2020-04-22

Shalom Aleichem LLC v. Soto

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Shalom Aleichem LLC v Soto
2020 NY Slip Op 20091
Decided on April 22, 2020
Civil Court Of The City Of New York, Bronx County
Garland, J.
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Decided on April 22, 2020

Civil Court of the City of New York, Bronx County

Shalom Aleichem LLC, Petitioner,

against

Vanessa Soto, Respondent.

L & T 17406/19

For Petitioner:

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For Respondent:

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Christel F. Garland, J.

Petitioner commenced this summary nonpayment proceeding on or about April 2, 2019, seeking rent it alleged became due for Apartment No.D13, a rent stabilized apartment located at 3605 Sedgwick Avenue, Bronx, New York. The petition seeks rent for the months of February 2019 and March 2019 at the monthly rate of $1,410.61 as well as a balance of $569.78 for January 2019.

Respondent initially appeared *pro se* and interposed an answer asserting a general denial. In addition, Respondent asserted that the rent or part of the rent had already been paid to Petitioner, that legal fees were improperly assessed against her account and that Petitioner had harassed her.

Respondent subsequently retained counsel, and later by agreement between the parties interposed an amended answer asserting several defenses and counterclaims, including a counterclaim for rent overcharge.

After several adjournments without resolution, the proceeding was transferred to the Expediter and referred to this part for trial Prior to the start of the trial, the parties stipulated to [*2]Petitioner's prima facie case and the trial centered on Respondent's counterclaims

In support of her rent overcharge claim, Ms. Soto testified that sometime in 2013 she filed a rent overcharge complaint with the Division of Housing and Community Renewal ("DHCR") after discovering that her rent was "really high". According to Ms. Soto, she received a rent ledger from Petitioner which showed that the tenant who occupied the apartment before she took occupancy paid a monthly rent of $900 whereas she was being charged a monthly rent of $1,560. Following her complaint, in an order dated March 17, 2016 ("DHCR order"), DHCR found that Petitioner had overcharged Respondent and directed a roll back of the monthly rent. Upon receiving the DHCR order, Respondent contacted management but continued to send her rent

checks to Petitioner at the higher rent amount she was being billed. According to Respondent, she continued to pay the higher rent amount at the direction of management that she do so until it reconciled her account with the overcharge award. Respondent testified that following receipt of the DHCR order she continuously contacted management via telephone to have her account adjusted for the overcharge award and eventually was able to reach David Tenenbaum, Petitioner's managing agent, sometime in April 2016. Despite her efforts, Respondent testified that no action was taken in response to her calls and testified that she even began receiving three-day rent demands but continued to send her rent checks which remained uncashed. Respondent testified that when she met with Mr. Tenenbaum sometime in 2017, he gave her an envelope with the uncashed checks. Both she and Petitioner then agreed that she would be issued a new lease and she was asked to issue Petitioner checks in the amount in the new lease. However, Respondent testified that she continued to disagree with the amount of the monthly rent calculated by Petitioner and did not understand why she was being asked to issue the rent checks despite her concerns. According to Respondent, Mr. Tenenbaum's response to her concerns was that she needed to file a petition for administrative review ("PAR") with DHCR since at the time the overcharge occurred Petitioner did not own the building and did not have information about her overcharge claim.

In support of her breach of the warranty of habitability claim, Respondent testified that the floors in the apartment are the main issue because they are causing her son to have splinters on his feet. Respondent testified that the floors have been in this state for seven years, and were an issue even when the building was under different management. She contacted Petitioner sometime in 2015 when an individual named Angel was the building manager and sent photographs of the condition. Although Petitioner addressed a portion of the floor, not only was the work not done in a workmanlike manner, but a portion of the floor was not repaired and the floor is now two different shades. In addition, Respondent testified that on December 6, 2019, the ceiling in the bathroom collapsed causing the bathroom to flood which damaged the sink. When she contacted Petitioner, workers accessed the apartment and connected the bathroom light but left a hole in the ceiling and wires sticking out. Ms. Soto testified that she informed the building superintendent but Petitioner's workers needed a week for the wall to dry. However, a week came and went and the wires in the bathroom are still sticking out and the light is in a different place than before the ceiling collapse. Respondent further testified that there are huge holes in the apartment hallway through which mice come through, and that although Petitioner had to paint the apartment two years ago it only painted some areas in the apartment.

On cross-examination, Respondent testified that from the time she moved into the building through the time she received the DHCR order, the building was under receivership. The building was later sold at auction, and when Petitioner took over she began sending her rent [*3]checks to its office in Riverdale. Ms. Soto also testified that at some point her ledger was adjusted to reflect the DHCR order and she was given a rent credit. Ms. Soto added that she notified Petitioner of the conditions in the apartment through its website.

