# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

*Justice*

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KOURTNEY STREB,

Plaintiff,

- v -

WHISTLEPIG ASSOCIATES, INC, TOCKWOTTEN ASSOCIATES, INC,

Defendant.

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**INDEX NO.** 160707/2017

**MOTION DATE** 04/18/2019

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52 were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52 were read on this motion to/for JUDGMENT - SUMMARY.

In this residential landlord tenant action, defendants Whistlepig Associates, Inc. (Whistlepig) and Tockwotten Associates, Inc. (Tockwotten) move to dismiss the complaint, and plaintiff Kourtney Streb (Streb) cross-moves for partial summary judgment (motion sequence number 001). For the following reasons, the motion is denied and the cross motion is denied without prejudice.

## BACKGROUND

Whistlepig is the owner of a building (the building) located at 283 Bleeker Street in the County, City and State of New York. *See* notice of motion, exhibit B (complaint), ¶¶ 5-6. Whistlepig states that it purchased the building from its prior owner, Tockwotten, via a deed of sale dated March 26, 1998, and avers that there is no reason for Tockwotten to be a party to this action. *Id.*; notice of motion, Sperber affirmation, ¶ 4; exhibit A (deed). Streb is the occupant of

apartment 4C in the building, and her tenancy originally commenced on February 16, 1998 when she executed a non-rent-stabilized lease for the unit with Tockwotten. *Id.*, ¶ 5; exhibit C (lease).

Plaintiff originally commenced this action on November 30, 2017 by filing a summons and complaint that set forth causes of action for: 1) a declaratory judgment that apartment 4C is a rent stabilized unit; 2) a declaratory judgment as to the amount of apartment 4C's lawful monthly rent-stabilized rent; 3) a money judgment for rent overcharge; and 4) legal fees. *See* notice of motion, exhibit B (complaint), ¶¶ 74-90. Defendants filed an answer on January 30, 2018, and later filed the instant motion on December 20, 2018. *Id.;* notice of cross motion, exhibit 2. Streb filed her cross motion for partial summary judgment on December 29, 2018. *Id.,* notice of cross motion.

**DISCUSSION**

Defendants somewhat confusingly designated their motion as seeking to dismiss the complaint pursuant to both CPLR 3211 and 3212, however there are no meaningful procedural distinctions between the two types of motions in this case. A motion which seeks dismissal for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), may be made at any time. *See e.g.*, *Kales v City of New York*, 169 AD3d 585 (1st Dept 2019). That is what the first portion of defendants' motion alleges. Pursuant to CPLR 3212 (a), a motion for summary judgment is timely if it is submitted "after issue has been joined." *See*, *Sonny Boy Realty, Inc. v City of New York*, 8 AD3d 171, 172 (1st Dept 2004), quoting *Rochester v Chiarella*, 65 NY2d 92, 101 (1985) ("A motion for summary judgment may not be made before issue is joined . . . and the requirement is strictly adhered to"). Here, issue was joined when defendants filed their answer on January 30, 2018. *See* notice of cross motion, exhibit 2 (answer). Therefore, the second

portion of defendants' motion is timely. In any case, CPLR 3211 (c) permits the court to treat a motion denominated as seeking dismissal as a motion for summary judgment.

The first portion of defendants' motion seeks dismissal of Streb's claims on the sole ground that "the four (4) year lookback rule is a bar for any purposes unless fraud is demonstrated." *See* notice of motion, Sperber affirmation, ¶¶ 11-22. The "four-year lookback rule" that defendants refer to was formerly set forth in Rent Stabilization Law (RSL) § 26-516, and provided that:

> "a complaint under this subdivision shall be filed with the state division of housing and community renewal [DHCR] *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 an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed."

RSL § 26-516 (a) (2) (emphasis added). However, RSL § 26-516 was amended on June 14, 2019 by the Housing Stability and Tenant Protection Act (HSTPA), and the relevant portion of the statute now provides that:

> "A complaint under this subdivision may be filed with the [DHCR] or in a court of competent jurisdiction *at any time*, however any recovery of overcharge penalties shall be limited to the six years preceding the complaint."

RSL § 26-516 (a) (2) (emphasis added); *see also* CPLR 213-a. Thus, the newly amended version of RSL § 26-516 has repealed the "four-year lookback rule" that defendants based their motion on. Further, the Appellate Division, First Department, issued a decision on September 17, 2019 in *Dugan v London Terrace Gardens, L.P.* (177 AD3d 1 [1st Dept 2019]) concluding that "the legislature expressly made the amendments [enacted by the HSTPA] applicable to pending

claims." 177 AD3d at 10. Here, Streb originally raised her claims on November 30, 2017, and they are certainly still unresolved - and therefore still "pending" - as of this date. *See* notice of motion, exhibit B (complaint). Because the currently effective version of RSL § 26-516 does not contain a "four-year lookback rule," it is apparent that there is no longer any statutory basis for defendants' dismissal argument. Therefore, the court rejects that argument and denies the first portion of defendants' motion.

The second portion of defendants' motion seeks summary judgment to dismiss the complaint. *See* notice of motion, Sperber affirmation, ¶¶ 23-28. Defendants specifically contend that "clearly . . . the plaintiff cannot be considered rent stabilized and certainly is not entitled to ignore the DHCR's registrations from 1999 forward." *Id.*, ¶ 26. Plaintiff responds that defendants' evidence does not afford conclusive proof of the building's status as either rent-regulated or deregulated. *See* notice of cross motion, Milosavljevic affirmation, ¶¶ 9-31. After careful review, the court agrees.

It is well settled that the party seeking summary judgment bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the opposing party to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). Here, after reviewing the available evidence, the court concludes that Streb has borne her burden of proof and that defendants have not.

Defendants have presented copies of: 1) renovation plans for the building dated 1967; 2) the building's 1969 certificate of occupancy (Certificate of Occupancy); 3) tax records from the New York City Department of Finance that show that the building received "J-51" real estate tax exemptions from 1970 through 1982; and 4) apartment 4C's DHCR registration history, which shows that defendants had registered it as "exempt" from rent regulation from 1999 forward by reason of "substantial rehabilitation" *See* notice of motion, exhibits D, E, F, G. Defendants' counsel avers that the 1999 registration was done "in error," and that apartment 4C's previous tenant was only rent stabilized because her tenancy had commenced while the building was receiving "J-51" benefits. *Id.*, Sperber affirmation, ¶¶ 8-10. Defendants' president avers that he had advised Streb at the commencement of her tenancy in 1998 that she was not rent stabilized, and notes that her initial lease was not a rent stabilized lease. *See* notice of motion, Kissling aff, ¶ 5; exhibit C. He concludes that the documentary evidence shows that the building had been deregulated by virtue of "substantial rehabilitation" prior to Streb's tenancy. *Id.*, ¶ 3.

In Streb's cross motion, she contends that, pursuant to Rent Stabilization Code (RSC) § 2520.11 (e), an apartment could only be exempt from rent stabilization by virtue of "substantial rehabilitation" if that rehabilitation was performed after January 1, 1974. *See* notice of cross motion, Milosavljevic affirmation, ¶¶ 9-18. Plaintiff notes that defendants' own documents demonstrate that they performed the renovation work upon which they predicate the building's alleged "substantial rehabilitation" before 1969, when the Certificate of Occupancy was issued. *Id.* She then concludes that, because this work was not performed "after January 1, 1974," the exemption from rent stabilization provided in RSC § 2520.11 (e) did not apply to apartment 4C, and the apartment has remained rent stabilized regardless of how defendants registered it. *Id.*

Defendants have failed to show that they performed significant renovation work on the building after January 1, 1974. Accordingly, the court finds that pursuant to RSC § 2520.11 (e), defendants cannot claim that apartment 4C was exempted from rent stabilization protection. As a result, there is a question of fact as to the unit's current rent regulated status. Defendants note that the DHCR's "Operational Bulletin 95-2" (annexed to Streb's cross motion), which sets forth the agency's guide to how it applies RSC § 2520.11, "was not issued or effective until December 15, 1995!" *See* Handel-Harbour reply affirmation, ¶ 6. However, this observation is of no moment, since RSC § 2520.11 itself was certainly in effect in 1974.

In their reply papers, defendants also argue that, under an older version of the RSC which was enumerated 26 NYCRR § 26-504, apartment units were exempted from rent stabilization if those units were in buildings "for which a [Certificate of Occupancy] is obtained after March 10, 1969." *Id.*, ¶¶ 7-8, exhibits B, C. They argue that this exemption applied to apartment 4C because the building's Certificate of Occupancy was dated July 14, 1969. *Id.*, exhibit A. Streb replies that a 1969 New York City Council Special Report made it clear that this provision was only meant to apply to buildings that obtained their initial Certificates of Occupancy after March 10, 1969; i.e., to newly constructed buildings rather than renovated buildings (such as the one at issue in this litigation). *See* Milosavljevic reply affirmation, ¶¶ 4-5. She further notes that the building's 1969 Certificate of Occupancy plainly indicates that the building was "altered," rather than "new," since the latter word was crossed out. *See* Handel-Harbour reply affirmation, exhibit A. The court notes that the Certificate of Occupancy does indeed contain that marking, but nevertheless finds both parties arguments are unpersuasive, since (a) neither of them has presented any case law that conclusively supports their preferred interpretation of the old version of the RSC, and (b) that version of the RSC is no longer in effect. As a result, there is a question

of fact as to the current rent-regulated status of apartment 4C. Accordingly, the portion of defendants' motion which seeks summary judgment is denied.

Streb's cross motion seeks summary judgment on her causes of action for declaratory and money judgments, all of which are derived from her allegation that defendants improperly cancelled apartment 4C's rent-stabilized status and subsequently imposed rent overcharges in each of her successive renewal leases. *See* notice of cross motion, Milosavljevic affirmation, ¶¶ 25-39. Central to Streb's cross motion is her allegation that "it cannot be disputed that defendants have filed inaccurate and fraudulent registration statements with the DHCR claiming that [apartment 4C] is deregulated." *Id.*, ¶ 26. Defendants, deny this allegation. *See* Handel-Harbour reply affirmation, ¶¶ 6-14.

Determining the threshold issue of whether apartment 4C was properly deregulated, and the secondary issue of whether Streb's dependent overcharge-related claims are legally viable, will require careful review of apartment 4C's registration history, payment history and leases, as well as inquiry into any rent increases or decreases that might have been mandated over the course of Streb's tenancy. The documentary submissions that the parties have annexed to their respective motions do not afford the court sufficient evidence to accomplish these tasks. In such instances, however, the First Department has recognized that "the doctrine of primary jurisdiction enjoins courts sharing 'concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency's authority, particularly where the agency's specialized experience and technical expertise is involved.'" *Katz 737 Corp. v Cohen*, 104 AD3d 144, (1st Dept 2012) (internal citations omitted). Additionally, the First Department has noted that, while Supreme Court and the DHCR have concurrent jurisdiction over rent overcharge claims, "pursuant to the doctrine of primary jurisdiction, . . . [it is prudent that such matters] should be

determined by DHCR, given its expertise in rent regulation." *Olsen v Stellar W. 110, LLC*, 96 AD3d 440, 441-442 (1st Dept 2012). The court is mindful that the currently effective version of the rent overcharge statute acknowledges a complaining tenant's right to choose the preferred forum for their relief. Specifically, Rent Stabilization Law (RSL) § 26-516 (2), as amended by the Housing Stability and Tenant Protection Act of 2019 (HSTPA), states that "a complaint under this subdivision may be filed with the state division of housing and community renewal or in a court of competent jurisdiction at any time." However, this court has often acknowledged that the DHCR is in the best position to perform such tasks as, e.g., interpreting the provisions of the RSC, reviewing apartments' rent registration and payment histories, determining the validity of landlords' claims to rent increases by reason of apartment vacancy, major capital improvements and/or individual apartment improvements and calculating damages due for rent overcharges. *See e.g. Dodos v 244-246 E. 7th Street Invs., LLC*, 2019 NY Slip Op 31543(U) (Sup Ct, NY County 2019).

In this case, the court likewise believes that it would be provident for the DHCR to review Streb's claims in the first instance, given its institutional familiarity with the deregulation process and its greater access to much of the necessary documentary evidence. Therefore, the court denies Streb's cross motion for summary judgment without prejudice to her right to re-file her claims with the DHCR and to seek appropriate relief from that agency. The court notes that Streb initially filed her claims in the instant complaint on November 30, 2017, so the DHCR should compute the amount of rent overcharge due to Streb, if any, from that date. Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of defendants Whistlepig Associates, Inc. and Tockwotten Associates, Inc. (motion sequence number 001) is, in all respects, denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of plaintiff Kourtney Streb (motion sequence number 001) is denied without prejudice to said plaintiff's right to refile the claims in her complaint with the New York State Division of Housing and Community Renewal.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

1/23/2020
DATE

W. FRANC PERRY, J.S.C.

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