B-U Realty Corp. v Kiebert-Boss
2016 NY Slip Op 30265(U)
February 9, 2016
Civil Court of the City of New York, New York County
Docket Number: 64531/2015
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R

B-U REALTY CORP.

HON. SABRINA B. KRAUS

Petitioner-Landlord

DECISION & ORDER
Index No.: L&T 64531/2015

-against-

CHRISTINE KIEBERT-BOSS
945 West End Avenue, Apt. 6A
New York, New York 10025

Respondent- Tenant

"JOHN DOE" and/or "JANE DOE"

Respondents-Undertenants

BACKGROUND

This summary nonpayment proceeding was commenced by **B-U REALTY CORP.** (Petitioner) against **CHRISTINE KIEBERT-BOSS** (Respondent) the rent stabilized tenant of record seeking to recover possession of 945 West End Avenue, Apt. 6A, New York, New York 10025 (Subject Premises) based on the allegation that Respondent failed to pay rent due for the Subject Premises.

PROCEDURAL HISTORY

Petitioner issued a rent demand dated April 7, 2015, seeking $15,400.00 in rent, for the period of December 2014 through April 2015, at a rate of $3,081.80 per month. The petition is dated May 1, 2015.

Respondent appeared by counsel on May 26, 2015, and filed an answer asserting defenses including a general denial, failure to state a cause of action, failure to properly demand the rent, laches, and rent overcharge.

The proceeding was initially returnable on June 3, 2015. It was adjourned on consent to July 8, 2015 for trial pursuant to a stipulation between the parties which further provided that Petitioner would provide Respondent with an "explanation" as to "questionable rent increases" as soon as possible. The parties further stipulated to adjourn the proceeding to August 31, 2015.

On August 31, 2015, Respondent moved for summary judgment and an order finding that Respondent had been willfully overcharged and was entitled to a refund as well as treble damages. The proceeding and motion were adjourned for the submission of motion papers pursuant to the parties stipulation, which additionally provided that Respondent would pay two month's rent at a rate of $3,081.80, without prejudice.

On November 24, 2015, the Court (Stoller, J) issued a decision denying the motion. The Court found that absent fraud, the base date for considering the overcharge claim would be May 26, 2011. The court found that Respondent's allegation of fraud was not susceptible to summary determination and further held:

> Not only are fraud claims generally inappropriate for summary determination, but the knotted history of the MCI's applicable to this unit - the temporary retroactive increases, the change in the MCI level as a result of the PAR, the six percent limitation on collectability mandating that the increase be spread out - further muddies the waters.

The decision restored the proceeding to the calendar for trial on January 7, 2016, when it was assigned to Part R for trial. The trial commenced on that date and concluded on January 8,

2016. The proceeding was adjourned to January 22, 2016 for the submission of post trial memoranda and on January 22, 2016, the court reserved decision.

PRIOR RELATED PROCEEDINGS

There was a prior nonprimary residence holdover proceeding between the parties under Index Number 57688/2012. That proceeding was dismissed by the court (Schneider, J) on July 2, 2012, pursuant to a decision and order which found that the predicate notice was defective because it failed to sufficiently assert the facts upon which the proceeding was based (Ex C).

Additionally, at Respondent's request and as indicated at trial, the court takes judicial notice of a prior holdover proceeding between the parties under Index Number 77745-2013. Petitioner issued a ten day notice cure dated July 16, 2013, asserting that Respondent had sublet the Subject Premises, was living in California and had a child enrolled in elementary school in California. The Notice further asserted that inside the Subject Premises there were instructions for use of the Subject Premises in a hotel like manner. The proceeding was initially returnable September 4, 2013, and was adjourned to October 1, 2013.

Respondent appeared *pro se* and interposed an oral answer on October 1, 2013, asserting that the alleged subtenants were friends or roommates, that the California address was her mother's and that her child had special needs and attended school in California.

The proceeding was adjourned to October 29, 2013 for trial. On that date, Respondent appeared by counsel, who filed a written answer and counterclaim asserting various procedural defenses, that any sublet had been cured, that Respondent maintained the Subject Premises as her primary residence and that there was no extant lease between the parties. On that date, the parties filed a stipulation with the court stating that the proceeding had been settled, that a

stipulation would be filed by the parties and marking the proceeding off calendar. No further proceedings were had or papers filed in the matter.

