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

80TH STREET BROWNSTONE LLC,	**INDEX #: 64315/19**
***Petitioner*,**	**<u>DECISION / ORDER</u>**
-against-	**MOTION SEQS. 1 & 2**
GRACE ZANDARSKI, "JOHN DOE" and "JANE DOE",	**HON. KIMON C. THERMOS**
***Respondents*.**	

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

Papers	**Numbered**
Notice of Motion, Affirmation, Affidavit and Annexed (Ex. A-H)………..……………….…	1
Notice of Cross-Motion Affirmation, Affidavit and Annexed (Ex. A-Q)............................	2
Affirmation in Opposition to Cross-Motion and Annexed (Ex. A-B)..…………………......	3
Affirmation in Further Support of Cross-Motion………………………………………....	4

Appearing for Petitioner: Belkin Burden Wenig & Goldman, LLP, By: Daniel P. Phillips, Esq.
Appearing for Respondent Grace Zandarski: Lawrence W. Rader, Esq.

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

In this holdover proceeding, Petitioner seeks possession of the subject alleged deregulated apartment based upon Respondent's Grace Zandarski ("Respondent") failure to vacate and surrender the premises after expiration of her written lease. In her answer, Respondent asserts, *inter alia*, that the petition fails to state a cause of action because the apartment remains governed by the Rent Stabilization Law ("RSL") and, thus, she is entitled to a renewal lease.

Respondent now moves for an Order, pursuant to CPLR §3212, dismissing the petition on the grounds that the apartment remains subject to the RSL. Respondent argues that, pursuant to the First Department Appellate Division decision in *Altman infra.,* she acquired rent stabilization status which has vested and cannot be relinquished, even if the Decision and Order creating the apartment's regulated status was reversed. Respondent contends that she and Petitioner executed a rent stabilized lease and Petitioner registered the apartment as such for several years, and even passed along an MCI increase chargeable only to rent stabilized tenants. As such, Respondent avers that Petitioner was required to offer her a rent stabilized renewal lease, which would have been accepted, and that failure to do so deprives Petitioner of the right to treat her as a holdover.

Petitioner opposes the motion and cross moves for summary judgment in its favor. According to Petitioner, it used the established method at the time, where it was permitted to include the vacancy allowance increase and any apartment improvements in determining the new rent upon the

vacancy of the old tenant and, since that legal rent crossed the deregulation threshold, the apartment became deregulated for any new tenant, without regard to whether the rent paid by the exiting tenant exceeded the deregulation threshold. When the Appellate Division, in *Altman infra.,* changed the accepted interpretation of the statute to require that the threshold rent must be the amount of the legal rent due from the vacating tenant, in conformance with the new law, Petitioner offered Respondent a rent stabilized lease renewal and treated the subject apartment as governed by the RSL. However, three years later, when the Court of Appeals reversed the Appellate Division's determination and reaffirmed the older interpretation, all apartments similarly situated lost their temporary rent stabilization status and reverted to free market. Based upon that holding and the subject apartment's resultant reversion to free market status, Petitioner argues that it was within its right to choose not to renew Respondent's lease and further argues that it properly notified Respondent accordingly.

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. *Hourigan v. McGarry, 106 A.D.2d 845, appeal dismissed 65 N.Y.2d 637 (1985); 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. NY 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 salient facts are not in dispute. Respondent took possession of the subject apartment on March 1, 2009, signing a one-year lease with a monthly rent of $2,000.00. That first lease was delineated as a fair market lease. It contained a rider, pursuant to RSL §26-504.2(b), disclosing that the apartment was previously regulated and informing Respondent of the method by which the rent was increased through vacancy allowance to $2,179.76 per month, which entitled Petitioner to

exempt the apartment from regulation, since, at that time, the deregulation threshold was $2,000.00 per month. Subsequently, it appears that Respondent remained in occupancy without a written lease and with no increase in the rent, perhaps even a decrease to $1,900.00 per month.

On April 28, 2015, the Appellate Division issued *Altman v. 285 W. Fourth LLC, 127 A.D.3d 654 (1st Dept. 2015),* a decision interpreting RSL §26-504.2(a) to mean that landlords could no longer deregulate apartments where the outgoing tenant's rent was below the deregulation threshold amount. The Court held that the new tenant remained rent stabilized, even if vacancy or other permitted increases to the rent brought the new rent above the threshold until that new tenant vacated.

In June 2015, Respondent commenced an action in Supreme Court, New York County, seeking an Order declaring her apartment subject to the RSL in light of the decision in *Altman supra*. The parties quickly settled the matter and, pursuant to the law at the time, Petitioner agreed to give Respondent a rent stabilized lease, registered the apartment with the New York State Division of Homes and Community Renewal ("DHCR") and, in all respects, treated the apartment as subject to the RSL. Respondent's two-year rent stabilized lease commenced on July 1, 2015 and, upon its expiration, was renewed for another two years, expiring on June 30, 2019.

In April 2018, the Court of Appeals, in *Altman v. 285 W. Fourth LLC,* 31 N.Y.3d 178 (2018), reversed the Appellate Division's holding and found, as previously understood, that the proper interpretation of RSL §26-504.2(a) is that vacancy increases can be included to bring an apartment's rent above the deregulation threshold, thereby rendering such apartment exempt prior to the commencement of a new tenancy.

On May 6, 2019, Petitioner's counsel sent a letter to Respondent advising that, in light of the Court of Appeals' decision, the subject apartment was no longer governed by the RSL and that, as a result, Respondent's lease, expiring on June 30, 3019, would not be renewed. After Respondent did not vacate upon expiration of her lease, Petitioner commenced the instant holdover.

In support of her motion, Respondent argues that, since Petitioner treated her tenancy as covered by the RSL, it cannot now unilaterally deprive her of the protections under the RSL. Respondent points to the holding, in *Jaziliek v. Albart Holdings, LLC, 72 A.D.3d 529 (1st Dept. 2010),* for support. However, that case is distinguishable on its facts. Unlike in this matter, in *Jazilek,* the court was deciding whether an overcharge award should be upheld where the landlord, in settling the illegal sublet holdover case, recognized the subtenant as the new tenant but, in the first offered lease, took unjustified increases improperly bringing the new rent above the deregulation threshold. Respondent's reliance on *Jaziliek* is also misplaced because she does not challenge Petitioner s derivation of her initial rent, which exceeded the deregulation threshold.

Although Respondent now contends that she did not request to be treated as rent stabilized and that Petitioner's acted unilaterally in registering the premises with DHCR and offering her a rent stabilization renewal lease unsolicited by Respondent, the facts speak otherwise. Immediately upon the issuance of the *Altman* decision by the Appellate Division, Respondent sued for a declaratory judgment in Supreme Court, New York County, to establish her rent stabilized rights. The offered rent stabilized lease was in conformance with the new interpretation and in settlement of her declaratory action.

Moreover, Respondent's argument that her rights vested when the Appellate Division issued their decision re-regulating the entire class of similarly deregulated apartments under the RSL, but did not divest when the Court of Appeals reversed that holding, is internally inconsistent, potentially frivolous and antithetical to the fundamental precept regarding the weight of judicial precedent in American jurisprudence, namely that the rights and obligations of all similarly situated parties are affected by the appellate courts' decisions and that these decisions establish law that all must follow.

In paragraph "2" of his affirmation in opposition to Petitioner's cross-motion, Respondent counsel argues that

> "[an appellate court's ruling which other litigants rely upon in conducting their affairs, even if it is ultimately reversed, cannot automatically become the basis for affecting the rights of people who were not parties to the reversed case. …the only person whose rights were affected by the Court of Appeals was Mr. Altman, no one else."

This argument is not only disingenuous because of Respondent's prior positions in this dispute between the parties, but internally inconsistent; and although the court does not, at this juncture, reach this conclusion, it may be considered frivolous and dilatory. See, *Minister, Elders & Deacons of Reformed Protestant Dutch Church v. 198 Broadway, Inc.*, 76 N.Y.2d 411, 414, (1990). *Minister, Elders & Deacons of Reformed Protestant Dutch Church v. 198 Broadway, Inc.*, 76 N.Y.2d 411, 414, (1990), where the court held that "[a] motion is 'frivolous' within the meaning of rule 130-1.1 (a) of the Uniform Rules for Trial Courts, [when] it is 'completely without merit in law or fact' and 'cannot be supported by a[ny] reasonable argument for an extension, modification or reversal of existing law (22 NYCRR §130-1.1[c][1])."

