Tanzillo v Windermere Owners LLC
2015 NY Slip Op 30818(U)
May 12, 2015
Supreme Court, New York County
Docket Number: 154711/2014
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

MICHAEL TANZILLO,

Plaintiff,

- against -

WINDERMERE OWNERS LLC,

Defendant.

Index No.: 154711/2014
Motion Date: Nov. 5, 2015
Motion Seq.: 001

DECISION and ORDER

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Papers considered in review of this motion to dismiss:

Papers	**Numbered**
Notice of Motion	1
Affirmation in Support	2
Affirmation in Opposition	3
Reply Affirmation in Support	4

ELLEN M. COIN, A.J.S.C.:

Plaintiff Michael Tanzillo moves for summary judgment on liability and for a declaratory judgment that he is entitled to a rent-stabilized lease, a refund of rent overcharges, treble damages, and attorneys' fees. Defendant Windermere Owners, LLC is the owner/landlord of the building in which plaintiff occupies an apartment.

Plaintiff's lease commenced March 15, 2013 and ended May 31, 2014 (one year, two months, and 17 days). The rent was $2,520 a month, and the lease expressly represented that the

apartment was not subject to rent stabilization. The lease was renewed for one year, effective June 1, 2014, at the same rent and on the same terms and conditions.

Plaintiff attaches a Division of Housing and Community Renewal (DHCR) record headed, "Registration Apartment Information." The record shows that in 1984 the apartment was registered as rent stabilized at a rent of $313.89. The apartment continued to be registered as rent stabilized through 2008, by which year the rent had increased to $460.90. From 1986 through 2008, the same tenant lived in the apartment.

Thereafter, the registration shows the following.

Registration Year	Filing Date	Apt Status	Legal Regulated Rent
2009	06/18/09	TE Hotel/SRO(Transient)	$2,075
2010	07/01/10	TE Hotel/SRO(Transient)	amount missing
2011	10/15/12	VA	amount missing
2012	12/14/12	VA	amount missing
2013	08/20/13	PE High rent vacancy	exempt

The DHCR record defines TE as temporarily exempt, VA as vacant, and PE as permanently exempt. Defendant states that it purchased the building on November 18, 2010 and that the 2010 registration was filed by the former owner.

Plaintiff submits a list of guidelines by the Rent Guidelines Board (RGB), which determines rent adjustments for housing accommodations, including hotels (*Matter of 1234 Broadway, LLC v Division of Hous. & Community Renewal*, 41 Misc 3d 593, 598 [Sup Ct, NY County 2013]). The RGB document summarizes the increases allowed for hotel rooms from 1971 to 2013. Neither the DHCR registration, nor the RGB document, is certified. However, there is no objection to the documents, so the court assumes that the parties agree that both are

correct copies of the originals.

Plaintiff argues that the rent could not have legally jumped from $460.90 in 2008 to $2,520 in 2013, and that the registration statement incorrectly states that the apartment became permanently exempt from regulation in 2013. The landlord argues that the apartment is no longer rent-stabilized due to high-rent vacancy deregulation, and that the statute of limitations and the four-year look-back rule prevent using the rents paid by the long-term tenant to fix the present rent.

The first issue to be addressed is the timing of the instant summary judgment motion. This action commenced on May 14, 2014. The defendant answered on June 9, 2014. On June 12, 2014, plaintiff filed the instant motion. On June 30, 2014, defendant served and filed an amended answer. The amended answer contains a jurisdictional defense not in the original answer, namely, that the summons and complaint were not served upon a person authorized to receive process pursuant to CPLR 311 (a). The identical summons and complaint were served again on July 2, 2014. Defendant claims that the second service starts anew its time to answer, and that the motion is premature, since issue has not been joined.

As the Court has previously ruled in motion sequences 002 and 003, the re-service of the summons and complaint obviated defendant's jurisdictional objection to the action.

Analysis

Summary judgment is appropriate when there are no issues of fact for a fact finder to decide (*Sun Yau Ko v Lincoln Sav. Bank,* 99 AD2d 943, 943 [1st Dept], *affd* 62 NY2d 938 [1984]). If the moving party succeeds in showing the absence of factual issues, the opposing

party, in order to avoid a grant of summary judgment, must show the existence of factual issues (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007]). On a summary judgment motion, the facts alleged by the opposing party and all inferences that may be drawn in favor of that party are to be accepted as true (*Barr v County of Albany,* 50 NY2d 247, 254 [1980]; *Byrnes v Scott*, 175 AD2d 786, 786 [1st Dept 1991]).

Rent-stabilized housing is governed by the Rent Stabilization Law of 1969 (Administrative Code of City of NY [Admin. Code] § 26-501, *et seq.*) and its implementing regulations, the Rent Stabilization Code (RSC) (9 NYCRR § 2520.1, *et seq.*).

Plaintiff and defendant agree that the apartment enjoyed rent-stabilized status until the long-term tenant vacated in 2008. They disagree whether the apartment became deregulated after that tenant left. Both sides agree that the building is classified as a hotel (9 NYCRR § 2521.3). Plaintiff appends a decision in which the judge determined that this defendant is "a rent stabilized hotel residence" (*Matter of Windmere [sic] Chateau v NYS Division of Hous. and Community Renewal,* Sup Ct, NY County, April 10, 2007, Wilkins, J., index No. 100230/07), and a deposition transcript from yet another case where this defendant's former property manager testified that the building was hotel stabilized. The court accepts that the building is classified as a hotel.

Hotel rooms occupied by permanent tenants are subject to the rent-stabilization law (Admin. Code § 26-504 [a] [1]). A "permanent tenant" of a hotel is one "who ha[s] continuously resided in the same building as a principal residence for a period of at least six months" (9 NYCRR § 2520.6 [j]). Hotel rooms used for transient occupancy are temporarily exempt from

rent stabilization (9 NYCRR § 2520.11 [g]). Upon the expiration of the exempt use, a temporarily exempt unit can revert to rent-stabilized status (*see* 9 NYCRR § 2526.1 [a] [3] [iii]; *Goldman v Malagic,* 45 Misc 3d 37, 39 [App Term, 1st Dept 2014] [temporarily exempt apartment reverted to prior stabilized status]; *Kanti-Savita Realty Corp. v Santiago,* 18 Misc 3d 74, 76 [App Term, 2d Dept 2007] [same]; *Blumenthal v Chung Fu Lam*, 17 Misc 3d 233, 235-236 [Civ Ct, NY County 2007] [same]). A temporarily exempt unit can also become permanently exempt via high-rent vacancy deregulation (*see Gordon v 305 Riverside Corp.*, 93 AD3d 590, 592 [1st Dept 2012], *affg* 2011 WL 2746537, 2011 NY Misc LEXIS 3362, 2011 NY Slip Op 31860[U] [Sup Ct, NY County 2011]).

High-rent vacancy deregulation occurs, pursuant to the pertinent part of 9 NYCRR § 2520.11 (r), to housing accommodations which "(4) became or become vacant on or after June 19, 1997 but before June 24, 2011, with a legal regulated rent of $2,000 or more per month; (5) became or become vacant on or after June 24, 2011, with a legal regulated rent of $2,500 or more per month." The DHCR treats the transient occupation of housing accommodations "as the functional equivalent of a 'vacant' . . . , because such transient occupation temporarily exempts the apartment from regulation" (*Matter of Ogunrimde v New York State Div. of Hous. & Community Renewal*, 2010 WL 5044921, *4, 2010 NY Misc LEXIS 5864, * 7, 2010 NY Slip Op 33350[U], *7 [Sup Ct, NY County 2010], *affd* 110 AD3d 441 [1st Dept 2013]).

While the code does not define "vacant," it defines a "vacancy lease" as "[t]he first lease or rental agreement for a housing accommodation that is entered into between an owner and a tenant" (9 NYCRR § 2520.6 [g]). A vacancy occurs when all the tenants named in a lease have

permanently vacated the apartment (9 NYCRR § 2522.8 [b]).

The apartment in this case became vacant when the long-time tenant departed in 2009. The next occupants were transients. Then, the apartment was registered as vacant in 2011 and 2012, and plaintiff became a tenant in 2013. Plaintiff's lease was the first lease, hence, a vacancy lease, and by that lease, plaintiff became a permanent tenant. Although plaintiff's rent was $2,520, above the statutory limit, that rent was not a legal regulated rent, for the reasons discussed below.

The legal regulated rent is the rent mandated by the Code, and it may be increased or decreased only as specified there (9 NYCRR § 2522.1). For a hotel, "'[t]he legal regulated rent is equal to the most recent rent charged the prior permanent tenant, (assuming that the rent so charged was legal), plus any lawful guidelines increase in effect at the time of the commencement of the permanent tenancy, in accordance with Hotel Orders promulgated by the RGB'" (*Kanti-Savita,* 18 Misc 3d at 76, quoting Finkelstein and Ferrara, Landlord and Tenant Practice in New York § 18:200, at 18-92 [2006]). When the occupant of an hotel or SRO is transient, a "'landlord may demand and receive any amount of rent . . . until permanent tenancy status is secured'" (*Kanti-Savita,* 18 Misc at 76, quoting Finkelstein and Ferrara, Landlord and Tenant Practice in New York). Once a transient becomes a permanent tenant, he or she may not be charged more than the legal regulated rent (*id.*; 9 NYCRR 2522.5 [a] [2]).

It is not argued that the landlord was wrong to charge $2,075 for transient occupancy, but once a permanent tenant occupied the apartment, the rent had to conform to the rent stabilization law.

Upon a tenant presenting a valid objection to the rent/status of its apartment, the landlord must produce evidence showing that the rent is the legal regulated rent or that the landlord was not obligated to charge said rent (*e.g. Glimmer Five LLC v Clarke,* 46 Misc 3d 1219[A], *2 [Civ Ct, NY County 2015]; *Becker v Park Murray Assoc., LLC,* 31 Misc 3d 1234[A], *5 [Sup Ct, NY County 2011]). In this case, there is no explanation for the increase in rent from 2008 to today. The record does not establish the validity of the rent increase that allegedly brings the rent to the level of high-rent vacancy deregulation.

Rents can be increased, under 9 NYCRR § 2522.8, upon vacancy or succession. Succession is not at issue here and, as plaintiff correctly states, under the RGB guidelines, the building was not eligible for vacancy increases. Defendant does not dispute that the apartment's rent could not have increased under the RGB guidelines. In addition, rent increases under 9 NYCRR § 2522.8 are available where the vacancy lease is for a one- or two-year term (*Housing Dev. Assn. v Gilpatrick*, 27 Misc 3d 134[A], *1 [App Term, 1st Dept 2010]). In this case, plaintiff's vacancy lease was for a term exceeding one year. Since a legal regulated rent was not charged, the apartment was not deregulated upon vacancy, under 9 NYCRR § 2520.11 (r) (4) or (5).

Another way for owners to raise the rent is to improve the apartment (Admin. Code § 26-511 [c] [13]; 9 NYCRR § 2522.4 [e] [4]). In the case of a building with 35 or more housing accommodations, the landlord may permanently increase the legal regulated rent by one-sixtieth of the total cost of the improvements (*id.*). The parties agree that the building has more than 35 housing units. Plaintiff alleges that the improvements needed to justify an increase in rent from

$460.90 to $2,500 must cost at least $122,346 (one-sixtieth of $122,346 is $2,039.10, which added to $460.90 totals $2,500). Plaintiff retained a home improvement contractor who alleges in an affidavit that he inspected the apartment and that he estimates the total cost of recent renovations to be $63,000. Defendant's opposing affidavit states that it spent $37,017.97 in improvements on the apartment. Thus, improvements would not justify the increased rent.

Legal Regulated Rent and the Base Date

Citing *Matter of Payne v New York State Div. of Hous. & Community Renewal* (287 AD2d 415 [1st Dept 2001]) and *Matter of Ogunrimde* (2010 NY Slip Op 33350[U] at 7), defendant argues that whatever rent the plaintiff agreed to is the legal regulated rent. In each case, the court approved the DHCR's determination that the legal regulated rent was the rent to which the landlord and tenant agreed. In *Payne,* the First Department stated that the DHCR's finding "was rationally based on the absence of any reviewable rent records prior to such agreement" (*Payne*, 287 AD2d at 415-416).

In *Ogunrimde*, despite having rent ledgers and other documentation of the apartment's history, the DHCR set the rent in the amount of the first rent agreed to by the landlord and the petitioner (*Ogunrimde,* 2010 NY Slip Op 33350[U], *7-8). In each case, the DHCR examined only the rental history for four years before the date that the complaint was filed (*see also Matter of Marmelstein v New York State Div. of Hous. & Community Renewal,* 292 AD2d 207, 207 [1st Dept 2002] [the "result of limiting examination of the apartment's rental history to such four-year period is a base rent in the amount of the first rent agreed to between petitioner's sister and respondent landlord."]). In *Marmelstein*, also, the DHCR's finding was approved.

Defendant's citations, however, were reviews of DHCR decisions under Article 78 of the CPLR. In other cases, the majority of the courts have arrived at the opposite conclusion.

Plaintiff claims that defendant's argument that the rent agreed to is the legal regulated rent is based on the previous version of 9 NYCRR 2526.1 (a) (3) (iii), which was amended on January 8, 2014. Plaintiff argues that the amended version should be applied.

The new 9 NYCRR § 2526.1 (a) (3) (iii) provides:

> Where a housing accommodation is vacant or temporarily exempt from regulation pursuant to section 2520.11 of this Title on the base date, the legal regulated rent shall be the prior legal regulated rent for the housing accommodation, the appropriate increase under section 2522.8, and if vacated or temporarily exempt for more than one year, as further increased by successive two year guideline increases that could have otherwise been offered during the period of such vacancy or exemption and such other rental adjustments that would have been allowed under this Code.

The previous version of 9 NYCRR § 2526.1 (a) (3) (iii) provides:

> Where a housing accommodation is vacant or temporarily exempt from regulation pursuant to section 2520.11 of this Title on the base date, the legal regulated rent shall be the rent agreed to by the owner and the first rent stabilized tenant taking occupancy after such vacancy or temporary exemption, and reserved in a lease or rental agreement; or, in the event a lesser amount is shown in the first registration for a year commencing after such tenant takes occupancy, the amount shown in such registration, as adjusted pursuant to this Code.

Under the old version of 9 NYCRR § 2526.1 (a) (3) (iii), the legal regulated rent would be what the landlord and tenant agreed to in the lease. Under the amended version, the legal regulated rent must be based on the previous legal regulated rent.

Since plaintiff entered into his renewal lease after 9 NYCRR § 2526.1 (a) (3) (iii) was amended, the amended version applies to that lease. The first lease, the vacancy lease, was made in March 2013, before the law was amended in January 2014. The question is whether, under the

older version of the law, the legal regulated rent is the $2,520 agreed to by plaintiff and defendant.

In *Gordon* (93 AD3d 590), the First Department determined that the pre-2014 version of 9 NYCRR 2526.1 (a) (3) (iii) had no application to the lease at issue. The court wrote that the statutory "language necessarily presumes that the first tenant after a vacancy is offered a rent-stabilized lease" (*id.* at 592), and the lease in that case was not a rent-stabilized lease. Also, the court noted, the rent agreed to in the lease was not the regulated rent, was not registered as such with the DHCR (*id.* at 593), and "[t]he record contains no information about how defendant determined the unit was subject to luxury deregulation" (*id.* at 591). Similarly, in this case, plaintiff's lease was not rent-stabilized and there is no evidence as to how defendant determined the rent.

In *Leheup v Direct Realty, LLC* (2008 WL 2871889, 2008 NY Misc LEXIS 9303, 2008 NY Slip Op 32028[U] [Sup Ct, NY County 2008]), a new landlord used a two-step approach in an attempt to deregulate an apartment. After a period of vacancy predating change in ownership, it issued a one-year lease to the first set of tenants for $2,065.00 per month, reduced to the preferential rate of $1,750.00 per month. The landlord gave plaintiff, the next tenant, a one-year lease at the same face value, reduced to 1,800.00 per month. The landlord argued that the first vacancy lease effectively deregulated the apartment, and plaintiff could not possibly claim that the apartment was rent stabilized. The court, however, determined that while 9 NYCRR § 2526.1 (a) (3) (iii) was applicable, the landlord's failure to provide the first tenants a rent-stabilized lease meant that their rent was not "the legal regulated rent" and could not be used for the purposes of

deregulation. Thus, the court found that the apartment did not lose its rent-stabilized status.

Similarly, in *656 Realty, LLC v Cabrera* (27 Misc 3d 1225[A], *3-4 [Civ Ct, NY County 2009], *affd* 27 Misc 3d 138[A] [App Term, 1st Dept 2010]), addressing temporary exemption from rent regulation of an apartment occupied by the building's staff under 9 NYCRR §2520.11(m), the court ruled that Section 2526.1 (a) (3) (iii) cannot convert a period of temporary exemption from rent regulation into permanent exemption with a new tenant. The fact that such tenant willingly agrees to an amount of rent qualifying for high-rent deregulation is of no effect. It is well recognized that an apartment cannot be deregulated by private contract, as the protections of the rent stabilization law are non-waivable (9 NYCRR §2520.13; *390 West End Assocs. v Harel*, 298 AD2d 11, 16 [1st Dept 2012]).

In this respect, DHCR's 2014 amendment of Section 2526.1 (a) (3) (iii) did not effect a change in law; it merely codified those court decisions that rejected attempts at deregulation, thereby foreclosing future attempts to exploit a perceived ambiguity in the prior version of the regulation.

Here, there is no support for the rent in the records of the landlord or of DHCR, and plaintiff's lease was not a rent-stabilized lease. Thus, the fact that the parties agreed to the rent does not render it the legal regulated rent (9 NYCRR § 2520.13; *Draper v Georgia Props.,* 94 NY2d 809, 810-811 [1999]; *Drucker v Mauro,* 30 AD3d 37, 39-40 [1st Dept 2006]).

Whether the amended version of 9 NYCRR 2526.1 (a) (3) (iii) is retroactive, as plaintiff argues, such that it would govern leases that predate its effective date, including plaintiff's lease, need not be determined now. Assuming that the amended version would apply to plaintiff's

lease, it is not clear at the present stage of this litigation whether the method in that law or another method, such as the default formula, should be used to determine the rent (*see Conason v Megan Holding, LLC,* 25 NY3d 1 [2015], *modfg* 109 AD3d 724 [1st Dept 2013]; *see also Thornton v Baron*, 4 AD3d 258, 259 [1st Dept 2004]).

Four-Year Look Back Period

Defendant argues that the rental history occurring before the base date may not be examined, and since there are no rent records for the time after the base date, plaintiff's rent in the lease becomes the new legal regulated rent. The base date (May 14, 2010 in this case) is the date four years prior to the commencement of an action challenging the rent (*Wasserman v Gordon*, 24 AD3d 201, 202 [1st Dept 2005]). The base date rent is the rent chargeable on the base date, together with any subsequent lawful increases and adjustments (9 NYCRR §§ 2520.6 [e], [f], 2526.1 [a] [3] [i]). Under the four-year look-back rule, the court may not examine the rent of the unit before the base date to determine a rent overcharge or the legal regulated rent; tenants may challenge only the rents charged after the base date during the four-year period before the filing of the complaint (CPLR 213-a; Admin. Code § 26-516 [a]).

A widening body of appellate authority has liberalized the prohibition against inspection of a rent history more than four years before a claim is filed, and it has become common for courts to disregard the rent on the base date if it has been falsified or the tenant alleges circumstances indicating a scheme to circumvent the Rent Stabilization Law and Rent Stabilization Code, coupled with charging an illegal rent (*Conason,* 25 NY3d at 16-17; *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358,

362 [2010]; *Thornton v Baron,* 5 NY3d 175 [2005]). Courts will look beyond the four-year period to determine whether the apartment is regulated (*Gersten v 56 7th Ave. LLC,* 88 AD3d 189, 200 [1st Dept 2011]) or whether an overcharge is willful (*Matter of H.O. Realty Corp. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 103, 106-107 [1st Dept 2007]; *see also Matter of Pehrson v Division of Hous. & Community Renewal of the State of N.Y.*, 34 Misc 3d 1220[A], *7 [Sup Ct, NY County 2011]).

Treble Damages and Legal Fees

Plaintiff seeks a refund of overcharges and treble damages. A landlord who has collected rent in excess of the legal regulated rent will be ordered to pay to the tenant a penalty equal to three times the amount of the excess rent (9 NYCRR § 2526.1 [a] [1]). If the owner establishes that the overcharge was not willful, the landlord will be ordered to pay to the tenant the amount of the overcharge plus interest (*H.O. Realty*, 46 AD3d at 107). However, and regardless of this continuing obligation, a tenant has a valid claim for an overcharge only for the four years preceding the commencement of the action (CPLR § 213-a; Admin. Code § 26–516 [a]; 9 NYCRR § 2526.1 [a]). Treble damages are limited to two years prior to the filing of the complaint (9 NYCRR § 2506.1 [a] [2] [i]; Admin. Code § 26-516 [a] [2]; *Borden v 400 E. 55th St. Assoc., L.P.,* 24 NY3d 382, 396 [2014]).

A landlord found to have overcharged for rent may be assessed the reasonable costs and attorneys' fees of the proceeding (Admin. Code § 26-516 [a] [4]; 9 NYCRR § 2526.1 [d]; *132132 LLC v Strasser,* 24 Misc 3d 140[A], *2 [App Term, 1st Dept 2009]). Moreover, here the lease provides for reasonable legal fees and expenses to the prevailing party. That is a sufficient

basis for plaintiff's attorneys' fees claim. The amount of legal fees, and plaintiff's entitlement to overcharge refunds and treble damages, will be determined when the legal regulated rent is established.

Conclusion

In this case, plaintiff establishes that he is entitled to a rent-stabilized lease and that the rent charged by defendant is not the legal regulated rent. To determine these issues, the Court examined the rental history of the apartment before the base date. The Court did not accept the argument that because the apartment was used by transients on the base date, it became deregulated and that the landlord could then set any rent. Plaintiff's motion for liability is not granted, however, because the manner in which the rent should be calculated, whether by the default or another method, will need to be determined at a later date.

In accordance with the foregoing, it is hereby

ORDERED that so much of plaintiff's motion for summary judgment as seeks a declaration that the subject apartment is rent stabilized is granted, and the balance of the motion is otherwise denied; and it is further

ORDERED that so much of the complaint as seeks declaratory relief that the subject apartment is rent stabilized is severed; and it is further

ADJUDGED AND DECLARED that the apartment known as 7A, 666 West End Avenue, New York, NY is a rent stabilized apartment; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the parties shall appear for a preliminary conference on

[* 15]

July 1, 2015 at 2:00 p.m.

This constitutes the Decision, Order and Judgment of the Court..

Dated: 5/12/15

ENTER:

Ellen M. Coin, A.J.S.C.