SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver PART 10

Justice

ROSENZWEIG, ROBERT H.

- v -

305 RIVERSIDE CORP aka 305 RIVERSIDE DR. CORPORATION

INDEX NO. 116367-2009

MOTION DATE

MOTION SEQ. NO. 006

The following papers, numbered 1 to 4, were read on this motion for

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits	No(s). 1, 2
Answering Affirmation(s) — Affidavit(s) — Exhibits	No(s). 3
Replying Affirmation — Affidavit(s) — Exhibits	No(s). 4

Upon the foregoing papers, it is ordered that the motion is

Plaintiff Robert H. Rosenzweig ("Plaintiff") moves pursuant to CPLR§2221(d) and (e) for an order granting leave to renew and reargue the motion Court's prior Order dated June 14, 2012 and upon renewal and reargument, seeks to vacate a portion of the prior order. Defendant 305 Riverside Corp. ("Defendant") opposes this motion.

In the underlying motion, Defendant moved for summary judgment and asked the Court to declare that $9,797.32 is the legal regulated rent-stabilized rent for Plaintiff's apartment, to award Defendant a judgment in ejectment on its counterclaim, and to dismiss Plaintiff's second, third, and fourth causes of action. The motion Court, in partial reliance on the Appellate Term's decision in *72A Realty Associates v. Lucas*, 32 Misc. 3d 47, 929 N.Y.S.2d 349 (N.Y. App. Term. 2011) ("*Lucas*") held that in order to calculate rent, the Court should look back to the rent charged four years immediately preceding an overcharge complaint and then add allowable rent stabilized increases. The motion Court held that there are issues of fact remaining which preclude the granting of summary judgment on the issue of what the calculated rent should be for this apartment. Further, the motion Court found that the major rent stabilized increase at issue in this case is the amount of Major Capital Improvements ("MCI's"), to which the motion Court found that Plaintiff raised issues of fact. Specifically, the motion Court found there were issues of fact as to whether the work claimed was actually done in the renovation of the apartment and whether the value of the work was inappropriately padded or bolstered. Lastly, the motion Court dismissed Plaintiff's claims for treble damages, where it found no evidence of Defendant's willfulness in their overcharge.

After the motion Court issued its decision in June 2012, The Appellate Division, First Department vacated two portions of the Appellate Term decision in *Lucas*, holding that the Appellate Term erred in setting the base date rent for the overcharge counterclaim at the 2004 rent of $2,250/month. (*72A Realty Associates v. Lucas*, 101 A.D.3d 401, 955 N.Y.S.2d 19 (2012)) The Appellate Division found that where the deregulation was improper and the record doesn't clearly establish the validity of the rent increase which brought the rent-stabilized amount over $2,000, the Appellate Term should not have adopted the free market lease. Further, the Appellate Division found that the Appellate Term erred in dismissing Plaintiff's claim for treble damages, finding that the record

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

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

did not contain anything to support Landlord's renovation claim, including but not limited to bills, contracts, or records of payment. The Appellate Division held that further inquiry was required to determine whether the overcharge was willful or the result of reasonable reliance on a DHCR regulation.

In support of this motion to reargue, Plaintiff avers that the motion Court made an incorrect determination in finding that Defendant exhibited no fraud when it refused to recognize Plaintiff's premises as rent stabilized. Having found no evidence of fraud, the motion Court limited its inquiry into the apartment's rent history (in order to be able to determine proper rent) to the four years prior to Plaintiff's filing the complaint. Plaintiff argues that if the historical rent charged is found to be unlawful or fraudulent, then the rental agreement between Plaintiff and Defendant is void and therefore, the Court must look back at the entire relevant rental history in order to calculate the new, post-renovation rent. Further, the motion Court's incorrect finding of lack of willfulness on the part of Defendant caused the motion Court to incorrectly dismiss Plaintiff's claim for treble damages. Plaintiff argues that once the *Roberts v. Tishman Speyer Properties, LP*, 13 N.Y.3d 279, 918 N.E.2d 900 ("*Roberts*") decision came down from the Court of Appeals in October 2009, Defendant should have immediately changed Plaintiff's rent from deregulated to regulated, which it did not do. Plaintiff argues that the motion Court should have found that Defendant's failure to acknowledge Plaintiff's regulated status was willful.

In support of his motion to renew, Plaintiff argues that there has been a change in the law which warrants vacating a portion of the motion Court's prior order. Plaintiff argues he is entitled to reargument based upon the Appellate Division's decision in *Lucas*. Plaintiff argues that Defendant claims it spent over $233,000 for renovations to the apartment and the only evidence of the renovations is a contract proposal, which provides no breakdown for the contractors alleged charges. The Appellate Division in *Lucas* opined that the entire rental history of the apartment should be examined where the Landlord spent $30,000 in renovations and failed to substantiate it with evidence. Plaintiff argues that Defendant's claims of a $233,000 renovation to his apartment also requires a complete examination for fraud or wilfulness in accordance with the *Lucas* precedent.

In opposition, Defendant argues that Plaintiff's application to the Court lacks merit. Defendant entered into a deregulated two-year lease with Plaintiff on December 4, 2007 for the period from January 1, 2008- December 31, 2009 at an agreed upon rent of $10,000/month. After the parties entered into the lease, the Court of Appeals issued its decision in *Roberts*, which in relevant part held that landlords and building owners were no longer able to utilize luxury deregulation mechanisms while receiving J-51 tax benefits. Defendant admits that it improperly deregulated Plaintiff's apartment, but only became aware of its improper deregulation post-*Roberts*. However, Defendant contends that Plaintiff's reliance on the Appellate Division's *Lucas* decision is inapplicable where *Lucas* is about whether the record establishes the validity of the rent increase that brought the rent-stabilized apartment above $2000/month after renovations were made to the apartment. Defendant argues that the Appellate Division's decision in *Lucas* is factually specific and distinguishable from this case where the pre-renovation rent-stabilized value for Plaintiff's apartment was $2,178.00 per month, already over the $2,000/month threshold. Defendant argues that the only question left for the Court, which the motion Court stated in its prior order, is to determine whether the improvements made to Plaintiff's apartment were sufficient to justify the increased rent sought by Defendants.

Defendant argues it provided evidence of the improvements as part of its original motion for summary judgment, including an affidavit from Plaintiff's expert, Susan Treanor, attesting to which work was actually completed, an affidavit from the Defendants expert, Frederick Porcello, who stated the expenditure was relatively low for the size of the apartment and explaining the work which he completed. Defendants also attached copies of checks for the completed work. Defendants argue that until the *Roberts* decision came down from the Court of Appeals in October 2009, there was no reason for Defendant to believe that it needed to justify its increased rent by showing extensive and inflated renovations. Defendant believed it was entitled to the luxury decontrol provisions of the RSL while simultaneously receiving J-51 tax benefits and that the $10,000 it charged for rent for the Plaintiff's apartment was the appropriate de-regulated market rent.

Defendant further opposes Plaintiff's motion, where Plaintiff argues that without full discovery there was no basis for the Court finding a complete absence of fraud by the Defendant. Defendant argues that at the time the motion for summary judgment was made, discovery was complete and there was no fraud committed by Defendant. Defendant argues that Plaintiff has engaged in dilatory tactics in order to continue paying the reduced interim rate ($3,006.43/month) for rent of the subject apartment, as decided by this Court in the prior Order. As such, Defendant asks that should any delay occur in order to decide this motion, Plaintiff should pay an increased use and occupancy rate of $5,234.24, which takes into account a value for renovations. Defendants argue it arrived at the new use and occupancy rate by using the prior tenant's rent ($2,178.58), plus a 20% vacancy allowance ($435.71), plus rent stabilization longevity allowance ($392.14) plus 1/40th of the lowest estimated renovation amount ($2,236.81.)

Analysis

Pursuant to CPLR§2221(d) "A motion for leave to reargue...shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion..." Pursuant to CPLR§2221(e) "A motion for leave to renew...shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion." (N.Y. C.P.L.R. 2221 (McKinney)). Plaintiff moves pursuant to CPLR§2221(d) and (e).

Plaintiff signed his lease for the subject apartment in December 2007, at which point the law on proper deregulation of apartments was still rather unclear. However, the Court of Appeals held in the *Roberts* decision, in October 2009, that landlords/owners were not entitled to take advantage of the luxury decontrol provisions of the Rent Stabilization Law ("RSL") while simultaneously receiving tax incentive benefits under the City's J-51 program. After the Court of Appeals decided *Roberts*, the Defendant was put on notice of it's improper deregulation of Plaintiff's apartment. Post-*Roberts*, landlords, tenants, and the Courts sought a way to set the new proper rent for those apartments that were improperly deregulated.

Rent Calculation

"CPLR 213(a) and RSL § 26-516 provide that a rent overcharge claim is subject to a four-year statute of limitations. Specifically, these two statutes provide that: (1) a rent overcharge action must be commenced within four years of the first overcharge alleged, and (2) the court is precluded from examining any rental history of the unit prior to the four-year period immediately preceding the commencement of the action. (CPLR § 213(a) and RSL § 26-516(a)(2)). In general, a rent overcharge claim is calculated using the legal registered rent amount that was in effect on the "base date" — the date four years prior to the filing of the complaint. (RSC § 2520.6(f)) Collectively, these provisions are referred to as the "four-year rule."

Prior to the Appellate Division's decision in *Lucas*, the Court could only look past the four year rule to calculate rent where "a tenant's overcharge claim alleges fraud and [where] there is doubt as to whether the legal registered rent on the base date is lawful, the court may examine the rental history prior to the four-year base date 'for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date.'" (*Altschuler v Jobman* 478/480, LLC, 2013 NY Slip Op 30208U *citing Grimm v. State Div. Of Hous. & Cmty. Renewal Office of Rent Admin.*, 15 N.Y.3d 358, 367, 938 N.E.2d 924, 912 N.Y.S.2d 491 (2010)) In those cases, "the court generally applies the DHCR default formula — 'the lowest rent charged for a rent-stabilized apartment with same number of rooms in the same building on the relevant base date.'" (*Altschuler, citing Levinson v. 390 West End Associates, LLC*, 22 A.D.3d 397, 802 N.Y.S.2d 659, 662 (1st Dep't 2005). The Appellate Term, in *Lucas*, found no evidence of a fraudulent scheme and therefore only used information from the four year period preceding the filing of an overcharge complaint.

The Appellate Division, in *Lucas*, held that a Court may also look beyond the four-year base date

to the entire rental history of an apartment to determine the proper base date rent where an apartment is improperly deregulated AND where the record does not clearly establish the validity of the rent increase which brought the rent-stabilized amount over the $2,000 threshold. The Appellate Division's holding in *Lucas* does not affect the motion Court's Order in this case.

In this case, the previous tenant who had been living in the apartment from 1977 until 2007, paid $2,178.00 per month. The Appellate Division in *Lucas* found it necessary to look at the entire available rental history where the landlord renovated the apartment and then increased the rent, bringing the rent-stabilized amount over the $2,000/month threshold and the validity of that rental increase was questioned. Here, the stabilized rent was over $2,000/month prior not only to the time Plaintiff entered into the lease but also prior to the renovations at issue. Here there is no evidence that the prior tenant's rent was ever below the $2,000/month threshold, or that the Defendant increased the rent above the threshold through fraudulent means. The First Department, in deciding *Lucas*, did not intend for every overcharge claim to be subject to an examination of the entire rental history. Rather, it vacated the Appellate Term's decision where it found that the renovations could have been completed solely to increase the base date rent over the $2,000 rental threshold required to qualify for luxury decontrol and therefore the validity of the rental increase was questionable. Here, Defendant concedes that they improperly deregulated Plaintiff's apartment. However, because prior tenant's rent was already over the $2,000/month threshold, it cannot be said that the motion Court misapprehended the law or the facts in applying the four-year rule to determine the base date in order to calculate Plaintiff's rent.