Herein, Respondent neither challenges the legality of the vacancy increase taken by Petitioner to yield the rent that exceeded the then-two-thousand dollar deregulation threshold nor the first rent charged to her upon commencement of her tenancy. Respondent also does not credibly challenge that the only reason that the parties began treating the subject apartment as rent stabilized was due exclusively to the Appellate Division decision in *Altman, supra.* and Respondent's

commencement of a declaratory action seeking the benefit of that decision. Respondent is also not arguing that Petitioner, without the compulsion of the Appellate Division decision in *Altman, supra.,* agreed to be independently bound by a lease whose terms mirrored the RSL, thus, creating a private contractual right to a renewal. However, even if the parties had so contracted, that contract would subject Respondent's tenancy to the RSL, since regulatory coverage of a housing accommodation is a product of statute and cannot be created or destroyed by waiver, mistake or estoppel or even agreement between the parties. *546 W. 156th St. HDFC v. Smalls,* 43 A.D.3d 7 (1st Dept., 2007); *Gregory v. Colonial DPC Corp. III,* 234 A.D.2d 419 (2nd Dept. 1996); *Ruiz v. Chwatt Assocs.,* 247 A.D.2d 308 (1st Dept. 1998).

In light of the foregoing, this Court finds that Respondent, who was irrefutably a free market tenant upon the commencement of her tenancy, became a rent stabilized tenant temporarily by virtue of a judicial decree, which was subsequently found to be in error and reversed. When the Appellate Division's decision, in *Altman, supra*., was reversed, any rights granted thereunder were nullified and vitiated. As a result, and while the issued rent stabilized lease was still in effect, Respondent reverted to being a free market tenant as before the Appellate Division's decision in *Altman, supra*. Respondent neither offers any other reason why the tenancy would be renewable under the RSL nor any other ground in support of her summary judgment motion. Accordingly, Respondent's summary judgment motion is denied in its entirety, as this Court finds that the subject apartment is a free market apartment and that, upon expiration of Respondent's lease on June 30, 2019, Respondents unjustifiably remained in possession giving rise to grounds for this holdover proceeding.

However, based upon this Court's findings and the *prima facie* supporting evidence annexed to Petitioner's cross-motion, Petitioner is entitled to summary judgment, as a matter of law. In support of its motion, Petitioner submitted the following *prima facie* evidence: (1) A certified copy of a deed to the premises dated September 28, 2018, indicating ownership by Petitioner; (2) Proof of current registration as a multiple dwelling with the New York City Housing Preservation and Development ("HPD"); (3) an uncontroverted copy of the face page of prior tenants Manuela Badawy and Anthony Brown's expired lease dated December 21, 2007, which, by its own terms, was set to expire on November 30, 2008; (4) a DHCR registration history for the subject apartment; (5) the first lease between the parties dated March 1, 2009; (6) the first rent stabilized lease renewal dated July 8, 2015; (7) the subsequent and last renewal dated June 12, 2017, which, by its own terms, expired on June 30, 2019; (8) a letter addressed to Respondent dated May 6, 2019, advising of Petitioner's intention not renew and Petitioner's position on the apartment's regulatory status; (9) the herein notice of petition and petition together with the affidavit of service thereon and Respondent's

answer; and (10) a supporting affidavit by Petitioner's member, who is familiar with the facts and circumstances of the case.

Based upon the foregoing, Petitioner is granted a Final Judgment of possession against Respondent and the issuance of a warrant of eviction forthwith. Execution of the warrant is stayed through June 30, 2020 to enable Respondent to vacate voluntarily.

Petitioner shall further be entitled to a Final Judgment of possession against Respondents "John Doe" and "Jane Doe" upon submission of non-military affidavits.

Respondent's affirmative defenses do not serve to defeat Petitioner's entitlement to summary judgment, as they are vague, irrelevant, conclusory and/or do not raise a triable issue of fact. Moreover, the jurisdictional challenge in her answer is deemed waived, since she did not move for relief on that issue. Lastly, in light of this Court's Decision and Order, Respondent's sole counterclaim alleging rent overcharge is dismissed.

Accordingly, Respondent's summary judgment motion is denied; and Petitioner's cross-motion for summary judgment is granted.

This constitutes the Decision and Order of the Court.

Dated: March 30, 2020
New York, New York

_______KCT___________________
Kimon C. Thermos, J.H.C.

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