2020-04-13

381 EAST 160th LLC v. Fana

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

----------X Index No. 013041/18

381 EAST 160th LLC Motion Seq. No. 3 & 4

Petitioner,

-against- **DECISION/ORDER**

YOJEIDY FANA

Respondent.

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HON. STEVEN WEISSMAN:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of motion and affidavits annexed . . . . . :	1
Order to Show Cause and affidavits annexed. . . . . :	
Answering affidavits by Cross Motion. . . . . :	2
Replying affidavits/opposition to Cross Motion. . . . . :	3
Exhibits. . . . . :	
Stipulations. . . . . :	
Other :	

Petitioner was represented by: Butnick & Levenson LLP, Joshua Butnick, Esq.

Respondent was represented by: Bronx Legal Services, Sarah E. Smith, Esq.

In this summary nonpayment proceeding, respondent moves for leave to conduct discovery regarding an alleged overcharge on the rent, initially seeking information and documentation back to 1983. Petitioner opposes said motion by cross-motion alleging respondent has failed to show the ample need for this Court to allow discovery on this issue, and asking that respondent be ordered to deposit the use and occupancy/rent that has come due since respondent's prior deposit. Petitioner's cross-motion for a further deposit of the rent into court is denied for the reasons set forth in respondent's opposition; respondent's motion is granted with caveats.

Respondent seeks leave to conduct discovery before trial to determine the legal regulated rent of the premises in regard to her overcharge defense and counterclaim. Discovery is permitted in

a special proceeding only by leave of court pursuant to CPLR §408. Discovery may be granted in summary proceedings upon a showing of ample need and if such disclosure will not unduly delay the proceeding, though "the ends of justice ought not be sacrificed to speed." *42 West 15th Street Corp. v. Friedman*, 2085 Misc. 123 (App. Term 1st Dept. 1955). Ample need may be established upon a showing that special circumstances exist which warrant discovery. *Harris V. Bigelow*, 135 Misc. 2d 331, 515 N.Y.S. 2d 176 (Civ. Ct. Kings Co. 1987) citing *Clark v. Kellogg*, N.Y.L.J., 7/28/82, p. 6, col. 2 (App. Term 1st Dept.). Six factors to be considered in determining whether ample need has been established were set forth in *New York University v. Farkas*, 121 Misc. 2d 643, 468 N.Y.S. 2d 808 (Civ. Ct. N.Y. Co. 1983). The six determining factors are: "(1) whether in the first instance, the petitioner [or the moving party] has asserted facts to establish a cause of action [or a defense]; (2) whether there is a need to determine information directly related to the cause of action; (3) whether the requested disclosure is carefully tailored and is likely to clarify the disputed facts; (4) whether prejudice will result from the granting of an application for disclosure; (5) whether the prejudice can be diminished or alleviated by an order fashioned by the court for this purpose; and (6) whether the court, in its supervisory role can structure discovery so that pro-se tenants in particular, will be protected and not adversely affected by a landlord's [or a parties] discovery requests."

Here, respondent attaches her proposed discovery so the Court is able to determine if same " is carefully tailored and is likely to clarify the disputed facts", and is able to " in its supervisory role ... structure discovery". The Court finds, and respondent consents in her reply/opposition papers, to limit discovery to the time frame from petitioner's purchase of the subject building, to wit: 2003 to the present.

Respondent relies upon the decision in *699 Venture Corp. V. Zuniga*, 64 Misc3d 847, 2019 WL 2850237, 2019 NY Slip Op 29200 (Civ Ct Bx Co, 2019, Bacdayan, J). That decision, written less than a month after the passage of HSTPA, was well thought out and correct under the assumption the new law, Part F thereof, had retroactive effect. The recent Court of Appeals decision, *In the Matter of Regina Metropolitan Co., LLC, v. New York State Division of Housing and Community Renewal, et al. (And Another Proceeding)*, 2020 NY Slip Op 02127 (CANY), unfortunately for Judge Bacdayan, makes her decision incorrect. The crux of the Court of Appeals

decision is this: "Thus, the overcharge calculation and treble damages provisions in Part F may not be applied retroactively, and these appeals must be resolved under the law in effect at the time the overcharges occurred." (*Regina Metro*., at p 54). The Court in *Regina* determined that the real effect of applying HSTPA Part F retroactively is not within the clear Legislative intent, stating: "Thus, the HSTPA effectively provides that an owner can be penalized indirectly for a disposal of records that was legal under the prior law but will now hinder the owner's ability to establish the legality of (and non-willfulness of any illegal) rent increases outside the lookback period, which – under the new legislation – impact recovery even in the absence of fraud." (at p. 30) ... "[I]t is a bedrock rule of law that, absent an unambiguous statement of legislative intent, statutes that revive time-barred claims if applied retroactively will not be construed to have that effect." (citations omitted, at p. 33) ... "The 'claims pending' language in the Part F effective date provision is insufficient to indicate that the Legislature intended retroactive application in a manner that revives time-barred claims, such as by extending the statute of limitations to permit recovery of two annual overcharge claims that were time-barred under the prior law. ... If applied to past conduct, the relevant HSTPA amendments would not only revive claims for two additional years but, by changing the overcharge calculation methodology to enable review of any illegal rent increase in the history of the apartment, would also substantially alter the nature of the liability by resurrecting nonfraudulent overcharges that initially occurred more than four years prior to the complaint but continue to impact the calculation of the current rent." (at p. 35).

And the Court's decision in *Regina* goes on to enunciate that the reason they find Part F not to have retroactive effect is:

"The HSTPA does much more than require a party to shoulder a new payment obligation going forward – and its destabilizing effect is especially severe. ... That potential effect is demonstrated by the cases before us. In Regina Metro., for example, as noted by the Appellate Division dissent, application of the standard calculation methodology under the former rule resulted in overcharge damages of $10,271.40, while the reconstruction method erroneously utilized by DHCR – which appears consistent with the HSTPA's new approach – resulted in damages of $285,390.39. ... Unlike cases where retroactive application rationally furthered a legislative goal, ... there is no indication here that the Legislature considered the harsh and destabilizing effect on owners' settled expectations, much less had a rational justification for that result. While prospective application of

Part F to overcharges occurring after the effective date may serve legitimate and laudable policy goals, no explanation has been offered, much less a rational one, for retroactive application of the amendments to increase or create liability for rent overcharges that occurred years – even decades – in the past." (at p. 49-50).

The Court went even further when it stated: "Relatedly, although the new treble damages provisions function distinctly from the integrated overcharge calculation provisions, *retroactive application of any Part F amendments* that would newly impose treble damages for past conduct is also impermissible." (at p. 52, emphasis added).

Thus, though this Court finds that respondent has met the ample needs test for discovery, and to lookback beyond the four year limitation, the caveat to this decision is that such discovery is governed by old law, not by the HSTPA. That the Court of Appeals was dealing with appeals is not relevant in this Court's opinion as the arguments set forth in the majority decision makes it clear that the Court was setting ground rules finding HSTPA Part F was effective prospectively only, but not applicable to any then pending cases.

Petitioner's cross-motion is denied, respondent's motion is granted. Petitioner shall comply with respondent's discovery demands to the extent possible given that under old law documents may have been lawfully disposed of and thus no longer available; that the existence of an apparent improper rental increase in the past is not, in and of itself, proof of an overcharge; but that if respondent can convince a court that there was a scheme by petitioner to defraud and illegally raise rents beyond the permissible increases under Rent Stabilization, then such court could find an overcharge, and, possibly, treble damages. These issues are for trial.

This is the decision and order of the Court. The proceeding is restored to the part D calendar at 9:30am on June 15, 2020, or such other date as the Court specifies. Copies are being emailed to both parties and hard copies will be mailed to both sides once the Courts resume regular scheduling.

Dated: Bronx, New York
April 13, 2020

STEVEN WEISSMAN, JHC