New York City Rent Guidelines Board ("RGB") [*2]Order Number 33, which dictated the legal rent increases for regulated apartments at that time. RGB Order Number 33 permitted Petitioner to increase the rent at the Premises by the greater of the MBR plus 150% plus fuel cost adjustments or HUD's fair market rent (Pet. Ex. C). At an MBR of $1,409.44 per month, the increase of 150% plus the MBR raised the rent for the Premises to $3,523.60. Therefore, Petitioner alleges it was permitted to deregulate the Premises based upon RSL § 26-504.2(a), the provision for

luxury deregulation in effect, as the rent had reached an amount of over $2,000.00 per month. However, Petitioner neither served an Initial Regulated Rent Notice ("RR-1"), nor notice that the Premises was deregulated, pursuant to RSL § 26-504.2(b) and RSC § 2522.5(c)(3), on the subsequent tenants. Respondent takes the position that the Premises were not properly deregulated at that time.

Petitioner asserts that it issued the next tenants, David Stadler and Catherine Stadler, a free market lease for the Premises from February 15, 2002 through February 28, 2003 at a rent amount of $7,000.00 per month (See 2002-2003 lease annexed as Pet Ex. B), and the subsequent tenants, Caroline Goodman and Robert Poll, a lease from August 1, 2003 through July 31, 2004 at a rent amount of $7300.00 per month. (See 2003-2004 lease annexed as Pet Ex. D). According to Petitioner, Ms. Goodman and Mr. Poll signed four more leases for one year terms each, although these leases are not attached to the motion. The rent for each term was allegedly $7,450.00, $7,600.00, $7,800.00 and $8,000.00 respectively.

Significantly, on or about April 2005, the building began receiving J-51 benefits (Pet Ex. F, H and I). The parties' positions sharply contrast regarding the effect those J-51 benefits have on the rent regulated status of the Premises. Petitioner maintains that the J-51 benefits it received for the building were proportionally reduced based upon the number of deregulated apartments in the building. Petitioner supports its position with the following language located in the comments section of the Certificate of Eligibility for the J-51 abatement: "CRC REDUCED TO 65.64% DUE TO 56 EXEMPT UNITS" (Pet Ex. F). Petitioner alleges that because the Premises were deregulated prior to the receipt of the benefits, the Premises were an "exempt unit," and therefore not covered by the J-51 abatement. Petitioner also maintains that the body of law which regulated units in buildings receiving J-51 tax abatements does not apply to the Premises. *See generally Roberts v Tishman Speyer Props., L.P., 89 AD3d 444* [1st Dept 2011]. Accordingly, Petitioner did not furnish rent stabilized leases to tenants who took possession of the Premises after the building began receiving the tax abatement, nor register the Premises as rent stabilized.**[FN1]**

Mr. Udo took possession of the Premises pursuant to a deregulated lease agreement which commenced on July 1, 2008 and terminated on June 30, 2010, at a rent of $9,500.00 per month (See 2008-2010 lease annexed as Pet. Ex. E). According to Petitioner, Respondent signed six successive lease agreements, which are not attached to the motion, for the following terms: July 2010 through June 2012 at a monthly rent amount of $9,600.00; July 2012 through June 2014 at a monthly rent amount of $10,000.00; July 2014 through June 2015 at a monthly rent amount of $10,200.00; July 2015 through June 2016 at a monthly rent amount of $10,302.00; July 2016 through June 2017 at a

monthly rent amount of $10,500.00; and July 2017 through [*3]June 2019 at a monthly rent amount of $9,650.00. Petitioner commenced this nonpayment proceeding in September 2018.

When the proceeding commenced, the rent registration record for the Premises filed with the New York State Division of Housing and Community Renewal ("DHCR") reflected that the Premises were subject to New York City Rent Control Law from the initial registration in 1984 through and including 2017 (See certified DHCR registration dated March 4, 2019 annexed as Resp Opp Ex. 8)[FN2] . In or about April 2019, Petitioner filed amended registrations for the Premises with DHCR for the years 2015 through 2018, to reflect the rent regulated status of the Premises as rent stabilized (See Proposed Amended Petition at Pet. Ex. P & Amended Registrations at Pet. Ex. Q).

