Antollino v Wright
2015 NY Slip Op 31646(U)
August 27, 2015
Supreme Court, New York County
Docket Number: 157929/2012
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

CHRISTOPHER ANTOLLINO, MARK FRUCE and ALEXIS HOPKINS,

Index No.: 157929/2012

Plaintiffs,

-against-

ELVA WRIGHT,

Defendant.

ELVA WRIGHT and ORLANDO POMATANA,

Index No.: 155568/2013

Plaintiffs,

-against-

620 LLC and BEN REIDER,

Defendants.

Edmead, J.:

This matter consists of two actions that were consolidated pursuant to the June 6, 2014 decision and order of this court. In regard to the first action, entitled *Antollino, Fruce & Hopkins v Wright*, index No. 157929/2012 (the First Action), sublessees and plaintiffs Christopher Antollino and Mark Fruce (Plaintiffs) move, pursuant to CPLR 3212, for partial summary judgment in their favor as to liability for alleged rent overages charged for their apartment (Apartment 32) on the part of defendant in the first action/plaintiff in the second action Elva Wright (Wright), as well as treble damages and attorneys' fees. Plaintiffs claim that they were charged a fair market rent for Apartment 32, when, in fact, the apartment was rent stabilized. Plaintiffs also seek summary judgment as to liability against defendants in the second action,

entitled *Wright & Pomatoma v 620 LLC & Rieder*, index No. 155568/2013 (the Second Action), landlord 620 LLC and managing agent Ben Rieder (together, 620 LLC), and for an apportionment as a matter of law, or for a trial.

Regarding the Second Action, tenants and plaintiffs Wright and Orlando Pomatana move, pursuant to CPLR 3212, for summary judgment in their favor on their second (single damages for alleged rent overages), third (treble damages for alleged rent overages) and fourth cause of action (attorneys' fees) against 620 LLC. Specifically, Wright and Pomatana claim that they were improperly charged fair market rent for Apartment 32, when the apartment was actually rent stabilized. In addition, they claim that Wright paid fair market rent for another apartment in the Building (Apartment 31), when that apartment was also rent stabilized.

It should be noted that, although Plaintiffs are suing Wright for alleged rent overages for Apartment 32, Pomatana, Wright's brother, was the tenant of record on that apartment, and not Wright. Wright and her husband, Michael Wright, were the tenants of record on the lease for Apartment 31.[1]

BACKGROUND

620 LLC is the owner and landlord of the building (the Building), which is the subject of the instant litigation. The Building is located at 622 West 137th Street, New York, New York. 620 LLC acquired possession of the Premises on June 5, 2001. The Building consists of 25 residential units and is currently registered with the Department of Housing Preservation and Development (the DHPD). Defendant Rieder is the registered managing agent and officer of the

[1] While the leases for Apartments 31 and 32 contained language that required tenants to get permission from the landlord in writing before subletting, no such permission was ever obtained before the apartments were sublet.

Building. He began working at the Building in 2005. 620 LLC has regained possession of both Apartments 31 and 32.

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'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). 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], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Whether Wright is Entitled to a Refund for Alleged Rent Overcharges For Apartment 31 (The Second Action)

Additional Facts Regarding Apartment 31

Wright took occupancy of Apartment 31 under a one-year lease commencing on April 1, 2008 at a rent of $2,000.00 per month. Prior to the start of her tenancy, Apartment 31 was rented to Salano Mejia, a long-time rent-controlled tenant. Apartment 31, which has five bedrooms, became vacant in February of 2008 when Majia moved out.

After Majia moved out, 620 LLC filed an "Owner's Report of Vacancy Decontrol for a

New York City Apartment Subject to Rent Control" with the Department of Housing and Community Renewal (DHCR) (620 LLC's opposition to Wright and Pomatana's motion, exhibit F, Apartment 31 DHCR Vacancy Decontrol Report). This report indicates that the last legal rent charged for the apartment was $388.93.

Initially, it should be noted that, regarding Apartment 31, although Wright is a tenant of record, Pomatana is not. As such, Pomatana is not in privity of contract with 620 LLC and cannot recover for alleged overages for Apartment 31 (*see Allied Control Co. v C. F. A. Graphics, Ltd.*, 43 AD2d 678, 679 [1st Dept 1973]). Therefore, the following discussion regarding Apartment 31 will be in reference to Wright only.

In opposition to Wright's motion, 620 LLC argues that the rent that it charged Wright for Apartment 31 was proper. 620 LLC asserts that the apartment was no longer subject to any rent control laws at the time that it was leased to Wright, because after applying applicable individual apartment major capital improvement (MCI) increases and a longevity bonus of 21.6% of the last rent charged ($388.89), based upon the approximate 36-year tenancy of Mejia (amounting to an $84 dollar increase), by operation of law, 620 LLC was entitled to charge a free market rent of about $2,000.00 per month. 620 LLC further argues that, when the apartment became vacant, 620 LLC spent in excess of $40,000.00 on renovations to the apartment, which would have permitted an additional vacancy increase of $1,000.00.

620 LLC acknowledges that it no longer has receipts to substantiate said renovations, but claims that it was under no obligation to keep said receipts more than four years, as per Rent Stabilization Law of 1969 [Administrative Code of City of NY] (RSL) § 26-515 (g) and Rent Stabilization Code [9 NYCRR] (RSC) § 2523.7 (c), which provide that an owner is not obligated

to keep rental records for more than four years. However, this argument is a red herring, because there is an exception to the four-year rule and the appropriate forum to bring this issue is with the DHCR, at which point the DHCR will require 620 LLC to provide proof of its claims.

That said, in support of its assertion that the subject renovations took place, 620 LLC submits the affidavit of Gunes, who has served as the field manager of the Building since 2001. In his affidavit, Gunes explained that, as field manager, "it was [his] responsibility to coordinate and oversee the renovations of apartments" (620 LLC's opposition to Wright's motion, Gunes aff). Additionally, Gunes stated:

> "3. With respect to Apartment 31 of the subject premises, it is my understanding that the apartment was subject to Rent Control and had not been renovated or remodeled in many years. Therefore, it was in need of substantial renovation. The renovation included replacing the entire kitchen (which included installing new appliances) and bathroom, replacing all flooring and tiling, new windows, wiring and fixtures. Work was commenced on or about February 2008 and completed within a month. The total cost of the renovation was in excess of $40,000.00 and all contractors were paid in full"

(*id.*). He also noted that he "was responsible for obtaining contracts, invoices, checks and other proofs with respect to the [subject] improvements," and that "[r]ecords were maintained by the Owner for a period of at least four years as required by the Rent Stabilization Code and Law (*id.*).[2]

In general, landlords are required to register their buildings and units with the DHCR Office of Rent Administration (RSL 26-517; RSC §§ 2528.1 to 2528.4). If a landlord fails to register a unit, he or she cannot charge rent in excess of the base date rent (RSL § 26-517 [e]).

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[2] It should be noted that, in their motion papers, Wright and Pomatana do not argue that renovations never took place.

If a rent controlled unit became vacant on or after April 1, 1984, like the one at bar, it must be registered before it can be re-rented at a "Fair Market Rent." At this time, a base rent is set by the landlord, which is subject to challenge in a "Fair Market Rent Appeal" ("FMRA") by the tenant (RSC § 2522.3 [a]).

Sections 18 to 20 of the Rent Regulation Reform Act of 1997 instituted a complex statutory formula for increasing rents upon vacancy. Landlords can also raise rents through MCI provisions in the Rent Stabilization Law and Rent Stabilization Code. In addition, rents may be increased in individual apartments for substantial increases in dwelling space, new equipment, improvements or furnishings under all of the regulation systems in New York State (RSC § 2522.4 [a] [1]).

Importantly, the landlord has the burden of justifying said increases to the Rent Administrator and proving that the costs of the improvements were reasonable (*see Matter of Maxwell-Kates, Inc. v New York State Div. of Housing & Community Renewal*, 196 AD2d 456, 456 [1st Dept 1993]). If an apartment rent increase due to an improvement is challenged by a tenant, either in an administrative proceeding or in a court, the landlord has the burden of documenting with sufficient specificity, the expenditures made for the improvements (*Jemrock Realty Co., LLC v Krugman*, 13 NY3d 924, 926 [2010]).

Here, 620 LLC was not entitled to re-rent Apartment 31 to Wright at a fair market rent, because a review of the record reveals that 620 LLC never properly registered Apartment 31 before increasing the rent, nor did it justify the rent increase allegedly owed to it for various

increases and alleged improvements to the apartment, in the first instance.[3] At this juncture, and on this record, the court cannot weigh in on whether the initial base rent charged to Wright by 620 LLC was proper until the DHCR has first reviewed the evidence and made its determination regarding the same.

It should be noted that, in opposition, 620 LLC argues that Wright is not entitled to recover for any alleged overages, because Wright's exclusive remedy in such a case is the filing of an FMRA with the DHCR, and the four-year statute of limitations for bringing such an appeal has passed (RSC § 2522.3 [a]). To that effect, Wright should have filed an FMRA on or before April 1, 2012. Rent Stabilization Code § 2522.3 (3) provides, in pertinent part:

> "[A]n appeal of the initial rent on the ground that it exceeds the fair market rent for the housing accommodation may be filed with the DHCR by the tenant . . . the time within which such tenant may file a fair market rent appeal is limited to 90 days after such notice was mailed to the tenant by the owner by certified mail. However, no fair market rent appeal may be filed after four years from the date the housing accommodation was no longer subject to the City Rent Law."

In this case, 620 LLC failed to register the initial rent. The DCHR takes the position that when the landlord fails to register an initial rent, the legal rent is the amount negotiated as the first rent after decontrol, subject to an FMRA (RSL § 26-512 [b] [2]). However, as put forth by Wright, as 620 LLC never provided her the required notice of the initial legal regulated rent, and her right to challenge it, the statute of limitations for Wright to file an FMRA has not yet begun running (*see generally* RSC §2522.3 (a); *see also Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101, 103 [1st Dept 2003]).

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[3] It should be noted that, as it offers only Gunes' conclusory affidavit, wherein he itemizes individual improvements without indicating their individual costs, it is likely that 620 LLC's evidence of the alleged improvements, so as to demonstrate the amount needed to bring the legal rent above the luxury decontrol threshhold, will not pass muster with the DHCR.

Finally, 620 LLC argues that, in any event, as the rental history of Apartment 31 is subject to a four-year statute of limitations, Wright may seek only to recover rent overages paid during the four years immediately preceding the filing of the complaint in the Second Action. 620 LLC asserts that, when looking back four years prior to the commencement of the Second Action, the rent charge to Wright for Apartment 31 was $2,000.00.

Rent Stabilization Law § 26-516 (a) (2) provides that:

> "a complaint under this subdivision shall be filed with the state division of housing and community renewal within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed . . . . This paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing. . . ."

Recently, affirming a decision of Justice Kenney of this court, the Court of Appeals found that section 213-a of the CPLR, which also provides for a four-year statute of limitations for rent overcharge claims, is a look-back provision, counting backwards from the date that the rent overcharge complaint is first filed (*Conason v Megan Holding, LLC*, 25 NY3d 1, 12 [2015]). However, the Court reiterated its position, articulated both in *Thorton v Baron* (5 NY3d 175, 181 [2005]), and *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.* (15 NY3d 358, 366 [2010]), that the base date of four years prior to the institution of the rent overcharge claim may not be used as the basis of calculating any overcharge if fraud on the part of the landlord is found to be present, and that the basis of such fraud need to be limited to illusory tenancies (*id.*). In addition, as applies here, if the record does not clearly establish that the lawful rent on the base date exceeded $2,000.00, the rent appearing on the base date shall not be used to calculate any overcharge and a review of the available rental history of the unit must

be scrutinized (*72A Realty Assoc. v Lucas*, 101 AD3d 401, 402 [1st Dept 2012]).

To establish fraud on the part of defendants, so as to enable Wright to search the rental history beyond the four-year period, there must be evidence of a misrepresentation or an omission of a material fact made by 620 LLC, knowing it to be false, that was relied upon by Wright to her detriment (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2013]; *Grimm*, 15 NY3d at 367 ["What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization"]). Consequently, in order to establish fraud on the part of 620 LLC, there must be sufficient proof that they either knew that Apartment 31 was not subject to rent deregulation because the building was receiving J-51 tax benefits, or that the base rent did not actually exceed $2,000.00 per month for the purposes of luxury deregulation.

Wright argues that the base rent amount of $2,000, in effect four years prior to the commencement of the Second Action, is fraudulent, and thus, unreliable, because 620 LLC allegedly failed to provide notices and certain DHCR annual registrations in an attempt to hide from her the unlawful deregulation of Apartment 31, so that it could charge a luxury rent. In opposition, 620 LLC argues that there can be no finding of fraud here, because the *Grimm* court also held that "[g]enerally, an increase in the rent alone will not be sufficient to establish a 'colorable claim of fraud,' and a mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further'" (*id.* [citation omitted]).

However, at this juncture, and on this record, the court cannot determine whether this exception applies. Once 620 LLC has properly registered Apartment 31 and justified the rent increase with the DHCR, and the proper initial base rent has been determined, if, at that time,

Wright believes that the calculation was made in error, or that she should not be limited by the four-year rule by the evidence, Wright could then bring these issues to this court via an article 78 proceeding.

Thus, regarding the Second Action and Apartment 31, Wright's motion for summary judgment in her favor on the second, third and fourth causes of action against 620 LLC is denied.

Whether Wright and Pomatana Are Entitled to a Refund for Alleged Rent Overcharges For Apartment 32 (The Second Action)

Additional Facts Regarding Apartment 32

Importantly, as noted previously, Wright is not a tenant of record on the Apartment 32 lease. Rather, in the leases for 2003-2004 and 2004-2005, Pomatana, Wright's brother, and Teodoro R. Salvatierra are listed as the tenants of record. In addition, in the yearly Apartment 32 leases spanning 2005-2013, Pomatana is listed as the apartment's only tenant of record.[4] Thus, as she is not in privity of contract with 620 LLC, Wright cannot recover for alleged overages for Apartment 32 (*see Allied Control Co. v C.F.A. Graphics, Ltd.*, 43 AD2d at 679). Therefore, the following discussion regarding Apartment 32 will be in reference to Pomatana only.

The initial rent charged to Pomatana for the lease of Apartment 32, commencing on May 29, 2003, was $1,450.00 per month. The rent was periodically increased, ultimately reaching $1,710.00. Prior to Pomatana's tenancy at Apartment 32, the apartment was rented to a long-

[4] In her affidavit, Wright asserts that she lived in Apartment 32 with her brother in 2003, and that, because she signed at the bottom of two riders attached to the lease for 2004-2005 (she was not named on said lease or riders), she is a named tenant on the lease for Apartment 32. However, it is very clear that Wright is not and was never intended to be a named tenant to Apartment 32, because, not only does her name not appear on any of the subject leases for Apartment 32, when she tried to sign her name at the bottom of the riders to the 2005-2006 lease, her name was scratched out with a note next to it advising that Wright was "not on lease" (Wright and Pomatana's notice of motion, exhibit J, 2005-2006 lease riders).

term, rent-stabilized tenant, Juan Gomez. Gomez occupied the apartment from at least 1984 to early 2003. The last rent charged to Gomez was $360.23.

620 LLC argues that, like Apartment 31, when Gomez vacated Apartment 32, it became free market by operation of law, and thus, it was no longer subject to rent regulation laws. 620 LLC submits that it was permitted a vacancy increase of 18%, or $64.84. In addition, it was permitted a longevity increase of 11.4% based upon the 19-year tenancy of Gomez, allowing for an additional increase of $41.06, entitling it to at least a rent of $466.14. 620 LLC further submits that it performed a substantial renovation of Apartment 32 before the Pomatana/Salvatierra tenancy, which cost at least $65,000.00. As such, it was entitled to raise the rent to over $2,000, thus making the apartment free market.

As with Apartment 31, 620 LLC acknowledges that it does not possess any records of the asserted improvements to Apartment 32, asserting that said records were lost when 620 LLC changed over its record keeping system. Again, in support of its contention that said renovations to Apartment 32 actually took place, 620 LLC submits the affidavit of Gunes, wherein he also states, in a conclusory fashion, that:

> "4. With respect to Apartment 32 of the subject premises, it is my understanding that the apartment had been occupied by a long term Rent Stabilized tenant and had not been renovated or remodeled in many years. Therefore, it was in need of substantial renovation. The renovation included replacing the entire kitchen (which included installing new appliances) and bathroom, replacing all flooring and tiling, new windows, wiring and fixtures. Work was commenced on or about April 2003 and completed in May 2003. The total cost of the renovation was in excess of $60,000.00 and the contractors were paid in full"

(620 LLC's opposition to Pomatana's motion, Gunes aff).

Importantly, like Apartment 31, a review of the record reveals that 620 LLC never

properly registered Apartment 32 with the DHCR or justified the improvements to the same before charging Pomatana free market rent. Moreover, 620 LLC has not sufficiently explained how the rent for Apartment 31 went from the amount of the last legally registered rent to $2,000, so as to take it out of rent stabilization. That said, at this point, the DHCR, and not the court, is the proper forum for adjudicating the issue of the appropriate rent to be charged to Pomatana for Apartment 32.

Notably, in regard to Apartment 32, in opposition to Pomatana's motion, 620 LLC makes the exact same arguments against Pomatana as he did against Wright, i.e., that the FMRA is Pomatana's exclusive remedy, and that he is limited to the four-year look back rules for recovery. As the circumstances regarding the two apartments are virtually the same, for the same reasons discussed previously in regard to Apartment 31, the court cannot now make the necessary determinations to decide the motion in regard to Apartment 32. Thus, Pomatana is not entitled to summary judgment in his favor on the second, third and fourth causes of action against 620 LLC.

Whether Plaintiffs Are Entitled to a Refund for Alleged Rent Overcharges, Treble Damages and Attorneys' Fees From Wright Regarding Apartment 32 (The First Action)

Initially, Wright does not oppose Plaintiffs' motion seeking a refund for alleged rent overcharges, treble damages and attorneys' fees from her. However, as noted above, Wright was never the tenant of record on the Apartment 32 lease, and therefore, she is not a proper defendant in the First Action. Thus, Plaintiffs are not entitled to summary judgment in their favor on their claims against Wright.

Whether Plaintiffs Are Entitled to a Refund for Alleged Rent Overcharges, Treble Damages and Attorneys' Fees From 620 LLC Regarding Apartment 32 (The First Action)

As acknowledged by Plaintiffs in their motion papers, Plaintiffs have previously

requested that the court allow them to implead 620 LLC, but the court denied their request because of the lack of privity between the parties. A subtenant is neither in privity of contract nor in privity of estate with the prime landlord (*New Amsterdam Cas. Co. v National Union Fire Ins. Co.*, 266 NY 254, 260 [1935]). As no privity of contract ever existed between Plaintiffs and 620 LLC, Plaintiffs have no valid claim against 620 LLC based upon the subtenant leases they had with Wright (*Allied Control Co. C.F.A. Graphics, Ltd.*, 43 AD2d at 679).

The court has considered the parties' remaining contentions and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiffs Christopher Antollino and Mark Fruce's motion, pursuant to CPLR 3212, for summary judgment is denied; and it is further

ORDERED that plaintiffs Elva Wright and Orlando Pomatana's motion, pursuant to CPLR 3212, for summary judgement on their second, third and fourth causes of action against is denied.

DATED: 8.27.2015

ENTER:

J.S.C.

HON. CAROL EDMEAD