SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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SAMMIE KATHLEEN SMITH & JOHN MARK SCHOBER,

Plaintiffs,

-against-

ACQUISITION AMERICA VIII, LLC,

Defendant.

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Index No. 150823/2016
Motion Seq: 001

DECISION & ORDER
ARLENE P. BLUTH, JSC

The motion by plaintiffs for summary judgment declaring that plaintiffs' apartment is subject to the Rent Stabilization Law and the Rent Stabilization Code is denied and the cross-motion by defendant for summary judgment is denied.

Background

This action arises out of plaintiffs' apartment located at 652 West 163rd Street, New York, New York. Plaintiffs moved into the apartment in February 2011 and argues that the apartment is rent stabilized. The prior tenant of the apartment was Nelson Becerra, who lived at the apartment from 1997 until late 2010 or early 2011, and the legal regulated rent at the time he vacated the apartment was $1,324.29. When plaintiffs commenced their tenancy, defendant informed them that the apartment was not subject to rent stabilization and charged them a free market rent of $2,225.00 pursuant to a non-rent stabilized lease. Plaintiffs' tenancy has been extended through several renewal leases, none of which have been rent stabilized leases.

Plaintiffs insist that the apartment is subject to rent stabilization because the rent at the time the prior tenant left did not exceed the deregulation threshold of $2,000. Plaintiffs also

observe that defendant registered the apartment as rent stabilized in 2011 despite the fact that defendant now claims that the apartment was deregulated when plaintiffs moved in.

In opposition and in support of its cross-motion for summary judgment, defendant contends that the 2011 rent registration was done in error and that defendant sought to amend this registration. Defendant insists that the apartment was subject to a high rent vacancy deregulation. DHCR denied defendant's attempt to amend but noted that defendant registered the apartment as a high rent vacancy deregulation in the 2012 registration. Defendant contends that it performed Individual Apartment Improvements (IAIs) to the apartment during the vacancy between Becerra and plaintiffs' tenancy that cost $42,364.77, which allowed defendant an improvement increase of $1,059.12. Defendant calculates the rent increases as follows: the Becerra rent, $1,324.29, plus a longevity increase of $103.29, plus a vacancy bonus of $235.06, plus an IAIs increase of $1,059.12 totaling $2,721.76, which is in excess of the threshold for high rent vacancy deregulation ($2,000).

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the

opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"Rent Stabilization Law (RSL) (Administrative Code of City of NY) § 26-504.2(a) contains two statutory bases for high rent deregulation, the second of which is if the housing accommodation is or becomes vacant . . . with a legal regulated rent of two thousand dollars or more per month . . . In addition, increases in rent for postvacancy improvements count to bring the legal rent above the luxury decontrol threshold" (*Aimco 322 East 61st St., LLC v Brosius*, 50 Misc3d 10, 11, 21 NYS3d 803 [App Term, 1st Dept 2015] [internal quotations and citations omitted]).

The majority of the parties' submissions focus on *Altman v 285 West Fourth, LLC* (127 AD3d 654, 8 NYS2d 295 [1st Dept 2015]) (*Altman I*) which held that "Although defendant was entitled to a vacancy increase of 20% following the departure of the tenant of record, the increase could not effectuate a deregulation of the apartment since the rent at the time of the tenant's vacatur did not exceed $2,000."

However, the *Altman I* decision only dealt with a vacancy increase and did not address the effect of IAI increases on the deregulation of an apartment. A deregulation based solely on a

vacancy increase, as in *Altman I* is factually distinct from a vacancy based on IAIs. A recently decided First Department case (decided after this motion was submitted) *18 St. Marks Place Trident LLC v DHCR* (149 AD3d 574, 50 NYS2d 273(Mem) [1st Dept 2017]), held that an apartment could be deregulated after a vacancy by adding increases for a vacancy and for improvements. Based on this ruling, an IAI increase can deregulate an apartment even if the rent at the time of the vacancy is less than $2,000. In *18 St. Marks*, the rent prior to the vacancy was $1,264.48 and the combination of the vacancy and improvement increases pushed the rent above $2,000 (*id.*). Here, the IAIs increase alone might justify increasing the rent above the $2,000 threshold. Therefore, plaintiffs' motion is denied because the IAIs, if substantiated, could serve to deregulate the apartment.[1]

Defendant's Cross-Motion

The Court also denies defendant's cross-motion for summary judgment because there are issues of fact relating to the IAIs allegedly completed by defendant. Defendant insists that it spent $42,364.77 on improvements to the apartment. A review of the invoices, attached as exhibit F, yield questions about the veracity of the total. For instance, one entry notes that "Bathroom Accessories: Towel Racks, Toilet Paper Holder & Curtain Bar" cost $4,400 (*see* affirmation in support of cross-motion, exh F); even at $100 each, it is inherently incredible that 44 towel racks and toiler paper holders were installed in this apartment. Although there are items listed above this entry without a price, the $4,400 total does not appear to include those entries.

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[1] *Altman II* does not affect this holding either. That case held that the landlord was "not entitled to longevity increases or any increases allowed by law for the period in which the apartment was illegally removed from rent stabilization" (*Altman v 285 West Fourth LLC*, 143 AD3d 415, 416, 38 NYS2d 173 [1st Dept 2016]). Here, there has not been a finding that the apartment was illegally removed from rent stabilization.

Those entries appear to be items yet to be completed such as "Kitchen Cabinets to be Furnished and Installed" (*id.*). Plaintiffs also claim that some of the alleged improvements were never made (*see* Schober affidavit ¶¶ 6-11) and that some of the improvements are merely repairs (as opposed to improvements) that cannot be used to justify a rent increase. The Court finds that the IAIs allegedly completed by defendant are not sufficiently supported to justify granting the cross-motion for summary judgment. The Court cannot rule as a matter of law that defendant is entitled to a rent increase that would exceed the $2,000 threshold.

Accordingly, it is hereby

ORDERED that the plaintiffs' motion and defendant's cross-motion are denied and the parties are directed to appear for the already-scheduled preliminary conference on September 12. 207 at 2:15 p.m.

This is the Decision and Order of the Court.

Dated: June 28, 2017
New York, New York

ARLENE P. BLUTH, JSC