ZB Prospect Realty LLC v France
2020 NY Slip Op 34488(U)
September 14, 2020
Civil Court of the City of New York, New York County
Docket Number: 56349/2019
Judge: Jack Stoller

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART Q

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ZB PROSPECT REALTY LLC,

Petitioner,

DECISION AND ORDER

-against-

DENEICE FRANCE,

Index # 56349/2019

Respondent.

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Present: Hon. Jack Stoller
Judge, Housing Court

ZB Prospect Realty LLC, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Deneice France,[1] the respondent in this proceeding ("Respondent"), seeking possession of 846-48 Prospect Place, Apt. 4, Brooklyn, New York ("the subject premises") on the basis of a termination of a month-to-month tenancy. Respondent interposed a counterclaim of rent overcharge by an answer verified on April 1, 2019. Petitioner then discontinued this proceeding. The proceeding continues on Respondent's counterclaim. The Court held a trial of this matter on September 1, 2020.

Undisputed facts

A number of the pertinent facts to this case are undisputed. An I-card[2] for the building in which the subject premises is located ("the Building") shows that it was constructed before certificates of occupancy were required. The I-card shows that the Building has four floors for

[1] Petitioner originally sued Respondent using the name "Deneice Frankel." The parties stipulated at trial to amend the caption to reflect her actual name, "Deneice France."

[2] An inspection card, known as an "I-card," provides evidence of an inspector's observations of the nature of the use or occupancy of a building. Matter of 345 W. 70th Tenants Corp. v. N.Y.C. Envtl. Control Bd., 143 A.D.3d 654, 654-55 (1st Dept. 2016).

residential purposes, no basement, and a cellar for non-business storage purposes. A managing member of Petitioner ("Landlord") has either owned the Building in his own name or through corporate entities under his control since 2003. Landlord currently owns more than ten buildings, although he did not own ten buildings in 2012. At some point before 2012, Petitioner was the beneficiary of a tax abatement pursuant to N.Y.C. Admin. Code §11-243 known colloquially as a "J-51," which remained in effect through 2012.

Throughout this time and up to the present, the subject premises has been subject to the Rent Stabilization Law. In 2011, pursuant to 9 N.Y.C.R.R. §2528.3, Petitioner registered with the New York City Division of Housing and Community Renewal ("DHCR") a two-year rent-stabilized lease commencing February 1, 2010 with a monthly rent of $1,227.00, the last such registration Petitioner effectuated for this case until August 15, 2019, after Respondent's interposition of her counterclaim during the pendency of this matter. **Three one-year leases for the subject premises ensued, none of which with any riders relating to the Rent Stabilization Law, all with different sets of tenants: the first commenced on October 15, 2012 with monthly rent of $3,700.00 ("the first lease"); the second commenced on October 1, 2013 with a monthly rent of $4,100.00 ("the second lease"); and a third commencing February 1, 2017 with a monthly rent of $4,200.00 ("Respondent's lease"). Respondent is one of five co-tenants on the lease commencing February 1, 2017.**

Petitioner's rent history shows that the tenant of the second lease paid $3,285.00 from October through December of 2014, $3,141.00 in January of 2015, $3,100.00 in February of 2015, $4,100.00 from March through December of 2015, and $4,120.00 in January of 2016.

Individual Apartment Improvements

Both parties introduced evidence of individual apartment improvements ("IAI") pursuant to 9 N.Y.C.R.R. §2522.4(a)(1) that Petitioner purported to have effectuated in the subject premises in 2012. Respondent introduced into evidence an application that Petitioner had filed with the New York City Department of Buildings ("DOB") on June 14, 2012 ("the Application"). The Application states, *inter alia*, that the estimated total cost of the job would be $357,500.00; that the job consisted of an interior renovation of apartments and work on the basement as well as the first, second, third, and fourth floors of the Building; that the Building has twenty units; that the Building is not subject to the Rent Stabilization Law; and that DOB approved the Application on August 24, 2012. Respondent also introduced into evidence work permit data issued by DOB, which shows that a permit was filed on August 29, 2012 with a proposed start date of November 19, 2012, and that the permit issued on November 19, 2012.

Respondent introduced into evidence a document signed by Petitioner and a contractor, dated July 24, 2012, that purported to call for a gut renovation of the subject premises for $100,000, with "complete" demolition, new plumbing, new electricity, a new HVAC system, a new kitchen, new bathrooms, new wood floors, new framing and sheetrock, painting, a stairway, and door knobs. Respondent introduced into evidence canceled checks with no apartment number or address written on the checks that Petitioner paid the contractor, one dated September 23, 2012 for $50,000, one dated October 16, 2012 for $25,000, and one more dated October 20, 2012 for $25,000. Respondent introduced into evidence receipts for these payments that the contractor provided to Petitioner that refer to the subject premises, dated the same days as the checks are dated.

Petitioner introduced into evidence a work permit that DOB issued for the Building, a DOB letter of completion stating that the work done pursuant to the Application was completed on January 10, 2014 and that a new certificate of occupancy ("C of O") would not be required, and drawings that an architect submitted to DOB ("the drawings") that showed that the subject premises, along with one other apartment in the Building ("the other duplex apartment"), were to be a duplex apartments on the first floor. The drawings revealed that Petitioner was planning to renovate a total of nine apartments in the Building.

Testimonial evidence

Landlord testified that he first learned that the Building had a J-51 tax abatement when his attorney told him that he did; that he did not understand what that meant; that he now understands what that means, that the Building has to be registered as rent-stabilized; that he did not register the Building when he started getting J-51 benefits; that he gut-renovated the subject premises; that a general contractor engaged in demolition, took everything out, put in brand new walls, new floors, new toilets, and new electric; that he spent $100,000 on the subject premises; that he added a vacancy allowance of 16.5% to the prior rent-stabilized rent, added $2,500.00 as one-fortieth the cost of the renovation, which he referred to as an "IAI," and was left with a rent was $3,700; that he thought that he was legally able to deregulate the subject premises and stopped registering the subject premises at this time; that he did not know when he had to provide riders for deregulated leases; and that he did not remember how he arrived at a rent of $4,100 for the lease that commenced in October of 2013.

Landlord testified on cross-examination that he has spent his adult life in the real estate business; that he did not know about a rider required for IAI's; that he did not remember what year he started getting a J-51 tax abatement; that he had to have applied for a J-51 tax abatement;

that he knew that he had a J-51 tax abatement but that he did not know about restrictions on deregulation until his attorney told him about that; that he does not know the architect who prepared the drawings; that his expediter hired the architect; that there are three bedrooms in the lower level of the subject premises; that the cellar was used for storage before 2012; that there is no C of O for the Building; and that he changed the use of the cellar and created a new exit on the lower floor without getting a new C of O.

Preliminary rent overcharge analysis

Respondent interposed her counterclaim on April 1, 2019, before the passage of the Housing Stability and Tenant Protection Act ("HSTPA") on June 14, 2019. Respondent did not pay any rent after June 14, 2019 according to the rent history in evidence. The record therefore does not show that Petitioner collected any rent overcharges on or after the passage of HSTPA. Accordingly, the time frames in the law prior to the passage of HSTPA apply to this matter. Matter of Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal, 2020 N.Y. Slip Op. 02127 (Court of Appeals). Under pre-HSTPA law, the legal regulated rent for the purposes of determining an overcharge was the rent charged on the base date, plus subsequent lawful adjustments. 9 N.Y.C.R.R. §2526.1(a)(3)(i). The base date is four years prior to the filing of a rent overcharge claim. 9 N.Y.C.R.R. §2520.6(f)(1). Service and filing of an answer has the same effect for this purpose as the filing of a rent overcharge complaint. Autopark, Inc. v. Bugdaycay, 7 Misc.3d 292, 297 (Civ. Ct. N.Y. Co. 2004), *citing* 78/79 York Assocs. v. Rand, 180 Misc.2d 316 (App. Term 1st Dept. 1999). As Respondent's answer is verified on April 1, 2019, the base date would be April 1, 2015.

A landlord bears the burden of proving the base date rent. Matter of Mangano v. N.Y. State Div. of Hous. & Cmty. Renewal, 30 A.D.3d 267, 267 (1st Dept. 2006), Matter of

Lexington House LLC v. N.Y. State Div. of Hous. & Cmty. Renewal, 31 Misc.3d 1215(A), (S. Ct. N.Y. Co. 2011), EMO Realty Partners v. Herrera, 2018 N.Y.L.J. LEXIS 1670, *5 (Civ. Ct. N.Y. Co.). **Although no lease was in effect on April 1, 2015, the rent history shows that, as of April of 2015, the tenants on the second lease consistently paid $4,100.00 per month, which Petitioner accepted, which suffices to show the base date rent.** Fink v. Ross, 1994 N.Y.L.J. LEXIS 9360, *25 (Civ. Ct. Kings Co. 1994). The monthly rent on the second lease also was $4,100.00, for what it's worth.

Respondent's lease that followed was a one-year lease commencing on February 1, 2017. The law in effect at that time permitted Petitioner to raise the rent by **twenty percent less the difference between an increase for a one-year and a two-year renewal applicable to the previous lease. N.Y.C. Admin. Code §26-511(c)(5-a),[3] 9 N.Y.C.R.R. §2522.8(a)(2), Lirakis v. 180 Seventh Ave. Assocs., LLC, 12 Misc.3d 1173(A)(Civ. Ct. N.Y. Co. 2006)**. The Rent Guidelines Board ("RGB") sets the applicable renewal rates, **N.Y.C. Admin. Code §26-510(b), which the Court can take judicial notice of.** Curry v. Battistotti, 5 Misc.3d 1012(A)(Civ. Ct. N.Y. Co. 2004). The difference between an increase for a one-year and a two-year renewal applicable to the second lease was 3.75%. RGB Order 45. Twenty percent less 3.75% is 16.25%. An increase of 16.25% over the base date rent of $4,100.00 yields a rent of $4,766.25. Respondent's lease had a **monthly rent of $4,200.00. Accordingly, the rent increases from base date do not show a rent overcharge.**

Although Petitioner registered rents with DHCR for the first lease, second lease, and Respondent's lease, Petitioner did not do so until Respondent had already interposed her counterclaim. Respondent had claimed in a summary judgment motion made prior to the trial

[3] The Housing Stability and Tenant Protection Act ("HSTPA") repealed this statute.

that the legal rent should have remained at the same rate as the last registered rent before these late registrations. As the overcharge that Respondent alleges occurred prior to the passage of HSTPA, and as the Court could only ascertain the rent from the last registration from an examination of the records before the base date, however, pre-HSTPA law applies, which precludes such an examination. Regina Metro. Co., LLC, supra, 2020 N.Y. Slip Op. at 02127, Corcoran v. Narrows Bayview Co., LLC, 183 A.D.3d 511, 512 (1st Dept. 2020), 435 Cent. Park W. Tenant Ass'n v. Park Front Apartments, LLC, 183 A.D.3d 509, 510-11 (1st Dept. 2020), Myers v. Frankel, 292 A.D.2d 575, 576 (2nd Dept. 2002),[4] Sessler v. N.Y. State Div. of Hous. & Cmty. Renewal, 282 A.D.2d 262 (1st Dept. 2001), Ridges & Spots Realty Corp. v. Edwards, 4 Misc.3d 130(A)(App. Term 1st Dept. 2004).

Fraudulent scheme to deregulate

Although Respondent does not show a rent overcharge by examination of the rent history from the base date through the interposition of Respondent's counterclaim, the Court can consider rents charged before the base date to ascertain if Petitioner engaged in a fraudulent scheme to deregulate the subject premises that tainted the base date rent. Grimm v. State of New York Hous. & Community Renewal Off. Of Rent Admin., 15 N.Y.3d 358, 366 (2010), Thornton v. Baron, 5 N.Y.3d 175 (2005).

As a threshold matter, Petitioner argued that Respondent cannot raise this issue because Respondent's answer does not plead the detail of the circumstances of any purported fraud as required by CPLR §3016. Respondent's answer only pleads that there has been a rent

[4] This decision does not refer to a failure to register. However, the decision modified the holding in Myers v. Frankel, 184 Misc.2d 608 (App. Term 2nd Dept. 2000) so as to proscribe an inspection of a registration history for more than four years. The modified Appellate Term decision had explicitly held that a landlord's failure to register warranted an inspection of a registration history beyond four years.

overcharge, with no allegation concerning a fraudulent scheme to deregulate the subject premises. As DHCR must ascertain whether fraud affects the legality of the base date rent "where the overcharge complaint alleges fraud …." Grimm, supra, 15 N.Y.3d at 366, and as a pleading raising a rent overcharge cause of action is analogous to a rent overcharge complaint with DHCR, Grimm therefore appears to require a pleading of fraud in order for the Court to adjudicate the claim. Tomic v. 92 E. LLC, 2016 N.Y. Slip Op. 30911(U), ¶ 7 (S. Ct. N.Y. Co.) (Kern, J.). Cf. Friscia v. Towns, 2013 N.Y. Slip Op 31832(U), ¶ 6 (S. Ct. N.Y. Co.)(a tenant claiming a rent overcharge by reason of a fraudulent scheme to deregulate an apartment bears the initial burden of proving not only the rent overcharge but the fraud as well).

Even assuming *arguendo* that the pleading did not present an obstacle to Respondent's claim, a rent overcharge claimant must prove an apartment's legal regulated rent and what payments in excess of that amount the claimant made. Dodos v. 244-246 E. 7th St. Inv'rs, LLC, 2019 N.Y. Slip Op. 31543(U), ¶ 5 (S. Ct. N.Y. Co.). Assuming *arguendo* that Petitioner engaged in a fraudulent scheme to deregulate the subject premises, the so-called "default formula," i.e., the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date, would determine the legal regulated rent. Regina Metro. Co., LLC, supra, 2020 N.Y. Slip Op at 02127, 435 Cent. Park W. Tenant Ass'n, supra, 183 A.D.3d at 510-11, Vendaval Realty, LLC v. Felder, 67 Misc.3d 145(A)(App. Term 1st Dept. 2020).[5] The record shows that the only other apartment with the same number of rooms as

[5] The default formula also applies when a landlord does not meet its burden, as noted above, of providing records necessary to establish a base date rent. Matter of S. Lexington Assocs., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal, 170 A.D.3d 733, 734 (2nd Dept. 2019), Matter of Bondam Realty Assocs., L.P. v. N.Y. State Div. of Hous. & Cmty. Renewal, 71 A.D.3d 477, 478 (1st Dept. 2010), Matter of DeSilva v. N.Y. State Div. of Hous. & Cmty. Renewal Office of Rent

the subject premises in the Building is the other duplex apartment. The record contains no evidence of the rent for the other duplex apartment.

The other duplex apartment fulfills the purpose of the default formula poorly at best. Both Landlord's testimony and the I-card indicate that the lower floor, onto which Petitioner extended both the subject premises and the other duplex apartment, was only previously used as a cellar for storage, not for residential purposes. Thus, the change of the cellar to residential use effectuates a change in the use or occupancy of that part of the Building. **"*Any* … change of use or occupancy … to a building" is an "alteration." N.Y.C. Admin. Code §28-101.5 (emphasis added). MDL §301(2) prohibits the occupancy of a dwelling altered as such after April 18, 1929 without the issuance of a C of O. Petitioner may not recover rent for an apartment so altered without a C of O. MDL §302(1)(b). Given that the evidence shows that the other duplex apartment was altered without the issuance of a C of O, Petitioner may not legally recover rent for the other duplex apartment, thus hopelessly muddling its utility for purposes of the default formula.[6] If a determination of a base date rent by comparison with a comparable apartment in the Building is not available or inappropriate, DHCR shall determine the base date rent by using**

Admin., 34 A.D.3d 673, 674 (2nd Dept. 2006), Matter of PWV Acquisition LLC v. Div. of Hous. & Cmty. Renewal, 2007 N.Y. Slip Op. 30623(U), ¶¶ 5-6 (S. Ct. N.Y. Co.)(Feinman, J.).

[6] DOB's letter of completion is not preclusive on the Court as to the need for a C of O. A determination of a tribunal only precludes a Court with regard to issues that were, ***inter alia***, **"actually litigated…." Liddle, Robinson & Shoemaker v. Shoemaker, 309 A.D.2d 688, 691 (1st Dept. 2003). The record does not support the proposition that DOB's letter of completion was the product of an administrative proceeding but, even in the unlikely event that it was, there is no evidence that Respondent was a party** to any process by which DOB reached its determination, thus depriving the determination of preclusive effect upon her. Buechel v. Bain, 97 N.Y.2d 295, 304 (2001), *cert. denied*, 535 U.S. 1096 (2002), Ji Sun Jennifer Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP, 120 A.D.3d 18, 23 (1st Dept. 2014).

sampling methods for regulated housing accommodations. 9 N.Y.C.R.R. §2522.6(a)(3)(iv), Simpson v. 16-26 E. 105, LLC, 176 A.D.3d 418, 419 (1st Dept. 2019).

Respondent did not introduce any evidence of any results of any sampling by DHCR. Had Respondent pursued her cause of action by an administrative complaint at DHCR, DHCR may make its own investigation, N.Y.C. Admin. Code §26-216(f), which may very well include DHCR's production of its own sampling. While Respondent's choice of the Court as the forum to litigate her cause of action binds this Court, Collazo v. Netherland Prop. Assets LLC, 35 N.Y.3d 987, 990 (2020), a Court, by contrast with DHCR, does not make its own investigation, as the Court does not make the record at trial. People v. Arnold, 98 N.Y.2d 63, 67 (2002), People v. Yut Wai Tom, 53 N.Y.2d 44, 58 (1981), People v. Mitchell, 184 A.D.3d 875, 876 (2nd Dept. 2020), Matter of Jacqulin M., 83 A.D.3d 844, 844 (2nd Dept. 2011). In a Court proceeding, a tenant bears the burden of proving its cause of action with regard to claims of fraud, Friscia, supra, 2013 N.Y. Slip Op. at 31832(U), ¶¶ 5-6, sometimes by subpoenaing DHCR. See, e.g., Altschuler v. Jobman 478/480, LLC, 2013 NY Slip Op 32323(U), ¶ 7 (S. Ct. N.Y. Co.) (Scarpulla, J.), *appeal dismissed*, 135 A.D.3d 439 (1st Dept. 2016), Townsend v. B-U Realty Corp., 67 Misc.3d 1228(A)(S. Ct. N.Y. Co. 2020), Sandlow v. 305 Riverside Corp., 2020 N.Y. Slip Op. 20214, ¶ 14 (S. Ct. N.Y. Co.). Respondent neither presented such evidence at trial nor moved to bifurcate this trial so as to provide such evidence.[7]

Respondent argues that the alteration of the subject premises without the issuance of a C of O bears some relationship to her cause of action for rent overcharge. However, the causes of action are distinct. A tenant who has paid rent in excess of the legal regulated rent is entitled to

[7] While the Court may bifurcate trials, CPLR §603, the Court may not do so unilaterally. Schaeffer v. Lipton, 217 A.D.2d 845, 846 (3rd Dept. 1995).

recovery of the overcharge at the very least. N.Y.C. Admin. Code §26-516(a). However, a tenant who has paid rent to an owner who has altered an apartment without the appropriate C of O cannot recover those rents paid. Atif v. Disapio, 63 Misc.3d 134(A)(App. Term 2nd Dept. 2019), Hayes v. Ramsey, 60 Misc.3d 137(A)(App. Term 2nd Dept. 2018), Ovalles v. Mayer Garage Corp., 8 Misc.3d 137(A)(App. Term 1st Dept. 2005), Candela v. Fried, 3 Misc.3d 136(A) (App. Term 2nd Dept. 2004), Commer. Hotel v. White, 194 Misc.2d 26, 27 (App. Term 2nd Dept. 2002), Baer v. Gotham Craftsman, Ltd., 154 Misc.2d 490, 493 (App. Term 1st Dept. 1992), Goho Equities v. Weiss, 149 Misc.2d 628, 630-631 (App. Term 1st Dept. 1991). Indeed, an illegal apartment may only be considered rent-stabilized in the first place if it is capable of being legalized. Wolinsky v. Kee Yip Realty Corp., 2 N.Y.3d 487, 493 (2004), Acevedo v. Piano Bldg. LLC, 70 A.D.3d 124, 130 (1st Dept. 2009), 142 Fulton LLC v. Hegarty, 41 A.D.3d 286, 288 (1st Dept. 2007), Duane Thomas LLC v. Wallin, 35 A.D.3d 232, 233 (1st Dept. 2006), *leave to appeal denied*, 2007 N.Y. App. Div. LEXIS 1956 (1st Dept. 2007). If the subject premises was altered without a certificate of occupancy, then, Petitioner may not collect rent for it, but a rent overcharge cause of action presents distinct elements.

Conclusion

Accordingly, Respondent has not proven her case. The Court dismisses Respondent's counterclaim.

The parties are directed to pick up their exhibits within thirty days or they will either be sent to the parties or destroyed at the Court's discretion in compliance with DRP-185.

This constitutes the decision and order of the Court.

Dated: September 14, 2020
Brooklyn, New York

APPROVED
JSTOLLER , 9/14/2020, 3:28:37 pm

HON. JACK STOLLER
J.H.C.