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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART N

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ROSSMIL ASSOCIATES, L.P.,

Petitioner, L & T Index #: 54330/12

-against- **DECISION/ORDER**

KELLY MACNEAL,

Respondent-Tenant.

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HON. ARLENE H. HAHN, J.H.C.

After several days of trial beginning March 4, 2013, and ending April 4, 2013, based on the testimonial and documentary evidence adduced therein, the Court finds and decides as follows:

In this summary nonpayment proceeding, petitioner seeks to recover from respondent $58,208.35 ($53,992.72 in base rent plus $4,215.63 in late fees due as additional rent under the lease) alleged due through March, 2013 for her occupancy of Apartment #3-C at 350 West 51st Street, in New York county ("Apartment"). Respondent interposes affirmative defenses of breach of the warranty of habitability, rent overcharge and fraud, and counter-claims for treble damages and harassment.

Facts

Respondent took occupancy of the Apartment March 1, 2009, pursuant to a one year, unregulated lease ending February 28, 2010, at a monthly rental rate of $2,200.00. Her next lease, also unregulated, commenced March 1, 2010 and ended February 28, 2011, at the same monthly rate. Respondent signed a third, one-year, unregulated lease beginning March 1, 2011 and ending February 28, 2012, at the rate of $2,250.00/month. By letter dated January 4, 2012, petitioner informed respondent that due to a recent court decision[1], although she had signed a free market lease for the apartment, she was now a rent-stabilized tenant, would soon receive a new, rent-stabilized lease renewal, and that based on its recalculation of the rent in light of this case, she had been overcharged $0.50 for a period of eleven months (March 2011 through January 2012) totaling $5.50, for which a check in that amount was remitted. The letter further requested she pay her rent arrears at that time in the amount of $27,612.32, exclusive of late fees, by January 13, 2012, or petitioner would commence a non-payment proceeding against her. By letter dated January 12, 2012, petitioner mailed respondent a rent-stabilized renewal lease offering her a choice of a one-year lease at the rate of $2,333.86/month or a two-year lease at the rate of $2,412.59/month, based on

[1] Gersten v. 56 7th Ave., LLC, 88 A.D.3d 189 (1st Dept. 2011) ("Gersten") ruling that the holding in Roberts v. Tishman Speyer, 13 N.Y.3d 270 (2009) ("Roberts") is to given retroactive effect.

the rent guideline increases of 3.75% and 7.25% respectively on a legal regulated rent of $2,249.50. Respondent never either signed or returned this proffered, rent-stabilized lease renewal.

The primary issues presented in this case are whether petitioner overcharged respondent and if so, willfully, and whether petitioner committed fraud such that the Court need look back beyond the four year statute of limitations and review the entire rental history in making this determination. For the reasons set forth below, the Court finds that petitioner neither overcharged respondent nor committed fraud.

Procedural History

The Court entered into an order dated November 5, 2012 (J. Stoller) granting petitioner's motion for partial summary judgment dismissing respondent's rent overcharge defense pursuant to 9 N.Y.C.R.R. §§2526.1(a)(3)(I) and 2520.6(f)(1), considering the base date to be four years prior to the interposition of the rent overcharge defenses and counterclaims, applied the relevant Rent Guidelines Board increases and found that the rent petitioner charged respondent did not exceed the permissible amount. In that decision, the court reviewed respondent's fraud claims in light of the law at the time and found them not to rise to the level of fraud found to justify an inspection of the rent history of the apartment prior to the base date according to the standards set forth in Thornton v. Baron, 5 N.Y.3d 175 (2005) and Matter of Grimm v. State of New York Div. Of Hous. & Community Renewal Off. Of Rent Admin, 15 N.Y. 3d 358, 366 (2010.) A month later, while in the middle of trial in this case before Judge Kaplan, respondent brought a motion to reargue in light of the Appellate Division's decision in 72A Realty Assoc. v. Lucas, 101 A.D.3d 401 (1st Dept 2012). Upon its review of the law and the limited facts before it, as petitioner did not submit any documentation regarding IAI's from 2002 which respondent is seeking to challenge, and the Court had only respondent's documentation regarding these IAI's, the Court reversed its decision finding that there were triable issues of fact precluding summary judgment: "[T]herefore, the Court grants Respondent's motion to the extent of vacating the Court's granting of partial summary judgment in favor of Petitioner and reinstating so much of Respondent's answer as seeks to assert both defenses and counterclaims sounding in rent overcharge." (Order of J. Stoller, January 10, 2013.) Upon the issuance of this order, Judge Kaplan declared a mistrial and a second trial was commenced in front of Judge Elsner. As the parties disagreed upon the proper interpretation of the January 10, 2013 order, Judge Stoller issued yet a third order on March 1, 2013 in an effort to provide clarity. The order states in part,

> "the only issue before the Court and the only issue that the Court has ruled on is whether Respondent's rent overcharge defenses and counterclaims should be dismissed. The court has ultimately denied that motion. Accordingly, Petitioner bears the burden that any landlord of a rent-stabilized apartment must bear in order to prevail in a nonpayment proceeding. Respondent still has her rent overcharge defense. In advance of the trial, the Court will not make a determination as to what evidence Respondent may or may not introduce to rebut Petitioner's case or establish her affirmative defenses and/or counterclaims, which is best left with the sound discretion of the trial court, except to reiterate that the Court interpreted the holding of 72A Realty, supra to warrant examination of the entire rent history."

Thereafter, mid-trial for the second time, respondent accused Judge Elsner of bias towards petitioner and moved for her recusal, which she granted. The Court has finally completed a third trial by the fourth judge who considered this matter.

After careful review of all the documentary and testimonial evidence presented at trial, the Court finds that petitioner neither overcharged respondent nor committed any fraud. Upon close inspection of all of the certified records of the DHCR, leases, rent ledgers, itemized lists of work done, receipts and documentation in support of the IAI's in the apartment in 2002 and all other documents entered into evidence, and the credible testimony of petitioner's witnesses, Mr. Alberts and George Fountoulis, a licensed contractor whose company was the general contractor for the 2002 renovations, the Court finds that the last lease rent of $2,249.50 is supported by the evidence and is not an improper rent from which to calculate the rent stabilized lease renewal proffered by petitioner and rejected by respondent. Respondent offered no relevant, credible documentary or testimonial evidence to contradict petitioner's evidence. In fact, during respondent's entire tenancy, she has been undercharged, rather than overcharged rent, based on the comparison of rent charged her to the legal regulated rent. The Court incorporates herein by reference Exhibit A of petitioner's Post-Trial Memorandum of Law and adopts the chart as an accurate historical analysis of the legal regulated rent of the apartment from 1989 to date[2]. During the term of respondent's first lease, from 3/1/09 - 2/28/10, the legal regulated rent on the apartment was $2,249.37/month, though the lease rate was only $2,200.00/month. During the term of respondent's second lease from 3/1/10 - 2/28/11, the legal regulated rent reached $2,316.85, yet she continued to pay only $2,200.00/month. Respondent's lease rate during her third lease term was only $2,250.00 while the legal regulated rent was $2,368.98. The rent offered in the as yet unsigned, rent-stabilized renewal lease is also below the legal regulated rent.

[2] This chart reflects Judge Stoller's analysis in his Decision/Order granting re-argument dated 1/10/13 with one minor exception detailed in its third footnote.

While respondent asserts that petitioner's late and amended DHCR filings prove nefarious, devious and fraudulent conduct, the Court finds that petitioner acted well within the law at every step of the complex legal environment created by the changing law affecting this case. At the time petitioner filed for high rent deregulation, it was following the procedures then in effect set forth by the DHCR at the time and was limited by their forms which contained a check-box for exemption based on "high rent vacancy" though not for "individual apartment improvements." Therefore, petitioner was not trying to hide the IAI's, as respondent contends, but rather was limited to the DHCR's check-box forms. The state of the law prior to Roberts was that participation in the J-51 program precluded luxury deregulation only where receipt of the J-51 benefits was the sole basis for the imposition of rent regulation. This position was reflected in the Rent Stabilization Code in 2000. Petitioner's witness, Mr. Alberts, explained that, consistent with this state of the law, the basis for the apartment's deregulation in 2002 was the vacancy plus IAI's which brought the rent to over $2,000.00/month. Roberts, in 2009, and Gersten, in 2011, completely changed what had long been the law, holding that as long as a building participated in the J-51 program, all its tenants would be given rent stabilized status, regardless of a previously legal deregulation of a unit, such as the case here, and such effect would not only be prospective under Roberts, but retroactive under Gersten.

Although petitioners who overcharge tenants are presumed to have done so wilfully, leading to an award of treble damages in such cases (though no overcharge was found here) case law in similar situations excepts these cases from the presumption of wilfulness. Rosenzweig v. 305 Riverside Corp., 35 Misc.3d 1241(A) (Sup. Ct. N.Y. Co, 2012). The court found that there was nothing in the record to demonstrate that the landlord had decontrolled the unit pursuant to some fraudulent scheme, as in Thornton, but rather the record supported "a deliberative process by which DHCR permitted such decontrol based on its own interpretation of the controlling statutes." See also Morgan v. Mayflower Development Corp., Index No. 102390/10 (Sup. Ct. N.Y. Co. 2011, Rakower, E.) and Dodd v. 98 Riverside Drive, LLC, Sup. Ct. N.Y. Co., Index No. 109968/10, 10/18/11, Gische, J.)

Respondent alleges that the unregulated leases provided her by petitioner along with the description of her apartment as unregulated in its prior, discontinued, nonpayment proceeding evidence an intentional and deliberate fraudulent scheme on the part of petitioner to hide from her the rent stabilized status of her apartment. This argument is unfounded, as petitioner commenced that case prior to the Appellate Division's decision in Gersten, dated August 18, 2011, which gave retroactive effect to Roberts, and all of her leases pre-dated the decision as well.

With respect to respondent's affirmative defense of breach of the warranty of habitability, respondent claims that she is entitled to a reduction in rent based on noise she could hear in her apartment from the landlord's construction in another apartment during a three to four month period from November, 2010 to February 2011, the landlord's preventing the tenants' association from using the community room in the building, a reduction in package retrieval hours and the landlord's interference with package and delivery services. To support her noise contention, respondent testified without specificity as to date, time, substance of conversation and person spoken with that she called the superintendent and management office during the months of November 2010, December 2010 and January 2011 complaining of noise from construction in the building and requesting that the petitioner use rubber mats below machinery. Paragraph 4 of the lease between the parties in effect at the time requires that any notice to the landlord by the tenant be in writing and sent by certified mail. Respondent provided no evidence that she had so notified petitioner. As further proof of the severity of the noise, respondent entered into evidence photographs of a crack in the ceiling of her apartment which she testified resulted from the noisy, vibrating machines used for construction. The Court finds these photographs, alone, insufficient to prove this point, especially without photographs of the ceiling un-cracked, prior to the incident, with which to compare them, and without any other evidence. Respondent testified on cross-examination when asked how the cracks impacted her health and safety or otherwise interfered with her ability to enjoy the apartment that they did not other than being aesthetically unpleasing. Petitioner's witness, Rodney Alberts, the managing agent of the building, whom the court found to be very credible, testified that no other tenants in the building complained of renovation noise. Both he and the superintendent, Mr. Colon, testified that after receiving respondent's verbal complaints about noise, the contractor was instructed to do the drilling by hand in order to minimize noise. It was undisputed that all construction work occurred only during the hours of 9:00 a.m. and 4:00 p.m. Respondent never complained to the New York City Department of Housing Preservation and Development ("HPD") about noise, nor were any violations ever placed for noise.

To prove a breach of the warranty of habitability under Real Property Law 235-b, a tenant must proffer evidence about the nature of the violation, the excessiveness of the condition, the way it affected the tenant's health, safety or welfare, notice given to the landlord, and any measures taken by the landlord to correct it. Park West Management Corp. V. Mitchell, 47 N.Y.2d 316, 328 (1979). Here, respondent failed to prove by way of credible testimony or evidence that a condition of excessive noise existed, and that if it

did, that she gave proper notice to the landlord under the terms of her lease. Further, she failed to prove that such condition affected her health, safety, welfare, or quiet enjoyment of the premises.

Respondent's claim that she is entitled to a rent abatement for petitioner's failure to give her access to a community room in the basement of the building for Tenant Association meetings, even if true, would not constitute a breach of the warranty of habitability. Additionally, this issue was already raised and ruled upon by the New York City Department of Housing and Community Renewal ("DHCR") which determined that the tenants were not entitled to a reduction in rent for a reduction in services where tenants waited longer than four years from the date they were last given use of this room to file a complaint. Likewise, respondent's complaint regarding a newly enforced building policy of provision #14 of her lease rider, requiring tenants to use the service entrance and service elevator for package delivery and moving large items, rather than using the front door of the building, would not constitute a breach of the warranty of habitability, even if true. The DHCR retains exclusive jurisdiction for tenant complaints and rent reductions related to reductions in service and is the proper forum for addressing such issues. Nevertheless, respondent's witness testified that he has routinely ignored these rules despite their introduction.

As the Court has found no evidence that petitioner overcharged respondent, respondent's claim for treble damages is moot. As respondent failed to meet her burden of proof under §27-2005 of the New York City Administrative Code for her counter-claim for harassment, the Court denies this claim. In respondent's post-trial memorandum, she asserts, "not being able to give closing statements has prevented her from entering into the record objections to the exclusion of certain evidence and testimony including DHCR certified Rent Registration Histories supplied by other tenants..." Closing statements are neither an opportunity for a party to make evidentiary objections which should have been made at the time the objection arose, nor are they an appropriate time to enter additional evidence or testimony not provided before a party has rested. Respondent was afforded ample opportunity to present her case, testimony, witnesses and evidence before she rested.

Accordingly, the Court awards petitioner a final judgment of possession in the amount of $58,208.35 through March, 2013. Issuance of the warrant is stayed five days.

The foregoing constitutes the decision and order of this court.

Dated: New York, New York
June 4, 2013

HON. ARLENE H. HAHN, J.H.C