2022-08-29

# Wise v. 1614 Madison Partners, LLC

# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. ARLENE P. BLUTH** **PART** **14**

***Justice***

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BRETT WISE

Plaintiff,

- v -

1614 MADISON PARTNERS, LLC,

Defendant.

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**INDEX NO.** 154592/2022

**MOTION DATE** 08/24/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 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, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISMISSAL.

The motion by defendant to dismiss is denied.

**Background**

Plaintiff brings this putative class action about a rental building in Ridgewood. He claims that he is the resident of a building owned by defendant and that the defendant received 421-a tax benefits. "Section 421–a of the Real Property Tax Law provides for an exemption from local taxation for certain new multiple dwellings. It explicitly provides authority for a local housing agency in a city with a population of one million or more to exclude certain new multiple dwellings through the passage of a local law" (*Kew Gardens Dev. Corp. v Wambua*, 103 AD3d 576, 577, 961 NYS2d 48 [1st Dept 2013]).

A building, such as the one owned by defendant, receives property tax exemptions (the taxes get phased in over time) and, in exchange, the apartments are classified as rent stabilized. That means that any increases in rent are set by the Rent Guidelines Board ("RGB").

Here, plaintiff complains about the initial legal regulated rent for his apartment (he was not the initial tenant). That initial rent is the rent from which all subsequent rent increases are based. This number is critical: the higher the initial rent, the more the landlord can charge when the RGB approves yearly rent increases. He claims that the apartment was advertised by a broker as renting for $2,211 but defendant registered the rent with DHCR at $2,395. Plaintiff complains that defendant did not register the rents at the building with the rent that was actually charged and paid by the initial tenants as required.

Defendant moves to dismiss on the grounds that documentary evidence compels dismissal, the statute of limitations bars his claims and plaintiff failed to state a cognizable cause of action. It claims that a broker listing containing the "net effective rent" has no bearing on the actual rent charged and paid. The net effective rent is simply the rent the tenant ends up actually paying whether or not that is what is paid each month. It claims that the tenant was provided with a construction concession based on the ongoing construction at the time the lease was signed. That concession was for one free month and it was included in the listing.

Defendant insists that the statute of limitations bars the instant complaint because the Court is restricted from looking beyond four years before the complaint was filed (that would be May 27, 2018 here) and the evidence shows the charged rent was accurate during this period. It points to a DHCR fact sheet (Fact Sheet #40) which it claims permits it to provide a concession and it does not count as preferential rent. Defendant asserts this means it was allowed to give a concession but register the higher rent (the monthly rent without the concession included in the calculation) with DHCR.

Defendant stresses that the one-month concession did not have any impact on other rental payments and so it should compel the Court to dismiss this case. It also argues that at the time the concession was provided, there was no permanent certificate of occupancy.

In opposition, plaintiff argues that the initial tenant (not plaintiff) took occupancy on October 15, 2017 and the lease term ended on November 30, 2018, a lease term of about thirteen and a half months. He points to the ledger submitted by defendant and observes that the average rent for the subject apartment was actually $2,041.53 and insists that this was the rent that was actually charged and paid (and should have been registered with DHCR). Plaintiff then engages in a series of hypotheticals, some apocryphal, to demonstrate that using concessions (as defendant claims it can) could let a landlord like defendant register an extremely high initial rent. One example is where a defendant charges an entire year of rent in a single month and gives 11 free months. In that example, the initial regulated rent would obviously be very high.

Plaintiff also attaches pictures from the time period to show that the construction concession was not for construction; the photos, allegedly from October 2017, purportedly show that the lobby, the roof, and other amenities were finished and images depicting the front of the building shows that there was no ongoing construction.

Plaintiff emphasizes that the statute of limitations should not bar this case because the Housing Stability and Tenant Protection Act of 2019 ("HSPTA") provided a six-year statute of limitations and that the four-year limitations period only applied retroactively. He argues that this claim was still viable when the HSTPA was enacted. And he insists that caselaw provides that a showing of fraud can permit a court to look beyond the four-year limitations period.

The Court did not consider the reply filed by defendant as it was filed late and after the motion was already marked fully submitted. Defendant's own notice of motion cited CPLR

2214(b), which provides that a reply for a motion such as this (where the return date is more than 16 days after the filing of a notice of motion) must be filed a day before the return date. That would be August 23, 2022 (as the parties agreed to adjourn the motion to August 24, 2022). Instead, defendant filed its reply at 11 p.m. on August 24, 2022. The Court observes that the adjournment did not contain a separate date for the reply to be filed.

**Discussion**

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141, 75 NE3d 1159 [2017] [citation and internal quotations omitted]).

On a "motion to dismiss on the ground that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law"(*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

The Court denies the motion to dismiss. At this stage of the case, plaintiff has stated cognizable causes of action. Defendant admits that it provided a "concession" to the initial tenants in the subject apartment and plaintiff has raised legitimate issues about the nature of that concession.

The Appellate Division, First Department, when considering a similar case, denied a landlord's motion to dismiss (*Chernett v Spruce 1209, LLC*, 200 AD3d 596, 161 NYS3d 48 [1st Dept 2021]). In *Chernett*, just as here, tenants in a building receiving 421-a tax benefits claimed that the landlord was engaged in a fraudulent scheme to evade the requirements of the 421-a program in order to charge higher rents by providing construction concessions well after construction was complete (*id*. at 597). The plaintiff here included photos in opposition (NYSCEF Doc. No. 30- 34) that show the building was purportedly completed prior to the purported concession.

Plaintiff also pointed out that the last job listed on the DOB website for the building was on July 25, 2017, three months before the first tenants of the subject unit moved in. The job requested was a change in the certificate of occupancy, not a significant construction job that could potentially justify a construction concession. Moreover, plaintiff adeptly points out that a review of the various permits issued to the building shows that none of these permits were for construction save for a January 2017 permit for sidewalk work. At this stage of the litigation, there is a contested issue about whether the concession was really for construction or part of a scheme to register a higher initial rent with DHCR.

The Court also observes that there was an early occupancy rider (NYSCEF Doc. No. 17) that permitted the first tenants to the unit to enter the apartment a month early and the ledger (NYSCEF Doc. No. 18) appears to show that there was a credit applied (meaning it was a month free in October 2017). And the construction concession (NYSCEF Doc. No. 16) says the month free is supposed to apply to October 2018. In other words, there are additional areas for the parties to explore about the exact nature of the concession.

More broadly, the Court emphasizes that under 9 NYCRR 2521.1(g), defendant was required to register the amount charged and paid (*Chernett*, 161 NYS3d at 597) and plaintiff sufficiently alleged that defendant did not do that.

**Fact Sheet #40**

In *Chernett*, the First Department acknowledged that "We have previously credited DHCR's fact sheet 40 as a permissible interpretation of the law, finding it within DHCR's authority to deem the legal regulated rent lower than an amount resulting from an impermissibly excessive late fee" (*id*. at 598). But it found that "plaintiffs here 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*.). The same analysis applies here. Plaintiff alleged irregularities with the rent and that defendant attempted to improperly manipulate the initial legal regulated rent.

**Statute of Limitations**

The Court finds that the statute of limitations does not compel dismissal of plaintiff's claims. Plaintiff's lease commenced on April 1, 2021 (NYSCEF Doc. No. 19) and this case began on May 27, 2022, meaning that the case was filed timely. Even assuming the four-year lookback period applies (plaintiff offers a theory that the six-year limitations period in HSTPA should apply here), the First Department in *Chernett* found (under analogous circumstances) that

those claims were timely and it was permissible to review predecessor tenants' leases (*id*. at 597).

And, of course, a review of the rental history is permissible outside the lookback period where there is a cognizable allegation of a fraudulent scheme to evade rent stabilization laws. "The rule that emerges from our precedent is that, under the prior law, review of rental history outside the four-year lookback period was permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate and, even then, 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" (*Regina Metro. Co., LLC v New York State Div. of Hous. and Community Renewal*, 35 NY3d 332, 355, 130 NYS3d 759 [2020]).

The First Department has held that "We reject defendant landlord's argument that the fraudulent exception to the four-year look back period applies only to a fraudulent-scheme-to-deregulate case. In the event it is proven that defendant engaged in a fraudulent rent overcharge scheme to raise the pre-stabilization rent of each apartment, tainting the reliability of the rent on the base date, then the lawful rent on the base date for each apartment must be determined by using the default formula devised by DHCR" (*435 Cent. Park W. Tenant Assn. v Park Front Apartments, LLC*, 183 AD3d 509, 510-11, 125 NYS3d 85 [1st Dept 2020]). Plaintiff claims that the scheme to charge a higher initial rent was used throughout the building.

***Flynn***

Defendant points to *Flynn v Red Apple 670 Pac. St., LLC* (200 AD3d 607, 161 NYS3d 35 [1st Dept 2021]) as binding precedent compelling the Court to dismiss this case. But that case is entirely inapposite. In *Flynn*, the First Department dismissed a somewhat similar claim

involving a building receiving 421-a tax benefits where the plaintiff signed his lease and construction rider in August 2016 but waited until October 29, 2020 to bring the case, thereby rendering the rider outside the scope of the four-year lookback period (*id*. at 608). Moreover, a key undisputed fact in *Flynn* was that the at the time of the concession, the building had not yet received a permanent certificate of occupancy (*id*. at 609).

Here, however, plaintiff included substantial documentation in opposition showing that the building was finished when the initial tenants in the building moved in. Although the final certificate of occupancy for this building is from February 2018, there were temporary certificates of occupancy in September and December 2017. These certificates (NYSCEF Doc. No. 12) permitted residency in dozens of apartments. In other words, based on this record, there is an issue as to whether there actually was construction ongoing that could justify a concession or, as plaintiff argues, the concession was just a ruse to allow it to register a higher rent.

**Summary**

It is important to consider the exact nature of the program at issue here. As part of an effort to incentivize the construction of new apartments, the 421-a program provides significant tax benefits to landlords. Plaintiff included in his opposition defendant's June 2022 tax bill which shows that defendant paid $56,138.12 in annual taxes (NYSCEF Doc. No. 26). Plaintiff says defendant's participation in this program helped defendant avoid $763,463.84 in taxes. The purpose of the 421-a program is not to allow a landlord to pay an extremely low tax rate, as compared with other property owners, and also artificially inflate the rents it can charge its tenants. That is what plaintiff alleges here: that defendant concocted a scheme to set the rents higher than what the law allows. Plaintiff has stated cognizable causes of action.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant is denied and this defendant is directed to answer pursuant to the CPLR.

Remote Conference: December 5, 2022 at 11:30 a.m. By November 28, 2022 the parties must e-file 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement or 3) letters explaining why no agreement about discovery could be reached. The Court will then assess whether a conference is necessary. The failure to upload something by November 28, 2022 will result in an adjournment of the conference.

**8/29/2022**
**DATE**

**ARLENE P. BLUTH, J.S.C.**

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