2020-09-16

750 Wash. Partners LLC v. Scantlen

[*1]

750 Wash. Partners, LLC v Scantlen
2020 NY Slip Op 51106(U)
Decided on September 16, 2020
Civil Court Of The City Of New York, Kings County
Barany, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on September 16, 2020

Civil Court of the City of New York, Kings County

750 Washington Partners, LLC, Petitioner- Landlord,

against

Seth Scantlen, Respondent-Tenant, ABBIE KLENZMAN, JOHN DOE and JANE DOE Respondents-Undertenants

050081/20
Kenneth T. Barany, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent's Motion for Summary Judgment.

PAPERS NUMBERED

Petitioner's Notice of Motion, Affirmation in Support, Affidavit in Support & Exhibits ("A" - "H") 1,2,3

Respondent's Notice of Cross-Motion, Affirmation in Opposition to Motion and in Support of cross-Motion, Affidavit in Opposition and in Support of Cross Motion, and Exhibits ("A" — "B" and "2") 4,5,6

Petitioners Memorandum of Law in Opposition to Cross Motion 7

Upon the foregoing cited papers, the Decision and Order is as follows

This is a holdover proceeding commenced against Tenant Seth Scantlen ("tenant") a purported unregulated tenant after the expiration of his last lease None of the undertenants (Abbie Klenzman, John Doe and Jane Doe) have appeared, but respondent acknowledges undertenant Abbie Klenzman is his wife and there is no denying that undertenants' rights to continued occupancy, or lack thereof, are subject to that of tenant

In his answer tenant alleges several defenses and counterclaims as follows:

(a) Warranty of Habitability;

(b) Rent Overcharge;

(c) Defective Predicate Notice;

(d) Constructive Eviction;

(e) Retaliatory eviction;

(f) Attorney' s Fees

Petitioner now moves for summary judgment as well as a dismissal of tenant's (a) Second Counterclaim (rent overcharge); (b) Third Counterclaim (Defective Predicate Notice and (c) Sixth Counterclaim (' Fees). Tenant cross-moves for denial of the petitioner's motion and for the right to discovery vis a vis the status of the apartment. As to the Second and Third Counterclaims they are predicated upon tenant's assertion that the subject premises are subject to rent stabilization and that petitioner improperly pled that the premises are deregulated. Tenant focuses on a "legal rent" increase found in the DHCR registrations that raised the "legal rent" from $1007.00 per month to $1800.00[FN1] .

Petitioner, however, asserts initially that the rent increase in 2004 was the result of a combination of a vacancy increase, longevity increase and individual apartment improvements ("IAI's"). That the subject premises was duly deregulated years later through permissible vacancy and renewal increases over the years resulting in a legal rent exceeding $2,000 prior to tenant entering into occupancy in 2011 (see Exhibit "E" of the motion -the DHCR registrations where the legal rent exceeded $2,000.00 per month in 2009, and Exhibit "F" of the motion - the affidavit of former tenant Anna Marie Farley confirming that her legal rent in 2009 prior to the deregulation was $1957.18 when she vacated on or about March 30, 2009) See also RSL §26-504.2 and *Roberts* v *Tishman Speyer Properties, L.P.*, 13 NY3d 270, 918 N.E.2d 900 (2009).

Petitioner also asserts that under the recent holding of the Court of Appeals in *Matter of Regina Metro, Co., v New York State Div. of Hous. & Community renewal, 2020 NY Slip Op 02127, 2020 NY LEXIS 779* tenant is precluded from a "lookback" of the rental history beyond the four-year statute of limitations then in effect. Alternatively, that any look back beyond four years vis a vis the status of the subject premises requires a showing by tenant of the likelihood of fraud and none has been established.

Before getting into the main substantive issue underlying this motion, the court addresses that portion of petitioner's motion seeking to dismiss tenant's Sixth Counterclaim asserting a right to attorneys' fees under RPL §234. That section provides a tenant, upon a successful prosecution or defense of an action or proceeding, with the reciprocal right to seek legal fees where the lease only provides the landlord with such a right. Here no such right is provided to tenant or landlord.

The "legal fees" provision of the original lease between the parties (Exhibit "B" to the motion) specifically states:

> "In the event either Owner or Renter incurs legal fees and/or court costs in the enforcement of any of Owner's or Renter's rights under this lease or pursuant to law, neither party shall be entitled to therepayment of such legal fees and/or court costs."

