

Leight v W7879 LLC

2014 NY Slip Op 33803(U)

August 21, 2014

Supreme Court, New York County

Docket Number: 104686/11

Judge: Joan M. Kenney

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This opinion is uncorrected and not selected for official publication.

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

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DOUGLAS L. LEIGHT, ROBERT M. LUBIN,
JOHN M. MASTEN, DAVID RESMICOW, MIRIAM
STEIR, and DIANE WEIST,

Plaintiffs,

DECISION, ORDER &
JUDGMENT

-against-

Index No.: 104686/11

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.

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JOAN M. KENNEY, J.:

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Papers considered in review of these motions:

Papers:	Numbered:
Notice of Motion, Affirmation,	1-21
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	22-38
Reply affidavit in Opposition to Cross Motion	
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Defendant moves, pursuant to CPLR 3211 *et seq*, for summary judgment dismissing the complaint.

Plaintiff cross-moves, seeking an Order, (i) transferring the instant action to Part 8, as a related case, due to the fact that Part 8 already has seven other similar cases that involve all the same defendants and all the plaintiffs are tenants of the same building; (ii) denial of the motion-in-chief, without prejudice, as to John Masten (Masten) and Dianne Weist (Weist), until a determination is made in *Gersten v. 56 7th Ave. LLC*, 88 AD3d 189, 2011 NY Slip Op 06300 (1st Dept 2011), leave granted, 2011 NY Slip Op 89163(U) (1st Dept). Since this motion was submitted to Part 8, this Court has accepted a voluntary transfer of the instant litigation for the purposes of consistency and judicial economy. Additionally, the appeals in *Gersten supra*, was marked "withdrawn/discontinued" see, *Gersten*, 18 NY3d 954. Consequently, this Court will consider Masten and Weist with the rest of the plaintiffs in the event such an application is made in reference to these tenants.¹ The balance of plaintiffs' cross motion is moot.

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

¹Defendants are not moving in this motion to dismiss the case against Masten and Weist.

landlord since January 22, 2003 (Leight); January 28, 2004 (Lubin); August 1, 1998 (Masten); March 18, 1996 (Resnicow); October 1996 (Stier); December 30, 1991 (Wiest), 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.

Plaintiffs are challenging the regulatory status of apartment known as 41N, 62N, 104S, and 52S, and 72 of 230 West 79th Street a/k/a 229 West 78th Street, New York, New York 10024 and 122 of 229 West 78th Street, New York, New York a/k/a 230 West 79th Street, New York, New York 10024. In particular, the tenants claim that the subject apartments are rent stabilized, based upon the landlords' receipt of J-51 tax benefits at the time the tenants first took occupancy of their units. 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.

Defendants do not proffer an explanation as to how plaintiffs' "base rents" were calculated. The documents annexed from DHCR indicate as follows: 41N was registered from 1984-2008 as "rent controlled," and registration of the legal rent was not required; 104S was registered as "rent stabilized" from 1997-2003; 52S was registered as "rent controlled" from 1984-2009 and the registration of the legal rent was not required.² The landlord does explain any rationale, for failing to register some of the apartments for at least 25 years (1984-2008), except for suggesting that the DHCR, during those years, did not require that the unit be registered at all. Also, defendants have not adequately explained how plaintiffs' "base rents," were or are to be calculated. Finally, defendants papers are silent regarding the conversion of the apartments from being rent-controlled to being rent-stabilized or rent controlled to market rate.

In opposition to landlords' motion, plaintiffs' contend that the landlord does 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 their apartments in 2003, 2004, 1998, 1996 or 1991 respectively. Further, the leases fail to contain the required J-51 notice, that the apartments remained subject to rent-stabilization, despite the expiration of the J-51 tax period. In reply, the landlords concede that *Roberts* is

²Plaintiffs have not annexed any other DHCR documents for the remaining apartments.

retroactive in its applicability, and does not oppose the tenants' request that the apartments 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 all the applicable years, as they applied to deregulation of rent regulated apartments, including the apartments at issue. The basis for this argument is that defendants had a good faith belief that plaintiffs' apartments were properly deregulated based "on the existing interpretation of law." Furthermore, the apartments were 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 plaintiffs' 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

In considering a CPLR 3211 motion to dismiss, the court is required to determine whether a plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four

corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002). The pleadings are to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87 (1994).

"On a motion to dismiss pursuant to CPLR 3211(a)(7), the court accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192 [1st Dept., 2013]). Thus, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." (Id.)

Since the landlord has admitted that the apartments are 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 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 (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 rents 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 (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 rents were calculated properly when the previous rent-controlled tenants vacated the apartments and when plaintiffs took possession, in 1996, or that plaintiffs' base rent was properly calculated.

Excluding the issue of the rent-regulated status of the apartments, 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 to dismiss is denied; and it is further

ORDERED plaintiffs' cross motion is moot; and it is further ADJUDGED and DECLARED that the apartments known as 41N, 62N, 104S, 52S and 72 are rent-stabilized apartments; 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.

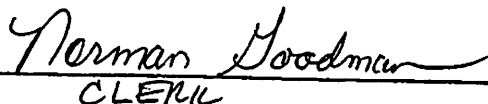
Dated: August 21, 2014

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Joan M. Kenney, J.S.C.


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