SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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CHARLOTTE OSWALD,

Plaintiff,

- v -

SCHULMANN PROPERTIES INTERNATIONAL LLC,302 MOTT STREET LLC

Defendant.

**INDEX NO.** 161236/2020

**MOTION DATE** 07/26/2021

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

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HON. SHAWN KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISSAL.

In a pre-Answer motion to dismiss, Defendants move pursuant to CPLR §3211(a)(1) to dismiss this proceeding on the ground that a defense is founded upon documentary evidence; and pursuant to CPLR §3211(a)(5) to dismiss this proceeding on the ground that the First and Second cause of action are time-barred by the statute of limitations. Defendants further move pursuant to CPLR §3211(a)(7) to dismiss this proceeding on the ground that the Plaintiff has failed to state a cause of action and granting Defendants such other and further relief as this Court deems just and proper.

Plaintiff alleges two causes of action for rent overcharge and negligent infliction of emotional distress.

**Analysis**

On a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank*

*National Association*, 159 AD3d 618, 621-22 [2018]). In addition, "on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Id.* at 622). However, vague and conclusory allegations cannot survive a motion to dismiss (*see, Kaplan v Conway and Conway*, 173 AD3d 452, 452-53 [2019]; *D. Penguin Brothers Ltd. v City National Bank*, 270 NYS3d 192, 192 [ 2018] [noting that "conclusory allegations fail"]; *R & R Capital LLC, et al., v Linda Merritt*, 68 AD3d 436, 437 [2010]).

The criterion for establishing whether a Complaint should be dismissed pursuant to §3211(a)(7) is "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Foley v D'Agostino*, 21 AD2d 60, 64-65 [1964]). Whether the pleader will ultimately be able to establish the allegations in the pleading is irrelevant to the determination of a motion to dismiss pursuant to CPLR §3211(a)(7) (*see EBC I, Inc., v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001][motion must be denied if "from [the] four corners [of the pleadings] factual allegations are discerned which taken together manifest any cause of action cognizable at law"]).

**First Cause of Action, Rent Overcharge**

Dismissal under CPLR § 3211(a)(1) is warranted where the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Fortis Financial Services, LLC v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]; *see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431 [1st Dept. 2014]).

Plaintiff claims that Defendants overcharged her in violation of the Rent Stabilization Law ("RSL"), NY Admin code 26-516(a). She further alleges that the Defendants, pursuant to a scheme to defraud the Plaintiff, charged her in excess of the legal regulated rent for the apartment for the duration of the tenancy. Plaintiff seeks money judgments in the amount of such overcharges, plus treble damages as provided by the RSL.

Defendants contend that there is no evidence in the record which shows or suggests that the Defendants engaged in a fraudulent scheme to deregulate the Apartment.

Retroactive Application of the Housing Stability & Tenant Protection Act of 2019

The Court of Appeals recently consolidated four separate appeals for review, which were all pending when the Legislature passed the Housing Stability & Tenant Protection Act of 2019 ("HSTPA") (*Matter of Regina*, 35 NY3d 332 [2020]). In each case, tenants sued their landlords for rent overcharge and sought to apply the HSTPA's new overcharge calculation provisions to their cases (*Id.*). HSTPA's new overcharge calculation expanded a landlord's damages liability under the Rent Stabilization Law ("RSL") (*Id.*). Accordingly, the Court of Appeals was faced with determining whether the HSTPA's rules applied retroactively to cases that were pending when HSTPA was passed (*Id.*).

Specifically, the HSTPA enacted three key changes to the RSL: (1) it extended the period for which overcharge damages could be recovered from four years to six years; (2) it empowered courts, in calculating the amount by which a tenant had been overcharged, to look back at the unit's rent history over six or more years, rather than four years; and (3) it lengthened the period for which landlords are obliged to retain records of their rental history from four to six years, and permitted regulators and courts to examine "all available rent history which is reasonably

necessary" to investigate overcharge claims, regardless of how old the history is and whether it is drawn from records belonging to landlords, tenants, or others (*Id.*).

