

**Stone v W7879 LLC**

2013 NY Slip Op 31377(U)

June 26, 2013

Supreme Court, New York County

Docket Number: 109621/10

Judge: Joan M. Kenney

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SCANNED ON 6/28/2013  
SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY  
*Justice*

PART 8

Index Number : 109621/2010  
STONE, JAMES W.  
vs.  
W7879 LLC  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

INDEX NO. 109621/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003

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 ATTACHED MEMORANDUM DECISION.**

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

**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).

Dated: 6/25/13

Joan M. Kenney, J.S.C.  
JOAN M. KENNEY  
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 PART 8

-----X  
JAMES W. STONE and LISA J. KIELL,

Plaintiffs,

**DECISION, ORDER &  
JUDGMENT**

-against-

Index No.: 109621/10

W7879 LLC; N, K and S, LLC; West 79<sup>th</sup>  
LLC; MN Broadway, LLC; Lisa W. Nagel  
Irrevocable T LLC; DECENDENTS SINGLE  
TRUST U/W MICHAEL NAGEL, Evelyn Nagel  
and Alan Trustees; DECENDENTS SINGLE  
TRUST U/W MICHAEL NAGEL, FBO STEVEN  
NAGEL ET AL., Evelyn Nagel and Alan  
Trustees; DECENDENTS SINGLE TRUST U/W  
MICHAEL NAGEL, FBO EVELYN NAGEL ET AL.,  
Evelyn Nagel and Alan Trustees; DECEN-  
DENTS SINGLE TRUST U/W MICHAEL NAGEL,  
FBO CLAIR NAGEL ET AL., DECENDENTS  
SINGLE TRUST U/W MICHAEL NAGEL, Clair  
Nagel Jernick and Alan Nagel Trustees;  
and DECENDENTS SINGLE TRUST U/W MICHAEL  
NAGEL FBO ALAN NAGEL ET AL, Alan Nagel  
and Steven Nagel Trustees,

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk  
and notice of entry cannot be served hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

Defendants.

-----X  
**JOAN M. KENNEY, J.:**

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(212) 869-5030

Papers considered in review of these motions:

**Papers:**

Notice of Motion, Affirmation,  
Affidavit, Exhibits, Memorandum of Law  
Notice of Cross-Motion, Affirmation in  
Support and Opposition, Affidavit in Support  
and Opposition, Exhibits, Memo of Law in Support  
Reply affidavit in Opposition to Cross Motion  
and Reply Memoranda of Law in Opposition  
Reply Affirmation in Opposition

**Numbered:**

1-15  
  
16-25  
  
26-27  
28

Defendants move, pursuant to CPLR 3212, for summary judgment

dismissing the complaint. Plaintiff cross-moves<sup>1</sup>, pursuant to CPLR 3212, for summary judgment declaring that plaintiffs are rent-stabilized tenants of the apartment they occupy and granting judgment in their favor for their claims of rent overcharge and treble damages.

#### **FACTUAL BACKGROUND**

This action involves a landlord-tenant dispute in which the plaintiff tenants seek: (1) a declaration that their apartment is rent-stabilized and that the monthly rents collected by defendant landlords since May, 1, 2003, are erroneous, unlawful and/or constitute an overcharge; (2) declarative relief directing defendants to register the premises as a rent-stabilized unit with the New York State Division of Housing and Community Renewal (DHCR) at the lawful rent; (3) judgment in the amount of the overcharges plus treble damages for all wilful overcharges; and (4) attorneys' fees.

This litigation results from the ruling of the Court of Appeals in *Roberts v Tishman Speyer Properties, L.P.* (13 NY3d 270 [2009]), which held, in sum and substance, that properties receiving J-51 tax benefits could not deregulate apartments therein, as long as such tax benefits were being received by the landlord of the property.

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<sup>1</sup>The motions were filed simultaneously. The Court is deeming the tenants' "Notice of Motion" a cross motion.

Plaintiffs are challenging the regulatory status of the apartment known as 54, 229 West 78<sup>th</sup> Street, a/k/a 230 West 79<sup>th</sup> Street, New York, New York 10024. In particular, the tenants claim that the subject apartment is rent stabilized, based upon the landlords' receipt of J-51 tax benefits at the time the tenants first took occupancy of the unit. It is the tenants' position that despite the ruling in the *Roberts* case, the landlords have refused to abide by the Court of Appeals decision.

Defendants do not proffer an explanation as to how plaintiffs' "base rent" was calculated. The documents from DHCR indicate that from 1998-2009 the apartment appears to be rent-controlled, without stating the registered rent. Nor do the landlords have any explanation or rationale, for failing to register the apartment as rent stabilized, assuming the rent controlled tenant vacated the unit. The only explanation proffered by the landlords for their failure to register the apartment legally, with the legal rent, is that DHCR, during those years, did not require that the unit be registered at all. Also, defendants have not adequately explained how plaintiffs' "base rent," of \$5,200.00 per month was calculated. Finally, defendants papers are silent regarding the conversion of the apartment from being rent-controlled to being rent-stabilized.

In support of their cross motion, and in opposition to landlords' motion, plaintiffs' contend that the landlords do not dispute any of the facts presented in the complaint, and admit that J-51 tax benefits were being received, when plaintiffs took

possession of the apartment in 2003. Further, the lease fails to contain the required J-51 notice, that the apartment remained subject to rent-stabilization, despite the expiration of the J-51 tax period.

In opposition to tenants' cross motion, and in reply, the landlords concede that *Roberts* is retroactive in its applicability, and does not oppose the tenants' request that the apartment be declared rent-stabilized. Defendants' argue that their voluntary, pre-litigation actions, should preclude plaintiffs from obtaining any finding of liability or damages as a matter of law. Moreover, by bringing the instant action plaintiffs' should be held liable for defendants' attorneys' fees.

Defendants also contend that they were in compliance with the existing law and the guidelines promulgated by DHCR in 2003, as they applied to deregulation of rent regulated apartments, including the apartment at issue. The basis for this argument is that defendants had a good faith belief that plaintiffs' apartment was properly deregulated based "on the existing interpretation of law." Furthermore, the apartment was deregulated by the prior owners of the building, and as far as defendants were concerned, in accordance with the law in effect at the time.

Finally, defendants claim that plaintiffs' fraud allegations are specious, and cannot extend the undisputed four year statute of limitations (CPLR 213-a) (rent overcharge), rather than the six year statute governing fraud (CPLR 213[8]).

### DISCUSSION

"The proponent of a summary judgment motion 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 [internal quotation marks and citation omitted]."

*Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Since the landlords have admitted that the apartment is rent-stabilized, this fact has rendered moot any question as to the apartment's rent regulated status and whether plaintiffs are to be provided with a rent-stabilized lease. However, the issue as to the calculation of the correct stabilized rent remains to be determined. For the purpose of calculating the correct rent, the tenants' rent overcharge claim is subject to a four-year statute of limitations (see Rent Stabilization Law of 1969 *et al*). "The Rent Regulation Reform Act of 1997 'clarified and reinforced the four-year statute of limitations applicable to rent overcharge claims ... by limiting examination of the rental history of housing accommodations prior to

the four-year period preceding the filing of an overcharge complaint' [internal citations omitted]." *Matter of Cintron v Calogero*, 15 NY3d 347, 353 (2010); *Gordon v 305 Riverside Corp.*, 93 AD3d 590 (1<sup>st</sup> Dept 2012). Defendants argue that the sole function of plaintiffs' fraud allegations, is an attempt to provide a subterfuge to circumvent, the well-settled four year statute of limitation applicable to rent overcharge complaints. (See CPLR 213[8]).

The elements of fraud are a misrepresentation or a material omission of fact which was known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or omission, and injury (*VisionChina Media Inc. v Shareholder Representative Services, LLC*, 2013 WL 2476558, quoting, *Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 178 [2011]).

"[R]eliance must be found to be justifiable under all the circumstances before a complaint can be found to state a cause of action in fraud" (*Danann Realty Corp. v Harris*, 5 NY2d 317, 322 [1959]). What constitutes reasonable reliance is "always nettlesome" because it is so fact-intensive (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 155 [2010] [internal quotation marks omitted]).

All of the elements of a fraud claim "must be supported by factual allegations containing the details constituting the wrong,"



in order to satisfy the pleading requirements of CPLR 3016(b) (*Cohen v Houseconnect Realty Corp.*, 289 AD2d 277, 278 [2<sup>nd</sup> Dept 2001]; see also, *68 Burns New Holding, Inc. v Burns St. Owners Corp.*, 18 AD3d 857 [2<sup>nd</sup> Dept 2005]). The purpose of this pleading requirement "is to inform a defendant of the complained-of incidents" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 353 [2009]). Nonetheless, it may be "almost impossible to state in detail the circumstances constituting a fraud where those circumstances are peculiarly within the knowledge of [an adverse] party" (*Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]). "Under such circumstances, the heightened pleading requirements of CPLR 3016(b) may be met when the material facts alleged in the complaint, in light of the surrounding circumstances, 'are sufficient to permit a reasonable inference of the alleged conduct' including the adverse party's knowledge of, or participation in, the fraudulent scheme" (*High Tides, LLC v. DeMichele*, 88 AD3d 954, 957 [2<sup>nd</sup> Dept 2011], quoting *Pludeman v. Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]).

In order to determine the correct rent and whether there has been any wilful rent overcharge, entitling plaintiffs to both treble damages and attorneys' fees, evidence must be presented on these issues. See *Matter of Obiora v New York State Division of Housing and Community Renewal*, 77 AD3d 755 (2d Dept 2010); *Matter of Graham Court Owners Corp. v Division of Housing and Community Renewal*, 71

AD3d 515 (1<sup>st</sup> Dept 2010).

In light of the landlords' admissions, there is no basis to dismiss plaintiffs' claims. With respect to the rent overcharges, defendants have failed to establish, as a matter of law, that the base rent was calculated properly when the previous rent-controlled tenant vacated the apartment and when plaintiffs took possession, in 2003, or that plaintiffs' base rent was properly calculated.

Excluding the issue of the rent-regulated status of the apartment, all of the causes of action are based on what would be the lawful rent for the unit and what, if any, increases from that amount are permissible under rent-regulation law. Since neither party has provided sufficient evidence for the court to make that determination, the following issues are referred to a Special Referee to hear and report, in no particular order:

1. Calculate the legal rent for the apartment in accordance with applicable DHCR regulations et al;
2. Calculate the overcharges, if any, attendant to the apt;
3. Take testimony and evidence in order to be able to recommend, or not, whether defendants wilfully registered an illegal rent for the subject apartment;
4. In the event the Special Referee makes a recommendation that plaintiffs' fraud claim is valid, e.g., the registration was wilfully deceptive, the Special Referee shall apply a 6-year statute of limitations to any damages and/or overcharges that may or may not be recommended;
5. In the event the Special Referee recommends an award of damages for rent overcharge without the presence of fraud, a 4-year statute of limitations is to be applied.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied;  
and it is further

ORDERED that the portion of plaintiffs' cross motion seeking a  
declaration that the apartment is rent-stabilized is granted; and it  
is further

ADJUDGED and DECLARED that the apartment known as 54, 229 West  
78<sup>th</sup> Street, a/k/a 230 West 79<sup>th</sup> Street New York, New York 10024 is a  
rent-stabilized apartment; and it is further

ORDERED that the issue of calculating plaintiffs' legal rent  
stabilized rent is referred to a Special Referee to hear and report  
with recommendations, except that, in the event of and upon the  
filing of a stipulation of the parties, as permitted by CPLR 4317,  
the Special Referee, or another person designated by the parties to  
serve as referee, shall determine the aforesaid issue; and it is  
further

ORDERED that the remainder of plaintiff's cross motion is  
granted; and it is further


ORDERED that defendants motion is denied.

Dated: June 26, 2013

ENTER:

**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).**

  
\_\_\_\_\_  
Joan M. Kenney, J.S.C.