SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10
Justice

Index Number : 106835/2010
BARON, MARLENE DELON
vs.
LAURENCE TOWERSCO. LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 106835/10
MOTION DATE
MOTION SEQ. NO. 002

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 (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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: 8/14/12

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

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

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Marlene Delon Baron and Matthew Baron,

Plaintiffs,

Decision/Order
Index # 106835/10
Mot. Seq. # 002

-against-

Laurence Towers Company LLC and
Plaza Realty Investors, Inc.

Defendants.

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Hon. Judith J. Gische:

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

PAPERS	NUMBERED
Notice of Motion, BS affd., exhbiits	1
Notice of Cross-Motion,	2
MB affd	3
HVL affirm., exhibits	4
BS reply affd., exhibits	5
MDB reply affd	6
HVL reply affirm., exhibits	7
SK sur-reply affirm., exhibits	8
Stenographic Record dated June 21, 2012	9

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

Defendants move for summary judgment dismissing the complaint. Plaintiffs cross-move for summary judgment and seek an immediate trial to determine damages. The underlying action is a rent overcharge claim and declaratory action brought after the Court of Appeals decided the case of Roberts v. Tishman Speyer 13 NY3d 270 (2009). Issue has been joined and the motion in chief was timely brought after the filing of the note of issue. CPLR §3212; Brill v. City of New York, 2 NY3d 648 (2004). Although the cross-motion was interposed after the statutory 120 day limit, it raises

identical issues to the motion in chief. Leonardi v. Cruz, 73 AD3d 580 [1st dept. 2010]; Flanning v. TBTA, 34 AD3d 280 (1st dept. 2006) app. dism. 9 NY3d 862 (2007). The motion and cross-motion are, therefore, properly before the court and may be addressed on their merits.

The following facts are undisputed on this motion:

Plaintiffs Marlene Delon Baron and Matthew Baron, as tenants, entered into a written residential lease ("lease") with defendant Laurence Towers Company, LLC, as landlord, for apartment 27i ("apartment") located in the building known by the street address 200 East 33rd Street, New York, N.Y. ("building"). The lease term began on May 1, 2006 and ended May 31, 2007. The monthly rent was $4,625.

The apartment had previously been rented to Remo Apparel Corp. ("Remo") and registered as a rent stabilized with the Division of Housing and Community Renewal ("DHCR"). Prior to the commencement of this action, the last registered rent for the apartment was made on July 26,2001 at $2,079.93 per month. After the last DHCR registration and Remo moved out, the defendants treated the apartment as de-regulated under the luxury de-control provisions of the Rent Stabilization Laws because the unit became vacant and the legal regulated rent was over $2,000 per month.

Consistent with the defendants' position at the time that the apartment was de-controlled, the first monthly rent negotiated with the plaintiffs was a market rent. The lease contained an express rider that the apartment was not subject to the Rent Stabilization Laws. The lease was renewed for a two year period ending May 31, 2009, during which the monthly rent was increased to $4,745. It was renewed again for a thirteen month period expiring June 30, 2010, at a monthly rent of $4,795 and once

more for a term expiring December 31, 2012, at a monthly rent of $4,795. Each of the rents reserved in the lease renewals was set without respect to any applicable Rent Stabilization Laws.

It is not disputed that the building was receiving a J-51 tax benefit from at least tax year 1988-89 through tax year 2010-11. Defendants claim that the benefit expired in the tax year 2011-12 and the governmental J-51 documentation supports the position that after tax year 2010-11 the amount of benefit remaining was $0, notwithstanding plaintiffs argument that such abatements have a "maximum life" of 20 years and "should expire during tax year 2019-20." (See also: Schiffren v. Lawlor, 2011 WL 2323242 [NY Co. Sup. Ct. 2011]).

On October 22, 2009, the Court of Appeals decided the case of Roberts v. Tishman Speyer (3 NY3d 270 [2009]), which holds that luxury decontrol of rent stabilized apartments is not available when a building is receiving the benefit of a J-51 tax abatement. .

On May 25, 2010 the plaintiffs filed the instant action which asserts two causes of action. The first cause of action is for money damages on account of an overcharge of rents, treble damages and reasonable attorney fees. The second cause of action is for a declaration that the apartment is and will continue to be subject to rent stabilization until such time as the apartment is properly deregulated.

Summary of the Arguments of the Parties

Defendants present two arguments why they are entitled to summary judgment. The first is that the Roberts decision should not be retroactively applied. The second argument is that even if Roberts is retroactively applied, using the formula for

more for a term expiring December 31, 2012, at a monthly rent of $4,795. Each of the rents reserved in the lease renewals was set without respect to any applicable Rent Stabilization Laws.

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Summary of the Arguments of the Parties

Defendants present two arguments why they are entitled to summary judgment. The first is that the Roberts decision should not be retroactively applied. The second argument is that even if Roberts is retroactively applied, using the formula for

calculating post Roberts rents as stated in the Appellate Term Case of 72A Realty Associates v. Lucas, 32 Misc3d 47 (AT 1st dept. 2011), there is no overcharge.

Plaintiff opposes the motion, arguing that Roberts is to be given retroactive application. In addition they dispute that the proper method for calculating post Roberts rent stabilized rents is the formula utilized by the court in 72A Realty Associates v. Lucas, *supra*. They argue that the court should instead look to the rent registered four years before the last registered rent and set that as the base rent. In their cross-motion, plaintiffs argue that they are entitled to summary judgment on their cause of action for declaratory relief. They also seek summary judgment on the overcharge claim, based upon the application of what they argue is the proper methodology for calculating post Roberts rent stabilized rents. Defendants oppose the cross-motion for summary judgment.

Discussion

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]; Forrest v. Jewish Guild for the Blind, 309 A.D.2d 546 (1st Dept 2003).

To the extent that defendants claim they are entitled to summary judgment because Roberts is not entitled to retroactive effect, the motion is denied. While the majority opinion in Roberts did not reach the issue of retroactivity (Id. at 287), the

Appellate Division in this department directly examined the issue and expressly held that Roberts is entitled to retroactive effect Gersten v. 56 7th Avenue LLC , 88 AD3d 189 (1st dept. 2011).

Defendants' second argument, like in so many of the other, post Roberts cases, turns on the proper methodology for determining the rent. In 72A Realty Associates v. Lucas, *supra,* the court upheld the formula used by the lower court as the proper basis for calculating a post Roberts rent stabilized rent. The lower court and the Appellate Term both held that the legal rent should be set by looking back to the rent charged four years immediately preceding the bringing of the overcharge complaint, plus allowable rent guideline board increases. See: 72A Realty Associates v. Lucas, 28 Misc3d 585 (NY City Civ. Ct. 2010) affd. 32 Misc3d 47 (AT1 2011). In subsequent cases before this court, it has applied the same formula. See: Rosenzweig v. 305 Riverside Corp., 35 Misc3d 1241(A)(Sup Ct. NY co 2012); Dodd v. 98 Riverside Drive, LLC., [decision dated October 18, 2011, index # 106968/10]; 2011 WL 5117699 (*n.o.r.*) decision on re-argument June 19, 2012. 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.

Plaintiffs argue that the Rent Stabilization Law ("RSL") required defendants to register the rent and that in the absence of the registration of a proper rent, the base rent should be four years before the last properly registered rent. RSL §25-516. Thus they argue that their overcharge should be based upon the 1997 registered rent of $1,923.00. This interpretation, however, is inconsistent with that part of RSL 26-516

and also of CPLR 213-a which preclude the examination of a rental history more than four years before the commencement of the litigation. The effect of plaintiffs' position would be to punish the defendants based upon their failure to register an apartment they, in good faith, believed was luxury decontrolled. This court has already rejected the failure to register as the basis for the calculation of the overcharged rent in Roberts situations. Rosenzweig v. 305 Riverside Corp., *supra*; Dodd v. 98 Riverside Drive, LLC., *supra*.

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 defendants 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 based solely on defendants' failure to register would be unduly punitive for what was action otherwise taken in good faith, relying upon the agency's own interpretation of the law.

Applying the 72A Realty Associates v. Lucas formula to this case reveals that there is no overcharge. Four years prior to this complaint being brought, the rent was $4.625.00 per month. While there were subsequent increases to the rent when the lease was renewed, at no time did the increase in rent exceed the increases that otherwise would have been allowed for rent stabilized premises.

Defendants are, therefore, entitled to summary judgment dismissing the first cause of action for overcharge.

The second cause of action is for declaratory relief. Plaintiffs seek a declaration that the apartment is subject to rent stabilization and, further, that it will remain subject

to rent stabilization for the entire period in which defendants are receiving a J-51 tax benefit and until such time as the apartment may thereafter be properly deregulated. Under Roberts, it is clear that the apartment should not have been luxury decontrolled while the building was receiving the J-51 benefits. The benefits, however, have expired. In 72A Realty Associates v. Lucas, supra, the court addressed this circumstance. The court held:

> We also sustain Civil Court's ruling that, although the J-51 tax abatement period has now expired, tenant's apartment remains subject to rent stabilization, in the absence of any showing that landlord provided the applicable lease notice informing the tenant that the apartment was to become deregulated at the expiration of the abatement period....We acknowledge that the strict application of the J - 51 notice requirement in the circumstances here present may work a hardship on this landlord. After all, landlord, in good faith reliance on DHCR's long-standing and unambiguous interpretation of the luxury decontrol statute-codified in Rent Stabilization Code (9 NYCRR) § 2520.11(o) and unchallenged for the better part of a decade until determined to be erroneous by the *Roberts* court – proceeded with the understanding that it was exempt from the notice requirement based upon a reasonable, but as it turns out, mistaken, belief that respondent's tenancy was not subject to rent stabilization coverage in the first instance. However, we are constrained to strictly enforce the statutory J-51 notice requirement as written, without engrafting onto the regulatory framework equitable factors not specified therein.

At bar, the underlying lease does not contain any notice that Rent Stabilization benefits will terminate upon the expiration of the J-51 benefit. Indeed, that lease was predicated on the assumption that the plaintiffs had no rights under Rent Stabilization at the time. Consequently, the court follows the reasoning in 72A Realty Associates, *supra*, and finds that plaintiffs continue to be entitled to the rights and benefits afforded tenants under rent stabilization, until such time as the apartment is lawfully deregulated. Plaintiffs' motion for summary judgment on their second cause of action

for a declaration that apartment 27i within the building located at 200 East 33rd Street, New York, NY is, and continues to be, subject to the Rent Stabilization laws until such time as it is lawfully deregulated.

Conclusion

In accordance herewith it is hereby:

ORDERED that defendants' motion for summary judgment dismissing the first cause of action for rent overcharge is granted, and it is further

ORDERED that plaintiffs' cross-motion for summary judgment on their first cause of action for rent overcharge is denied, and it is further

ORDERED, DECREED AND ADJUDGED that the first cause of action in plaintiffs' complaint is hereby dismissed with prejudice, and it is further

ORDERED, DECREED, ADJUDGED AND DECLARED that apartment 27i located in the building known by the street address of 200 East 33rd Street, New York, NY is, and continues to be, subject to the Rent Stabilization laws until such time as such apartment is lawfully deregulated, and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied and that his constitutes the decision, order and judgment on the court.

Dated: New York, New York
August 14, 2012

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J.G. J.S.C.