Palka v 160 E. 48th St. Owner II, LLC
2018 NY Slip Op 31026(U)
May 17, 2018
Supreme Court, New York County
Docket Number: 156260/16
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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ITZCHAK PALKA,

Plaintiff,

Index No.: 156260/16
DECISION/ORDER

-against-

160 EAST 48TH STREET OWNER II, LLC,

Defendant.

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Hon. Gerald Lebovits, J.S.C.:

In this declaratory judgment action, plaintiff Itzchak Palka moves for summary judgment on the complaint (motion sequence number 001). This motion is granted, in part, in accordance with the following decision.

BACKGROUND

Palka is the tenant of apartment 2K in a building (the building) located at 160 East 48th Street in the County, City and State of New York. *See* notice of motion, exhibit A (complaint), ¶ 2. Defendant 160 East 48th Street Owner II, LLC (landlord) is the building's current owner. *Id.*, ¶ 4. Landlord purchased the building from its prior owner, non-party Buchanan Apartments LLC (Buchanan), pursuant to a deed dated March 3, 2016. *Id.*, ¶ 3.

Palka states that he initially took possession of apartment 2K on July 1, 2010, pursuant to a lease which ran from that date through July 31, 2011, and which specified a monthly rent of $2,750. *See* notice of motion, Palka aff, ¶ 3. Palka also states that he subsequently renewed his lease five times, and that his last lease expired on August 31, 2016. *Id.*, ¶ 4. Palka further states that he paid all of his rent through December 31, 2016, despite the earlier expiration of that lease. *Id.*, ¶ 5. In his complaint, Palka alleges that, before his tenancy there, apartment 2K was occupied between some date in 1998 and October 2001 by Lisa M. Busweiler. *Id.*, exhibit A, ¶ 11.

Palka has presented a copy of a 2016 "registration apartment information" statement regarding apartment 2K that was maintained by the State of New York, Division of Housing and Community Renewal (DHCR), the agency charged with registering the legal rents for all rent-stabilized apartments located in New York City. *See* notice of motion, exhibit C.

In his complaint, Palka notes that the DHCR's rent registration history indicates that apartment 2K was rent-stabilized as of August 2001, and that Busweiler's legal registered rent that year was $1,877.40 a month. *Id.*, exhibit A (complaint), ¶ 11. Palka further notes that, for the years of 2002 through 2016, DHCR's rent registration history recites "reg. not found for subject premises." *Id.*, ¶ 12, exhibit C. Palka argues that, because Busweiler's rent was below $2,000.00 when she vacated the premises, and because the landlord failed to file any subsequent registrations with the DHCR that reflected an increase of apartment 2K's rent over $2,000 a month, the landlord was not entitled to treat apartment 2K as having been de-regulated and

removed from rent-stabilization protection, even though the landlord might have been entitled to increase the apartment's rent above the de-regulation threshold. *Id.*, ¶¶ 19-26. Palka concludes that apartment 2K remains rent-stabilized, as a matter of law, and that the landlord has been overcharging him since the inception of his tenancy. *Id.*

For its part, landlord has presented an affidavit from Michael Sass, the managing director of the company that acted as the managing agent for its predecessor in interest (i.e., Buchanan), who avers that, upon Busweiler's vacating apartment 2K in 2001, Buchanan became entitled to a statutory 20% "vacancy increase" to the apartment's rent. *See* Sass aff in opposition, ¶ 4. Sass further avers that adding that 20% increase ($375.48) to the 2001 legal registered rent ($1,877.40) was sufficient to raise the next legal registered rent for apartment 2K above the statutory $2,000 a month deregulation threshold (i.e., $2,252.88). *Id.*, ¶ 5. Sass finally avers that "in good faith reliance on the prevailing interpretation of the law at the time, upon Busweiler's vacatur . . ., Buchanan treated the apartment as luxury deregulated." *Id.*, ¶ 6. The landlord concludes that apartment 2K is no longer subject to rent-stabilization, and that Palka's case should be dismissed. *Id.*, Zegen aff, ¶ 14.

Palka commenced this action on July 27, 2016, by filing a summons and complaint that sets forth causes of action for (1) a declaratory judgment; and (2) rent overcharge (including treble damages). *See* notice of motion, exhibit A. The court notes that Palka's first cause of action actually requests both declaratory and injunctive relief. *Id.*, ¶¶ 2-34. The landlord filed an answer with a counterclaim for attorney fees on September 9, 2016. *Id.*, exhibit B. Now before the court is Palka's motion for summary judgment on the complaint (motion sequence number 001).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *accord Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (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 to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). Here, Palka's motion initially seeks summary judgment on his first cause of action, in which he requests a combination of declaratory and injunctive relief. Specifically, that cause of action requests the following:

> "27. . . . a declaration the premises are subject to the Rent Stabilization Code and Regulations.
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> * * *
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> "29. . . . an injunction directing [the landlord] to tender . . . a lease which

conforms to the requirements of said Code and Regulations

"30. . . . a permanent injunction directing [the landlord] to comply in all respects with the requirements of said Code and Regulations.

* * *

"32. . . . a declaration that [the 20% vacancy increase that the landlord was entitled to when Busweiler left the unit] is the maximum permissible increase at this time.

"33. . . . an injunction directing [the landlord] to register [apartment 2K] as a rent-stabilized apartment with the DHCR.

"34. . . . a declaration that, until such time as [the landlord] tenders a lease which conforms to the requirements of said Code and Regulations, and registers [apartment 2K] as a rent-stabilized apartment with the DHCR, the legal monthly rent remains at the last rent paid by Busweiler, namely $1,877.40."

See notice of motion, exhibit A, ¶¶ 27-34. But Palka's moving papers are devoid of any argument relating to the two injunction requests listed in the first cause of action. Therefore, the court deems that Palka has abandoned his application for summary judgment on these requests, and it will confine this decision to reviewing Palka's request for summary judgment on his three proposed declarations.

Declaratory judgment is a discretionary remedy which may be granted "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; *accord Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 681 (1st Dept 1999). In an action for a declaratory judgment, the court may properly determine the respective rights of all of the affected parties under a lease. *See Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 (1926). Palka's first cause of action requests three declarations.

In his motion, Palka first argues that he "is entitled to a declaration that the subject apartment is rent-stabilized." *See* plaintiff's mem of law at 1-7. Palka specifically argues that the two holdings by the Appellate Division, First Department, in *Altman v 285 W. Fourth, LLC* (respectively, 127 AD3d 654 [1st Dept 2015] ["*Altman* I"]; and 143 AD3d 415 [1st Dept 2016] ["*Altman* II"]) compel this declaration, as a matter of law. *See* plaintiff's mem of law at 1-7. The landlord responds that Buchanan's luxury deregulation of apartment 2K in 2002 was legally effective, notes that *Altman* II has been accepted for review by the Court of Appeals (29 NY3d 903 [2017]), and argues that First Department "post-*Altman*" holdings compel this court to declare that apartment 2K is not rent stabilized. *See* defendant's mem of law at 6-16. The court finds that both parties arguments rely on incomplete legal analysis, but nonetheless finds for

Palka.

In another case that involves the same subject building and the same defendant/landlord (*Cates-Reither v 160 East 48th St. II Owner LLC* [2017 NY Slip Op 30809 [U], * 1, 2017 WL 1407711, at *1 [Sup Ct, NY County 2017]), this court issued an order on April 18, 2017, finding that

> "[it] is bound by the First Department's first decision in *Altman* [i.e., *Altman* I], holding that a 20% vacancy increase may *not* be considered for the purposes of establishing a legal rent that is above the threshold for luxury deregulation. 127 AD3d at 664. The court is constrained to award the plaintiffs the first declaration that they seek -- a ruling that apartment 12Q is subject to rent stabilization."

Id. (emphasis in original). This court noted that there is "tension" between the First Department's *Altman* I decision and the holding of the Appellate Term, First Department, in *233 E. 5th St. LLC v Smith* (54 Misc 3d 79 [App Term, 1st Dept 2016]), which reaches the opposite result on the issue of using permissible vacancy increases to determine the propriety of luxury deregulations. The court also noted that the First Department's *Altman* II decision has been accepted for review by the Court of Appeals (albeit on different grounds).

Both *Altman* decisions feature abbreviated holdings that use fairly succinct language. In *Altman* I, the First Department found that

> "The motion court erred in dismissing plaintiff's complaint, and declaring that the apartment is not subject to the Rent Stabilization Law. Although defendant was entitled to a vacancy increase of 20% following the departure of the tenant of record, the increase could not effectuate a deregulation of the apartment since the rent at the time of the tenant's vacatur did not exceed $2,000.00."

127 AD3d at 655 (internal citations omitted).

In *Altman* II, the First Department found that

> "In determining the legal regulated rent for plaintiff's apartment, Supreme Court properly disregarded the rent charged four years before the filing of the complaint and looked to the last rent registered with the Division of Housing and Community Renewal (DHCR) ($1,829.49), since the unreliability of the apartment's rental history within the four-year limitations period was caused by defendant's failure to file annual rent registrations.
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> * * *
>
> "Supreme Court properly fixed the legal rent for the apartment at $1,829.49 until such time as defendant tenders a rent-stabilized lease to plaintiff and registers the

> apartment with DHCR. The court properly fixed the initial legal regulated rent at that time at $2,195.39, which reflects the allowed 20% vacancy increase. Defendant is not entitled to longevity increases or any increases allowed by law for the period in which the apartment was illegally removed from rent stabilization."

143 AD3d at 416 (internal citations omitted).

Several months after this court entered its order in *Cates-Reither*, however, the First Department issued another brief, succinctly worded decision in *Matter of COB 3420 Broadway, LLC v Towns* (156 AD3d 577 [1st Dept 2017]) that held that

> "DHCR's finding of a rent overcharge was based on its incorrect determination that respondent['s] . . . apartment was rent stabilized. Upon vacancy of the apartment by the previous rent controlled tenant, the rent reached the $2,000.00 deregulation threshold due to a combination of vacancy and individual apartment improvement increases that were not challenged. Thus, the apartment qualified for exemption from rent stabilization, regardless of whether [respondent] was actually charged and paid a monthly rent that was less than the deregulation threshold."

156 AD3d at 577 (internal citations omitted). At first blush, these decisions appear to be inconsistent. All of them acknowledge that the Rent Stabilization Code authorizes landlords to raise a rent-stabilized apartment's rent by a 20% "vacancy increase" every time a tenant leaves and another tenant signs a new lease for the unit.[1] *See* New York City Administrative Code (NYC Admin Code) § 26-511 (c) (5-a). But the *Altman* decisions did not permit the landlord to use that 20% rent increase as a basis for raising the subject apartment's legal rent above the deregulation threshold and removing the apartment from rent-stabilized status, whereas the *COB* decision did. The court believes that this apparent inconsistency may be resolved by a closer reading of *Altman* II.

