2023-06-29

Reilly v. 5504-301 E. 21st St. Manhattan LLC

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS **PART** 57TR

Justice

----------X

PATRICK J. REILLY, JOSHUA L. PINKELMAN,

Plaintiff,

- v -

5504-301 EAST 21ST STREET MANHATTAN LLC,

Defendant.

----------X

INDEX NO. 159490/2019

MOTION DATE 06/23/2023

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 103, 120, 121, 122, 123, 124, 126, 128, 129

were read on this motion to/for DISMISSAL.

BACKGROUND

This is an action for rent overcharge and related declaratory relief based upon Plaintiffs' tenancy at 301 East 21st Street, Apartment 16L, New York, New York 10010 ("Subject Premises"), initially filed September 30, 2019.

On November 17, 2022, pursuant to the parties' stipulation Plaintiffs filed an amended complaint ("FAC") to conform their pleadings to the discovery and to the seminal case of *Matter of Regina Metro. Co. v. DHCR*, 35 N.Y.3d 332 (2020), in which the Court of Appeals held that a tenant claiming rent overcharge based on pre base date events must plead and prove that the base date rent is fraudulent, failing which the base date rent is deemed lawful.

The FAC includes a cause of action for fraud.

On May 15, 2023, Defendant moved pursuant to CPLR §§3211(a)(7) and 3016(b) for dismissal of the third cause of action for fraud.

On June 23, 2023, the motion was submitted and the court reserved decision.

For the reasons stated below, the motion is granted.

ALLEGED FACTS

Defendant is the owner of 301 East 21st Street, New York, New York 10010. Defendant took ownership on May 8, 2015. At the time of the conveyance the Subject Premises was represented to Defendant as a non-regulated tenancy, with Tiffany Ng as the tenant, at a rent of $3,700 per month.

The DHCR registration history for the Premises, reveals that the Subject Premises had a rent stabilized tenant, Dr. Robert Love, until 2000; thereafter the Subject Premises was registered as vacant from 2001 through 2008. From 2009 on, the Subject Premises was not registered with DHCR.

DISCUSSION

On a motion to dismiss, the court must afford the complaint a liberal construction, accept the facts as alleged in the pleading as true, confer on the nonmoving party the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory. *Graven v. Children's Home R.T.F., Inc*. 152 A.D.3d 1152 (3d Dept. 2017). The question is not whether the complaint states a cause of action but whether the pleader in fact has a cause of action. *Leon v Martinez* 84 N.Y.2d 83 (1994).

In an overcharge case challenging rental events occurring prior to the "base date," the question of fraud is a paramount concern, as it determines how any overcharge damages are calculated. In a case such as this one, where the relevant events all occurred prior to enactment of the Housing Stability and Tenant Protection Act ("HSTPA") on June 14, 2019 (L. 2019, Ch. 36), the base date is governed by pre-HSTPA law, and is four years prior to interposition of the complaint. As such, in this case the base date is September 30, 2015.

> …(U)nder the pre-Housing Stability and Tenant Protection Act of 2019 law applicable here, 'review' of rental history outside the four-year lookback period [i]s 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.

Casey v. Whitehouse Ests., Inc., 39 N.Y.3d 1104, 1106 (2023).

> Fraud consists of 'evidence [of] a representation of material fact, falsity, scienter, reliance and injury' (*Vermeer Owners v Guterman*, 78 NY2d 1114, 1116 [1991]; *see e.g. Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569 [2018]; *Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016]).

Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal, 35 N.Y.3d 332, 426 (2020); *see also Woodson v Convent 1 LLC* 2023 NY Slip Op 02857. "[A] mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further. What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization." *Matter of Grimm v DHCR*, 15 N.Y.3d 358 (2010); *See also Matter of Boyd v DHCR*, 23 N.Y.3d 999 (2014).

Plaintiffs fail to plead the elements of falsity or scienter in this case. These two elements are essential components of fraud as they constitute the actual wrongdoing and show the intent of the alleged wrongdoer. Plaintiffs allege that Defendant knew or should have known that Plaintiffs were entitled to be rent stabilized tenants, and that Defendants "negligently" failed to register and treat Plaintiffs as such.

The FAC, which is not verified and primarily makes assertions based upon information and belief, fails to provide any specifics as to the alleged fraud, such as if, when, and how any fraudulent deregulation occurred, what misrepresentations were made and to whom about the deregulation, how Plaintiffs' multiple predecessors relied upon them, whether Defendant knew

they were false, or the general "circumstances constituting the wrong" as would be required in cases of fraud governed by CPLR §3016(b).

Exactly when and how the Subject Premises was deregulated is unknown, and nothing in the FAC specifies any action or scheme of illegal deregulation.

The DHCR registration history indicates that the Subject Premises was vacant from 2000 through 2008. Thus, when subsequently rented in 2009, the then owner would have been entitled, pursuant to the prior version of RSC §2526.1(a)(3)(iii), to charge a first rent, which at minimum would have provided a basis for Tiffany Ng to be a lawfully deregulated tenant. Plaintiffs rely on an affidavit which asserts that the Subject Premises was owner occupied during several years when it was registered as vacant, assuming the truth of such allegation, it is without legal significance, since under prior RSC §2526.1(a)(3)(iii) vacant apartments and owner-occupied apartments are functionally identical.

Plaintiffs are looking at a vacancy registration and subsequent lack of registration and assuming it was improper without any actual knowledge nor even a direct allegation of a fraudulent deregulation. The FAC points to the 20-year period prior to the initiation of this action stating that "the last legitimate registered rent was in 2000" and infers that all subsequent registrations are false, but fails to allege what happened, or why the subsequent registrations are false. Allowing such an assumption to stand creates an unreasonable and unrealistic standard that would shift the burden to the Defendant to prove an absence of fraud for 20 years, 15 years of which occurred prior to their ownership.

"What is [c]ritical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action…" Under "…CPLR 3016(b) the complaint must sufficiently

detail the allegedly fraudulent conduct…" *Sargiss v. Magarelli*, 12 NY3d 527, 530–31 (2009). Plaintiff has failed to plead falsity.

Scienter refers to the intent to deceive, as a fraud claim is not actionable without a showing that the misrepresentations were made with the intent to deceive. *Friedman v Anderson*, 23 AD3d 163, 167 (1st Dept 2005). For pleading purposes, Plaintiffs must allege that Defendant intentionally misrepresented a material fact to induce Plaintiffs' reliance, see *Ozelkan v Tyree Bros. Environmental Services, Inc*., 29 AD3d 877, 878 (2d Dept 2006). Intent to deceive may be proved by showing that defendant knew, at the time he or she made the representation, that it was false. *Abrahami v UPC Const. Co., Inc*., 224 AD2d 231, 232-233 (1st Dept 1996).

Scienter in the FAC is not sufficiently alleged by conclusory statements that Defendants knew or should have known that the Subject Premises is regulated, or that Defendant's failure to register the rent with the DHCR was a willful act because Defendant reasonably should have known the apartment is regulated. Such claims are not a direct showing of willfulness and stand only as an allegation of negligence. Plaintiffs have failed to allege how Defendant was to know the apartment was rent stabilized, let alone how such representations were part of a fraudulent scheme to deregulate the apartment.

Negligence does not include a wrongful purpose and, therefore, is not fraud, and cannot be converted to fraud. *Giant Group, Ltd. v Arthur Andersen, LLP*., 2 AD3d 189, 190 (1st Dept 2003).

In opposition, Plaintiffs do not directly address these points. The alleged fraudulent pre base date conduct Plaintiffs claim amounts to a failure to register and a failure to serve a notice of deregulation pursuant to RSC §2520.11(u). However, a failure to register and serve a notice of deregulation cannot by themselves establish fraud. *See Fuentes v. Kwik Realty LLC* 186 AD 3d

435, 437-438 (2020); *Tribbs v. 326-338 E 100th LLC*, 215 AD3d 480 (1st Dept. 2023) (failure to register).

Plaintiffs argue that they are not required to establish the traditional elements of fraud, but that argument is rejected based on the Appellate authority discussed above.

The Appellate Division has now held repeatedly that allegations that the base date rent is tainted by fraud requires pleading and proving all the traditional elements of fraud. In this case the deregulation of the Subject Premises took place long before any of the current parties were involved. There are plausible factual scenarios under which the deregulation could have been entirely proper, and certainly non-fraudulent. Any claims of pre base date fraud are speculative.

Finally, Plaintiffs argue Defendant's motion is precluded by either collateral estoppel or law of the case, based decisions handed down prior to service and filing of the FAC. However, the FAC is the only operative pleading in this action at this time and the only appropriate complaint to consider.

Collateral estoppel is not applicable here, as Plaintiffs do not cite a decision a prior action that would have preclusive effect here. *See Kaufman v Eli Lilly and Co.*, 65 NY2d 449 (1985); *Matter of Donziger*, 163 AD3d 123 (1st Dept 2018).

As to the law of the case doctrine, it is discretionary rather than mandatory, and a previous order denying a motion to dismiss a complaint is not dispositive on a motion to dismiss a subsequent amended complaint. *Cobalt Partners L.P. v. GSC Capital Corp.*, 97 AD3d 35, 39 (1st Dep't. 2012). Additionally, the court's 2020 dismissal of Defendant's affirmative defense that fraud was insufficiently pleaded in the original complaint was without prejudice to the right to raise it in a subsequent motion. In the years since, the Appellate Division has clarified the law. In *Tribbs*, the Appellate Division noted:

> When, in May 2021, the motion court said "[f]raud may…. be shown by an owner's failure to register with DHCR coupled with increases in rent.' It did not have the benefit of our decision iin *Ampim v 160 E. 48th St. Owner II LLC* (208 AD3d 1085 [1st Dept 2022]), which said, "an increase in rent and failure to register [an] apartment with . . . (DHCR), standing alone, are insufficient to establish a colorable claim of a fraudulent scheme to deregulate the apartment" (*id.* at 1085-1086).

Tribbs v. 326-338 E 100th LLC, 215 A.D.3d 480, 481 (2023).

It is equally fair to say that the law of fraud in the context of challenging the base date rent has evolved since the prior 2020 decision in this action addressing the initial complaint.

WHEREFORE it is hereby:

ORDERED that Defendant's motion to dismiss the third cause of action in the first amended complaint is granted; and it is further

ORDERED that, within 20 days from entry of this order, Defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that this constitutes the decision and order of this court.

20230629141435SBKRAUS170544645A2049159D02B7041886FCC8

6/29/2023
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE: [ ] **CASE DISPOSED** [X] **NON-FINAL DISPOSITION**
[X] **GRANTED** [ ] **DENIED** [ ] **GRANTED IN PART** [ ] **OTHER**