

Dodd v 98 Riverside Dr., LLC
2012 NY Slip Op 31653(U)
June 19, 2012
Supreme Court, New York County
Docket Number: 106968/10
Judge: Judith J. Gische
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

Index Number : 106968/2010
DODD, JENIFER
vs.
98 RIVERSIDE DRIVE, LLC
SEQUENCE NUMBER : 004
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 004

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s)** _____
Answering Affidavits — Exhibits _____ **No(s)** _____
Replying Affidavits _____ **No(s)** _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

*Status conf 7/26/12
9:30 am pt 10*

FILED

JUN 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

June 19, 2012

Dated: ~~July 19, 2012~~

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

- 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

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
Jennifer Dodd, Robert Tracy, Jeremy Hockenstein,
Joanna Samuels, Richard Jardine and Jenny Sun,

Plaintiff (s),

-against-

98 Riverside Drive, LLC, Northbrook
Management, LLC, AVJ Realty Corporation and
AVJ Management Corporation,

Defendant (s).

-----X

DECISION/ ORDER

Index No.:106968/10
Seq. Nos.:004

PRESENT:
Hon. Judith J. Gische
JSC

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Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Notice of Motion	1
Exhibits (Vol. 1)	2
Exhibits (Vol. 2)	3
DMV affirm, exhibit A	4
SK affirm in Opp, exhibit A	5
DMV reply affirm, exhibits	6

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

Plaintiffs seek to reargue in part and renew the motion underlying this court's
decision and order, dated October 18, 2011, and entered on January 20, 2012
("underlying decision"). The reader is presumed familiar with the facts and
circumstances stated in the underlying decision, which will not be repeated here.

A motion to reargue is available where the court misapprehend the relevant facts

or misapplied any principle of law. CPLR § 2221 [d] [2]; Foley v. Roche, 68 AD2d 558, 567 (1st dept. 1979). Renewal motions, on the other hand, should be based on newly discovered facts, that could not be offered on the prior motion (see: CPLR § 2221 [e]). Courts, however, have the discretion to relax these requirements and grant such motions in the interest of justice. Mejia v. Nanni, 307 AD2d 870, 871 (1st dept. 2003). This is a rent overcharge case based upon the Court of Appeals' decision in Roberts v. Tishman Speyer, 13 NY3d 270 (2009). Given the host of emerging, collateral issues engendered by the Roberts decision, the court in its discretion, grants the motion and will consider the arguments raised by plaintiffs on their merits, notwithstanding that the technical prerequisites for re-argument and/or renewal have not been met.

In the underlying decision this court held that the formula for determining the new rent stabilized rents for the plaintiffs was the one stated in the case of 72A Realty Associates v. Lucas, 32 Misc3d 47 (AT 1 2011) ("72A Realty Formula"). Consistent with that decision, the court held that "The court finds ... that the allowable rent for each apartment, shall be the rent agreed to in the lease in effect four years immediately preceding the filing of the action, along with the periodic rent stabilization guideline increases available over the term of the tenancies." Plaintiffs now argue that even if the 72A Realty Formula is applicable, the court should not allow the periodic rent stabilization guideline increases that would have otherwise been available because the proper rent was never registered. Following the underlying decision, the defendants ("owner") registered the apartments at rents that it calculated based upon the formula set forth by this court. The issue of whether the court was correct in fixing the formula in the first instance is still the subject of a appeal in this case and it is one of the

emerging issues developing in the courts in the aftermath of Roberts, *supra*.

In making this argument, plaintiffs rely on Rent Stabilization Law ("RSL") §26-517(e); and Jazilek v. Abart Holdings, LLC, 72 AD3d 529 (1st dept. 2010) which provide that the 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.

While the cited RSL provision may, on the surface, appear to have technical application to this case, further examination of the context in which it was promulgated reveals that it does not provide a proper basis for setting the legal rent in this context. This RSL provision was intended to effectuate registration compliance, which 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: Sponsor's 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 provision itself draws 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 the owner would have been required to register a rent stabilized rent under Roberts, the DHCR did not even require such registration. Fixing the rent stabilized rent in hindsight pursuant to

the failure to register provisions of the RSL, under these circumstances, would be unduly punitive for what was action otherwise taken in good faith, relying upon the agency's own interpretation of the law. See also : Rosenzweig v. 305 Riverside Corp., ___ Misc3d ___ (Sup Ct., N.Y. Co 2012); 2012 NY slip op 51103 (6/15/12 Gische J.).

The facts of this case demonstrate just how problematic utilizing a "proper" registration as the basis for the calculation of rent would be in post Roberts overcharge cases. Following this court's underlying decision, the owner did, in fact, register the apartments at rents it calculated according to the formula set out by the court. The issue of the formula to be used in post Roberts cases has yet to be finally resolved (whether by case law or by the state legislature) and, based upon the pending appeal in this particular case the issue is not finally resolved. Thus, the legal and factual issues surrounding just how to calculate the "proper" rent for these plaintiffs are complicated and the registration of a "proper" rent, as required by the RSL, remains illusive.

The plaintiffs also seeks to reargue that part of the courts underlying decision which struck their claim for legal fees. In the underlying decision, the court held that because the plaintiffs' initial leases did not provide for the owner to collect legal fees in a like circumstance, the plaintiffs had no reciprocal rights under RPL §234. Plaintiffs now rely on renewal leases, which contain different language that the initial leases, to justify their claim for legal fees. Alternatively, they claim that they are entitled to legal fees under Rent Stabilization Code ("RSC") §2526.1(d).

With respect to the renewal leases, the court finds that they do not provide a basis for the collection of reciprocal legal fees. As a consequence of Roberts, the owner would not have been permitted to modify the initial leases to provide themselves

with a greater right to legal fees than was originally set out in the initial leases. Such provisions in the renewal leases would be void. RSC § 2522.5(g). Likewise, RPL §234 would not support a reciprocal right to legal fees based upon such renewal leases.

RSC §2526.1(d), however, expressly provides that attorney's fees may be assessed where an owner is found to have overcharged by the DHCR. This stands as a separate and distinct basis on which to recover legal fees. The right is not limited to only those overcharge proceedings brought before the DHCR, but may be recovered in a court proceeding as well. 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).¹

The owner argues that the attorneys fees claim should be barred, as a matter of law, based upon basic fairness principles. In making this argument, the owner relies on 72A Realty Associates v. Lucas, *supra*, where the Appellate Term reversed the trial court granting of legal fees as "unfair" because the claims, although ultimately unsuccessful, were colorable. The Appellate Term decision, however, was made only after the case had finally concluded. RSC §2526.1(d) is discretionary and legal fees awarded, if at all, are only at the conclusion of a case. Since this case has not concluded, there is no basis, as a matter of law, to dismiss the claim for legal fees at sought under this RSC provision at this time. The owner's argument about whether

¹Indeed RSC 2526.1(a) which provides for a treble damages remedy, contains similar language. 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.

legal fees are fair may be raised when the issue of legal fees is substantively considered by the court in opposition to the plaintiffs' arguments about why they are entitled to such fees. The court, therefore reinstates the claim for attorneys fees.

Finally plaintiffs' seeks to have the court address the fact that since March 2011, all of the tenants in the building, including the plaintiffs, were provided with electrical meters for their apartments. Previously, the base rent charged included electricity. Now that the plaintiffs pay for electricity directly, they believe that the base rent charge set by this court should take that fact into account. They also claim that a 6/16/10 DHCR order, reducing the rent of another tenant, would apply to the calculation of their rent, at least to the extent that it applies to building wide services.

The adjustments sought by plaintiffs for changes in building wide services are best determined by the DHCR because these issues are not unique to the plaintiffs. which are unique to them. The court, therefore, declines to address these newly raised building wide issues as part of these proceedings, but does so without prejudice to the parties' rights if any before the DHCR.

In conclusion, the court grants the motion to the extent of permitting renewal and re-argument of the motion underlying the October 18, 2011 decision and order and upon and such renewal and re-argument the court reinstates the plaintiffs' claims for legal fees, but otherwise adheres to its October 18, 2011 decision and order in all other respects. The court further denies, without prejudice, plaintiffs' request to have the court adjust rents based upon the recent electrical metering at the building and decreases in building wide services.

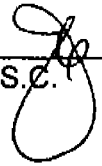
The court sets a status conference int his case for **July 26, 2012 at 9:30 a.m.**

No further notices will be sent.

This constitutes the decision and order of the court.

Dated: New York, New York
June 19, 2012

SO ORDERED:



J.G. J.S.C.

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