[*1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

LISA TOMIC and GORAN TOMIC,

Plaintiffs,

Index No. 151152/2015

-against-

DECISION/ORDER

92 EAST LLC,

Defendant.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs, tenants of an alleged rent stabilized apartment, commenced the instant action demanding, among other things, reimbursement for alleged rent overcharges. Both parties now move for summary judgment in their favor. For the reasons set forth below, both motions are denied.

The relevant facts are essentially undisputed. Defendant is the current landlord and owner of a residential apartment building located at 92 East Broadway, New York, NY 10002 (the "Building") having purchased the building on or about February 20, 2014. Plaintiffs are the current tenants of Apartment 4 (the "Apartment") in the Building. Plaintiffs first entered into possession of the Apartment in May of 2007 pursuant to a fair market residential lease agreement (the "First Lease") with defendant's predecessor-in-interest, The Third Dynasty Realty Corp.

("Dynasty"), commencing May 1, 2007 and ending April 30, 2008 with a rent in the amount of $1,700.00 per month. Over the next eight years, plaintiffs' entered into no less than five fair market residential leases with Dynasty. Over that time, plaintiffs' rent was raised a total of $100. Plaintiffs now occupy the Apartment pursuant to a lease with defendant for a total rent of $1,872.00 per month.

Prior to plaintiffs' tenancy, the Apartment was registered as rent stabilized with a monthly rent of $267.27. According to defendant, after a former tenant vacated the Apartment in 2007, Dynasty, the former owner of the Building, retained the services of two construction companies at the cost of over $70,000 to renovate the Apartment. Defendant further contends that these renovations coupled with two statutory rent increases increased the legal regulated rent for the Apartment beyond $2,000.00. Thus, according to defendant, the Apartment was deregulated in 2007, due to a high rent vacancy.

Plaintiffs have commenced the instant action alleging that the Apartment is still subject to the Rent Stabilization Law ("RSL") and was never deregulated in 2007. In essence, plaintiffs challenge the lawfulness of the purported deregulation of the Apartment. Accordingly, in their complaint plaintiffs seek rent overcharges, treble damages and attorney's fees. Both parties now move for summary judgment. Defendant argues that it is entitled to summary judgment as the Apartment is permanently exempt from rent stabilization as a result of a high rent vacancy decontrol that occurred prior to May 1, 2007. Further, defendant argues that it is entitled to summary judgment dismissing this action as the rent increases at issue here are beyond the four-year statute of limitations. Plaintiffs dispute the deregulation of the Apartment in 2007. Specifically, plaintiffs challenge defendant's contention that approximately $70,000 worth of

renovation work was done to the Apartment in 2007 to increase the legally allowable rent to over $2,000 per month.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the present case, as an initial matter, defendant's motion for summary judgment dismissing this action on the ground that it is time-barred is denied. It is true that RSL § 16-516(a)(2) and CPLR 213-a prohibit the courts from examining the rental history of the housing accommodation prior to the four-year period preceding the filing of commencement of a overcharge proceeding. *See Ador Realty, LLC v. Division of Housing and Community Renewal*, 25 A.D.3d 128, 132 (1st Dept 2005). However, this four-year statute of limitations is limited to calculating a rent overcharge claim specifically and does not apply when the court is determining whether an apartment is regulated in the first instance. *See Gersten v. 56 7th Avenue LLC*, 88 A.D.3d 189, 199-200 (1st Dept 2011). Indeed, "courts have uniformly held that landlords must prove the change in an apartment's status from rent-stabilized to unregulated even beyond the four-year limitations for rent overcharge claims." *Id.*

To the extent defendant claims that if the court were to allow this case to go forward and

compel the defendant to produce records from nine years ago to establish the Apartment's individual apartment improvements, the ramifications of such a decision would have a widespread negative impact on the real estate market as it would effectively require landlords to maintain records indefinitely, such contention is without merit. As an initial matter, such policy consideration does not change the current state of the law that a tenant may challenge the deregulated status of an apartment at any time during the tenancy. *See id.* Further, such argument is unpersuasive as to avoid this potential "unreasonable hardship," as defendant refers to it, a landlord need only to file an exit registration statement with the Division of Housing and Community Renewal ("DHCR"), which would include all records necessary to establish the proper deregulation of the apartment.

Additionally, the court finds that neither party is entitled to summary judgment as there remain triable issues of fact in this matter, including whether the Apartment is exempt from rent stabilization based on a high rent vacancy said to have occurred in 2007. Both the Rent Stabilization Code ("RSC") § 2520.1 and The Administrative Code of the City of New York § 26-504 (the "Rent Stabilization Law" or "RSL") provide that an apartment which became vacant after 1997, but before 2011, with a legal regulated rent of $2,000 or more is exempt from rent stabilization. This applies "whether the next tenant in occupancy or any subsequent tenant in occupancy actually is charged or pays less than two thousand dollars a month." RSL § 26-504.5(a).

Usually the resolution of the issue as to whether a landlord's expenditures for renovations or improvements were actually equal to the amount necessary to bring the legal rent above the high rent vacancy decontrol threshold is one for the finder of fact. *See Jemrock Realty Co., LLC*

v. Krugman, 13 N.Y.3d 924 (2010); *Merber v. 37 West 72nd Street*, Inc., 29 Misc.3d 415 (Sup. Ct. N.Y. Co., 2010). As the Court of Appeals recognized in *Jemrock*, "[t]he resolution of that issue is not governed by any inflexible rule either that a landlord is always required, or that it is never required, to submit an item-by-item breakdown, showing an allocation between improvements and repairs, where the landlord has engaged in extensive renovation work." *Jemrock*, 13 N.Y.3d at 926. Rather, "[t]he question is one to be resolved by the factfinder in the same manner as other issues, based on the persuasive force of the evidence submitted by the parties." *Id.*

Here, on the record before it, the court cannot say that, as a matter of law, the Apartment is or is not rent stabilized to award either party summary judgment. In support of its motion, defendant presents only the affidavit of Stanley Keung Cheung, the managing member of Dynasty, who attests to the renovations. However, no further documentary evidence is included with the affirmation to support the renovation work. Plaintiffs, on the other hand, in support of their motion, present their own affidavits wherein they attest to the poor condition of the Apartment when they moved in, including several photographs of the Apartment, which they attest demonstrate the condition of the Apartment when they moved in. These photographs are not dated and plaintiffs do not state when or by whom the photographs were taken. This evidence clearly raises but does not resolve the issue of whether the alleged improvements to the Apartment did or did not occur and, as such, whether the Apartment was deregulated due to a high rent vacancy in 2007. Rather, given the conflicting evidence, this is clearly an issue of fact to be resolved by the trier of fact.

To the extent plaintiffs contend that they are entitled to summary judgment on the ground

that defendant, and its predecessor, failed to file a proper and timely annual rent registration statement, such contention is without merit. Whether or not defendant filed an annual rent registration is only dispositive of rent overcharge claims if the Apartment is in fact still subject to rent stabilization. As such issue is still in dispute, the fact that defendant failed to file proper and timely annual rent registration statements does not entitle plaintiffs to summary judgment at this time.

Further unavailing is plaintiffs' argument that the Apartment was not deregulated as a matter of law as their actual rent has never reached the deregulation threshold of $2,000. RSL § 26-504.5(a) makes clear that a high rent vacancy occurs "whether the next tenant in occupancy or any subsequent tenant in occupancy actually is charged or pays less than two thousand dollars a month." Thus, the only important inquiry is whether the legal allowable rent for the Apartment exceed $2,000 in 2007 and, contrary to plaintiffs' contention, plaintiffs' actual rent is irrelevant.

Accordingly, based on the foregoing, plaintiffs and defendant's respective motions for summary judgment are denied. This constitutes the decision and order of the court.

Dated: 7/23/15

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C