2020-10-14

Upper Broadway J LLC v. Iverson

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART G

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UPPER BROADWAY J LLC,

Petitioner,

-against-

L&T Index No. 80175/17

JANICE IVERSON,

DECISION / ORDER

Respondent.

PREMISES: Apartment 1E
216 West 108TH Street
New York, New York 10025

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HON. TIMMIE ERIN ELSNER, J.H.C.

Recitation, as required by CPLR §2219(A), of the papers considered in the review of respondent's motion to renew this Court's November 1, 2018 decision pursuant to CPLR § 2221:

Papers	**Numbered**
Respondent's Notice of Motion; Affirmation in Support; and Annexed Exhibits	1
Petitioner's Affirmation in Opposition	2
Respondent's Reply Affirmation	3

Upon the foregoing papers, the Decision/Order of this Court is as follows:

PROCEDURAL HISTORY & STIPULATED FACTS

The underlying facts and procedural history of this matter, have been set forth in detail in the court's November 1, 2018 Decision and Order ("Decision"), and are incorporated herein by reference. Following issuance of the Decision, both parties filed notices of appeal.

Petitioner then moved to reargue and/or renew the Decision by motion originally returnable February 28, 2019. The basis for the motion was, in part, petitioner's registration of the premises as stabilized subsequent to issuance of the Decision. This motion was denied by Order and Decision, dated July 2, 2019, wherein the court adhered to the Decision noting petitioner's fraudulent scheme to deregulate the premises. The Decision required that the parties settle an order calculating damages resulting from respondent's overcharge claims. Ultimately, respondent moved to settle an order by motion, dated November 25, 2019. The motion was still pending at the time the court recessed due to COVID-19 concerns.

By motion, returnable May 20, 2020, petitioner again moved to reargue the Decision. Petitioner alleged that the Court of Appeals decision, *Matter of Regina Metro. Co., LLC v DHCR et. al*, __NY3d__, 2020 N.Y. Slip Op. 02127, 2020 WL 1557900 [2020], mandated its modification. Subsequent to the filing of opposition and reply papers, petitioner withdrew its motion on August 3, 2020. Respondent now moves, based on *Regina,* to renew that portion of the Decision which calculated a legal rent for the premises using methodology other than the "default formula."

LEGAL ANALYSIS

Respondent moves to renew the decision pursuant to CPLR § 2221(e) which provides:

> A motion to renew: (1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion.

The basis for respondent's motion are recent appellate rulings which alter the analysis courts are required to utilize in assessing a tenant's rent overcharge claims and a landlord's defenses, the calculation of damages, if any, and the methodology for setting the legal regulated rent ("LRR").

The Court of Appeals, in the *Matter of Regina Metro. Co., LLC, supra*, effectively reversed prior appellate law holding those provisions of *HSTPA* relating to overcharge calculation cannot be applied retroactively prior to their enactment. *Regina* conclusively stated that under pre-*HSTPA* law, the four-year lookback rule and standard method of calculating LRR govern certain proceedings absent fraud. This "lookback" period is applicable in instances where a tenant's overcharge claim accrued prior to enactment of *HSTPA*. Based upon *Regina*, the Appellate Division, First Department, in *Dugan v London Terrace Gardens, LP*, __AD3d __, 2020 N.Y. Slip Op. 04239, 2020 WL 4212776 [July 23, 2020], recalled and vacated its prior decision and order, and "remanded the proceeding to the trial court to set forth a methodology for calculating rents and any overcharges . . ." *See also, Vendaval Rlty. v Felder*, 67 Misc3d 145 [App Term, First Dept 2020].

Regina also reaffirmed longstanding case law that courts may look beyond the four-year period in limited instances, permitting tenants to use evidence which predates the limitation period to prove that the owner engaged in a fraudulent scheme to deregulate an apartment. Specifically, the

Court of Appeals held:

> The rule that emerges from our precedent is that, under the prior law, review of rental history outside the four-year lookback period was permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate and, even then, solely to ascertain whether fraud occurred - not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations (*Grimm, 15NY3d at 367*). In fraud cases, this Court sanctioned use of the default formula to set the base date rent.

Citing *Thornton v Baron*, 5 NY3d 175 [2006], the Court of Appeals explained a "default formula" must be utilized in calculating the rent where fraud which predates the limitation period was found, due to the preclusive effect of the four-year rule:

> In *Thornton*, the owner engaged in an egregious, fraudulent scheme to deregulate the apartment. For overcharge calculation purposes, the Court acknowledged the preclusive effect of the four-year lookback rule, deeming the LRR charged before that period to be "of no relevance" (*Id.* at 180). We held that the LRR should be based on a "default formula," otherwise reserved for cases where there are no reliable rent records, setting the base date rent as "the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date."

See also, *Vendaval Rlty. v Felder*, *supra*, where the Appellate Term, First Department held "[a]pplying pre-*HSTPA* law to this case, we agree with this court that the summary judgment record conclusively establishes that landlord engaged in a fraudulent scheme to remove the subject apartment from rent stabilization," however the court "erred in considering the rental history outside the four-year lookback period for purposes of calculating the base date rent."

In this case, undisputed New York State Homes and Community Renewal ("HCR") and New York City Department of Finance ("DOF") records as well as documents produced by petitioner pursuant to discovery reveal that: "(1) no annual registrations were filed with HCR from 2011

through 2015; (2) the subject building has been receiving J-51 benefits since 2010/2011; (3) despite the undisputed rent-stabilized status of the premises, petitioner did not designate tenants as rent-stabilized in HCR registration from 2011 through 2015; (4) petitioner did not offer a rent-stabilized lease to either respondent or respondent's predecessors; and (5) petitioner repeatedly raised the LRR beyond the Rent Guidelines Board increases. Documents reveal a pattern of unsubstantiated and unexplained increases in rent, preferential rents, and no evidence which might justify increases based upon alleged improvements to the premises. The leases supplied by petitioner do not match the HCR rent history."

Moreover, "petitioner failed to sustain its burden in refuting the presumption of wilfulness. It produced no documentation to support the failure to register the premises as rent-stabilized while receiving J-51 benefits." The court notes that in 2009, in *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009], the Court of Appeals held that apartments located in a building receiving J-51 benefits were subject to rent stabilization and must be registered as stabilized with HCR. Petitioner first received J-51 benefits in 2010/2011 after the *Roberts* decision was issued. "The leases supplied by petitioner allege the premises are un-regulated despite the undisputed fact that the premises are subject to rent-regulation, further supporting a finding of wilfulness. Finally, the leases do not reflect information registered with HCR. Petitioner does not address the inconsistencies and irregularities of the rental history of the premises. Instead, petitioner's counsel contends that the court may not review records beyond the four years based upon a conclusory allegation that there was no fraud on petitioner's part."

As set forth by the Court of Appeals in *Regina*, application of *HSTPA* to claims which accrued years before its enactment would, in many cases, create an unreasonable financial burden

on landlords. The *Regina* Court was, however, painstaking in its effort not to issue a blanket ruling which rewarded malfeasance on the part of a landlord. As part of the holding in *Regina*, the Court of Appeals retained the exception carved out through years of pre-*HSTPA* litigation relating to fraudulent de-regulatory schemes.

The court reiterates that portion of the Decision which finds that petitioner 's receipt of J-51 benefits and failure to register the premises as stabilized, in and of itself, warrants the Court's review into the reliability and legality of the $2,900 rent charged to respondent. Furthermore, the owner's actions constitute a fraudulent scheme to remove the apartment from rent regulation. Thus, a review of records beyond the four-year statute of limitations is warranted. The Court adheres to the Decision in this regard. The Court strikes and modifies the decision so as to utilize the "default formula" outlined in *Regina, Dugan, and Vendaval Rlty., supra,* in calculating the LRR. This rent will form the basis for any finding of overcharge and treble damages.

CONCLUSION

Based upon the foregoing, respondent's application to renew the court's November 1, 2018 decision and order is granted. Upon renewal, that portion of the order and decision which calculates the LRR for the premises as well as the period for calculation of damages is stricken and modified to reflect that the "default formula" will be utilized by the court to determine the LRR for the premises. Further, respondent shall be entitled to damages which results from the difference between the LRR determined by utilizing the "default formula" and the amount paid, less any arrears calculated at the LRR for the four-year period pre-dating imposition of the overcharge claim. Treble damages, if any, shall be determined by the court utilizing these figures.

The matter is referred to Resolution Part G to schedule a conference regarding the aforementioned hearing. The parties' claims relating to attorneys' fees are held in abeyance without prejudice pending a final determination in this matter.

This constitutes the order and decision of this court.

Dated: New York, New York
October 14, 2020

TIMMIE ERIN ELSNER, J.H.C.