The portion of that decision that refused to allow the landlord to destabilize the subject apartment as a result of a permissible 20% vacancy increase cites to the First Department's

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[1] To the extent that the court's April 18, 2017 *Cates-Reither* decision stated that "a 20% vacancy increase may not be considered for the purposes of establishing a legal rent that is above the threshold for luxury deregulation," the court's language was improvident. As both *Altman* decisions indicate, a landlord who fails to file a DHCR rent registration may be entitled to impose a 20% vacancy increase on the unit's rent, and may collect that increase as part of the rent, but that landlord may not end the apartment's rent-stabilized status as a result of such increase. In *Cates-Reither*, as in this case, the applicable 20% vacancy increase would have mathematically raised the subject apartment's rent over the statutory deregulation threshold. But the landlord's failure to file the necessary DHCR registration statements mandated that the apartment in *Cates-Reither* remain subject to rent stabilization anyway. Therefore, no reason exists to disturb the court's earlier decision in *Cates-Reither*.

earlier holding in *Jazilek v Abart Holdings, LLC* (72 AD3d 529 [1st Dept 2010]). 143 AD3d at 416. *Jazilek*, which also acknowledged a landlord's right to collect a 20% vacancy increase to an apartment's rent yet still declined to remove the subject apartment from rent stabilization (and found the landlord liable for rent overcharge), relied on a different section of the Rent Stabilization Code as the basis for the court's decision. NYC Admin Code § 26-517 (e) requires landlords of rent-stabilized apartment units to file "proper and timely" annual rent registration statements with the DHCR, and provides that the landlord's failure to do so shall

> ". . . bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement or if no such statements have been filed, the legal regulated rent in effect on the date that the housing accommodation became subject to the registration requirements of this section."

NYC Admin Code § 26-517 (e).

In *Jazilek*, the landlord filed "false" registration statements with the DHCR. 72 AD3d at 531. In *Altman*, the landlord failed to file any registrations statements. 143 AD3d at 415. But neither *COB* nor the precedent that the First Department cited therein (*see Matter of 18 St. Marks Place Trident LLC v State of New York Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 149 AD3d 574 [1st Dept 2017]) contains any references about registration statements or NYC Admin Code § 26-517 (e).

The court, therefore, concludes that the First Department permitted the landlords in those cases to deregulate their subject apartments by means of a rent calculation that included a 20% vacancy increase (thereby raising the subject rents above the applicable deregulation threshold) because DHCR registration compliance was not an issue in those cases. Thus, any perceived inconsistency is between the two statutes — one which permits a landlord to impose a rent increase and the other which forbids the landlord to collect or otherwise rely on that increase until registration requirements are complied with — not between the court decision that seek to give equal and appropriate effect to both statutes.

This court observes that any confusion could be easily resolved by enacting a simple rule requiring the DHCR to issue a certificate of deregulation every time a landlord seeks to remove an apartment from rent control or rent stabilization, and forbidding a landlord from executing any non-regulated leases until it obtains such a certificate.

But in the absence of such a rule, the court must look to the facts of each case. Here, the landlord did not comply with NYC Admin Code § 26-517 (e), because Buchanan simply stopped filing DHCR registration statements for apartment 2K in 2002, and the current landlord never filed any statements. *See* notice of motion, exhibit C. The result of this non-compliance are twofold. First, apartment 2K remains rent stabilized despite the fact that the landlord was entitled to a 20% vacancy increase upon Busweiler's departure, which would have raised the apartment's legal rent above the applicable $2,000 a month deregulation threshold. Second, the landlord is

rendered potentially liable for collecting a rent overcharge for any amounts above apartment 2K's last legally registered rent of $1,877.40 per month, subject to the liability exceptions listed in the statute.

For the purposes of the instant motion, Palka is entitled to summary judgment, as a matter of law, on two of his proposed declarations: 1) that apartment 2K is subject to rent stabilization; and 2) that until the landlord registers apartment 2K with the DHCR and provides Palka with a lease that reflects the apartment's current legal registered rent, the landlord may not collect any more than the previous legally registered rent of $1,877.40 a month plus the 20% vacancy increase that it is entitled to as a result of Busweiler's departure.

Palka is not entitled to his third proposed declaration — that the aforementioned 20% vacancy increase is the only such increase available to the landlord at this time. The NYC Admin Code § 26-517 (e) does not dictate this result. As discussed above, the statute authorizes curative measures (including a landlord's filing of retroactive DHCR registrations) which the landlord may be able to take advantage of.[2] As a result, the court believes that the most prudent course is to grant Palka's motion solely to the extent of awarding him summary judgment on the two declarations that he seeks, and the balance of the motion is granted to the extent that the issues are referred to a Special Referee. The court commits the issues of the calculation of apartment 2K's current, legal rent, and the calculation of what amount (if any) of rent overcharge the landlord's failure to comply with the DHCR registration requirement has resulted in, to a Special Referee to hear and report on, and directs the Special referee to use the DHCR's "default formula" in making these calculations. *See e.g. Altschuler v Jobman 478/480, LLC*, 135 AD3d 439 (1st Dept 2016).

The Special Referee is also directed to hear argument and make recommendations on the issues of treble damages due to willfulness, and also legal fees. As the First Department observed in *Taylor v 72A Realty Assoc., L.P.* (151 AD3d 95 [1st Dept 2017]):

> "The timing of . . . retroactive registrations may play a role in this case on the issue of willfulness. We have recognized that at least by March 2012 the law clearly required the retroactive return of apartments like these to rent regulation. In the *Lucas* decision . . ., we made it clear that an improperly deregulated apartment was required to be returned to rent stabilization and that the base date rent should not have been set at the market rate. The owner here failed to register [the subject] apartment . . . and readjust the rent until 2014 when faced with this litigation. These facts preclude any determination at this time about whether an overcharge, if any, was willful, and the owner should be allowed the opportunity to explain the reasons for such delay and the steps, if any, it undertook to bring itself in compliance. Legal fees also cannot be determined without the underlying

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[2] Further, pursuant to NYC Admin Code § 26-516 (a) (2) (i), "[n]o penalty of three times the overcharge may be based upon an overcharge having occurred more than two years before the complaint is filed."

issues of overcharge and penalty being decided."

151 AD3d at 106-107. Inasmuch as the balance of Palka's motion seeks both summary judgment on his second cause of action for rent overcharge, that portion of this motion is granted to the extent that the issues are referred to a Special Referee. Palka's request for legal fees will be the subject of a legal fee hearing at the close of this litigation.

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Itzchak Palka (motion sequence number 001) is granted solely to the extent that the portion of the motion seeking a declaratory judgment with respect to the subject matter of the complaint's first cause of action is granted to the extent set forth below, with costs and disbursements to plaintiff as taxed by the Clerk, but is otherwise denied; and it is further

ORDERED that the portion of plaintiff's motion seeking injunctive relief is denied without prejudice; and it is further

ADJUDGED and DECLARED that

1) Apartment 2K in the building located at 160 East 48th Street in the County, City and State of New York is a rent-stabilized unit subject to the provisions of the Rent Stabilization Law and Code; and

2) defendant/landlord 160 East 48th Street Owner II, LLC is directed to immediately register apartment 2K with the State of New York Division of Housing and Community Renewal as a rent-stabilized unit and to thereafter provide plaintiff with a lease that reflects the apartment's current legal registered rent (once same has been calculated); and

3) until defendant/landlord provides such lease, defendant/landlord is barred from collecting rent in excess of apartment 2K's previous legal registered rent ($1,877.40 per month) plus a permissible 20% vacancy increase ($275.48) for a total of $2,252.88 per month; and it is further

ORDERED that the balance of this motion is granted to the extent that it is referred to a Special Referee to hear and report with recommendations on the following issues:

1) the calculation of the current, legal rent for apartment 2K (utilizing the DHCR's "default formula");

2) the calculation of what amount, if any, rent overcharge defendant/landlord is liable for; and

3) a recommendation about whether the defendant/landlord acted "willfully" in imposing said overcharge, if any,

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 issue; and it is further

ORDERED that 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.

Dated: May 17, 2018

J.S.C.

HON. GERALD LEBOVITS
J.S.C.