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

LEON TOVAR and MARIA TOVAR,

Plaintiff, Index No. 150776/2017

against

ADAM'S TOWER LIMITED PARTNERSHIP, THE KIBEL COMPANIES, LLC, PETER LEVENSON, HENRY KIBEL, AND LEE ROSEN,

Defendants.

DECISION & ORDER

Anthony Cannataro, J.:

Plaintiffs seek in this action a declaratory judgment and money damages stemming from defendants' alleged rent overcharge and breach of the warranty of habitability. Defendants counterclaim for unpaid rent and attorneys' fees.

Plaintiffs now move for summary judgment and/or partial summary judgment as to liability and move to dismiss and/or strike all defenses and counterclaims. In the alternative, plaintiffs move for an order compelling defendants to offer a more definitive statement of any defenses that are not dismissed. Defendants oppose plaintiffs' motion as premature. Defendants also cross-move to strike the complaint and for related discovery sanctions.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, Leon and Maria Tovar (the Tovars), entered into a two-year lease with Adam's Tower Limited Partnership (ATLP) for an apartment with a private wrap-around terrace located at 351 East 84th Street, Apartment 2D (the subject premises). ATLP is the owner and landlord of the subject premises, and Peter Levenson is a partner of ATLP. The Kibel Companies, LLC (TKC) is the managing agent, and the now-deceased Henry Kibel was the principal of TKC. Lee Rosen is a leasing agent for the subject

premises. The building, which contains the subject premises, was constructed prior to 1974 and contains approximately 179 residential units and seven commercial units.

The original lease had a lease term commencing November 1, 2011, set rent at $7,700 per month, and did not include a rent-stabilization rider. Plaintiffs renewed their lease for another two-year period beginning in October 2013, with a rent of $8,050 per month. Plaintiffs again renewed their lease for a single year term at a rate of $8,750 beginning November 1, 2015. However, on or around June 2016, ATLP commenced a nonpayment proceeding against plaintiffs. That case settled with plaintiffs agreeing to move out of the apartment on or around August 31, 2016 but reserving the instant claims.

The certified Division of Housing and Community Renewal (DHCR) rent registration history records for 351 East 84th Street, Apt 2D indicate that no rent amount was ever registered with DHCR. The rental history states that the first tenant registered in 1984 was rent stabilized, but does not provide any corresponding rent. There were no further registrations until 1992 and 1993, when the apartment was registered as exempt due to "owner occupied/employee" status. From 1994 to 1995, there were no registrations. In 1996, the apartment was registered as temporarily exempt. However, in 1997, the apartment was registered as a "high rent vacancy." After 1997, the apartment was registered as exempt without a reason given.

The instant action was commenced on January 23, 2017. Defendants interposed an answer four months later and served a demand for a verified bill of particulars, combined demands, and a notice to take depositions on July 26, 2017. Plaintiffs failed to respond to these demands and never sought any discovery from defendants before making the instant motion for summary judgment.

ARGUMENTS

On their motion, plaintiffs argue that they are entitled to judgment as a matter of law on the issue of liability on both their rent overcharge and breach of the warranty of habitability claims. As to the rent overcharge cause of action, plaintiffs

contend that their apartment was rent-stabilized, and that it was fraudulently deregulated. Plaintiffs rely on the DHRC registration history to support their fraud argument and further contend that the rent history has been insurmountably tainted or is inherently unreliable. Thus, plaintiff urges the Court to use the "default rent formula" provided in Rent Stabilization Code § 2522.6 to determine the legal rent. With respect to their claim for breach of the warranty of habitability, plaintiffs rely on the affidavit of Leon Tovar who avers that, beginning June 2016, construction began on the building that subjected the Tovars to dust, dirt, noxious chemical fumes, asbestos, and diminished light. However, insofar as plaintiffs seek summary judgment on this claim, they failed to proffer any legal arguments in support of their motion. As such, this branch of the motion is deemed abandoned.

In opposition, defendants argue that plaintiffs' motion must be denied as premature given that plaintiffs have willfully failed to respond to their discovery demands. Defendants further allege that triable issues of fact exist sufficient to defeat summary judgment at this juncture. Lastly, they contend that the portion of plaintiffs' motion seeking to strike defendants' defenses and counterclaims or compel a more definite statement must be denied because the proper form would be to serve a demand for a verified bill of particulars.

DISCUSSION

On a motion for summary judgment, the movant carries the initial burden of tendering sufficient, admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden then shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The Court must view the evidence in the light most favorable to the nonmoving party and give them the benefit of all reasonable inferences that can be drawn (*Benjamin v City of New York*, 55 Misc. 3d 1217[A] [N.Y. Sup. Ct. 2017]). Summary judgment "is a drastic remedy which should only be employed when there is no doubt

as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 363 [1974]).

As a preliminary issue, the Court must address the question of whether it can look past the base date, i.e. the date four years prior to the filing date of the complaint, to determine the proper amount of rent to be charged. Rent overcharge claims are generally subject to a four-year statute of limitations (*Grimm v. State Div. of Hous. & Cmty. Renewal Office of Rent Admin.*, 15 N.Y.3d 358, 364 [2010]). Rental history beyond four years may nevertheless be examined to determine "whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date" (*see Grimm*, supra at 366). However, a mere allegation of fraud or an increase in the rent alone will not be sufficient, instead it is necessary to establish evidence of a landlord's fraudulent deregulation scheme (*id.* at 367). In considering what constitutes a colorable claim for fraud, it has been established that there are three categories of factors to examine: (1) whether the tenant alleges circumstances that indicate a violation of the Rent Stabilization Law (RSL) and Rent Stabilization Code (RSC) in addition to charging illegal rent; (2) whether evidence indicates a fraudulent scheme to deregulate the apartment; and (3) whether the rent history is inconsistent with the lease history (*Pehrson v Div. of Hous & Cmty. Renewal of State*, 34 Misc. 3d 1220[A] [Sup. Ct. 2011]).

Despite plaintiff's detailed explanation on how to interpret rent regulation histories, the Court cannot determine whether there is a rent overcharge in the absence of any discovery. Here, the DHCR records reveal little about the rental history of the apartment or the reliability of the rent on the base date. It is also unclear whether there is an inconsistency with the lease history since no prior leases for the unit have been sought by plaintiff. Nor can the Court analyze the sufficiency of the exemptions listed in the DHCR records without a meaningful exchange of documents, if any, from the owner to plaintiffs. Absent discovery on these pertinent issues, plaintiff has not demonstrated its entitlement to liability on its rent overcharge claim as a matter of law (*see e.g. Pehrson*, supra at 3 [prior leases considered in determining whether colorable claim of fraud exists]; *see also 1290 Ocean Realty LLC v Massena*, 46 Misc 3d 1223(A) [Civ Ct 2015]

[discrepancy in financial documents submitted by landlord demonstrating alleged apartment improvements sufficient to show indicia of fraud]).

Insofar as defendants seek discovery sanctions against plaintiffs for their failure to provide responses to demands, the motion is denied as they moved for summary judgment shortly after defendants' reply and counterclaim was filed. Thus, it cannot be said that plaintiff's noncompliance was contumacious and the Court will not impose the "extreme" remedy of dismissing the complaint (*CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 321 [2014]).

The remaining arguments raised in the moving papers have been considered and are without merit or deemed abandoned. Accordingly, it is

ORDERED that plaintiffs' motion is denied in its entirety; and it is further

ORDERED that defendants' cross-motion to strike is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 490, 111 Centre Street, on July 11, 2018 at 2:15PM.

Dated: 6/15/18

ENTER:

Anthony Cannataro, JSC