Next, Petitioner called David Tenenbaum as its witness Mr Tenenbaum testified that he works for Chestnut Holdings of New York where he manages and oversees its legal department According to him, Petitioner purchased the building following a foreclosure after the building had been managed by a receiver Mr Tenenbaum testified that when Petitioner took over the building it continued to charge Respondent rent based on the lease that was in effect at that time and based on the rent the receiver had been charging Respondent When Petitioner received the order from DHCR in March 2016, Petitioner was slightly delayed in making the adjustment to Respondent's account because there was a glitch in Petitioner's rent record keeping system or someone in the office overlooked the adjustment that had to be made to the rent being charged Respondent at the time However, the adjustment was made in June 2016 At the time Petitioner credited Respondent a total of $4,281 58 per the DHCR order The order also established Respondent's monthly rent at $1,372 60 and not the $1,575 60 Petitioner was charging Respondent, and this adjustment lowering Respondent's rent was made in September 2016 Mr Tenenbaum testified that as per Petitioner's rent ledger, three line item credits totaling more than $700 were applied to Respondent's account adjusting rent for the months of June 2016 through September 2016 Mr Tenenbaum testified that the lower rent appears for the first time on the ledger in October 2016, and that from this point forward all lease renewals and increases have been made strictly pursuant to the Rent Guideline Board ("RGB") increases based on Petitioner's interpretation of the DHCR order Mr Tenenbaum further testified that although Petitioner may have had to answer or supplement the overcharge complaint, the complaint was filed prior to Petitioner's ownership of the building Lastly, Mr Tenenbaum opined that the reason Petitioner's calculation of what is due Respondent differs from Respondent's calculations could be attributed to a period that DHCR did not include in its order which should have been the subject of a PAR

As for the conditions in the apartment, Mr. Tenenbaum testified that he has overseen the completion of repairs in the apartment for some time, and in doing so assigned and communicated with Israel Yaesh. Mr. Yaesh is a member of senior field personnel for Petitioner who has overseen some of the repairs in Respondent's apartment. Mr. Tenenbaum testified that

he did not know about the holes in the walls in Respondent's apartment because had he known, the condition would have already been addressed as were the cabinets and painting that had already been done in the apartment. According to Mr. Tenenbaum, the only issue that remained were the color of the floors which was only a cosmetic issue that Petitioner planned to address. As for the ceiling collapse and the light fixture in the bathroom, Mr. Tenenbaum testified that those issues were more recent and that Petitioner would address them.

On cross examination, Mr Tenenbaum testified that he first learned of the DHCR order sometime in March 2016 when the decision was first issued by the agency According to Mr Tenenbaum, the overcharge covers the period of January 1, 2012 through April 30, 2013 which the agency calculated to be in the amount of $4,281 58 Mr Tenenbaum acknowledged that as of November 2013 Petitioner was billing Respondent a monthly rent of $1,560 and that Respondent was billed at that rate prior to November 2013 as well as in May 2013 He further testified that at some point Petitioner made an adjustment to Respondent's account and gave her a rent credit of $5,024 80 Mr Tenenbaum then testified that there were no additional credits [*4]issued for the period after the DHCR order, the period between May 1, 2013 and April 30, 2016, because those were the subject of a potential PAR as it appeared that a number of months were not included in DHCR's calculations Mr Tenenbaum further testified that based on the DHCR order, Petitioner calculated the legal regulated rent for the apartment to be $1,359 01 as of May 1, 2013 As for the repairs, Mr Tenenbaum testified that the photographs depicting the conditions in the apartment are consistent with the photographs that his office has on file and confirmed that the floors are different shades

The main issue to be determined at trial is whether an overcharge occurred and whether the overcharge was willful entitling Respondent to treble damages.

Respondent argues that she has been overcharged from the period of May 1, 2013 through April 30, 2016 for a total rent overcharge of $7,267.80. However, Petitioner contends that it credited Respondent's account when DHCR issued its order finding an overcharge which Respondent is barred from challenging by the doctrine of res judicata. The dispute between the parties centers on the application of the DHCR order following the date the order was issued.

In its order, DHCR determined that Respondent was overcharged. The amount of the overcharge was determined to be $4,281.58 of which $1,017.51 was the interest the agency calculated was due after finding no willfulness. In its determination, DHCR also directed Petitioner to roll back the monthly rent to the legal regulated rent and to base all future lawful

increases in the rent on the monthly legal regulated rent of $1,359.01. The DHCR order covers the period of January 1, 2012 through April 30, 2013 because this was the date of the last rent payment information submitted by Respondent.

At the outset, the Court notes that Petitioner's argument that res judicata precludes Respondent from re litigating her claims herein is without merit as it is well established that "under the doctrine of res judicata, a final adjudication of a claim on the merits precludes relitigation of *that* claim and all claims arising out of the same transaction or series of transactions by a party or those in privity with a party" (*Ciraldo v JP Morgan Chase Bank, N.A.*, 140 AD3d 912 [2nd Dept 2016]) (emphasis added).

A review of the evidence adduced at the trial reveals that the period covered by the DHCR order and the period covering Respondent's claim herein do not overlap and the doctrine of res judicata thus does not apply as the agency's award goes through April 2013. Although Respondent's overcharge claim stems from the same DHCR order, Respondent here claims that she was overcharged *after* the date of the DHCR order for a period not covered by the order, starting in May 2013, and this claim is properly before the Court (emphasis added).

Even though the Housing Stability Tenant and Protection Act of 2019 ("HSTPA") changed the overcharge calculus and extended the statute of limitations for claims of rent overcharge, this month the Court of Appeals disallowed the retroactive application of the rent overcharge provisions contained in Part F of the HSTPA and ruled that "the overcharge calculation and treble damages provision" of the HSTPA "may not be applied retroactively" and held that the "appeals must be resolved under the law in effect at the time the overcharges occurred" which this Court interprets to mean that overcharge claims that accrued prior to the effective date of the HSTPA are to be resolved under the law in effect at the time of the overcharge (*Matter of Regina Metropolitan Co., LLC v Division of Housing and Community Renewal*, 2020 NY Slip Op 02127 [2020]).

Applying these developments to the facts here, this Court finds that Respondent's overcharge claim is to be resolved under the law in effect at the time of the overcharge which [*5]predates the effective date of the HSTPA. As such, Respondent's overcharge claim is limited to the four years preceding the filing of her claim which limits her claim to April 2015 forward.

In addition, the Court of Appeals in *Matter of Regina*, held that "under the prior law, treble damages were calculated based on two years' worth of overcharges, even though four years of

overcharges could be recovered" but that "under the HSTPA, treble damages are measured against the full overcharge amount, that is, up to six years of overcharges" (2020 NY Slip Op 02127 at 31). This limitation stems from Section 2526.1 (a) of the Rent Stabilization Code ("RSC") which provides that a complaint pursuant to this section must be filed with the DHCR within four years of the first overcharge alleged, and no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed and a penalty of three times the overcharge may not be based upon an overcharge having occurred more than two years before the complaint is filed (9 NYCRR § 2526.1).

DHCR determined that Petitioner overcharged Respondent in the amount of $4,281.58. The overcharge award covers the period of January 2012 through April 2014. The agency directed that Petitioner refund this amount to Respondent and directed Petitioner to roll back the rent to the legal regulated rent amount it calculated at $1,359.01 from May 2013 as well as calculate the current rent based on this figure.[FN1] Petitioner's rent breakdown reflects that Petitioner credited Respondent's account with the overcharge of $4,281.58 award in June 2016.

A review of Petitioner's rent ledger which runs from November 2013, reveals that as of November 2013 Petitioner was charging Respondent rent at the monthly rate of $1,560 and that as of December 2013 Respondent was paying rent at that rate [FN2] . Then the ledger reflects that beginning in January 2015, Petitioner began charging Respondent a monthly rent of $1,575.60 which Respondent paid. The ledger further reflects that Respondent was issued a credit for $4,281.58 on June 10, 2016 which corresponds with the amount to be credited Respondent per the DHCR order. Later, in September 2016, Petitioner issued Respondent an additional rent credit totaling $743.22. Despite the order's directive, Petitioner did not begin to charge Respondent the lower rent until October 2016 when the ledger reflects a monthly rent charged at the rate of $1,372.60 which amounts to a 1% increase in the legal regulated rent as determined by DHCR [FN3] .

The following table reflects the Court's calculations of the rent following the DHCR order using the RGB increases subsequent to the agency's order:

Lease Renewal Term	Rent Charged	Permitted RGB Increase	Overcharge
1/1/2013-12/31/2014(2 YR)	$1,560	$1,359.01 [FN4]	$200.99 x 20 mos [FN5]
1/1/2015-12/31/2015(1 YR)	$1,575.60	$1,372.60 OR 1% increase ($13.50)	$203 x 12 mos

1/1/2016-12/31/2016	$1,575.60	$1,372.60 OR 0% increase	$203 x 9 mos [FN6]

Based on the above calculations, the Court finds that Petitioner overcharged Respondent in an amount totaling $7,539.58 which takes into account the additional rent credit Petitioner issued Respondent in September 2016.[FN7] However, Respondent's overcharge award is limited to the period of April 2015 through September 2016 which results in an award totaling $3,654.[FN8]

The remaining question is whether the overcharge was willful and warrants treble damages.