In a 4-3 decision, the Court of Appeals held, as a matter of statutory interpretation and federal constitutional law, that the HSTPA rules could not apply retroactively to the tenants' pending claims for overcharges that occurred prior to the HSTPA's enactment (*Id.*).

In the present case, the alleged rent overcharges occurred well before the passage of the HSTPA. Accordingly, the HSTPA cannot be applied retroactively to this matter. As such, the pre-HSTPA law should govern the instant proceeding and no damages for an overcharge may be awarded beginning more than four years before the action was commenced, and no penalties for a willful overcharge beginning more than two years before the action was commenced, rather than the six years permitted by the newly enacted C.P.L.R. §213-a and the amended RSL, N.Y.C. Admin. Code § 26-516(a)(2) (*see Sandlow v 305 Riverside Corp.*, 69 Misc 3d 893, 895, 131 NYS3d 783, 788 [2020]).

To justify examining an apartment's rental history more than four years retroactively, plaintiff must make more than "a mere allegation of fraud alone" against defendant, as such a claim, "without more, will not be sufficient" for the court to inquire further (*see Conason v Megan Holding*, LLC, 25 NY.3d 1, 16, 6 NYS3d 206 [2015]; Grimm v State of NY Div. of Hous. & Community Renewal Off. of Rent Admin., 15 NY3d 358, 367, 912 NYS2d 491 [2010]). Only actual evidence of fraud will warrant examination of the apartment's rental history beyond four years before plaintiff's overcharge complaint, which was filed on December 23, 2020.

In her complaint, Plaintiff contends that Defendants failed to provide a vacancy rider at the inception of plaintiff's tenancy as required by 9 NYCRR 2522.5 (c)(1) and was not permitted to collect any rent increases for the years from 2016-2020 from plaintiff. She also maintains that

the Department of Buildings in 2011 did not issue any permits for the apartment that would in any way indicate there was a "gut renovation" which would support Defendants' rent increases. In support, Plaintiff states in her affidavit that "When I initially entered the apartment there were no evidence of any renovations, to the contrary the kitchen, the appliances were old, and absolutely no evidence of renovation." (NYSCEF Doc. No. 18 ¶3).

Defendants submit the affidavit of Benjamin Aryeh, Managing Member of Brownstone Building Management, the registered managing agent (NYSCEF Doc. No. 4). Mr. Aryeh states that Plaintiff became the tenant of apartment #1 located in the Subject Building pursuant to a written lease dated April 2, 2014 for a period of one (1) year commencing on May 1, 2014 and expiring on April 30, 2015 with a monthly rent of $2,300.00 per month (*Id.*). Plaintiff was offered a one-year renewal every year from the years 2015 through and including 2019 and Plaintiff accepted each and every renewal pursuant to the terms and conditions stated therein (*Id.*). By notice dated January 29, 2020, Plaintiff was notified that her current lease was set to expire on April 30, 2020, and that the lease would not be renewed. Plaintiff vacated the Apartment on or about April 30, 2020 (*Id*). Defendants contend that according to the records of New York State Division of Housing and Community Renewal ("DHCR"), in 2011, the Apartment was deregulated and a vacancy lease for the Apartment was provided to Christina Andersen, who was the first tenant to reside in the Apartment after it was deregulated (*Id.*). Ms. Andersen's lease is dated April 25, 2011 for a two-year period commencing on May 1, 2011 and expiring on May 2013 (*Id.*). Thereafter, the Plaintiff's tenancy commenced in 2014 (*Id.*).

Defendants contend that pursuant to the four year look back period, from December 23, 2016 until the date of vacatur by Plaintiff in April 2020, the renewal leases were all market rate leases as allowed by law and provide no basis for a rent overcharge.

Plaintiff does not plead any factual allegations in support of her argument that Defendants pursued a fraudulent scheme that would allow examination prior to the four year look back period. Further, Plaintiff does not provide any documentation in support of her claims. Accordingly, Defendants' motion to dismiss the first cause of action is granted.

**Second Cause of Action, Negligent Infliction of Emotional Distress**

Statute of Limitations

Dismissal of a cause of action under CPLR § 3211(a)(5) is appropriate if the cause of action may not be maintained because of "arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds."

The statute of limitations for a negligent infliction of distress claim is three years. The complaint and Plaintiff's affidavit state that the incident which gave rise to the claim occurred on August 10, 2017 (NYSCEF Doc. No. 1, NYSCEF Doc. No. 18 at ¶6). The statute of limitations would have expired on August 10, 2020, however due to the COVID-19 pandemic, on March 20, 2020, pursuant to Executive Law Section 29-a, Governor Andrew Cuomo issued Executive Order 202.8, tolling New York's statute of limitations and other procedural deadlines until April 19, 2020. Subsequent Executive Orders further extended the initial toll of the statute of limitations that Governor Cuomo signed at the beginning of the COVID-19 pandemic to November 3, 2020 (see Executive Orders 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, and 202.67). The complaint was filed on December 23, 2020 and thus, Plaintiff's claim for negligent infliction of emotional distress is timely.

To recover for negligent infliction of emotional harm there must be a duty owed by defendant to plaintiff and breach of that duty resulting directly in emotional harm, even if no

physical injury occurred (*see Taggart v Costabile*, 131 AD3d 243, 252–53, 14 NYS3d 388, 396 ([2015]). The Court of Appeals has stated that, "[a] breach of the duty of care resulting directly in emotional harm is compensable even though no physical injury occurred when the mental injury is a direct, rather than a consequential, result of the breach and when the claim possesses some guarantee of genuineness" (*Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1, 6, 852 NYS2d 1 [2008] [internal quotation marks and citations omitted]).

Claims of negligent infliction of emotional distress are properly dismissed if the allegations do not set forth the breach of a duty of care owed to plaintiff (*see DeCintio v Lawrence Hosp.*, 299 AD2d 165, 166, 753 NYS2d 26 [1st Dept. 2002], *lv denied* 100 NY2d 549 [2003]), or that defendant's actions caused plaintiff to fear for her safety (*see Nainan v 715–723 Sixth Ave. Owners Corp.*, 177 AD3d 489, 491 [1st Dept. 2019]).

Recently, the First Department held that extreme and outrageous conduct continues to be an essential element of a cause of action alleging negligent infliction of emotional distress (*see Xenias v Roosevelt Hosp.*, 180 AD3d 588, 589, 120 NYS3d 298, 299–300 [2020]; *also Holmes v City of New York*, 178 AD3d 496 [1st Dept 2019]; *Melendez v City of New York*, 171 AD3d 566, 567 [1st Dept 2019], *lv denied* 33 NY3d 914, 2019 WL 4383502 [2019]; *contra Taggart v Costabile*, 131 AD3d 243 [2d Dept 2015]).

Plaintiff alleges that due to Defendants' failure to fix windows and provide window guards, on August 10, 2017, she was attacked at the apartment due to an intruder getting into the window. She claims that as result of the attack, she suffered emotional distress which has caused her to go to counseling, along with lingering physical injuries. In opposition, Defendants submit a window guard notice dated March 20, 2017, which Plaintiff signed and checked the box indicating that "window guards are currently installed and do not need maintenance or repair."

(NYSCEF Doc. No. 15). Plaintiff does not address the window guard notice in either her affidavit or in her attorney's affirmation, nor does Plaintiff provide any opposition on this issue.

Plaintiff has failed to plead factual allegations that demonstrate that Defendants' behavior in regard to her window security was in an extreme and outrageous manner to sufficiently maintain a cause of action for negligent infliction of emotional distress. Accordingly, Defendants' motion to dismiss is granted as to the second cause of action.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

11/15/2021
DATE

SHAWN KELLY, J.S.C.

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| CHECK ONE: | [X] | CASE DISPOSED | | [ ] | NON-FINAL DISPOSITION | | |
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| APPLICATION: | [ ] | SETTLE ORDER | | [ ] | SUBMIT ORDER | | |
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