Petitioner's principal, Jacob Weinreb, concedes that the Premises are subject to rent stabilization after "careful reflection of the[] facts and for the purpose of progressing this litigation" (Weinreb Aff. Par. 48). Petitioner acknowledges that it has "decided to concede Mr. Udo's rent stabilized status for the purposes of this litigation only and to progress it to its conclusion" (Pet. Memo of Law, page 5). However, Petitioner included the following language on the DHCR registrations for the Premises: "we are filing these forms without prejudice to our belief that the unit does not require rent registration, nor does any other unit that caused a reduction of J-51 benefits, because the unit was already deregulated prior to the owner's receipt of said benefits, and the benefits were reduced proportionally due to the exempt status of this unit and others" (See amended registration annexed as Pet. Ex. Q). While the amended DHCR registrations from 2015 through 2018 reflect that the Premises are subject to rent stabilization, the DHCR registration for the Premises still provides that the Premises were subject to rent control from 1984 to 2014.

Petitioner's Motion to Amend the Petition

The first branch of Petitioner's first motion seeks to amend paragraph 2 of the petition to reflect that the monthly rent for the Premises according to the lease is $9,650.00, instead of $10,000.00, and paragraph 7 to reflect, among other things, that the Premises are subject to rent stabilization and duly registered with DHCR, instead of deregulated. In support of the motion, Petitioner attaches the registrations it filed with DHCR in April 2019 reflecting that the Premises were subject to rent stabilization from 2015-2018 (Pet Ex. Q). Petitioner also attaches copies of leases for the Premises from 2002-2003, 2003-2004, and 2008-2010, as well as a chart depicting the rent amounts Petitioner allegedly charged for the Premises for each lease from 2002 to the present (Pet Exs. B, D and G,

respectively). Petitioner maintains that the chart reflects that Petitioner only collected what would have otherwise been lawful rent increases for the Premises, pursuant to the RGB Orders in effect from 2001 to 2008, with the exception of July 2016 through June 2017.[FN3]

In the opposition papers, Respondent consents to the amendments of paragraphs 2 and 7 [*4]of the petition to reflect that the rent for the Premises according to the lease is $9,650.00 per month and that the Premises are subject to rent stabilization, registered with DHCR, and that the rent sought in the petition does not exceed the legal rent amount. Accordingly, the branch of the motion seeking to amend the petition is granted. The amended petition annexed to Petitioner's motion at Exhibit P is deemed amended, served and filed *nunc pro tunc*, without prejudice to Respondent's defenses and counterclaims.

Respondent's Cross-Motion for Leave to File Supplemental Papers

Respondent's cross-motion seeks leave to file a sur-reply to Petitioner's motion to dismiss defenses, so that he can address HSTPA's applicability to this proceeding. It is now well-established that portions of HSTPA apply to rent overcharge claims that are "pending" before a court or agency (HSTPA, § 1, part F, § 7; *Grady v Hessert Realty, L.P.*, 2019 NY Slip Op 08598 [1st Dept 2019], *Fuentes v Kwik Realty LLC*, 2019 NY Slip Op 08643 [1st Dept 2019], *Dugan v London Terrace Gardens, L.P.*, 177 AD3d 9 [1st Dept 2019]). Since Respondent's overcharge claim in this proceeding is "pending," some of the legislation's amendments to the rent stabilization law apply here and must be considered in this decision. *Id.* Furthermore, Petitioner has filed a sur-sur- reply addressing the new rent laws. Therefore, Respondent's cross-motion is granted to the extent that the court will consider Respondent's supplemental papers, and Petitioner's sur-sur-reply, to the motion to dismiss Respondent's defenses.

Petitioner's Motion to Dismiss Defenses

CPLR § 3211(b) provides, "a party may move for judgment dismissing one or more defenses on the ground that a defense is not stated or has no merit." Furthermore, "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense" (CPLR § 3013).

The standard of review on a motion to dismiss an affirmative defense pursuant to CPLR § 3211(b) is akin to that used under CPLR § 3211(a)(7), i.e., whether there is any legal or factual basis for the assertion of the defense (*In re Liquidation of Ideal Mut. Ins. Co.*, 140 AD2d 62, 67 [1st Dept 1988]). In moving to dismiss an affirmative defense pursuant to CPLR § 3211(b), the petitioner bears the burden of establishing that the defense is without merit as a matter of law (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1st Dept 2011]). The allegations set forth in the answer must be liberally construed and viewed in the light most favorable to the respondent, who is entitled to the benefit of every reasonable inference (*Id.*, citing *182 Fifth Ave. v Design Dev. Concepts*, 300 AD2d 198, 199 [1st Dept 2002]). Further, "the court should not dismiss a defense where there remain questions of fact requiring a trial" (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015], citing *182 Fifth Ave. v Design Dev. Concepts*, 300 AD2d at 199).

