HON. JENNIFER G. SCHECTER
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

----------x

JAMES TAYLOR and TAMARA JENKINS,

Index No.151560/14

Plaintiffs,

-against-

72A REALTY ASSOCIATES, L.P. and
JANET ZINBERG,

Defendants.

----------x

JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3212, defendants move for summary judgment dismissing the complaint. Alternatively, they seek dismissal of the action as against defendant Janet Zinberg, 72A Realty Associates, L.P.'s managing agent.

Plaintiffs cross-move (1) for a declaration that the subject apartment is rent stabilized and that they are the rent stabilized tenants and (2) for dismissal of defendants' seventh and ninth affirmative defenses.

The motion is granted to the limited extent that the complaint is dismissed as to Janet Zinberg and the cross-motion is granted.

Background

Plaintiffs, tenants of apartment 5M at 187 East 4th Street in Manhattan since February 2000, commenced this action alleging that defendant landlord improperly and fraudulently removed the subject apartment from rent stabilization and overcharged rent for the last 15 years. They seek a

declaration that the apartment is rent stabilized and that they are the lawful tenants and a judgment setting the maximum legal rent. They also seek recovery for overcharges, treble damages and attorneys' fees.

In 1993 (and later expanded in 1997), the Legislature enacted the Rent Regulation Reform Act (RRRA), which provided for the deregulation of certain rent stabilized apartments. Under the RRRA, and as relevant here, rent stabilized apartments could be deregulated when there was (1) a vacancy and (2) the legal regulated rent was $2,000 per month or more (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 280 [2009]).

In addition, New York City created a tax abatement program commonly referred to as J-51 (Administrative Code of City of NY § 11-243), which allows property owners who complete eligible projects such as rehabilitation or improvements to properties, to receive tax exemptions and/or abatements (*id.*).

In large part, the facts are undisputed. From 1991/1992 through 2002/2003, defendants received J-51 benefits (Affirmation in Support [Supp] at ¶ 29). From 1993 through 2000 the apartment was occupied by Peter Zajonc, who was the rent stabilized tenant of record. In 1999, the last annual registration statement was filed for the apartment listing the

legal rent at $1,464 per month. Zajonc left in late 1999 or early 2000 creating a vacancy.

After Zajonc vacated, defendants, while still receiving the J-51 tax abatement, and relying on DHCR's interpretation of the RRRA, allegedly performed $18,343.07 of individual apartment improvements (IMIs)(Supp at ¶¶ 11, 24). Plaintiffs allege that no renovations were actually performed (Supp, Ex A [Complaint] at ¶ 41). Defendants urge that upon the vacancy and completion of the IMIs, they believed that $2,200 was a lawful rent because they added the permissible 20% rent increase and 1/40 of the IMI costs to the last rental amount ($1,464 [last rent amount] + $292.80 [20% vacancy increase] + $458.57 [1/40 of $18,343.07 (IMI)] = $2,215.37)(9 NYCRR 2522.4[a][1]). Defendants believed that they could deregulate the apartment pursuant to the high rent/high income decontrol provision of Rent Stabilization Law and DHCR's interpretation of such law.

Plaintiff Jenkins took possession of the apartment in February 2000 and signed a free-market lease with the monthly rent set at $2,200 through February 28, 2002. Since that time, defendants stopped filing annual registration statements for the apartment, believing that it was deregulated. Subsequently, plaintiff Taylor was added to the lease. Plaintiffs renewed their lease on multiple occasions.

Plaintiffs' monthly rent was $2,400 from March 2002 through February 2003, $2,500 from March 2003 through February 2004, $2,700 from March 2004 through February 2006, $2,900 from March 2006 through February 2007, $3,100 from March 2007 through February 2008, $3,400 from March 2008 through February 2009; $3,500 from March 2009 through February 2010, $3,575 from March 2010 through February 2012, $3,709 from March 2012 through February 2013 and $3,783 from March 2013 through February 2014 (Complaint at ¶ 17). In the last lease renewal in 2013, based on the decision in *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 (2009), defendants offered plaintiffs a rent-stabilized renewal lease (Complaint at ¶ 45).

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues(*see Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden is on the movant to make a *prima facie* showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed

material facts. Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In light of the Court of Appeals' decision in *Roberts v Tishman Speyer Props., L.P.* and subsequent case law giving *Roberts* retroactive effect, it has become settled law that luxury deregulation is improper if, as is the case here, the landlord is receiving a J-51 tax benefit (*Roberts v Tishman Speyer Props., L.P.*, 89 Ad3d 444 [1st Dept 2011]; *Gersten v 56 7th Ave. LLC*, 88 AD3d 189 [1st Dept 2011]). In addition, it has also been established that once a tenant is rent stabilized, the tenant is entitled to rent-stabilized status for the duration of the tenancy and to collect any overcharge when an apartment had been improperly deregulated while receiving J-51 benefits (*72A Realty Assoc. v Lucas*, 101 Ad3d 401 [1st Dept 2012]).

