Bernstein v 96 Diamond St. Realty Inc.
2018 NY Slip Op 31280(U)
June 18, 2018
Supreme Court, Kings County
Docket Number: 514225/2016
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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MARCEE BERNSTEIN, ELIZABETH RUDY, MAX RUDY, MATT CARON, MELISSA CARON, JUSTIN WELLS, AVIVA GROSSMAN, ALICIA VELEZ, SCOTT KRAUS, COLE INGRAM, MELAYNA INGRAM, TIM HETTLER, GESSICA LESSER and MATTHEW BADDOUR,

Plaintiffs,

-against-

96 DIAMOND STREET REALTY INC. a/k/a 96 DIAMOND ST. LLC, a/k/a 96 DIAMOND STREET LLC,

Defendant.

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DECISION / ORDER / JUDGMENT

Index No.514225/2016
Motion Seq. No. 1
Date Submitted: 3/29/18
Cal No. 4

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiffs' motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	20-50
Answering Affirmation and Exhibits Annexed.....	51-53, 58, 60
Reply Affirmation.....	56-57, 59

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is an action for declaratory relief with regard to the plaintiffs' claim that they are protected by rent stabilization, together with their prayer for the court to set their legal regulated rents, for an order directing the defendant to refund the alleged rent overcharges and to pay plaintiff treble damages and attorneys' fees. Plaintiffs are seven households currently residing in defendant's eight-family building at 96 Diamond Street, Brooklyn, New York, and one tenant who resided there but has since relocated.

Plaintiffs contend that defendant[1] fraudulently treated the plaintiffs' apartments as deregulated new construction while defendant applied for and was receiving the benefits of New York State's 421-a real estate tax abatement program.[2] A property owner who applied to participate in this program in 2009, as defendant did, was required to comply with the Rent Stabilization Code with regard to rents if the new building was going to be a multiple dwelling for rental, as opposed to home ownership, such as condominiums or co-ops (RPTL. § 421-a).[3]

This action was commenced by e-filing the summons and complaint on August 15, 2016, making the "base date" for establishing the legal regulated rents four years earlier, or August 15, 2012, pursuant to § 2526.1(a) of the New York Rent Stabilization Code.[4] The Initial Apartment Registration (with DHCR[5]) for the period from 10/1/2010 to 9/30/2011[6] states that the initial legal regulated rents were $1,700 for seven of the eight apartments, with apartment #1A registered at $1,500.[7] However, the leases provided in

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[1]The first name in the caption is the property owner. The other entities named, both LLC's, are not "also known as" defendant corporation. In any event, the LLCs are hereby stricken from the caption.

[2]Real Property Tax Law § 421-a.

[3]The statute was substantially revised in 2015.

[4]9 NYCRR § 2520.1 *et seq.*, hereinafter the "RSC".

[5]New York State Division of Housing and Community Renewal, hereinafter "DHCR".

[6]While the defendant purchased the property in 2005, a new Certificate of Occupancy was issued on September 14, 2010 following defendant's demolition of the existing building and construction of a new building on the site.

[7]Defendant obtained approval of its 421-a application while construction was ongoing, and the tax abatement commenced on July 1, 2009, before the Certificate of

movants' papers for this time period show that the defendant entered into leases during that time period with rents which were above the registered initial legal regulated rents. The next rent registration was filed on May 10, 2013 for the period from November 1, 2011 to October 31, 2012, which includes the base date of August 15, 2012, as is applicable herein.[8] This registration indicates that the legal registered rents for that period were $1,763.75 for each apartment except 1A, which was registered at $1,556.25. Plaintiff Rudy's lease for apartment #2A for the period October 1, 2011 to September 30, 2012, annexed to the motion papers as Exhibit I-6, is for $2,500. No subsequent rent registration was filed by defendant until a "retroactive" registration was filed on August 3, 2016, which indicates (Exhibit G) that after November 1, 2012, there were large rent increases for all eight apartments.

Plaintiffs contend that the May 10, 2013 and August 3, 2016 rent registration filings with DHCR were fraudulent, improper and unreliable and that consequently, their rents should be frozen at the initial legal regulated rents approved by HPD[9] and filed with DHCR, insofar as defendant completely disregarded the legal registered rents in setting the rents for the apartments in the building. In addition, they maintain that treble damages are appropriate here, as it is clear that the overcharges were willful, given that the 421-a tax abatement program mandates that the apartments be subject to rent

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Occupancy was issued. The initial legal rents were approved by HPD before the Certificate of Occupancy was issued.

[8]None of the plaintiffs were residing at the premises on August 15, 2012, the "base date."

[9]New York City Department of Housing Preservation and Development, hereinafter "HPD".

stabilization, which was completely disregarded by defendant in setting the actual rents charged. Plaintiffs contend that defendant's deposition witness professed a complete lack of knowledge of the relevant facts and that defendant's corporate president invoked his Fifth Amendment privilege against self incrimination in refusing to testify, so that defendant has not and cannot raise an issue of fact sufficient to prevent summary judgment.

Defendant counters that plaintiffs have failed to make a prima facie showing of their entitlement to summary judgment, and asserts that plaintiffs' reliance on one affidavit from each household is insufficient, as it fails to authenticate or corroborate the payments purportedly made by their co-tenants; that the plaintiffs who submitted the affidavits fail to allege that they are "tenants" and fail to provide proof of all of their claimed payments; and that the affiants fail to authenticate their annexed leases. Defendant further contends that plaintiffs have not proven that the building in fact received a tax abatement pursuant to New York State Real Property Tax Law § 421-a.

CONCLUSIONS OF LAW

First, it must be noted that Supreme Court and the DHCR share concurrent jurisdiction over the determination of legal rents and the adjudication of rent overcharge claims, and in the absence of the filing of an overcharge claim with DHCR, there is no basis to stay or dismiss this action. The plaintiffs need not exhaust any administrative remedies (*see Nezry v Haven Ave. Owner LLC*, 28 Misc 3d 1226 [A], 2010 NY Slip Op 51506[U] [Sup Ct NY Co 2010]). They have a choice of forums.

Next, the four-year statute of limitations for rent overcharge claims generally

limits the examination of the rental history of housing accommodations to the four-year period preceding the filing of an overcharge complaint, known as the "base date" (*see Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 364 [2010]; *Watson v New York State Div. of Housing*, 2011 NY Slip Op 33610[U] [Sup Ct, Queens County 2011]). However, the rental history may be examined for a period earlier than the base date for the limited purpose of determining if a fraudulent scheme to remove the apartment(s) from stabilization tainted the reliability of the rents on the base date (*see RSC § 2526.1 (a)(2)(iv); Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d at 365). Here, the Certificate of Occupancy was issued on September 14, 2010. The tax abatement was effective July 1, 2009, and continues for fifteen years. As the effective date of the 421-a tax abatement was prior to the date the Certificate of Occupancy was issued, the premises became subject to rent regulation before any of the leases for the new building, never mind those in issue here, were signed (*see North-Driggs Holdings, LLC v Burstiner*, 44 Misc 3d 318, 326–27 [Civ Ct, Kings County 2014]).

RSC § 2521.1(g) provides that "[t]he initial legal regulated rent for a housing accommodation constructed pursuant to section 421-a of the Real Property Tax Law shall be the initial adjusted monthly rent charged and paid [after the building is completed] but no higher than the rent approved by HPD pursuant to such section for the housing accommodation" (*Watson v New York State Div. of Housing*, 2011 NY Slip Op 33610[U]). Here, the rents approved by HPD and registered with DHCR were $1,700 for seven of the apartments, and $1,500 for apartment #1A. The rent

registration filed on May 10, 2013 for the period from November 1, 2011 to October 31, 2012, which encompasses the base date of August 15, 2012, states that the registered rents for that period were $1,763.75 for each apartment except 1A, which was registered at $1,556.25. These increases, from $1,700 to $1,763.75 and from $1,500 to $1,556.25, constitute the allowable increase of 3.75% for one-year renewals entered into after October 1, 2011 and before September 30, 2012, as is set forth in New York City Rent Guidelines Board 2011 Apartment and Loft Order #43.

Contrary to defendant's contentions, plaintiffs have made a prima facie showing of their entitlement to summary judgment on the issue of liability. Plaintiffs' have established that, as a matter of law, the subject premises were subject to rent stabilization as a result of the 421-a tax abatement granted to defendant (see RSC § 2520.11[p][2]; *North-Driggs Holdings, LLC v Burstiner*, 44 Misc 3d at 326) and that, as defendant's tenants, residing at the premises pursuant to written leases, they paid rents in excess of the legal regulated rents for their apartments. Further, one affidavit from each household is sufficient to make a prima facie showing of entitlement to summary judgment on an overcharge claim. Plaintiffs are listed, by name, as tenants in the certified rent registration statements filed by defendant with DHCR, so the names on the affidavits can be matched to the names on the defendant's rent registrations. Likewise, their affidavits, combined with the copies of their leases, are sufficient to establish that they were overcharged, without a complete set of cancelled checks evidencing their rental payments, in the absence of any dispute that the rents stated in their leases were the amounts paid (*see Remnek v Sindell*, 42 Misc 2d 291 [App Term, 2d Dept 1964]; *Gersten v 111-50 Realty Co.*, 188 Misc 2d 403, 405 [Civ Ct, Queens

County 2001]; *see also Clearwater Realty Co. v Hernandez*, 256 AD2d 100, 103 [1st Dept 1998]).

Next, plaintiffs have supplied ample proof that the building was granted a RPTL § 421-a tax abatement. In an abundance of caution, plaintiffs availed themselves of the opportunity provided by the court to make a supplemental submission of a certified copy of the document in the motion papers, a document from the New York City Department of Finance which clearly indicates that the building received a 421-a tax abatement commencing on July 1, 2009.[10]

Insofar as the applicable base date rents herein, as registered with DHCR, are the initial legal regulated rents approved by HPD but with one properly calculated renewal increase of 3.75%, and the initial legal regulated rents were listed in defendant's application to HPD (Exhibit E) and were approved by HPD, the court finds that the legal regulated rents for the base date of August 15, 2012 are $1,763.75 for each apartment except 1A, which was $1,556.25. These rents are reliable and should be used to calculate the legal regulated rents during the plaintiffs' tenancies, by applying all applicable renewal and vacancy allowances after the base date. (RSC § 2528.4; *see Matter of 215 W 88th St. Holdings LLC v New York State Div. of Hous. & Community Renewal*, 143 AD3d 652, 653 [1st Dept 2016]; *see also Thornton v Baron*, 5 NY3d 175, 181 [2005]). The motion papers include copies of leases in effect at the time of the original DHCR registration and plaintiffs' leases, but not copies of the leases in effect in the intervening period. Consequently, a hearing is necessary to determine the

[10]July 1st is the beginning of the fiscal year in New York City and all tax abatements granted under § 421-a must start on July 1st.

legal regulated rent for each of the plaintiffs' apartments and the overcharge each plaintiff is entitled to receive a refund for.

In view of defendant's complete disregard for its clear obligations under the Rent Stabilization Code, treble damages are appropriate here (see *Matter of Century Tower Assoc. v State of N.Y. Div. of Hous. & Community Renewal*, 83 NY2d 819, 823 [1994] ["The Omnibus Housing Act of 1983 provides for treble damages for overcharges collected after the Act's effective date (Apr. 1, 1984) unless the owner establishes that the overcharges were not willful (see, New York City Administrative Code § 26-516 [a])"]). To be clear, this burden of proof is on the property owner. The conclusory statement in Miecyzslaw Cielspak's affidavit (NYSCEF DOC #52) that the initial rents were set in reliance on "professional advice" from an accountant and a consultant is insufficient to rebut the presumption of wilfulness engendered by the defendant's complete disregard for the stabilized status of the subject apartments, something which is clearly acknowledged in the defendant's 421-a application to HPD and in the certified rent registration statements (Exhibit F) which defendant filed with DHCR, but which do not reflect the rents actually charged.[11] (*see Matter of 4947 Assoc. v New York State Div. of Hous. & Community Renewal*, 199 AD2d 179, 180 [1st Dept 1993] ["the owner offered no proof to sustain its burden of showing that its rent overcharge was not willful and, indeed, it must have known from its own rent rolls that the rent was excessive"]; *Matter of East 163rd St. v New York State Div. of Hous. & Community Renewal*, 4 Misc

[11] "For the purpose of determining if the owner establishes by a preponderance of the evidence that the overcharge was not willful, examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section shall not be precluded." 9 NYCRR § 2526.1 (a)(2)(vi).

3d 169, 174 [Sup Ct, Bronx County 2004]).

It is noted that Mr. Cielspak's affidavit solely refers to the initial regulated rents listed in defendant's 421-a application, which plaintiffs are not disputing, and does not address the setting of rents in the leases thereafter. It is clear that there is no evidence in defendant's papers in opposition to plaintiffs' motion which supports the defendant's contention that the rent overcharges were not willful. For example, in Exhibit H, plaintiffs provide the leases for the initial tenants at the premises. The initial legal regulated rent for #3B was registered as $1,700 and the lease rent is $2,100 per month. This lease was for the period October 1, 2009 to September 30, 2011.[12]

The court finds that plaintiffs are entitled to treble damages for up to two years prior to the commencement of this action, pursuant to their Third Cause of Action, which is provided for in the New York City Admin Code § 26-516(a)(2)(i) and RSC § 2526.1(a)(2)(i). That is, plaintiffs are entitled to treble damages from the date they first moved into the building to the date this action was commenced, August 15, 2016, but for no more than two years. It is noted that defendant stipulated to lower the rents while this action is pending (Exhibit J).

Finally, plaintiffs are entitled to attorneys' fees, as requested in their Fourth Cause of Action and pursuant to RSC § 2521.1 (d) and RPL § 234, as the prevailing party (*see Paganuzzi v Primrose Mgt. Co.*, 181 Misc 2d 34, 38 [Sup Ct, NY County 1999] ["the plaintiff's right to be charged the legal, regulated rent under the Rent Stabilization Code must be construed as an implied covenant of the plaintiff's lease.

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[12] Defendant received a notice of violation from the New York City Department of Buildings for renting the apartments before the Certificate of Occupancy was issued.

Because the defendant has breached this covenant and charged rent in excess of the legal, regulated rent, pursuant to RPL § 234, plaintiff is entitled to recover attorneys' fees for prosecuting this action"], *affd.* 268 AD2d 213 [1st Dept 2000]). Defendant's counterclaim for attorneys' fees is dismissed. The determination of the amount of reasonable attorneys' fees due plaintiffs requires a hearing (*see Matter of First Natl. Bank of E. Islip v Brower*, 42 NY2d 471, 474 [1977]; *47 Thames Realty, LLC v Robinson*, 120 AD3d 1183, 1184–85 [2d Dept 2014]).

Accordingly, it is

ORDERED, ADJUDGED and DECLARED that the plaintiffs are (or if any of them have moved out, were) rent stabilized tenants of defendant's premises at 96 Diamond Street, Brooklyn, New York, and they will continue to be rent stabilized for the duration of the 421-a tax abatement, or possibly for the duration of their tenancies, if longer, depending on the law in effect when the tax abatement expires on June 30, 2024, and plaintiffs were subjected to willful rent overcharges, and it is further

ORDERED, ADJUDGED and DECLARED that those plaintiffs who are still residing at the premises are entitled to have their legal stabilization rent calculated by the court and their current leases reformed and replaced with leases for the same rental period, but at the legal rent, and it is further

ORDERED that plaintiffs are granted summary judgment on the issue of liability with regard to their claims for the refund of the rent overcharges (Second Cause of Action) without interest,[13] treble damages (Third Cause of Action), and attorneys' fees

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[13]RSC § 2526.1(d).

(Fourth Cause of Action). A Referee Referral Order is issued simultaneously herewith. The Referee shall hear and determine the amount of the plaintiffs' damages (rent overcharges) by applying all applicable and lawful vacancy and renewal increases to the registered base date rents for the eight subject apartments[14] for the time period from their initial occupancy at the premises to the date they vacated or the date their rent was reduced by stipulation of the parties to either $1,500 or $1,700, as applicable. The Referee shall also calculate the amount to be awarded to plaintiffs as and for their treble damages, in accordance with the provisions above, and the Referee shall also determine the amount to be awarded to plaintiffs for their attorneys' fees and disbursements. In addition, plaintiffs are entitled to the costs and disbursements of this action, which shall be included in the judgment issued by the Referee; and it is further

ORDERED that following the Referee's calculation of the legal stabilization rents for the apartments occupied by plaintiffs at the time of the Referee's hearing, the defendant shall issue revised leases to the plaintiffs still residing at the premises and shall file amended rent registration statements with DHCR in accordance therewith.

This shall constitute the Decision, Order and Judgment of the Court.

Dated: June 18, 2018

ENTER:

Hon. Debra Silber, J.S.C.
Hon. Debra Silber
Justice Supreme Court

[14]$1,556.25 for #1A and $1,763.75 for the others.