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Isidoro v Team Props. LLC
2021 NY Slip Op 30543(U)
February 23, 2021
Supreme Court, New York County
Docket Number: 450688/2020
Judge: Margaret A. Chan
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN **PART IAS MOTION 33EFM**

Justice

---X

LEOPOLDO ISIDORO; JULIAN ISODORO; FLORENCE MEJIA,

Plaintiffs,

- v -

TEAM PROPERTIES LLC;

Defendant.

---X

INDEX NO. 450688/2020

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers 11, 12,13,14,15,16, 17, 18, 21, were read on this motion to DISMISS.

Defendant moves pursuant to CPLR 3211(a)(7) for an order dismissing (i) the first cause of action seeking a declaration that plaintiffs' tenancies are subject to the New York City Rent And Rehabilitation Law or the Rent Stabilization Law of 1969, as amended and New York City Administrative Code § 26-504(b)("Rent Stabilization Law and Code"), and (ii) the second cause of action for a permanent injunction requiring defendant to offer plaintiffs renewal leases pursuant to the Rent Stabilization Law and Code. Plaintiffs oppose the motion, which is denied for the reasons below.

Background

Unless otherwise noted, the following facts are based on the allegations in the complaint. Defendant is the landlord and owner of the building located at 176 East 109th Street, New York, NY ("the Building"). Plaintiffs are long-time tenants of the various apartments ("the Apartments") in the Building, which is a class "A" multiple dwelling. The current and previous owners of the Building "have treated the Apartments as rent-stabilized for decades [and] [i]n the years where they provided [p]laintiffs with renewal leases, those leases specifically stated that [p]laintiffs' Apartments were rent-stabilized and sought rent increases consistent with the Rent Guideline Board adjustments in effect at the time" (NYSCEF #1, ¶ 5).

While the Building "consists of five units as currently configured … [it] contained six or more apartments at some point between 1974 and 1988, [and therefore] the Apartments are rent-stabilized … ." (*id.,* ¶¶ 1, 8). The rent-stabilized status of the Apartments is evidenced by the conduct of the current of prior owners

in providing renewal leases consistent with the Rent Guideline Board adjustments, the low rents charged even though the plaintiffs each occupy a three-bedroom apartment, and the layout of Building, including that the Apartments have two or three entrances (*id.*, ¶¶ 28-30). In 1988, the previous owner told Margarita Isidoro, who is plaintiff Julian Isidoro's wife, that "each apartment was specifically designed to house more than one household" (*id.*, ¶ 30). In November 2019, plaintiff received non-renewal notices from defendant "stating that [defendant] would not renew the [p]laintiff's leases and ordering them to vacate their Apartments by February 29, 2020 … and that [p]laintiffs' Apartments are not rent-stabilized because they were 'within a building containing less than (6) six apartments'" (NYSCEF #1, ¶ 26; NYSCEF #7).

After the plaintiffs received the non-renewal notices, they commenced this action seeking a declaration that the Apartments are rent-stabilized and injunctive relief requiring defendant to offer rent-stabilized leases to defendants.

Defendant moves to dismiss the complaint for failure to state a cause of action on the ground that the Building is not rent-stabilized. Specifically, it argues that as the Building contains less than six apartments, plaintiffs' tenancies are not subject to the Rent Stabilization Law and Code, citing NYC Admin. Code § 26-504(b), which provides that the law is applicable to "Class A multiple dwellings not owned as a cooperative or a condominium …containing six or more dwelling units…" and Rent Stabilization Code § 2520.11(c) which exempts buildings "containing fewer than six housing accommodations" (NYCEF # 12, ¶ 20). As for the allegations in the complaint that sometime between 1974 and 1988, that the Building consisted of six or more units, defendants argue that these allegations are based on "conjecture and surmise," and "cannot override the incontrovertible fact that the Building never contained more than five (5) dwelling unit" (*id.*, ¶ 19). With regard to the allegations that defendant and previous owners treated the Apartments as rent-stabilized by charging below market rate rent and offering rent-stabilized leases and renewal leases, defendant asserts that rent stabilization is a matter of statutory right which cannot be created by waiver or estoppel based on conduct of the building owner.

In support of its motion, defendant submits the affidavit of Derek Cohn, who is a member of defendant and the registered managing agent of the Building (NYSCEF # 13); documents including the Building's deed; renewal leases with plaintiffs; and an "I-Card" (NYSEC # 14). Mr. Cohn states that because it was constructed in 1906, the Building does not have a certificate of occupancy but instead "has an 'I-Card' listing the Building's legal use, configuration and mechanical details that was filed with the New York Department of Buildings" (*id.,* ¶ 3). He states that the I-Card, which is dated March 14, 1938, indicates that the "'Legal Occupancy'" of the Building is five (5) apartments [and] … contains a floorplan showing the configuration of each story of the Building (*id.,* ¶ 4; *see*

NYSCEF # 14). He further states that "[t]he configuration of each floor as depicted on the I-Card is consistent with the current floorplan of each floor of the Building [and therefore] … the Building always contained four (4) class "A" apartments and one cellar apartment and cannot be subject to the rent stabilization law" (*id.*). With respect to the use of rent stabilized lease and renewal forms, Mr. Cohn states that "I have always known the [p]laintiffs' tenancies were not subject to the Rent Stabilization Law, but I used the form rent stabilized leases because they were convenient [and] … I have never registered the subject apartments with the Department of Housing and Community Renewal because the Building contains fewer than six (6) class 'A' dwelling units" (*id.,* ¶ 12).

