2023-01-12

Marantz v. MD CBD 180 Franklin LLC

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2023 NY Slip Op 30141(U)
January 12, 2023
Supreme Court, Kings County
Docket Number: Index No. 521055/2020
Judge: Ingrid Joseph
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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of January 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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RUTH MARANTZ and ANTONIO CHECCO, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

MD CBD 180 FRANKLIN LLC,

Defendant.

----------X

ORDER

Index No. 521055/2020

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits Annexed.....	64-82
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Upon the foregoing papers, plaintiffs Ruth Marantz and Antonio Checco, on behalf of themselves and all others similarly situated, move (Motion Sequence No. 3) for an order, pursuant to CPLR 2221, renewing their opposition to a prior motion for dismissal by defendant MD CBD 180 Franklin LLC.

Plaintiffs commenced this putative class action to recover rent overcharge awards and injunctive relief as the result of defendant's alleged violation of the Rent Stabilization Law (RSL) and Code (RSC). Construction of defendant's building commenced in 2014 and a temporary certificate of occupancy was issued in March 2016. As new construction, the building was eligible to receive tax benefits under Real Property Tax Law § 421-a, making the building subject to the RSL and RSC for the pendency of the benefits period and requiring defendant to register the rents charged to and paid by the first tenants as the initial legal regulated rents. Under the RSL and RSC, an owner cannot register an amount as the initial legal rent but charge the first tenant a lower "preferential rent;" the lower preferential rent charged to the tenant must be registered as the initial regulated rent. The essential claims of plaintiffs involve defendants' allegedly fraudulent use of rent concessions to market the apartments to tenants using a "net effective" rent (total rent of lease term divided by the number of months in the term), and

registering the legal regulated rent as the higher, undiscounted monthly figure in the lease, thereby avoiding registration of the initial regulated rents at the lower preferential amounts. Defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5) and (7), which motion was granted by this court by order dated September 30, 2021. In its decision, this court referred to Fact Sheet # 40 issued by the Division of Housing and Community Renewal (DHCR) which differentiated preferential rents and rent concessions. Fact Sheet # 40 stated that a "concession for specific months, as for example, where the lease provides that the tenant will not have to pay rent for one or more specified months during the lease term" is not considered a preferential rent. In finding that plaintiffs did not state a cognizable claim to survive dismissal, this court stated that there was "no reason to deviate from the DHCR's distinction between preferential rents and rent concessions for specific months, particularly since there is no statute, regulation or controlling precedent which suggests that the average 'net effective rent' charged over the course of a lease term becomes the initial regulated rent rather than the monthly rent first reserved in the lease and charged to the first tenant to occupy an accommodation in a 421-a building."

Following dismissal of this action, the Appellate Division, First Department issued a decision affirming an order of the Supreme Court, New York County, which also involved the question of whether plaintiff tenants had a cognizable overcharge claim where the landlord employed concession riders resulting in a "net effective" rent lower than that registered as the initial regulated rent. In its decision, the Supreme Court denied defendant landlord's motion to dismiss, stating:

> "At this early stage of the litigation, plaintiffs have stated viable causes of action and defendant did not cite to any documentary evidence that utterly refutes plaintiffs' claims. If the Court assumes that the allegations set forth by plaintiffs are true (as the Court must do on a motion to dismiss), then they evidence a scheme to evade the requirements of the 421-a Program in order to charge higher rents. As alleged by plaintiffs, defendant provided leases for the initial occupants that included concessions for construction despite the fact that construction was completed. And defendant purportedly continued to use "construction concession

> riders" long after construction was completed. If plaintiffs' theory is accurate, then it demonstrates that defendant utilized preferential rents in the initial lease which is not permitted under the Rent Stabilization Code. The applicable provision requires a landlord to register the amount charged and paid.
>
> "Although defendant and proposed amici claim that offering a temporary concession based on construction cannot support plaintiffs' claims, more discovery is needed to explore the ways in which these concessions were used. Information about when construction was completed and the justification for the concessions is necessary to determine whether these were actually concessions or functionally preferential rent." (*Chernett v Spruce 1209, LLC*, 2021 NY Slip Op 31064[U], *3 [Sup Ct, NY County 2021]).

In affirming the Supreme Court decision, the Appellate Division agreed that "allegations in the complaint warrant discovery to determine whether the concessions were functionally equivalent to a preferential rent; simply calling it a concession does not transform it into a permissible activity under the applicable statutory scheme" (*Chernett v Spruce 1209, LLC*, 200 AD3d 596, 597 [1st Dept 2021] [citation, internal quotation marks and brackets omitted]). The Appellate Division stated that the Supreme Court "correctly denied defendant's motion [to dismiss], finding that the complaint stated a cause of action for overcharges based on an alleged fraudulent scheme to evade the requirements of the 421-a program so as to charge higher rents by providing 'construction concessions' well after construction was complete" (*id.* at 597). The Appellate Division noted that while DHCR's Fact Sheet # 40 distinguishes between a permissible one-time concession for a specific month and a preferential rent, plaintiffs presented "evidence of irregularities in their leases and their predecessor tenants' leases that raise the question of whether the rent 'charged and paid' under RSC § 2521.1 (g) was improperly manipulated and therefore should have, but did not, take into account the purported concessions in calculating the proper initial legal regulated rents under the 421-a program" (*id.* at 598).

In another Appellate Division, First Department decision issued following this court's order dismissing the instant action, *Flynn v Red Apple 670 Pac. St., LLC* (200 AD3d 607 [1st

Dept 2021]), the court dismissed the plaintiff's fraud claim predicated on the landlord's use of a rent concession to allegedly avoid registration of a lower preferential rent. The court stated that pursuant to the concession rider, the parties plainly agreed that the one-month rent concession was a one-time event that had no impact on the remainder of plaintiff's rent payments; that there was no dispute that, at the time plaintiff received the one-month rent concession, the building had not yet received a permanent certificate of occupancy; and that "[u]nder these circumstances, plaintiff failed to assert allegations sufficient to withstand a motion to dismiss his claim that defendants attempted to defraud him by manipulating the legal regulated rent" (*Flynn*, 200 AD3d at 609).[1]

Plaintiffs here argue that, taken together, *Chernett* and *Flynn* stand for the proposition that unless the landlord can present a justifiable reason for rent concessions, a tenant's complaint should survive dismissal, and discovery should be allowed to determine whether the concessions were functionally equivalent to preferential rents. Plaintiffs contend that the instant action is not dissimilar to *Chernett* in that plaintiffs were given concession riders which either did not state a reason or justification for the concession (as with plaintiff Checco) or stated that the concession was construction-related despite the lease being executed after the issuance of the final certificate of occupancy for the building (as with plaintiff Marantz). Plaintiffs maintain that based on the "new law" established by *Chernett* and *Flynn*, this court should grant renewal and issue a new order denying defendant's motion to dismiss.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221[e][2]). A renewal motion may be based on an intervening clarification of the law (*see Dinallo v DAL Elec.*, 60 AD3d 620, 621 [2d Dept 2009]; *Roundabout Theatre Co. v Tishman Realty & Constr. Co.*, 302 AD2d 272, 272 [1st Dept 2003]). Although the doctrine of stare decisis requires trial courts to

[1] It is noted that the *Flynn* court rejected the landlord's argument that, since plaintiff signed his lease and the construction rider on August 18, 2016 and the complaint was not filed until October 29, 2020, the concession rider was outside the scope of the four-year rent history lookback rule. In rejecting this argument, the court applied Executive Order No. 202.8 (9 NYCRR 8.202.8) providing that "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including . . . the civil practice law and rules . . . is hereby tolled" from March 20, 2020 to November 3, 2020.

follow precedent in this department, a court may follow precedents set by the Appellate Division of another department until the Court of Appeals or the Second Department pronounces a contrary rule (*see Mountain View Coach Lines v Storms*, 102 AD2d 663 [2d Dept 1984]). Because *Chernett* "reflects a change in [or clarification of] the law that warrant[s] reexamination" of plaintiffs' arguments regarding the use of concessions as means to avoid registering a lower preferential rent, plaintiffs' motion for renewal is granted (*A.A. v New York City Health & Hosps. Corp. [Jacobi Hosp. Ctr.]*, 189 AD3d 426, 427 [1st Dept 2020]). In light of the reasoning behind the decisions in the *Chernett* and *Flynn* cases, this court must revisit the allegations in the amended complaint and the record adduced thus far in this matter. Because plaintiffs allege, and the leases to plaintiffs indicate, that defendant continued to offer rent concession riders even after the initial tenants vacated and construction of the building was complete, this court finds plaintiffs have stated a cognizable claim that defendant improperly used concession riders in plaintiffs' leases as a way to avoid registering lower preferential rents. The documentary evidence submitted in this matter does not otherwise utterly refute plaintiffs' claims. Moreover, in light of the Appellate Division's application of Executive Order No. 202.8 (9 NYCRR 8.202.8) in the *Flynn* case to suspend the four-year lookback period, plaintiffs' overcharge claims, filed on October 29, 2020, and based upon initial rents charged in August 2016, fall within the statute of limitations.

Accordingly, it is

ORDERED that plaintiffs' motion for renewal is granted; and it is further

ORDERED that upon renewal, this court's order dated September 30, 2021 is vacated; and it is further

ORDERED that upon renewal, defendant's prior motion to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5) and (7) is denied; and it is further

ORDERED that the instant action is restored to active status and plaintiffs' amended complaint is reinstated.

The foregoing constitutes the decision and order of the court.

Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice