SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. ROBERT D. KALISH *Justice* **PART 29**

GEOFFREY POPPLER,

Plaintiff,

INDEX NO. 155266/2014

MOTION DATE 1/24/17

MOTION SEQ. NO. 002

- v -

NINE & C, LLC and 145 AVENUCE C, LLC,

Defendants.

The following papers, numbered 33-61, were read on this motion for summary judgment, pursuant to CPLR 3212.

Notice of Motion—Affirmation—Affidavit in Support--Memorandum—Exhibits A-H	**No(s). 33-44**
Affirmation in Opposition—Affidavit in Opposition—Exhibits A-F—Affidavit of Service	**No(s). 46-53**
Reply Affirmation—Reply Memorandum—Exhibits A-D	**No(s). 56-61**

Motion for summary judgment, pursuant to CPLR 3212, to dismiss the complaint and for an award of attorney fees is granted for reasons stated herein.

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

BACKGROUND

I. The Underlying Action

Plaintiff commenced the instant action on May 29, 2014 seeking declaratory relief and money damages due to alleged rent overcharges.

Plaintiff alleges that he was the tenant of apartment C-3 (the Apartment) in a building (the Building) located at 649 East 9th Street, New York, New York, commencing on May 1, 2008, pursuant to a lease dated April 18, 2008 (the Lease) for the period from May 1, 2008 through April 30, 2009 at a monthly rent of $2,500 (complaint, ¶ 4; admitted, Defendants' answer; plaintiff EBT at 6-7, 12-13;

Oral Arg. at 6). The Lease had a heading at the top of the first page in bold capital letters that stated "THIS APARTMENT IS NOT SUBJECT TO RENT REGULATION" (the Non-Regulated Legend).

The Lease was executed with 145 Avenue C, LLC (145). Plaintiff thereafter signed the following renewal leases for the Apartment: a renewal lease on April 30, 2009 for the period from May 1, 2009 through April 30, 2010; another renewal lease dated January 15, 2010 for the period May 1, 2010 through April 30, 2012; another renewal lease dated February 21, 2012 for the period from May 1, 2012 through April 30, 2013; and another renewal lease dated February 11, 2013 for the period from May 1, 2013 through April 30, 2015 (the Subsequent Leases) (complaint, ¶¶ 18-21; admitted, Defendants' answer).

The Subsequent Leases all had the Non-Regulated Legend at the top of the first page in bold capital letters. The Lease and the Subsequent Leases had a provision, article 19 (the Attorneys' Fees Provision), that stated the "[r]enter shall be liable to [the] Owner in the event [the] Owner incurs legal fees in the enforcement of any of [the] Owner's rights under this [L]ease or pursuant to law."

On December 1, 2011, 145 sold the Building to Nine & C, LLC (Nine) (complaint, ¶ 4; admitted, Defendants' answer). The leases covering the period from May 1, 2008 to April 30, 2012 are between Plaintiff and 145; and the leases covering the period from May 1, 2012 to April 30, 2015 are between Plaintiff and Nine.

Plaintiff states that the first time he began to research the Apartment's rental history was after he was told that Nine would not renew his Lease (plaintiff affidavit, ¶ 2). In the complaint, plaintiff asserts that the Apartment was not registered with the New York State Division of Housing and Community Renewal (DHCR) since 1989, that it was properly a rent stabilized apartment and that, consequently, he was charged in excess of the legal regulated rent (complaint, ¶¶ 29-30, 33-34). Plaintiff also states that, when he was deposed on March 24, 2017, he first "became aware of the rent registration history" for the Apartment that shows increases from 1989 until 2008, but contends that there are "inaccurate and improper filings indicative of fraud" (plaintiff affidavit, ¶¶ 3, 13).

In the instant complaint, Plaintiff alleges the following causes of action:

- First Cause of Action: "Money Judgment for Rent Overcharge and Treble Damages" (Complaint ¶¶ 31-42);
- Second Cause of Action: Attorney Fees (id. ¶¶ 43-45);
- Third Cause of Action: Declaratory Judgment that the apartment is subject to the protections of the Rent Stabilization Code (id. ¶¶ 46-50);
- Fourth Cause of Action: Fraud (id. ¶¶ 51-56).

In Defendants' answer, Defendants assert counterclaims for a declaratory judgment declaring "that the subject premises were not subject to rent regulation when plaintiff first took occupancy" and for an award of attorney fees. (Answer ¶¶ 17-21.)

II. The Instant Motion

Initially, Plaintiff's theory of the case was that his apartment was rent stabilized in 1989, and that Defendant failed to properly register the apartment since 1989.

On the instant motion, Defendants have presented two rent registration statements for Plaintiff's subject apartment. The first rent registration statement is for Apartment registered as C-3, which indicates the names of the tenants and the legal regulated rent for Apartment C-3 since July 1, 1989 to July 2, 2008 (Golino affirmation dated July 14, 2017, ¶ 14, Exhibit D; Oral Arg. at 9-10). This registration statement shows the rental history up to and including the tenant Raffaela Kozar, who appears to have had possession of the Apartment immediately before Plaintiff. It further shows that, while Ms. Kozar's "registration legal regulated rent" was $2,224.02 per month for a lease from February 1, 2007 to January 31, 2008, Ms. Kozar was given a preferential rent of $2,000 per month (id.). At that time, the luxury decontrol rental amount was $2,000 per month.

The second rent registration statement presented by Defendants is for the apartment registered as 3-C, which showed the same tenant in July 1989 as the rent registration statement for the apartment registered as C-3, but had missing information for all subsequent years (Oral Arg. at 13-15).

Plaintiff has agreed that his apartment "had two separate rent registrations" (plaintiff affidavit, ¶ 5; Oral Arg. at 10-11, 27).

Defendants have also presented evidence that the Apartment's monthly legal rent was brought above the deregulation threshold during Ms. Kozar's occupancy, due to permitted increases under the Rent Stabilization Code, improvement costs[1] and the permitted vacancy allowance, and they have submitted her leases which also have on the first page the Non-Regulated Legend in bold capital letters (Golino affirmation dated September 14, 2017, ¶¶ 18-19, Exhibits C, D; Oral Arg. at 15-16, 18).

Defendants therefore contend that they have shown that there was no fraud, that CPLR 213-a's four-year limitations period bars this action and that, pursuant to the Attorneys' Fees Provision, they should be awarded reasonable attorneys' fees that they incurred in defending this action (Memo in Supp. at 1-2; Oral Arg. at 20-21, 40-43).

In opposition, Plaintiff argues that the four-year statute of limitations does not bar the instant action because the record evidence provides sufficient indicia of fraud to permit the Court to look back beyond the four-year statute of limitations. Plaintiff argues that such indicia of fraud includes: (1) Defendants allegedly failing to submit an RR-1 form to Plaintiff stating that the apartment had recently moved from rent-stabilized status to non-regulated market rate status, and that Plaintiff could challenge that change in status; (2) that Plaintiff is not listed on the DHCR rent registration records for either "C3" or "3C", and that Ms. Kozar is listed as living in the apartment in the DCHR records at the time that Plaintiff's initial lease shows he was occupying the apartment; and (3) that Defendants improperly inflated the monthly rent to $2,224.02 in 2007—effectively taking the apartment above the $2,000 monthly rent threshold—when they were only entitled to increase the rent 4.5% from the 2006 legal rent of $1,900.88 to $1986.42; and (4) that Defendants did not register the improvements to the apartment that Defendants claim as a basis for increasing the rent.

In Defendants' reply papers, Defendants respond to the following of Plaintiff's claims of indicia of fraud as follows: (2) that Rachel Kozar is listed in

[1] Defendants submit the affidavit of Steven Gautier-Winther, the general partner of Defendant Nine & C's parent company, who states that when Defendant Nine & C purchased the building from 145 Avenue C, LLC in 2011, the latter provided him with copies of checks totaling $20,000 that was paid to the contracting company, and he references the Bates numbers of these checks that were apparently produced during the instant litigation. (Gautier-Winther Affidavit ¶ 5.) Mr. Gautier-Winther further states that, as part of his due diligence, he also did a walk-through of the subject apartment and "it appeared it had been updated, consistent with what one would expect seven (7) years after the fact." (*Id.* ¶ 10.)

the DHCR records as being the tenant for the July 2, 2008 date because the DHCR rent registration system requires a landlord to report the tenancy and rent that were in place on April 1 of each year, and that Plaintiff is not in the rent registration system because the apartment was deregulated when he began his tenacy; (3) that the 2007 legal rent was properly increased by 17% to $2,224.02 because Ms. Kozar signed a new lease with a new co-tenant, but the apartment remained rent stabilized; and (4) that the renovations which occurred in 2004 were not "registered" with DHCR because "there was no mechanism in 2004 to 'register' improvements." Defendants do not address, in their papers, the assertion that Plaintiff was not given an RR-1 form when his tenancy began in April 2008.

