2019-12-23

116 Ave. C. Invs. LLC v. Wright

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART D

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116 AVENUE C INVESTORS LLC, **INDEX #: 77511/18**

Petitioner-Landlord, **DECISION / ORDER**

-against- **MOTION SEQS. 3 & 4**

HON. KIMON C. THERMOS

DAVID A. WRIGHT,

Respondent-Tenant,

-and-

"JOHN DOE" and "JANE DOE",

Respondents-Undertenants.

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Recitation, as required by CPLR §2219(a), of the papers considered in review of the instant motions.

Papers	**Numbered**
Notice of Motion, Affirmation, Affidavit and Annexed (Ex. A-E)	1
Notice of Cross-Motion, Affirmations, Affidavit and Annexed (Ex. A-X)	2
Affirmation in Opposition to Respondent's Summary Judgment Motion and Annexed (Ex. A-D)	3
Affirmation and Affidavit in Opposition to Petitioner's Summary Judgment Motion	4
Reply Affirmation and Annexed (Ex. A-D)	5
Supplemental Affirmation in Opposition to Petitioner's Motion and in Support of Respondent's Motion and Annexed (Ex. A)	6
Supplemental Affirmation in Opposition to Respondent's Motion and in Support of Petitioner's Motion	7

Appearing for Petitioner: Schneider Buchel, LLP, By: Mary T. Lucere, Esq.
Appearing for Respondent-Tenant: Himmelstein, McConnell Gribben, Donoghue & Joseph, LLP, By: William Gribben, Esq.

Upon the foregoing cited papers, the Decision/Order on this motion and cross-motion is as follows:

PROCEDURAL HISTORY

Petitioner commenced this nonpayment proceeding in November 2018, seeking possession of the alleged unregulated apartment based upon $89,888.10 in rent and additional rent due from October 2016 through November 2018 at $3,250.00 per month. The petition, which indicates that the apartment is a cooperative or condominium, states that the apartment is not subject to the Rent Stabilization Law of 1969 as amended ("RSL"), since it was deregulated due to high rent vacancy as the rent exceeds $2,500.00 per month. On or about September 27, 2018, Respondent-Tenant David Wright ("Respondent")

was served with a "Notice of Default, Ten (10) Day Notice to Cure and Notice of Intention to Terminate Proprietary Lease". The Notice of Petition and Petition were served upon Respondents on or about November 19, 2018.

On November 27, 2018, Respondent, by counsel, filed an answer asserting as affirmative defenses, *inter alia*, that the petition improperly alleges that the apartment is not subject to the RSL; improper deregulation; that the rent sought in the petition is not the legal rent; rent overcharge; and that the predicate "Notice of Default" improperly seeks to terminate a proprietary lease where Respondent is not a proprietary lessee and the building was never converted to a cooperative or condominium and, thus, the predicate notice is fatally defective. Respondent-Tenant also asserts counterclaims for rent overcharge and legal fees pursuant to RPL §234.

Respondent now moves for an Order, pursuant to CPLR §3212, determining that the subject apartment is rent stabilized and granting summary judgment in his favor on his rent overcharge and legal fees counterclaims. Respondent took possession of the subject apartment in 2004, with a monthly rent of $2,000.00, pursuant to an unregulated lease with a prior owner of the subject premises. Respondent argues that the subject apartment was improperly deregulated, since the New York State Division of Home and Community Renewal ("DHCR") rent registration records notes that the apartment was registered as exempt, as a "NYC COOP/CONDO", on July 12, 2000, but the subject building was never converted into a cooperative or condominium. He argues that the legal regulated rent for the apartment should be set at $73.50, the last properly registered rent in 1999, until the DHCR records are corrected. Respondent further argues that, when Petitioner purchased the subject building in 2015, it knew that the building was not converted into a cooperative or condominium, yet Petitioner willfully did not amend the DHCR registration filings for the subject apartment. As such, Respondent contends that Petitioner acted fraudulently and has further failed to provide any justification for the increase in the monthly rent from $73.50 in 1999 to $2,000.00 in 2004, such as improvements to the apartment or a DHCR Order affecting the rent.

Petitioner opposes the motion and cross moves for an Order, pursuant to CPLR §3212, granting summary judgment in its favor, awarding a judgment of possession and warrant of eviction against Respondent and awarding money judgments for the rent due and legal fees in its favor. According to Petitioner, there were two prior owners of the subject premises before it acquired ownership in September 2015 and, thus, it cannot be held liable for the acts of the prior owners. Petitioner denies any fraud and contends that the indications in its predicate notice, petition and DHCR registration filing that the subject premises is a cooperative or a condominium are harmless clerical errors. Petitioner argues that the subject apartment was properly deregulated because, at the time of its deregulation in 2000, the monthly rent for

the apartment was at or over the deregulation threshold of $2,000.00 in effect from 1997 through June 23, 2011.

DISCUSSION

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of a triable issue of fact or if there is even arguably such an issue. *Andre v Pomeroy, 35 N.Y.2d 361 (1974)*. The function of the court is to determine whether any issues of fact exist that preclude summary resolution of the dispute between the parties on the merits. *Consolidated Edison Co. v Zebler, 40 Misc.3d 1230A (Sup. Ct. N.Y. 2013); Menzel v Plotnick, 202 A.D.2d 558 (2nd Dept. 1994)*. The court must accept, as true, the non-moving party's recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Warney v Haddad, 237 A.D.2d 123 (1st Dept. 1997); Assaf v Ropog Cab Corp., 153 A.D.2d 520 (1st Dept. 1989)*. The movant must submit admissible evidence to demonstrate *prima facie* entitlement to summary judgment as a matter of law and the absence of any issues of fact that require a trial. *Zuckerman v City of New York, 49 N.Y.2d 557 (1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986)*. The movant's failure to make such a showing mandates denial of summary judgment, regardless of the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr., supra; Alvarez v Prospect Hosp., supra*. Once a *prima facie* showing has been made, the burden shifts to the non-moving party to submit admissible evidence sufficient to raise a triable issue of fact. *Giuffrida v. Citibank Corp., 100 N.Y.2d 72 (2003); Zuckerman v. City of New York, supra.* The opponent of a summary judgment motion has the burden of laying bare its proof in admissible form to establish that there remains a material issue of fact that requires a trial. *Grullon v. City of New York, 297 A.D.2d 261 (1st Dept. 2002)* and *Di Sabato v. Soffes, 9 A.D.2d 297 (1st Dept. 1959).*

In the case at bar, this Court grants that branch of Respondent's motion seeking an Order determining that the apartment is subject to the RSL. As such, this Court hereby finds that the subject apartment was improperly deregulated and, therefore, remains rent stabilized. Petitioner has failed to demonstrate that the apartment was properly deregulated in light of the fact that the subject premises was admittedly never converted to a cooperative or a condominium and no admissible evidence was submitted to justify the increase in the monthly rent from $73.50 in 1999 to $2,000.00 in 2004, such as improvements to the apartment or a DHCR Order affecting the rent.

Contrary to Petitioner's contention, the statutory limitation under CPLR §213-a only applies to rent overcharge damages, not for determining whether the premises was improperly deregulated. Appellate authority has consistently held that there is no statute of limitations barring examination of an apartment's rent history, when the purpose is to address a challenge to the regulatory status of the

premises and the mode of its deregulation. *Gersten v. 56 7th Ave. LLC, 88 A.D.3d 189 (App. Term 1st Dept. 2001).*

Therefore, given this Court's findings that the subject apartment was improperly deregulated and remains subject to the RSL, Petitioner's cross-motion seeking summary judgment in its favor is denied and Respondent's current monthly rent is hereby frozen at $73.50, which is the amount of the last legal regulated rent according to the DHCR records and, thus, the most recent reliable registered rent, until Petitioner corrects the DHCR rent registrations. *HSTPA, Part F, §2 and §5; Jazilek v Abart Holdings, LLC, 72 A.D.3d 529 (1st Dept. 2010).* See also, *NYC Administrative Code §26-517(e)* and *9 NYCRR §2528.4(a)*; *Matter of Second 82nd SM LLC v New York State Div. of Hous. & Community Renewal, 2012 N.Y. Misc. Lexis 1577 (Sup. Ct. NY 2012)* and *Ernest & Maryanna Jeremias Family Partnership, LP v Matas, 39 Misc.3d 1206A (Civ. Kings 2013).*

As to those branches of Respondent's motion seeking summary judgment in his favor on his rent overcharge and legal fees counterclaims, this Court must deny those requests as Respondent has not demonstrated *prima facie* entitlement to summary judgment as a matter of law and the absence of any issues of fact that require a trial. *Zuckerman v City of New York, supra.; Winegrad v New York Univ. Med. Ctr., supra.; Alvarez v Prospect Hosp., supra.* [Notwithstanding, contrary to Petitioner's contention, although it was not the property owner when the subject premises was improperly deregulated in 2000, a new residential property owner can be held liable for rent overcharges by a prior owner under a carry-over liability theory. *RSC §2526.1(f)(2)(i)*].

Since neither Respondent's rent history from 2004 through present nor all of Respondent's admissible receipts from 2004 to present reflecting actual payments made to Petitioner were submitted herein, there remain triable issues of fact as to whether Respondent was overcharged and, if so, the extent of the overcharge, especially since HSTPA now requires the court, in determining whether there has been a rent overcharge, to "consider all available rent history which is reasonably necessary to make such determinations." *HSTPA, Part F,* §2 and §5. In addition, triable issues of fact remain as to whether the DHCR registration filing indicating that the subject premises was exempt as it was a cooperative or condominium and the failure to correct such filing was harmless clerical error as Petitioner alleges or a fraudulent scheme to destabilize the subject apartment.

CPLR §213-a, as amended by HSTPA, states that "[n]o overcharge penalties or damages may be awarded for a period of more than six years period before the action is commenced or complaint is filed..." *HSTPA, Part F, §6.* Similarly, RSL §26-516(a)(2), as amended by HSTPA, states that "a penalty of three times the overcharge shall be assessed upon all overcharges willfully collected by the owner starting six years before the complaint is filed." HSTPA states that the statutory amendments "shall take effect immediately and shall apply to any claims pending or filed on or after" the effective date of the

Act. *HSTPA, Part F, §7.* Since Respondent's overcharge claim herein was pending on HSTPA's effective date, the amendments made therein apply to this proceeding. Therefore, if the trier of fact finds that no fraud is involved, the look back period for determining any overcharge damages would begin six years prior to November 27, 2018 (the base date), when Respondent filed his answer in this action, which includes a rent overcharge counterclaim. Thus, the look back period for determination of overcharge penalties and damages would be limited to six years prior to the base date of November 27, 2018, to wit: November 27, 2012.

However, if the trier of fact finds that fraud is involved, HSTPA provides, in pertinent, part:

> "The division of housing and community renewal, and the courts, in investigating complaints of overcharge…shall consider all available rent history which is reasonably necessary to make such determinations... 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..." *HSTPA, Part F, §2.*

As such, examination of the rent history before November 27, 2012 would be allowed, without limit, for the purpose of determining whether there was a fraudulent scheme to destabilize the housing accommodation, since the rent on during the six-year look back period from the base date would be unreliable.

CONCLUSION

Accordingly, Respondent's motion is granted, in part, and denied, in part, as explained herein; and Petitioner's cross-motion is denied, in its entirety.

The parties are directed to appear on January 30, 2020, at 9:30 a.m., in Part D, Room 524, for settlement or trial.

This constitutes the Decision and Order of the Court.

Dated: December 23, 2019
New York, New York

Kimon C. Thermos, J.H.C.