NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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CHRISTOPHER SONG,

Plaintiff,

Index No.: 156262/16
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 Christopher Song moves for summary judgment on the complaint (motion sequence number 001). For the following reasons, this motion is granted in part and denied in part.

BACKGROUND

Song is the tenant of apartment 14N 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. The landlord purchased the building from its prior owner, non-party Buchanan Apartments LLC (Buchanan), pursuant to a deed dated March 3, 2016. *Id.*, ¶ 3.

Song states that he originally took possession of apartment 14N pursuant to a non-rent-stabilized lease that ran from August 24, 2014, to August 31, 2015, and that he thereafter signed a renewal lease that ran from September 1, 2015, to August 31, 2016. *See* notice of motion, Song ff, ¶ 2. Song further states that his original lease specified a monthly rent of $3,200, which was raised to $3,375.00 on his renewal lease. *Id.* Song finally states that he has paid all of his rent through March 3, 2017. *Id.*, ¶ 4.

Song's complaint alleges that, before his tenancy, apartment 14N was registered as a rent-stabilized unit from between 1984 and 2004, and vacant in 2005. *See* notice of motion, exhibit A (complaint), ¶¶ 10-11. Patel has presented a copy of a 2016 "registration apartment information" statement for apartment 14N that was generated 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 within New York City. *Id.*, exhibit C. The DHCR's rent registration history discloses that, in 2004, apartment 14N was listed as a rent-stabilized unit occupied by Florence Neuhaus at a monthly rent of $1,107.02, that in 2005 the unit was registered as "vacant" with the same monthly rent, and that from 2006 onward it was listed as "exempt - high rent vacancy - reg not required." *Id.* Song argues that, because Neuhaus's rent was below $2,000 when she vacated the premises, and because the landlord failed to file any subsequent registrations with the DHCR reflecting an increase of apartment

14N's rent over $2,000 a month, landlord was not entitled to treat apartment 14N as having been de-regulated or to remove it from rent-stabilization. *Id.*; exhibit A (complaint) ¶¶ 11-28. Song concludes that apartment 14N remains rent-stabilized, as a matter of law, and that the landlord has been overcharging him since the inception of his tenancy. *Id.*

The 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 Neuhaus's vacating apartment 14N, Buchanan became entitled to a statutory 20% "vacancy increase" to the apartment's rent, as well as to additional "individual apartment increases" (IAIs) resulting from renovation work that Buchanan performed in the unit. *See* Sass aff in opposition, ¶ 4. Sass further avers that adding the 20% vacancy increase and the IAI increases to the 2005 legal registered rent was sufficient to raise the next legal registered rent for apartment 14N above the statutory $2,000 a month deregulation threshold. *Id.*, ¶ 5. Sass finally avers that "in good faith reliance on the prevailing interpretation of the law at the time, upon Neuhaus's vacatur . . ., Buchanan treated the apartment as luxury deregulated." *Id.*, ¶ 6. The landlord concludes that apartment 14N is no longer subject to rent-stabilization, and that Song's case should be dismissed. *Id.*, Zegen aff, ¶ 13.

Song 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 Song's first cause of action requests both declaratory and injunctive relief. *Id.*, ¶¶ 2-35. The landlord filed an answer with a counterclaim for attorney's fees on September 9, 2016. *Id.*, exhibit B. Now before the court is Song's motion for summary judgment on the complaint (motion sequence number 001).

DISCUSSION

Song's motion seeks summary judgment on the complaint. 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); *accord Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). Here, Song's first cause of action requests hybrid declaratory and injunctive relief, specifically:

> "28. . . . a declaration the premises are subject to the Rent Stabilization Code and Regulations.
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> * * *
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> "30. . . . an injunction directing [the landlord] to tender . . . a lease which

conforms to the requirements of said Code and Regulations.

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

* * *

"33. . . . a declaration that [the 20% vacancy increase that the landlord claims that it was entitled to after Neuhaus left the apartment] is the maximum permissible increase at this time.

"34. . . . an injunction directing [the landlord] to register [apartment 14N] as a rent-stabilized apartment with the DHCR.

"35. . . . 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 14N] as a rent-stabilized apartment with the DHCR, the legal monthly rent remains at the last rent paid by Neuhaus, namely $1,107.02."

See notice of motion, exhibit A (complaint), ¶¶ 28-35.

This decision follows another decision that the court issues today in the case of *Itzchak Palka v 160 East 48th Street Owner II LLC* (Index No. 156260/16). It involves the same landlord, the same building, and substantially identical pleadings. This decision also incorporates all of the legal findings and rulings that the court made in the *Palka* decision. The first of those findings is that, because Song's motion, like Palka's, omits any argument regarding the injunctions requested in the first cause of action, the court deems that Song has abandoned those requests in his motion, and will, instead, confine this discussion to Song's three proposed declarations.

The first of these is a declaration that apartment 14N is rent-stabilized. *See* notice of motion, exhibit A (complaint), ¶ 28. The court finds that apartment 14N is rent stabilized. The unrefuted evidence discloses that Buchanan ceased filing annual registration statements for apartment 14N in 2006, and that the instant defendant/landlord has never filed any registration statements for the apartment. *See* notice of motion, exhibit C. The evidence also discloses that the last legally registered rent for apartment 14N was $1,107.02 a month in 2005 - an amount below the applicable $2,000 a month de-regulation threshold set forth in the Rent Stabilization Code (RSC). *Id., see* New York City Administrative Code (NYC Admin Code) § 26-511 (c) (5-a).

As the court observed in the *Palka* decision, NYC Admin Code § 26-517 (e) mandates that a landlord must file "proper and timely" annual registration statements with the DHCR for all rent regulated apartments, and a landlord's failure to submit such statements has twofold effect. First, controlling Appellate Division, First Department, case law mandates that an

unregistered apartment will remain rent stabilized, whether the landlord might be entitled to a 20% vacancy rent increase which would otherwise raise the apartment's legal rent above the RSC's $2,000 a month deregulation threshold. *See Altman v 285 W. Fourth LLC*, 143 AD3d 415 (1st Dept 2016). Second, NYC Admin Code § 26-517 (e) also subjects the landlord to potential liability for imposing a rent overcharge, subject to certain exceptions listed in the statute.

Here, the court also observes that, given that the last legally registered monthly rent for apartment 14N was $1,107.02, a 20% vacancy increase ($221.40) would have left the apartment's rent below the $2,000 deregulation threshold that applied in 2005 (i.e., $1,328.42).

The court also observes that landlord has failed to support its claim that apartment 14N's rent was raised above the threshold by certain IAI increases. Pursuant to RSC § 2522.4 (a) (4), the landlord would have been allowed to permanently add 1/40th of the total cost of any pre-2011 renovation work performed in apartment 14N to the apartment's rent stabilized rent, provided that the work consisted of certain statutorily listed IAIs. *See also* Rent Stabilization Law (RSL) § 26-511 (c) (13).

The DHCR has promulgated a series of "operational bulletins" that set forth the agency's rules regarding what types of evidence it will deem sufficient proof of a landlord's IAI expenditures, in satisfaction of RSC § 2522.4 (a) (4). These rules might be considered stringent. But following a remand from the Court of Appeals in *Jemrock Realty Co., LLC v Krugman* (13 NY3d 924 [2010]), the Appellate Division, First Department, has recognized that these rules are not binding on trial courts, which must, instead, make a factual inquiry into the IAI expenditures that are alleged in any given case, and then issue a determination that is "based on the persuasive force of the evidence submitted by the parties." *Jemrock Realty Co., LLC v Krugman*, 72 AD3d 438, 440 (1st Dept 2010), quoting 13 NY3d at 926.

But here the landlord has presented no evidence concerning alleged IAIs in apartment 14N, apart from Sass's unsupported claim that they were performed. This evidence is insufficient, and the court must, therefore, reject as unfounded the landlord's argument that the purported IAI increases raised apartment 14N's rent over the deregulation threshold. The court concludes that apartment 14N is still rent-stabilized. The landlord's failure to comply with NYC Admin Code § 26-517 (e), and its failure to establish the above-mentioned IAI increases, mandate this conclusion as a matter of law. Therefore, the court grants that portion of Song's motion as it relates to the first proposed declaration in his first cause of action.

Song's second proposed declaration is that the only rent increase that the landlord is entitled to at this time is a 20% vacancy increase over the apartment's last registered rent of $1,107.02, or $221.40. *See* notice of motion, exhibit A (complaint), ¶ 33. As the court previously observed, such a finding would result in a legal monthly rent of $1,328.42, which is well under the $2,000 a month statutory deregulation threshold. NYC Admin Code § 26-511 (c) (5-a). But in the *Palka* decision, the court also found that a determination that this is the *only* rent increase that the landlord is entitled to would be unwarranted. The NYC Admin Code § 26-517 (e) permits landlords to undertake curative measures, including the filing of retroactive DHCR

registrations, by which landlords may remove any legal impediments to their collecting rent increases. Here, too, the court's finding that the landlord has so far failed to establish the right to augment apartment 14N's rent with IAI increases does not mean that it is forever foreclosed from doing so. The landlord may well establish such a right, if it can present sufficient proof of its expenditures for statutorily-recognized IAI renovation work. Therefore, the court denies that part of Song's motion as it relates to the second proposed declaration in his first cause of action.

Song's third proposed declaration seeks a judgment that, until such time as the landlord tenders a lease that conforms to the requirements of the RSC and registers apartment 14N as a rent-stabilized unit with the DHCR, "the legal monthly rent remains at the last rent paid by Neuhaus, namely $1,107.02." *See* notice of motion, exhibit A (complaint), ¶ 35. In the *Palka* decision, the court noted the holding of the Appellate Division, First Department in *Altman v 285 W. Fourth LLC* (143 AD3d 415 [1st Dept 2016], "*Altman* II"), that an apartment will remain rent stabilized, despite the availability of a 20% vacancy increase which would raise its rent above the deregulation threshold, where the landlord has failed to submit annual registration statements to the DHCR, in violation of NYC Admin Code § 26-517 (e).

Here, the court has already determined that apartment 14N is rent stabilized, for the reasons discussed above.[1] The court concludes that, as was the case with Palka's apartment, Song is entitled to a declaration that the landlord must register apartment 14N with the DHCR as a rent-stabilized unit, and must issue Song a rent-stabilized lease that reflects the apartment's current legal rent. The issues of calculating that rent, and also of calculating any overcharge that the landlord might be liable for as a result of its failure to file statutorily required registration statements, are committed to a Special Referee to hear and report on the issues. Pending the court's receipt and acceptance of the Referee's report, however, the court directs Song to pay, and landlord to accept, monthly rent for apartment 14N in the amount of $1,328.42, which reflects the apartment's last legally registered monthly rent of $1,107.02, plus a 20% vacancy increase of $221.40.

The balance of Song's motion seeks summary judgment on his second cause of action, which seeks money damages for rent overcharge, and treble damages because the overcharge was "willful," in violation of RSC § 2526.1 (a) (1). *See* notice of motion, exhibit A (complaint), ¶¶ 36-39 In the *Palka* decision, the court took note of the holding of the Appellate Division, First Department, in *Taylor v 72A Realty Assoc., L.P.* (151 AD3d 95 [1st Dept 2017]) that

> "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

[1] The landlord failed to submit any registration statements for apartment 14Nn violation of NYC Admin Code § 26-517 (e) and the apartment's rent remains below the deregulation threshold even with a 20% vacancy increase.

> 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 issues of overcharge and penalty being decided."

151 AD3d at 106-107. Here, as in *Palka*, the court finds that, pursuant to *Taylor*, the Special Referee should receive evidence on the issue of "willfulness" and include a recommendation about whether such "willfulness," if any, mandates the imposition of treble damages on any rent overcharge that the landlord may be liable for, if any. The court finds that that portion of Song's motion as it seeks summary judgment on his second cause of action is granted to the extent that those issues are referred to a Special Referee (along with so much of Song's motion as it relates to the balance of his first cause of action).

Finally, as in *Palka*, Patel'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 Christopher Song (motion sequence number 001) is granted solely to the extent that so much of said motion as it seeks 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 14N 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) the defendant/landlord 160 East 48th Street Owner II, LLC is directed to immediately register apartment 14N 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 the defendant/landlord provides such lease, defendant/landlord is barred from collecting rent in excess of apartment 14N's previous legal registered rent ($1,107.02 per month) plus a permissible 20% vacancy increase ($221.40) for a total of $1,328.42 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 14N (utilizing the DHCR's "default formula");

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

3) a recommendation about whether the defendant/landlord acted "willfully" in imposing the 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

HON. GERALD LEBOVITS J.S.C.