

Raden v W7879 LLC

2013 NY Slip Op 32521(U)

October 16, 2013

Supreme Court, New York County

Docket Number: 111725/10

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KENNEY
Justice

PART 8

RADEN, JOEL, ETAL.

INDEX NO.

111725/10

MOTION DATE

- v -

W7879, LLC, ETAL.

MOTION SEQ. NO.

06

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.

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: 10/16/13

Joan M. Kenney
J.S.C.
JOAN M. KENNEY

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

JOEL RADEN and ODETTE RADEN,

Plaintiffs,

AMENDED
DECISION, ORDER &
JUDGMENT

Index No.: 111725/10

-against-

W7879 LLC; N, K and S, LLC; West 79th
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:	Numbered:
Notice of Motion, Affirmation,	1-22
Affidavit, Exhibits, Memorandum of Law	
Notice of Cross-Motion, Affirmation in	
Support and Opposition, Affidavit in Support	
and Opposition, Exhibits	23-44
Reply affidavit in Opposition to Cross Motion	
and Reply Memoranda of Law Support and in Opposition	45-48

Defendant moves, pursuant to CPLR 3212, for summary judgment

dismissing the complaint. Plaintiff cross-moves¹, 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 landlord since January 15, 1995, are erroneous, unlawful and/or constitute an overcharge; (2) declarative relief directing landlord 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) attorney's 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 that 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.

Plaintiffs are challenging the regulatory status of the

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

apartment known as 63N, 230 West 79th Street a/k/a 229 West 78th 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.

Essentially, defendants maintain that the present action is moot because the first two causes of action in plaintiffs' complaint,² seek relief that defendants have already provided voluntarily. As a result, plaintiffs are not entitled to attorneys' fees (the third cause of action). The landlords state that discovery has revealed that plaintiffs have failed to identify any fraudulent conduct on the part of defendants. Plaintiffs testified during their depositions that defendants never made any written or oral misrepresentations to them with respect to the deregulation of the premises. Therefore, plaintiffs are not entitled to treble damages. Consequently, the tenants are only entitled to the amount previously tendered by defendants, and rejected.

Plaintiffs fraud claim asserts that their lease and rider (the

²The first cause of action seeks a declaratory judgment that the apartment in question is rent stabilized, and the second cause of action seeks a money judgment for rent overcharge and treble damages.

lease), and the attendant renewals/extensions, contained language stating that the apartment was not subject to rent-stabilization, nor does the DHCR registration indicate how the apartment was deregulated or how the rent was calculated pre- and post-deregulation.

Defendants do not proffer an explanation as to how plaintiffs' "base rent" was calculated. The documents from DHCR indicate that in 1984 the legal rent was \$610.03 (the apartment appears to be rent-controlled). In 1992, the registered rent for the apartment was \$1,966.28. The DHCR registration merely notes "VA and MCI" referring to an alleged vacancy allowance and an alleged major capital improvement increase. The Court can only assume that the rent-controlled tenant either died or vacated the apartment before 1992 because defendants papers are silent. Again, defendants do not explain how the registered rent was calculated in 1992. It is also unclear how plaintiffs' "base rent" of \$3,500.00 was determined, when the apartment went from being rent-controlled to rent-stabilized. The only explanation given is that this all occurred before defendants owned the building.

In support of their cross motion, and in opposition to landlord's motion, plaintiff's 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 1995. 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 tenant's cross motion, and in reply, landlord concedes 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 1995, 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 the specious fraud allegations 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 (1st 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 (1st 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 ...). 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 (1st 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 [2nd Dept 2001]; see also, 68 *Burns New Holding, Inc. v Burns St. Owners Corp.*, 18 AD3d 857 [2nd 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 [2nd 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 (2^d Dept 2010); *Matter of Graham Court Owners Corp. v Division of Housing and Community*

Renewal, 71 AD3d 515 (1st 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 tenants took possession of the apartment in 1992 or that plaintiffs' base rent was properly calculated.

The evidence of the rent previously charged by the landlord has been provided by both plaintiffs and defendants, consisting of a copy of the lease and extensions/renewals thereof for the period January 15, 1995 through January 31, 2010, and the annual apartment registrations for the years 1994 through 2008³, which indicate that the apartment was reclassified as rent stabilized, from rent controlled, with the registered rent in 1992 being \$1966.28. The landlord contends that the apartment was completely decontrolled in 1994 because of DHCR's luxury decontrol regulations applied to the apartment and the rent included an alleged vacancy allowance, and an assessment for a major capital improvement increase to the registered rent, thereby increasing the rent to exceed \$2,000.00.

Defendant has not met its burden of demonstrating the method of calculation used, and whether such calculation conforms to rent stabilization requirements. Moreover, defendants fail to

³The landlord attached the rent registrations for the years 2011-2012, *post-Roberts*.

"acknowledge that under *Roberts*, the apartment was rent stabilized and not subject to luxury decontrol" during the period J-51 benefits were relevant. See, *Gordon*, at 591.

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 without the presence of fraud, 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 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 63N, 230 West 79th Street a/k/a 229 West 78th Street, New York, New York 10024 is

a rent-stabilized apartment; and it is further

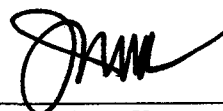
ORDERED that the issue of calculating plaintiffs' legal rent stabilized rent is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated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

ORDERED that defendants' motion is denied.

Dated: October 16, 2013

ENTER:



Joan M. Kenney, J.S.C.