2021-11-03

106 W. 13th St. LLC v. Yampolsky

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33
Justice

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106 WEST 13TH STREET LLC

Plaintiff,

- v -

MAX YAMPOLSKY,

Defendant.

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INDEX NO. 156303/2021

MOTION DATE 11/03/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for STRIKE AFFIRMATIVE DEFENSE

Upon the foregoing documents, and oral argument, which took place on July 28, 2022, with Heather Ticotin, Esq. appearing on behalf of Plaintiff 106 West 13th Street LLC ("Landlord"), and Jennifer Rozen, Esq. appearing on behalf of Defendant Max Yampolsky ("Tenant"), Landlord's motion to strike Tenant's first affirmative defense and first, fifth, and sixth counterclaim is granted.

I. Procedural Background

Landlord initiated this action against Tenant seeking a money judgment for past due rent, an order of ejectment, and attorneys' fees (NYSCEF Doc. 1). After Tenant initially failed to respond to the Complaint, Landlord moved for default judgment (NYSCEF Doc. 5). The motion for default judgment was resolved via stipulation on September 24, 2021 and Tenant's time to respond to Landlord' Complaint was extended (NYSCEF Doc. 18).

Tenant filed its Answer on October 6, 2021 (NYSCEF Doc. 19). Tenant has pled as a first affirmative defense and counterclaim injunctive relief forcing Plaintiff to provide Defendant with a rent-stabilized lease, as a second affirmative defense and counterclaim breach of the warranty of

habitability, as a third counterclaim injunctive relief directing Plaintiff to correct all violations of the New York City Housing Maintenance Code, as a fourth counterclaim harassment in violation of NYC Administrative Code §27-2005(d), as a fifth counterclaim rent overcharge, as a sixth counterclaim unjust enrichment, and as a seventh counterclaim attorneys' fees (*id.*). Landlord filed its reply to Tenant's counterclaims on October 6, 2021 (NYSCEF Doc. 20).

On October 28, 2021, Landlord filed the instant motion pursuant to CPLR § 3211(b) (NYSCEF Doc. 21). Landlord seeks to strike and dismiss Tenant's first affirmative defense and first, fifth and sixth counterclaims alleging rent overcharge and unjust enrichment.

II. Factual Background

Landlord and Tenant entered into a written lease dated January 25, 2013 in which Tenant rented 106 West 13th Street, unit #12, New York, New York (the "Premises") from Landlord (NYSCEF Doc. 23). The rent was $2,600 (*id.*). Tenant claims, that he spent approximately $40,000.00 on material and labor to improve the premises at the beginning of his tenancy (NYSCEF Doc. 30). Landlord and Tenant executed a series of renewal leases, the most recent expiring on January 31, 2020 with a monthly rent of $3,100 (NYSCEF Doc. 24). Allegedly, beginning in June 2019, Tenant began missing monthly rent payments, and as of January 2020 had stopped paying rent altogether (NYSCEF Doc. 1). Landlord claims Tenant owes at least $70,630.00 (NYSCEF Doc. 26).

Tenant alleges that his apartment is rent stabilized because, based on the condition of the premises when Tenant's first lease began, it was "clear that Plaintiff did not ever spend the requisite approximately $25,000.00 on qualifying Individual Apartment Improvements ("IAIs") to raise the legal regulated rent for the premises from $466.24 to $1,100.00" (NYSCEF Doc. 19 at ¶ 61). This rental spike took place in 1988-1989 (NYSCEF Doc. 28). According to Landlord and the

DHCR filings, the apartment was exempt from rent stabilization due to high rent vacancy since 2004 (NYSCEF Doc. 28). Nonetheless, Tenant alleges the DHCR filings are unreliable because Landlord engaged in a fraudulent scheme to deregulate the subject apartment (NYSCEF Doc. 19 at ¶ 62).

III. Discussion

A. Standard

The standard of review on a motion to dismiss pursuant to CPLR § 3211(b) is similar to that used under CPLR §3211(a)(7) (*87th Street Realty v Mulholland*, 62 Misc3d 213, 215 [Civ Ct, New York City 2018]). The movant bears the burden of establishing the defense or counterclaim is without merit as a matter of law (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1st Dept 2011]). This burden is a heavy one (*Alpha Capital Anstalt v General Biotechnology* Corporation, 191 AD3d 515 [1st Dept 2021]). The allegations in the answer must be liberally construed and viewed in the light most favorable to the non-movant (*182 Fifth Ave v Design Dev. Concepts*, 300 AD2d 198, 199 [1st Dept 2002]). It is inappropriate to dismiss a defense where there remain questions of fact requiring trial (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD2d 479, 481 [1st Dept 2015]).

B. Rent Overcharge (First Affirmative Defense, First Counterclaim, and Fifth Counterclaim)

Landlord asserts that Tenant's First Affirmative Defense, First Counterclaim, and Fifth Counterclaim, which allege that the apartment is rent stabilized, and that Tenant has suffered rent overcharge, must be dismissed. Tenant alleges in conclusory fashion that the apartment is rent stabilized and Landlord "fraudulently offered [Tenant] an initial non-regulated initial lease" (NYSCEF Doc. 19 at ¶ 35). Nowhere in its first affirmative defense or first counterclaim (which

seeks an order directing Landlord to provide Tenant with a rent-stabilized lease) is the basis for the apartment being rent stabilized pled.

The Fifth Counterclaim, which specifically alleges rent overcharge, states in similar conclusory fashion that "based on the condition of the subject apartment, as it existed when [Tenant's] initial lease commenced, it is clear that [Landlord] did not ever spend the requisite approximately $25,000.00 on qualifying Individual Apartment Improvements to raise the legal regulated rent for the subject apartment from $466.24 to $1,100" (*id.* at ¶ 61). Tenant than alleges that based on this allegation, the entire rent history on file with DHCR is inconsistent and wholly unreliable and that "it is abundantly clear that [Landlord] engaged in a fraudulent scheme to deregulate the subject apartment" (*id.* at ¶ 62).

However, the DHCR history provided by Landlord shows that the spike in rent which corresponded to the allegedly questionable IAIs, took place long ago in 1988-1989, while the premises were not exempt from rent stabilization due to high rent vacancy since 2004 (NYSCEF Doc. 28). Moreover, as Landlord points out, it is unclear what basis Tenant has, as he occupied the apartment in 2013, to question the IAIs from 1988-1989, which predate Tenant's first lease by almost 25 years.

Further, there are several procedural and substantive infirmities which require dismissal of the first affirmative defense and counterclaim and fifth counterclaim. First, although not explicitly pled in its Answer, Tenant clarified in opposition to this motion that his allegations pertaining to him being entitled to a rent stabilized lease are premised on a few rent fluctuations from the late 1980's and early 1990's (NYSCEF Doc. 29 at ¶¶ 26-29). While the Court may examine the DHCR rental history to determine an apartment's rent stabilized status, in examining this Apartment's history, the Court does not find substantial indicia of a fraudulent scheme to deregulate the

Apartment (*see Grimm v State Div. of Housing and Community Renewal Office of Rent Admin.*, 15 NY3d 358, 367 [2010] ["an increase in the rent alone will not be sufficient to establish a "colorable claim of fraud," and a mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further."]; *Ampim v 160 East 48th Street Owner II LLC*, 2022 NY Slip Op. 05263 at *1 [1st Dept 2022] ["an increase in rent and failure to register the apartment with DHCR, standing alone, are insufficient to establish a colorable claim of a fraudulent scheme to deregulate the apartment"]; *Gridley v Turnbury Village,* LLC, 196 AD3d 95, 102 [2d Dept 2021] ["an increase in rent alone is insufficient to establish a colorable claim of fraud"]; *see also Fuentes v Kwik Realty LLC*, 186 AD3d 435 [1st Dept 2020] [Landlord's failure to maintain any records of alleged individual apartment improvements and failure to provide notices under Rent Stabilization Code relating to last legal, regulated rent were not evidence of an attempt to fraudulently circumvent Rent Stabilization Law]).

Despite the existence of one rent increase pled by Defendant, in reviewing the DHCR rental history of this three-room apartment over the span of 20 years, the legal regulated rent increased from $336.28 in 1984 to $1991.76 in 2003 after which it became deregulated due to high rent vacancy in 2004. The on average gradual increases over the span of 20 years, which Landlord asserts were in accordance with all applicable RGBO orders, does not indicate a fraudulent scheme to deregulate the apartment or that Tenant, who assumed occupancy in 2013, well after the rent reached the $2,000 threshold, is entitled to a rent stabilized lease (*Breen v 330 E. 50th Partners LP*, 154 AD3d 583 [1st Dept 2017] [where landlord demonstrated that rent would have reached the deregulation threshold by the time plaintiff leased the apartment, tenant was not entitled to a rent-stabilized lease]). "Indeed, neither an increase in rent, standing alone, nor plaintiffs' skepticism about apartment improvements suffice to establish indicia of fraud" (*Butterworth v 281*

St. Nicholas Partners, LLC, 160 AD3d 434 [1st Dept 2018]). These facts do not amount to improper deregulation of Tenant's apartment.

Procedurally, 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]). Here, the fraud alleged is set forth in barebone and conclusory allegations (NYSCEF Doc. 19 at ¶ 35 ["Plaintiff's predecessor fraudulently offered Defendant an initial non-regulated initial lease"]; ¶ 62 ["it is abundantly clear that Plaintiff engaged in a fraudulent scheme to deregulate the subject apartment]; ¶ 64 ["the rent overcharge was collected intentionally and fraudulently"]). The sole basis actually pled by Tenant in alleging fraud is one rent increase from the 1980s and supposedly insufficient IAIs to support that increase, even though Tenant provides no further particularized or detailed facts to support these allegations. As such, not only do the facts and evidence presented on this motion contradict Tenant's allegations, but Tenant also does not meet the heightened pleading requirements of CPLR 3016(b).

Since Tenant has failed to plead a substantial indicia of fraud, and the alleged rent overcharge commenced prior to the passage of the Housing Stability and Tenant Protection Act of 2019 (HSTPA), the statute of limitations is limited to the four year lookback period (*Austin v 25 Grove Street LLC*, 202 AD3d 429, 431 [1st Dept 2022]). Applying the four-year lookback period to the base date of October 2017, the rent was market rent (*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]). Tenant's rent overcharge claim is premised on the fact that the Apartment was fraudulently deregulated and the entire DHCR rent is unreliable. However, as discussed above, the Court finds these allegations contradicted by both

the evidence and precedent's requirements on how this Court shall interpret the evidence. Moreover, since the relevant four-year lookback period the rent was market rent and the apartment was not regulated, there can be no rent overcharge claim (*Sandlow v 305 Riverside Corp.*, 201 AD3d 418 [1st Dept 2022] [tenant was only entitled to recover increases added to the base rent that were over the legal limits during the four-year recover period prior to filing lawsuit, but tenant was not overcharged rent by landlord because the rent was not illegally inflated during the relevant four-year period]). As such, the first affirmative defense and counterclaim, as well as the fifth counterclaim, are dismissed.

C. Unjust Enrichment (Sixth Counterclaim)

It is well established that the existence of a valid and enforceable written contract precludes an unjust enrichment claim (*Ingham ex re. Cobalt Asset Management, L.P. v Thompson*, 88 AD3d 607 [1st Dept 2011]; *Katz v American Mayflower Life Ins. Co. of New York*, 14 AD3d 195 [1st Dept 2004]). This also applies to the landlord-tenant context where a tenant alleges it made improvements to leased premises (*International Development Institute, Inc. v Westchester Plaza, LLC*, 194 AD3d 411 [1st Dept 2021]; *Nezry v Haven Ave. Owner LLC*, 28 Misc.3d 1226(A) at *11 [Sup Ct, New York County 2010]). In opposition, Tenant admits that the lease between the parties did not require either party to make improvements to the subject apartment, but that the implied warranty of habitability, which Landlord allegedly breached required Tenant to make the repairs himself (NYSCEF Doc. 29 at ¶ 40). To that end, Tenant concedes that the unjust enrichment claim is duplicative of its warranty of habitability counterclaim, which Landlord has not moved to strike. The duplicative nature of the unjust enrichment claim provides further grounds warranting its dismissal. (*Linkable Networks, Inc. v Mastercard Inc.*, 184 AD3d 418 [1st Dept 2020] [cause of

action for unjust enrichment was duplicative of contract-based claim and therefore was properly dismissed]). Therefore, the sixth counterclaim is dismissed.

Accordingly, it is hereby

ORDERED that Landlord's motion to strike Tenant's first affirmative defense and first, fifth, and sixth counterclaims is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

10/18/2022
DATE

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

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