In the motion, Petitioner seeks to dismiss Respondent's first through fourth objections in point of law, first affirmative defense, and first, third and sixth counterclaims. In Respondent's opposition to the motion, Respondent withdraws portions of his first objection in point of law and first affirmative defense, to the limited extent that they seek to dismiss the petition based upon its failure to state the proper rent regulatory status of the Premises, or to dismiss the petition due to Petitioner's failure to properly register the Premises with DHCR. Respondent also withdrew his fourth objection in point of law.

First Objection in Point of Law and First Affirmative Defense

The remaining allegations in Respondent's first objection in point of law and first [*5]affirmative defense state, in pertinent part, that Respondent is entitled to a rent stabilized lease for the Premises, and that he should have been registered as a rent stabilized tenant since the inception of his tenancy. Petitioner argues that the Premises were properly deregulated in 2001 in accordance with RSC § 26-405.2 when it took the increase from $1,409.44 to $3,523.60 pursuant to RGB Order Number 33. Therefore, once the Premises were no longer subject to rent regulation, Petitioner asserts it was entitled to treat the Premises as deregulated. Furthermore, due to the commentary on the certificate of eligibility for J-51 benefits, purporting to exempt previously deregulated units from coverage under the tax benefit, Petitioner argues its continued treatment of the Premises as deregulated remained proper; although, as a result of this litigation, that position has been modified.

Petitioner argues that due to the four year statute of limitations ensconced in the now-amended CPLR § 312-a ("Four Year Rule"), it was only required to file amended registrations with DHCR from 2015 through 2018 because the statute prohibited parties from examining a rent history beyond the four years prior to the filing of an overcharge claim. Because Petitioner posits that the Premises are properly registered with DHCR, Petitioner argues that once the petition is amended to state that Respondent is a rent stabilized tenant, the first objection in point of law and first affirmative defense become moot and must be stricken. However, the fact that Petitioner belatedly filed amended rent registrations from 2015 to 2018, reflecting that the Premises are rent stabilized, is insufficient to support striking the objection in point of law and affirmative defense.

First, HSTPA has amended CPLR § 312-a and expanded the statute of limitations articulated in the Four Year Rule to a period of six years (*see Fuentes v Kwik Realty LLC*, 2019 NY Slip Op 08643 ["Rent overcharge claims are no longer generally subject to a four-year statute of limitations."], Rent Stabilization Law § 26-516[a][2], *see also* CPLR § 213-[a]). Moreover, the statute of limitations for reviewing rent registrations in determining an overcharge is not nearly as rigid as it was prior to the enactment of the new law. HSTPA provides, "a court of competent jurisdiction, in investigating complaints of overcharge and in determining legal regulated rent, shall consider all available rent history which is reasonably necessary to make such determinations" (NYC Administrative Code § 26-516[a]).

The registration for the Premises reflects that from 1984 through 2012 (which is six years prior to Respondent's overcharge claim) the Premises were subject to the New York City Rent Control Law. The DHCR rent history clearly contrasts with Petitioner's position that the Premises were deregulated and/or rent stabilized. Moreover, although Petitioner concedes the Premises are currently subject to rent stabilization, it is undisputed that Respondent does not currently have a rent stabilized lease for the Premises (*see* RSC § 2522.5[b][1]). Accordingly, the branch of the motion seeking to dismiss the first objection in point of law and first affirmative defense, that Respondent is entitled to a rent stabilized lease and the Premises are not properly registered, is denied.

Second and Third Objections in Point of Law and First Counterclaim

Respondent's second and third objections in point of law, as well as a portion of his first affirmative defense, provide that the rent amount Petitioner is seeking in this proceeding is not the proper rent stabilized rent amount for the Premises, and that Petitioner has overcharged Respondent. The first counterclaim reiterates these statements and requests that the court utilize the default formula articulated in RSC § 2522.6 to determine the legal rent for the Premises.

Petitioner maintains that the defense should be stricken because Respondent is barred [*6]from challenging the rent amount for the Premises based on the former Four Year Rule and Appellate Division cases decided prior to the legislature's enactment of HSTPA in June 2019. Petitioner relies on (*Matter of Grimm v New York State Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358 [2010]) and (*Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014]), which prohibited the examination of a rent history beyond the four year limitations period, absent a finding by the court that the landlord engaged in fraud when setting the rent (*see also Matter of Regina Metropolitan Co. LLC*, 164 AD3d 420 [1st Dept 2018]).

