Siguencia v 504 W 143rd Assoc. LLC
2018 NY Slip Op 31618(U)
July 3, 2018
Supreme Court, New York County
Docket Number: 654984/2017
Judge: Gerald Lebovits

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

HOLGER SIGUENCIA and OLGA LLAMUCA,

Plaintiffs,

-against-

504 W 143rd ASSOCIATES LLC, AMWEST REALTY ASSOCIATES LLC, STELLAR MANAGEMENT, LLC, SMAJLJE SRDANOVIC, and RAMSES CAPELLAN,

Defendants.

Index No.: 654984/2017
DECISION/ORDER
Motion Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants Amwest Realty Associates LLC (Amwest), Stellar Management Co. (Stellar), Smajlje Srdanovic, and Ramses Capellan's (collectively, the moving defendants) motion for summary judgment, and in reviewing plaintiffs Holger Siguencia and Olga Llamuca's cross-motion to dismiss the moving defendants' and defendant 504 W 143rd Associates LLC's (504 W 143rd Associates) affirmative defenses and for summary judgment or, alternatively, partial summary judgment as to liability.

Papers	**NYSEF Documents Numbered**
Defendants' Notice of Motion	15-18
Plaintiffs' Notice of Cross-Motion	24
Plaintiffs' Affirmation in Support of Cross-Motion	25, 27-28
Plaintiffs' Affidavit in Support of Cross-Motion	26, 29-33
Plaintiffs' Verified Complaint	1, 5-7
Defendants' Affirmation in Opposition to Cross-Motion	37
Defendants' Affidavit in Opposition to Cross-Motion	38-44
Plaintiffs' Supplemental Memorandum of Law in Support of Cross-Motion	46
Defendants' Letter/Correspondence to Judge in Opposition to Cross-Motion	47
Plaintiffs' Letter/Correspondence to Judge in Support of Cross-Motion	48

Grimble & Lo Guidice, LLC, New York (Robert Grimble of counsel), for plaintiffs.
Cullen & Associates, P.C., New York (Kevin D. Cullen of counsel), for defendants.

Gerald Lebovits, J.

In this rent-overcharge action, defendants, Amwest Realty Associates LLC (Amwest), Stellar Management Co. (Stellar), Smajlje Srdanovic, and Ramses Capellan (collectively, the moving defendants), move for summary judgment to dismiss plaintiffs Holger Siguencia and Olga Llamuca's complaint against them.

Plaintiffs cross-move to dismiss the moving defendants' and defendant 504 W 143rd Associates LLC's (504 W 143rd Associates) affirmative defenses and for summary judgment or, alternatively, partial summary judgment as to liability.

The moving defendants' motion is granted. Plaintiffs' cross-motion is granted in part and denied in part.

I. Background

On April 28, 2005, plaintiff Holger Siguencia rented a vacant apartment, apartment 4A, owned by defendant 504 W 143rd Associates. (Plaintiffs' Verified Complaint, Exhibit D.) Their one-year lease began on May 1, 2005, and ended on April 30, 2006, with a monthly rental of $1300. (*Id.*) The lease's heading provided that the attached rider sets forth rights and obligations under the Rent-Stabilized Law (RSL), but 504 W 143rd Associates crossed out a "rent adjustments" provision in the initial lease. (*Id.*) In doing so, 504 W 143rd Associates suggested that the subject apartment was deregulated under the RSL.

Defendants registered the subject apartment's last legal rent in 2005 at $1083.54 a month. (*Id.* Exhibit F.) In 2006, defendants registered the apartment as deregulated with the Division of Housing and Community Renewal (DHCR) for high-rent vacancy, which means that the rent exceeded $2000 a month at that time. (*Id.*)

II. The Moving Defendants' Motion for Summary Judgment

The moving defendants' motion for summary judgment is granted.

A summary judgment movant must make a prima facie showing of entitlement to judgment as a matter of law and showing absence of any material issue of fact. (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985].) Once the movant makes this showing, the burden shifts to the party opposing the motion to prove the existence of material issues of fact requiring a trial. (*Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003].)

The moving defendants have shown the absence of any issue of fact against Stellar, Srdanovic, and Capellan. "[A]n agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or add his personal liability for, or to, that of his principal." (*Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964] [internal quotation marks and citation omitted].)

Stellar is a disclosed agent of defendant 504 W 143rd Associates. (Defendants' Notice of Motion, Affidavit, Francine Schiff.) Srdanovic and Capellan are employees of agent Stellar. (*Id.* Affidavit, Srdanovic, Capellan.) Plaintiffs argue that Rent Stabilization Code's (RSC) definition of "owner" is broad. (Plaintiffs' Affirmation in Support of Cross-Motion, Exhibit B.) But here, the agent's principal, defendant 504 W 143rd Associates, is disclosed. Plaintiffs fail to show clear and explicit evidence that the agent, Stellar and its employees, intend to substitute or add their personal liabilities for, or to, that of 504 W 143rd Associates.

Plaintiffs' case against Amwest is discontinued. The inclusion of Amwest as the subject apartment's owner in the initial lease appears to be a clerical error. (Defendants' Notice of Motion, Affirmation, ¶ 10.) Plaintiffs agree to discontinue the complaint against Amwest. (Plaintiffs' Affirmation in Support of Cross-Motion, ¶ 15.)

The moving defendants have shown the absence of any issue of fact against them. Plaintiffs fail to prove the existence of material issues of fact requiring a trial. Thus, the moving defendants' motion for summary judgment is granted.

III. Plaintiffs' Cross-Motion to Dismiss the Moving Defendants and Defendant 504 W 143rd Associates' Fifth, Sixth, Eighth, and Ninth Affirmative Defenses

Plaintiffs' cross-motion to dismiss the moving defendants and defendant 504 W 143rd Associates' (collectively, defendants) fifth, sixth, eighth, and ninth affirmative defenses is denied.

Defendants allege in the fifth affirmative defense that Srdanovic and Capellan are not the subject apartment' owners and have no obligations to plaintiffs. Defendants allege in the sixth affirmative defense that Srdanovic and Capellan are not proper parties to this case. Defendants allege in the eighth affirmative defense that Amwest is not the subject apartment's owner nor an agent, thus making it an improper party. Defendants allege in the ninth affirmative defense that Stellar is an agent for a disclosed principal, thus not liable in this action.

As discussed in Part II (The Moving Defendants' Motion for Summary Judgment), plaintiffs' cross-motion to dismiss defendants' fifth, sixth, eighth, and ninth affirmative defenses is without any merit. Therefore, this part of plaintiffs' cross-motion is denied.

IV. Plaintiffs' Cross-Motion to Dismiss Defendants' Tenth Affirmative Defense

Plaintiffs' cross-motion to dismiss defendants' tenth affirmative defense is denied. Defendants argue that plaintiff Olga Llamuca lacks standing to bring this action. Plaintiffs fail to submit any evidence to show why this affirmative defense has no merit.

V. Plaintiffs' Cross-Motion to Dismiss Defendants' First Affirmative Defense

Plaintiffs' cross-motion to dismiss defendants' first affirmative defense is granted. Defendants argue that plaintiffs fail to state a cause of action. The court must determine only whether the facts, as a plaintiff alleges, fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) Here, the initial lease and the rent registration with DHCR referred to in the complaint allow plaintiffs to state a rent-overcharge claim.

VI. Plaintiffs' Cross-Motion to Dismiss Defendants' Second Affirmative Defense

Plaintiffs' cross-motion to dismiss defendants' second affirmative defense of waiver and estoppel is granted. Defendants argue that plaintiffs have waived their right to bring this action.

But a tenant may not waive the RSL's benefit. (*Georgia Properties, Inc. v Dalsimer*, 39 AD3d 332, 334 [1st Dept 2007].)

VII. Plaintiffs' Cross-Motion to Dismiss Defendants' Seventh Affirmative Defense

Plaintiffs' cross-motion to dismiss defendants' seventh affirmative defense is granted. Defendants argue that the court lacks jurisdiction over defendants for lack of service. The burden of proving jurisdiction is upon the claiming party. (*Jacobs v Zurich Ins. Co.*, 53 AD2d 524, 525 [1st Dept 1976].) Here, plaintiffs' evidence of service satisfies this burden, showing that defendants have been served. (Plaintiffs' Affidavit in Support of Cross-Motion, Exhibit F.)

VIII. Plaintiffs' Cross-Motion to Dismiss Defendants' Fourth Affirmative Defense

Plaintiffs' cross-motion to dismiss defendants' fourth affirmative defense is granted. Defendants argue that plaintiffs' action is barred by the four-year statute of limitations. A rent-overcharge action is subject to a four-year statute of limitations. (RSL § 26-516 [a].) The rental history's examination is also subject to a four-year statute of limitations. (*Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 154 [2002].) The initial lease was signed on April 28, 2005. (Plaintiffs' Verified Complaint, Exhibit D.) Over 11 years after the initial lease's signing, plaintiffs filed this rent-overcharge action on April 24, 2017. Plaintiffs claim that the subject apartment was stabilized when they signed the lease on April 28, 2005.

But if a plaintiff's evidence substantially indicates a defendant's fraud in initially setting the rent or in deregulating an apartment, a court may examine the rental history beyond the four-year statute of limitations, although the overcharge's collection is still subject to the four-year statute of limitations. (*Grimm v State of N.Y. Div. of Hous. & Community Renewal*, 15 NY3d 358, 366-367 [2010].)

Plaintiffs' evidence substantially indicates defendants' fraud in initially deregulating the subject apartment. Thus, plaintiffs are entitled to examine the rent history beyond the four-year statute of limitations. A vacancy lease is the initial lease when a tenant moves into a vacant rent-stabilized apartment, and the vacancy increase for a one-year vacancy lease is 17% of the previous legal regulated rent. (RSL § 26-511 [c] [5-a].) Here, the subject apartment's last legal registered rent is $1083.54 a month. (Plaintiffs' Verified Complaint, Exhibit F.) The 17% vacancy increase would increase the subject apartment's rent to $1267.74, far less than the deregulation threshold, $2000 at the relevant time. (RSL § 26-504.2 [a].) Furthermore, defendants failed to give plaintiff notice of the high-rent vacancy deregulation, as required by RSL § 26-504.2 (b) and RSC § 2520.11 (u). (Plaintiffs' Affirmation in Support of Cross-Motion, Exhibit B.)

To deregulate a rent-stabilized apartment based on high-rent vacancy, the last legal rent before the vacancy, plus the vacancy increase, plus individual-apartment-improvement (IAI) increase if available, must exceed the rent threshold. (*Altman v 285 West Fourth LLC*, 31 NY3d 178, 185-186 [2018].) Defendant landlord bears the burden to offer IAI's evidence, including, for example, "bills from a contractor, an agreement or contract for work in the apartment, or records of payments for the renovations." (*72A Realty Assoc. v Lucas*, 101 AD3d 401, 402 [1st

Dept 2012].) The IAI must be beyond ordinary repair, and distinguishing between improvement and repair is a question of fact. (*Jemrock v Krugman*, 13 NY3d 924, 926 [2010].)

Defendants fail to oppose plaintiffs' evidence that substantially indicates defendants' fraud in deregulating the apartment for high-rent vacancy. Defendants' IAI evidence dose not prove that the subject apartment's rent exceeds $2000 a month. Defendants' affidavit states that the last registered legal rent should be $1132.30, not the $1083.54 registered with the DHCR. (Defendants' Affidavit in Opposition to Cross-Motion, Exhibit E.) Defendants submitted to this court a lease-renovation package to show that the IAI increase is $832.62. (*Id.* Exhibit F.) Accordingly, defendants' affidavit alleges that the subject apartment's legal rent in 2006 should be $2157.41. That number comes from the last registered legal rent $1132.30, plus the 17% vacancy increase $192.49, plus the IAI increase $832.62. (*Id.*) Plaintiffs rebut defendants' affidavit with evidence that the NYC Department of Buildings did not permit any work in the subject apartment during such time period. (Plaintiffs' Affidavit in Support of Cross-Motion, Exhibit D, E.) Furthermore, defendants fail to offer sufficient IAI's evidence, such as bills from a contractor, an agreement, or payment records for the IAI. (*See 72A Realty Assoc.*, 101 AD3d at 402.) Although defendants' affidavit alleges that because the renovation in question occurred in 2005, the renovation records are difficult to locate (Defendants' Affidavit in Opposition to Cross-Motion, ¶ 8), plaintiffs' evidence substantially indicates defendants' fraud in deregulation.

Defendants' affirmative defense that the action is barred by the statute of limitations is dismissed.

IX. Plaintiffs' Cross-Motion to Dismiss Defendants' Third Affirmative Defense

Plaintiffs' cross-motion to dismiss defendants' third affirmative defense is denied. Defendants argue that the subject apartment is deregulated for high-rent vacancy. In deciding a motion to dismiss a defense, a court must liberally construe the pleadings in defendants' favor. (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011].) A court must afford the defendant the benefit of every reasonable inference on whether a defense has any merit. (*Id.*) A defense should not be dismissed if questions of fact require a trial. (*Id.*)

As discussed in Part VIII (Plaintiffs' Cross-Motion to Dismiss Defendants' Fourth Affirmative Defense), plaintiffs' evidence substantially indicates defendants' fraud in deregulation for high-rent vacancy. But plaintiffs' evidence is insufficient to show that defendants' affirmative defense of high-rent vacancy is without any merit. Defendants submitted to this court an affidavit by the director of defendants' agent, Francine Schiff, the person who is responsible for the subject apartment's daily operation, renovation, and compliance. (Defendants' Affidavit in Opposition to Cross-Motion, ¶ 1-2.) Schiff's affidavit alleges that the IAI's records are difficult to locate, considering that the renovation in question occurred in 2005. (*Id.* ¶ 8.) Defendants' affidavit states that defendants are attempting to locate further IAI's evidence, and will provide testimony at trial from employees, agents, or third-party vendors in connection with the IAI. (*Id.* ¶ 8-9.) Nonetheless, she states that the lease-renovation package shows all the vendors that defendants used to supply goods and services in renovating the apartment. (*Id.* ¶ 9; Exhibit F.) The itemized work shows plumbing and electrical work and expenses from Home Depot, PC Richards, and other vendors. (*Id.* Exhibit F.) Considering

defendants' lease-renovation package and the the affidavit, this court finds that defendants have raised triable issues of fact about the IAI.

X. Plaintiffs' Cross-Motion for Summary Judgment, or, Alternatively, Partial Summary Judgment as to Liability

Plaintiffs' cross-motion for summary judgment, or, alternatively, partial summary judgment as to liability is denied.

Plaintiffs' cross-motion for summary judgment seeks (1) a declaratory judgment setting plaintiffs' rent and applying it retroactively to the initial lease; (2) monetary damages, jointly and severally against defendants, including rent overcharges, treble damages, statutory interest, and punitive damages; (3) a mandatory injunction requiring defendants to comply with the declaratory judgment, as to setting of rents, lease renewal process, and maintenance of services; (4) monetary damages, including punitive damages, for alleged defendants' conversion of the security deposit; and (5) reasonable legal fees based on a lease clause.

Plaintiffs' cross-motion for summary judgment or partial summary judgment as to liability depends on whether the subject apartment is deregulated for high-rent vacancy. Without addressing the merits of defendants' allegation that the last stabilized rent should be $1132.30, this court finds that the subject apartment's regulatory status depends on the defendants' proving of IAI. As discussed in Part IX (Plaintiffs' Cross-Motion to Dismiss Defendants' Third Affirmative Defense), defendants have raised triable issues of fact about the IAI.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the case against Stellar Management Co., Smajlje Srdanovic, and Ramses Capellan is dismissed; and plaintiffs discontinues the action as against Amwest Realty Associates LLC; and it is further

ORDERED that plaintiffs' cross-motion is granted in part and denied in part: defendants' first, second, forth, and seventh affirmative defenses are dismissed, and the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve a copy of this decision and order with notice of entry on plaintiffs and on the County Clerk's Office, which is directed to amend its records accordingly; and it is further

ORDERED that the parties appear for a conference on October 17, 2018, at 11:00 a.m. in Part 7, room 345, at 60 Centre Street.

Dated: July 3, 2018

J.S.C.

6

HON. GERALD LEBOVITS J.S.C.