SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **IAS MOTION 47EFM**

Justice

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MICHAEL SCHWARTZ

Plaintiff,

- v -

10 WEST 87TH ST. PARTNERS LLC,

Defendant.

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INDEX NO. 153169/2019

MOTION DATE 01/09/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 65, 66, 67, 68, 69, 70, 72, 73

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff Michael Schwartz, who resides in an apartment building located at 10 West 87th Street, New York, New York, which is owned by defendant 10 West 87th Street Partners, LLC, commenced this action seeking a declaration that the apartments in the building are rent stabilized and that he is entitled to damages for overpayment of rent, including treble damages. Plaintiff now moves, pursuant to CPLR 3025 for leave to amend the complaint in order to increase the amount of treble damages demanded based on the recent changes to the rent stabilization law which increased the look back period for treble damages from 2 years to 6 years. Simultaneously therewith, plaintiff also moves pursuant to CPLR 3212 for summary judgment on his proposed amended complaint in which he alleges that the defendant's building is rent stabilized. Defendant cross-moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. Defendant also seeks an award of summary judgment on its three counter-claims in which defendant seeks (1) a declaration that the building is exempt from the rent stabilization law because it was substantially rehabilitated after 1974; (2) an award of

attorneys' fees associated with this action; and (3) an award of damages for unpaid rent since August 2018.

The issue in plaintiff's motion and the cross-motion is whether the building was substantially rehabilitated within the meaning of the Rent Stabilization Code § 2520.11(e) as set forth in the New York State Division of Housing and Community Renewal Office of Rent Administration's Operation Bulletin 95-2. Affirmation of Carolyn Z. Rualo dated July 10, 2019, Exh. 6. In its cross-motion, defendant argues primarily that the building underwent a substantial rehabilitation, as defined in the DHCR's Operation Bulletin, in 1974-75 when a complete gut renovation was performed, including removing and replacing all floors, walls, stairs and mechanical systems in the building. In connection with this renovation, on January 3, 1975, the City of New York issued a certificate of occupancy stating that the building had been converted from a Class B Multiple Dwelling, commonly referred to as single room occupancy, to a multifamily Class A multiple dwelling. Defendant's argument regarding this renovation is well-documented and supported by the motion papers, which include an affidavit and a report from James Schelkle, a licensed architect, who performed exhaustive research on the building and the records of various City agencies regarding the building, to reach his conclusions. Affidavit of James Schelkle sworn to on August 27, 2019; Affidavit of James Carbone dated August 28, 2019, Exh. 12 (August 2, 2019 Report of James Schelkle). Defendant has met its prima facie burden of showing that the building underwent a substantial rehabilitation as defined in the Rent Stabilization Code and is thus not subject to rent stabilization. Schelkle August 27 Aff.; Carbone Aff., Exh. 12 (August 2, 2019 Report of James Schelkle, Exh. S [1/3/75 Certificate of Occupancy]).

In his opposition, plaintiff argues that pursuant to the DHCR's operational bulletin, 75% of the building's systems must be replaced to establish that it has been substantially rehabilitated. Plaintiff does not dispute defendant's documentation that nine of the seventeen systems used as criteria in the DHCR's operational bulletin, specifically the plumbing (#1), heating (#2), gas supply (#3), intercoms (#5), windows (#6), interior stairways (#11), kitchens (#12), bathrooms (#13), ceiling and wall surfaces (#15) and doors and frames (#17), were all replaced in the renovation. Plaintiff also concedes that since the building lacks an elevator (#8), incinerator (#9) and fire escape (#10), and thus has 14 of the 17 total systems listed in the operational bulletin, only 11 of these 14 systems needed to be replaced in order to be considered a substantial rehabilitation (75% of 14 equals 10.5 systems). However, plaintiff argues that defendant failed to provide proof as to the replacement of four other systems: electrical wiring (#4), roof (#7), floors (#14) or exterior pointing (#16). Further, plaintiff argues that defendant's alleged failure to provide proof of the replacement of the floors (#14) is fatal to its motion since this constitutes a separate, mandatory criteria that must be replaced under the DHCR's operational bulletin.

However, in its reply papers in further support of the cross-motion, to which plaintiff did not object, defendant submits an additional affidavit from Mr. Schelkle in which he points to sections of his moving affidavit, the August 2, 2019 report and supporting documentation which undermine plaintiff's contention. For example, with respect the replacement of the flooring, Mr. Schelkle's moving affidavit states that "[t]he entrance to the Building, stoop and all interior stairs were removed, partitions on every floor of the Building were removed, the floors removed to accommodate new floor joists throughout the Building, all electrical and plumbing lines were removed." Schelkle August 27 Affidavit, ¶ 42. In addition, Mr. Schelkle's August 2, 2019 report which was submitted in defendant's moving papers discusses and attaches certain applications

and drawings which show that, as part of the renovation and conversion of the building from a Class B to a Class A dwelling, the apartment partitions were removed and 50% of the floor joists on each floor of the building were replaced. See Carbone Affidavit, Exh. 12 (August 2, 2019 Report of James Schelkle, pp. 7, 10 and Exhs. P and Q). In addition, defendant submitted evidence that the building's electrical wiring (#4) was replaced. *See* Affidavit of James Schelkle sworn to on October 4, 2019, ¶ 5. Thus, contrary to plaintiff's contention, defendant has shown that at least 12 of the building's 14 systems were replaced during the 1974-75 renovation.

Plaintiff also argues that the renovation does not constitute a substantial rehabilitation because there are currently pending violations that were issued by the New York City Department of Buildings. DHCR's operational bulletin and Rent Stabilization Code § 2520.11(e)(5) both provide that in order for there to be a finding of substantial rehabilitation, "all building systems must comply with all applicable codes and requirements, and the owner must submit copies of the building's certificate of occupancy, if such certificate is required by law, before and after the rehabilitation." Plaintiff fails to attach or authenticate the alleged violations issued by the Department of Buildings but merely copies the text of the alleged violations into an attorney affirmation. Affirmation of Carolyn Z. Rualo dated September 25, 2019, ¶ 23. Further, even if these alleged pending violations that plaintiff cites to in its papers were considered, they have not yet been adjudicated, have nothing to do with the "building's systems", and in any event arose well after the certificate of occupancy was issued. Finally, plaintiff's argument regarding the cost of the renovation is speculative and lacks merit. Accordingly, defendant is entitled to summary judgment dismissing the complaint and on its first counterclaim seeking a declaration that the building is not subject to rent stabilization.

With respect to defendant's third counterclaim for unpaid rent, defendant submits an affidavit from its managing agent as well as plaintiff's lease for his apartment which show that plaintiff failed to pay the rent for his apartment, in the amount of $4,000 per month, since August 1, 2018 through August 31, 2019, totaling $52,000. Carbone Aff., ¶¶ 9, 13 and Exhs. 3, 5. Plaintiff does not dispute this but argues that he is not required to pay rent because of the alleged violations issued by the Department of Buildings regarding the certificate of occupancy. In support, plaintiff cites to *West 47th Holdings LLC v. Eliyahu*, 64 Misc.3d 133(A) (App. Term 1st Dep't 2019) in which the court held that, pursuant to Multiple Dwelling Law § 302, rent may not be recovered by an owner of premises where it is found that the dwelling is occupied in violation of Multiple Dwelling Law § 301, which requires the issuance of a certificate of occupancy for each occupied dwelling. However, unlike in *West 47th Holdings*, there is no dispute here that there was a valid certificate of occupancy issued for this building and thus this defense to non-payment is inapplicable. Accordingly, defendant is entitled to summary judgment on its third counterclaim.

With respect to the second counterclaim for legal fees, Article 18 of plaintiff's lease provides that the defendant landlord is entitled to any expenses, including reasonable attorneys' fees, incurred "in collecting rents or enforcing the obligations of Tenant under the Lease . . . ." Carbone Aff., Exh. 3, ¶ 18. Thus, the lease provides that the defendant is entitled to attorneys' fees incurred in connection with this provision and plaintiff does not dispute this. Accordingly, defendant is entitled to summary judgment on its second counterclaim.

Finally, defendant's request for an order requiring plaintiff to return defendant's tender of $84,442.93, which defendant made on May 2, 2019 in order to avoid the possibility of treble

damages in connection with this action, must be granted since plaintiff's action lacks merit. Carbone Aff., Exh. 11. Accordingly, it is

ORDERED that plaintiff's motion to amend is denied as moot and his motion for summary judgment is denied; and it is further

ORDERED that defendant's cross-motion for summary judgment is granted and the complaint is dismissed, with costs and disbursements awarded to defendant; and it is further

ORDERED, ADJUDGED and DECLARED that the defendant's building located at 10 West 87th Street, New York, New York, is not subject to rent stabilization, and the defendant is awarded summary judgment on its first counterclaim; and it is further

ORDERED that the defendant is awarded summary judgment on its second counterclaim for attorneys' fees; and it is further

ORDERED that the issue of the amount of attorneys' fees awarded to defendant is respectfully referred to a Judicial Hearing Officer ("JHO") or Special Referee to hear and determine; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link

on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that defendant is entitled to summary judgment on its third counterclaim for unpaid rent and the Clerk is directed to enter judgment in favor of defendant and against plaintiff in the amount of $52,000, together with interest at the statutory rate from August 1, 2018 to May 31, 2019, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that within ten days of service of entry of this order, plaintiff shall return to defendant its tender of $84,442.93 made on May 2, 2019.

1/17/20
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE