Badesch v Fort 710 Assoc., L.P.
2020 NY Slip Op 31796(U)
June 9, 2020
Supreme Court, New York County
Docket Number: 160639/2018
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

---X

SPENCER BADESCH

Plaintiff,

- v -

FORT 710 ASSOCIATES, L.P.,

Defendant.

---X

INDEX NO. 160639/2018

MOTION DATE 06/27/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 34

were read on this motion to/for DISMISS.

In this action plaintiff is seeking to recover damages for alleged rent overcharges since December 2011. In motion sequence number 001, defendant Fort 710 Associates, L.P., seeks an order pursuant to CPLR 3211(a)(1) and (7) dismissing plaintiff's complaint. Plaintiff opposes the motion.

BACKGROUND/CONTENTIONS

Plaintiff alleges that he has resided in Apartment 3, in a building owned by defendant, located at 710 West 173rd Street, New York, New York since December 2011, pursuant to the terms of a lease which commenced on December 15, 2011 and expired on December 31, 2012. (NYSCEF Doc. Nos. 1, 7). Thereafter, plaintiff and defendant entered into several renewal leases for various terms, with the last lease renewal covering a two-year term commencing on January 1, 2017 and expiring on December 31, 2018. (NYSCEF Doc. Nos. 8, 9, 10, 11, and 12). Defendant contends that throughout the various lease terms, plaintiff was charged a preferential

rent that never exceeded the legal rent that could be charged by defendant for plaintiff's apartment. (NYSCEF Doc. No. 5, ¶ 6).

Plaintiff contends, however, that from the outset, defendant has unlawfully overcharged the rent and has unlawfully increased rent upon lease renewals, for his apartment, claiming that defendant has engaged in an illegal scheme intended to hide the rent-stabilized status of the apartment from plaintiff and various government agencies. (NYSCEF Doc. No. 1, ¶ 5). Plaintiff alleges that the language contained in the Deregulated Status Rider, attached to the December 15, 2011 lease, misrepresented that the apartment was not subject to the Rent Stabilization Law of the State of New York ("RSL") and was intended to, and had the effect of, causing plaintiff to believe he had no rights under the RSL and that the apartment was market rate and not subject to rent regulation. (NYSCEF Doc. No. 1, ¶¶ 46-47).

Plaintiff also alleges that defendant, in furtherance of its fraudulent scheme, filed false certifications with the New York City Department of Housing Preservation and Development ("HPD"), the New York City Department of Finance ("DOF"), and the New York State Division of Homes and Community Renewal ("HCR"), formerly DHCR, stating that defendant was managing plaintiff's apartment as required by law to receive J-51 tax benefits. (NYSCEF Doc. No. 1, ¶¶ 79-84).

On or about March 3, 2018, plaintiff filed a complaint with HCR, alleging rent overcharge, however, plaintiff withdrew his complaint filed with HCR, in or about October 18, 2018 and commenced the instant action on November 15, 2018. (NYSCEF Doc. Nos. 1, 13, 23, ¶¶ 18-22). Defendant has filed this pre-answer motion to dismiss plaintiff's complaint on two grounds; first, defendant avers that the complaint should be dismissed as the claims therein are barred by the doctrine of primary jurisdiction and second, defendant asserts that the complaint is

barred by the applicable statute of limitations that restricts the court from reviewing the apartment's rental history that occurred before November 15, 2014, four years prior to the commencement of this action. For the reasons that follow, defendant's motion is denied.

STANDARD OF REVIEW/ANALYSIS

On a motion to dismiss under CPLR 3211(a), the complaint is to be liberally construed (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d,144, 151-152 [2002]). The court must "accept the facts as alleged in the complaint as true, accord [the] plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokol v Leader*, 74 AD3d 1180, 1181 [2010], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]).

Pursuant to CPLR 3211(a)(1), to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations" (G*oshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see also Greenapple v Capital One, N.A.*, 92 AD3d 548, 550 [1st Dept 2012]), and "conclusively establishes a defense to the asserted claims as a matter of law" (*Weil, Gotshal & Manges, LLP, v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004] [internal quotation marks omitted]).

Concerning a motion to dismiss pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of cause of action, not whether the proponent of the pleading has a cause of action. (*Sokol v Leader*, 74 AD3d 1180, 1180-81 [2010] [citation omitted]). The "question for

us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv*., 287 NY 411, 414 [1942]). A "plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face" (*Miglino v Bally Total Fitness of Greater N.Y., Inc*., 20 NY3d 342, 351 [2013]).

Here, defendant seeks dismissal of plaintiff's rent overcharge claims on the basis that plaintiff is "forum shopping" because he initially commended this action before HCR. Defendant claims that plaintiff's decision to withdraw the HCR proceeding was just a litigation tactic to secure the best possible forum for adjudication of his claims. Moreover, defendant claims that plaintiff has failed to exhaust his administrative remedies and as such dismissal is appropriate. Plaintiff refutes that defendant filed an answer in the HCR proceeding and argues in any event, that defendant's answer to the HCR complaint is not the type of documentary evidence this court may consider on a motion to dismiss. Additionally, plaintiff contends that this court should not cede jurisdiction to HCR as the complaint raises legal issues that are best decided by the court.

Recently, the Court of Appeals in *Collazo v Netherland Prop. Assets LLC*, 155 AD3d 538, 538, 64 N.Y.S.3d 537 [1st Dept 2017], modified NY3d , 2020 N.Y. LEXIS 778 [2020]), addressed the issue of primary jurisdiction and found that the Housing Stability and Tenant Protection Act of 2019 ("HSTPA") provides that "'[t]he courts and [DHCR] shall have concurrent jurisdiction, subject to the tenant's choice of forum (L 2019, ch 36, Part F, §§ 1, 3)'" (id. at *1). The Court then found that "plaintiffs' choice of forum controls and these claims should be adjudicated in Supreme Court." (id.) Judge Rivera, who dissented in part, concurred with the majority's decision, noting her agreement that the newly enacted HSTPA provisions,

Part F, §§ 1, 3 dictate that the plaintiffs' choice of forum controls and when a plaintiff chooses to litigate claims in Supreme Court, that is the forum where the claims will be adjudicated. (*id.* at *2).

Accordingly, the doctrine of primary jurisdiction does not provide a basis for this court to dismiss the claims alleged herein and transfer the action to HCR, the administrative agency with the expertise to adjudicate such claims. The Court of Appeals' interpretation of the HSTPA provision, confirms that tenants must be afforded their choice of forum, notwithstanding the fact that the HSTPA vests HCR with concurrent jurisdiction to adjudicate plaintiff's claims. *Collazo v Netherland Property Assets LLC* (NY3d , 2020 N.Y. Slip Op. 02128 [2020]). Consequently, as plaintiff has chosen to have his rent overcharge claims brought in this court, his action may not be dismissed in favor of the claims being heard by HCR.

Defendant also seeks to dismiss the complaint as barred by the applicable statute of limitations related to rent overcharge claims. Specifically, defendant contends that any claims which accrued prior to November 15, 2014, four years prior to the date the complaint was filed herein, cannot be the basis for any relief sought in this action. Defendant concedes however, if a tenant demonstrates a fraudulent scheme to deregulate, a court can look beyond the applicable statute of limitations to determine the base date rent, but contends that such circumstances are not present here. Plaintiff argues that the allegations in the complaint outline a fraudulent scheme by defendant that justifies examining the entire rent history at issue and that even in the absence of fraud, this court can apply the default formula established by the First Department in *Taylor v. 72A Realty Assoc., L.P.,* 151 AD3d 95, 105-106, and look back more than four years, to resolve the claims alleged herein.

In *Regina Metro Co, LLC v New York State Div. of Hous. and Community Renewal* (NYS3d , 2020 NY Slip Op 02127 [2020]) the Court of Appeals held that retroactive application of overcharge calculation amendments set forth in Part F of the Housing Stability Tenant Protection Act (“HSTPA”), did not comport with due process and are thus unenforceable. Specifically, the Court held that “[w]e therefore decline to create a new exception to the lookback rule and instead clarify that, under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in *Roberts* overcharge cases, absent fraud.” (*Regina Metro. Co., LLC*, 2020 NY Slip Op 02127, at *9). The *Regina* Court explained that:

> The rule that emerges from our precedent is that, under the prior law, review of rental history outside the four-year lookback period was permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate and, even then, solely to ascertain whether fraud occurred — not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations (*Grimm*, 15 NY3d at 367). In fraud cases, this Court sanctioned use of the default formula to set the base date rent. Otherwise, for overcharge calculation purposes, the base date rent was the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges were to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period. Tenants were therefore entitled to damages reflecting only the increases collected during that period that exceeded legal limits.

(*Regina Metro. Co., LLC*,2020 NY Slip Op 02127, *5).

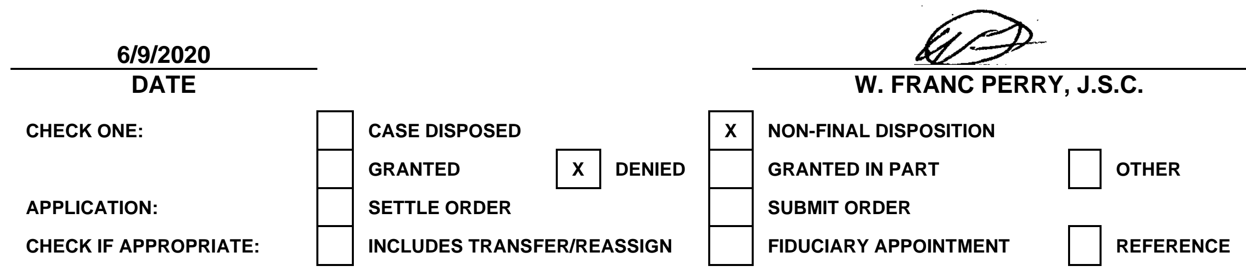
Here the complaint was filed prior to the HSTPA and based on *Regina,* this court must apply pre-HSTPA law. Determining whether Apartment 3 was properly deregulated, and whether plaintiff is entitled to damages related to the alleged overcharge based on his claims that defendant engaged in a fraudulent scheme to obfuscate the true legal status of his apartment, will require careful review of the apartment’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 plaintiff’s tenancy. At this stage of the proceeding, where defendant has not interposed an answer

and no discovery has been exchanged, the court finds that the documentary submissions that the parties have provided, do not afford sufficient evidence to resolve the legal issues raised by the allegations in the complaint. Defendant's motion to dismiss the complaint based on the statute of limitations is denied, however, as plaintiff filed his claims in the instant complaint on November 15, 2014, the court will compute the amount of rent overcharge due to plaintiff, if any, from that date. The lawful rent on the base date for plaintiff's apartment must be determined by using the default formula devised by HCR and plaintiffs' recovery, if any, would be limited to those overcharges occurring during the four-year period immediately preceding plaintiff's rent challenge. (*Regina Metro. Co., LLC*, 2020 NY Slip Op 02127, at *5).

Accordingly, it is hereby

ORDERED that (MSN 001) Defendant's motion to dismiss the Complaint is denied.

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.



6/9/2020
DATE

W. FRANC PERRY, J.S.C.

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