2023-05-25

Traub v. RSD 920, LLC

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHLOMO S. HAGLER** **PART** **17**

Justice

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PETER PEARSON TRAUB, YULIA DUSMAN

Plaintiff,

- v -

RSD 920, LLC,GOLDFARB PROPERTIES, INC.,

Defendant.

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INDEX NO. 159504/2019

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 67, 68, 69

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

In this landlord-tenant action, plaintiffs, Peter Pearson Traub, Jr. and Yulia Dusman move, pursuant to CPLR 3212, for an order granting summary judgment in favor of plaintiffs and against defendants as well as dismissing all affirmative defenses asserted against them.

Defendants, RSD, LLC and Goldfarb Properties, Inc., oppose and cross-move for an order denying plaintiffs' motion and for an order declaring that: (a) the rent defendants charge in the lease commencing October 1, 2019 should be $2,486.62; (b) on January 1, 2020, defendants were permitted to add $44.93 to the monthly rent; and (c) on January 1, 2021, defendants will be permitted to add $.85 to the monthly rent.

Background

The Parties

Plaintiffs are the rent stabilized tenants of apartment 32 located at 920 Riverside Drive, New York, New York 10032 (the premises), pursuant to a written lease dated September 14, 2017 effective October 1, 2017 through to and including September 30, 2019 (Lease

Agreement). Plaintiff Dusman has been renting apartment 32 since 2004. After the parties were married, plaintiff Traub moved into the apartment, and he has been on the lease along with Dusman since 2014.

Defendant RSD 920, LLC (RSD) is a New York limited liability company which owned the premises. Defendant Goldfarb Properties, Inc. (Goldfarb), a New York corporation, is the managing agent on behalf of RSD for the premises.

General Background

At or around April 27, 2017, defendants applied for a major capital improvement (MCI) with the New York State Division of Housing and Community Renewal, Office of Rent Administration (DHCR) in the amount of $1,528,853.83, which was subsequently approved (NYSCEF Doc. No. 13). The DHCR MCI order dated November 28, 2018, awarded defendant RSD a monthly rent increase of $45.14 per room resulting in an increase of $180.56 for plaintiff's four-room apartment (NYCEF Doc. No. 57). The order also provided that the increase for rent stabilized tenants, is "**effective as of 07/01/2017**, and collectible as of 12/01/18" (*id.* at ¶ VI, page 2 [emphasis added]). At the time defendants filed the MCI application, plaintiff's monthly rent was $2,246.26, as they had entered into a one-year lease renewal (*see* dated June 21, 2016 effective October 1, 2016, NYSCEF Doc. No. 58). Thereafter, pursuant to a lease dated September 17, 2017, plaintiffs entered into a two-year lease renewal at a monthly rent of $2,291.19 per month from October 1, 2017 through September 30, 2019 (NYCEF Doc. Nos. 43, 59). This figure represents a 2.0% increase as established under the rent board guidelines (*id.*).

On or about May 27, 2019, defendants presented plaintiffs with a renewal lease agreement dated May 27, 2019 (NYSCEF Doc. No. 45), which reflected a one-year renewal option at a monthly rate of $2,508.83, and a two-year renewal lease at the monthly rate of

$2,533.54.[1] However, plaintiffs were offered a lower rent of $2,463.05 for a one year lease, and $2,487.76 for a two year lease (*id.*). In addition, the lease renewal acknowledged a security deposit in the amount of $2,291.19, and requested additional monies toward the security deposit (*id.*).

On June 14, 2019, the "Housing Stability and Tenant Protection Act" (HSTPA) was passed by the New York legislature. Under the HSTPA, MCI charges as additional rent are capped at 2% per year, commencing on September 1, 2019.

On September 1, 2019, plaintiffs tendered the monthly rent and an additional $45.82, reflecting the MCI charges capped at 2%. Defendants demanded the full 6%, as this was the pre-HSTPA MCI rent increase cap to which they claim they were entitled as an additional MCI charge for the month of September; and also demanded a lease renewal in compliance with the HSTPA, capping all MCI surcharges at 2%. In addition, on September 1, 2019, plaintiffs demanded the excess security deposit to be refunded. Defendants refused to refund the excess.[2]

On October 1, 2019, defendants again demanded the full 6%, which plaintiffs tendered, subject to reservation and recoupment, continuing until the court renders a judgment on the issue.

On October 5, 2019, RSD issued a 15-day notice of termination effective October 20, 2019 as a result of plaintiffs' failure to execute a renewal lease (Fifteen Day Notice of Termination dated 10/5/19, NYSCEF Doc. No 46). Plaintiffs seek a two-year renewal lease commencing on October 1, 2019 at a rate of $2,348.47 plus the additional MCI charge of $45.82 per month, i.e., $2,394.29, capped at 2% of the annual rent.

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[1] These figures represent the September 2019 legal rent of $2,291.29 plus a 6% increase, as well as the 2% MCI increase and either a 1.5% RGB increase on the one-year lease, or 2.5% RGB increase on a two-year lease (*see* NYSCEF Doc. No. 45).
[2] This issue was resolved between the parties (*see* NYSCEF Doc. No. 66).

The parties thereafter, on October 30, 2019, entered into a Stipulation agreeing that plaintiffs would pay rent at the $2,393.40 monthly rent, which was so ordered by the court on December 4, 2019 (*see* NYSCEF Doc. No. 48; *see also* discussion infra at 5-6). On October 31, 2019, defendants presented plaintiffs with a lease renewal reflecting a lower rent to be charge of $2,393.40 for a two-year lease renewal, which was signed by plaintiffs on November 5, 2019 (NYSCEF Doc. No. 47). The 6% increase was not added to the calculation.

Relevant Statutes

Article 26-511.1 of the New York City Administrative Code, referred to as the HSPTA provides, in relevant part, "Notwithstanding any other provision of law to the contrary, the [DHCR] . . . shall promulgate rules and regulations applicable to all rent regulated units that shall:

> "(7) establish that temporary major capital improvement increases shall be fixed to the unit and shall cease thirty years from the date the increase became effective. Temporary major capital improvement increases shall be added to the legal regulated rent as a temporary increase and shall be removed from the legal regulated rent **thirty years** from the date the increase became effective inclusive of any increases granted by the local rent guidelines board;
>
> (8) establish that temporary major capital improvement increases shall be collectible prospectively on the first day of the first month beginning sixty days from the date of mailing notice of approval to the tenant. Such notice shall disclose the total monthly increase in rent and the first month in which the tenant would be required to pay the temporary increase. An approval for a temporary major capital improvement increase shall not include retroactive payments. **The collection of any increase shall not exceed two percent in any year from the effective date of the order granting the increase over the rent set forth in the schedule of gross rents, with collectability of any dollar excess above said sum to be spread forward in similar increments and added to the rent as established or set in future years.** Upon vacancy, the landlord may add any remaining balance of the temporary major capital improvement increase to the legal regulated rent. **Notwithstanding any other provision of the law, for any renewal lease commencing on or after June 14, 2019, the collection of any rent increases due to any major capital improvements approved on or after June 16, 2012 and before June 16,**

2019 shall not exceed two percent in any year for any tenant in occupancy on the date the major capital improvement was approved"[3]

(emphasis added).

Procedural History

On September 27, 2019, plaintiffs commenced this action via a summons with notice. On October 18, 2019, plaintiffs served an amended Complaint, as well as moved, by order to show cause for a temporary restraining order or preliminary injunction seeking to maintain the status quo in order to enable the court to render a judgment on the merits. On October 21, 2019, a temporary restraining order was granted.

By stipulation entered into between the parties on October 30, 2019 and so-ordered by the court on December 4, 2019, the parties stipulated and agreed, among other things:

> "10. In order to permit the parties to litigate their differences and in good faith without subjecting the Plaintiffs to a holdover status with respect to said Apartment, and in consideration for the lifting of the Temporary Restraining Order dated October 21, 2019, it is agreed as follows: The Defendant will prepare a renewal lease offer for the Plaintiff's [sic] to commence October 1st, 2019 with a one-year renewal option at $2,370.49 [$2,291.19 (prior lease) + 1.5% + $44.93] and a two-year option at $2,393.40 [$2,291.19 (prior lease) + 2.5% + $44.93]"[4]
>
> 11. All parties understand [and] agree that this lease shall be entered into without prejudice by either party pending the final determination of this action. In the event the Court finally determines that the rent charged in this renewal lease or any subsequent renewal lease is subject to re-calculation, then this renewal lease and any subsequent lease shall be re-calculated in accordance therewith.
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> 12. In the event that the rent charged herein requires re-calculation as set forth in the final determination of this action, then in accordance with paragraph "11" herein, the Plaintiffs shall pay all back rent owed pursuant to the recalculated renewal lease commencing on October 1st, 2019, and any

[3] HSTPA initially made this section effective as of September 1, 2019, but a later amendment, as reflected herein, made the 2% limitation effective for any renewal lease commencing on or after June 16, 2019.
[4] Based on this stipulation, the 6% increase added to the rent in in January 2019 was rolled back to 2% in computing the rent for the lease beginning October 1, 2019. No increase was added to rent on January 1, 2020.

> subsequent renewal lease, within 30 days from the date of said final determination."

(NYSCEF Doc. No. 48).

Discussion

It is well settled that "'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], *rearg denied* 10 NY3d 885 [2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]).

This is a matter of first impression. After a review of the papers and upon oral argument, the questions before the court are: (1) whether the former 6% cap is at all applicable to the MCI rent increase at issue herein; and (2) whether the initial 2% MCI cap can be added to base rent for future lease renewals up until the expiration of 30 years. This issue is a question of "statutory reading and analysis, dependent only upon accurate apprehension of legislative intent" and as such "we need not . . . defer to the agency in construing the statute" (*Matter of Ansonia Residents Assn. v New York State Div. of Housing & Community Renewal*, 75 NY2d 206, 214 [1989] [internal quotation marks and citation omitted]).

Plaintiffs argue that the HSTPA prohibits defendants from collecting MCI charges in excess of 2% of the existing legal rent as reflected herein. Plaintiffs do not dispute the 6%

increase that was applied pre-2019. However, they contend that the 2019 lawful rent with 2-year renewal increase at 2.5% as approved for rent stabilized apartments should not include the 6%. Further, they assert that any MCI surcharges are capped at 2% per month for the October 2019 lease renewal, which amounts to $46.96 and that the MCI surcharges must be capped at 2% per month for all future renewal leases based upon the base lawful rent, without compounding MCI increases from lease to lease, as was the practice under the previous law. In sum, plaintiffs assert that defendants are limited to a straight two percent increase, not compounded, and are not entitled to keep the 6% (Dec. 9, 2021 hearing tr at 13, NYSCEF Doc. No. 69).

Defendants counter that plaintiffs misinterpret the collection of MCI rent increases, as the HSTPA does not limit the award to only 2% to be collected or added to the rent in total, just to any one increase at a time. Rather, they want to keep the 6%, and add the 2% MCI rent increase, which would be compounded at 2% for subsequent lease renewals (*id.*). Here, RSD added $134.78, which represented 6% of plaintiff's rent in effect of the filing date of the MCI application, i.e., April 25, 2017, to the rent beginning January 2019. This increase occurred during the term of the lease in effect, which commenced on October 1, 2017 and expired on September 30, 2019. The remaining balance of the award, i.e., $45.78, was not planned to be added to the legal regulated rent (LRR) until January 2020, one year after the initial portion of the increase was added to the rent. However, under the HSTPA, the collection or addition to the LRR, limited the amount to 2% of $2,246.26, i.e., $44.93. Thereafter, defendants argue that beginning January 1, 2021, the remaining balance could be added on to the LRR in the amount of $.85 per month.

As noted above, plaintiffs do not assert that they are entitled to a repayment of the 6% MCI charges prior to the execution of the new lease, i.e., October 2019.[5] However, they are claiming that under the HSTPA, any lease executed after June 14, 2019 may not contain an MCI increase exceeding 2%, such that defendants "may only contain a single 2% MCI surcharge to the existing lease agreement at issue here over the next 30 years" (Traub reply affirmation & affirmation in opposition to cross-motion at 6, NYSCEF Doc. No. 63). In other words, after that date, the MCI rent increase reverts back to the 2% on the rent as of the time that the application was made. They contend that defendant is free to apply the remaining portion of the MCI, should plaintiffs vacate the premises, to the next tenant (*id.*).

The purpose of the HSTPA was to protect tenants from deregulation of rent controlled and/or subsidized apartments, as there were many abuses being taken advantage of by landlords. The law closed loopholes, which allowed landlords to use apartment and building improvements, as well as tenant turnover, as a mechanism to impose large rent hikes and deregulation. Prior to the enactment of the HSPTA, with respect to MCI's, landlords were entitled to a permanent legal rent increase for certain capital work for building-wide improvements (*see Ansonia*, 75 NY2d at 214-217). The MCI rent increase was amortized over eight or nine years, depending on the building size and the MCI rent increase was capped at 6%.

In pertinent part, Park K section 18 of HSTPA amended the MCI related sections of the Rent Stabilization Law (RSL) and the Rent Stabilization Code of New York City (RSC) and provides that "this act shall take effect immediately."

[5] Specifically, during oral argument plaintiff conceded stating "this statute is meant to look back at prior MCI awards and looking forward saying, . . . "maybe you got 6 percent for [] six months before this went into effect but moving forward any renewal lease [is] limited to 2 percent" (12/9/21 hearing tr at 3).

After the HSTPA was passed, the MCI increases are no longer permanent, and the MCI rent increase cap is reduced from 6% to 2%. In addition, the 2% cap applies prospectively to MCIs that became effective in the last seven years, i.e., between June 16, 2012 and June 16, 2019. The MCI changes in the HSTPA make it so that "increases shall be collectible prospectively" and thus not result in impermissibly retroactive legislation (NYC Administrative Code § 26-511.1 [8]).

On October 3, 2022, an Article 78 action was brought before the Supreme Court, Queens County, wherein the petitioner argued that the HSTPA was not intended to apply to its MCI application (dated June 15, 2018), which predated the HSTPA's effective date of June 14, 2019 (*Richmond Hill 108 LLC v New York State Division of Housing & Community Renewal*, index No. 728474/2021, Leverett, J. [Sup Ct, Queens County Oct. 3, 2022]). In that case, the DHCR was still processing petitioner's application when the legislature passed the HSTPA. The DHCR's rent administrator (RA) issued an order partially denying and granting the MCI application. Petitioner filed a petition for administrative review (PAR) claiming that since the MCI application was filed prior to HSTPA's enactment, the RA erred in applying the MCI provisions to the owner's pending application. The RA order was affirmed. The court found that an owner's "MCI application filed prior to the passage of HSTPA did not entitle [the owner] to an automatic rent increase . . . [t]the change in the MCI formula had only prospective effect which have been found constitutional permissible" (*Richmond Hill 108 LLC,* at 5, 6). The court further found that "[DHCR's] application of Part K was consistent with the statutory construction and language of the legislature to apply HSTPA to MCI proceeding pending at the time of the enactment" (*id.* at 5). In dicta, the Honorable Leverett opined "petitioner had no right to MCI increase based on a judgment awarded prior to HSTPA, as was found in *Harris v Israel*,

191 AD3d 468 [1st Dept 1998]), but rather petitioner's right to MCI increases was determined subsequent to HSTPA" (*id.* at 6).

Comparatively, here, however, the MCI order was granted and in effect *before* the HSTPA's effective date. As there is minimal or no case law on this specific issue, this court looks to the DHCR's bulletins for guidance (*see e.g., 1337 Fulton St., LLC v Smith*, 2022 NY Slip Op 32294[U], *3 [Civ Ct, Kings County 2022] [finding DHCR has authority pursuant to RSL § 26-511.1 and RSC § 2527.11 to promulgate operational bulletins and provide advisory opinions interpreting rent stabilization laws]).

The New York State Division of Housing and Community Renewal's webpage entitled "HCR's FAQ's on Major Capital and Individual Apartment Improvements" question 2 asks "How is the legal rent adjusted when an MCI order is issued after a renewal lease had been executed?" The answer states:

> "If the effective date of the MCI order is before September 30 (the date used for calculating guideline adjustments), the renewal lease increase may be recalculated based on the higher legal rent, *which now includes the entire amount of the MCI rent increase. This will result in a larger renewal increase.* . . If the effective date of the MCI increase is after September 30, the increase in the legal rent will not be compounded by the guideline adjustment(s) until the next lease renewal. The actual rent paid by the tenant is subject to an annual MCI rent increase cap of 2%" (italics added)

(https://hcr.ny.gov/apartment-improvements accessed March 14 and May 9, 2023). While the court is not obligated to follow this advice, it finds it particularly instructive and persuasive. Here, the MCI order is effective as of July 1, 2018, before September 30th, and collectible as of December 1, 2018 (NYSCEF Doc. No. 57), well before the enactment of the HSTPA on June 14, 2019. As such, the renewal lease "may be recalculated" including the "entire amount of the MCI rent increase," that is, using the 6%. The court further holds that this rationale comports with the findings in *Richmond Hill 108 LLC* as that case is factually distinguishable since the MCI order

there was issued *after* the HSTPA's enactment. Plaintiffs misconstrue that any lease renewal subsequent to HSPTA's enactment must revert the base rent to 2%. However, the adjustment is made based on the effective date of the MCI order, not the date of the lease renewal. Once 30 years after the effective date passes or full payment of the MCI is made, whichever comes first, the base rent will revert back and the MCI increase will be removed. To hold otherwise, would run afoul of the Court of Appeals holding in *Matter of Regina Metro. Co., LLC v NY State Div of Hous. & Community Renewal*, 35 NY3d 332 [2020] [holding that certain overcharge calculations provisions amended by Part F of the HSTPA increased an owner's financial liability for past illegal conduct and, therefore could not be applied by the DHCR retroactively to pending overcharge proceedings]). Therefore, the October 2019 lease should include the 6% as the base rent as it predated HSTPA's enactment and the first renewal lease thereafter shall include the 2% increase cap as required under the statute.

With respect to the 2% increase going forward, the court looks to the DHCR's Office of Rent Administration Fact Sheet #24, entitled "Major Capital Improvements (MCI)" which provides that MCI's "are now capped at 2% *per year"* (https://hcr.ny.gov/system/files/documents/2020/11/fact-sheet-24-10-2019.pdf accessed on March 14, 2023). Further, it provides that "MCI increases are temporary and must be removed from the rent 30 years after the date the increase became effective inclusive of any increases granted by the local rent guidelines board" (*id.*). In response to question 13 "How does this increase apply to my rent?", the DHCR advises "DHCR's MCI order will specify the rent increase for your apartment and when such increase is collectible. The MCI rent increase is limited to 2% of your rent that was in effect when the owner filed the application . . . during any 12-month period from the collectible date on the order. *Any amount that is more than 2% of the*

rent may only be collected in the future 12-month periods" (*id.* [emphasis added]). Under the most recent Fact Sheet # 26, entitled "Guide to Rent Increases for Rent Stabilized Apartments" the DHCR provides that "Under the HSTPA, there are limitations on future MCI increases, such as: an annual 2% rent increase cap . . ." (https://hcr.ny.gov/system/files/documents/2022/07/fact-sheet-26-07-22.pdf last accessed March 14, 2023). With respect to MCI, it provides, among other things, "There are no retroactive rent increases. The collection of the increase is limited to a 2% cap/yearly phase in. . . . The first renewal lease effective after June 14, 2019 must reflect no more than a 2% increase. . . . The MCI rent increase is temporary and it must be removed from the rent in 30 years and the legal rent must be adjusted at that time for guideline increases that were previously compounded on a rent that included the MCI rent increase" (*id.*).

Taking these together, this court holds that based on the plain language of the statute and DHCR's advisory bulletins, it appears that the 2% MCI is intended to be added to the base rent in the subsequent years, up until the amount is paid or 30 years, whichever occurs first (*see Bryant Ave. Tenants' Assn. v Koch*, 84 NY2d 960, 963 [1994] ["The practice of merging the increase into the base rent was implicitly condoned by *Ansonia* and is, in any event, consistent with the intent of the Rent Stabilization Law"]). The court pays particular attention to the language set forth under RSL 26-511.1, which states, among other things

> "The collection of any increase shall not exceed two percent in any year from the effective date of the order granting the increase over the rent set forth in the schedule of gross rents, with collectability of any dollar excess above said sum to be spread forward in **similar** increments and added to the rent as established or set in future years. Upon vacancy, the landlord may add any remaining balance of the temporary major capital improvement increase to the legal regulated rent" (emphasis added).

If the legislature intended for the 2% increase to be set at a dollar amount for the duration of a tenant's residence, it would have stated that the collectability of any dollar excess above said

sum to be spread forward in the same or identical increment for the duration of that person's tenancy, rather than similar increments, which implies that the monetary amount would not be the same as it is added to the base rent.

Based on the foregoing, the motion by plaintiffs is denied and the cross-motion is granted.

Conclusion

Accordingly, it is

ORDERED that the motion by plaintiffs, Peter Pearson Traub, Jr. and Yulia Dusman, is denied; and it is further

ORDERED, ADJUDGED and DECLARED that the cross-motion by defendants, RSD 920, LLC and Goldfarb Properties, Inc. is granted such that the court declares (a) the rent defendants charge in the lease commencing October 1, 2019 should be $2,486.62; (b) on January 1, 2020, defendants were permitted to add $44.93 to the monthly rent; and (c) on January 1, 2021, defendants will be permitted to add $.85 to the monthly rent.

This constitutes the decision and order of the court.

5/25/2023
DATE

SHLOMO S. HAGLER, J.S.C.

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