2022-10-26

601 W. Realty, LLC v. Algarin

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601 W. Realty, LLC v Algarin
2022 NY Slip Op 51072(U)
Decided on October 26, 2022
Civil Court Of The City Of New York, New York County
Bacdayan, J.
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Decided on October 26, 2022

Civil Court of the City of New York, New York County

601 West Realty, LLC, Petitioner,

against

Edwin Algarin, Respondent.

Index No. 078379/18

Kaplain & Duval, LP (Leonard Kaplain, Esq.), for petitioner

Housing Conservation Coordinators (Lynn Horowitz, Esq.), for respondent

Karen May Bacdayan, J.

PROCEDURAL HISTORY AND BACKGROUND

In this nonpayment proceeding, petitioner first alleged that the subject premises is rent stabilized and later sought to amend the petition to reflect that the apartment is deregulated. Respondent moved to amend his answer to claim unlawful deregulation of the premises, overcharge, and, as a result, a defective predicate rent demand. Those motions were settled by stipulation in which respondent accepted the amendment of the petition, and petitioner

accepted respondent's amended answer. (NYSCEF Doc No. 5, stipulation dated November 18, 2019.)

Petitioner now moves for summary judgment. Respondent opposes and cross-moves for discovery of the rental history from 1984 to present. Petitioner's motion for summary judgment sets forth the alleged basis for deregulation, to wit: the apartment was rent controlled in 1984, and exited regulation in 2005 when the former rent-controlled tenant vacated. Petitioner states that that tenant who took possession immediately thereafter was charged a "first rent" which was in excess of the rent stabilization deregulation threshold in effect at the time, and the apartment became a free market rental.

Respondent's opposition rests on the allegation that the apartment has been rent stabilized since at least 1993, when the former rent-controlled tenant vacated, and petitioner falsely claimed that the apartment remained rent controlled until 2005 in order to take advantage of the ability to charge a first rent in excess of the deregulation threshold. Respondent claims to have personal knowledge of this because he worked for petitioner for 10 years until October 2018. (NYSCEF Doc No. 28, Algarin affidavit ¶¶ 5, 11.) Respondent claims through his attorney in opposition that petitioner engaged in a "fraudulent scheme to deregulate the apartment," and that, as a result, he has been illegally overcharged. (NYSCEF Doc No. 27, respondent's attorney's affirmation ¶ 48.)

The parties rely on various documents to support their claims, most of which, they conceded at oral argument, do not make sense when reviewed as a whole. Much of the oral argument was spent by both parties' attorneys, and the court, speculating why or how certain [*2]events transpired, and why or how it came to be that certain documents were filed or reflected certain information.

Respondent's attorney cites to a lack of registration of the premises with the Division of Housing and Community Renewal ("DHCR") between 1985 and 1992, and calls the court's attention to 1993 when the apartment was registered as rent stabilized and rented to Elsie Mujica at a monthly rental of $642.03. (NYSCEF Doc No. 14, petitioner's exhibit E.) Respondent also submits a maximum base rent ("MBR") master schedule which indicates, confusingly, that the apartment was registered by petitioner as rented to Elsie Mujica at a *rent-controlled* maximum base rent of $690.19 in 2008 and $741.96 in 2009, three and four years, respectively after Elsie Mujica purportedly vacated the premises. (NYSCEF Doc No. 40, respondent's exhibit L.) Respondent also maintains that "illusory leases" between the owner and himself for various apartments show a "deliberate pattern of behavior with the

sole goal of deregulating as many units as possible." (NYSCEF Doc No. 28, Algarin affidavit ¶¶ 5, 6.) Some of these leases overlap in time with respondent's own leases for the subject premises. (NYSCEF Doc No. 15, petitioner's exhibit F, Alagarin leases; NYSCEF Doc Nos. 30-35, respondent's exhibits B-G, leases and rent registrations for apartments 8C, 8E, and 10E.) All of the leases comprise a "contract rent" and a higher "unit rent." Respondent's involvement in what he calls "illusory lease" arrangements as petitioner's then employee is not clear, nor at oral argument was the court able to clarify exactly how respondent *knows* that "the subject apartment had been rent controlled in the 1970s when Elsie Mujica's mother, Erika Mujica, was the rent controlled tenant. . . ." (NYSCEF Doc No. 28, Algarin affidavit ¶ 10.) Respondent states the basis for his knowledge: "Having reviewed the records as both an employee and a tenant, the subject premises should still be rent stabilized." (*Id.* ¶ 14.)[FN1]

Respondent states that several years prior to his employment by petitioner, "in 2005, Elsie Mujica was a rent stabilized tenant of the subject apartment. (NYSCEF Doc No. 28, Algarin affidavit.) Petitioner states that it has no knowledge, nor is any evidence presented regarding the existence of an Ericka Mujica. (NYSCEF Doc No. 45, petitioner's attorney's affirmation in opposition and reply ¶ 11.) Respondent states in his affidavit, "the landlord claimed that she was rent controlled so that it could circumvent the rent stabilization regime and go directly into market rate." (NYSCEF Doc No. 28, Algarin affidavit ¶ 9.) Petitioner contends that the Division of Housing and Community Renewal ("DHCR") erred by reflecting its 2006 filing that the apartment was exiting rent control in the 1984 registration column of the rent history, and that it should have been reflected in the 2006 apartment registration. (NYSCEF Doc No. 9, Jakob affidavit ¶¶ 5, 6.)

Respondent also raises as an issue a 1988 DHCR proceeding bearing docket number BF410100U. Respondent's attorney states that when this docket number is "decoded," it is clear that it pertains to the changing status of the apartment from rent control to rent stabilization. (NYSCEF Doc No. 27, respondent's attorney's affirmation in support ¶ 13.) Respondent posits that DHCR does not keep records indefinitely, thus, discovery is needed to determine what information petitioner may have from the prior owners regarding that proceeding. Petitioner [*3]disputes that this docket number is necessarily relevant by pointing out that the proceeding involved "various tenants" including Apartment 6A, but that alone does not mean that a determination was made as to respondent's apartment that it was rent stabilized. (NYSCEF Doc No. 45, petitioner's attorney's affirmation in opposition and reply, ¶ 11.)

Discovery is necessary, respondent argues, in order to determine information directly

related to his defenses. Petitioner counters that the parties have obtained everything that is available through foil requests and subpoenas and that it does not have any more documentation than that already provided. Petitioner further states that "it is beyond dispute that the apartment was rent controlled in 1984" (NYSCEF Doc No. 45, petitioner affirmation in opposition ¶ 6), and that absent fraud, respondent cannot look back prior to four years before the answer was interposed. (*Id*. ¶ 27.) However, aside from the fact that petitioner has owned the building since 1997, when it purchased the building from a prior owner who had purchased it from a referee after foreclosure, and the fact that respondent is the tenant of the subject premises, very little is undisputed.

DISCUSSION

Petitioner's Motion for Summary Judgment

A court may employ the drastic remedy of summary judgment only where there is no doubt as to the absence of triable issues. (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974].) On such a motion, a court's function is to find, rather than to decide, issues of fact. (*Southbridge Towers*, *Inc. v Renda*, 21 Misc 3d 1138[A], 2008 NY Slip Op 52418[U] [Civ Ct, NY County 2008], citing *Epstein v Scally*, 99 AD2d 713 [1st Dept 1984].) The facts must be considered "in the light most favorable to the non-moving party." (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011].) Only upon a *prima facie* showing of entitlement to summary judgment, does the burden shift to the non-moving party to establish material issues of fact requiring a trial. (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].) When determining a summary judgment motion, courts should not decide issues of credibility. (*See Glick & Dolleck, Inc. v Tri-Pac Export Corp*., 22 NY2d 439, 441 [1968].) If an issue is "fairly debatable a motion for summary judgment must be denied." (*Stone v Goodson*, 8 NY2d 8, 12 [1960].)

Petitioner has not met its *prima facie* burden of entitlement to summary judgment, and, thus, the burden never shifted to respondent. Petitioner is at a loss to explain a number of puzzling documents. For example, regarding a registration in 1984 that indicates the apartment is rent stabilized (NYSCEF Doc No. 14, petitioner's exhibit E, rent registration history), petitioner states, "It can only be surmised that the filing in 1984 was not properly recorded by DHCR and does not appear in the Apartment Registration History. . . . Clearly the registration history is not accurate." (NYSCEF Doc No. 9, petitioner's attorney's affirmation ¶¶ 5, 6.) Petitioner has not adequately demonstrated that the subject apartment was rent controlled in 2005, and that all triable issues of fact have been eliminated. Petitioner

simply asks the court to accept this as true; however, in the same paragraph petitioner concedes that "the information in the DHCR registration history merely reflects entry of data received by DHCR [from petitioner], and which is not determinative of the apartment status." (*Id*. ¶ 6.) Petitioner is necessarily at a disadvantage given the potential paucity of records at its disposal from the prior owners; but speculation and conjecture can never be the basis for summary judgment; and what may seem obvious to petitioner is not obvious to the court.

Moreover, even if petitioner had met its burden and the burden had shifted to respondent, respondent has set forth evidence sufficient to establish that there are genuine issues of material fact necessitating a trial. There is certainly a vigorous debate as to the rental history and regulatory status of the premises. Indeed, *both* parties rely on speculation and conjecture as to what occurred in the past. The court agrees that the rental history of the apartment is mysterious and riddled with mistakes and unknowns. The 45-minute oral argument of the motions alone, during which both parties were unable to answer the court's questions, is enough to convince the court that the issue of the regulatory status of the apartment is not susceptible to summary judgment.

Respondent's Cross-motion for Discovery

In determining whether a party has established ample need for discovery, courts consider a number of factors, not all of which need be present in every case, including: (1) whether the movant has asserted facts to establish a claim or defense; whether there is a need to determine information directly related to the claim or defense; (2) whether the requested disclosure is carefully tailored and likely to clarify the disputed facts; (3) whether prejudice will result from granting leave to conduct discovery; and (4) whether any prejudice caused by granting a discovery request can be diminished by an order fashioned by the court for that purpose. (*New York Univ. v Farkas* (121 Misc 2d 643, 647 [Civ Ct, NY County 1983].)

Respondent may challenge the regulatory status of the apartment at any time and the petitioner must "prove the change in an apartment's status from rent stabilized to unregulated even beyond the . . . statute of limitations . . . ." (*See Gersten v 56 7th Ave. LLC* , 88 AD3d 189, 201 [1st Dept 2011], *appeal withdrawn* 18 NY3d 954 [2012] ["except as to limit rent overcharge claims, the Legislature has not imposed a limitations period for determining the rent regulatory status of an apartment"]; *Bazan v New York State Div. of Hous. & Cmty. Renewal*, 189 AD3d 495, 496 [1st Dept 2020] [discovery as to deregulation warranted beyond the statute of limitations but not as to overcharge as respondent had not claimed fraud]; *AEJ 534 E. 88th, LLC v New York State Div. of Hous. & Cmty. Renewal*, 194 AD3d

464, 470 [1st Dept 2021] ["there is no time restriction at all" as to discovery related to deregulation of a premises]; *East W. Renovating Co. v New York State Div. of Hous. & Community Renewal*, 16 AD3d 166 [1st Dept 2005].) A tenant is "not required] to allege any colorable claim of fraud in order to challenge the change in an apartment's status from rent-stabilized to unregulated, even if the change occurred beyond the four-year statute of limitations for rent overcharge claims." (*Gersten* at 199.) However, respondent must still establish ample need for discovery regarding deregulation as this is a summary proceeding.

While courts have found in the context of allegedly fraudulent *overcharge* claims that "the question is not whether fraud has been demonstrated, but rather whether fraud could be shown," *Ioannou v 1BK St. Corp.*, 203 AD3d 627, 627 (1st Dept 2022), fraud must still be *pleaded*. The *Ioannou* decision and others like it presume that the litigation forum allows for discovery as of right. While establishing a need for discovery is a lower burden than proving one's case at trial, in a summary proceeding, a party must establish ample need prior to engaging in discovery in a summary proceeding. As set forth in *Farkas*, the initial inquiry that the court must make on a motion for disclosure in Housing Court pursuant to CPLR 408 is "[w]hether, in the first instance, the [movant] has asserted facts to establish a cause of action [or defense]." [*4](*Farkas* at 647.) "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." (CPLR 3013.)

Respondent's Third Affirmative Defense and First Counterclaim states in full: "Petitioner is overcharging Respondent." (NYSCEF Doc No. 4 ¶ 20.) Petitioner is charging Respondent over $2,600.00 more than the last registered rent. (*Id*. ¶ 21.) "The failure to register the rent for over 20 years, claim any exemption, and charge a 'preferential rent' of $3,300 entitle[s] Respondent to look back beyond the four-year period. (*Id*. ¶ 22.) "Respondent is being overcharged and is entitled to a refund on [his] overcharge and treble damages." (*Id*. ¶ 23.)

