2022-08-11

Najera-Ordonez v. 260 Partners L.P.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

JORGE A NAJERA-ORDONEZ et al.

INDEX NO. 160546/2017

MOT. DATE

- v -

MOT. SEQ. NO. 003

260 PARTNERS L.P. et al.

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

This is a class action alleging *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]) type J-51 rent overcharges. Plaintiffs now move for summary judgment in their favor and to dismiss defendants' affirmative defenses and counterclaims. Defendants oppose the motion and cross-move for an order: (a) granting them summary judgment; (b) permitting them to file and amend DHCR apartment registrations for 2013 through 2017 in accordance with the four-year rule; and (c) scheduling a hearing before a special referee to determine the apartments' current rents and Plaintiffs' overcharge damages in accordance with the four-year rule. Plaintiffs oppose the cross-motion. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available.

In an interim order dated March 11, 2022, the court directed plaintiff to refile each exhibit on NYSCEF and adjourned the motion for oral argument on April 19, 2022. Oral argument was held on that date. Subsequently, in an interim order dated July 19, 2022, the court erroneously scheduled this motion for oral argument again. Since that order was issued in error, it is hereby *sua sponte* vacated, as the court advised via email to the parties on July 27, 2022. The court's decision on the motion and cross-motion follows.

Plaintiffs Jorge A. Najera-Ordonez and E. Lopez, individually, and on behalf of all others similarly situated, tenants and former tenants at the building located at 260 Convent Avenue in Manhattan (the "building" or "260 Convent"). Specifically, there are 37 apartments at issue. Defendants are 260 Partners, L.P., which owns the apartment building and Beach Lane Management, the managing agent for the building.

The undisputed facts are that following *Roberts*, *supra*, which held that rent-regulated apartments could not be removed from rent stabilization while the building received J-51 benefits, defendants continued deregulating units in the building. Specifically, eight units were removed from the rent-

Dated: _____

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐**GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

stabilization rolls after *Roberts* was decided. Further, Mitchell Rothken, a manager of Beach Lane, admitted that he, and Beach Lane, knew of the Roberts decision in 2009. It is also undisputed that the defendants did not promptly re-register units after the First Department's decision in *Gersten v 56 7th Ave. LLC*, (88 AD2d 189 [1st Dept 2011]) decision, which required that apartments deregulated pre-*Roberts*, needed to be returned to the rent-stabilization rolls promptly. Finally, plaintiffs have shown that when the defendants re-registered apartments for rent-stabilization, they utilized preferential rents in violation of guidance provided by DHCR vis-à-vis its J-51 FAQ (*see i.e. Casey v Whitehouse Estates, Inc*., 197 A.D.3d 401 [1st Dept 2021]).

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

On this record, plaintiffs have thus shown that the defendants engaged in fraud and not just because they deregulated apartments while receiving J-51 benefits (*Hess et al v EDR Assets*, 200 AD3d 491 [1st Dept 2021]; see *Casey, supra*, J. Gische, dissent; *see also Chester et al. v Cleo Realty Associates, L.P*., Index No. 151972/2017 [Sup Ct., NY County July 6, 2022] [J. Nervo]). Contrary to defendants' contention, plaintiffs have shown more than merely allege the dates of the deregulations. Defense counsel asserts that "[i]ndeed, other than apartment 105, these apartments were deregulated or last registered as rent stabilized prior to March 6, 2012, the date that the appeal from *Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189 (1st Dep't 2011), in which the Appellate Division first determined that Roberts applied retroactively, was withdrawn." This argument is unavailing in the face of the undisputed facts on this record.

Mitchell Rothken, a manager of Beach Lane, the managing agent for the building testified in another J-51 action, that he, and Beach Lane, knew of the *Roberts* decision in 2009. In 2015, Beach Lane issued refunds and registered rent-stabilized units in a nearby building but took no action at 260 Convent. In 2016, the Division of Housing and Community Renewal ("DHCR"), issued a "J51 FAQ," which advised landlords to re-register their units, yet defendants waited an additional six months to register. When they did register, they used rents for some of the units that were higher than the rent being paid by tenants. Such acts were in contravention to the explicit guidance from DHCR in the J51 FAQ which advised that, "[t]he legal regulated rent to be registered cannot exceed the actual rent being paid by the tenant." In total, defendants' conduct demonstrates a fraudulent scheme to deregulate the apartments at the building (*see i.e. Kreisler v B-U Realty*, 164 AD3d 1117 [1st Dept 2018] [reliance on pre-*Roberts* framework rejected since wrongdoing occurred after *Roberts* decided, other litigation alleging same or similar misconduct relevant and probative of a fraudulent scheme to deregulate]; *Nolte v Bridgestone,* 167 AD3d 498 [1st Dept 2018] [failure to register 31 apartments as rent stabilized when applicability of *Roberts* is clear supports finding a fraudulent scheme to deregulate]; *Montera v. KMR Amsterdam LLC*, 193 AD3d 102 [1st Dept 2021] [ignorance of the law is not a defense to a claim that a landlord engaged in a fraudulent scheme to deregulate]).

Defendants argue that the issue of whether they engaged in a fraudulent scheme cannot be answered on a building-wide basis but must be considered apartment by apartment. The court disagrees. Defendants' treatment of all of the apartments at the building should not be considered myopically in a vacuum (*see i.e. Nolte, supra*; *see i.e. Chester v. Cleo Realty Associates, L.P.*, Index Number 151972/2017 [Sup Ct, NY Co July 6, 2022] [J. Nervo, F.]). Defendants contend that only eight apartments were deregulated after *Roberts*, but there is no dispute that defendants did not promptly attempt

to register the 29 apartments improperly deregulated before *Roberts.* Defendants' reliance on *Gridley v. Turnbury Vil., LLC*, (196 AD3d 95 [2d Dept 2021]) is misplaced, as the deregulation at issue was made in good faith. There is no evidence on this record that defendants' actions here were made in good faith. Plaintiffs are also entitled to summary judgment dismissing defendants' affirmative defenses. Beach Lane is not immune to liability because as plaintiffs' counsel correctly points out, it participated in the fraudulent scheme and is therefore a proper party. Thus, the second and third affirmative defenses that Beach Lane has no privity with plaintiffs or is an agent for a disclosed principal are severed and dismissed. The remaining defenses are either meritless (fraud with particularity, previous recovery, compliance with application regulations, primary residence, statute of limitations, unjust enrichment), conclusory (another adequate remedy at law, good faith reliance, waiver/release/estoppel, documentary evidence, failure to state a cause of action) or inapplicable (unconstitutional retroactive damages, plaintiffs do not seek treble damages in this class action, four-year defense, RSC § 2528.4[a]).

Since plaintiffs have established by clear and convincing evidence that the defendants engaged in a fraudulent scheme to deregulate the subject apartments, the default formula under RSC § 2522.6[b][3] must be applied (*see i.e. Casey v Whitehouse Estates*, 197 AD3d 401 [1st Dept 2021]; *see generally Thornton v. Baron*, 5 NY3d 175, 180 [2005]; *Matter of Grimm v. State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.,* 15 NY3d 358 [2010]; *Regina Metropolitan Co., LLC v. New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 [2020] [footnote 11]). Accordingly, the issue of the proper calculations for base rent dates and legally regulated rent-stabilized rents utilizing the DHCR's default formula for each of the 37 apartments at issue is hereby referred to a Special Referee or JHO to hear and **report**. After a motion to confirm or reject the Report of the JHO/Special Referee is decided, plaintiffs may move for the entry of money judgments for rent overcharges and legal fees, if any.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that the court's interim order dated July 19, 2022 which erroneously scheduled this motion for oral argument on August 2, 2022 is vacated; and it is further

ORDERED that plaintiff's motion is granted to the extent that the court finds that the defendants engaged in a fraudulent scheme to deregulate the subject 37 apartments, the defendants' affirmative defenses are dismissed and the issues of:

(1) calculating the base rent date for each plaintiff's apartment utilizing the DHCR's "default formula;" and

(2) calculating the maximum legal regulated rent for each plaintiff's apartment

are referred to a Special Referee to hear and **report**; and it is further

ORDERED that plaintiffs shall, within 60 days from entry of this decision/order, serve a copy of this order with notice of entry, together with a complete Information Sheet[1], upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part and/or assign this matter to a JHO for the earliest convenient date; and it is further

[1] Copies are available in Room 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh (under the "References" section of the "Courthouse Procedures link).

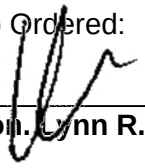
ORDERED that any motion to confirm or reject the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that and defendants' cross-motion is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: _____
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.