2022-10-03

Burris v. 100 John Mazal SPE Owner LLC

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO **PART** 33

Justice

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HANNA BURRIS

Plaintiff,

- v -

100 JOHN MAZAL SPE OWNER LLC,

Defendant.

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INDEX NO. 154191/2021

MOTION DATE 12/07/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 44

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and oral argument which took place on July 28, 2022 with Serge Joseph, Esq. appearing for Hanna Burris ("Plaintiff") and Joshua Zukofsky, Esq. appearing for 100 John Mazal SPE Owner LLC ("Defendant"), Defendant's motion to dismiss is granted in part and Plaintiff's cross-motion seeking leave to amend is granted.

I. Procedural Background

Plaintiff is seeking (1) declaratory judgment stating the Apartment is subject to rent stabilization and that any renewal lease offered to Plaintiff that do not comply with the rent stabilization laws are invalid; (2) rent overcharge, and (3) attorneys' fees. In response, Defendant filed the instant motion to dismiss pursuant to CPLR 3211(a)(1) and (7) dismissing Plaintiff's causes of action seeking rent overcharge and attorneys' (NYSCEF Doc. 14). Plaintiff cross-moved pursuant to CPLR 3025 (b) and (c) seeking leave to serve and file a proposed amended complaint (NYSCEF Doc. 23).

II. Factual Background

This action stems from a landlord tenant relationship between Plaintiff and Defendant. Defendant is the lease holder of the building located at 100 John Street, New York, New York (the "Building") (NYSCEF Doc. 16 at ¶ 4). Plaintiff rents apartment 2902 (the "Apartment") in the Building from Defendant (NYSCEF Doc. 1 at ¶ 3). Plaintiff alleges that the Building was completed in 1931 and was originally an office building (NYSCEF Doc. 1 at ¶ 9). Plaintiff further alleges that the Building was converted into residential use in 1999 (*id.* at ¶ 10). The Building received tax relief under New York City's 421-g program (*id.* at ¶¶ 11-12). Plaintiff claims that despite participating in the 421-g program, Defendant charged rents in excess of the regulated rent and caused numerous units to be improperly deregulated (*id.* at ¶ 13). Plaintiff began leasing her Apartment in December of 2007 (*id.* at ¶ 54). She has continued to lease the apartment although she commenced this action (*id.* at ¶ 55).

Plaintiff alleges that despite the Building's participation in the 421-g program, her apartment was not treated as rent stabilized nor did her initial lease or any renewals contain any rider or notice in compliance with Real Property Tax Law § 421-g (*id.* at ¶ 31). Plaintiff states that even though Defendant knew or should have known that Plaintiff's apartment is subject to rent stabilization, they represented to Plaintiff that her apartment is exempt from rent stabilization (*id.* at ¶¶ 36-37).

Plaintiff asserts in her Complaint that the legal regulated rent is the amount of rent reflected in the last properly filed registration with the Division of Housing and Community Renewal ("DHCR") and that any DHCR registration while Defendant received 421-g benefits that did not state the apartment was subject to rent stabilization is null and void (*id.* at ¶¶ 39-40). Plaintiff further alleges in her Complaint that because the treatment of her Apartment as exempt from rent

stabilization was unlawful, the collection of her rent and security deposit in excess of the amount in the last proper DHCR registration statement has led to her being overcharged (*id.* at ¶¶ 41-44). Plaintiff alleges that this overcharge was knowing and willful (*id.* at ¶ 52).

For purposes of this motion, Defendant does not dispute that the Apartment is subject to rent stabilization because receiving 421-g benefits requires that apartments in subject buildings be treated as rent-stabilized during the benefit period (NYSCEF Doc. 16 at ¶ 7). Defendant, via the affidavit of Kimberly Cafaro, who is the Executive Vice President of Residential Properties of Defendant, testified that the 421-g benefits period ran from July 1, 2002, through June 30, 2013 (*id.* at ¶ 6). Defendant asserts that it mistakenly assumed the Apartment had been deregulated because the Building was no longer receiving 421-g benefits, and that the lack of any fraudulent scheme to overcharge is belied by the fact that Defendants actually decreased Plaintiff's market rent every year from 2016 through 2021 (*id.* at ¶ 9).

III. Discussion

A. Motion to Dismiss

i. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim

will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). In opposing a motion to dismiss for failure to state a claim, a plaintiff may amplify the allegations in the Complaint through affidavits (*Mulder v Donaldson, Lifkin & Jenrette*, 208 AD2d 301, 307 [1st Dept 1995]).

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

ii. Rent Overcharge

Defendant asserts that per Court of Appeals precedent, the base date rent for the purposes of calculating an overcharge claim that pre-dates the Housing Stability and Protection Act of 2019 ("HSTPA") is four years prior to initiation of the overcharge claim (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 [2020]). Although Plaintiff began leasing her Apartment from Defendant in 2007, because she commenced this action in 2021, and the alleged overcharge began pre-HSTPA, Defendants argue that the four-year look back period is limited to April 2017. Further, Defendants argue that the actual rent charged in 2017 was $3,140, and since every year after April 2017 there has only been rent decreases, there is no way Plaintiff can allege a rent overcharge.

While Defendants concede that *Regina* recognized a limited exception where a review of the rental history is warranted when the complaint properly alleges a fraudulent scheme to deregulate or overcharge tenants, the Defendant's claim Plaintiff's allegations here do not sufficiently plead the fraudulent scheme required to avoid the four-year lookback period.

In response, Plaintiff argues that Defendant's construction of *Regina* and the applicability of the four-year lookback period is incorrect. Plaintiff further claims that even if a four-year lookback period does apply, *Regina* should be interpreted so that the four-year lookback period is four years prior to the enactment of HSTPA, which would make the base date June 14, 2015. Plaintiff argues that since the base date monthly rent in 2015 was $2,395, Plaintiff would have a rent overcharge claim. Plaintiff also claims she has pled sufficient indicia of fraud to pierce the four-year lookback period and that she has provided an affidavit in opposition to Defendant's motion to amplify her fraud claim.

As a preliminary matter, being bound by precedent from the Court of Appeals and the First Department, the Court agrees with Defendant that the four-year lookback period applies since the alleged rent overcharges took place pre-HSTPA. The Court also agrees with Defendant that the proper base date is four years from the date the Complaint was filed, and not four years from enactment of the HSTPA (*Austin v 25 Grove Street LLC*, 202 AD3d 429, 431 [1st Dept 2022] [four-year lookback period applied to alleged pre-HSTPA overcharges, and four-year lookback period was held to be July 2016 for overcharge action commenced in July 2020]; *Chernett v Spruce 1209, LLC*, 200 AD3d 596 [1st Dept 2021]; *Flynn v Red Apple 670 Pacific Street, LLC*, 200 AD3d 607 [1st Dept 2021]).

Applying the four-year lookback period to the base date of April 2017, the actual rent was $3,140 (*West v BCRE 90 West Street, LLC*, 68 Misc 3d 696, 702 [Sup Ct, New York County 2020]

[holding that *Regina*'s four-year lookback formula applies even if base date rent was market rent]). Every year since April 2017, the rent decreased (NYSCEF Doc. 20). Therefore, within the four-year lookback period, there is no claim for rent overcharge since Plaintiff's rent actually decreased every year from 2017 (*see Sandlow v 305 Riverside Corp.*, 201 AD3d 418 [1st Dept 2022] [tenant was not overcharged rent by landlord because the rent was not illegally inflated during the relevant four-year period]). Plaintiff's claim for rent overcharge must therefore be dismissed unless Plaintiff has sufficiently pled a fraudulent scheme within the *Regina* exception.

To look beyond the four-year lookback period, a tenant must set forth sufficient indicia of fraud (*Boyd v New York State Div. of Housing and Community Renewal*, 23 NY3d 999, 1000 [2014]; *Stafford v A&E Real Estate Holdings, LLC*, 188 AD3d 583, 584 [1st Dept 2020]). As stated by the Court of Appeals, "Fraud consists of 'evidence [of] a representation of material fact, falsity, scienter, reliance and injury'" (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 356 n.7 [2020] quoting *Vermeer Owners v Guterman*, 78 NY2d 1114, 1116 [1991]). CPLR 3016(b) requires each element of fraud to be well pleaded and set forth in detail (*Gridley v Turnbury Village, LLC*, 196 AD3d 95, 101 [2d Dept 2021]; *699 Venture Corp. v Zuniga*, 69 Misc3d 863 [Civ Ct, Bronx County 2020]).