Petitioner also argues that even if the court were to allow Respondent to examine the rent history for the Premises prior to 2014, Respondent may not challenge the first rent set by the landlord after the Premises became deregulated at some point in or about 2002. Notwithstanding the foregoing, Petitioner maintains that the rent charged for the Premises is in all respects legal and the rent demand, and amount sought in the petition, are proper.

Petitioner relies on (*Matter of Park v NY State Div. of Hous. & Community Renewal*, 150 AD3d 105 [1st Dept 2017] *lv denied* 30 NY3d 961 [2017]) in support of its arguments that Respondent cannot challenge the first rent charged in 2002 and that the rent sought in the petition is legal. In *Park*, the landlord deregulated the apartment after the rent controlled tenant died in 2004. The RGB Order in effect at the time permitted the landlord to increase the rent to over the luxury deregulation threshold in RSL § 26-504.2(a). As in this proceeding, at the time the apartment was deregulated, the landlord did not serve an RR-1 on the first deregulated tenant, and that tenant never filed an FMRA. However, the building started receiving J-51 benefits during the first deregulated tenancy.

As a result of the decisions in (*Roberts v Tishman Speyer Props.*, L.P., 89 AD3d 444) and (*Roberts v Tishman Speyer Props. L.P.* (13 NY3d 270 [2009]), which held that apartments in a building receiving J-51 tax benefits are subject to rent regulation, and (*Gersten v 56 7th Ave, LLC*, 88 AD3d 189 [1st Dept 2011]), which held that the decision in *Roberts* should be applied retroactively, the landlord in *Park* filed retroactive registrations for the apartment with DHCR for every missing year, and served the tenant in possession at the time, and the current tenant, with an RR-1. The current tenant filed an FMRA within 90 days after being served with the RR-1. The Appellate Division affirmed DHCR's determination that the statute of limitations barred the tenant from filing an FMRA because four years had passed since the apartment had been removed from rent control. (*Id.*, *see also* RSC §§ 2522.3 [a], [b] [1], [2]). In *Park*, the court also found that the landlord's reliance on the RGB increase and luxury deregulation status was sufficient to legally deregulate the

apartment.

Petitioner maintains that even if Respondent were permitted to challenge the deregulation of the Premises, Petitioner established that the Premises were properly deregulated and the rent charged was lawful. Petitioner explains that, as in *Park*, it relied on RBG Order Number 33 to increase the rent to over $2,000.00 and RSL § 26-402(a) to remove the Premises from rent regulation. Based on the purportedly lawful deregulation of the Premises, Petitioner entered into a free market lease with the Stadlers in 2002, for a rent amount of $7000. Petitioner finally posits that even if the Premises became subject to rent stabilization when it began receiving J-51 benefits in 2005 it does not affect the validity of the deregulation of the Premises nor the legality of the rent.

In response to these arguments, Respondent maintains that Petitioner has not sufficiently established that the rent is legal nor that the second and third objections in point of law should be [*7]dismissed. The court agrees. First, the "base date" for examining a rent history to determine the legal regulated rent is no longer four years, but is now at least six years prior to the filing of an overcharge claim (NYC Administrative Code § 26-516[a]). The rent registration history for the Premises six years prior to the overcharge claim is unreliable as it states that the Premises is subject to rent control. Therefore, HSTPA, which was decided after *Grimm, Boyd and Park*, greatly expands the court's ability to examine rent registrations for the Premises to determine the legal regulated rent (NYC Administrative Code § 26-516[a] and [h]).

Petitioner's argument that *Park* prohibits the Respondent from challenging the first rent for the Premises is also misplaced. While the facts in *Park* are similar to those here, an integral difference is that the landlord in *Park* re-filed each of the missing registrations for the apartment after the Appellate Division in *Gersten* determined that the *Roberts* decision applied retroactively (*Matter of Park v NY State Div. of Hous. & Community Renewal*, 150 AD3d 105, *Gersten v 56 7th Ave, LLC*, 88 AD3d 189). Here, however, the Premises are registered as rent controlled from 1984 through 2014, and the legal regulated rent for the Premises is not listed, with the exception of the registration for 1984. Therefore, the DHCR rent history for the Premises does not support Petitioner's position that the rent charged on the base date was lawful, since the rent registration does not list the rent amount for the Premises in 2012 and 2013.

