SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58
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John Ferentinos and Lee Brendler,

Plaintiffs, Index Number:

-against- 159534/2014

CF E 88 LLC, SM 88 LLC, UES Mgmt LLC, and Lexington Towers Company LP,

Defendants.
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David B. Cohen, J.:

Plaintiff John Ferentinos (plaintiff) moves, pursuant to CPLR 3212, for summary judgment against defendants CF E 88 LLC, SM 88 LLC and UES Mgmt LLC (collectively, defendants) and defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint, for summary judgment on their first counter claim in the amount of $6,272. 27 and, alternatively, for an order directing plaintiff to pay past use and occupancy and to pay prospective use and occupancy in the amount of $3051 per month. Defendants also seek an order, pursuant to 22 NYCRR 216.1, sealing certain records which were e-filed by plaintiff, suppressing certain records obtained from the New York State Division of Housing and Community Renewal (DHCR) in allegedly improper manner and imposing sanctions upon plaintiff's counsel. Plaintiff has also moved to compel defendants to provide certain documentary discovery. The court

notes that plaintiff Lee Brendler has settled the action against the defendants pursuant to a stipulation dated June 9, 2015. The motions and cross motion are consolidated for disposition and decided as noted below.

Underlying Allegations and Procedural Background

Plaintiff is a tenant in apartment 14-E (the Apartment) in a building (the Building), located at 160 East 88th Street, New York, New York, currently owned by CF E 88 LLC and SM E 88 LLC and managed by UES Mgmt LLC, pursuant to a one year lease that commenced on February 1, 2009 with Lexington Towers Company L.P., the owner at that time. The monthly rent under that lease was $4000 and plaintiff had two succeeding one year leases at the same $4000 monthly rent, while his fourth lease for the period from February 1, 2012 through January 31, 2013 had a monthly rent of $4100, the fifth one year lease had a monthly rent of $4200 and the sixth one year lease had a monthly rent of $4400.

The prior tenant's rent-stabilized lease had a monthly rent of $2091.34. The prior owner raised the rent to a market rate, since the legal stabilized rent was above the luxury rental threshold of $2000. However, the Building had been receiving J-51 tax benefits when plaintiff entered in his first lease. The J-51 tax benefits expired on June 30, 2011 and the Apartment was reregistered with DHCR as rent stabilized and DHCR's documents indicate that the Apartment was rent stabilized.

Shortly after purchasing the Building on September 24, 2014, defendants analyzed the Apartment's rent history and issued a check to plaintiff in the amount of $96,171.58, contending that this represented the amount of rental overcharge plus interest, reflecting the appropriate level of rent guidelines board increases for stabilized leases for the period in question. Plaintiff contends that the proper legal rent is $2091.34, the amount paid by the last rent stabilized tenant, without any increases. He deposited and cashed the tendered check and has not paid any rent or use and occupancy since December 2014. Defendants assert that the proper legal stabilized rent should reflect the statutory vacancy allowance permitted after the prior tenant left, the yearly rent guideline board allowed increases and the major capital improvements attributable to the Apartment, setting the legal rent at $3051.60.

Plaintiff commenced this action, seeking a declaration that the Apartment was rent stabilized, setting the legal stabilized rental, seeking damages for rental overcharges including treble damages for willfulness and attorneys' fees and raising a claim under General Business Law § 349.

After commencing this action, plaintiff served a subpoena duces tecum (the Subpoena) in February 2016 on DHCR, seeking production of the rent roll of the Building from 1984 to the present and copies of all DHCR orders on rent levels at the

Building. While the Subpoena indicated that a copy was sent to defendants' counsel, the documents received by plaintiff pursuant to the Subpoena were sent to defendants' counsel on August 16, 2016, some six months later. These documents relate to other tenants in the Building and are included in plaintiff's motion for summary judgment as e-filed documents # 19, 34, 35, 36, 48. DHCR obtained these records and maintains them in the expectation of, and under the obligation of confidentiality. Plaintiff's counsel does not object to the sealing of these documents, does not dispute that the Subpoena was not sent to defendants' counsel in a timely manner, but stated that this "was not done intentionally."

