Koval v St Nicholas 175 Assoc. LLC
2017 NY Slip Op 32511(U)
December 1, 2017
Supreme Court, New York County
Docket Number: 157027/2016
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

ZACHARY KOVAL,
Plaintiff,
-against-

INDEX NO. 157027/2016
MOTION DATE 11/27/2017
MOTION SEQ. NO. 003
MOTION CAL. NO. ____

ST NICHOLAS 175 ASSOC LLC, a/k/a ST NICHOLAS ONE SEVEN FIVE ASSOCIATES, L.L.C., LAURENCE GLUCK, SMAJLJE SRDANOVIC, STELLAR MANAGEMENT CO., and RAMSES CAPELLAN,
Defendants,

The following papers, numbered 1 to 8 were read on this motion to strike affirmative defenses and counterclaims and for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4- 6
Replying Affidavits	7 - 8

Cross-Motion: ☐ Yes X No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff Zachary Koval's motion to strike Defendants St. Nicholas 175 Assoc LLC, a/k/a St. Nicholas One Seven Five Associates, L.L.C. ("St Nicholas") and Stellar Management Co.'s (together "Defendants") Affirmative Defenses and Counterclaims in their Answer pursuant to CPLR §3211[b], and for summary judgment on liability pursuant to CPLR §3212, is granted to the extent that Defendants Fourth Affirmative Defense is dismissed. The remainder of Plaintiff's motion is denied.

From October 2014 to September 2016 Plaintiff was a tenant in Apartment #46 owned by Defendant St Nicholas located at 1306 St. Nicholas Avenue, New York, New York ("Apartment"). From October 2014 to September 2015 Plaintiff's rent was $2,125.00 per month. From October 2015 to October 2016 Plaintiff's rent was $2,225.00 per month. Aside from alleging being overcharged due to rent regulation laws, Plaintiff also alleges Defendant St Nicholas breached the warranty of habitability due to multiple violations in his Apartment. On August 19, 2016 Plaintiff commenced this action against Defendants to recover for: (i) rent overcharge, (ii) breaches of the warranty of habitability, and (iii) legal fees.

On May 31, 2017 the Court granted Defendants Laurence Gluck, Smajlje Srdanovic, and Ramses Capellan's motion for summary judgment dismissing the Complaint against

them. The Court also granted Plaintiff's January 23, 2017 cross-motion for summary judgment as to liability on the First Cause of Action for Rent Overcharge against St Nicholas and dismissed St Nicholas' First, Third and Fourth Affirmative Defenses in its Answer (Moving Papers Ex. A). The Court found the Apartment was subject to Rent Stabilization Law because the record presented by both parties led the Court to believe that St Nicholas' failed to register the Apartment with the Division of Housing and Community Renewal ("DHCR") from 1984 to 1996 and then again from 1999 onward. Therefore, the record showed the last legal registration of the Apartment would have been in 1998 with a rent of $612.74. With the record showing that the landlord failed to register the Apartment, and both parties agreeing that Plaintiff was never given a rent stabilization lease rider, the rent would have been frozen at the last registered rent price of $612.74 (RSL 26-517[3]).

On September 22, 2017 the Court granted Defendants motion to reargue and upon reargument, denied Plaintiff's January 23, 2017 cross-motion without prejudice. The Court found Plaintiff's cross-motion was procedurally defective since the Plaintiff failed to serve a notice of motion with his papers.

Plaintiff now moves to dismiss all of Defendants' Affirmative Defenses and Counterclaims in their Answer pursuant to CPLR §3211[b], and for summary judgment on liability pursuant to CPLR §3212. Defendants oppose the motion.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]).Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD2d 772, 461 NYS2d 342 [1983], *aff'd* 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

A vacant apartment is not decontrolled unless the rent of the outgoing tenant prior to the vacancy exceeds the decontrol threshold (Altman v 285 W. Fourth LLC, 127 AD3d 654, 8 NYS3d 295 [1st Dept. 2015]). New York courts have recently applied post vacancy increases to the outgoing tenant's rent for the purpose of determining whether or not an apartment reaches the threshold for deregulation (Matter of 18 St. Marks Place Trident LLC v State of N.Y. Div. of Hous. & Cmty. Renewal, Office of Rent Admin., 149 AD3d 574, 50 NYS3d 273 [1st Dept. 2017]). The deregulation threshold at the relevant time was $2,500.00 (RSL Section §26-504.2, Emergency Tenant Protection Act Section §5[a][13]).

Failure to serve the first tenant, after high rent deregulation, with the notice required in Administrative Code of the City of NY §26-504.2[b] is not proof that the subject premises was never lawfully deregulated. "A court must attempt to effectuate the intent of the Legislature and where the terms of the statute are clear and unambiguous, the court should construe it so as to give effect to the plain meaning

of the words used" (Matter of World Trade Ctr. Bombing Litig.,17 NY3d 428, 933 NYS2d 164, 957NE2d 733 [2011]). The code, while making it mandatory to give notice, does not impose a penalty for failure to serve the notice such as a finding that the lease is null and void, and/or that the landlord overcharged the tenant (§26-504.2[b]). The legislature's intent to not impose a penalty is made clear by other penalties imposed for failures to provide notice in other rent-regulation sections (*e.g.* People v Valenza, 60 NY2d 363, 469 NYS2d 642, 457 NE2d 748 [1983]).

Defendants successfully rebut Plaintiff's prima facie showing, to defeat his summary judgment motion. Contrary to Plaintiff's assertion, the Apartment was legally registered from 1984 through 2014 (Opposition Papers Ex. A). Defendants last registered stabilized rent was in 2014 for $983.95. Defendants submit the DHCR Registration Rent Roll Reports for these years to establish that from 1984-2014 the Apartment was registered as Rent Stabilized, and in 2015 it was listed as Permanently Exempt as a High Rent Vacancy. Defendants also annexed an affidavit from Ago Kolenovic, the owner of Ago & Alaudin General Contracting Corp., an invoice, and checks made to Ago & Alaudin General Contracting Corp. in the amount of $84,400.00 for renovations made to the building in an attempt to establish that the Apartment, with the $983.95 added to the building renovations formula, surpassed the deregulation threshold when the Plaintiff began to rent it (Opposition Papers Ex. F).

Issues of fact remain as to whether the rent Defendants charged for the Apartment would have reached the deregulation threshold when Plaintiff leased it (Breen v 330 E. 50th Partners, L.P., 2017 NY Slip Op 07402 [App. Div.]). The fact that Plaintiff did not receive a Lease Rider is irrelevant at this stage, as the regulatory status of the Apartment has not been determined. Plaintiff must prove that the landlord did not make improvements sufficient to remove the apartment from rent regulation pursuant to Administrative Code of the City of NY §26-511[c][13].

Plaintiff fails to makes a prima facie showing of entitlement to judgment as a matter of law for his Second Cause of Action of an alleged breach of the warranty of habitability by Defendants. Plaintiff again only offers a self-serving affidavit without any accompanying evidence, which is of zero probative value. The Court again is unpersuaded by Plaintiff's annexed exhibit that memorializes all violations of the apartment building because none of the violations listed refer to his specific Apartment (Moving Papers Ex. J).

To dismiss an affirmative defense pursuant to CPLR §3211[b], "the plaintiff bears a heavy burden of showing that the defense is without merit as a matter of law" (Granite State Ins. Co. v Transatlantic Reins. Co., 132 AD3d 479, 19 NYS3d 13 [1st Dept. 2015] *citing* 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541, 541, 935 NYS2d 23 [1st Dept 2011]). "The allegations set forth in the answer must be viewed in the light most favorable to the defendant" (182 Fifth Ave. v Design Dev. Concepts, 300 AD2d 198, 751 NYS2d 739 [1st Dept 2002]), and "the defendant is entitled to the benefit

of every reasonable intendment of the pleading, which is to be liberally construed" (534 E. 11th St., *supra*). The court should not dismiss a defense when questions of fact remain (*id*).

Plaintiff has demonstrated that the Defendants' Fourth Affirmative Defense is without merit as a matter of law and is hereby dismissed. Defendants' Fourth Affirmative Defense is based upon the statute of limitations. The statute of limitations for rent overcharge is four (4) years, with a two (2) year statue of limitations for treble damages, and the warranty of habitability has a six (6) year statute of limitations. This action was brought less than (2) years after Plaintiff's lease (CPLR §213[a], RSL 26-516a[2][l]).

Accordingly, it is ORDERED, that Plaintiff Zachary Koval's motion to strike Defendants St. Nicholas 175 Assoc LLC, a/k/a St. Nicholas One Seven Five Associates, L.L.C. and Stellar Management Co.'s Affirmative Defenses and Counterclaims in their Answer pursuant to CPLR §3211[b], is granted to the extent that Defendants Fourth Affirmative Defense is dismissed, and it is further,

ORDERED, that the Fourth Affirmative Defense of Defendants St. Nicholas 175 Assoc LLC, a/k/a St. Nicholas One Seven Five Associates, L.L.C. and Stellar Management Co.'s Answer is hereby severed and dismissed, and it is further,

ORDERED, that the remaining Affirmative Defenses in the Defendants St. Nicholas 175 Assoc LLC, a/k/a St. Nicholas One Seven Five Associates, L.L.C. and Stellar Management Co.'s Answer remain in effect, and it is further,

ORDERED, that the remainder of Plaintiff's motion is denied, and it is further,

ORDERED, that the parties appear for a Compliance Conference on January 31, 2018 at 9:30 a.m. in IAS Part 13 at 71 Thomas Street, New York, NY 10013.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: December 1, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE