SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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HAIM ZITMAN,

Plaintiff,

Index No. 652015/2018
Motion Seq: 001

-against-

SUTTON LLC and STELLAR SUTTON LLC,

DECISION & ORDER
ARLENE P. BLUTH, JSC

Defendants.

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The motion to dismiss by defendants is granted.

Background

This rent overcharge action arises out of plaintiff's tenancy at 320 East 52nd Street in Manhattan. Plaintiff moved into the subject apartment in February 1988. At that time, defendant Sutton LLC ("Sutton") was the owner of the building.[1] Defendant Stellar Sutton LLC ("Stellar") acquired the property in 2005.

Plaintiff alleges that he has been charged unlawful rent every year since he began living in the apartment. Plaintiff claims that the registration statements for his apartment indicate that the tenant who lived in the apartment prior to June 1, 1985 paid $704.00 per month and the tenant after that (who immediately preceded plaintiff) paid $1,600 per month. Plaintiff argues

[1]After both defendants brought the instant motion to dismiss, plaintiff discontinued the action with prejudice against only defendant Sutton (NYSCEF Doc. No. 19).

that this 200 percent increase demonstrates that every lease provided to him starting in 1988 was illegal.

Defendants move to dismiss on the ground that plaintiff's claims are time-barred. Defendants maintain that within the four-year review period (four years prior to plaintiff's complaint), plaintiff's rent was increased in accordance with the Rent Guidelines Board orders and a single DHCR order granting an increase for a major capital improvement. Defendants contend that plaintiff cannot meet his burden to compel this Court to look beyond four years.

In opposition, plaintiff claims that although he first took occupancy of the premises in 1988, he only found out about the rental overcharges in 2016. Plaintiff urges this Court to look at his entire rental history to establish the proper rent for his unit. Plaintiff argues that there is an issue of fact as to when plaintiff was on notice of defendants' alleged fraud. Plaintiff insists that indicia of fraud exist, including the fact that nothing was filed with DHCR supporting the rent increase in mid 1980s, plaintiff was not provided with a mandatory lease renewal form, defendants never mailed the annual apartment registration to plaintiff and that Stellar did not provide a rent stabilization rider to plaintiff until March 2016 despite acquiring the building in 2005.

Discussion

"On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]).

CPLR 213-a provides that:

> "An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action."

"An increase in rent, standing alone, does not establish a fraudulent scheme to evade rent stabilization" (*Regina Metropolitan Co., LLC v New York State Div. of Hous. & Community Renewal*, 2018 NY SlipOp 05797, *3 [1st Dept 2018]). "[A] mere allegation of fraud alone, without more, will not be sufficient to . . . inquire further. What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization" (*Grimm v State Div. of Hous. & Community Renewal Office of Rent Admin.*, 15 NY3d 358, 367, 912 NYS2d 491 [2010]).

The Court finds that plaintiff failed to meet his burden to allege a cognizable cause of action because he did not sufficiently allege indicia of fraud. Plaintiff asks this Court to look at the rental history for his apartment dating back more than 30 years and two prior tenants for a unit that is still subject to rent regulation. He does not challenge that the rent increases for the four years immediately preceding the instant complaint complied with rent stabilization laws. Instead, plaintiff points to a purportedly mysterious rent increase in 1985 as the basis for his causes of action. However, an increase in the rent alone is not enough to state a cause of action for rent overcharge.

Plaintiff's reliance on *Butterworth v 281 St. Nicholas Partners, LLC* (160 AD3d 434, 74 NYS3d 528 [1st Dept 2018]) does not compel a different outcome. The First Department in

Butterworth stressed that "[N]either an increase in rent, standing alone, nor plaintiffs' skepticism about apartment improvements suffice to establish indicia of fraud" (*id.* at 434). The Court denied defendants' motion for summary judgment dismissing the rent overcharge claim based on the fact that a predecessor landlord failed to file annual registration statements (*id.*). The Court also relied on a Deregulation Rider attached to plaintiff's initial lease "which left blank spaces which would have indicated either that the last regulated legal rent or the new legal rent exceeded the $2,000 threshold for deregulation, and may well be viewed as an attempt to obfuscate the regulatory status of the apartment, despite that the rent had not reached the $2,000 threshold" (*id.*).

The circumstances here are quite different from *Butterworth*. Plaintiff alleges no facts that indicate that defendants engaged in a fraudulent scheme to deregulate the apartment. Taking the allegations as true (as the Court must on a motion to dismiss), plaintiff only alleges an unexplained rent increase on the tenant immediately preceding him and that the registration statements contained false information. Plaintiff does not claim that either defendant failed to file registration statements and fails to explain how it was part of a scheme to deregulate.

Moreover, plaintiff's affidavit suggests that this Court should not look beyond the four years. Plaintiff claims that "After occupancy over several months, I came to learn from other tenants that I may have been paying excessive rent" (Zitman affidavit ¶ 3). Plaintiff claims that after complaining to the landlord, the owner reduced his rent from $1,800 to $1,200 per month for the next year (*id.*). That was in 1988. Plaintiff did not bring a rent overcharge claim at that time or, for that matter, any claim until this lawsuit was commenced in 2018. This is exactly the type of case the four-year statute of limitations is intended to prevent. "[T]he purpose of the four-

year limitations period is to alleviate the burden on honest landlords to retain rent records indefinitely" (*Regina*, 2018 NY SlipOp 05797 at *5 [internal quotations and citation omitted]).

The fact that plaintiff decided not look at the DHCR registration history for his apartment until 2016 (*id.* ¶ 5) despite his initial misgivings about the apartment cannot save his claims. Plaintiff does not contend that these filings concerning the mid 1980s were unavailable until 2016. Rather, plaintiff simply decided to take a look nearly thirty years after moving in. Plaintiff's delay does not extend the statute of limitations.

Accordingly, it is hereby

ORDERED that the defendants' motion to dismiss this action is granted and the Clerk is directed to enter judgment in favor of defendant dismissing this action, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of a bill of costs.

Dated: September 5, 2018
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH