2020-02-19

699 Venture Corp v. Trinidad

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART M

----------X **DECISION/ORDER**

699 VENTURE CORP.,

Petitioner, **Index No.: L&T 053028/18**

-against-

ANTONIO V. TRINIDAD

Respondent,

----------X

MIRIAM BREIER, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent's motion seeking leave to amend his answer pursuant to CPLR § 3025(b); seeking leave to conduct discovery pursuant to CPLR § 408; and seeking an order to correct conditions in his apartment pursuant to RPL § 235-b(1).

Papers	**Numbered**
Notice of Motion, Affirmation, Affidavit and Exhibits Annexed	1
Affirmation in Opposition	2

Upon the foregoing cited papers, the Decision/Order in this motion is as follows:

Petitioner commenced this nonpayment proceeding against respondent, Antonio V. Trinidad, the rent stabilized tenant of 699 East 137 Street, Apt. 1E, Bronx NY 10454, alleging respondent defaulted in the payment of rent, a violation of his lease agreement. Respondent filed his answer on October 24, 2018.

The proceeding initially appeared on the court's calendar on November 5, 2018. The Legal Aid Society appeared for Respondent and the case was adjourned multiple times. In the interim, respondent sought relief to consolidate the instant proceeding with eight other non-payment proceedings. Respondent moved to consolidate alleging that the issues in all the proceedings involved the same petitioner and the same issues of law. Respondent not only sought consolidation, but also sought leave to conduct discovery as well. The motion was brought in the case with the lowest index number, *699 Venture Corp. v. Javier Catalan,* Index No. 53023/18. That case was assigned to Part G, before

Hon. Christel Garland. On February 1, 2019, Hon. Christel Garland denied respondent's motion to consolidate, and the request to conduct discovery, without prejudice.

Respondent subsequently made the instant motion returnable on August 26, 2019. The proceeding was adjourned to October 3, 2019, then to November 21, 2019 for petitioner to oppose the motion, then to January 7, 2020 for respondent to serve reply. Respondent did not serve reply to the instant motion which was submitted on consent that day.

By this motion, respondent seeks leave to amend the answer pursuant to CPLR § 3025(b); leave to conduct discovery pursuant to CPLR §4 08; and an order to correct conditions in the apartment pursuant to RPL § 235-b(1).

Respondent argues that he should be permitted to file an amended answer pursuant to CPLR § 3025(b) because there are several meritorious defenses to the proceeding and counterclaims available to respondent. Respondent asserts that he was not aware of these defenses and counterclaims at the time he filed his answer. Respondent also contends that filing an amended answer does not cause any prejudice to petitioner because petitioner has actual knowledge of the information asserted.

Respondent also seeks disclosure pursuant to CPLR § 408. Respondent argues that disclosure is permitted upon a showing of ample need. Specifically, respondent seeks to interpose an affirmative defense of rent overcharge. Respondent asserts that crucial information relating to that claim is in the sole custody of petitioner. Respondent alleges that between 2007 and 2012, petitioner charged five consecutive rent vacancy increases and that this is a pattern throughout the subject building.

Additionally, respondent alleges that the legal regulated rent registered with DHCR is not the same as the legal regulated rent listed on respondent's lease and renewals. Respondent also argues that in 2007, petitioner charged an unexplained increase in the amount of $156.00 in addition to the permissible vacancy increase of 17% for that year, for a total of 33%. Respondent states that when he took occupancy of the apartment in 2012, it seemed that the apartment was not painted or renovated, nor were there any permits issued by the Department of Buildings for large scale work that would justify increases due to apartment improvements.

Lastly, respondent argues that there are violations which exist in his apartment that breach the warrant of habitability and seeks an order correcting the alleged conditions pursuant to RPL § 235-b(1).

Petitioner opposes the motion and argues that the motion should be denied because the supporting papers fail to describe how the proposed

amended answer differs from respondent's answer. Petitioner also argues that the proposed amended answer fails to plead a proper defense to the petition.

Petitioner argues that prior to the enactment of the Housing Stability Tenant Protection Act of 2019 (HSTPA), the "look back" period on a claim for a rent overcharge was four years. Petitioner is no longer in possession of the records respondent seeks disclosure of, because petitioner was not required to keep those records for a period greater than the four years. Petitioner argues that enforcing the statute and granting respondent's relief would be unconstitutional.

Petitioner also argues that the motion for discovery is premature because respondent's original answer does not include an affirmative defense of rent overcharge and therefore cannot seek discovery on an affirmative defense that was not raised.

Lastly, petitioner argues that respondent's rent overcharge claim is barred by laches, because respondent cannot at this juncture claim a rent overcharge after having been in occupancy of the subject premises for at least seven years.

For the reasons which shall be stated below, respondent's motion for leave to serve and file the proposed amended answer pursuant to CPLR § 3025(b), is granted in part and denied in part. The motion for disclosure pursuant to CPLR §408 is denied, as the defense upon which respondent seeks disclosure is not properly interposed in this proceeding. The motion and for an immediate order directing petitioner to correct conditions in respondent's apartment is denied, without prejudice to renewal at trial.

Discussion and Conclusions of Law

CPLR § 3025(b) "Amended and supplemental pleading" provides:

> (b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

It is well settled that a party may move at any time to amend or supplement a pleading and "leave shall be freely given". (CPLR 3025[b]). Leave to amend a pleading should be granted where the amendment is neither palpably insufficient

nor patently devoid of merit, and the delay in seeking amendment does not prejudice or surprise the opposing party. (see *DLJ Mtge. Capital, Inc. v. David*, 147 A.D.3d 1024, 1025 (2017); *US Bank, N.A. v. Primiano*, 140 A.D.3d 857 (2016); *HSBC Bank v. Picarelli*, 110 A.D.3d 1031[2013]).

Contrary to petitioner's allegation, the failure to blackline amendments in a proposed answer does not render a motion to amend a pleading, procedurally defective. The court finds petitioner's argument unavailing. One need only include a copy of the proposed amended answer and make a clear showing of the proposed changes.

Here, respondent included a copy of the answer and proposed amendments which clearly identify the changes he seeks to include in his answer. Respondent wants to amend the answer to include two affirmative defenses; first, a claim of rent overcharge and second, the breach of warranty of habitability. Respondent also seeks to include five counterclaims[1].

In determining whether respondent should be permitted to amend the answer, the court must consider whether respondent's affirmative defenses are neither palpably insufficient nor patently devoid of merit. Respondent argues that in 2007, petitioner took a rent increase of 33% which was in excess of the 17% increase that could have been taken that year, thus leaving an unexplained increase charge of $156.00. Respondent states that this "unexplained increase" raised the rent to $1,295.76 in 2007. Respondent states that as a result of the overcharge in 2007, that overcharge trickled down into subsequent leases which resulted in an overcharge of respondent's rent when he moved in in 2012. In support of the overcharge claim, respondent attached the apartment registration statement for the court to determine its reliability vis a vis the above-described rent increases from 2007, which was thirteen years ago.

The New York State Legislature, by the Housing Stability and Tenant Protection Act of 2019 (HSTPA), amended CPLR § 213-a, the lookback period for rent overcharge claims. The legislature passed HSTPA during the pendency of this proceeding and directed that the statutory amendments "shall take effect immediately and shall apply to any claims pending or filed on or after such date." (HSTPA § 1, Part F, § 7). CPLR § 213(a) now expands the statute of limitations on rent overcharge claims from four years to six years.

The recently amended, RSL § 26-516(a) provides that the legal regulated rent, for purposes of determining overcharges "shall be the rent indicated in the most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement, ... plus in each case any subsequent lawful increases and adjustments." HSTPA

[1] Respondent's proposed answer delineates five counterclaims, however the fifth counterclaim is labeled "Fourth Counterclaim – Attorney's Fees", which this court believes to be a scrivener's error.

broadens exploration of a rental histories beyond the bounds of the six years statute of limitations, when investigating overcharge complaints and determining legal rents. *Dugan v. London Terrace Gardens L.P.*, 177 A.D.3d at 9, (2019); *699 Venture Corp. v. Zuniga*, 64 Misc. 3d 847, 853 (Civ. Ct. Bronx Co. 2019)

CPLR § 213-a enables the court "to look back as far as necessary to find the most reliable rent registration upon which to base its determination regarding an overcharge claim." This expansion permits the court in this proceeding to review the reliability of the increase in rent from 2006 – 2007, which is what respondent bases the claim for overcharge on. See *699 Venture Corp.*, supra, 64 Misc. 3d at 853.

RSL § 26–516(h) sets forth an extensive list of records that a court shall consider in determining legal rents and overcharges such as: (i) rent registration and other records filed with DHCR or other government agencies, regardless of the date to which the information refers; (ii) any order issued by any state, municipal or 28 federal agency; (iii) any records maintained by the owner or tenants; and (iv) public record kept in the regular course of business by any state, municipal or federal agency. The statute further provides that "[n]othing [therein] shall limit the examination of rent history relevant to a determination as to ... whether the legality of a rental amount charged or registered is reliable in light of all available evidence ..." (RSL § 26–516[h][i]).

Respondent attached a copy of the apartment rent registration statement history filed with the New York State Homes and Community Renewal (HCR) to its motion. Respondent alleged that the registration statement shows that an overcharge occurred in 2007 when petitioner took an unexplained increase of 33%, in excess of the allowable Rent Guidelines Board (RGB) vacancy increase permitted for that year.

The registration statement shows that in 2006 the legal regulated rent was registered at $973.68 to Jorge C. Yebara. In 2007, the registration statement shows that a vacancy occurred. The legal regulated rent was registered at $1295.76, with a preferential rent registered at $1250.00 for a one year lease term, to Rene Jimenez. The RGB vacancy increase in effect at that time, for a one year lease term was 17%. (New York City Rent Guidelines Board, Order Number 38). A further review of the registration statement shows, in the column marked "REASONS DIFFER./CHANGE", that when petitioner registered the legal regulated rent at $1295.76, it included a vacancy increase, and an increase for "IMPRVMNT" as indicated on face of the registration statement.

In 2008 a vacancy occurred. The registration statement shows the legal regulated rent was registered at $1519.27, with a preferential rent registered at $1287.50 for a one year lease term, to Esperanza Lorenso. The allowable RGB vacancy increase in effect at that time, for a one year lease term was 17.25%.

(New York City Rent Guidelines Board, Order Number 39). Here, the registration statement shows that petitioner calculated the new legal regulated rent in accordance with the allowable RGB vacancy increase of $233.51 for that year.

In 2009 petitioner's registration statement shows the legal regulated rent was registered at $1587.63, with a preferential rent registered at $1345.44 for a one year renewal lease to the same tenant, Esperanza Lorenso. The allowable RGB renewal increase in effect at that time, for a one year lease renewal was 4.5%. (New York City Rent Guidelines Board, Order Number 40). Here, the registration statement shows that petitioner calculated the new legal regulated rent in accordance with the allowable RGB renewal lease increase of $68.36 for that year.

In 2010 a vacancy occurred. The registration statement shows the legal regulated rent was registered at $1857.52, with a preferential rent registered at $1400.00 for a one year lease term, to Juan C. Juarez. The allowable RGB vacancy increase in effect at that time, for a one year lease term was 17.00%. (New York City Rent Guidelines Board, Order Number 41). Here, the registration statement shows that petitioner calculated the new legal regulated rent in accordance with the allowable RGB vacancy increase of $269.89 for that year.

In 2011 a vacancy occurred. The registration statement shows that the legal regulated rent and preferential rent were both registered at the exact same rental amount as in the year 2010, but now to Jose N. Santos. The court notes that petitioner did not take a vacancy increase in 2011, although permitted to do so.

In 2012 respondent moved into the subject apartment. The registration statement shows the legal regulated rent was registered at $2164.01, with a preferential rent registered at $1300.00 for a one year lease term. The allowable RGB vacancy increase in effect at that time for a one year lease term was 16.50%. (New York City Rent Guidelines Board, Order Number 43). Here, the registration statement shows that petitioner calculated the new rent in accordance with the allowable RGB vacancy increase of $306.49 for that year.

In 2013 the registration statement shows the legal regulated rent was registered at $2207.29, with a preferential rent registered at $1326.00 for a one year renewal lease to respondent. The allowable RGB renewal increase in effect at that time, for a one year lease term was 2%. (New York City Rent Guidelines Board, Order Number 44). Here, the registration statement shows that petitioner calculated the new legal regulated rent and the preferential rent in accordance with the allowable RGB renewal lease increase for that year.

In 2014 the registration statement shows the legal regulated rent was registered at $2378.35, with a preferential rent registered at $1428.77 for a two year renewal lease to respondent. The allowable RGB renewal increase in effect

at that time, for a two year lease term was 7.75%. (New York City Rent Guidelines Board, Order Number 45). Here, the registration statement shows that petitioner calculated the new legal regulated rent and the preferential rent in accordance with the allowable RGB renewal lease increase for that year.

In 2015 the petitioner registered the same information on the registration statement as in 2014, because respondent's lease was still in effect during that registration period.

In 2016 the registration statement shows the legal regulated rent was registered at $2425.91, with a preferential rent registered at $1457.35, for a two year renewal lease. The allowable RGB renewal increase in effect at that time, for a two year lease term was 2%. (New York City Rent Guidelines Board, Order Number 47). Here, the registration statement shows that petitioner calculated the new legal regulated rent and the preferential rent in accordance with the allowable RGB renewal lease increase for that year.

In 2017 the petitioner registered the same information on the registration statement as in 2016, because respondent's lease was still in effect during that registration period.

In 2018 the registration statement shows the legal regulated rent was registered at $2474.42, with a preferential rent registered at $1486.50, for a two year renewal lease. The allowable RGB renewal increase in effect at that time, for a two year lease term was again 2%. (New York City Rent Guidelines Board, Order Number 49). Here, the registration statement shows that petitioner calculated the new legal regulated rent and the preferential rent in accordance with the allowable RGB renewal lease increase for that year.

Respondent argues that because petitioner took an unexplained 33% increase in excess of the allowable RGB increase in 2007, it automatically renders the registration statement unreliable, giving rise to a colorable claim of rent overcharge. In this case, the court finds this argument unavailing. The court does not find that respondent has shown the rent registration statement to be unreliable in 2007 or any subsequent year.

There was an increase of $322.08 in the legal regulated rent registered in 2007. As the registration statement reflects, part of that increase was due to a vacancy increase of 17% which amounted to an increase of $165.52. This vacancy increase raised the rent from $973.68 to $1139.20. The legal regulated rent was registered at $1295.76, showing a difference of $156.55 between the rent registered in 2006 and the rent registered in 2007. The registration statement shows a notation labeled "VAC/LEASE IMPRVMNT" in the column which requires a reason or explanation for the change in the legal regulated rent from the previous year registered.

According to the information provided by petitioner on the registration statement, the legal regulated rent registered in 2007 included a vacancy increase of 17%, plus an increase for apartment improvements. The allowable increase for apartment improvements in 2007 was a 1/40th percent of the total cost of improvements, pursuant to RSL §26-511(c)(13), now amended. Based on the court's own calculations, an additional increase of $156.55 for improvements would be the result of $6262.00 in total expenditures by the landlord. The court does not view this cost as unreasonable considering that the registration statement indicates that the only other times increases were taken for improvements prior to 2007, were in the years 1996 and 2000.

Additionally, the court does not find respondent's argument persuasive that since the NYC Buildings Department records show no permits were issued for large scale work at that time, that can only mean that improvements were not made to the apartment. The work performed in the apartment may not have been "large scale" or required work permits. In fact, the amount of the increase was not unreasonably high, which would have this court believe that large scale work was not performed.

Respondent states that when he moved into the apartment, it did not look renovated or painted. The HCR registration statement denotes that an increase for apartment improvements was taken in 2007, which was five years prior to respondent taking occupancy. It is not unreasonable to believe that after five years, the apartment sustained wear and tear so it did not seem so "new" to respondent, especially in light of the minimal improvements done in 2007.

The HSTPA gives the court broad discretion when investigating complaints of rent overcharge and determining legal regulated rents. It directs the court to consider "all available rent history" and any other records filed with any state, municipal or federal agency when making such determinations (HSTPA Part F, §2). Respondent, in further support of his claim that the registration statement is unreliable, states that his leases contain a legal regulated rent that differs from the legal regulated rent registered on the statement itself. Respondent did not attach a copy of his lease or lease renewals to corroborate his statement, especially for the purpose of determining the reliability of the rent registration statement. Respondent did not attach any other document that would show the registration statement to be inherently unreliable in 2007. Respondent relies solely on the HCR registration statement for the court to determine its reliability and where in certain instances it might be insufficient, but here it is not.

Petitioner's argument that applying HSTPA amendments to RSL § 26—516 and CPLR 213—a to this case would be constitutional, is unavailing. The Court in *Dugan*, supra, 177 A.D.3d at 9, addressed this issue and found that the application of the HSTPA to a pending proceeding is not unconstitutional. The court stated as follows:

To begin, the legislature expressly made the amendments applicable to pending claims, and legislative enactments carry 'an exceedingly strong presumption of constitutionality' (*Barklee Realty Co. v. Pataki*, 309 AD2d 310, 311, 765 N.Y.S.2d 599 [1st Dept. 2003] [internal quotation marks omitted], appeal dismissed 1 NY3d 622, 777 N.Y.S.2d 20, 808 N.E.2d 1279 [2004], lv denied 2 NY3d 707, 781 N.Y.S.2d 288, 814 N.E.2d 460 [2004]). Further, it is well settled that absent deliberate or negligent delay, "[w]here a statute has been amended during the pendency of a proceeding, the application of that amended statute to the pending proceeding is appropriate and poses no constitutional problem" (*Matter of St. Vincent's Hosp. & Med. Ctr. Of NY v. New York State Div. of Hous. & Community Renewal*, 109 AD2d 711, 712, 487 N.Y.S.2d 36 [1st Dept. 1985], affd 66 NY2d 959, 498 N.Y.S.2d 799, 489 N.E.2d 768 [1985]; accord *Matter of Kass v. Club Mart of Am.*, 160 AD2d 1148, 554 N.Y.S.2d 357 [3d Dept. 1990]; *Jonathan Woodner Co. v. Eimicke*, 160 AD2d 907, 554 N.Y.S.2d 630 [2d Dept. 1990]).

Although petitioner's papers do not include an affidavit on the merits, the HCR registration statement indicates that the increase in rent from 2006 to 2007 was due to a vacancy increase plus an increase for individual apartment improvements. The court finds this to be a valid explanation for the increase that year. Moreover, subsequent to 2007, the registration statements show that petitioner registered not only the legal regulated rent but also the preferential rents within the allowable RGB increase guidelines for each year, including the years where respondent was registered as the tenant for the subject premises (2012-2018). The amounts registered each year were consistent with the RGB guidelines for rent stabilized apartments in the City of New York.

Respondent failed to show that the registration statement in 2007 or any subsequent year, was unreliable. Respondent's mere suspicion regarding the increase which occurred between 2006 and 2007, is not a sufficient basis to find that the registration statement was unreliable, or to permit respondent to challenge the rent that was registered thirteen years ago. This is especially true in light of the reliability of the entirety of the registration statement, and the plausibility of the $156.55 rent increase for minimal improvements in the apartment.

Respondent's reliance on *Zuniga*, with respect to the issues in this case is misplaced. *Zuniga*, is not entirely analogous to this case. In *Zuniga*, the court, after examining the rent registration history, found that petitioner took a 43% increase in 1997 based solely on a vacancy increase. The allowable RGB vacancy increase in effect for that year was either 14% or 16%, depending on the length of the lease term. The court, in *Zuniga* found the most recent reliable rent registration to be from 1996, the year preceding the unexplained increase of 43%

registered in 1997. In *Zuniga*, the court found that a 43% increase based solely on a vacancy increase was clearly an unlawful increase pursuant to the RGB guidelines for that year, therefore rendering the registration statement unreliable in 1997. Here petitioner indicated on the registration statement that the increase in rent in 2007 was due to a vacancy increase plus an additional increase for improvements to the apartment, not merely a vacancy increase.

In *137th Street Properties LLC, v. Alejandra Vasquez,* Index No. 63393/18, the court found that respondent's rent riders failed to indicate how the rent increase of $585.43 to $1200.00 was calculated therefore it rendered the registration of the rent in 2006 as unreliable. Here there is no reliance upon calculations in rent riders. Rather, the rents were clearly calculated based upon the RGB guidelines and the increase for apartment improvements.

Also, in *SF 878 E. 176th LLC, v. Jennifer Grullon,* Index No. 15965/18, the court found a 75% increase in the registered rent between 2014 and 2015, which increases did not correspond with allowable RGB guidelines for that year. No such increase is evident in this proceeding.

Here the 2007 rent increase resulted from a vacancy increase and improvements in the apartment, no faulty lease or rent rider are at issue in this proceeding, and respondent took occupancy of the apartment five years after improvements were made, not immediately as in *Vasquez.* Moreover, the court determines that the entirety of the registration statement submitted by petitioner for the subject apartment is reliable, with increases that consistently correspond with the RGB guidelines for rent stabilized apartment in the City of New York.

The above cases cited by respondent, contain different facts, and this necessarily brings different results. The court finds respondent's proposed first affirmative defense of rent overcharge lacks merit, and strikes that affirmative defense and the first counterclaim, as well as associated relief requested based on alleged rent overcharge from the proposed amended answer. (See *Ulster Savings Bank v. Nicholas B. Fiore,* 165 A.D.3d 734 (2018).

For the above-stated reasons, respondents' motion for leave to amend the answer pursuant to CPLR §3025(b) is granted in part and denied in part. The motion is granted to the extent that respondent shall interpose the proposed amended answer containing only the second affirmative defense, second counterclaim, third counterclaim, fourth counterclaim, but only as it pertains to alleged interruption of essential services, lack of repairs, inappropriate and intimidating contact and threatening language, and the final counterclaim for attorneys fees and omit from the relief requested subparagraphs "a" and "c". The motion to amend is denied with respect to the first affirmative defense, first counterclaim, the allegations of rent overcharge in the fourth counterclaim and subparagraphs "a" and "c" in the relief requested. The proposed first affirmative

defense, first counterclaim and associated relief requested have no merit and interposition of such a defense, counterclaim and request for relief would be improper in this proceeding. However, the balance of affirmative defenses, counterclaims and relief requested are properly interposed in this summary nonpayment proceeding. See, *Findley, Kumble, Wagner, Heine & Undergberg v. Wolosoff*, 63 A.D.2d 950 (1978).

In that the proposed first affirmative defense and associated counterclaim and request for relief are stricken, that branch of respondent's motion seeking disclosure pursuant to CPLR §408 is denied. The proposed demand for document production seeks documents and information pertaining only to the alleged overcharge claim which was stricken and shall not be interposed in this proceeding. Respondent's request for an immediate order directing petitioner to correct conditions in respondent's apartment is denied at this juncture without prejudice to renewal at trial.

Respondent shall serve and file the amended answer by February 28, 2020. The proceeding is restored to the Part M calendar for March 9, 2020 at 9:30 AM.

This constitutes the Decision and Order of the Court. A copy of this Decision and Order is being mailed to all parties.

Dated: Bronx, New York
February 19, 2020

So Ordered:

HON. MIRIAM BREIER
JUDGE, HOUSING COURT

Hon. Miriam Breier
Judge of the Housing Court

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