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

PRESENT: HON. JUDITH J. GISCHE PART 10
Justice

Robert H. Rosenzweig
Plaintiff (s),

INDEX NO. 116367/09

MOTION DATE

-v-

305 Riverside Corp a/k/a 305 Riverside Dr. Corp
Defendant(s).

MOTION SEQ. NO. 004

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

JUN 07 2012

Dated: June 7, 2012

HON. JUDITH J. GISCHE, J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

[* 2]

Supreme Court of the State of New York
County of New York: IAS 10

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Robert H. Rosenzweig,

Plaintiff,

-against-

305 Riverside Corp., aka
305 Riverside Dr. Corporation,

Defendant.

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Decision/Order
Index #116367/09
Mot. Seq. # 004

Hon. Judith J. Gische:

Pursuant to CPLR 2219(A) the following numbered papers were considered by the court on this motion:

PAPERS	**NUMBERED**
N/M, NCW affirm., AP affd., JG affd., FP affd., exhibits	1
RES affirm in Opp., ST affd., exhibits	2
NCW relpy affirm., FAP affd., exhibits	3

Upon the foregoing papers the decision and order of the court is as follows:

Defendant, ("305 Riverside") moves for summary judgment to set the legal rent stabilized rent for apartment 11 A ("apartment") located in the building known by the street address of 305 Riverside Drive, New York, New York ("building") and tenanted by plaintiff ("Rosenzweig"). It also seeks: [1] a judgment of ejectment, [2] a money judgment against Rosenzweig for unpaid rent, in the amount of $186,191.90, and [3] to dismiss Rosenzweig's second, third and fourth causes of action. Alternatively, 305 Riverside seeks an immediate trial on any remaining disputed issues and an upward adjustment of the amount Rosenzweig should be paying as temporary use and occupancy. Rosenzweig opposes the motion.

Issue has been joined and the motion was timely brought after the filing of the note of issue. Summary judgment will, therefore, be considered and decided on its merits. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004).

This is another case arising as a consequence of the Court of Appeal's decision in Roberts v. Tishman Speyer (13 NY3d 270 [2009]). It is conceded by the parties that in December, 2007, when 305 Riverside and Rosenzweig entered into a free market rent lease ("lease") for the apartment, the building was receiving J-51 tax benefits. As a consequence of the Roberts decision, 305 Riverside concedes that the apartment was subject to rent stabilization when the parties entered into the lease and that the $10,000 market rent previously agreed to by the parties needs to be adjusted.

In his first cause of action, Rosenzweig seeks a judgment declaring: [a] that the apartment is subject to rent stabilization, [2] that Rosenzweig is the lawful rent stabilized tenant of the apartment; [3] the amount of the lawful regulated rent and [4] that the $10,000 per month rent provided for the in the lease is "erroneous, unlawful and/or constitutes an overcharge." In the second cause of action, Rosenzweig seeks a permanent injunction requiring 305 Riverside to offer him a rent stabilized lease and to properly register the apartment with the New York State Division of Housing and Community Renewal ("DHCR"). In the third cause of action, Rosenzweig seeks a money judgment for overcharged rent, treble damages and attorneys fees. In the fourth cause of action, Rosenzweig seeks to recoup the attorney's fees he expended in this and another proceeding between himself and 305 Riverside. In its second amended answer, 305 Riverside denies the material allegations in the complaint, and asserts an "affirmative defense" that Rosensweig was offered, but refused, a rent stabilized lease

following the Roberts decision. There are also three counterclaims. The first counterclaim seeks possession of the apartment (ejectment) based upon Rosenzweig's alleged failure to sign a proper rent stabilized lease tendered to him. The second counterclaim seeks a money judgment for past due rents, as recalculated by 305 Riverside. The third counterclaim seeks to recoup legal fees.

The gravamen of 305 Riverside's motion is that because it has conceded that the apartment is rent stabilized, the only issue preventing a final resolution of this case is a determination of what the rent stabilized rent should be. It argues that the legally regulated rent at the inception of Rosenzweig's tenancy would have been $9,797.32. Although the last regulated rent registered with the DHCR prior to Rosenzweig's tenancy was $2,178.54, 305 Riverside claims that the rental increase is justified by a combination of a vacancy allowance, a rent stabilized longevity allowance and major capital improvements ("MCIs"). Specifically, it claims that there can be no dispute that the rent stabilized rent should be calculated by adding up the following items:

Prior Tenant's rent	$2,178.58
20% vacancy allowance	$ 435.71
Longevity Allowance[1]	$ 392.14
1/40th MCIs	$6,790.94
Total	$9,767.32

In connection with the MCIs, 305 Riverside claims that the total cost of

[1]This is based upon the prior tenant living in the apartment for 30 years.

renovating the apartment was $271,637.52. In support of its claim, 305 Riverside has included: [1] an affidavit from Ari Paul, the registered managing agent for the building, [2] an initial contract for renovation work in the amount of $233,000, [3] various checks in payment of the $233,000 contract price, [4] invoices and payment checks for additional renovation related installations and equipment, in the amount of $38,637.52 and [5] an affidavit of the president of the contractor, Joseph Gans, that he did the renovation work and was paid in full for same. It has also provided the affidavit of Frederick A. Procello, an engineer, who rendered an expert opinion that the cost of the renovation to the apartment was "mid-range to low end for a luxury apartment of this type, size and location." In opposition Rosenzweig argues that: [1] based upon 305 Riverside's failure to register the rent, it is now frozen at the last legally filed rent of $2,178.54; and [2] the amount claimed for MCIs is incredible. Rosenzwieg strongly questions the sufficiency of 305 Riverside's documentation, arguing that some of it is demonstrably false and that the invoices do not detail the work allegedly done. He also claims that without proof of the prior condition of the apartment, 305 Riverside cannot establish that the work allegedly done on the apartment was renovation work as opposed to ordinary maintenance. Rosenzweig also relies on the affidavit of his expert, Susan Treanor, contesting that much of claimed work was ever done and estimating that the value of the work actually done was within the range of $89,472.52 and $95,772.52.

305 Riverside seeks to have this court reject Ms. Treanor's expert opinion as a matter of law.

Discussion

Law Applicable to Summary Judgment

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if this burden is met, will it then shift to the party opposing summary judgment, who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial; therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film , 3 N.Y.2d 395 (1957). When, however, only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Wejsz, 303 A.D.2d 459 (2d Dept. 2003).

Formula for Determining the Rent

A preliminary issue that needs to be resolved before the court sets a post

Roberts rent, is what methodology should be used to make the rent calculation. This is an open legal issue that is just now emerging through the courts. The Court of Appeals in Roberts did not address how to reset the rents in cases such as the one at bar. Although the issue has been raised in subsequent cases, as of the writing of this decision, the only appellate court to address the issue is the Appellate Term, first judicial department, in the cases of 72A Realty Associates v. Lucas, 32 Misc3d 47 (AT 1st dept. 2011). In 72A Realty Associates v. Lucas, *supra*, the court rejected calculating the rent stabilized rent according to a formula set out in the Court of Appeals decision Thorton v. Baron (5 NY3d 175 [2005]) in the absence of fraud or willfulness. Instead, it affirmed the trial court formula that looked back to the rent charged four years immediately preceding an overcharge complaint, and then added the allowable rent stabilized increases ("72A Realty Associates formula") 72A Realty Associates v. Lucas, 28 Misc3d 585 (NY City Civil Ct. 2010) affd. 32 Misc3d 47 (AT 1st dept. 2011).

The 72 A Realty Associates formula, while not perfect, is the one that, in this court's opinion, makes the most sense. It neither unduly punishes either party nor does it create any windfall, because the parties followed what was widely believed to be the correct law at the time the lease was made. See also: Dodd v. 98 Riverside Drive, LLC., [decision dated October 18, 2011, index # 106968/10]; 2011 WL 5117699 (NOR)..

Rosenzweig argues that under the Rent Stabilization Law and Code (sometimes respectively "RSL" and "RSC"), 305 Riverside's failure to register a proper and timely rent stabilization rent with the DHCR bars the owner from collecting any rent in excess of the legally registered rent in effect on the date of the last preceding registration

statement. RSL §26-517(e); 9 NYCRR §2528.3, 2528.4[a]; Jazilek v. Abart Holdings, LLC, 72 AD3d 529 (1st dept. 2010). It argues that the rent is frozen at the last registered rent in effect before this action was commenced. In this case that amount was $2,178.58 per month. For the reasons that follow, the court rejects this approach to calculating the rent stabilized rent in this case.

While the cited RSL and RSC provisions may, on the surface, appear to have technical application to this case, further examination of the context in which these laws and regulations were promulgated reveals that they do not provide a proper basis for setting the legal rent. These provisions were intended to effectuate registration compliance. This stands in distinction to what the legal rent stabilized rent otherwise may be. Thus, for example, RSL§ 26-517(e) was amended in 1993 to make it clear that an owner who files an untimely registration statement for a rent that is otherwise legal cannot be found to have collected an illegal overcharge. See: Sponsors Memo in Support, L 1993 ch. 253 at 4; Verveniotis c. Cacioppo, 164 Misc2d 334 (AT 2nd 1995); 17 East 101 Street Associates v. Huguenin, 161 Misc2d 815 (NY Civ Ct. 1994). In other words, the provisions themselves draw a distinction between how a legal rent may be calculated and the effect of failing to register that properly calculated rent.

Roberts overcharge cases, such as this one, are not really about registration compliance; they are, in a broader sense, about the reach and application of the rent stabilization laws and how to now calculate a legal rent. At the time 305 Riverside would have been required to register a rent stabilized rent under Roberts, the DHCR did not even require such registration. Fixing the rent stabilization rent in hindsight under the failure to register provisions of the RSL and RSC would, under these

circumstances, be unduly punitive for what was action otherwise taken in good faith, relying upon the agency's own interpretation of the law.

Indeed, the facts of this particular case demonstrate just how ill suited using the last properly filed registered rent to calculate a new rent in post Roberts overcharge cases. Following Roberts, 305 Riverside did in fact register the apartment at the rent it claims is proper for this apartment. As this decision aptly demonstrates, the legal and factual issues surrounding just how to calculate the "proper" rent are complicated and far from finally resolved. Thus even now registering a "proper" rent remains illusive.

Application of the Formula to this Particular Case

Notwithstanding that the court adopts the 72A Realty Associates formula for fixing post Roberts rent stabilized rents, the court finds that there are issues of fact that preclude the granting of summary judgment on the issue of what the rent should be for the apartment at issue here.

Under the 72A Associates formula, rent stabilization increases for a vacancy and long term prior tenancy would have been available over and above the last registered rent. The last registered rent is undisputed. These increases are simply a matter of mathematical calculation.

The bulk of the increases to rent claimed by 305 Riverside, however, are due to MCIs. Justification for these types of increases are intensely factual in nature. Jemrock Realty Co., LLC v. Krugman, 13 NY3d 924 (2010). Even where an owner submits documents and affidavits in support of a motion for summary judgment, the nature and extent of the proof may require scrutiny as to issues of authentication and weight. Merber v. 37 West 72nd Street, Inc. 29 Misc3d 415 (Sup Ct. NY Co. 2010). In

addition, work in a rent stabilized apartment that is ordinary maintenance, repair or cosmetic work will not support an MCI rent increase. Matter of Mayfair New York Co. v. DHCR, 240 AD2d 158 (1st dept. 1997); Ansonia Associates v. DHCR, 160 AD2d 210 (1st dept. 1990).

Although 305 Riverside submits documents and affidavits in support of its position, Rosezweig has raised issues of fact, based largely upon: inconsistences and omissions in the owner's documentation, the personal knowledge of Rosenzweig of the ocndition of the apartment, the deposition testimony of Mr. Paul and the contractor, Joseph Ganz and the expert opinion of Susan Treano, who personally visited the building and apartment, reviewed 305 Riverside's documentation and researched records in the New York City Department of Buildings. Issues of fact requiring a trial include but are not limited to: whether the worked claimed to be done was actually done, whether the work done is ordinary maintenance, repair or cosmetic work, whether proper permits and approvals were obtained for the claimed work and the claimed value of the work done has been inappropriately padded or bolstered.

Although 305 Riverside, in reply, attacks Rosenzweig's expert's opinion as speculative and insufficient to defeat summary judgment, the court disagrees. Ms. Treano's eight page affidavit provides sufficient detail based upon personal observations, personal research and critical examination of the quantity and quality of 305 Riverside's own proof.

Treble Damages and Attorneys Fees

305 Riverside also seeks to dismiss those parts of Rosenzweig's complaint seeking treble damages and attorneys fees. While treble damages and attorneys fees

are ancillary issues, usually decided at the end of an overcharge case, they may be disposed of earlier where the issues raised are simply ones of law.

Treble damages may only be awarded where an overcharge is willful. RSC § 2526.1(a). Whether treble damages are available in the context of post Roberts overcharge cases is a further legal issue now emerging in the trial courts. Although there is a presumption that any overcharge is willful, willfulness in the context of post Roberts overcharge cases is still almost impossible to establish. This is because the initial rents were established in reliance on existing DHCR regulations as they then stood. Since Roberts, the law on how to calculate the rent stabilized rents is emerging, without any fixed formula. Thus any attempt at recalculating the rent cannot be considered a willful disregard of law that is not yet fully established. Gordon v. 305 riverside Corp., 93 AD3d 590 (1st dept. 2012), Gersten v. 56th 7th Ave., LLC, 88 AD3d 189 (1st dept. 2011)(1999 DHCR Luxury Decontrol order is collateral estoppel on issue of rent); 72A Realty Associates v. Lucas, 28 Misc3d 585 (NY City Civ. Ct. 2010) affd. 32 Misc3d 47 (AT1 2011); Bordon v. 400 East 55th Street, NY Co. Sup. Court, order dated 4/11/12; Index No.: 650361/09; Dodd v.98 Riverside Drive, LLC, 2011 WL 5117699 (NY Co. Sup Ct. 2011); Sandlow v. Riverside Corp., 2012 WL 1141126 (NY Co. Sup Ct. 2012). See also: Dugan v. London Terrace Gardens LP, 34 Misc3d 1240 (NY Co. Sup Ct. 2011).

305 Riverside has presented proof that its decision to raise the apartment rent to market rent was based upon an interpretation of law at the time that was consistent with DHCR rules and regulations. This is *prima facie* proof that negates the presumption of willfulness and establishes a lack thereof.

Rosenzweig has not raised a factual dispute about whether 305 Riverside's conduct was a willful disregard of law. Contrary to Rozenzweig's claims, this is not simply a case where a landlord is claiming ignorance of the law. Instead, 305 Riverside claims that is was relying upon the interpretation of law made by the agency charged with its enforcement. This reliance was widely accepted within the residential real estate community at the time. Nor is the claim of willfulness salvaged by Rosenzweig's argument that once Roberts was decided, 305 Riverside's failure to charge a correct rent was "willful." 305 Riverside has conceded that the apartment is subject to rent stabilization. There is no evidence that, in the aftermath of Roberts, 305 Riverside is seeking to evade the law. As this decision makes abundantly clear, the rent that now can be charged for the apartment is hardly clear cut, and 305 Riverside's present inability to forecast how the issue will ultimately turn out is not a matter of willful defiance of the law.

The court, therefore, grants summary judgment dismissing the claim for treble damages.

As for legal fees, in general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). In the case of residential leases, RPL § 234 provides that when, in any action or summary proceeding, an owner is permitted to recover legal fees from the tenant based upon the failure to perform any covenant or agreement of the lease, there is also an implied reciprocal obligation by the owner to pay the tenant's legal fees, if the tenant otherwise prevails in the dispute. While this reciprocal right will apply to actions commenced by

the tenant against a landlord, either directly or by way of counterclaim, its scope is still limited to the rights afforded the landlord by the terms of the underlying lease. Gottlieb v. Such, 293 AD2d 267 (1st dept. 2002).

The lease at bar contains no right for the landlord to collect legal fees in connection with these claims. As a consequence, there is no reciprocal right of a tenant to collect such fees. Dodds v 98 Riverside Drive, LLC., *supra*.

Rosenzweig separately claims that it can seek its legal fees under RSC §2526.1(d), which expressly provides that attorney's fees may be assessed where an owner is found to have overcharged by the DHCR. Contrary to 305 Riverside's argument, the right to seek legal fees under this provision is not limited to situations where there is a reciprocal lease provision. It stands as a separate basis on which to recover legal fees. Nor is the right limited to only those overcharge proceedings brought before the DHCR. See: Kaminsky v. Mautner-Glick Corp., 298 AD2d 104 (1st dept. 2002); Jenkins v. Fieldbridge Associates, LLC, 21 Misc3d 143 (A)(AT 2nd and 11th jud. Depts. 2008). [2]

305 Riverside correctly points out that any award of legal fees under RSC §2526.1(d) is discretionary. Since the primary issue of setting the rent has not yet been determined, there is no basis, as a matter of law, to dismiss the claim for legal fees at this time. While the court retains its discretion to make such an award or not, the claim

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[2]Indeed RSC 2526.1(a) which provides for a treble damages remedy, contains similar language about DHCR findings. It is well established that a treble damage remedy can be awarded by a court as well as the DHCR. Jazilek v. Abart Holdings, LLC, 72 AD3d 529 (1st dept. 2010). By the same reasoning it follows that the right to recover legal fees in an overcharge situation may be asserted in a court proceeding as well as a proceeding before the DHCR.

may certainly be interposed by Rosenzweig.

Increase to Temporary Use and Occupancy

305 Riverside seeks, as alternative relief, an increase in the award of temporary use and occupancy that should be paid by Rosenzweig while this case is pending. By decision and order, dated September 24, 2010, this court set use and occupancy in the amount of $2,178.54 per month, which amount corresponds to the last legally registered rent.

The court holds that it would be inappropriate to increase temporary use and occupancy based upon the disputed MCIs. Any number used would be too speculative, given the parties' sharp factual disputes about the bona fides of these increases. The court holds, however, that increasing temporary use and occupancy to now reflect the vacancy and longevity increases is appropriate. The court has decided, as a matter of law, the formula it will be applying to calculate the rent. The identified increases are not only allowable under the formula, but they are just a matter of mathematical calculation. The court, therefore, increases the temporary monthly use and occupancy to $3,006.43 per month. This amount is prospective from the first day of the month following this court's decision. The court anticipates that at the conclusion of this case there will be debits and credits they need to be applied in order to calculate what, if any, sums are due either party. This award is, therefore, without prejudice to the parties' rights regarding the final decision fixing the rent stabilized rent and their claims for credits and debits as a result..

Immediate Trial

305 Riverside's request for an "immediate" trial under CPLR § 3212(c) is denied.

This is not a case where the movant has been granted summary judgment on liability and all that is left in dispute is a fairly straightforward trial on damages. See: Fedyszyn v. Rubin, 2010 WL 4914454 (Nass. Co. Sup. Ct.). Here 305 Riverside has been denied summary judgment on the issue of calculating the rent and the disputed factual issues are complicated and not susceptible to a quick resolution. No judicial economy would be served by jumping this case ahead of other cases that have been waiting for trial. Nor would it be fair to the other litigants. Since this case is otherwise ready for trial, it should be put in its rightful place on the courts' calendar and tried in due course.

Conclusion and Order

In accordance with the above, it is hereby:

ORDERED that defendant's motion for summary judgment on plaintiff's first cause of action declaring the amount of the rent stabilized rent for apartment # 11A located in the building known by the street address of 305 Riverside Drive, New York, New York is denied,[3] and it is further

ORDERED that defendant's motion for summary judgment dismissing the second cause of action is denied , and it is further

ORDERED that defendant's motion for summary judgment dismissing the third cause of action is granted only to the extent of dismissing plaintiff claim for treble damages and it is otherwise denied, and it is further

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[3]The issues of fact that need to resolved preclude any declaration of any rights on the issue of the rent at this time. The court notes that while plaintiff's first cause of action seeks declarations other than just the setting of the rent stabilized rent, plaintiff never cross-moved for summary judgment. Accordingly, the court makes no declaration on plaintiff's first cause of action at this time. Cannon Point North, Inc. v. City of New York, 87 AD3d 861 (1st dept. 2011).

ORDERED that defendant's motion for summary judgment dismissing plaintiff's fourth cause of action is denied, and it is further

ORDERED that defendant's motion for summary judgment on its first and second counterclaims is denied, and it is further

ORDERED that defendant's motion to increase the amount, pending final determination or further court order (whichever is first), that plaintiff is required to pay as and for temporary use and occupancy is granted to the extent that on the first day of the first month following the date of this decision plaintiff shall pay prospective temporary use and occupancy in the amount of $ 3,006.43 per month , and it is further

ORDERED that defendant's motion for an immediate trial is denied, and it is further

ORDERED that within 30 days of this decision and order appearing on the Supreme Court Records On Line Library ("SCROLL") a copy thereof shall be filed by the parties with the clerk in the trial support office, so that the matter may be put in its rightful place on the trial calendar, and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied, and it is further

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

Dated: New York, NY
June 7, 2012

SO ORDERED:

J.G. J.S.C.