Plaintiff also moved to compel the production of records of other tenants and the records of another building. Defendants seeks the sealing of the improperly obtained records and the suppression of their use. They object to the production of additional records as over broad and not relevant to the issue in this case, which relates to the Apartment. Defendants also seek dismissal of plaintiff's complaint, summary judgment in the amount of $6672.27, the amount of an excess that was sent to plaintiff or use and occupancy in the amount of $90,199.68 for the period of January 2015 through April 2017 (the date when defendants cross-moved for use and occupancy) and prospective use and occupancy in the amount of $3051.60 per month. In their

letter dated October 17, 2018, defendants withdrew that portion of their cross motion for summary judgement that sought dismissal of plaintiff's complaint based upon the doctrine of primary jurisdiction.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). "[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment" (*Santos v Temco Serv. Indus.*, 295 AD2d 218,

218-219 [1st Dept 2002]; *see also Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

Rent Stabilization and Rent Overcharge Claims

"[A] tenant is entitled to rent-stabilized status for the duration of the tenancy and to collect any rent overcharges, where an apartment was improperly deregulated at a time when the landlord was receiving J-51 benefits" (*Stulz v 305 Riverside Corp.*, 150 AD3d 558, 558 [1st Dept 2017]; *see also Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009]). Calculation of the base date for the legal regulated rent is "[t]he most contentious issue" but generally, the court may not look beyond the four years prior to filing of the complaint (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 164 AD3d 420, 424 [1st Dept 2018]; *see also Raden v W7879, LLC*, 164 AD3d 440, 441 [1st Dept 2018]). Moreover, "[a]n increase in rent, standing alone, does not establish a fraudulent scheme to evade rent stabilization" (*Regina*, 164 AD3d at 423). Also, "a finding of willfulness 'is generally not applicable to cases arising in the aftermath of Roberts . . . [since] defendants followed [DCHCR's] own guidance when deregulating the units, so there is little possibility of a finding of willfulness'" (*id., quoting Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 398 [2014]).

Statute of Limitations

CPLR 213-a provides, in pertinent part:

> "An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged . . . [and] [t]his section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action."

"[U]nder certain circumstances, especially where a landlord has engaged in fraud in initially setting the rent or in removing an apartment from rent regulation, the court may examine the rental history for an apartment beyond the four-year statutory period allowed by CPLR 213-a" (*Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 102 [1st Dept 2017]; *see also Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 367 [2010]). To avoid the four-year statute, a tenant must establish "substantial indicia of fraud" (*Matter of Watson v New York State Div. of Hous & Community Renewal*, 109 AD3d 833, 834 [2d Dept 2013]; *see also Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999, 1000-1001 [2014]).

Fraud

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Ross v Louise Wise Servs., Inc.*, 8

NY3d 478, 488 [2007]). A cause of action for "fraud must state in detail 'the circumstances constituting the wrong' (CPLR 3016 [b]) [and] [c]onclusory allegations or mere suspicion of fraud are wholly insufficient" (*Bank Leumi Trust Co. of N.Y. v D'Evori Intl.*, 163 AD2d 26, 32 [1st Dept 1990]; see also *Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005]). Moreover, "[a] fraud claim is not actionable without evidence that the misrepresentations were made with the intent to deceive" (*Friedman*, 23 AD3d at 167).

Sealing

22 NYCRR 216.1 provides, in pertinent part that:

> "[e]xcept where otherwise provided by statute or rule, a court shall not enter an order sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties."

There is a "substantial burden of establishing good cause to seal [] exhibits . . . since the public has a powerful interest in open court proceedings" (*Mosallem v Berenson*, 76 AD3d 345, 349 -350[1st Dept 2010]). "The presumption of the benefit of public access to court proceedings takes precedence, and sealing of court papers is permitted only to serve compelling objectives, such as when the need for secrecy outweighs the public's right to access, e.g., in the case of trade secrets . . . [and, this is

so] even when both sides to the litigation request sealing" (*Applehead Pictures LLC v Perelman*, 80 AD3d 181, 191-192 [1st Dept 2010]).

Discovery

Generally, CPLR 3101 (a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (*see e.g. Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]). Moreover, "a broad interpretation of the words 'material and necessary' is proper [and they are] to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]; *Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009]). This includes not only admissible material, but also "matter that may lead to the disclosure of admissible proof" (*Montalvo v CVS Pharmacy, Inc.*, 81 AD3d 611, 612 [2d Dept 2011]; *Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance*, 226 AD2d 175, 175-176 [1st Dept 1996]). Also, "the party seeking to preclude discovery . . . [has] the burden of proving that the material was not discoverable" (*Vivitorian Corp. v First Cent. Ins. Co.*, 203 AD2d 452, 452-453 [2d Dept 1994]; *see also Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 40 [1st Dept 1998]). Finally, "[t]he drastic sanction of striking a pleading is inappropriate absent a clear showing that the failure to comply with discovery

directives was willful, contumacious or the result of bad faith" (*Banner v New York City Hous. Auth.*, 73 AD3d 502, 503 [1st Dept 2010]; *see also Delgado v City of New York*, 47 AD3d 550, 550 [1st Dept 2008]). However, where documents are improperly obtained, through the use an ex parte subpoena, "suppression of the improperly obtained materials [is] warranted pursuant to CPLR 3103 (c)" (*Matter of Beiny (Weinberg)*, 129 AD2d 126, 136 [1st Dept 1987], *rearg denied* 132 AD2d 190, *lv dismissed* 71 NY2d 994 [1988]; *see also Porter v SPD Trucking*, 284 AD2d 181, 181 [1st Dept 2001]).

Discussion

Initially, the court will address the Subpoena and the documents improperly obtained from DHCR as a result of it. While the parties agree to the sealing of the records, the court must also consider "the public's right to access" (*Applehead Pictures*, 80 Ad3d at 192). In this case, the records that DHCR produced are confidential and relate to other tenants, who are not the subject of the parties' dispute. Access to their rent information would be improper, particularly, since they never had an opportunity to protect their private information. The court, therefore, finds that there is good cause to seal e-filed documents, # 19, 34, 35, 36, 48. Additionally, since there is no dispute that the records were obtained through the improper use of an ex parte subpoena and, consequently, the appropriate remedy

is "suppression of the improperly obtained materials" (*Beiny*, 129 AD2d at 136; *see also Porter*, 284 AD2d at 181). The court exercises its discretion to decline to award sanctions for frivolous behavior.

Plaintiff's motion to compel is denied, since it is also involves documents relating to other tenants and another building, in addition to the claims relating to the Apartment.

Plaintiff's cause of action under General Business Law § 349 must be dismissed since this case involves only the dispute regarding the Apartment and "private disputes between landlords and tenants [do not amount to the] consumer-oriented conduct aimed at the public at large, as required by the statute" (*Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 423 [1st Dept 2010]; see also *City of New York v Smokes-Spirits. Com, Inc.*, 12 NY3d 616, 621 [2009]; *Promatech, Inc. v AFG Group, Inc.*, 95 AD3d 450, 451 [1st Dept 2012]).

Plaintiff seeks a declaration that the Apartment is subject to rent stabilization, since the Building was receiving J-51 tax benefits at the time when he signed his initial lease and defendants have filed with DHCR that the Apartment is subject to rent stabilization and, in their papers, have not disputed this claim. Consequently, the portion of plaintiff's motion that seeks summary judgment on this issue is granted.

Plaintiff also seeks treble damages, based upon wilfulness.

However, while he is entitled to damages for rental overcharges, the mere increase in rent does not establish the wilfulness required to sustain a claim for treble damages (*see Regina*, 164 AD3d at 423-424). The fact that defendants "reimbursed plaintiff[] for the overcharges, using the rent [of the legal stabilized lease of the prior tenancy] to compute the overcharges" is indicative of the absence of wilfulness (*Stulz*, 150 AD3d at 558; *see also Raden*, 164 AD3d at 441). Plaintiff has not shown evidence sufficient to sustain a claim of fraud. Plaintiff's claim for treble damages is, therefore, dismissed.

The remaining issue is the legal stabilized rent for the Apartment. In this connection, plaintiff has not disputed that defendants' mathematical calculations of the appropriate legal stabilized rent for the Apartment, with the applicable rent guidelines board and major capital improvement increases, are correct and the legal stabilized rent would be $3051.60, if those increases are applied. He asserts, since the Building's owners did not properly file with DHCR, that no increase in the legal stabilized rent should be permitted and the legal stabilized rent should be set at $2091.34, the amount paid by the prior stabilized tenant for the lease term of February 1, 2008 through January 31, 2009. However, this would amount to a windfall, which is not warranted in a case where plaintiff has not established a fraudulent scheme to evade the rent regulatory

system (*see Regina*, 164 AD3d at 423-424). Recognition of the prior legal stabilized rent and the allowable rent increases due to the guidelines board and the major capital improvements increases more properly reflect the level of rental overcharges, particularly in a case such as this where defendants refunded the rental overcharges. Accordingly, the court must deny the balance of plaintiff's motion for summary judgment, grant the portion of defendants' cross motion that seeks summary judgment dismissing the balance of plaintiff's complaint, set the legal stabilized rent at $3051.60 per month and award defendants' damages in the amount of $6,272.27 plus interest from November 24, 2014. Finally, there is no dispute that plaintiff has not paid rent or use and occupancy since December 2014. Defendants are entitled to use and occupancy for the period from January 2015 at the monthly rate of $3051.60 until the date of this order and prospective use and occupancy at the same rate until resolution of this action or further order of the court.

Order

It is, therefore,

ORDERED that the court having determined, in accordance with Part 216 of the Uniform Rules for the Trial Courts, that good cause exists for the sealing of part of the file in this action and the grounds thereof have been specified, that the Clerk of the Court is directed, upon service upon him (60 Centre Street, Room 141B) of a copy of this order with notice of entry, to seal e-filed documents # 19, 34, 35, 38, 48 in the docket of the New York State Courts Electronic Filing System and to separate said documents and to keep them separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed documents to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the portion of defendants' motion that seeks to suppress all documents obtained by plaintiff in response to a Subpoena issued to the New York State Department of Housing and Community Renewal is granted and the said documents are suppressed, pursuant to CPLR 3103 (c); and it is further

ORDERED that plaintiff's motion to compel is denied; and it is further

ORDERED that the portion of plaintiff's motion that seeks summary judgment is granted to the extent of granting summary judgment on plaintiff's cause of action for a declaratory judgment and is otherwise denied; and it is further

ADJUDGED AND DECLARED that apartment 14E in the building located at 160 East 88th Street, New York, New York is subject to the Rent Stabilization Code and the legal rent is set at $3051.60 per month; and it is further

ORDERED that defendants' cross motion is granted to the extent of dismissing the remainder of plaintiff's complaint and awarding defendants damages in the amount of $6,272.27 with interest from November 24, 2014; and it is further

ORDERED that plaintiff is directed pay defendants past use and occupancy in the amount of $3051.60 per month for the period from January 1, 2015 until the date of service of a copy of this order with notice of entry within 90 days of said service and to pay prospective use and occupancy in the amount of $3051.60 per month until resolution of this action or further order of the court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 14, 2018

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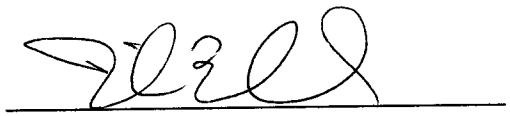

J.S.C.

HON. DAVID B. COHEN
J.S.C.