Plaintiff's Complaint alleges fraud in just one paragraph (NYSCEF Doc. 1 at ¶ 52). In support of its contention of a fraudulent scheme, Plaintiff alleges that Defendant knowingly and willfully failed to comply with the requirements of the Rent Stabilization Law by failing to provide a rent stabilized lease, failing to adjust "market" rents to rent stabilization level, and failing to register the subject Apartment with DHCR (*id.*). *Regina* has held "willfulness" to mean "consciously and knowingly charg[ing]... improper rent" (*Regina, supra* at 356 n.7, quoting *Matter of Lavanant v New York State Div. of Hous. & Community Renewal*, 148 AD2d 185, 190

[1st Dept 1989]). Assumptions regarding the regulatory status of an apartment may amount to "willful ignorance, which constitutes willful conduct, particularly since defendants are sophisticated property managers and owners" (*Montera v KMR Amsterdam LLC*, 193 AD3d 102, 107 [1st Dept 2021] quoting *Grady v Hessert Realty L.P.*, 178 AD3d 401, 405 [1st Dept 2019]).

In 2019, in analyzing the context of deregulation of apartments in buildings that have received 421-g benefits, the Court of Appeals explicitly delineated the circumstances upon which apartments in 421-g buildings may become deregulated (*Kuzmich v 50 Murray Street Acquisition LLC*, 34 NY3d 84, 91-95 [2019]). While Plaintiff cites to *Kuzmich* in its one paragraph alleging fraud, Defendant correctly points out that the Court of Appeals in *Regina* held that a belief that an apartment is deregulated prior to formal guidance from the Courts of DHCR alone is not sufficient indicia of fraud to pierce the four-year lookback rule (*Regina, supra* at 356 n.8). In 2019, in *Kuzmich*, the Court of Appeals finally ruled that apartments in buildings subject to 421-g benefits are not subject to luxury deregulation. However, the DHCR filing history provided by Plaintiff in opposition to Defendant's motion to dismiss shows that in 2001 (18 years before the Court's guidance in *Kuzmich*) the Apartment was listed as exempt due to high rent vacancy, and ever since, the Defendant was under the impression that the unit was exempt from rent stabilization (NYSCEF Doc. 37; *see also Sandlow v 305 Riverside Corp.*, 201 AD3d 418 [1st Dept 2022] [Landlord's delay in filing or failure to file rent registrations did not demonstrate fraud in suit alleging landlord attempted to deregulate tenant's rent-stabilized apartment]). Moreover, Plaintiff alleges she did not move into the apartment until 2007, when ostensibly the Defendant had already believed that the apartment was not subject to rent regulation (*see also* NYSCEF Doc. 16). These facts, coupled with the scantily pled allegations of fraud in Plaintiff's Complaint, warrant dismissing the cause of action alleging rent overcharge without prejudice.

iii. Attorneys' Fees

Defendant also seeks to dismiss the fourth cause of action for attorneys' fees. The Court rejects this argument as Plaintiff may still prevail on its causes of action seeking declaratory judgment and related injunctive relief (*see Sandlow v 305 Riverside Corp.*, 201 AD3d 418, 418-419 [1st Dept 2022] [award of attorneys' fees was proper where plaintiff prevailed on his cause of action for declaratory judgment and injunctive relief regarding the rent-stabilized status of the apartment]).

B. Cross-motion to Amend the Complaint

i. Standard

Leave to amend pleadings is freely granted in the absence of prejudice if the proposed amendment is not palpably insufficient as a matter of law (*Mashinsky v Drescher*, 188 AD3d 465 [1st Dept 2020]). A party opposing a motion to amend must demonstrate that it would be substantially prejudiced by the amendment, or that the amendments are patently devoid of merit (*Greenburg Eleven Union Free School Dist. V National Union Fire Ins. Co.*, 298 AD2d 180, 181 [1st Dept 2002]). Importantly, a Plaintiff need not establish the merit of its proposed allegations, but only show that they are not clearly devoid of merit (*Fairpoint Cos., LLC v Vella*, 134 AD3d 645 [1st Dept 2015]). Delay alone is not sufficient to deny leave to amend (*Johnson v Montefiore Medical center*, 203 AD3d 462 [1st Dept 2022]).