At oral argument, the parties largely reiterated the arguments in their papers. However, the Court questioned Defendant's counsel with regard to Plaintiff's assertion that he never received an RR-1 form stating that the apartment had recently moved from rent-stabilized status to non-regulated market rate status, and that Plaintiff could challenge that change in status. Defendant's counsel responded that the particular form that Plaintiff's counsel refers to as an "RR-1" is filed the first time that an apartment is registered as rent stabilized—not immediately after an apartment is deregulated for the first time. Defendant's counsel further stated that subsequently in 2014, the DHCR began requiring that landlords provide the first deregulated tenant with a HRVD-N form, which is akin to what Plaintiff's counsel refers to as an RR-1 form. Defendant's counsel stated, however, that in 2008, there was no requirement that a landlord provide its first deregulated tenant with a HRVD-N form.

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980] [internal quotation marks and citation omitted].) "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 University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Id.) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

I. The Branch of the Motion Seeking to Dismiss Plaintiff's Cause of Action for a Declaratory Judgment is Granted.

Declaratory judgment is a discretionary remedy which may be granted as "having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *see e.g. Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 681 (1st Dept 1999). It has long been the rule that, in an action for declaratory judgment, the court may properly determine respective rights of all of the affected parties under a lease. (*See Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 [1926].)

Here, Plaintiff seeks a declaration that:

- "Plaintiff has been overcharged by Defendant."
- "The legal rent for the subject unit is less than $2,500/month and $2,000/month."
- "Plaintiff is entitled to protection under the Rent Stabilization Code."
- "Plaintiff is entitled to a determination that he has been the lawful rent stabilized tenant of the subject unit from the date he entered possession."

(Compl. ¶¶ 46-50.)

§ 26-504.2 of the Rent Stabilization Code provides that:

"'Housing accommodations' shall not include: any housing accommodation which becomes vacant on or after April first, nineteen hundred ninety-seven and before the effective date of the rent act of 2011 and where at the time the tenant vacated such housing accommodation the legal regulated rent was two thousand dollars or more per month; or, for any housing accommodation which is or

> becomes vacant on or after the effective date of the rent regulation reform act of 1997 and before the effective date of the rent act of 2011, with a legal regulated rent of two thousand dollars or more per month . . . ."

(NYC Admin Code § 26-504.2 [a].)

Here, Defendants argue that, in 2007, Ms. Kozar's legal rent exceeded the regulatory threshold, with a monthly rate of $2,224.02—notwithstanding that the apartment remained subject to rent stabilization because Ms. Kozar began her tenancy when the apartment was subject to rent stabilization. Defendants argue that the legal rent for 2007 included a 17% vacancy increase because Ms. Kozar signed a new lease with a new co-tenant—although the new lease remained subject to rent regulation. Defendants argue that when Plaintiff began his tenancy in May 2008, he was properly provided with a non-regulated lease at the rate of $2,300 per month because the prior tenant's rent exceeded the $2,000 threshold for deregulation.

Plaintiff, as previously mentioned, seeks a declaration from this Court that he is entitled to a rent stabilized lease on the theory that his apartment was not properly registered and that the rent was improperly inflated above the $2000 regulatory threshold in 2007. Defendants, in contrast, seek a declaration that that the subject apartment was not subject to rent regulation when plaintiff first took occupancy.

CPLR 213-a provides:

> "An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge 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. This 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."

Here, Plaintiff commenced the instant action on May 29, 2014, so if this Court were to read the statute literally, this Court would look back no further than the rental history on May 29, 2010 when the rent was $2,300.

However, "under certain circumstances, especially where a landlord has engaged in fraud in initially setting the rent or in removing an apartment from rent regulation, the court may examine the rental history for an apartment beyond the four-year statutory period allowed by CLR 213-a." (*Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 102 [1st Dept 2017].) This exception to the statute of limitations is based on a long line of cases from the Court of Appeals.

In 2005, in *Thornton v Baron* (5 NY3d 175, 181 [2005]), the Court of Appeals held that a lease whose illegal rent reflects "an attempt to circumvent the Rent Stabilization Law in violation of the public policy of New York . . . [is] void at its inception" and any rent registration statement listing the illegal rent is "also a nullity." The Court reasoned that it "surely was not the intention of the Legislature" to permit "a landlord whose fraud remains undetected for four years - however willful or egregious the violation - [to], simply by virtue of having filed a registration statement, transform an illegal rent into a lawful assessment that would form the basis for all future rent increases." (5 NY3d at 181.) The *Thornton* case involved a particular type of rent fraud commonly known as an "illusory prime tenancy."

Five years later, in *Grimm v DHCR*, the Court of Appeals rejected the argument that "looking back" past the four-year statute of limitations should only be permitted in cases where an "illusory prime tenancy" is alleged, and held instead that such "looking back" is permissible when "the standard base date rent is tainted by fraudulent conduct on the part of a landlord." (15 NY3d 358, 362 [2010].) The *Grimm* Court specifically held that a "combination of factors" amounting to "substantial indicia of fraud" could constitute sufficient "evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization" so as to justify and compel the finder of fact to make an inquiry beyond the four-year statute of limitations to determine whether or not such fraud had actually been perpetrated and resulted in a rent overcharge. (*Id.*) The Grimm decision took pains to state that the Court, itself, did not make the determination regarding the existence of fraud, and also to state that "fraud" could be found to exist in a number of factual scenarios, and not just in "illusory prime tenancy" schemes, but reserved those actual inquiries for the finder of fact; i.e., the DHCR and/or the trial court. (*Id.*)

Without setting a bright-line rule, the *Grimm* Court did, however, opine that the "combination of factors" present in *Grimm* could be found to constitute sufficient evidence of fraud. (*Id.*) Those factors included: 1) that "the tenants

immediately preceding petitioner paid significantly more than the previously registered rent"; 2) that those tenants "were [also] not given a rent-stabilized lease rider"; 3) that "those tenants were informed that their rent would be higher but for their performance of upgrades and improvements at their own expense"; 4) that "[a]lmost simultaneously with the substantial increase in the rent for the affected unit, the owner ceased filing annual registration statements . . . [but] later filed several years' registration statements retroactively after receiving petitioner's overcharge complaint"; and 5) that "petitioner's [own] initial lease did not contain a rent-stabilized rider." (*Id.*) The Court emphasized that, while "[g]enerally, an increase in the rent alone will not be sufficient to establish a 'colorable claim of fraud,'" the foregoing "combination of factors" could establish such a claim. (*Id.*)

Five years after *Grimm*, in *Conason v Megan Holding, LLC* (25 NY3d 1 [2015]), the Court of Appeals found that a similar "combination of factors" existed where the plaintiff alleged that the landlord "created an entirely fictitious tenant. . . and at least one entirely fictitious apartment renovation ... in order to boost the regulated rent" over the $2,000.00 per month deregulation threshold. (25 NY3d at 9.) Regarding the effect of the combination of these two factors, the Court specifically found that:

> "Here, tenants do not just make a generalized claim of fraud. They instead advance a colorable claim of fraud within the meaning of *Grimm* - i.e., tenants alleged substantial evidence pointing to the setting of an illegal rent in connection with a stratagem devised by [landlord] to remove tenants' apartment from the protections of rent stabilization."

(25 NY3d at 16.)

Thus, the rule of *Thornton* and its progeny may be summarized as follows: whenever a tenant's cause of action for rent overcharge makes more than "a generalized claim of fraud," and instead sets forth a "combination of factors" from which it may be reasonably inferred that a landlord has engaged in "a stratagem to remove an apartment from rent stabilization," the finder of fact must make an inquiry into the existence of the alleged fraud, and will not be bound by the RSL's four-year statute of limitations when doing so. It is against the backdrop of this rule that the Court considers Defendants' dismissal argument.

Here, based upon the submitted papers and the oral argument, the Court finds that Plaintiff fails to establish that there are sufficient indicia of fraud to

permit this Court to examine the rental history beyond the four-year statute of limitations pursuant to CPLR 213-a.

As a preliminary matter, it bears noting that Plaintiff's initial contention in the complaint that Defendants failed to register a regulated apartment from as far back as 1989 is belied by the fact that his apartment has been registered from 1989 to 2008, albeit under two different designations: 3C and C3. However, that the apartment was registered under two different names is, at best, indicative of a clerical error. (*See e.g. Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 99–100 [1st Dept 2017] ["Although the entry indicates that the reason for the exemption is based upon the apartment being either a coop or condo, this is a clerical error; the exemption was based upon luxury decontrol."].) And as Plaintiff himself states that he believes his door says "3C" but that "then downstairs, it says C3. Like you'll see it written differently." (Plaintiff EBT at 6:15-23.)