Treble Damages

According to the Rent Stabilization Law §26-516, "any owner of housing accommodations who, upon complaint of a tenant, or of the state division of housing and community renewal, is found by the state division of housing and community renewal, after a reasonable opportunity to be heard, to have collected an overcharge above the rent authorized for a housing accommodation subject to this chapter shall be liable to the tenant for a penalty equal to three times the amount of such overcharge....If the owner establishes by a preponderance of the evidence that the overcharge was not willful, the state division of housing and community renewal shall establish the penalty as the amount of the overcharge plus interest." (N.Y. Unconsol. Law § 26-516 (McKinney)).

In the *Lucas* decision, the Appellate Division found that the Appellate Term erred in dismissing tenant's claim for treble damages. The Appellate Division held that, "the record does not contain anything to support landlord's renovation claim [of 30,000], including for example, bills from a contractor, an agreement or contract for work in the apartment, or records of payments for the renovations. A $1,491 monthly increase in rent is a substantial amount, and landlord did not provide sufficient information to validate the increase. Further inquiry upon remand is required to determine whether the overcharge was not willful, but rather the result of reasonable reliance on a DHCR regulation." (*Lucas* at 22).

In contrast to the *Lucas* decision, the rental increase here is not one which brought the rent over the $2,000 threshold and therefore, there is no question that the Landlord did anything other than rely on the DHCR regulations when it deregulated Plaintiff's apartment. The Court's inquiry into the rental increase in *Lucas* has a different motivation where the apartment was under the $2,000 threshold and only brought over that threshold due to renovations. In further contrast to the *Lucas* decision, Defendant provided evidentiary support for its renovation claim. In its underlying motion, Defendant included an affidavit from its managing agent, Ari Paul, an initial contract for the renovation work in the amount of $233,000 from CDP Building and Design Group, and a letter from Defendant's expert Frederick Porcello reviewing the scope of the renovations performed. Further, Porcello included Cost Estimates for each item of the renovation, which he estimated in total to cost $248,591.17. Defendant also attached an affidavit from the contractor, Joseph Gans, that the contracted for work was actually completed. Defendant further included proof of payment by attaching copies of checks to its motion papers. While questions of fact require a trial to declare the proper rent stabilized rent, the claim of treble

damages will not be reinstated where there is no evidence of Defendant's willfulness. As noted by the Appellate Term in its *Lucas* decision, "the rent stabilization scheme, even without factoring in differences in interpretation between court and agency, can prove to be an 'impenetrable thicket confusing not only to laymen but to lawyers.'" (*Lucas* at 50). Courts have recognized the post-*Roberts* confusion and changing case law on the regulatory scheme. As such, simply improperly deregulating an apartment and failing to immediately re-regulate it post-*Roberts* is not in it of itself willful.

To the extent that Plaintiff moves to reargue, the application is denied. For the reasons set forth above, the motion Court did not misapprehend the laws or facts in finding that there was no fraud or wilfulness displayed by Defendant. To the extent that Plaintiff moves to renew based on the Appellate Division's decision in *Lucas*, the application is granted and, upon renewal, the Court adheres to the motion Court's prior Order.

Accordingly, it is hereby

ORDERED that Plaintiff's motion to reargue is denied; and it is further

ORDERED that Plaintiff's motion to renew is granted and, upon renewal, the court adheres to the Order dated June 14, 2012; and it is further

ORDERED that as per the parties prior stipulation, Plaintiff will continue to pay the amended use and occupancy rent of $5,243.24 until the final resolution of this matter; and it is further

ORDERED that the parties are to appear for a hearing on October 22, 2013 at 2:00 PM at 60 Centre Street, Room 422, New York, New York 10007; and it is further

ORDERED that Plaintiff serve a copy of this order with notice of entry upon Defendant within thirty (30) days of entry.

Dated: AUG 16 2013
New York County

George J. Silver J.S.C.

GEORGE J. SILVER

FILED
AUG 20 2013
COUNTY CLERK'S OFFICE
NEW YORK