FINDINGS OF FACT

Petitioner is the owner of the subject building pursuant to a deed dated April 23, 1979 (Ex 1). There is a valid MDR on file with HPD (Ex 2).

Respondent is the rent-stabilized tenant of record for the Subject Premises pursuant to an initial lease dated February 12, 1996, for a two year term from March 1, 1996 through February 28, 1998, at a monthly rent of $1536.14 (Ex 4). Two other lease renewals were submitted into evidence. One was dated November 1, 2010, for a one year period from March 1, 2011 through March 1, 2012 at a rent of $2860.14 (Ex 6). In addition to the most recent renewal dated November 4, 2013, for a two year period from February 1, 2014 through January 31, 2016 at a monthly rent of $3081.80 (Ex 5).

A certified DHCR rent history for the Subject Premises as of August 4, 2015 was submitted into evidence by Petitioner (Ex 3). It shows the legal regulated rent for the Subject Premises is $3081.80, and that the annual registrations for the years 2012 through 2014 were amended on May 4, 2015, listing rents of $2860.14 for 2012 and 2013, and $3081.80 for 2014. The legal registered rent as of May 13, 2011 was listed at $2860.14.

Prior to the amendments, in January 2015, the registered rent for 2012 was $2861.00, and for 2013 and 2014 was $2968.29 (Ex A). The annual apartment registrations for these years were also submitted into evidence (Ex E) and in each year the landlord added the notation "(COURT)" to the registrations.

An MCI order issued by DHCR on August 13, 2004 awarded Petitioner a rent increase of $42.07 per room, effective November 1, 2002, and collectible as of September 1, 2004. The order further provided for a temporary retroactive increase of $925.54 per room (Ex B). A subsequent order granting in part the tenants PAR was issued February 8, 2007, and reduced the increase per room to $31.47 (Ex B). The MCI order of 2004 was further modified by DHCR pursuant to an order issued December 7, 2011, based on the fact that the buildings was subject to a J-51 tax abatement, however the modification pertained to the rent controlled units, not the rent stabilized units. The order does list the Subject Premises as rent stabilized with a room count of 3 (EX B-1), however other DHCR documents, such as the rent history list the Subject Premises as having four rooms (Ex B).

Paul Bogoni (PB) testified for Petitioner, he is an officer of Petitioner and a managing agent for the building. PB testified that from December 2014 to January 2016, Respondent paid only two months rent and that 12 months rent remained outstanding through January 2016. PB was not very familiar with the registrations for the building and testified that he believes his attorney filed amended registrations.

There are 48 apartments in the building, and Petitioner does not own any other buildings, however PB manages another building in Manhattan. PB's native language is Italian.

PB explained that there was a gap between Respondent's last two lease renewals because of a prior holdover proceeding related to subletting. When that proceeding settled, a new lease was issued in accordance with the settlement. PB testified that the proceeding took approximately two years to resolve, and he was not sure if there was more than one proceeding pending between the parties during that period.

PB testified that during this period a renewal lease was timely offered to Respondent, but Respondent never executed it. PB does not know if he has a copy of said renewal offer. The court does not find this testimony credible.

PB is familiar with the concept of deemed lease renewals, and acknowledged that the original registrations for 2012 and 2013 had a higher amount then the amended registrations. PB stated he never received a proper lease renewal from Respondent during this period.

After PB's testimony, Petitioner's motion to amend the petition to include all rent due through January 2016 was granted over Respondent's objection, and Respondent's motion to dismiss based on her claim that Petitioner failed to prove how much rent was unpaid was denied. The court found that PB's testimony regarding the number of months that were unpaid, along with the leases, sufficient to establish Petitioner's *prima facie* case as to the amount of unpaid rent.

Respondent's motion to amend her answer to include a breach of warranty of habitability claim for October 2015 through January 2016 was granted without objection. The parties stipulated that there was no gas in the Subject Premises from October 2015 through January 2016. Additionally, the Court agreed to take judicial notice of HPD violations of record (Ex D) however there were no outstanding violations of record pertaining to the Subject Premises as of January 8, 2016.

PB was recalled by Respondent as Respondent's first witness. PB acknowledged that there was no gas in the building since before Thanksgiving. This prevented tenants from cooking and impacted the laundry room, but did not effect heat. Petitioner provided tenants with hot plates, but did not recall if Respondent took one. PB testified that the gas was turned off by

Con Ed and was unrelated to a stop work order. Petitioner is in the process of restoring the gas to the building. This requires access to every apartment because Petitioner has to drill to install new lines from the 1st floor through the 12th floor in the abc lines for the building. Not all of the tenants have cooperated in providing access, but most have. Petitioner requires three accees dates for each unit.

