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Gomes v. Vermyck LLC

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NEW YORK STATE SUPREME COURT, PART 24– QUEENS COUNTY

Present: HON. SALLY E. UNGER

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JACOBUS GOMES and KATHRYN GOMES, On behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

VERMYCK LLC,

Defendant.

----------X

Index No. 713219/18

Motion Date: 6/21/2022

Motion Seq. 7

The following papers, electronically filed (EF), were read on this motion by defendant for a stay pending the determination of defendant's appeal from the order of this Court entered March 22, 2022, pursuant to CPLR 5519(c) and duly submitted as motion sequence 1.

	NYSCEF Doc. Nos
Order to Show Cause – Exhibits, Affirmation and Affidavit Annexed	EF192- EF200, EF209
Affirmation in Opposition	EF201- EF207, EF211-EF224
Reply Affirmation	EF238

Upon the foregoing papers, the defendant's motion by order to show cause is determined as follows:

Plaintiffs commenced the instant class action for relief from rent overcharges based on an alleged fraudulent scheme by the defendant to create those overcharges by treating plaintiffs' apartments as free market units, exempt from rent stabilization while obtaining J-51 tax abatements. The defendant's answer consisted of denials and various affirmative defenses pursuant to CPLR 3016(b), statute of limitations, alleging both treble damages and use of the default formula in calculating rent are inappropriate in a class action, late filing of registrations does not constitute rent overcharges if the registered rent is otherwise lawful, a retroactive award would be unconstitutional and a counterclaim for attorneys fees in the event that defendant prevails and the lease provides for it.

Thereafter, the plaintiffs moved for and were granted by decision and order dated July 24, 2019, certification of its class, which is defined as: all tenants at 28-30 34th Street, Queens, New York, (hereinafter "subject building") living, or who had lived, inapartments

that were deregulated during the period when J-51 tax benefits were being received by owner of the subject building, except that the class should not include: (i) any tenants who vacated before August 27, 2014, or (ii) any tenants whose occupancy in any such apartment commenced after such J-51 tax benefits to the building ended (hereinafter "Class"); and certification of a subclass defined as: current tenants of the subject building who seek injunctive relief only (hereinafter "Subclass");

By order entered March 22, 2022, this Court in essence, codified the January 13, 2021 order of a prior judge which set forth its determination on plaintiff's motion to strike defendant's defenses and counterclaim and for summary judgment. The underlying order determined that: the defendant's late rent regulated registrations translated into a fraudulent scheme to deregulate the affected apartments resulting in overcharged rents and granted summary judgment to the plaintiffs.

In the March 22, 2022 order, this court also appointed a referee to compute the appropriate rents to be charged based upon the underlying decision and order.

On April 11, 2022, defendant served and efiled its notice of appeal of the March 22,2022 order. Thereafter, the appeal was issued file number 2022-02763. The defendant has represented that it will perfect its appeal for the September 2022 Term, that being the next term by which it can be perfected according to the schedule of the NYS Supreme Court, Appellate Division, Second Department.

In support of the application for a stay, defendant submits an affirmation of its counsel and supporting exhibits. Essentially, defendant's position is that it would be a waste of judicial resources, legal services and financial resources of the parties to comply with the directives of the March order, only to have all the work be for naught in the event the appellate court reverses the lower court's order.

In opposition to the instant application, plaintiffs submitted an affirmation of its counsel together with several exhibits. Plaintiffs' opposition is limited to opposing a stay of the reference to the Referee. While the plaintiffs are not opposing the balance of the stay application, they have somehow conjectured that they might reserve their right to do so at some other point in time. This Court is unaware of any statutory or other procedural provision that allows such a preservation of right and the plaintiffs have failed to cite one. Therefore, the ability to oppose the balance of the stay application is hereby waived.

Apparently, earlier on in the litigation the defendant explained that it had not engaged in a fraudulent scheme to evade rent regulations, but instead was confused as to the appropriate procedure for doing so and the methodology for calculating rents for housing units that were believed to be de-regulated. By making this statement, the plaintiffs now accuse defendant of making an admission against its interest, because "it knew re-registration was required, and that the subject units were rent stabilized, it just did not know how to go about re-registering them."

The plaintiffs are merely engaging in a game of semantics with the defendant and yelling "gotcha", through what can only be viewed as a misinterpretation of defendant's explanation for its late filing of registrations. There are numerous types and methods of

registering dwelling units with the New York State Housing and Community Renewal (hereinafter "DHCR"). There are also different methods to correct erroneous registration information and to supplement registrations that have missing information. For instance, where an erroneous rent registration has been filed, the query is often whether a clean new registration form should be utilized for the same time frame or should be marked "AMENDED" at the top of the registration page or should be considered as an "Add On" registration. So, the mere fact that the defendant's representative stated he did not know how to register the units, in this Court's mind could very well mean that the defendant was not certain if the typical annual rent registration was necessary or something else. Moreover, the potential for dire consequences resulting from a mis-step, is real.

For many years after the Court of Appeals landmark case of *Roberts v Tishman Speyer Properties, LP*, 13 NY3d 270, 890 NYS2d 388 (2009), thousands of landlords as well as tenants in this State have been in a state of confusion regarding the effects of J-51 tax exemptions on deregulating rent stabilized apartments under the then laws on luxury de-regulation. That case was of such significance in the residential housing sector of New York that no less than 9 amicus briefs were filed.

The water was not made any less murky by the fact that in the run up to *Roberts*, landlords throughout the State of New York relied upon the guidance of DHCR to determine how to classify and register their apartments. The logic of following DHCR's guidance was sound, considering this is the agency that has oversight, rule-making and administrative authority for all rent regulated dwelling units in New York State. Before *Roberts*, based on DHCR's interpretation of the laws governing J-51 benefits, apartments in buildings receiving J-51 benefits were eligible for what was referred to as luxury de-regulation. However, in this instance, the guidance of DHCR was incorrect, according to the Court of Appeals' decision in *Roberts*.

As described in one of its progeny, *Gersten v 56 7th Ave., LLC*, 88 AD3d 189, 928 NYS2d 515 (1st Dept 2011), the *Roberts* decision left many people quizzical amongst real estate practitioners,. "The ramifications of *Roberts,* however, remain uncertain; the case left unresolved a number of issues, including those explicitly noted by the Court: 'retroactivity, class classification, the statute of limitations and other defenses that may be applicable to particular tenants' (13 N.Y.3d at 287, 890 N.Y.S.2d 388, 918 N.E.2d 900)". Without going into the entire litany of cases that further defined, narrowed or expanded *Roberts*, suffice it to say that the law concerning apartment registrations in buildings receiving J-51 benefits, has been developing since *Roberts* over the course of many years, and most recently in June of last year with *Gridley v Turnbury Village, LLC*, 196 AD3d 95, 149 NYS3d 243 (2nd Dept 2021).

The plaintiffs have accused the defendant of engaging in a fraudulent scheme to collect rent overcharges through its erroneous DHCR filings and/or failing to file registrations for their plaintiff tenants. The vicissitudes and seemingly mysterious intricacies and requirements of DHCR have made many a landlord, tenant, attorney and judge go running from a room ripping their hair out. A simple search on the DCR website under the term "J-51" renders a result of no less than 81 documents, more than 50 of which are in English. While the agency has no doubt put a lot of effort into having its Fact Sheets and forms translated into several languages, Greek, the native language of the defendant's principal, is not one of them. The defendant's attorney represented to this Court that there

is a language barrier with his client's principal. It is no wonder that the defendant was "confused". However, jumping from confusion to the scienter necessary to make out an allegation of fraud is a larger leap than can possibly be taken.

In its opposition papers, the plaintiffs take the position that an undertaking should be required of the defendant pursuant to CPLR §5519(d), in the event that this Court is inclined to issue a stay pending the appeal. However, that reliance isstatutory provision is inapplicable to this case in its present posture. The application of CPLR §5519(d) would be premature. It would not come into play unless and until there is an appeal to the New York State Court of Appeals. The statute is triggered when there is an appeal of an affirmance of an order, i.e. a second appeal.

Plaintiff's application for an undertaking pursuant to CPLR §6312, as a condition of the issuance of a stay pending appeal is similarly flawed. That statute is applicable to plaintiffs only and in the limited circumstance where a plaintiff is seeking a preliminary injunction. The flagrant misuse of these statutes is rather concerning, particularly in light of the fact that the erroneous reliance on these statutes is by an attorney; an attorney who sees fit to argue that "Willful ignorance constitutes fraud (*Obiora v DHCR*, 77 AD3d 755, 756 [2d Dept 2010]…"; and the same counsel who has made proclamations that "Indeed, if Defendant is 'not a lawyer, and unsure how to proceed,' he was charged with remedying that ignorance." It seems to this Court that a litigant's ignorance of the current status of a law that has been in flux for years is far more excusable than an attorney who misrepresents statutes that are not only straightforward in their meaning, but have been in existence for approximately 40 years.

The Court agrees with the defendant that there would be an unnecessary expenditure of attorneys' time, legal fees, referee's fees and judicial resources in the event that the defendant prevails on appeal and the case is not stayed concerning all aspects of this case pending the appeal. The plaintiffs have not demonstrated any prejudice would result to them in the event a stay is granted pending the appeal.

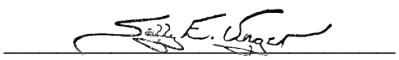
The Court has reviewed the remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED, that defendant's motion for a stay pending the appeal of the March 22, 2022 order is hereby granted in its entirety.

This constitutes the Decision and Order of the Court.

Dated: July 1, 2022



SALLY E. UNGER, A.J.S.C.