Suarez v Hopkins
2018 NY Slip Op 30126(U)
January 22, 2018
Supreme Court, New York County
Docket Number: 160035/2015
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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MARIO SUAREZ and ELLEN HOPKINS,

Plaintiffs,

Index No.: 160035/2015

-against-

DECISION and ORDER

FOUR THIRTY REALTY, LLC and DAVID HERMAN,

Defendants.

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HON. NANCY M. BANNON, J.S.C.:

I. INTRODUCTION

In this action for a judgment declaring that the plaintiff's apartment is rent stabilized (first cause of action), a permanent injunction compelling the defendants to furnish the plaintiffs with a rent-stabilized lease (second cause of action), to recover rent overcharges (third cause of action), and for an award of attorneys' fees (fourth cause of action), the defendants move for summary judgment dismissing the complaint. The plaintiffs cross-move for partial summary judgment on the complaint and dismissing the fourth and fifth affirmative defenses, both of which assert that the plaintiffs are collaterally estopped from prosecuting this action by virtue of a 2002 determination of the New York State Division of Housing and Community Renewal (DHCR), and the sixth affirmative defense, which asserts the overcharge claim is barred by the relevant statute of limitations.

The motion is granted to the extent that the second, third, and fourth causes of action are dismissed as against the defendant David Herman, and the motion is otherwise denied. The cross motion is granted to the extent of dismissing the fourth and fifth affirmative defenses, and so

much of the sixth affirmative defense as is referable to the first, second, and fourth causes of action, and the cross motion is otherwise denied.

II. BACKGROUND

The plaintiffs, Mario Suarez and Ellen Hopkins (the tenants), are the occupants of apartment unit 9H in a residential apartment building located at 430 East 86th Street in Manhattan (the building). The tenants assert that apartment 9H is rent stabilized, and the landlord counters that it is not.

Hopkins initially took possession of apartment 9H on September 15, 1993, pursuant to a rent-stabilized lease (the lease) that she executed with the landlord's predecessor-in-interest, nonparty 430 Realty Co. Hopkins and Suarez were married in May 2000, and Suarez began residing with Hopkins in apartment 9H during August 2000. The tenants state that, at that time, Suarez's name was not added to the rent-stabilized lease as a tenant of record, and that his status at apartment 9H had been that of an "occupant."

In her affidavit, Hopkins avers that, in the first half of 2001, the DHCR served her with an "income recertification form" for the period covering 1999 to 2000. The tenants assert that Suarez only occupied apartment 9H with Hopkins for 3 1/2 months during that period of time. They further assert that the income recertification form did not indicate that the building was benefitted by the J-51 tax abatement program at that time, even though the landlord received benefits under that program through 2007, as corroborated by documentation submitted by the tenants that was generated by the New York City Department of Taxation and Finance (DTF). The landlord concedes that the building was initially enrolled in that program in 1974, although it does not state when, if ever, the building's participation in the program was terminated.

The landlord notes that, on July 12, 2002, the DHCR served Hopkins with a "notice of proposed deregulation" stating that the DHCR had determined from the tenants' income tax filings that the tenants' combined income totaled over $175,000.00 during both 1999 and 2000, and the landlord claims that this determination rendered apartment 9H "eligible for deregulation," i.e., removed from rent-stabilized status. That notice also afforded Hopkins 30 days in which to submit material in opposition to the DHCR's determination. The tenants' motion papers are silent as to whether Hopkins did so. However, both of the tenants assert that Suarez was never served with any papers in the DHCR deregulation proceeding, and contend that he was never afforded the opportunity to challenge the DHCR's determination.

The landlord submits an "order of deregulation" issued by the Rent Administrator of the DHCR, dated September 16, 2002, and served upon Hopkins, which recited, in pertinent part, as follows:

> "On June 11, 2001 the Owner of the building filed a 'petition for high income rent deregulation' for the subject housing accommodation. After consideration of the entire evidence of record, the Rent Administrator finds that:
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> "The housing accommodation is subject to the Rent Stabilization Law of 1969 and/or the Emergency Tenant Protection Act of 1974 and that the legal regulated rent was $2,000.00 or more per month on the applicable date(s). In addition, based on income verification information transmitted by the [DHCR], the [DTF] has determined that the sum of the annual incomes of the tenant(s) named on the lease who occupied the housing accommodation, and of the other persons who occupied this housing accommodation as a primary residence on other than a temporary basis . . . was in excess of $175,000.00 in each of the two preceding calendar years. Accordingly, and upon the grounds stated in the Rent Regulation Reform Act of 1997 and in Local Law 4 of 1994 (the latter applicable in New York City only), it is
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> "Ordered, that the subject housing accommodation is deregulated upon the

expiration of the existing lease."

Appended to that order was the statutorily required notification informing Hopkins that she had 35 days in which to file a "petition for administrative review" (PAR) to contest the deregulation order. The parties' submissions demonstrate that Hopkins filed a PAR on September 26, 2002.

On November 12, 2002, the office of the DHCR Commissioner (the Commissioner) denied Hopkins's PAR. The Commissioner concluded that, in connection with a request for luxury decontrol such as that made by the landlord, Section 2531.1(b) of the Rent Stabilization Code (RSC; 9 NYCRR 2520.1-2531.9) requires consideration of the total annual incomes of both the tenant of record and all persons occupying the apartment as their primary residence as of the date that the income certification form was served upon the tenant. The Commissioner thus explained that the fact that Suarez did not live in the subject apartment during 1999 and 2000 was of no moment, since he concededly was occupying the apartment as his primary residence as of March 2001, the date that the income certification form was served upon Hopkins. Inasmuch as the combined income of Hopkins and Suarez exceeded $175,000.00 during 2001, the Commissioner concluded that the apartment was eligible for luxury decontrol, noting that Hopkins did not challenge the Commissioner's calculation of combined income or the Commissioner's reliance on the DTF's documentation.

The tenants commenced this action on September 30, 2015. In the complaint, they seek a judgment declaring that Apartment 9H is subject to rent stabilization, a permanent injunction compelling to tender them a rent-stabilized lease, damages for rent overcharges, and an award of attorneys' fees. The tenants assert that, when Hopkins's last rent-stabilized renewal lease expired in 2002, she and Suarez signed a "free market vacancy lease" that expired in 2004 and named

both Hopkins and Suarez as tenants of record, and that they thereafter signed a series of renewal leases, the last of which expired in 2015. The tenants contend that the 2002 luxury decontrol order did not permanently decontrol the apartment and that, upon the execution of the lease at the free market vacancy rate, they were no longer bound by the DHCR's November 12, 2002, luxury decontrol order and the apartment was restored to the J-51 abatement program.

The landlord answered the complaint, and asserted several affirmative defenses, including that the action was barred by collateral estoppel and the limitations period of CPLR 213-a. The landlord contends that, inasmuch as Hopkins did not commence a proceeding pursuant to CPLR article 78 in the Supreme Court to challenge the denial of the PAR, and the 2002 decontrol order was in effect when the tenants executed the free market vacancy lease, the execution of the free market vacancy lease did not require calculation of the amount of the vacancy rent based upon the amount of rent at the regulated rate. It thus asserts that each subsequent renewal lease is subject to the luxury decontrol order, and that it is thus permitted to charge rent at the luxury decontrol rate in connection with each renewal lease.

III. DISCUSSION

A. Standards Applicable to Summary Judgment Motions

When seeking summary judgment, the moving party bears the burden of establishing his or her prima facie entitlement to judgment as a matter of law by proving, by competent, admissible evidence, that no material and triable issues of fact exist. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Sokolow, Dunaud, Mercadier & Carreras v Lacher, 299 AD2d 64 (1st Dept. 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient raise a triable

issue of fact. See Zuckerman v City of New York, 49 NY2d 557 (1980); Pemberton v New York City Tr. Auth., 304 AD2d 340 (1st Dept. 2003).

B. Collateral Estoppel in the Context of Rent Regulation

The landlord seeks summary judgment on the ground of collateral estoppel, relying on Gersten v 56 7th Ave., LLC (88 AD3d 189 [1st Dept. 2011]), which held that, under certain circumstances, the issuance of a luxury decontrol order by the DHCR may collaterally estop the parties from litigating the issue of luxury decontrol. The tenants respond that this equitable doctrine is not applicable to the facts of this case. The court concludes that both the landlord and the tenants failed to establish their prima facie entitlement to judgment as a matter of law on the ultimate issues of whether the apartment is currently rent stabilized or whether it might be retroactively returned rent-stabilized status. The court further holds that the tenants established their prima facie entitlement to dismissal of the fourth and fifth affirmative defenses, and that the landlord failed to raise a triable issue of fact in opposition to that showing.

Collateral estoppel does not bar this action, since there is no identity of issues between the 2001-2002 DCHR proceeding that resulted in the luxury decontrol order and this action, which raises the issue of whether the execution of a free market vacancy lease after the expiration of a lease subject to luxury decontrol vitiates the luxury decontrol order. See Leight v W7879 LLC, 128 AD3d 417 (1st Dept. 2015).

In Extell Belnord LLC v Uppman (113 AD3d 1 [1st Dept. 2013]), the First Department explained:

"In *Gersten*, DHCR issued a luxury deregulation order, despite the fact

> that the landlord was receiving J–51 benefits at the time. After the Court of Appeals handed down *Roberts [v Tishman Speyer Props., L.P. (13 NY3d 270 [2009])]* , which held that J–51 benefits preclude luxury deregulation, the tenant commenced an action seeking retroactive application of its holding. This Court held that *Roberts* did in fact have retroactive effect and that no statute of limitations defense is available on the issue of whether an apartment is regulated. However, this Court found that the tenant's claim had to be dismissed, because the DHCR's deregulation order had collateral estoppel effect. We stated:
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> "'Three of the elements necessary for the application of collateral estoppel cannot be seriously disputed here because (1) the issue before DHCR, whether the subject apartment was properly removed from rent stabilization by luxury decontrol, is identical to the issue before the motion court and this Court, (2) the issue was fully litigated, and (3) the issue was decided in the DHCR proceeding.'"

Id. at 10-11 (citations omitted).

Here, there is a lack of identity between the 2002 luxury deregulation order and the purported challenge to the rent-stabilization status of 2004 free market vacancy lease. The issue before the DHCR in 2002 was whether apartment 9H was subject to luxury decontrol because of the combined income of Hopkins and Suarez, and thus properly removed from rent stabilization. The validity of the landlord's luxury decontrol petition was the subject of the full administrative review process provided by the DHCR, which included a hearing before the Rent Administrator and, later, the consideration and determination of a PAR by the office of the DHCR Commissioner. Hence, that issue was fully litigated before the DHCR. However, where a tenant seeks a judicial determination that his or her apartment "became re-regulated upon . . . execution of subsequent market rate leases," the issues raised in such an action "are not identical to those in [a] prior DCHR deregulation proceeding[ ]" that considered decontrol under the "luxury deregulation law." Leight v W7879 LLC, supra, at 418-419 (1st Dept. 2015). Since that is

precisely the situation presented here, the landlord has failed to establish its prima facie entitlement to judgment as a matter of law, since it is unable to show that one of the three prongs of the collateral estoppel test was satisfied.

The court rejects the tenants' alternative contentions that collateral estoppel does not bar Suarez's claims because he was never notified of the luxury decontrol proceedings and was not in privity with Hopkins. "[Both of the tenants] were fully informed of the deregulation proceedings" (Matter of Klein v New York State Div. of Hous. & Community Renewal, 17 AD3d 186, 189 [1st Dept. 2005]; cf. Matter of Bleecker St. Invs., LLC v Zabari, 148 AD3d 577 [1st Dept. 2017] [occupant not provided with notice]), and the luxury decontrol order specifically noted Suarez's occupancy of apartment 9H. That order also recounted that Suarez's name was included on the proposed notice of deregulation that was sent to Hopkins. "[P]rivity . . . includes . . . those whose interests are represented by a party to the action" (Buechel v Bain, 97 NY2d 295, 304 [2001], cert denied 535 US 1096 [2002]), and it is clear that, in the DHCR proceedings, Hopkins "represented" Suarez's "interests," which were the same as her own, i.e., continued occupancy of apartment 9H pursuant to a rent-stabilized lease.

For the same reason as underlies the determination to deny summary judgment to the defendants based on collateral estoppel, the tenants established their prima facie entitlement to judgment as a matter of law dismissing the fourth and fifth affirmative defenses, and the landlord has failed to raise a triable issue of fact in opposition. Those affirmative defenses must thus be dismissed. Moreover, since the landlord cannot establish, prima facie, that collateral estoppel bars the cause of action for declaratory relief, there is no basis for dismissing the second, third, and fourth causes of action insofar as asserted against it at this juncture, since those causes of

action are predicated on the declaratory judgment cause of action. Conversely, the tenants "are not entitled to a declaratory judgment that their apartments are rent-stabilized, since they have failed to establish, as a matter of law, that their apartments became re-regulated upon plaintiffs' execution of subsequent market rate leases." Leight v W7879 LLC, supra, at 418-419.

C. Statute of Limitations

The tenants established, prima facie, that the first, second, and fourth causes of action are not time-barred, since "imposing such limitations on determining rent regulatory status subverts the protection afforded by the rent-stabilization scheme. . . . Indeed, except as to limit rent overcharge claims, the Legislature has not imposed a limitations period for determining the rent regulatory status of an apartment." Gersten v 56 7th Ave., LLC, supra, at 200. Inasmuch as the defendants fail to raise a triable issue of fact in opposition to this showing, the tenants' motion for summary judgment dismissing the sixth affirmative defense, insofar as it relates to the causes of action for declaratory and injunctive relief, as well as the cause of action to recover attorneys' fees, must be granted.

Conversely, insofar as the sixth affirmative defense relates to the third cause of action, which is to recover rent overcharges, the tenants have not established their prima facie entitlement to judgment as a matter of law dismissing that portion of the affirmative defense. The limitations period for the commencement of an action to recover a residential rent overcharge is four years from "the first overcharge alleged and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced" CPLR 213-a; see Rent Stabilization Law,

Admin. Code of City of N.Y. § 26-516 (a)(i). This statute has been construed to mean that, if the first residential rent overcharge occurred more than four years prior to the commencement of the action, the court may even not consider overcharges that were assessed during the four years immediately prior to commencement. See Direnna v Christensen, 57 AD3d 408 (1st Dept. 2008); cf. Matter of Nur Ashki Jerrahi Community v New York City Loft Bd., 80 AD3d 323 (1st Dept. 2010); 29 RCNY 1.06.1(c) (since unconverted loft is not a "residence," a claim of overcharge for loft is not governed by CPLR 213-a).

Although both the DHCR and a court may consider events that occurred more than four years prior to the first overcharge for the purposes of determining whether an apartment is regulated (see East West Renovating Co. v New York State Div. of Hous. & Community Renewal, 16 AD3d 166 [1st Dept. 2005]), the applicability of DHCR rent-reduction orders predating the four-year lookback period to the calculation of the appropriate legal base rent (see Matter of Cintron v Calogero, 15 N.Y.3d 347 [2010]), or whether the overcharge was an element of a fraud cause of action (see Conason v Megan Holding, Inc., 25 NY3d 1 [2015]), neither the agency nor the courts may consider such events for the purpose of calculating a simple overcharge. See Taylor v 72A Realty Assoc., L.P., 151 AD3d 95 (1st Dept. 2017); East West Renovating Co. v New York State Div. of Hous. & Community Renewal, supra.

Hence, the tenants have not made the necessary prima facie showing that the sixth affirmative defense is inapplicable to their third cause of action, which is to recover rent overcharges in connection with an allegedly rent-stabilized apartment.

D. Action As Against David Herman

The second, third, and fourth causes of action must be dismissed as against the defendant David Herman because the defendants established, prima facie, that, as the managing agent for the subject apartment building, he is an agent for a disclosed principal, and would thus not be personally liable for any portion of an alleged overcharge. See Crimmins v Handler & Co., 249 AD2d 89 (1st Dept 1998). Nor would he personally be liable for attorneys' fees. In addition, any injunctive relief compelling the landlord to tender the tenants a rent-stabilized lease would properly be imposed only upon the landlord. In opposition to that showing, the tenants fail to raise a triable issue of fact.

IV. CONCLUSION

ACCORDINGLY, it is hereby

ORDERED that the defendants' motion for summary judgment dismissing the complaint is granted to the extent of dismissing the second, third, and fourth causes of action against the defendant David Herman, and the motion is otherwise denied; and it is further,

ORDERED that the plaintiffs' cross motion for summary judgment is granted to the extent of dismissing the defendants' fourth and fifth affirmative defenses, and so much of the sixth affirmative defense as applies to the third cause of action, and the cross motion is otherwise denied..

This constitutes the Decision and Order of the court.

Dated: January 22, 2018

ENTER:

Hon. Nancy M. Bannon, J.S.C.

HON. NANCY M. BANNON