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[*1]

24-25 27th St., LLC v Zaman
2022 NY Slip Op 50938(U)
Decided on September 23, 2022
Appellate Term, Second Department
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This opinion is uncorrected and will not be published in the printed Official Reports.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 23, 2022

SUPREME COURT, APPELLATE TERM, SECOND DEPARTMENT, 2d, 11th and 13th
JUDICIAL DISTRICTS

PRESENT: : THOMAS P. ALIOTTA, P.J., MICHELLE WESTON, CHEREÉ A. BUGGS, JJ
2021-460 Q C

24-25 27th Street, LLC, Appellant,

against

Syed A. Zaman, Respondent, John Doe and Jane Doe, Undertenants.

Hertz, Cherson & Rosenthal, P.C. (David Troupp of counsel), for appellant. Shiryak, Bowman, Anderson, Gill & Kadochnikov, LLP (Matthew J. Routh and Dustin Bowman of counsel), for respondent.

Appeal from an order of the Civil Court of the City of New York, Queens County (John S. Lansden, J.), entered July 21, 2021. The order, insofar as appealed from as limited by the brief, upon the court's review, pursuant to CPLR 409 (b), of the papers submitted by the parties, awarded tenant the sum of \$50,025 on his counterclaim for rent overcharge in a holdover summary proceeding, using the registered rent for 1995 as the base date rent. The order also stated that, pursuant to Rent Stabilization Code (9 NYCRR) § 2526.1 (e), tenant could choose between the entry of a judgment or an offset against future rent in that amount.

ORDERED that the order, insofar as appealed from, is reversed, without costs, and the matter is remitted to the Civil Court for a trial to determine the base date rent and for a calculation of rent overcharged in accordance with this decision and order, and, following such trial, for the entry of a final judgment dismissing the petition and, in accordance with

that determination, on the counterclaim.

In this holdover proceeding to recover possession of the subject apartment after the expiration of a one-year lease, the petition, dated September 1, 2016, alleged that the apartment was not subject to rent stabilization because it had been deregulated by high-rent vacancy deregulation. In his answer, dated October 24, 2016, tenant, insofar as is relevant to this appeal, counterclaimed to recover for rent overcharge, asserting that the deregulation of the apartment [*2] had been unlawful. The Civil Court found that the apartment had not been unlawfully deregulated, dismissed tenant's counterclaim, and awarded landlord possession. On appeal, this court, by decision and order dated December 23, 2020 ([24-25 27th St., LLC v Zaman, 70 Misc 3d 131](#)[A], 2020 NY Slip Op 51547[U], *2 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2020]), held that the apartment had been unlawfully deregulated, finding:

"The basis for the deregulation was a series of vacancy increases the former landlord allegedly imposed every year between 1996 and 2001. However, there is ample testimony and documentary evidence that supports tenant's claim that tenant's brother-in law, Syed Nazmul Hassan, resided in the apartment from 1992 to 2014. Moreover, Hassan testified that he does not know any of the six individuals that landlord, in effect, claims were the tenants of record of the former landlord from 1996 to 2001, and that none of them resided in the subject apartment during the relevant years."

Thus, this court reversed the final judgment, dismissed the petition, reinstated tenant's rent-overcharge counterclaim, and remitted the matter to the Civil Court for all further proceedings on the counterclaim (*id.*).

Following the remittal, the Civil Court, upon a review of the parties' submissions pursuant to CPLR 409 (b), awarded tenant the sum of \$50,025, consisting of a rent overcharge of \$16,675 plus treble damages. The Civil Court reasoned that the base date rent was the registered rent for 1995 "because the Appellate Term decided that it was the last legal registered rent for the subject apartment." Pursuant to Rent Stabilization Code (RSC) (9 NYCRR) § 2526.1 (e), the Civil Court gave tenant the choice of recovering the award as a judgment or as an offset against his future rent, and tenant chose the offset method. On appeal, landlord challenges the Civil Court's use of the registered rent for 1995 as the base date rent.

As this court has previously determined that the subject apartment had been unlawfully deregulated pursuant to a fraudulent scheme by the prior landlord to create fictitious new tenancies ([24-25 27th St., LLC](#), 2020 NY Slip Op 51547[U]), the default formula must be

utilized to set the base date rent (*see Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 355 [2020]; *Matter of Grimm v State of NY Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 367 [2010]). The default formula "uses the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date" (*Thornton v Baron*, 5 NY3d 175, 180 n 1 [2005]; *see Matter of Regina Metro. Co., LLC*, 35 NY3d at 354-355), which is four years before initiation of the overcharge claim (*see* former CPLR 213-a; *Matter of Regina Metro. Co., LLC*, 35 NY3d 332). Contrary to the determination of the Civil Court, "review of rental history outside the four-year lookback period [is] permitted . . . 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" (*Matter of Regina Metro. Co., LLC*, 35 NY3d at 355). Here, the overcharge claim was first asserted in tenant's October 2016 answer, so the relevant base date is four years earlier in 2012. Thus, "the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building" in October 2012 is the base date rent for the purpose of calculating the award to tenant (*Thornton*, 5 NY3d at 180 n 1).

We note that there was no basis for the Civil Court to give tenant the option to collect his award by an offset. There is no money judgment in landlord's favor against which to offset tenant's award and the court relied upon a regulation that does not apply. RSC § 2526.1 (e) provides that "[a] tenant may recover any overcharge penalty established by the [Division of Housing and Community Renewal (DHCR)] by deducting it from the rent due to the present owner at a rate not in excess of 20 percent of the amount of the penalty for any one month's rent." The regulation authorizes the DHCR, not the Civil Court, to award an overcharge penalty in the form of an offset against a tenant's future rent. Thus, the trial ordered in this decision and order must conclude with the entry of a final judgment dismissing the petition and on the counterclaim.

Accordingly, the order, insofar as appealed from, is reversed and the matter is remitted to the Civil Court for a trial to determine the base date rent and for a calculation of rent overcharged in accordance with this decision and order, and, following such trial, for the entry of a final judgment dismissing the petition and, in accordance with that determination, on the counterclaim in accordance therewith.

ALIOTTA, P.J., WESTON and BUGGS, JJ., concur.

ENTER:
Paul Kenny

Chief Clerk

Decision Date: September 23, 2022

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