Accordingly, tenant's Sixth Counterclaim seeking attorney's fees is dismissed.

The court next addresses the issue of whether tenant should be allowed to discovery regarding the rent increase in 2004. Prior to the enactment in 2019 of the Housing Stability Tenant Protection Act ("HSTPA") the scope of inquiry regarding an alleged rent overcharge or alleged improper deregulation was clearly established by the appellate courts. For a claim of rent overcharge, a party was limited to a four year "lookback rule" preceding the imposition of a claim, (former 25-516[a][2]; former 213-a; see *Conoson v Megan Holding LLC,* 25 NY3d 2015 [2015]. This "lookback rule" was reinforced by Chapter 116 of the Laws of 1997 which "clarified and reinforced the four-year statute of limitations" (*Thornton v Baron,* 5 NY3d 175, 180 [2005].

In the recent decision in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal,* 2020 NY Slip Op 02127, 2020 NY LEXIS 779,785 the Court of Appeals noted that the pre-HSTPA four-year statute of limitations:

> "was complimented by a record retention provision directing that certain Owners 'shall not be required to maintain or produce any records relating to rentals of such accommodation for more than four years prior to the most recent registration or annual statement for such accommodation' (citing former RSL §26-516[g]), see also RSC §2523.7[b] 'An owner shall not be required to produce any rent records in connection with (overcharge proceedings relating to a period that is prior to the base date'. '

> The court in *Matter of Regina* further noted:

> " The record retention provision permitted owners to dispose of records outside the four-year period (former RSL §26-516[g]; see Matter of Cintron v Calogero, 15 NY3d 347,354 [2010]; *Thornton,* 5 NY3d at 181), further evincing the Legislature's intent that records predating the recovery period not be used to calculate overcharges. Together, the statute of limitations, lookback provision and record retention rules formed an integrated scheme for calculating overcharges based on a closed universe of records pertaining only to the apartment's rental history in the four years preceding the filing of the complaint."

The court has noted above the position of the courts on rent overcharge to underscore the reluctance of the Court of Appeals to pierce the "look back" provisions in light of the long standing allowance for landlord's to dispose of records pre-HSTPA after four years. In fact, a very limited exception was carved out by the courts whereby the "look back rule" of four-years could be pierced.

As reaffirmed by the Court of Appeals in *Matter of Regina*:

> "In a series of cases, we confirmed that reviewing rental history outside the four-year lookback rule was inappropriate for purposes of calculating an overcharge, but we recognized a limited common-law exception to the otherwise -categorical evidentiary bar, permitting tenants to use such *evidence* only to prove that the [*2]owner was engaged in a fraudulent scheme to deregulate the apartment.[FN2]
>
> "

Tenant herein effectively claims that the absence of proof of IAI's should automatically constitute establishment of fraud sufficient to mandate a "look back". To adopt such a posture would completely ignore the policy of the Court of Appeals set forth in Regina not to prejudice landlord's for following a prior law which allowed them to dispose of old records. In this proceeding the rent increase occurred more than 16 years ago. Furthermore, this very argument was recently rejected by the Appellate Division First Department *post Regina* in *Fuentes v Kwik realty LLC,* 2020 NY Slip Op 04626. As stated therein:

> "Here, plaintiff failed to set forth sufficient indicia of fraud to warrant consideration of the rental history beyond the four-year statutory period from January 2014 The motion court improperly concluded that defendant's failure to maintain records of the alleged individual apartment improvements (IAIs) and its failure to provide notices under the rent stabilization Code relating to the last legal, regulated rent, were evidence of 'an attempt to circumvent the Rent Stabilization law.' While defendant failed to provide notices, defendant registered the apartment with DHCR. And, although, defendant concededly failed to maintain records of the IAIs, there is no requirement under the statute that such records be maintained indefinitely (see *Thornton v Baron,* 5 NY3d 175,181 [2005], citing *Matter of Gilman v New York State Div. of Hous. & Community renewal,* 99 NY2d 144, 149 [2002])"

In the case at bar respondent presents no "evidence" whatsoever of an alleged fraudulent scheme other than conjecture at the fact that in 2004 the rent increase exceeded the vacancy increase in effect and the longevity increase. To the contrary the rent registration, if anything, demonstrate a history of a landlord following the law sometimes to its own detriment. For example:

> (a) The Owner never raised the legal rent from 1984 to 1989;
>
> (b) From 1990 until 2003 (except for 1992) the Owner never increased the legal rent from $1007.00 per month. Throughout this period the owner on many

occasions offered a preferential rent which was actually lowered from $900.00 in 1991 and 1992 to $850.00 in 1995 and $896.00 (to accommodate a section 8 tenant);

(c) Even after the 2004 rent increase the Owner continued to provide preferential [*3]rents in most of the years.