Moreover, Petitioner fails to establish the legal rent for the Premises as it does not attach all of the leases for the Premises from 2002 forward, but rather only a portion of the leases. Significantly, in *Park*, the registered rent amounts for the apartment corresponded to the amounts actually charged by the landlord to the tenants, and accurately reflected the rent regulated status of the apartment.

Here, it is uncontroverted that the rent registration for the Premises does not accurately reflect the rent regulated status of the Premises from 2002 through 2014, and the rent charged during that period is not listed on the registrations. It is also notable that in *Park*, the landlord filed a report of vacancy decontrol and an RR-1, and sent the forms to the current tenant in occupancy as well as the prior tenant, along with the amended registrations.

RSC §2522.6 provides for a "default formula" or methodology for a court to utilize in the event that the legal regulated rent is "in doubt." The base date on the rent registration, as amended, is not a reliable means by which to determine the legal regulated rent for the Premises. Accordingly, Petitioner has failed to establish that Respondent's second and third objections in point of law and first counterclaim are meritless, the branch of the motion seeking to dismiss these objections in point of law and counterclaim is denied.

Respondent's Third Counterclaim

In his third counterclaim, Respondent seeks treble damages based upon Petitioner's alleged willful overcharge of the rent pursuant to New York City Administrative Code § 26-516(a). Indeed, if the court determines that a landlord has collected rent in excess of the legal amount, the landlord is liable to the tenant for a penalty equal to three times the amount of the overcharge, unless the landlord establishes by a preponderance of evidence that the overcharge was not willful (Rent Stabilization Law of 1969 [Administrative Code of the City of NY], § 26-516 [a], *Matter of 508 Realty Assoc., LLC v New York State Div. of Hous. & Community Renewal*, 61 AD3d 753, 754, 877 NYS2d 392 [2d Dept 2009], *Choice Assoc. LLC v NY State Div. of Hous. & Community Renewal*, 62 Misc 3d 852, 856 [Sup Ct, NY County 2018]). Petitioner maintains that it only overcharged Respondent during the period of 2016 through 2017, that the overcharge was minimal, and was not willful. Petitioner asserts that any overcharge that occurred because it unknowingly deregulated the Premises prior to the decision [*8]in *Roberts* cannot be found to be willful. In Jacob Weinreb's affidavit annexed to the motion, Petitioner's principal maintains that it relied on DHCR's interpretation of the luxury deregulation law in effect when it deregulated the Premises.

In *Matter of Regina Metropolitan Co. LLC*, 164 AD3d at 423, the Appellate Division explained, "a finding of willfulness 'is generally not applicable to cases arising in the aftermath of Roberts'" (*Regina* citing *Borden v 400 E. 55th St. Assoc., L.P.* 24 NY3d 382, 398 [2014]). However, the landlord still bears the burden to rebut the presumption of willfulness, which is an issue of fact (*Matter of Bauer v New York State Div. of Hous. & Community Renewal*, 225 AD2d 410, 640 NYS2d 492 [1st Dept 1996], *Choice Assoc. LLC v NY State Div. of Hous. & Community Renewal, 62*

Misc 3d 852, 859 [Sup Ct, NY County 2018], *Matter of 425 3rd Ave. Realty Co. v New York State Div. of Hous. & Community Renewal*, 29 AD3d 332, 333, [1st Dept 2006] [With respect to treble damages, courts determine whether it was rational to conclude that a landlord "failed to establish, by a preponderance of the evidence, that the . . . rent overcharges were not willful"]).

As Petitioner concedes it may have overcharged the Respondent in rent, Petitioner bears the burden to prove that the overcharge was not willful. Because willfulness is an issue of fact, Mr. Weinreb's statement that Petitioner relied on the DHCR's interpretation of the law when it deregulated the Premises is not sufficient to support a determination that Respondent's counterclaim is meritless. Accordingly, the branch of the motion seeking to dismiss the third counterclaim is denied.

Sixth Counterclaim

In his sixth counterclaim, Respondent requests that the court award damages and penalties against Petitioner due to Petitioner's harassment of Respondent in violation of New York City Administrative Code §§ 27-2005(d) and 27-2004(a)(48). Respondent maintains that, among other things, Petitioner: "knowingly providing to Respondent false or misleading information relating to the occupancy of the subject premises," failed to correct hazardous conditions at the Premises, and "commenc[ed] repeated baseless or frivolous court proceedings against Respondent."

Petitioner argues that the allegations in the sixth counterclaim are vague and devoid of fact, that Petitioner offered Respondent leases with one or two year options at a rent stabilized amount (with the exception of 2016-2017), that there are no violations for the Premises on file with HPD, and that a portion of the alleged acts of harassment "concern the legitimate dispute as to his rent stabilized status" (Memo of Law page 16).

In support of the counterclaim Respondent repeats and realleges the entirety of the allegations stated in the Answer. Respondent asserts that Petitioner's failure to register the Premises as rent stabilized, and offer him a rent stabilized lease pursuant to (NYC Administrative Code 26-504[c], 28 RCNY 5-03[f][1]-[2]), although the building was receiving J-51 benefits, was intended to harass him. Respondent argues that after (*Roberts v Tishman Speyer Props.*, L.P., 13 NY3d 270) was determined to have retroactive effect, Petitioner should have promptly regulated the Premises, even if the Premises had been properly deregulated (*see Roberts v Tishman Speyer Props.*, L.P., 89 AD3d 444). Respondent attaches to his opposition papers proof that Petitioner furnished Respondent a rent stabilized lease in 2015, and then a free market lease renewal in 2016 (Resp. Ex. 1). Respondent

claims Petitioner intentionally refused to offer him rent stabilized leases subsequent to 2015 in order to harass him.

Respondent also attaches to his opposition papers purported email conversations with [*9]Petitioner's principal, Jacob Weinreb, in which Mr. Weinreb threatens to postpone agreed upon repairs in August, 2018, stating, "[i]f I do not receive two months rent before the job, we will postpone it." (Resp. Ex. 5). Respondent attaches another purported email conversation with Mr. Weinreb, dated September, 7, 2018, wherein Mr. Weinreb states, "FYI we have ordered the warrant of eviction," and later, "Yu [sic] just don't get it. I guess you want to wait until the marshal takes you out of the apt." *Id.*

On a motion to dismiss, the court may consider affidavits a party submits in opposition to the dismissal motion to remedy any defects in a pleading (*see Sargiss v. Magarelli*, 12 NY3d 527, 531 [2009], *Leon v. Martinez*, 84 NY2d 83, 88 [1994], *Fitzsimmons v. Pryor Cashman LLP*, 93 AD3d 497, 498 [1st Dept 2012]). Here, the statements in the Answer alone provide sufficient support for the counterclaim to preclude this court from dismissing it. The emails annexed to the opposition papers, in addition to Respondent's affidavit, further support the counterclaim. Accordingly, the branch of Petitioner's motion seeking to dismiss the sixth counterclaim is denied.

Respondent's Motion to Renew Prior Decision Awarding Discovery

Based upon the newly enacted HSTPA, Respondent moves to renew this court's March 14, 2019 decision and order ("Decision") which limited the discoverable documents based upon the Four Year Rule and Respondent's failure to establish that Petitioner engaged in a fraudulent scheme to deregulate the Premises (*see Matter of Grimm v New York State Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358). As stated above, HSTPA has repealed the Four Year Rule and significantly increased the court's latitude in investigating evidence to determine the legal regulated rent amount. The portion of HSTPA repealing the Four Year Rule applies to pending cases (HSTPA, § 1, part F, § 7, *Grady v Hessert Realty, L.P.*, 2019 NY Slip Op 08598, *Fuentes v Kwik Realty LLC*, 2019 NY Slip Op 08643, *Dugan v London Terrace Gardens, L.P.*, 177 AD3d 9).

Respondent's motion to renew is therefore granted (CPLR § 2221[e][2]["a motion for leave to renew...shall demonstrate that there has been a change in the law that would change the prior determination"]). As discussed above, the DHCR rental registration history for the Premises is the starting point for overcharge inquiries. Here, the court must look, as a starting point only, to the 2012

registration year with the purpose of finding a reliable rental registration statement.

In the absence of a reliable registration, the court "shall consider all available rent history which is reasonably necessary to make such determinations" (NYC Administrative Code § 26-516[a]). The Premises were registered as rent controlled from 2001 through 2014, at a point where Petitioner argues the Premises were deregulated. Furthermore, Petitioner has never filed documents with DHCR, nor served notices on tenants, that establish when or how the Premises were purportedly decontrolled. Accordingly, Respondent is entitled to additional discovery from 1994 to the present, not previously granted in the Decision, to determine the legal regulated rent amount for the Premises. (*see 3440 Broadway BCR LLC. v Greenfield*, 64 Misc 3d 1217[A], Civ Ct, NY County 2019], *SF 878 E. 176th LLC. v Grullon*, 65 Misc 3d 171 [Civ Ct, Bronx County 2019], *699 Venture Corp. v Zuniga*, 64 Misc 3d 847 [Civ Ct, Bronx County 2019]).

However, Respondent has not established "ample need" for Petitioner's records from 1984 through 1993, which is the date of the last Maximum Base Rent Schedule for the Building that Petitioner attaches to its motion (Pet Ex. A, *NY Univ. v Farkas*, 121 Misc 2d 643 [Civ Ct, New York County 1983]).

In light of the foregoing, the court awards to Respondent the following additional limited discovery from 1994 through the present, unless otherwise specified: Petitioner is required to respond to demands 1 through 6, but only for the time period 2001-present. For demand 2, Petitioner need only produce the renewal leases. Petitioner is only required to respond to demands 13-20 and 22 in the event work was performed at the Premises based upon which Petitioner increased the rent. If no increase in rent was taken as a result of work performed, Petitioner shall produce an affidavit to that effect from its agent or principal. Petitioner is also required to respond to demand 28. Demands 9, 10, 11, 12 and 21 are overly broad and insufficiently relevant and are stricken.

Respondent has not shown "ample need" for the voluminous records and documents requested in demand 23, and 24. (*NY Univ. v Farkas*, 121 Misc 2d 643). These demands seek comparables from other apartments in the building, presumably to be utilized in the event a court determines the default formula should be used to calculate the rent. Discovery on this issue, particularly as it is voluminous and pertains to other apartments in the building, is premature. The trial court must first determine whether the default formula is required to calculate the legal regulated rent for the Premises. In that event, Respondent reserves its right to renew its request for these documents.

The portion of the Decision which awarded Respondent discovery with regard to demands 7, 8,

25, 26, 29, 30 remains in effect, except that 29 and 30 shall no longer be limited, and 30 shall only apply to the Premises, and not the entire building. Demand 27 is stricken as moot as Petitioner has now conceded that the Premises are subject to rent stabilization. Petitioner shall produce all discoverable documents, unless already provided, to Respondent's counsel 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 principal or agent claiming same.

Petitioner's Order to Show Cause to Quash Subpoenas

Petitioner's order to show cause seeks to quash two subpoenas dated June 18, 2019, issued by Respondent to the New York Community Bank and Capital One National Association, pursuant to CPLR § 2304. Both subpoenas request documents related to Petitioner's mortgages from each bank. Petitioner argues that the subpoenas should be quashed because they seek confidential information that is not relevant or material to the proceeding. Respondent maintains that the information sought is relevant to his overcharge defense, and specifically his demand for treble damages.

As stated above, landlords bear the burden of proof of establishing that an overcharge is not willful (*Matter of 508 Realty Assoc., LLC v NY State Div. of Hous. & Community Renewal*, 61 AD3d at 754). However, where a landlord can demonstrate it relied upon DHCR guidance to its detriment in the wake of *Roberts*, the landlord may be able to rebut the presumption of wilfulness (*Matter of Regina Metropolitan Co. LLC*, 164 AD3d at 423). As discussed above, this determination is an issue of fact not an issue of law (*see e.g. Matter of Bauer v New York State Div. of Hous. & Community Renewal*, 225 AD2d 410, 640 NYS2d 492).

It is clear from the papers submitted by Petitioner that it intends to defend against the presumption of willfulness by claiming it relied solely on DHCR guidance when it deregulated the Premises, and therefore any overcharge in rent was not willful. Respondent argues that it requires the subpoenaed documents in order to prove Petitioner's willfulness despite the holding in *Regina* (*Regina*, 164 AD3d 420). Specifically, Respondent maintains that he seeks evidence [*10]of whether Petitioner willfully misrepresented the rent regulatory status of the Premises in order to bolster its loan applications with various banks. Petitioner, however, posits that the documents sought in the subpoena are confidential and therefore the subpoenas are unduly prejudicial to Petitioner's business interests. Petitioner particularly opposes the language in the subpoenas that states that the reason for

the requested disclosure is because Respondent suspects Petitioner engaged in fraud and unlawfully deregulated the Premises.

"An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry" (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014] *citing* (*Kooper v Kooper*, 74 AD3d 6, 16-17, [2d Dept 2010]). Here, a portion of the information sought in the subpoenas, particularly Petitioner's disclosure to the bank regarding the building's receipt of J-51 benefits and the rent regulatory status of the Premises, are relevant to the question of whether Petitioner willfully overcharged Respondent. However, Petitioner has raised a legitimate concern about the privacy of its financial information and the irrelevance of certain documents demanded. Accordingly, a protective order is required (CPLR § 3103).

The court strikes the demands in the subpoena to New York Community Bank other than items 2, 3, 4, 5 and 11. However, the responses to items 2, 3, 4, 5, and 11 shall be limited to documents relating to Petitioner's disclosure of the building's receipt of J-51 benefits and the rent regulatory status of the Premises. Similarly the court strikes the demands in the subpoena to Capital One National Association other than items 3, 4, 5 and 6. However, the responses to items 3, 4, 5 and 6 shall be limited to documents relating to Petitioner's disclosure of the building's receipt of J-51 benefits and the rent regulatory status of the Premises.

In both subpoenas, the paragraph beginning "[t]he circumstances under which this disclosure is sought . . .", which explains that the documents sought are relevant because they relate to Petitioner's unlawful deregulation of the Premises, will remain. CPLR § 3101(a)(4) obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, "the circumstances or reasons such disclosure is sought or required" (*see Matter of Kapon v Koch*, 23 NY3d 32, 39 [2014], citing *Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327 [1988]). However, it is not necessary to include on the subpoena the allegation that Petitioner committed a fraud on the bank, as it is an allegation that is not relevant or material to this case. Accordingly, the sentences on both subpoenas beginning with, "Respondent further has alleged that Petitioner has engaged in a fraudulent scheme to evade rent regulation at the mortgaged property - including fraud on [name of bank]. . ." should be stricken. In order to implement these changes, the court is suppressing any information already provided in response to these subpoenas, and suspending disclosure pursuant to CPLR § 3103(b) & (c). Respondent may tailor the subpoenas according to this decision and order and reissue them to the banks.

The court further grants a protective order limiting the review of the subpoenaed records to an *in camera* review. In his opposition papers, Respondent consents to this relief, and the court finds the relief appropriate in this circumstance. Accordingly, the order to show cause is granted.

Motion for Use and Occupancy

Petitioner moves for a rent deposit order pursuant to RPAPL § 745(2). However, Judge Elsner's Decision/Order dated January 24, 2019 denying the award of use and occupancy pursuant to RPAPL § 745 prior to "a hearing relating to the ultimate issues to be disposed of by the court" is law of the case. Furthermore, this court already denied Petitioner's subsequent [*11]motion for a rent deposit order, in the Decision, pursuant to the law of the case doctrine (*see People v Evans*, 94 NY2d 499 [2000]). Therefore the branch of the motion seeking a rent deposit order is denied without prejudice to renewal at trial.

Conclusion

Accordingly, Petitioner's motion is granted to the extent of amending the petition and denied in all other respects. Respondent's cross-motion is granted in that the sur-reply and sur-sur reply are deemed served and filed, and additional discovery is ordered to be produced. Petitioner's order to show cause to quash the two bank subpoenas issued by Respondent is granted to the extent of issuing a protective order and *in camera* review of the responsive documents. Petitioner's motion for use and occupancy is denied without prejudice to renewal at trial.

The proceeding is marked off of the court's calendar for Petitioner to provide additional discovery responses to Respondent. The proceeding may be restored to the court's calendar by motion or stipulation upon the completion of discovery, or by stipulation prior to the completion of discovery for a conference with the court.

This constitutes the decision and order of the court.

Dated: December 13, 2019

New York, New York

HON. HEELA D. CAPELL

J.H.C.

Footnotes

Footnote 1: Respondent argues that even assuming *arguendo* the Premises were properly removed from rent control and deregulated in 2001/2002, the Premises became rent stabilized once the building began receiving J-51 tax credits.

Footnote 2: For the initial registration in 1984, the status for the Premises is listed as "RC," the "Legal Regulated Rent" as $866.25, and the "tenant" as "Carol Pederson." For all other years through 2017, the registration reads: "RENT CONTROL - REG NOT REQUIRED."

Footnote 3: Petitioner acknowledges it may have overcharged Respondent when it increased the rent from $10,302.00 to $10,500.00, between 2016 and 2017, rather than charging $10,302.00 per month for the Premises pursuant to the RGB order in effect at that time.

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