Fuentes v Kwik Realty LLC
2017 NY Slip Op 32195(U)
October 17, 2017
Supreme Court, New York County
Docket Number: 450153/2014
Judge: Ellen M. Coin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 63

ODILSON FUENTES,

Index No. 450153/2014

Plaintiff,

DECISION AND ORDER

-against-

KWIK REALTY LLC and SUSAN EDELSTEIN,

Defendants.

ELLEN M. COIN, J.:

Plaintiff Odilson Fuentes (Fuentes) moves pursuant to CPLR 3212 for an order granting him summary judgment as to liability, declaring that he is entitled to a rent-stabilized lease at the correct legal amount, and awarding him a refund of rent overcharges, treble damages and attorneys' fees.

Fuentes is a tenant in apartment 5 (the Apartment) of a building located at 520 W 183rd St., New York, NY, which was purchased by defendant Kwik Realty LLC (Kwik) on or about March 2, 2000.

Fuentes' first lease for the Apartment, dated February 15, 2010, covers the period from February 1, 2010 to January 31, 2011. The rent listed for the Apartment was $2,200, with a preferential monthly rent of $1,300. Fuentes' next lease, dated November 10, 2010, covers the period from February 1, 2011 to January 31, 2012, at a unit charge of $2,200, with a preferential monthly rent of $1,350. Fuentes' third lease, dated November 25, 2011, covers the period from February 1, 2012 to January 31, 2013, at a unit charge of $2,500, with a preferential monthly rent of $1,400. His final lease, dated December 5, 2012, covers the period from February 1, 2013 to

January 31, 2014, at a unit charge of $2600, with a preferential rent of $1450. All four leases are on standard Bloomberg forms, are labeled "EXEMPT UNIT" in handwriting, contain no information concerning rent stabilization, and do not indicate that the Apartment had previously been, or was currently, rent-stabilized, or contain rent stabilization riders. The complaint alleges that Fuentes was never provided with notice, as required by section 26-504.2 (b) of the New York City Administrative Code (governing the exclusion of high rent accommodations from rent stabilization), that the Apartment had previously been rent-stabilized, the reason that the Apartment was no longer subject to rent stabilization, or information about how the new rent had been calculated.

The complaint further alleges that in December 2013, Fuentes was informed by the building superintendent that defendants did not intend to renew his lease when it expired in January 2014. Additionally, according to Fuentes, on December 5, 2013, defendant Susan Edelstein (Edelstein) sent him a letter stating that Kwik would not renew his lease and demanding that he vacate "'due to hazardous conditions.'" Aff of Odilson Fuentes, ¶ 2.[1] According to Fuentes, Kwik has, however, continued to bill him a claimed rent of $2,600 per month, with a preferential rent of $1,450, which he has continued to pay.

The rent registration history, maintained by the Division of Housing and Community Renewal (DHCR), for the Apartment in 2000, when Kwik purchased the building, shows that Jose Francisco (Francisco) was the tenant in the Apartment and had resided there since 1984.[2]

---

[1] According to Fuentes' counsel, Matthew J. Chachere, although Fuentes does not fully understand written English, Chachere translated the affidavit into Spanish for him, and Fuentes stated to Chachere that he understood the translation and that the statements contained in the affidavit were correct. The same procedure was followed by Chachere with respect to the complaint, which was verified by Fuentes.

[2] According to the rent registration history, no information was found for the Apartment from 1989 to 1999; however, Francisco was listed as the tenant from 1984 to 1988, and again from 2000 to 2005.

Francisco had a rent-stabilized lease through November 30, 2005, with a rent of $613.70 under his final lease.

The rent registration information that Kwik provided to DHCR reflects that the Apartment was vacant during 2006, with a vacancy regulated rent of $628.34. The next tenant listed with DHCR was Wen Shuan Yang, with a lease period of June 1, 2006 through May 31, 2007, at a regulated rent of $1450.00, and a preferential rent of $1350.00. For the years 2008 and 2009, Anya P. Ismail is listed as the tenant, at a regulated rent of $1696.50 and a preferential rent of $1350.00 for 2008, and a regulated rent of $1747.40 and a preferential rent of $1390.50 for 2009.

According to the rent registration information, in 2010, the Apartment became exempt as a high rent vacancy, with a preferential rent of $1300, and was listed as an exempt apartment, registration not required, thereafter.

Pursuant to the Rent Stabilization Code, the legal regulated rent (LRR) for a vacancy lease can be no more than 20% of the previous LRR, minus the difference between the current rent guidelines increases set by the Rent Guidelines Board for one and two year renewals. Rent Stabilization Code (RSC)(9 NYCRR) § 2522.8 (a) (1) & (2). If there has been no vacancy for at least eight years prior to the vacancy, an owner can increase the LRR by an additional 0.6% multiplied by the number of years since the last vacancy. RSC § 2522.8 (a) (2)(ii). An owner may also increase the rent in connection with "a substantial increase . . . of dwelling space or an increase in the services, or installation of new equipment or improvements, or new furniture or furnishings." RSC § 2522.4 (a) (1). Such an increase, known as an Individual Apartment Improvement (IAI), must be disclosed to the tenant through a Rent Stabilization Rider, annexed to the initial vacancy lease pursuant to RSC § 2522.5 (c) (1), indicating the prior legal rent and

how the current rent was calculated. The new rent may be increased in the amount of 1/40 of the total expenditures for IAIs made to the apartment. RSC § 2522.4. At the time that Fuentes entered into his first lease, a vacant apartment became deregulated, as a high rent accommodation, when the rent for the apartment exceeded $2000. Administrative Code § 26-504.2 (a). However, the owner must give written notice to the first tenant of the apartment after the apartment becomes exempt from rent stabilization, indicating the last regulated rent, the reason that the apartment is no longer subject to rent stabilization, and how the rent amount is derived. Administrative Code § 26-504.2 (b). If the owner fails to provide the Rent Stabilization Rider or requested documentation, "the owner shall not be entitled to collect any adjustments in excess of the rent set forth in the prior lease unless the owner can establish that the rent collected was otherwise legal." RSC § 2522.5 (c) (3).

According to defendants, in 2006, they renovated the Apartment. Although defendants have not supplied any documents substantiating the alleged renovations, defendants' agent, Chayim Jakob, describes the renovations as follows:

> In addition to the standard work that is done after a long-term tenant vacates, in this instance it was determined that a gut renovation of the entire apartment was needed, which includes, but is not limited to: a new kitchen, including cabinets, counter, sink, faucet and appliances; new bathroom, including all fixtures, tiles, and wetboard; all new plumbing, including kitchen and bathroom hot and cold supply lines and waste lines; new electrical wiring with dedicated lines for air conditioner and kitchen appliances; new floors throughout; walls, including framing, sheetrock and painting, leaving some exposed brick work; replacing all doors.
>
> The standard cost for the work that was done at the time is in excess of $25,000, however, based upon the short term of the immediately preceding lease renewal and the timing of the MCI, Defendant took a conservative approach at calculating the rent in order to ensure marketability and accuracy maintaining the legal regulated rent.

Aff. of Chayim Jakob (Jakob), dated December 30, 2014, ¶¶ 6 & 7.

Defendants contend that the work was done more than eight years ago and that they do not maintain receipts for work done that many years ago. *See id.*, ¶ 4. They further contend that the addition of 1/40 of the amount allegedly spent on renovating the Apartment in 2006, raised the rent for the Apartment from $628, the vacancy regulated rent when Francisco vacated the Apartment in 2005, to $1450, the regulated rent when Wen Shuan Yang leased the Apartment in 2006.[3]

Fuentes contends that defendants failed to provide the information required under the Rent Stabilization Code to either of the two tenants who preceded him,[4] or to establish that the rent collected was otherwise legal.

Fuentes argues, in reply, that Jakob's affidavit regarding the alleged IAIs is an inadequate basis for the claimed IAIs, because "it was unsupported by bills from a contractor, an agreement or contract for work in the apartment, or records of payments for the [claimed improvements]." *Altschuler v Jobman 478/480, LLC.*, 135 AD3d 439, 440 (1st Dept 2016)(internal quotation marks and citations omitted). Therefore, according to Fuentes, defendants were limited to the permitted vacancy and longevity increases in calculating the rents subsequent to Francisco's

---

[3] Although in his affidavit dated February 17, 2017, Jakob refers to a rent of $659.76 for Francisco under a lease renewal, there is no reference to such a rent in the DHCR Registration Apartment Information, and no copy of such a renewal lease appears to have been produced in discovery. Aff of Jakob, dated February 17, 2017, ¶ 10.

[4] In response to his discovery demands, defendants produced copies of the leases signed by Wen Shuan Yang and Anya P. Ismail; however, those leases were not on forms prescribed by DHCR and were not accompanied by Rent Stabilization Riders.

tenancy, and the permissible rent for his lease would not have exceeded the high rent deregulation threshold.[5]

SUMMARY JUDGMENT

"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." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). However, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment. *Id.* at 562.

In support of his motion for summary judgment, Fuentes submits a copy of his first lease, which fails to contain any advice that he is the first non-stabilized tenant and the way in which his rent was calculated, as required by section 26-504.2 (b) of the Administrative Code. *See also* RSC § 2522.5 (c) (3). He also submits a copy of the lease for Wen Shuan Yang, which contains no reference to the rent-stabilized status of the Apartment, the manner in which the rent was calculated, or the justification for the increase from Francisco's final rent of $613.70 to her rent of $1450, as required by RSC § 2522.5 (c) (1). Of course, the very point of these notice requirements is to enable the tenant to challenge the rent on a timely basis where a question about the validity of that rent exists.

---

[5] According to Fuentes' calculations, were an increase for the alleged IAIs discounted, increases including a longevity increase, vacancy increases and rent guidelines increases for the tenancies of Yang and Ismail would only have brought Fuentes' first lease to a total of $1,207.71, which would not have exceeded the threshold for high rent vacancy deregulation.

Defendants argue that Fuentes may not look beyond the four-year rule, established by New York City Administrative Code 26-516 (a) (2), to challenge his rent, absent proof of fraud, which, they contend, Fuentes has failed to establish. Therefore, according to defendants, utilizing the last registered rent stabilized rent of $1,747.00 in 2010, no overcharge can be found. However, "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 statute of limitations for rent overcharge claims." *Gersten v 56 7th Ave. LLC,* 88 AD3d 189, 199 (1st Dept 2011), citing *East W. Renovating Co. v New York State Div. of Hous. & Community Renewal*, 16 AD3d 166, 167 (1st Dept 2005); see also *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 68 AD3d 29, 32 (1st Dept 2009), *affd* 15 NY3d 358 (2010); *Matter of H.O. Realty Corp. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 103, 106-07 (1st Dept 2007). Since Fuentes' rent would not have reached the $2000 threshold for high rent deregulation absent the renovations allegedly performed by defendants in 2006, this court is not bound by the four-year rule in determining whether the Apartment was properly deregulated.

It has long been clear that the burden is on the owner to establish by proper documentation that the IAIs were actually carried out. *Matter of 985 Fifth Ave., Inc. v State Div. of Hous. & Community Renewal*, 171 AD2d 572, 574-75 (1st Dept 1991). Jakob's affidavit, unsupported by any documentation, is inadequate to establish that any IAIs were in fact made, much less in the amount of $25,000. *See Altschuler,* 135 AD3d at 440 (internal quotation marks and citations omitted)(affidavit "unsupported by bills from a contractor, an agreement or contract for work in the apartment, or records of payments" is inadequate basis for claimed improvements); *Matter of Yorkroad Assocs. v New York State Div. of Hous. & Community Renewal*, 19 AD3d 217, 218 (1st

Dept 2005) (disallowance for rent increases for various alleged IAIs proper where "no invoices or proof of payment were submitted for the claimed work"). Furthermore, as Fuentes has argued, even assuming that Kwik spent $25,000 on work in the Apartment, it would have to establish the amounts that were spent on "improvements" versus "normal maintenance or repair." *Matter of Linden v New York State Div. of Hous. & Community Renewal,* 217 AD2d 407, 407 (1st Dept 1995). Defendants cannot rely on the ruling in *Jemrock Realty Co., LLC v Krugman* (13 NY3d 924, 926 [2010]), that there is no "inflexible rule" requiring that the landlord always produce, or never produce, an itemized breakdown allocating between improvements and repairs —in all cases, it is a fact-specific inquiry, "to be resolved by the factfinder in the same manner as other issue, based on the persuasive force of the evidence. . ." Here, defendants submit only a completely conclusory affidavit of their agent, with no supporting documentation, as proof that any improvements were actually made or that $25,000 was in fact spent on the alleged improvements.

Defendants contend that at the time that Francisco departed from the Apartment and they conducted the alleged renovations, the posture of the law was to limit the look-back period to four years, and that it was "not the practice of this landlord nor any other landlord for whom I am agent to retain records more than that length of time." Aff of Jakob, dated February 17, 2017, ¶ 7. In reply, however, plaintiff cites to the decision in *Matter of Kwik RHG LLC v New York State Div. of Hous. & Community Renewal* (2009 NY Slip Op 32665 [U], *11 [Sup Ct, NY County 2009]), decided only three years after the alleged improvements were made, in which defendant Kwik (named in the caption only as Kwik RHG LLC) successfully sought to rely on evidence from before the four-year look-back period. Perhaps more importantly, however, had defendant

presented Wen Shuan Yang, the first tenant whose rent was calculated based upon the alleged improvements, with a lease which complied with DHCR requirements, that tenant would have had the necessary information and opportunity to challenge the rent calculation, and this issue would not now be before the court. To permit the landlord to now rely on its purported policy of not retaining documents concerning improvements more than four years, would be to reward it for its failure to comply with rent stabilization requirements.

This court has previously entered an order "precluding defendants from offering at trial any evidence not heretofore disclosed in response to any outstanding discovery demands." Order dated June 18, 2015. Defendants contend that they should be able to present expert witnesses at trial to support Jakob's affidavit.[6] However, given the absence of any documentation for any work performed, there is little on which an expert could opine.

Based on the totality of these irregularities, the court concludes that defendants' actions "[r]eflect[] an attempt to circumvent the Rent Stabilization Law in violation of the public policy of New York" that renders Fuentes' initial lease "void at its inception." *Thornton v Baron*, 5 NY3d 175, 181 (2005).

For these reasons, the court concludes that the initial and renewal leases given to Fuentes did not comply with the Rent Stabilization Code and regulations, and that Fuentes is entitled to a

---

[6] Defendants contend, in their brief, that Jakob's affidavit regarding the alleged improvements is made on personal knowledge; however, the court notes that Jakob merely states that as agent for Kwik, he is "fully familiar with the facts and circumstances stated," and not that he has personal knowledge of the work allegedly performed. Nor does he state the basis for his assertion that "it was determined" that the alleged improvements were needed, who made the determination, or whether he was even the agent of Kwik at the time. Finally, the exact amount of money spent on the alleged improvements is not specified. Instead, Jakob merely states that "the standard cost for the work that was done at the time is in excess of $25,000."

rent-stabilized lease and an award of overcharges, if any.[7] Although Fuentes paid a "preferential" rent, which was lower than the rent set in his lease, according to the calculations by his counsel, that "preferential" rent exceeded the rent that would have been permitted had Kwik properly calculated the rent in accordance with the rent stabilization law.

Regarding calculation of overcharges where an apartment was improperly removed from rent stabilization, the Court of Appeals in *Thornton* endorsed use of the default formula used by DHCR to set the rent where no reliable rent records are available. *Id.* at 181; *see also Matter of Grimm v State of N. Y. Div. of Hous. & Community Renewal Off. of Rent Admin.,* 15 NY3d 358, 365-366 (2010). That default formula "uses the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date." *Thornton,* 5 NY3d at 179-180, n 1. It is not clear, however, whether such a comparable rent-stabilized apartment exists in the building. If there is no such comparable apartment, the proper rent should be calculated based upon the last properly registered rent, which here appears to have been set in 2005 and 2006, in connection with the final Francisco lease and the 2006 vacancy increase. *See Bradbury v 342 W. 30th St. Corp.*, 84 AD3d 681, 684 (1st Dept 2011).

Fuentes also seeks punitive damages for willful rent overcharges. "The imposition of treble damages for rent overcharging is authorized by section 26-516 (a) of the Administrative Code of the City of New York ... unless 'the owner establishes by a preponderance of the evidence that the overcharge was not willful.'" *Matter of 985 Fifth Ave.*, 171 AD2d at 575. Defendants' complete lack of documentation to support the alleged IAIs which defendants used

---

[7] Having reached this conclusion, it is not necessary for the court to consider Fuentes' argument that the leases of Wen Shuan Yang and Anya P. Ismail represented "illusory tenancies," or defendants' opposition to such argument.

to justify the removal of the Apartment from rent stabilization, and their failure to provide the required rent stabilization information to Fuentes or the tenants that immediately preceded him, supports a finding of willfulness. However, the determination of the amount of punitive damages must await a determination of Fuentes' proper rent.

Finally, defendants argue that Edelstein is not a proper party to this action and may not be held personally liable for any alleged acts of wrongdoing by Kwik. Edelstein states that although she is a member of the defendant limited liability company, she has never acted in any capacity for Kwik, other than as an agent, and has never comingled the funds of Kwik with her personal funds. She further states, "[i]t was part of my job responsibilities as an agent for and member of Kwik to execute leases; this was never done with any intention to defraud anyone. I similarly have never used funds obtained by tenant for personal use nor personal gain." Aff of Susan Edelstein, ¶ 7.

Defendants argue that an agent for a disclosed principal will not be held personally liable 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." *Savoy Record Co. Inc. v Cardinal Export Corp.,* 15 NY2d 1, 4 (1964) (internal quotation marks and citation omitted). Defendants cite *Conason v Megan Holding*, LLC (25 NY3d 1, 18 [2015][internal quotation marks and citation omitted]), a case dealing with alleged rent overcharges, which states that

"a plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury."

In reply, plaintiff argues that the Rent Stabilization Code provides a cause of action for rent overcharges against an owner (*see* RSC § 2526.1), and that the definition of owner in the Rent Stabilization Code includes "[a] fee owner, lessor, sublessor, assignee, . . . or any other person or entity receiving or entitled to receive rent for the use or occupation of any housing accommodation, or an agent of any of the foregoing." RSC § 2520.6 (i). Plaintiff also cites *Matter of Elm Realty, Inc. v Office of Rent Control* (54 NY2d 650 [1981]) for the proposition that an officer of an owner corporation can be held personally liable for violating the rent overcharge statute. The three-paragraph decision in *Elm Realty* states that the Appellate Division erred in "holding that [the corporate principal and manager] could not be held personally responsible for his acts or be required to make restitution" and later states that "he can be compelled to refund the sums unlawfully obtained." *Id.* at 652. However, the Appellate Division decision, which the Court of Appeals modified, involved a reversal of the determination of the Office of Rent Control, "which made a finding of harassment and imposed civil penalties against petitioners." *Matter of Elm Realty, Inc. v Office of Rent Control*, 63 AD2d 674, 674 (2d Dept 1978), *amended* 75 AD2d 592 (2d Dept 1980), and *mod* 54 NY2d 650 (1981). Thus, it is not entirely clear that the decision of the Court of Appeals can be read to support the principle that an agent of the owner is personally liable for rent overcharges, absent additional allegations of personal involvement.

In any case, more recently, the Appellate Division, First Department, rejected the imposition of personal liability for rent overcharges against a managing agent, stating "an agent for a disclosed principal will not be personally bound 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 (1st Dept 1998) (internal quotation marks and citation omitted); *see also Paganuzzi v Primrose Mgt. Co.*, 181 Misc 2d 34, 36 (Sup Ct, NY County 1999), *affd* 268 AD2d 213, 214 (1st Dept 2000). Here, in addition to Edelstein's status as a member of the limited liability company, plaintiff has alleged that she signed Fuentes' leases, though there is no allegation that she did so in any capacity other than as agent for the company, or any evidence that she intended to substitute or superadd her personal liability for or to that of the company.

Although defendants failed to make a formal motion to dismiss Edelstein as a defendant, they argue that since there is no basis on which to pierce the corporate veil, on a motion for summary judgment, the court may properly search the record and determine whether such dismissal would be proper. *Friedman v Carey Press Corp.*, 117 AD2d 568, 569 (1st Dept 1986). In light of the foregoing, defendants' request to dismiss Edelstein as a defendant is granted.

Accordingly, it is hereby

ORDERED that the motion of plaintiff Odilson Fuentes for summary judgment is granted to the extent that it is hereby

DECLARED that plaintiff's initial lease was subject to rent stabilization; and it is further

ORDERED that the calculation of rent overcharges, treble damages and attorneys' fees, if any, 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 issues; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this Court on _____ ; and it is further

ORDERED that the motion of plaintiff Odilson Fuentes is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that, upon a search of the record pursuant to CPLR 3212 (b), the request of defendant Susan Edelstein to dismiss the complaint as against her is granted and the complaint is dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office

(Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

Dated: October 17, 2017

ENTER:

Ellen M. Coin, A.J.S.C.

HON. ELLEN M. COIN