ii. Plaintiff is Granted Leave to Amend Her Complaint

Plaintiff seeks to amend her complaint to provide more specific facts related to Defendant's allegedly fraudulent scheme to deregulate her apartment and overcharge rent (*see* NYSCEF Doc. 26). Plaintiff alleges that Defendant has engaged in a scheme to compel Plaintiff and other tenants to surrender possession of their rent-stabilized premises in order to deregulate them. Plaintiff

claims that the scheme has been perpetuated by refusing to renew leases and requiring tenants to move out of the building, providing incentives to tenants to move to other apartments in the building, limiting, interrupting, or discontinuing essential services, and failing to otherwise comply with various requirements of the rent stabilization laws.

Plaintiff alleges that despite Defendant's being on notice that Plaintiff's apartment is rent stabilized after the Court of Appeal's decision in *Kuzmich*, Defendants allegedly told Plaintiff it was under no obligation to renew Plaintiff's lease and have attempted to illegally force her to surrender the premises (*id.* at ¶¶ 56-60).

Although Defendant claims it will be severely prejudiced by these new facts being pled, the Court finds no prejudice here where Defendant has not even served its Answer and there has not yet been any discovery (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 505 [1st Dept 2011] [no prejudice to defendants from amended complaint because litigation was still in its initial phase]; *Seda v New York City Housing Authority,* 181 AD2d 469 [1st Dept 1992] [not withstanding that defendant waited three years to amend answer to include statute of limitations defense, in the absence of meaningful discovery, plaintiff demonstrated no prejudice from proposed amendment]). Moreover, Plaintiff is not alleging any new claims but merely substantiating her allegations of fraud.

Further, while Defendant argues in conclusory fashion that Plaintiff's proposed amendments do not amount to an indicia of fraud, the Court disagrees. Notably, while Defendant attacks Plaintiff's allegations regarding reduced services, Defendant makes no comment on Plaintiff's allegation that Defendant attempted to illegally force Plaintiff to surrender her allegedly rent-stabilized apartment by refusing to renew her lease and providing incentives to move to other (possibly unregulated) apartments. Indeed, an e-mail from Defendant to Plaintiff, which Plaintiff

annexed in support of her cross-motion, summarily states that "Unfortunately there was a mix up on managements [sic] part with leasing in regard to your unit. Leasing needs the unit back, so I was wondering if there would be any way for you to transfer to another unit." (NYSCEF Doc. 32).

While Defendant asserts that these allegations are not sufficient to survive a motion to dismiss, the Court disagrees. First, the allegations are not "palpably insufficient as a matter of law," and Plaintiff is not required to prove the merits of her allegations on a cross-motion seeking leave to amend. Further, accepting all the allegations as true, and giving Plaintiff the benefit of all favorable inferences which can be drawn from those allegations, the Court finds that Plaintiff has pled a sufficient indicia of fraud to warrant looking past the four-year lookback period for purposes of this motion to dismiss. While this decision has no bearing on the relative strength of the merits of Plaintiff's fraud claims, given the current stage of litigation is a pre-answer motion to dismiss, the Court finds the allegations that Defendants have fraudulently attempted to force Plaintiff to surrender possession of her rent-stabilized apartment in an attempt to deregulate that apartment are sufficient to grant Plaintiff leave to amend her pleadings. As Plaintiff has pled an indicia of fraud warranting piercing the four-year lookback period, Plaintiff may have a viable overcharge claim. Therefore, Plaintiff's cross-motion seeking leave to amend her pleadings is granted.

Accordingly, it is hereby,

ORDERED that Defendant's motion to dismiss Plaintiff's third cause of action is granted; and it is further

ORDERED that Plaintiff's cross-motion seeking leave to amend her pleadings is granted and the proposed Amended Complaint annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that Defendant shall serve a responsive pleading to Plaintiff's Amended Complaint within twenty (20) days from entry of this decision and order.

This constitutes the decision and order of the Court.

10/3/2022
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

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