PB testified that he assumed the registered rents were charged by Petitioner and paid by Respondent, and that the 2006 registration incorporated both the guidelines increase and the MCI. PB testified that the MCI was not indicated as a basis for the increase on the annual registration, because it was being challenged by the tenants.

PB testified he believed the Subject Premises had four rooms, but he was not certain if by DHCR's definition the number of rooms in the Subject Premises was four or five. PB acknowledged that quite a few tenants were suing Petitioner for rent overcharge. PB thinks there are approximately twenty such claims.

Respondent was the next witness to testify. Respondent has lived in the Subject Premises for 20 years. Respondent lives there alone. Respondent has two kids but they don't live in the Subject Premises. Respondent is a fabric designer.

Respondent testified that the gas was turned off in the end of October. This has prevented Respondent from cooking and from doing her laundry in the building, which was her habit.

Respondent testified that she paid whatever rent Petitioner sought from 2002 forward. Respondent testified she paid the amounts on the annual registrations, but then Respondent testified she pais the amounts as reflected in the most recent rent history (Ex 3). Respondent

paid no increases from 2011 to 2013. In 2014, Respondent paid $3081.80, the amount on the lease, except for the twelve months that are unpaid.

Respondent testified that she occupied the Subject Premises for all but two weeks of the period for which the abatement is sought.

DISCUSSION

9 NYCRR § 2526.1(a)(3)(I) provides " (t)he legal regulated rent for purposes of determining an overcharge shall be deemed to be the rent charged on the base date, plus in each case any subsequent lawful increases and adjustments." For a rent overcharge complaint the base date is defined as four years prior to the date of filing the complaint [9 NYCRR §2520.6(f)(1)].

Pursuant to CPLR §231-a, a rent overcharge complaint is subject to a four year statute of limitations [*see also Administrative Code of The City of NY §26-516(a)(2)*]. The statute further provides "(t)his section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action."

However, an exception to the examination of the rental history prior to the base date has been made where there is substantial indicia of fraud (*Matter of Grimm v NY Div. Of Hous. & Community Renewal Off. of Rent Admin.* 15 NY3d 358). In *Grimm*, The Court of Appeals held that to establish a colorable claim of fraud triggering the need to investigate the legality of the rent on the base date " ... an increase in the rent alone will not be sufficient ..." and "... a mere allegation of fraud alone, without more ..." will not require further inquiry (*Id* at 367). Rather

the Court held "(w)hat is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protection of rent stabilization (*id*)."

Respondent failed to produce such evidence at trial. Respondent's theory of fraud primarily relies on two increases in 2006 and 2007, which were above the guidelines increases. Respondent acknowledges that applicable MCI orders were included in those increases, but asserts Petitioner's failure to list the MCI as a basis for the increase in the registrations constitutes the fraud. The Court disagrees, while the registered rent may have been incorrectly calculated there is no indication that any mistake was intended to remove the Subject Premises from rent regulation. Indeed even the motion court in this proceeding when faced with determining the appropriate amount described the "knotted history of MCIs" as a factor preventing the easy calculation of same. Additionally, any discrepancy was relatively minor and never impacted the continued subjection of the Subject Premises to Rent Stabilization.

Nor did Petitioner's improper registrations for 2012-2014 constitute the colorable fraud. Petitioner indicated on said registrations that there was pending litigation between the parties that could impact the amount of the registered rent. While the original registrations were improper and listed inflated amounts, Petitioner never sought to collect these amounts, and cured the impropriety by the amended filing. This does not establish the colorable fraud required to go back ten years to 2006, as Respondent argues.

Finally, Respondent argues that the registrations for 2004 and 2005 were at odds with the leases executed by the parties for this period. However, Respondent failed to submit any such leases in evidence at trial, leaving said argument unsupported by the record.1

Based on the foregoing, the Court will not examine the rental history of the Subject Premises prior to the base date in determining Respondent's overcharge claim *(Matter of Watson v NYSDHCR* 109 AD3d 833; *Matter of Gomez v NYSDHCR* 79 AD3d 878).

While the 2011 registration is valid, Respondent argues for the first time in her post trial memo that the amended registrations for 2012-2014 are not proper, because Petitioner presented no evidence that it followed the statutory requirements in filing the amended registrations. Specifically, in January 2014 the Rent Stabilization Code was amended and §2528.3 thereafter provided:

> An owner seeking to file an amended registration statement for other than the present registration year must file an application pursuant to section 2522.6(b) and Part 2527 of this Title as applicable to establish the propriety of such amendment unless the amendment has already been directed by DHCR or is directed by another governmental agency that supervises such housing accommodation.

This court found no case law on the consequences of noncompliance nor what if any burden Petitioner has to establish compliance in defending against Respondent's overcharge claim. However, DHCR on its website lists instructions regarding amended registrations which were labeled as "Reissued 5/2015." They provide in pertinent part that "(a)nnual registrations are considered timely if filed by July 31 of that year. An amended registration will be

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1 To the extent Respond requests that the court treat her arguments in the post trial memorandum as a motion to renew her summary judgment claim pursuant to CPLR 2221 said request is denied as not in conformance with the statutory requirements for such an application.

considered timely and accepted for filing through July 31 of the following year." The instructions further provides as to amended registrations:

> Amended annual registrations will be accepted for filing through July 31 of the following year. Amended annual registrations submitted after that date will be rejected, unless accompanied by an order/directive from the DHCR or another government agency that supervises the housing accommodation.

Based on said instructions, DHCR appears to interpret "present registration year" in §2528.3 to run through July 31 of the following year. This means that the amended registration for the Subject Premises for 2014, which was filed on May 4, 2015, was timely and would be accepted by DHCR without requiring an application pursuant to §2522.6(b). The record does not disclose whether Petitioner made an application for the filing of the amended registrations for 2012 and 2013, presumably the fact that DHCR accepted the registrations for filing, rather than rejecting them, indicates that the registration conformed to the statutory requirements. Moreover, since the amount of the rent is not increased in either the 2012 or 2013 registration, there is no impact on Respondent's overcharge claim.

§ 26-517(e) of the Rent Stabilization Law provides in pertinent part:

> The failure to file a proper and timely initial or annual rent registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement or if no such statements have been filed, the legal regulated rent in effect on the date that the housing accommodation became subject to the registration requirements of this section. The filing of a late registration shall result in the prospective elimination of such sanctions and provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration, the owner, upon the service and filing of a late registration, shall not be found to have collected an overcharge at any time prior to the filing of the late registration.

Other than testimony, there is no direct evidence of what Respondent paid during the alleged overcharge period. Respondent did not submit any proof of payment, and objected to the

entry into evidence of Petitioner's rent records. Respondent testified that she paid whatever was charged, and she also testified she paid the amounts shown in Ex 3, which reflects the amended registrations. The parties were unable to make any stipulation as to what was paid when, but did not really contest each other's positions on this by submission of evidence at the trial.

Exhibit 6 is a lease renewal for a one year period starting March 2011. It appears that when it expired, Respondent continued to pay the same $2860.14 per month, until February 2014 when the next executed renewal kicked in rasing the rent for a two year term to $3081.80. Therefore, there is no overcharge through January 2014.

Moreover, given that the rent of $3081.80 was lawful other than the late filing of the proper registration any penalty is eliminated prospectively (*Verveniotis v Cacioppo* 164 Misc2d 334; *DBL Realty Corp v Zavala* 166 Misc2d 736).

Pursuant to §26-517(e),for the period of December 2014 through May 2015, Petitioner is entitled to collect only the lower amount of $2860.14 per month or a total of $17,160.84. For the period of June 2015 through January 2016, said sanction is eliminated and Petitioner is entitled to a monthly rent of $3081.80, totaling $24,654.40 in arrears.

Respondent is entitled to a 15% abatement for the lack of gas from October 2015 through January 2016, or a total abatement of $1849.08. Additionally, Respondent is entitled to credit for the two months paid with out prejudice during the litigation or a total of $6163.60.

Based on the foregoing, Petitioner is awarded a final judgment in the amount of $33802.56 for all rent due through January 2016. Issuance of the warrant is stayed five days for payment.

This constitutes the decision and order of the Court.2

Dated: New York, New York
February 9, 2016

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Sabrina B. Kraus, JHC

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2 Parties may pick up Trial Exhibits within thirty days of the date of this decision from the second floor record room, Window 9, located at 111 Centre Street. After thirty days, the exhibits may be shredded in accordance with administrative directives.

[* 14]