

Meyers v Four Thirty Realty, LLC

2013 NY Slip Op 32486(U)

October 15, 2013

Supreme Court, New York County

Docket Number: 116747/2010

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

PRESENT: _____
Justice

PART 61

Index Number : 116747/2010
MEYERS, MARCIA
vs.
FOUR THIRTY REALTY
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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 *decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 10/9/2013

ACS, J.S.C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

- 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 61

-----X
MARCIA MEYERS,

Plaintiff,

DECISION AND
ORDER

-against-

FOUR THIRTY REALTY, LLC

Index No.
116747/10

Defendant.

-----X

HON. ANIL C. SINGH, J.:

Motion sequence 003 and 004 are consolidated for disposition.

Defendant moves for an order awarding summary judgment for all rent due through August 31, 2012, together with a possessory judgment and the issuance of a warrant of eviction, as well as dismissal of tenant’s counterclaim for legal fees, pursuant to CPLR 3212. Plaintiff opposes the motion and cross-moves pursuant to CPLR 2221(d) and (e) for an order granting leave to renew and reargue the Court’s prior order dated June 22, 2012.

Defendant Four Thirty Realty LLC is the owner/landlord of the building located at 430 East 86th Street in Manhattan. In November 2004, plaintiff Marcia Meyers entered into a written lease agreement for a term beginning December 22, 2004, and ending December 31, 2006, at a monthly rent of \$3,700. Subsequently, the lease was renewed several times. From 2004 through the present, plaintiff paid monthly rents between \$3,700 and \$4,100.

Plaintiff commenced the instant action by filing a summons and complaint on December 30, 2010, alleging that the building is the recipient of tax abatements under New York City’s J-51 tax benefit program; that the premises has never been eligible for high rent vacancy deregulation; and that plaintiff should be awarded damages for rent overcharges, as well as a declaratory judgment that her apartment is rent stabilized, and that the rent charged is unlawful.

In a memorandum opinion dated June 21, 2012, this Court denied defendant's motion for summary judgment; granted plaintiff's cross-motion for partial summary judgment with respect to the complaint's first and second causes of action; declared that the premises are subject to rent stabilization; and ordered landlord to provide tenant with a rent-stabilized lease agreement at the rate of \$3,700 per month, plus annual increases as permitted by the Rent Guidelines Board.

To determine the base date for calculating tenant's monthly rent, we used a four-year look-back period, adopting the reasoning of Civil Court Judge Peter Wendt's opinion in 72A Realty Assoc. v. Lucas, 28 Misc.3d 585 [Civ. Ct. N.Y. Cty., 2010], as affirmed by the Appellate Term (32 Misc.3d 47 [App.Term, 1st Dept., 2011]).

The other issue in the underlying decision was whether the tenant could assert a claim for treble damages. We found that the landlord was acting in good faith reliance upon DHCR's long-standing and unambiguous interpretation of the luxury decontrol statute codified in the Rent Stabilization Code. Accordingly, we concluded that the landlord did not willfully misrepresent the regulatory status of the apartment based on the law as it existed at the time. In the absence of willful misrepresentation, we dismissed tenant's claim for treble damages.

In a decision dated December 4, 2012, the Appellate Division overturned the decisions of Judge Wendt and the Appellate Term, finding that the lower courts had erred in setting the base date for calculating the rent overcharge and in dismissing the tenant's counterclaim against the landlord for fraud (72A Realty Associates v. Lucas, 101 A.D.3d 401 [1st Dept., 2012]).

Tenant seeks leave to renew/reargue this Court's underlying decision on the issues of the base date and willful misrepresentation based on a change of law in light of the Appellate Division's reversal of Lucas.

Discussion

The rule that "a motion for renewal be based upon newly discovered evidence is a flexible one,

and a court, in its discretion, may grant renewal even where the additional facts were known to the party seeking renewal at the time of the original motion, provided the moving party offers a reasonable justification for the failure to submit the additional facts on the original motion” (Grantat v. Walbaum’s Inc., 289 AD2d 289, 290 [2nd Dept. 2001] (other citations omitted)).

“A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion.” (Foley v. Roche, 68 A.D.2d 558, 567-568 [1st Dept., 1979]).

After reviewing the Appellate Division’s opinion carefully, we find that tenant should be granted leave to reargue/renew under the circumstances.

In Lucas, the Appellate Division found that the lower courts should have calculated the rent based on the last proper registration in effect, even if the rent reverted back to a period in excess of four years prior to the date of the claim. The Appellate Division held that

in light of the improper deregulation of the apartment and given that the record does not clearly establish the validity of the rent increase that brought the rent-stabilized amount above \$2,000, the free market lease amount should not be adopted, and the matter must be remanded for further review of any available record of rental history necessary to set the proper base date rate.

(Lucas, 101 A.D.3d at 402).

In addition, the Appellate Division held that the lower courts failed to make an adequate inquiry into the issue of whether the landlord had willfully overcharged the tenant. The Appellate Division wrote:

The courts also erred to the extent they dismissed, as a matter of law, tenant’s

counterclaim seeking treble damages. Landlord, in its affidavit, states that in 2001, \$30,000 worth of renovations to the apartment were completed, bringing the monthly rent above the \$2,000 threshold. However, the record does not contain anything to support landlord's renovation claim, 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.

(Id., 101 A.D.3d at 402-403).

This Court's independent research has unearthed two Supreme Court cases employing the methodology utilized by the First Department in Lucas.

In a decision dated January 16, 2013, Justice Saliann Scarpulla considered a landlord's argument that the tenant's rent overcharge claim must be analyzed using the "four-year rule." In Altschuler v. 478/480, LLC, 2013 WL 486792 (Sup. Ct., N.Y. Cty, January 16, 2013), Justice Scarpulla found that the tenant had demonstrated his entitlement to judgment as a matter of law on his rent overcharge claim, and the landlord had failed to demonstrate a triable issue of fact. Justice Scarpulla wrote:

[Tenant] established that [Landlord] improperly deregulated the apartment in 2000. The record shows that [Landlord] received the J-51 benefits from 1997-2011. Thus, the apartment was subject to rent-stabilization from the inception of [Tenant's] tenancy in 2000 until at least 2011.

Pursuant to CPLR 213(a), [Tenant's] rent overcharge claim is limited to any overcharges occurring after November 20, 2005, the date four years prior to the filing of the complaint. However, as a result of [Landlord's] improper deregulation of the apartment and given that the record does not clearly establish the validity of the 1995 rent increase that brought the rent-stabilized amount above \$2,000, I find that the court must disregard the free market lease amount of \$3,500 that was in effect on November 20, 2005. 72A Realty Associates, 995 N.Y.S.2d 19, 21 (1st Dep't 2012). Instead, the court must review "any available record of rental history necessary to set the proper base date rate." Id.

Moreover, [Tenant] also demonstrates a colorable claim of fraud which further requires the court to disregard the \$3,500 rent amount on the base date. In addition to the significant rent increase in 1995, there are other factors that suggest the existence of a fraudulent scheme to deregulate the apartment, such as the additional deregulations in 1998 and 2000, and [Landlord's] failure to file rent registration statements in 2001, 2002, 2006, and 2011, until [Tenant] filed his complaint. Grimm, 15 N.Y.3d at 366.

Furthermore, [Landlord's] argument that it deregulated the apartment in reliance on the 1996 DHCR advisory opinion is without merit. The record indicates that the apartment was rent-stabilized solely because [Landlord] received J-51 benefits. Thus, even under the 1996 advisory opinion, [Landlord] would have been prohibited from relying upon luxury decontrol to deregulate the apartment.

Based upon a review of the parties' submissions, I find that there are triable issues of fact related to the amount and extent of [Tenant's] damages for rent overcharges, treble damages, and attorney's fees.

More recently, Supreme Court Justice George Silver considered the ramifications of Lucas in Rosenzweig v. 305 Riverside Corp., 2013 WL 4496775 (Sup. Ct., N.Y. Cty., August 16, 2013). The tenant in Rosenzweig, like the tenant in the present action, filed a motion to reargue and renew a prior order. The motion court, in partial reliance on the Appellate Term's decision in 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 were issues of fact remaining which precluded the granting of summary judgment on the issue of what the calculated rent should be for the apartment. Further, the motion Court found that the major rent stabilized increase at issue in the case was the amount of Major Capital Improvements ("MCI's"), to which the motion court found that tenant 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 tenant'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 issued its decision vacating portions of the Appellate Term in Lucas.

Judge Silver granted the motion to renew and, upon renewal, adhered to the court's prior order.

Judge Silver wrote:

The Appellate Division, in Lucas, held that a court may ... 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.

* * *

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 rental 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.

* * *

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.

(Rosenzweig, supra. (emphasis in original)).

The Altschuler and Rosenzweig cases demonstrate that there is no bright-line rule regarding the application of the four-year limitations period on overcharge claims. Rather, the Court must make a fact-specific inquiry as to the application of the four-year rule.

In the instant matter, tenant's occupancy of the subject premises commenced in 2004. However, the registration history indicates that improvements were made in 1988 to bring the rent over the \$2,000 threshold.¹ Further, no proof is offered by the owner as to what improvements and renovations were

¹The DHCR registration history for the apartment in the instant matter states as follows:

Registration Year	Apartment Status	Legal Regulated Rent	Reasons Differ./Change
1984	Rent Control	\$648.58	
1985	Rent Control	No Registration Required	

undertaken to justify the rent increase above the \$2,000 mark in 1988.

On these facts, consistent with Lucas, the Court may look beyond the four-year rule and consider all rental history records to determine the proper base date rate. Discovery is necessary to determine whether the overcharge was willful, and to determine the proper base date rental rate.

Accordingly, it is

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

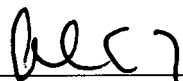
ORDERED that plaintiff's cross-motion for reargument/renewal is granted and, upon reconsideration, the Court's decision and order dated June 22, 2012, is vacated; and it is further

ORDERED that the branch of the underlying motion to dismiss tenant's claim for treble damages is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on October 30, 2013, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date:
New York, New York


Anil C. Singh
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

1986	Rent Control	No Registration Required	
1987	Rent Control	No Registration Required	
1988	Rent Stabilized	\$2,175.22	Improvement
1989	Rent Stabilized	\$2,175.22	
1990	Rent Stabilized	\$2,370.99	
1991	Rent Stabilized	\$2,785.90	
1992	Rent Stabilized	\$2,911.27	
1993	Rent Stabilized	\$3,027.72	
1994	Rent Stabilized	\$3,269.94	
1995	Rent Stabilized	\$3,368.04	
1996	Exempt	High Rent Vacancy	
1997	Exempt	No Registration Required	
1998	Exempt	No Registration Required	
1999	Exempt	High Rent Vacancy	
2000 - 2009	Exempt	No Registration Required	