

<b>Roberts v W7879 LLC</b>
2013 NY Slip Op 32519(U)
October 16, 2013
Supreme Court, New York County
Docket Number: 110213/10
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KENNEY  
Justice

PART 8

COHEN ROBERTS, JUDITH

INDEX NO.

110213/10

MOTION DATE

- v -

W7879, LLC, ETAL.

MOTION SEQ. NO.

07

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.**

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: 10/16/13

JOAN M. KENNEY J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK PART 8

-----X  
JUDITH COHEN ROBERTS,

Plaintiffs,

AMENDED  
DECISION, ORDER &  
JUDGMENT

-against-

Index No.: 110213/10

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,

Defendants.

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

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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:**

1-21  
  
  
  
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 plaintiff is a rent-stabilized tenant of the apartment she occupies and granting judgment in her favor for her claims of rent overcharge and treble damages.

#### **FACTUAL BACKGROUND**

This action involves a landlord-tenant dispute in which the plaintiff tenant seeks: (1) a declaration that her 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.

Plaintiff is challenging the regulatory status of the apartment known as 104, 230 West 79<sup>th</sup> Street, a/k/a 229 West 78<sup>th</sup> Street, New York, New York 10024. In particular, the tenant claims that the subject apartment is rent stabilized, based upon the landlords' receipt of J-51 tax benefits at the time the tenant first took occupancy of the unit. It is the tenant's 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 plaintiff's "base rent" was calculated. The documents from DHCR indicate that from 1984-1992 the apartment was never registered. Then, in 1993, it appears that the apartment was registered as rent stabilized, with a rent of \$1,227.43. There is a notation that the registered rent was subject to an "MCI" or major capital increase, attendant to the registered rent. Nor do the landlords have any explanation or rationale, for failing to register the apartment for eight years, and then without explanation register the apartment as rent stabilized. 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 her cross motion, and in opposition to landlords' motion, plaintiff contends 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 plaintiff 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 the tenant's cross motion, and in reply, the landlords concede that *Roberts* is retroactive in its applicability, and does not oppose the tenant's request that the apartment be declared rent-stabilized. Defendants' argue that their voluntary, pre-litigation actions, should preclude plaintiff from obtaining any finding of liability or damages as a matter of law. Moreover, by bringing the instant action plaintiff 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 plaintiff's 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 plaintiff's 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 tenant's 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 plaintiff's 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 plaintiff's 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 and/or rent stabilized tenant vacated the apartment, and when plaintiff took possession, in 2003, or that plaintiff's 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 recommends an award of damages for

rent overcharge, a 4-year statute of limitations is to be applied.

5. None of the foregoing shall preclude plaintiff from making a motion before the Special Referee to conform the pleadings to the proof.

Accordingly, it is

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

ORDERED that the portion of plaintiff's 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 104, 230 West 79<sup>th</sup> Street, a/k/a 229 West 78<sup>th</sup> Street, New York, New York 10024, is a rent-stabilized apartment; and it is further

ORDERED that the issue of calculating plaintiff's legal 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 denied; and it is further

ORDERED that defendants' motion is denied, and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice

of entry, together with a completed Information Sheet (Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) under the "References" section of the "Courthouse Procedures" link), upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Dated: October 16, 2013

ENTER:



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Joan M. Kenney, J.S.C.