Under the standard enunciated by *Regina* , a cause of action for an overcharge calculated using the default formula requires a demonstration of facts supporting a "fraudulent scheme to deregulate the apartment."[FN2] (*Matter of Regina Metro.Co., LLC* , 35 NY3d 332, 354.) "In the absence of fraud," even a potentially illegal "base date" rent is properly accepted. (*Id.* at 358.) "Fraud consists of evidence [of] a representation of material fact, falsity, scienter, reliance and injury." (*Id.* at 356 n 7 [internal quotation marks and citations omitted].) The elements of fraud must be pleaded, and each element must be set

forth in detail. (CPLR 3016 [b]; *699 Venture Corp. v Zuniga*, 69 Misc 3d 863, 869 [Civ Ct, New York County 2020]; *Gridley v Turnbury Vill., LLC*, 196 AD3d 95, 10 [2d Dept 2021], *leave to appeal denied*, No. 2021-567, 2021 WL 5898137 [Dec 14, 2021].) Respondent has not adequately pleaded the issue of fraud and, thus, discovery is denied regarding respondent's Third Affirmative Defense and First Counterclaim.

Moreover, when overcharges occurred prior to the enactment of the Housing Stability and Tenant Protection Act of 2019 ("HSTPA"), the look back period in the First Department is four years from the interposition of the claim. As stated in *Burris v 100 John Mazal Spe Owner LLC*, 2022 WL 4790496, *3 (Sup Ct, New York County 2022):

> "[T]he 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 [c]omplaint 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]).

In *Burris*, the tenant had initially leased her apartment in 2007. The overcharge claim was interposed in April 2021 (*Burris v 100 John Mazal Spe Owner LLC,* Index No. 154191/2021, Sup Ct, New York County, NYSCEF Doc No 1, original summons and complaint ["Plaintiff has been, and continue[s] to be, illegally charged rents in excess of the legal rent stabilized levels for her apartment. . . ."] The *Burris* court limited the lookback period to April 2017, four years before the complaint was interposed even though some of the alleged [*5]overcharges had occurred *after* the passage of the HSTPA.

As for respondent's argument that "where an owner charges a preferential rent, the rental history immediately preceding the preferential rent may be examined to determine whether the legal regulated rent has been properly calculated," this request for documents is subsumed by discovery related to the deregulation of the premises which the court grants below. (NYSCEF Doc No. 27, respondent's attorney's affirmation in support of cross-motion ¶ 70.)

At oral argument, respondent's attorney could not articulate how deposing employees who did not work for the prior owners would provide any additional information related to his defenses which rely on events that transpired prior to petitioner purchasing the premises. To the extent that respondent believes petitioner will not call it's employees, Susan Edelstein

or Chaim Jakob, as witnesses for trial, respondent may serve subpoenas for their testimony. To the extent they are called as witnesses for petitioner, respondent will have the opportunity to cross-examine them.

CONCLUSION

Accordingly, it is

ORDERED that petitioner's motion for summary judgment is DENIED; and it is further

ORDERED that respondent's motion for leave to conduct discovery is GRANTED *only to the extent* that respondent is granted leave conduct discovery as to documents within petitioner's custody and control from 1988 forward related to the subject apartment (6A) *only*, and *only related to the regulatory status of the premises*; and it is further

ORDERED that respondents motion for leave to conduct discovery for records pertaining to its Third Affirmative Defense and First Counterclaim of overcharge is DENIED; and it is further

ORDERED that any portions of petitioner's discovery demands comprising respondent's exhibit O, NYSCEF Doc No. 43, that do not comport with this order are stricken and so stricken it is further

ORDERED that the document demands as limited by the court are deemed served and filed; and it is further

ORDERED that petitioner shall provide respondent with any additional documentation in its custody and control within 45 days of this order, and the parties shall engage in good faith efforts to resolve any discovery disputes that may arise; and it is further

ORDERED that respondent's motion for leave to conduct depositions of Susan Edelstein and Chaim Jakob is DENIED for the reasons set forth above.

The proceeding is marked off the court's calendar. Either party may restore this proceeding to the court's calendar on 8 days written notice of motion for a pre-trial conference or other appropriate relief.

This constitutes the decision and order of this court.

Dated: October 26, 2022
New York, NY

_____
HON. KAREN MAY BACDAYAN
Judge, Housing Part

Footnotes

Footnote 1: Petitioner states that respondent was employed by peitioner from 2012 through 2018 and "at all times . . . had access to all building records including those relating to the subject apartment." (NYSCEF Doc No. 9, Jakob affidavit ¶ 3.) Respondent states that he worked for respondent for ten years until his relationship as an employee ended in October 2018. (NYSCEF Doc No.28, Algarin affidavit ¶¶ 5, 11.)

Footnote 2: It has since been clarified that the fraud exception applies to overcharge claims as well as claims of unlawful deregulation. *435 Cent. Park W. Tenant Ass'n v Park Front Apartments, LLC*, 183 AD3d 509, 510 (1st Dept 2020); *Montera v. KMR Amsterdam LLC*, 193 AD3d 102 (1st Dept 2021).

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