Nieborak v W54-7, LLC
2018 NY Slip Op 32132(U)
July 31, 2018
Supreme Court, New York County
Docket Number: 157084/14
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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STEFAN NIEBORAK, et al.

Plaintiffs

Index No. 157084/14

DECISION, ORDER, and JUDGMENT

W54-7, LLC

Defendant.

MOT SEQ 005

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NANCY M. BANNON, J.S.C.:

I. INTRODUCTION

This is an action for a judgment declaring that several apartments in a building located at 162 West 54th Street in Manhattan (the building) are subject to the Rent Stabilization Law (RSL; Admin. Code of City of NY §§ 26-501-26-520) and Rent Stabilization Code (RSC; 9 NYCRR 2520.1-2531.9), and to recover damages for rent overcharges.

The plaintiffs move for partial summary judgment declaring that the apartments are subject to the RSL and RSC, and that the so-called "default formula" set forth in 9 NYCRR 2526.1(g) is the appropriate methodology for calculating the legal regulated rent as of the relevant "base date" and the amount of refunds due to them. They also seek summary judgment in connection with the defendant's counterclaim, and dismissing the defendant's affirmative defenses. The defendant opposes the motion. The motion is granted to the extent that summary judgment is awarded

to the plaintiffs declaring that their apartments are subject to the RSL and RSC, they are entitled to refunds of overcharges, and the default formula set forth in 9 NYCRR 2526.1(g) is the appropriate methodology, and dismissing the second, third, and fourth affirmative defenses. The motion is otherwise denied.

II. BACKGROUND

By order dated November 6, 2014, this court fully consolidated 14 separate overcharge actions commenced by the plaintiff tenants against the defendant landlord, each action referable to one of 14 different apartments in the building. By order dated January 22, 2016, the court, among other things, found that the plaintiffs established a likelihood of success on the merits of their claims, and preliminarily enjoined the defendant from prosecuting any nonpayment or eviction proceedings against the plaintiffs in the Housing Court based on the plaintiffs' refusal to pay rent increases. In a compliance conference order dated December 1, 2016, the defendant agreed to provide the plaintiffs with an affidavit attesting that no individual apartment improvements had been completed in the building, and the parties agreed to exchange their calculations as to the overcharges within 45 days of that order. The parties informed the court that, as of the date of oral argument of this motion, neither that affidavit nor the calculations had been

exchanged.

In support of their motion, the plaintiffs submit, among other things, the pleadings in each of the 14 underlying actions. The plaintiffs separately verified each of the complaints in those actions, which set forth in detail when they each executed initial and renewal leases, and the amount of rent charged pursuant to all of those leases. The plaintiffs also submit their initial and renewal leases with the defendant landlord, and a printout from the New York City Department of Finance (DOF) referable to the building's participation in the City's J-51 tax abatement program. See Admin. Code of City of NY § 11-243.

The plaintiffs' submissions show that, beginning in tax year 2003/2004, the defendant's predecessor-in-interest received tax abatements under the J-51 program, a municipal program authorized by Real Property Tax Law § 489, which requires units in a building receiving such abatements to be rent-stabilized. They further show that the defendant purchased the building in 2009, and that each plaintiff entered into initial and/or renewal leases with the defendant in or after 2009 at market-rate rents, with renewal increases at unregulated rates. Of the 14 initial leases at issue, 6 were executed between July 1, 2009, and March 1, 2010, and thus more than four years prior to the commencement of this consolidated action on July 21, 2014. All of those leases were renewed at least once. The remaining 8 initial

leases were executed after July 21, 2010, that is, within four years prior to the commencement of the consolidated action.

The plaintiffs assert that, despite the building's participation in the J-51 program as of 2003/2004, each subject apartment had either been unlawfully deregulated by virtue of filings with the New York State Division of Housing and Community Renewal (DHCR) that falsely described the unit as a condo or coop, or had been unlawfully deregulated pursuant to the luxury decontrol provisions of the RSL. Luxury deregulation is triggered either when (a) the unit became vacant and the legal regulated rent thereupon exceeded $2,000.00 per month ($2,500.00 after June 24, 2011; see L 2011, ch 97) (high rent vacancy deregulation), or (b) the legal regulated monthly rent of the unit exceeded $2,000.00 ($2,500.00 after June 24, 2011) and the tenants' annual household income exceeded $175,000.00 for two consecutive years (high rent/high income deregulation). See Admin. Code of City of NY §§ 26-403.1, 26-504.1. The plaintiffs thus assert that the deregulation was part of a fraudulent scheme meant to avoid regulation. They thus all contend that they are entitled to a declaration that their apartments were subject to the RSL and RSC as of the date of execution of each lease, and that they are entitled to a refund of overcharges, trebled, from the date each of them executed their respective initial lease.

In support of these arguments, the plaintiffs submit rent

histories generated by the DHCR for the subject apartments, showing, for instance, that Apartment 3A had a monthly rent of $570.21 in 1984 and was rent controlled between 1984 and 1998, became rent stabilized at a monthly rent of $3,500.00, and became exempt from all regulation in 2000 because it was a "coop/condo." Similarly, Apartment 3E had a rent-controlled monthly rent of $248.65 in 1984, became rent stabilized in 1992 at a monthly rental of $800.00, which was ultimately increased to $1,572.94 during 2001, and listed in 2002 through 2011 as exempt from all regulation as a "coop/condo." Apartment 9F had a monthly rent of $361.12 in 2003, yet was registered with the DHCR as having been exempt for "high rent vacancy" in 2004, meaning that the allowable vacancy increase of 20% (see Admin. Code of City of N.Y. § 26-511[c][5-a][i]), or $72.00, plus any allowances for individual apartment improvements came to more than $1,600.00 per month. The plaintiffs assert that this increase is implausible, particularly because the defendant agreed to provide them with an affidavit that no such improvements were undertaken. Similarly, the defendant's predecessor registered Apartment 9C as having a legal monthly rent of $839.10 in 1996, as vacant in 1997, and exempt under high rent vacancy decontrol in late 1997, which the plaintiffs again contend is an implausible increase.

III. DISCUSSION

A. DECLARATION THAT APARTMENTS ARE SUBJECT TO THE RSL and RSC

The plaintiffs' submissions established their prima facie entitlement to judgment as a matter of law (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]) on the first cause of action, which seeks a judgment declaring that the apartments are subject to the RSL and RSC.

An apartment in a building receiving J-51 abatements is subject to the regulated rents and renewal increases required by the RSL and RSC. See Roberts v Tishman Speyer Props., L.P., 13 NY3d 270 (2009); Altschuler v Jobman 478/480, LLC, 135 AD3d 439 (1st Dept. 2016); 72A Realty Assoc. v Lucas, 101 AD3d 401 (1st Dept. 2012). A landlord that receives J-51 abatements may not deregulate any apartment under the RSL's luxury decontrol provisions, and, subsequent to receiving J-51 abatements, "the subject apartment must be returned to rent stabilization as of [the date] when the Owner first treated the apartment as exempt." Taylor v 72A Realty Assoc., L.P., 151 AD3d 95, 97 (1st Dept. 2017); see Roberts v Tishman Speyer Props., L.P., supra; Altschuler v Jobman 478/480, LLC, supra; 72A Realty Assoc. v Lucas, supra. These principles apply to the entire time period that the building was enrolled in the J-51 program, here, from 2003/2004 to date. See Gersten v 56 7th Ave., LLC, 88 AD3d 189

(1st Dept. 2011).

The defendant, which submitted no affidavit from anyone with personal knowledge of the rental histories of the subject apartments, failed to raise a triable issue of fact in opposition to the plaintiffs' showing in this regard. In addition, its legal argument that some of the apartments were lawfully deregulated prior to 2003/2004, and may thus remain deregulated, is unavailing. See Taylor v 72A Realty Assoc., L.P., supra. In any event, the defendant submits no evidence showing that any individual apartment improvements were undertaken, and does not dispute that it failed to file any rent registrations with the DHCR, which bars it "from applying for or collecting an increase in excess of the base date rent, plus any adjustments allowable prior to the failure to register." 9 NYCRR 2528.4(a).

B. APPLICABILITY OF DEFAULT FORMULA TO CALCULATION OF OVERCHARGES

The plaintiffs have established that the overcharges were both willful and part of a fraudulent scheme to avoid rent regulation. See Altschuler v Jobman 478/480, LLC, supra. In the first instance, the plaintiffs' submissions demonstrate that the defendant's predecessor falsely claimed exemption from rent regulation for several of the apartments on the ground that the units were condominiums or cooperative units. With respect to apartments not falsely registered as condos or coops, the

plaintiffs established that the defendant's predecessor falsely claimed the right to exemption on the basis of unlawful high rent vacancy deregulation.

In Altman v 285 W. Fourth, LLC (31 NY3d 178 [2018]), the Court of Appeals concluded that high rent vacancy deregulation is warranted where, after a stabilized apartment becomes vacant, its legal regulated rent exceeds $2,000.00 ($2,500.00 after June 24, 2011), inclusive of vacancy increase allowances and increases permitted for landlord improvements. The plaintiffs show that, with respect to the relevant apartments, the vacancy increases claimed by the defendant's predecessor would have brought the legal rent nowhere near $2,000.00, and that the defendant effectively conceded that no improvements were undertaken that would warrant an increase. Since, on this motion, the defendant submitted no affidavit from anyone with personal knowledge, or any documentation whatsoever, it has not rebutted this showing. For the same reason, treble damages are recoverable here, since the defendant has not raised a triable issue of fact in opposition to the plaintiffs' showing that the overcharges were willful. See Altschuler v Jobman 478/480, LLC, supra. The defendant's reliance on Stulz v 305 Riverside Corp., 150 AD3d 558 [1st Dept. 2017]) is misplaced, since there the Court determined that there was insufficient proof of a fraudulent scheme to permit looking back beyond the otherwise applicable four-year

period.

Thus, in connection with the second cause of action, which seeks to recover rent overcharges, the plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability declaring that they are each entitled to refunds under the so-called "default formula." This formula dispenses with the requirement that the court apply the registered rent on the "base date" as the basis for determining the amount of an overcharge where, as here, it is established that deregulation was accomplished by means of a fraudulent scheme. Application of the default formula entitles the plaintiffs to refunds equal to three times the difference between the amount that they actually paid for rental and security deposits and "the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date" (Levinson v 390 W. End Assoc, LLC, 22 AD3d 397, 400-401 [1st Dept. 2005], quoting Thornton v Baron, 5 NY3d 175, 180 n 1 [2005]), from the date that they executed their leases to the present. See Matter of Grimm v New York State Div. of Hous. & Community Renewal, 15 NY3d 358 (2010); 9 NYCRR 2526.1 (g).

For those plaintiffs who executed their initial lease on or after the July 21, 2010, "base date," i.e., four years prior to the commencement of the consolidated action, it cannot be

disputed that they are entitled to such an award from the date of execution of the lease until the present, since they are within the generally applicable four-year lookback period under any circumstances. See Altschuler v Jobman 478/480, LLC, supra. As to the plaintiffs who executed their initial leases in 2009 or early 2010, and thus prior to the otherwise applicable base date, these plaintiffs established, prima facie, that the rents charged and collected as of the date of the execution of those initial leases were illegal market rate rents, and that they are thus entitled to recover overcharges from the date they executed their initial leases.

The First Department recently reaffirmed that, where there is no showing of a fraudulent scheme, the court may not look back beyond the applicable four-year period, and may not apply the default formula. See Matter of Regina Metropolitan, LLC v New York State Div. of Housing & Community Renewal, ____AD3d____, 2018 NY Slip Op 05797 (1st Dept., Aug. 16, 2018). However, where, as here, there are clear indicia of such a scheme, both the extended look-back period and the application of the default formula are warranted. See Altschuler v Jobman 478/480, LLC, supra.

The court notes that the note of issue has already been filed. At trial, in calculating the amounts of the overcharges and refunds that are due to the plaintiffs, the finder of fact

must consider the entire rental history and records, including those generated before the otherwise applicable four-year lookback period, so that the Thornton "default formula" may be properly applied. See Rosa v Koscal 59, LLC, 162 AD3d 466 (1st Dept. 2018); 72A Assocs. v Lucas, supra.

C. AFFIRMATIVE DEFENSES AND COUNTERCLAIM

For the same reasons that partial summary judgment is awarded to the plaintiffs, the defendant's counterclaim seeking a contrary declaration must be resolved in the plaintiff's favor. Dismissal of the counterclaim, however, is inappropriate. Rather, the counterclaim must be resolved by declaring that the apartments are subject to the RSL and RSC. See Lanza v Wagner, 11 NY2d 317 (1962).

There is no basis upon which to "dismiss the 'affirmative defense' of failure to state a claim, because failure to state a claim may be asserted at any time even if not pleaded (CPLR 3211[e]) and is therefore 'mere surplusage' as an affirmative defense." San-Dar Assoc. v Fried, 151 AD3d 545, 545-546 (1st Dept. 2017); see Bernstein v Freudman, 136 AD2d 490 (1st Dept 1988); Riland v Frederick S. Todman & Co., 56 A.D.2d 350 (1st Dept 1977). Hence, that branch of the plaintiff's motion which is for summary judgment dismissing the first affirmative defense is denied.

However, the other affirmative defenses must be dismissed. The second affirmative defense asserts that the plaintiffs are not entitled to declaratory relief because they have an adequate remedy at law. However, in rent overcharge actions, a court may declare whether or not an apartment is subject to rent regulation in addition to awarding a refund of the overcharge. See Breen v 330 E. 50th Partners, L.P., 154 AD3d 583 (1st Dept. 2017); Taylor v 72A Realty Assoc., L.P., supra.

The plaintiffs established that they are entitled to relief on their first and second causes of action, and that they did not act inequitably in any fashion in connection with the underlying rent dispute. The defendant's opposition did not articulate how the plaintiffs have unclean hands. Where, as here, allegations that an action is barred by unclean hands are "conclusory," that affirmative defense may "properly [be] dismissed." Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd., 35 AD3d 317 (1st Dept. 2006). Since the defendant failed to allege or establish any facts supporting the third affirmative defense, which alleges that the action is barred by unclean hands, that affirmative defense is dismissed.

Since the court has concluded that the plaintiffs were overcharged, the fourth affirmative defense, which asserts that they were not overcharged, must be dismissed as without merit.

IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiffs' motion is granted to the extent that summary judgment is awarded to them declaring that their apartments are subject to the Rent Stabilization Law and the Rent Stabilization Code, they are entitled to refunds of overcharges as of the date they each executed their initial lease with the defendant, and the default formula set forth in 9 NYCRR 2526.1(g) is the appropriate methodology for calculating rent overcharges, and dismissing the second, third, and fourth affirmative defenses asserted by the defendants, those affirmative defenses are dismissed, and the motion is otherwise denied; and it is,

ADJUDGED and DECLARED that the plaintiffs' apartments are subject to the Rent Stabilization Law and the Rent Stabilization Code, they are entitled to refunds of overcharges as of the date they each executed their initial leases with the defendant, and the default formula set forth in 9 NYCRR 2526.1(g) is the appropriate methodology for calculating rent overcharges; and it is further,

ORDERED that the causes of action and claims for declaratory relief are severed from the remaining causes of action.

This constitutes the Decision, Order, and Judgment of the court.

Dated: July 31, 2018

ENTER: _____

J.S.C.
HON. NANCY M. BANNON