As such, defendants correctly point out that there must be a determination of the validity of the rent increase that brought the rent above $2,000. After such determination is made, the base-date rent can be established and there can be a determination of whether overcharges are due and whether plaintiffs are entitled to treble damages and attorneys' fees

(Supp at ¶ 10; *Meyers v Four Thirty Realty, LLC*, 2013 NY Slip Op 32486[U][Sup Ct, New York County 2013], *affd* 127 AD3d 501 [1st Dept 2015]).

At this early stage of the proceedings--before plaintiffs have had any opportunity for disclosure that could impact the substance of their opposition--the court will not determine the base date rent and whether treble damages and attorneys' fees are appropriate. Defendants attach canceled checks and receipts purporting to establish the renovations performed (Supp, Ex E). Plaintiffs' urge that the renovations were not performed (Complaint at ¶ 41). The record does not definitively establish whether the renovations were performed, whether they comply with 9 NYCRR 2522.4 and the condition of the apartment prior to and after the renovations. In addition, further inquiry is required to determine whether the increase over the $2,000 threshold, if improper, was willful and/or fraudulent. Once these questions are answered, the court will be able to make the appropriate determinations (*Meyers v Four Thirty Realty, LLC*, 127 AD3d 501[1st Dept 2015] ["motion court properly declined, at . . . early stage in the proceedings, to determine the base date rent"]; *Rosenzweig v 305 Riverside Corp.*, 2013 NY Slip Op 31949[U] [Sup Ct, New York County 2013]; *72A Realty Assoc. v Lucas*, 101 AD3d 401, 402 [1st Dept 2012]; *contrast Matter of Boyd v New York State Div. of Hous.*

& Community Renewal, 23 NY3d 999 [2014] [upholding administrative determination in the context of an article 78 proceeding where there is no discovery]).

Defendants also argue that the action must be dismissed against Janet Zinberg.* It is undisputed that at all times Zinberg was acting on behalf of 72A Realty Associates, LP, her disclosed principal. Managing agents are not personally liable for rent overcharges unless "there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to that of his principal" (*Crimmins v Handler & Co.*, 249 AD2d 89, 91-92 [1998] *citing Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964]; *Paganuzzi v Primrose Management Co.*, 181 Misc 2d 34 [Sup Ct, New York County 1999] *affd* 268 AD2d 213 [1st Dept 2000]). There has been no allegation or showing that Zinberg can be personally liable here.

Plaintiffs' cross-motion is granted as defendants concede that the apartment is stabilized and have offered plaintiffs a stabilized lease, which plaintiffs have already signed (Supp

---

* Zinberg's argument that she was not properly served is rejected. Bald statements of denial of receipt are insufficient to rebut the process server's affidavit, which is *prima facie* evidence of proper service under CPLR 308(4)(CPLR 308[4]; *ATM One, LLC v Landaverde*, 2 NY3d 472, 477-78[2004]; *Reem Contr. v Altschul*, 117 AD3d 583, 584 [1st Dept 2014] *Fairmont Funding Ltd. v Stefansky*, 235 AD2d 213 [1st Dept 1997]).

at ¶ 47, Exs F and G; Affirmation in Reply and Opposition to Cross-Motion at ¶ 94). Plaintiffs' cross-motion to dismiss defendants' seventh and ninth affirmative defenses is also granted based on the precedent cited above.

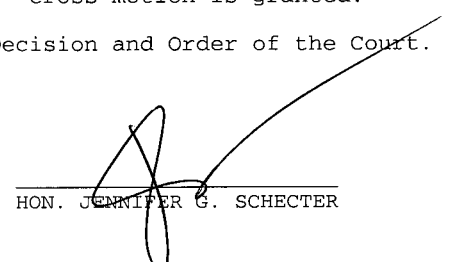
Accordingly, it is

ORDERED that defendants' motion is granted to the limited extent that the complaint is dismissed as to Janet Zinberg and in all other respects defendants' motion is denied; and it is further

ORDERED the plaintiffs' cross-motion is granted.

This constitutes the Decision and Order of the Court.

Dated: January 29, 2016



HON. JENNIFER G. SCHECTER