2023-07-18

525-527 W 135 LLC v. Morales

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525-527 W 135 LLC v Morales
2023 NY Slip Op 23212
Decided on July 18, 2023
Civil Court Of The City Of New York, New York County
Bacdayan, J.
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Decided on July 18, 2023

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

525-527 W 135 LLC, Petitioner,

against

Ana Morales, Respondent.

Index No. 308353-22

Novick Edelstein Pomerantz, PC (Micheli I. Perez, Esq.), for the petitioner

Northern Manhattan Improvement Corporation (Madeline R. Passaro, Esq.) for the respondent

Karen May Bacdayan, J.

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc Nos: 9-26.

PROCEDURAL POSTURE AND BACKGROUND

This is a nonpayment proceeding commenced against Ana Morales ("respondent"), the rent stabilized tenant of record. Respondent has resided in the premises since September

2008 when she took occupancy pursuant to a vacancy lease which indicated a preferential rent of $1,463, and a higher legal regulated rent ("LRR") of $1,582.62. (NYSCEF Doc No. 11, Morales affidavit ¶¶ 2-3.) Respondent filed an answer in response to the petition alleging improper service of the notice of petition and petition, that part of the rent claimed had been paid, conditions in the apartment in need of repair, and a general denial. (NYSCEF Doc No 4, self-represented answer.)

Upon retaining counsel, respondent moved to amend her answer to include additional defenses including laches, defective predicate notices and pleadings, a more detailed breach of the "warranty of habitability" affirmative claim, and a fraudulent rent overcharge defense and counterclaim. (NYSCEF Doc No. 9, notice of motion [sequence 1]; NYSCEF Doc No. 12, proposed amended answer.) With regard to respondent's fraudulent overcharge claim, respondent proposes to plead that petitioner knowingly made material misrepresentations about the lawful rent upon which respondent relied to her injury; that petitioner registered a significant rent increase of 60% between vacatur of the former tenant and her tenancy; that the former tenancy and respondent's tenancy overlapped; that the apartment did not look as though the landlord had made any improvements to the premises prior to her taking occupancy; that the landlord charged the former tenant and respondent preferential rents; and that there are discrepancies on the face of the Division of Housing and Community Renewal ("DHCR") rent registration history, including three years of no registrations prior to respondent's tenancy. (NYSCEF Doc No. 12, proposed amended answer ¶¶ 17-20.) In support of her argument, respondent attaches a copy of the DHCR registration which documents that petitioner assessed a 60% increase in rent between [*2]the tenancy of the immediately preceding tenant and that of respondent, which respondent surmises could only be "justifiable . . . if the landlord completed an Individual Apartment Improvement ('IAI')." [FN1] (NYSCEF Doc No. 11, Morales affidavit ¶ 6; NYSCEF Doc No. 10, respondent's attorney's affirmation ¶ 38.)

This motion was fully briefed. At oral argument, the court sought supplemental briefing regarding a recently issued Appellate Division First Department case, *Burrows v 75-25 153rd St., LLC*, 215 AD3d 105 [1st Dept 2023], which had not been cited by either party. It is undisputed that, as in *Burrows*, the law in effect prior to the passage of the Housing Stability and Tenant Protection Act ("HSTPA") applies to the facts of this proceeding, as some of the alleged overcharges occurred prior to the commencement of the HSTPA.[FN2] The parties submitted their supplemental affirmations, and oral argument was held on July 11, 2023.

DISCUSSION

***Burrows v 75-25 153rd St., LLC*, 215 AD3d 105 [1st Dept 2023]**

In *Burrows*, all of the subject building's owners had benefitted from the Real Property Tax Law ("RPTL") § 421-a, which provides certain tax abatements for new construction in exchange for certain consideration. Important here is that the apartments in a building subject to RPTL 421-a must be subject to rent stabilization so long as the owner is receiving benefits under the program. Under Rent Stabilization Code ("RSC") (9 NYCRR) § 2521.1 (g), the initial LRR of an apartment in a building receiving section 421-a tax benefits is required to "be the initial adjusted monthly rent *charged and paid* (emphasis added)." (*Burrows* at 111.) Each of the tenants received leases which stated that their rent was a preferential rent, which what they had been paying, and informed them of a higher LRR.[FN3] , [FN4] Each lease had a rider attached to it, signed [*3]by the parties, which acknowledged that the LRR was the higher amount registered with DHCR, and that the tenant would be charged a lower preferential rent, plus allowable increases, for the duration of their tenancy. The tenants argued that according to RSC, the rent registered as the LRR should have been the lower preferential rent charged and paid. (RSC 2521.2 [b].) The landlord did not dispute this point. However, because the landlord calculated increases based on an illegally inflated rent, the tenants argued that each subsequent increase that was charged and paid was an unlawful, *and fraudulent*, overcharge. As such, the tenants posited that the landlord could not be insulated by the four-year statute of limitations and four-year look-back period. (CPLR 213-a, as amended by L 2019, ch 36, § 1, part F, § 6.)

The *Burrows* tenants relied on the "fraud exception" to the four-year look-back rule as clarified in *Regina Metro. Co., LLC v New York State Div. of Hous. & Cmty. Renewal*, 35 NY3d 332, 355 [2020] ("[U]nder 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 . . . .") The *Regina* Court explicated that fraud in the context of overcharge claims is none other than common law fraud and, accordingly, "[f]raud consists of evidence [of] a representation of material fact, falsity, scienter, reliance and injury (internal quotation marks and citations omitted)." (*Id*. at n 7.) The *Burrows* court stressed the heightened pleading standard for all elements of common law fraud as elucidated in *Regina*, a standard which is now universally accepted by the appellate courts in both the First and Second Departments. Specifically, in *Burrows*, the court focused on the need to demonstrate, at the pleading stage, a tenant's *justifiable reliance* on a landlord's misrepresentation, and injury as a result.

In *Burrows*, the landlord disputed that the overcharge was fraudulent. The court agreed:

> "Plaintiffs' reliance on the fraud exception is unavailing because the record, and plaintiffs' own admissions in their complaint, establish that there was no such fraudulent scheme in this case. As previously noted, DHCR's rental histories of the subject apartments . . . document that the registrations in question identified both a higher legal regulated rent and a lower preferential rent that the tenant actually paid. It is undisputed that this rental history has been available for public inspection at all relevant times. Thus, the inflation of the legal regulated rents was evident from the face of the registration statements on which plaintiffs' claims are based." (*Burrows*, 215 AD3d 105, 112.)

In addition to the publicly available DHCR registration history, the court noted that each of the tenant's leases "directly and expressly notified them" of both the higher LRR, and their lower preferential rent. (*Id*. at 112.) A rider attached to each lease, and signed by each tenant, informed them of what the LRR would be, but that the landlord would accept a reduced amount "'representing a preferential rent[.]'" (*Id*. at 113.) However, the court emphasized, *without reference* to the aforementioned leases and riders which are not publicly available, that "as a matter of law, neither [the complaining tenants] nor any of their predecessors could have reasonably relied on the inflated legal regulated rent figures that appeared on the face of the registration statements [internal quotation marks and citation omitted]." (*Id*.) Again, *without reference* to the leases and riders, the court held that "the undisputed disclosure in the publicly [*4]available rental histories of the discrepant figures for legal regulated rent and preferential rent negates any inference of fraud as a matter of law." (*Id*.)

Burrows leaves almost no room for consideration of differing levels of sophistication between seasoned property owners,[FN5] and tenants who initially rent apartments without advice of counsel. Indeed, in *Burrows*, as is the case here and at almost any lease signing, the tenants had no benefit of counsel when they signed their original leases. In *Burrows*, as here, additional specialized knowledge would have been required to understand that the lease or rent registration history misrepresented a material fact. Nevertheless, *Burrows* stands squarely for the proposition that where the DHCR records are publicly available, a tenant cannot claim justifiable reliance upon the landlord's knowing misrepresentation when advancing the "fraud exception."

In *310 E. 74 LLC v Mirea*, 2023 WL 4273895 (Sup Ct, New York County, June 29, 2023), the only published decision thus far to substantively discuss *Burrows* and to rely on it for its decision, the tenants claimed that the landlord improperly assessed a vacancy increase when they succeeded to the apartment, and that the landlord unlawfully revoked their

preferential rent. The court found that the landlord "accurately reflected the rent increases in both the leases it provided to defendants and in the DHCR rent registrations, which shows that preferential rent was revoked in 2008 . . . Accordingly, this Court finds that defendants did not establish the reasonable reliance element of a fraud claim." (*Id*., *2.) The court also found that the respondents could not rely on a purportedly unlawful rent increase in 2001, because the increase was "also accurately documented in the rental history filed with DHCR." Explaining further, the court held, "[t]hat means that defendants cannot now claim, twenty years later, that their initial rent was improper and part of a fraudulent scheme because publicly filed information put defendants on notice about their potential claims long ago." (*Id.*, *3.)

Application of *Burrows* to the Facts of this Proceeding

Respondent's argument that the instant case is distinguishable from *Burrows* is unavailing. Respondent suggests that here, as opposed to the facts in *Burrows*, petitioner engaged in additional surreptitious conduct not plain on the face of the DHCR registrations, *i.e.*, an unexplained, fraudulent, and significant increase in rent which can only be supported by proof of an Individual Apartment Improvement increase. Respondent asserts that "the proposition *Burrows* actually stands for . . . is that a tenant cannot establish reliance *only* when every aspect of the landlord's alleged fraud is apparent on the face of the rent history, without resort to any extrinsic evidence (emphasis added)." (NYSCEF Doc No. 26, respondent's attorney's supplemental mem of law at 2.) Thus, respondent argues that she must be granted leave to amend her answer to assert a fraudulent overcharge claim, and is entitled to discovery reaching [*5]back to 2005 based on ample need related to a cognizable cause of action.[FN6] ,[FN7]

Even under pre-HSTPA and pre-*Regina* law, a significant increase in rent alone was not sufficient to pierce the statute of limitations. However, a significant, unexplained increase in rent, *coupled with* additional suspicious irregularities in the rent registration and lease history, could potentially indicate fraud. Prior to *Regina* and *Burrows*, respondent's claim of fraudulent overcharge *may have* passed muster. However, here there is a significant increase in rent explained and documented on the DHCR registration history as due to a "vacancy." [FN8] (NYSCEF Doc No. 15, respondent's exhibit D, DHCR rent registration history.) As in *Burrows*, respondent's initial vacancy lease documented a preferential rent and a higher LRR. As in *Burrows*, this increase, as well as the preferential rent and higher LRR, is also documented on the face of the DHCR registration history, as were the other irregularities to

which respondent cites, *e.g.* missing registrations for three years prior to the prior tenant's occupancy.[FN9] Indeed, every irregularity to which respondent cites was at all times "publicly filed information [which] put [respondent] on notice about [her] potential claims long ago." (*Mirea*, *3; *Burrows* at 113.)[FN10]

The one remaining factor which potentially distinguishes this instant case from *Burrows* and *Mirea*, is that respondent "[does] not recall having a rider to [her] lease explaining [her] rent amount." (NYSCEF Doc No. 11, Morales affidavit ¶ 3.) In any case, the strong emphasis in both *Burrows* and *Mirea* on the publicly available registration histories which would have alerted the tenants to their claims, considered together with petitioner's expectation of repose, [FN11] constrains this court to find that respondent has not satisfied the justifiable reliance element of a claim sounding in common law fraud.[FN12]

Respondent's reliance on caselaw is also unavailing. Citing to *Sherman v Eisenberg*, 267 AD2d 29 [1st Dept 1999], respondent urges that *Burrows* should be interpreted narrowly and limited to its facts, and further cautions against an "expansive" interpretation of the holding. [*6](NYSCEF Doc No. 26, respondent's attorney's supplemental mem of law at 7.) The facts of that case, however, are readily distinguishable. In *Eisenberg*, the plaintiff sued, within the applicable statute of limitations, to rescind a settlement agreement which had been fraudulently procured by the defendants. The plaintiff knew that documentary proof of her claims existed, but could not locate the papers and therefore could not prove her claim; thus, her attorney recommended that she settle the case. After the case settled, the documents were discovered. Ultimately, the settlement was set aside on the basis that both the defendants and their attorneys knowingly misrepresented that they were unaware of the existence of the relevant documents. *Eisenberg* is not apropos.

Next, respondent argues that an overly broad reading of *Burrows* would effectively nullify the holding in *Grimm v State Div. of Hous. & Cmty. Renewal Off. of Rent Admin.*, 15 NY3d 358 [2010]. Under *Grimm*, the Court of Appeals held that indicia of fraud must be shown to consider the rent history of an apartment more than four years prior to the interposition of an overcharge claim. Respondent correctly notes that in Housing Court, such a showing is required in order to obtain leave for discovery. Respondent explains:

> "[T]he only evidence tenants have available at the initial stages of any case must be publicly available—such as the DHCR rent history and public records. Thus . . . *Burrows* [creates a] catch-22 for tenants—in order to seek discovery, they must gather whatever evidence is publicly available, yet by gathering publicly-available

> evidence, they would be barred from asserting fraud for [justifiable] reliance. This interpretation would effectively render *Grimm's* holding a dead letter, as no tenant would ever be able to show evidence of fraud without defeating the 'reliance' element of the common-law fraud test." (NYSCEF Doc No. 26, respondent's attorney's supplemental mem of law at 8.)

Burrows most certainly raises the bar on demonstrating justifiable reliance in order to pierce the four-year rule, and essentially requires a tenant to review publicly available records within four years of signing a lease. It is not irrational to conclude that this holding could result in an insurmountable challenge for renters who do not know that they are able to seek records from DHCR. Moreover, even if a lessee reviews the records within the four-year statute of limitations, the average tenant is likely not to understand the intricacies of the Rent Stabilization Law well enough to review the DHCR printout in an informed light. Nevertheless, the ruling is clear, and consistent with *Regina* and its other progeny. *Burrows* further expounds upon the *Regina* Court's embrace of the definition of fraud in the context of overcharge claims and finds that the essential element of justifiable and reasonable reliance on a landlord's misrepresentation cannot be shown if the errors, inconsistencies, and/or illegalities, would be apparent on the face of a publicly available document.

CONCLUSION

Accordingly, it is

ORDERED that respondent's motion to amend her answer to include the defense and counterclaim of overcharge, fraudulent or otherwise, is DENIED; and it is further

ORDERED that upon consideration of petitioner's other arguments in opposition to respondent's motion to amend the answer, the court finds them unavailing and that the proposed amendments except as set forth above are not devoid of merit, and respondent's motion to amend her answer, other than claims sounding in overcharge, is GRANTED in this court's discretion; [*7]and it is further

ORDERED that respondent shall serve petitioner with an amended answer which comports with this decision and order within 10 business days.

Petitioner shall serve respondent with a copy of this decision and order by filing on NYSCEF.

The parties are to appear in Part F, room 523 of the New York Count Civil Courthouse

on August 7, 2023 at 9:30 a.m. in person for settlement or trial.

This constitutes the decision and order of this court.

Dated: July 18, 2023
New York, NY

_____
HON. KAREN MAY BACDAYAN
Judge, Housing Part

Footnotes

Footnote 1: Until the HSTPA, an owner was allowed to apply a permanent increase in the legal regulated rent in an amount equal to 1/40 (in a building with 35 or fewer units) or 1/60 (in a building with more than 35 units) of the cost of a "substantial modification or increase of dwelling space or an increase in the services, or installation of new equipment or improvements or new furniture or furnishings provided in or to a [vacant] housing accommodation." Administrative Code former § 26-511 (13).

Footnote 2:*See Wise v 1614 Madison Partners, LLC*, 214 AD3d 550 (1st Dept 2023) ("The court correctly determined that the four-year statute of limitations under the former CPLR 213-a governed the rent overcharge claims, which accrued prior to the enactment of the [HSTPA].")

Footnote 3: Prior to the passage of the HSTPA, as long as a landlord preserved both the preferential rent and the higher legal regulated rent in the lease and the DHCR registrations, a preferential rent was generally revocable upon a lease expiration, or upon vacancy of the unit. Upon revocation, the landlord could legally charge the higher legal regulated rent. Many tenant advocates believed that preferential rents were a loophole which incentivized landlords to file fraudulent DHCR registrations in order to deregulate rent stabilized apartments at the end of a lease term or upon vacancy. After the HSTPA, a preferential rent becomes the legal rent for the apartment until the tenant vacates. "Tenants supported the change because it prevents landlords from abruptly and significantly raising renewal rents, which can price current tenants out. Landlords characterized the change as unfair and harmful to owners' expected return on investment." Charles K. Gehnrich, Note, *Stronger Than Ever: New York's Rent Stabilization System Survives Another Legal Challenge*, 90 Fordham L. Rev 831, 845 (2021).

Footnote 4: As an example of the disparities that can exist between registered preferential rents and concomitantly registered higher legal regulated rents, Burrows' predecessor in interest was signed a one year lease which expired prior to the passage of the HSTPA and set forth a higher legal regulated rent of $8,043.60, and a preferential rent of $2,480.63 which could have been revoked upon renewal had she not vacated at the end of the lease. *See* NYSCEF Doc No. 14, *Brian Burrows et al v 75-25 153rd Street, LLC,* Sup Ct, New York

County, Index No. 160082/2020.

Footnote 5: For instance, according to an internet search on the JustFix.org website, Maggie McCormick, the Head Officer of 72-75 153, LLC, the property owner in Burrows, is the "landlord" of at least 147 properties city-wide. *See* Who Owns What in NYC, available at https://whoownswhat.justfix.org/en/address/QUEENS/72-25/153%20STREET/portfolio (last accessed July 17, 2023.)

Footnote 6: The court notes that respondent requests in her affidavit leave to amend her answer and "discovery in order to establish my defenses and counterclaims[.]" NYSCEF Doc No. 11, Morales affidavit ¶ 12. However, discovery "utilized by the landlord for the purposes of formulating a cause of action or by the tenant to establish a defense, should never be permitted." (*New York Univ. v Farkas*, 121 Misc 2d 643, 647 [Civ Ct, New York County, 2003].)

Footnote 7: The court notes that there is no time-period for which documents are demanded, however, the proposed interrogatories request information from 2005 forward. NYSCEF Doc Nos. 13, 14. Regardless, petitioner has provided the leases from 2017 through present. *Id*. NYSCEF Doc No. 21 at 1-2, petitioner's exhibit A.

Footnote 8: See *Woodson v Convent 1 LLC*, 216 AD3d 585 (1st Dept 2023), finding that "[i]n particular, plaintiffs did not establish that defendants made any misrepresentation of material fact in connection with the rent increases for these units. That the increases were not justified by any major capital improvements (MCI) or individual apartment improvements (IAI) does not establish fraud, as there is no evidence that defendants ever made a statement justifying the increases based on any MCI or IAI[.]" *Id*. at 577.

Footnote 9: Notably, respondent does not point to any other unlawful increases to her rent after she took occupancy; nor does she point to any inconsistencies between her leases and the DHCR registration history.

Footnote 10: The court notes Department of Buildings records, relied upon by respondent, are also publicly available documents..

Footnote 11: Petitioner avers that it does not possess any records spanning back 15 years to 2008. NYSCEF Doc No.20, Rodriguez affidavit ¶ 7.

Footnote 12: While it is true that the DHCR registration history for a particular apartment is generally not available to a person until they become the tenant of record of the apartment, *Burrows* suggests an obligation on the part of the tenant to obtain the rent registration history within the relevant statute of limitations.

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