Furthermore, while respondent has presented no evidence to pierce the four year statute, just conjecture, petitioner in the midst of the Covid crisis has managed to actually locate and provide an affidavit from the first tenant who took occupancy after the rent increase. Notably, she addresses the issue of the IAI's. In her affidavit (Exhibit "H" to the motion) Arianna Basco confirms that when she took occupancy in January 2004 the subject apartment was "newly renovated".

This is not a situation like in *Thornton* (supra) where the owner engaged in "an egregious, fraudulent scheme to remove apartments from stabilization by conspiring with tenants, who shared in the illegal profits, by falsely agreeing the apartment was not being used as a primary residence (and utilizing the courts as a tool to obtain false declarations to that effect) to rent at market rates and then sublease at even higher rates." (*Matter of Regina at 786).*

As further noted by the court of Appeals in *Matter of Regina*:

"We elaborated on this fraud exception to the lookback rule in *Matter of Grimm v New York Div. of Hous. & Community Renewal,* holding that where a tenant had made a "colorable claim of fraud" by identifying "substantial indicia" i.e. evidence," of "a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization," that apartment's "rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date" (15 NY3d 358, 366-367 [2010]").

As noted above, whether pre-HSTPA or post-HSTPA, whether pre-*Matter of Regina* or post *Matter of Regina,* respondent has failed to present "substantial indicia" of a fraudulent scheme warranting the finding of a "colorable claim of fraud"**[FN3]** . The petitioner had an absolute right to deregulate the apartment in question prior to tenant's occupancy as a result of legitimate increases taken over the span of years, see *Altman v 285 W. Fourth LLC,* 31 NY3d 178, 99 NE3d 858, *reargument denied,* 31 NY3d 1136, 106 NE3d 743 [2018]. Moreover, a single rent increase, in and of itself, does not constitute a fraudulent scheme sufficient to

pierce the "look back" period, see *Grimm v State Div. of Hous. & Cmty. Renewal Office of Rent Admin.,* 15 NY3d 358, 938 NE2d 924 [2010].

Equally unavailing is respondent's argument that somehow petitioner's use of a rent stabilized lease form as respondent's initial lease somehow confers regulatory status to respondent. Rent stabilization coverage is a matter of statutory right and cannot be created by waiver or estoppel, see *Matter of Trainer v State of NY Div. of Hous. & Community Renewal,* 162 AD3d 461 (1st Dept., 2018); *Heller v Middagh St. Assoc.,* 4 AD3d 332 (2nd Dept., 2004). The fact that a lease is designated as rent stabilized does not automatically confer such status, see *512 East 11th St. HDFC v Grimmet,* 148 Misc 2d 971,972 (App. Term, 1st Dept., 1991), *aff'd on other grounds,* 181 AD2d 488 (1st Dept., 1992)[FN4] . Furthermore, the fact that the apartment continued to be registered as stabilized after the vacancy deregulation also does not act as creating regulatory status. As noted in *Cvek 446 E. 88th St. LLC v Fish,* 67 Misc 3d 137(A) (App Term, 1st Dept. 2020) :

> "As the trial court properly held, it does not avail tenant that landlord subsequently mistakenly registered the apartment as stabilized or that landlord's predecessor tendered certain renewal leases using rent stabilization forms. Rent stabilization coverage is a matter of statutory right and cannot be created by waiver or estoppel "

A party moving for summary judgment must present a prima-facie showing of entitlement to judgment as a matter of law and tender sufficient evidence in admissible form demonstrating the absence of material issues of fact, see *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]. Based upon this court's holding petitioner has established its right to summary judgment on the issue of the non-regulatory status of the subject premises.

To allow respondent to pierce the lookback rule back to 2004 under this deficient showing of "evidence" would be violative of traditional notions of substantial justice. As noted by the Court in *Matter of Regina (supra)* with respect to rent overcharge inquiry provisions under the HSTPA, "Such a vast period of retroactivity upends owners' expectations of repose relating to conduct that may have occurred many years prior" (at 804). Accordingly, the Second and Third counterclaims of tenant are dismissed.

Additionally, while the notice of motion submitted by petitioner does not seek to dismiss tenant's Fifth Counterclaim based upon an allegation of Retaliatory Eviction under RPL§223-b, the body of the motion does. Moreover, both parties have addressed this issue in their respective papers. Even if that were not so, this court cannot overlook a deficiency mandating

dismissal of that counterclaim. RPL §223-b (4) in pertinent part states: "Retaliation *shall* be asserted as an *affirmative defense* in such action or proceeding" (emphasis supplied). It is extremely rare that a statute designates how an allegation should be pled. The word "shall", mandates the application of the legal maxim "*inclusio unius est exclusio alterius",* the inclusion of one excludes the inclusion [*4]of others. In designating that the statute should be used as a defense, it is clear that it should not be used as a counterclaim[FN5] .

In conclusion, petitioner's motion is granted to the extent of striking tenant's Second, Third, Fifth and Sixth counterclaims. It is further granted to the extent of granting petitioner summary judgment as against tenant Seth Scantlen with the entry of a judgment of possession against Seth Scantlen and issuance of a warrant forthwith. Execution is stayed through the latter of October 31, 2020 or any applicable administrative, legislative or executive stays in effect due to the Covid crisis. As to the remaining respondents, OCA currently has a hold on the entering of any judgments on default. Once that prohibition is lifted petitioner may move on eight days notice to the remaining respondents for the court to schedule an inquest against the remaining respondents.

Tenant's cross-motion is denied in its entirety. Tenant's remaining counterclaims are potential offsets to petitioner's claims for rent and/or use and occupancy. Specifically breach of the warranty of habitability (First Counterclaim and First Affirmative Defense) and constructive eviction (Fourth Counterclaim). As the petitioner's motion for summary judgment did not incorporate a request for a money judgment, the court severs petitioner's monetary claims for rent and/or use and occupancy for a plenary action. The two potential offsets to such claims raised in Tenant's answer are reserved by tenant for any such plenary action.

This constitutes the Decision and Order of the Court.

SO- ORDERED

DATED September 16, 2020

KENNETH T. BARANY

J.H.C

Footnotes

Footnote 1: The rent increase actually consisted of a two-year permissible vacancy increase ($201.40); a ten (10) year permissible longevity increase (60.42) pursuant to RSC §2522.8(a) and Individual Apartment Increases ("IAI's") ($531.18). The IAI's would have required $21,247.20 in expenditures.

Footnote 2: This court rejects petitioner's attempt to equate the issues of deregulation and rent overcharge vis a vis the four-year lookback. This was flatly rejected by the Court in *Matter of Regina* (footnote 4) where the court stated "There is significant disagreement between us and the dissent concerning the pre-HSTPA law. Critically, there is a distinction between an overcharge claim and a challenge to the deregulated status of an apartment, although the two types of claims are repeatedly conflated by the dissent "

Footnote 3: In *Matter of Regina* the Court rejected the retroactive application of the provisions of the HSTPA (Part F0 with respect to review of a rent overcharge claim, the formula for computation of the legal rent and treble damages. The court held that to apply those provisions retroactively offended traditional notions of substantial justice embodied in the Due Process Clause. Under the HSTPA "[e]xamination of [a] rent history that predates the period covered by the former lookback rule is no longer precluded. Instead, DHCR and courts are now required to 'consider all available rent history which is reasonably necessary' to investigate overcharge claims and determine legal regulated rent ." *Matter of Regina* at 792.

Footnote 4: The fact that tenant "assumed" he was rent stabilized based upon the forms presented did not preclude him from investigating his status or conferring with counsel prior to his taking occupancy.

Footnote 5: The court will not entertain at this late stage a motion to amend the answer. Issue has already been joined leading to petitioner's motion and a request for relief by tenant in the cross-motion in seeking discovery. When a party relies on a specific statute in pleading, it is incumbent upon that party to meet its requirements when submitting that pleading.

Return to Decision List