In addition, even if, for the sake of argument, Defendants did impermissibly claim a vacancy calculation for the 2007 rent charged to Ms. Kozar and her co-tenant, by Plaintiff's own calculations, the legal rent for 2007 would have been o $1986.42. A 17% vacancy increase for the change in tenancy from Ms. Kozar to Plaintiff would have increased the rent by $337.69, bringing the rent to $2,324.11 and effectively outside rent regulation. (*Altman v 285 W. Fourth LLC*, 2018 NY Slip Op 02829, 1 [Ct App Apr. 26, 2018] [holding that the 20% vacancy increase "should have been considered in determining the legal regulated rent at the time of the vacancy and, as a result, the subject apartment was properly deregulated in 2005"].) Accordingly, the Court rejects Plaintiff's argument that Defendant's rent calculations reflect "a stratagem devised by [landlord] to remove tenants' apartment from the protections of rent stabilization." (*Conanson*, 25 NY3d at 16.)[2]

That Defendants allegedly did not provide an RR-1 form to Plaintiff—stating that the apartment had recently moved from rent-stabilized status to non-regulated market rate status—is also not indicative of fraud. While compliance with DHCR disclosure requirements should, of course, not be taken lightly, here, Plaintiff was fully aware that his apartment was not rent regulated when he began his tenancy—the legend at the top of his lease informed him so—and the prior rent history was a matter of public record, having been registered with DHCR. Plaintiff

[2] The Court however makes no opinion on the propriety of Defendants' argument that the addition of a co-tenant to Ms. Kozar's lease permitted them a vacancy increase of 17% to Ms. Kozar's lease when Ms. Kozar was still occupying the apartment between 2006 and 2007.

had "every incentive" to challenge the deregulated status of his apartment when he first moved in—when he could have challenged the rent history going back to 2005. (*Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 103 [1st Dept 2017].)

In addition, that the rental history shows the apartment as being leased to Ms. Kozar at the same time that it was in fact being leased to Plaintiff is explained by Defendant in that the DHCR rent registration system requires a landlord to report the tenancy and rent that were in place on April 1 of each year. Plaintiff did not offer any competing explanation for this during oral argument.

Likewise, Defendants explain that the renovations which occurred in 2004 were not "registered" with DHCR because "there was no mechanism in 2004 to 'register' improvements", and Plaintiff does not contest these assertions.

II. Plaintiff's Claim for Fraud Is Also Summarily Dismissed.

"The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages." (*Mitchell v Diji*, 134 AD3d 779, 780 [2d Dept 2015].) A cause of action for fraud must be alleged with specificity, pursuant to CPLR 3016 (b), and "[b]are allegations of fraud in a complaint without any allegation of the details constituting the wrong are not sufficient to sustain a cause of action." (*Kline v Taukpoint Realty Corp.*, 302 AD2d 433, 433–34 [2d Dept 2003].)

As shown above, there do not appear to be any misrepresentations of facts made to Plaintiff, and neither is there a showing that Plaintiff reasonably relied on any misrepresentations to his detriment. To the contrary, the facts reveal that the subject apartment had been legally deregulated when Plaintiff signed his lease, and there is no evidence to show anything otherwise than that Plaintiff believed he was signing a lease that was not subject to the protections of rent stabilization. Accordingly, Plaintiff's cause of action for common law fraud is dismissed.

III. Plaintiff's Claim for Money Damages and Attorney Fees Are Dismissed, and the Court Grants Defendants an Award of Attorney Fees as the Prevailing Parties.

Given that this Court has found that, as a matter of law, Plaintiff cannot show that the subject apartment was improperly deregulated, Plaintiff's claims for money damages and attorney fees must also be dismissed.

In addition, because Plaintiff's lease also contained a prevailing party clause, Defendants are entitled to an award of attorney fees.

CONCLUSION

Accordingly, it is,

ORDERED that the instant motion by Defendants Nine & C, LLC and 145 Avenue C, LLC for summary judgment, pursuant to CPLR 3212, dismissing the complaint in its entirety is granted; and it is further;

ORDERED upon service of a copy of this order with notice of entry on the Office of the Special Referee, 60 Centre Street, Room 119, the clerk shall place the matter on the calendar for assignment to a referee to hear and report with recommendations the amount of expenses including attorneys' fees; and it is further

ORDERED, ADJUDGED and DECLARED that apartment C-3 in the building located at 649 East 9th Street, New York, New York, owned by defendant 9 & C, LLC, is not subject to rent stabilization and plaintiff was not a rent stabilized tenant.

The foregoing constitutes the decision and order of the Court.

Dated: May 1, 2018
New York, New York

J.S.C.
HON. ROBERT D. KALISH
J.S.C.

1. Check one:..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE