Dignam v 305 Riverside Corp.
2012 NY Slip Op 31019(U)
April 14, 2012
Supreme Court, New York County
Docket Number: 105503/2010
Judge: Doris Ling-Cohan
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[*1] SCANNED ON 4/18/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan Justice

PART 36

Index Number : 105503/2010
DIGNAM, MARK
vs.
305 RIVERSIDE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2, 3

Answering Affidavits — Exhibits _____ | No(s). 6

Replying Affidavits _____ | No(s). 7

Notice of Cross-Motion, Affidavits, Exhibits _____ 4, 5

Upon the foregoing papers, it is ordered that this motion is and cross-motion for summary judgment are decided in accordance with the attached memorandum decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4-16-2012

_____, J.S.C.
DORIS LING-COHAN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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MARK DIGNAM and LAURA LEOPARD,

Plaintiffs,

Index No.: 105503/10
DECISION/ORDER

-against-

Motion Seq. No.: 001

305 RIVERSIDE CORP. a/k/a
305 RIVERSIDE DR. CORPORATION,

Defendants.

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HON. DORIS LING-COHAN, J.S.C.:

In this residential landlord/tenant action, defendant moves for summary judgment to dismiss the complaint, and plaintiffs cross-move for partial summary judgment on the complaint (together, motion sequence number 001). For the following reasons, the motion is denied, and the cross motion is granted.

BACKGROUND

Plaintiffs Mark Dignam (Dignam) and Laura Leopard (Leopard) are the tenants of apartment 9E in a residential apartment building (the building) located at 305 Riverside Drive in the County, City and State of New York. *See* Notice of Motion, Exhibit A (complaint), ¶¶ 1-2, 5. Defendant 305 Riverside Corp. a/k/a 305 Riverside Dr. Corporation (305 Riverside) is the building's owner and landlord. *Id.*, ¶ 3.

Plaintiffs commenced this action after the Appellate Division, First Department, rendered its first decision in *Roberts v Tishman Speyer Props., L.P.* (62 AD3d 71 [1st Dept 2009]), the case that reaffirmed the ongoing rent stabilized status of those New York City apartments that had purportedly been "luxury decontrolled" by owners who had previously enrolled their buildings in

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the "J-51" tax benefits program. Plaintiffs believed their apartment was one of those that had been improperly "luxury decontrolled," with the result that they had been obligated to make rental payments far in excess of what the legally allowed maximum monthly rent would have been. Plaintiffs originally took possession of apartment 9E in 2008, and present copies of their leases from July 1, 2008 - June 30, 2010 and September 1, 2010 - August 31, 2012. *See* Notice of Motion, Exhibit E; Sokolski Reply Affirmation, Exhibit C. The former lease specified a monthly rental charge of $3,150.00, and the latter listed a monthly rental charge of $3,339.00.[1] *Id.*

305 Riverside also presents a copy of the original lease of Rachelle Abrahami (Abrahami), the tenant who occupied apartment 9E immediately before plaintiffs did. *See* Notice of Motion, Exhibit C. That lease ran from February 1, 2005 - January 31, 2007, and specified a monthly rental charge of $2,600.00. *Id.* Abrahami's lease also included two options permitting her to renew it for the periods of February 1, 2007 - January 31, 2008 at a monthly rental of $2,800.00, and February 1, 2008 - January 31, 2009 at a monthly rental of $3,150.00. *Id.* 305 Riverside asserts that Abrahami exercised both options. *See* Notice of Motion, Paul Affidavit, ¶ 14. 305 Riverside presents copies of the annual apartment registration forms for apartment 9E that it claims to have submitted to the New York State Division of Housing and Community Renewal (DHCR) for the years of 2006-2010, and those submissions list the monthly rent for the apartment as follows: $2,600.00 (2006); $2,800.00 (2007); $3,150.00 (2008); $3,150.00 (2009)

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[1] The cover letter that accompanies plaintiffs' current lease states that they have signed it "under protest" in order not to be deemed to be holding over their possession of apartment 9E illegally to the detriment of the claims that they are pursuing in this action. *See* Sokolski Reply Affirmation, Exhibit C.

and $3,150.00 (2010). *See* Notice of Motion, Exhibit G. Abrahami is listed as the tenant of record on the first three registrations, and plaintiffs are listed on the last two. *Id.* None of the registrations states that apartment 9E is rent stabilized, however, the final registration includes a margin note inserted by 305 Riverside that "Rent Stabilization status [is] to be determined per *Roberts v Tishman.*" *Id.*

Plaintiffs present a copy of a "registration apartment information" sheet that they obtained from the DHCR that indicates that, prior to Abrahami's tenancy, apartment 9E was registered as rent stabilized until July 29, 2005. *See* Notice of Cross Motion, Exhibit C. The DHCR "registration apartment information" sheet also indicates that the tenants at that time, Stephanie Shapiro (Shapiro) and Karen Benezra (Benezra), paid a legal regulated rent of $1,098.00 per month until July 26, 2004, after which the rental charges inexplicably increased to $1,800.00 per month, and apartment 9E became "permanently exempt" from rent registration on July 29, 2005 as a result of "high rent vacancy." *Id.* Plaintiffs also note that 305 Riverside has admitted both that apartment 9E was formerly rent stabilized, and that the building itself was, and still is, enrolled in the "J-51" tax benefits program. *See* Notice of Motion, Paul Affidavit, ¶ 4; Exhibit A, ¶ 15; Exhibit B, ¶ 4.

Plaintiffs commenced this action on April 22, 2010 by serving a summons and complaint that sets forth causes of action for: 1) a declaratory judgment that apartment 9E is rent stabilized; 2) an injunction requiring 305 Riverside to register apartment 9E as a rent stabilized unit with the DHCR; 3) rent overcharge; and 4) attorney's fees. *See* Notice of Motion, Exhibit A. 305 Riverside filed an answer with affirmative defenses on August 12, 2010. *Id.*; Exhibit B. Limited discovery ensued. Now before the court are 305 Riverside's motion for summary judgment to

dismiss the complaint, and plaintiffs' cross motion for partial summary judgment on their first cause of action.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Here, as detailed below, plaintiffs have satisfied their burden of proof, but defendant 305 Riverside has not.

As previously indicated, plaintiffs' complaint sets forth four causes of action; defendants' motion seeks dismissal of all of them, and plaintiffs' cross motion seeks partial summary judgment on the first. The court will examine each in turn.

Plaintiffs' first cause of action requests a three-part declaratory judgment: 1) that apartment 9E is rent stabilized; 2) fixing the monthly legal maximum rent; and 3) finding that their current $3,150.00 monthly rental constitutes an overcharge. *See* Notice of Motion, Exhibit A (complaint), ¶¶ 33-36. Declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *see e.g. Jenkins v State of N.Y., Div. of Hous. and Community Renewal*, 264 AD2d 681 (1st Dept 1999). It has long been the rule that, in an

action for declaratory judgment, the court may properly determine respective rights of all of the affected parties under a lease. *See Leibowitz v Bickford's Lunch System*, 241 NY 489 (1926). Here, the parties eventually agreed that apartment 9E is rent stabilized as a result of the Appellate Division, First Department's initial decision in *Roberts v Tishman Speyer Properties, L.P.* (62 AD3d 71, *supra*). Although 305 Riverside originally questioned the retroactive effect of that holding, it and plaintiffs both accepted the position that the First Department's recent decision in *Gersten v 56 7th Ave. LLC* (88 AD3d 189 [1st Dept 2011]) settled the question in the affirmative. *See* Notice of Cross Motion, Memorandum of Law, at 1; Welikson Affirmation in Opposition to Cross Motion, ¶¶ 3-5. Additionally, the First Department's most recent decision in *Roberts v Tishman Speyer Props., L.P.* (89 AD3d 444 [1st Dept 2011]), after remand from the Court of Appeals, has put the issue completely to rest. Therefore, because 305 Riverside has admitted that apartment 9E was rent stabilized at a time when the building was enrolled in the "J-51" tax benefits program, such apartment is still rent stabilized, by operation of law, and plaintiffs are entitled to a declaration to that effect, and a declaration that they are the lawful rent stabilized tenants of apartment 9E.

The balance of plaintiffs' first cause of action requests a judgment "declaring the maximum legal rent for the subject premises," and that "the $3,150.00 monthly rent collected by [305 Riverside] since July, 2008 is erroneous, unlawful and/or constitutes an overcharge." *See* Notice of Motion, Exhibit A (complaint), ¶¶ 35, 36. However, in their cross motion, plaintiffs state that:

> Inasmuch as no discovery has been completed with respect to setting the rent, or the fraudulent increases in rent, plaintiffs' papers are limited to opposition to defendant's motion for summary judgment, and plaintiffs cross move only for the

> relief they are entitled to presently - partial summary judgment declaring that the premises is rent stabilized, that plaintiffs are the rent stabilized tenants, and that the "base date" market rent charged to plaintiffs was and is unlawful.

See Notice of Cross Motion, Sokolski Affirmation, ¶ 27.[2] 305 Riverside nonetheless seeks to dismiss the balance of plaintiffs' first cause of action on the ground that the declaration that they seek would require the examination of rent records older than those permitted by the applicable four-year statute of limitations. *See* Memorandum of Law in Opposition to Cross Motion, at 2-11. Plaintiffs reply that the law permits the court to look beyond the four-year statute of limitations in order to ascertain whether a rent calculation was the product of fraud. *See* Sokolski Affirmation in Reply, ¶ 15. Plaintiffs are correct.

In *Matter of Grimm v State of N.Y. Div. of Hous. & and Community Renewal Off. of Rent Admin.* (15 NY3d 358, 362 [2010]), the Court of Appeals squarely held that:

> On this appeal, we are asked to determine whether the rationale employed in *Thornton v. Baron* ... which allowed the parties to look back farther than four years, applies in a situation where it is alleged that the standard base date rent is tainted by fraudulent conduct on the part of a landlord. We conclude that it does, and that such base date rent may not be used as a basis for calculating subsequent regulated rent if fraud is indeed present [internal citation omitted].

Here, 305 Riverside argues that "there is no fraudulent scheme alleged or shown with respect to this action." *See* Memorandum of Law in Opposition to Cross Motion, at 8-10. Plaintiffs reply that the unexplained increase of Shapiro's and Benezra's rent from $1,098.00 to $1,800.00 in 2004, and the subsequent further increase of apartment 9E's rent to $2,600.00 when Abrahami took possession of it in 2005, "clearly warrants ... an inquiry into the circumstances, because ... the lack of evidence to support the rent increase[s] ... indicate[s] fraud." *See* Sokolski

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[2] The court notes that subsequent to the submission of the within motion and cross-motion, discovery was completed and a note of issue filed, on or about March 1, 2012.

Affirmation in Reply, ¶ 16.

In *Grimm*, the Court of Appeals also held that:

> Generally, an increase in the rent alone will not be sufficient to establish a "colorable claim of fraud," and 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. As in *Thornton*, the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date.

Id. at 367. The evidence at hand - which consists of documents evincing significant unexplained rent increases - may not be sufficient to "indicate fraud," as plaintiffs argue; however, it is sufficient to warrant a further inquiry herein, as to whether 305 Riverside was engaged in a "fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization", when it made the subject increases. Therefore, the court rejects 305 Riverside's statute of limitations argument, and that the portion of 305 Riverside's motion that seeks to dismiss the balance of plaintiffs' first cause of action is denied.

Plaintiffs' second cause of action seeks an injunction "directing [305 Riverside] to furnish plaintiffs with a proper rent stabilized lease agreement stating the proper, lawful maximum rent, and to furnish proper rent stabilized lease renewal leases [*sic*] in the future," and "directing [305 Riverside] to properly register the subject premises as a rent stabilized unit at the correct maximumlegal rent with the DHCR." *See* Notice of Motion, Exhibit A (complaint), ¶¶ 38-39. 305 Riverside's moving papers assert that plaintiffs' request for a rent stabilized lease "is contingent upon whether the subject premises are eventually found to be rent stabilized." *Id.*; Paul Affidavit, ¶ 7. However, as was previously observed, 305 Riverside eventually agreed that apartment 9E is rent stabilized, and issued plaintiffs a lease with a monthly rental amount of

.$3,339.00. Thus, 305 Riverside's initial dismissal argument is now moot. 305 Riverside argues that, because it eventually acceded to plaintiffs' request for a lease, and also voluntarily re-registered apartment 9E with the DHCR as rent stabilized, the court should dismiss plaintiffs' second cause of action as also now being moot. *Id.*; Paul Affidavit, ¶ 4. Plaintiffs reply that they signed their current lease with 305 Riverside "under protest," and aver that they continue to contest the legality of the monthly rental amounts that 305 Riverside has set forth in both that lease and its current DHCR registration. *See* Sokolski Affirmation in Reply, ¶ 6; Exhibit C. Because the court has already concluded that there is sufficient evidence to inquire whether 305 Riverside was engaged in a "fraudulent deregulation scheme" with respect to apartment 9E, and because that inquiry may well result in all of the prior leases for that apartment being declared void and the base rent for the apartment being recalculated, the court agrees that plaintiffs' request for injunctive relief is *not* moot, since the requested relief seeks that the "correct maximum legal rent" be set forth in all of the documents to which the injunctive relief applies. Therefore, the branch of 305 Riverside's motion which seeks dismissal of plaintiffs' second cause of action is denied.

Plaintiffs' third cause of action seeks money damages for an alleged rent overcharge by 305 Riverside. 305 Riverside argues that "the rent charged [to] plaintiffs is less than what defendant could have charged under the Rent Stabilization Law and Code." *See* Notice of Motion, Paul Affidavit, ¶ 10. As has been sufficiently discussed *supra*, any such calculations will have to await resolution of the question of whether or not 305 Riverside's leases are found to be void and whether a new base rent date must be utilized herein. Therefore, the court rejects 305 Riverside's dismissal argument, and that portion of 305 Riverside's motion that seeks

dismissal of plaintiffs' third cause of action is denied.

Plaintiffs' fourth cause of action seeks money damages for attorney's fees incurred by plaintiffs in pursuing their overcharge claim against 305 Riverside. 305 Riverside argues that this cause of action "is contingent upon there being a finding of rent overcharge," and also that plaintiffs have failed to identify a statute that would support their claim for attorney's fees. *See* Notice of Motion, Paul Affidavit, ¶ 11. Plaintiffs respond that Rent Stabilization Law § 26-516 (a) (4) and 9 NYCRR 2526.1 (d) both authorize tenants to pursue claims for attorney's fees when making overcharge claims, and also argue that the right to seek legal fees is implied as a contractual term of their leases. *See* Notice of Cross Motion, Memorandum of Law, at 12-13. Even a cursory review of the controlling law reveals that plaintiffs are correct. Therefore, the court rejects 305 Riverside's dismissal argument, and the portion of 305 Riverside's motion that seeks dismissal of plaintiffs' fourth cause of action is denied. Accordingly, 305 Riverside's motion is denied in its entirety.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendant 305 Riverside Corp. a/k/a 305 Riverside Dr. Corporation is in all respects denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of plaintiffs Mark Dignam and Laura Leopard for partial summary judgment is granted as provided below; and it is further

ADJUDGED and DECLARED that apartment 9E in the building located at 305 Riverside Drive in the County, City and State of New York is a rent stabilized unit and that said plaintiffs are the lawful tenants of said unit; and it is further

ORDERED that the balance of this action shall continue expeditiously; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant, with notice of entry.

Dated: New York, New York
April 16, 2012

Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\dignamv305riverside.lane.wpd

UNFILED JUDGMENT
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