It is well-settled that "an overcharge is presumed willful, and warrants a treble damage award under Administrative Code § 26-516 (a), 'unless the owner establishes by a preponderance of the evidence that the overcharge was not willful (*Matter of Hargrove v Division of Housing and Community Renewal*, 244 D2d 241 [1st Dept 1997]) (internal quotation marks and citation omitted). In *Hargrove*, the Appellate Division found that "there [was] no rational basis in the record to support DHCR's determination that the landlord's claimed misinterpretation of the J-51 law was in good faith, and that the overcharge was nonwillful" (*id*). The court questioned "why the landlord did not, for the purpose of rebutting the presumption of willfulness, come forward with some evidence that it did not take advantage of these benefits" (*id*). *Matter of Hargrove* was recently relied upon by the Appellate Term, First Department, where the Court affirmed the trial court's judgment after trial dismissing a nonpayment proceeding after finding that the landlord willfully overcharged the tenants and awarded tenants treble damages (*Morris Realty LLC v Caceres*, 66 Misc 3d 150[A] [App Term, 1st Dept 2020]).

Following a review of the evidence adduced at trial and the Court's calculations, this Court finds that the overcharge was indeed willful. The DHCR order was clear and unequivocal and provides that the rent as contained in the order was calculated through April 30, 2013 because that was the last rental payment information submitted by the tenant. Respondent did not and could not have anticipated that Petitioner would not credit her account upon receipt of the agency's order to comply with its determination. The order was issued in March 2016 and Petitioner's breakdown reflects that the overcharge award was applied to Respondent's account three months later in June 2016 but that despite the agency's directive that Petitioner roll back the rent to the amount indicated in the order Petitioner did not begin charging the correct rent [*6]until October 2016 and issued Respondent additional rent credits the month before in September 2016. In addition, Petitioner did not cash Respondent's rent checks which were issued per the amount in the DHCR order until February 2017. Petitioner's explanation for the

delay coupled with its belief that Respondent's remedy if she disagreed with its application of the DHCR order was to file a PAR falls flat of its burden to establish by a preponderance of the evidence that the overcharge was not willful and in fact shows willfulness as Petitioner fully appreciated the consequences of the order. Despite the above, the last overcharge here did not occur in the two years *preceding* the filing of Respondent's overcharge claim since Petitioner began billing Respondent rent at the rate determined by DHCR in its order in October 2016 and Respondent did not file her overcharge claim until April 2019 (*see* CPLR § 203 [f]) (emphasis added). As a result, treble damages may not be awarded Respondent.

Based on the foregoing, the petition is hereby dismissed. Petitioner is directed to credit Respondent's account with the amount of the overcharge as outlined above upon receipt of a copy of this Court's order. As for Respondent's counterclaim for breach of the warranty of habitability, Respondent's claim lacks the level of specificity required for the court to make a finding relating to when the conditions began and when they were finally corrected (see Real Property Law § 235-b, *Park West Management Corp v Mitchell*, 47 NY2d 316, 329 [1979], and *EB Management Properties, LLC v Sultan Al Maruf*, 63 Misc 3d 155(A) [App Term, 2d Dept, 2d, 11th and 13th Jud Dists 2019]). Notwithstanding the above, Respondent credibility testified that although repairs were made in the apartment, the work was not done in a workmanlike manner. Even though some of the conditions may be cosmetic in nature, Petitioner is directed to repair the conditions which include the wires in the bathroom, the holes in the hallway, painting of the apartment and repair of the floors when access may be safely arranged and all stay at home orders have been lifted by the Governor of the State of New York.

This constitutes the decision and order of this Court.

All trial exhibits will be available in Part G, Room 560 once the Court resumes all regular operation.

Dated: April 22, 2020

Christel F. Garland, JHC

Footnotes

Footnote 1: The DHCR order already awarded Respondent a credit for the overcharge which occurred between January 2013 and April 2013.

Footnote 2: Petitioner's Exhibit 1.

Footnote 3: Per the Rent Guidelines Board, the permitted increase for a lease commencing between October 1, 2016 and September 30, 2017 was 0% for a one-year lease and 2% for a two-year lease.

Footnote 4: Legal regulated rent as calculated by DHCR.

Footnote 5: From May 2013 through December 2014.

Footnote 6: The overcharge calculation is through September 2016 because Petitioner's breakdown reflects that Petitioner started to charge Respondent the correct amount in October 2016.

Footnote 7:$200.99 x 20 months = $4,019.80 + $203 x 12 months = $2,436 + $203 x 9 months $1,827 $743 22 $7,539 58

Footnote 8: April 2015 through December 2015 $203 x 9 months + January 2016 through September 2016 = 9 months $203 x 9 months.

Return to Decision List