In opposition, plaintiffs argue that their complaint alleging that the Building contained at least one additional housing accommodation sometime after the base date of January 1, 1974, is sufficient to support allegations that the Building is rent-stabilized. Moreover, plaintiffs assert that this theory is adequately supported by allegations that each Apartment has two or more entrances, statements by the former owner that the Apartments were intended to house more than one household, and that the current and previous owners treated Building as rent-stabilized based on the rent charged and their use of rent stabilized leases and renewals. In addition, plaintiffs submit HPD violation reports from 1977 received in response to their FOIL request which plaintiffs assert show the Building was being used at the time for six or more housing accommodations (NYSCEF # 25). Specifically, they point to a violation for "a nuisance consisting of bed and mattresses used for sleeping quarters cellar at rear section," and another requiring owner to "provide app'vd fire proof self-closing door with key operated deadbolt & latch set peephole & chain door guard at entrance to 4th [story] apts."

In reply, defendant argues that plaintiff has failed to refute its showing that the Building always contained five dwelling units and relies solely on vague and unsubstantiated allegations to the contrary. As for the evidence of HPD violations relied on by plaintiffs, defendant asserts that the violations are immaterial as they do not relate to a violation of the Building's legal capacity.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, "whether a plaintiff … can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]). At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly

contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference'" (*Morgenthow & Latham v Bank of New York Company, Inc.,* 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). However, dismissal based on documentary evidence may result "only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it'" (*Acquista v New York Life Ins. Co.,* 285 AD2d 73, 76 [1st Dept 2001]), quoting *Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]).

"[H]ousing accommodations in buildings built before January 1, 1974, with more than six units are subject to rent stabilization" *(Matter of Golden Horse Realty, Inc v New York State Div. of Hous. & Community Renewal*, 173 AD3d 612, 613 [1st Dept 2019]; *see also* NYC Admin. Code § 26-504 [b]; Rent Stabilization Code § 2520.11[c]). Here, viewing the alleged facts in the light most favorable to plaintiffs, the court finds that the allegations in the complaint that the Building consisted of six or more apartments at some point between 1974 and 1988 are sufficient to support plaintiffs' claims for a declaration that the Apartments are rent stabilized, and for injunctive relief requiring defendants to provide plaintiffs with rent stabilized leases (*see e.g., Matter of Golden Horse Realty,* 173 AD3d at 613 [upholding respondent's determination that apartment was rent stabilized when the building contained more than six housing accommodations on the applicable base date even though it was subsequently converted to less than six apartments]; *Matter of Shubert v New York State Div. of Hous. & Community Renewal*, 162 AD2d 261, 261 [1st Dept 1990] [finding that "combining apartments, thereby reducing the number of residential units from seven to five subsequent to the base date for rent stabilization purposes, cannot effect an exemption from pertinent regulations"]).

And, plaintiffs' claims that the Building is rent stabilized are supported by allegations that defendant and previous owners treated the plaintiffs as rent stabilized tenants;[1] that the Apartments each contain two or more entrances; and that the previous owner stated that the Apartments were intended to house more than one family. Moreover, documents submitted by plaintiffs regarding the HPD violations in 1977 potentially lend further support to their theory that the Building contained more than five housing accommodations as defined by the Rent Stabilization Law and Code after the 1974 base date.

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[1] While as defendants argue the parties' treatment of the tenancy as rent stabilized is insufficient alone to render the Apartments statutorily protected (*see e.g.*, *546 W. 156th St. HDFC v Smalls,* 43 AD3d 7, 11-12 [1st Dept 2007]), allegations and evidence that the tenants were offered rent stabilized leases and renewals and were charged below market rate rents support plaintiffs' theory that the Apartments are subject to Rent Stabilization Law and Code.

Next, defendant's evidence, including the I-Card which purports to show that consistent with its current configuration the Building had five legal apartments at the time it was built, does not flatly contradict the allegations in the complaint that the Building is subject to rent stabilization. In particular, even assuming that this evidence indicates that the Building was originally intended to house five legal apartments, such evidence does not eliminate the possibility that, as alleged in the complaint, the Building was used for six or more housing accommodations after the base date (*see e.g. White Knight Ltd. v Shea*, 10 AD3d 567, 567 [1st Dept 2004] [finding that premises was rent stabilized when it consisted of at least eight residential units even though the units, which lacked windows, "do not resemble traditional apartments"]).

Finally, to the extent that the statements in Mr. Cohn's affidavit conflict with the allegations in the complaint, such statements are not a basis for granting dismissal (*see Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007] [noting that "affidavits, which do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint … and do not otherwise conclusively establish a defense to the asserted claims as a matter of law"][internal citations omitted]).

Conclusion

In view of the above, it is

ORDERED that defendant's motion to dismiss is denied; and it is further

ORDERED that defendant shall file its answer within 20 days of the efiling of this order; and it is further

ORDERED that a preliminary conference will be held by telephone on April 15, 2021, at noon, with a call-in number to be provided by the court.

This constitutes the Decision and Order of the court.

2/23/2021
DATE

MARGARET A. CHAN, J.S.C.
MARGARET A. CHAN, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE