SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR ENGORON** **PART** 37

Justice

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MELVYN DAVIS,

INDEX NO. 153293/2014

Plaintiff,

- v -

Decision and Order
After Non-Jury Trial

GRAHAM COURT OWNERS CORP, BENNETT SCHWARZMANN, MARJORIE MILLER,

Defendants.

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Arthur F. Engoron, Justice

After presiding over a non-jury trial, over non-consecutive days, beginning on January 17, 2020 and ending on November 8, 2022[1], this Court makes the following findings of fact, and conclusions of law and issues the following Decision and Order:

Background

This case arises out of a landlord tenant rent overcharge dispute. Plaintiff, Melvyn Davis, is the tenant of apartment 8I in a building located at 1925 Seventh Avenue, New York, New York ("the Apartment").

In November 2002, Mr. Davis entered into a written lease with defendant Graham Court Owners Corp. ("Graham Court") for a five-year term, commencing May 1, 2003, with a monthly rent set at $2,001 ("the Initial Lease"). Paragraph 31 of the Initial Lease reads, in part, that "this [Apartment] is a non-stabilized apartment and is not subject to the Rent Stabilization Code, Rent Control, DHCR or any governmental entity." The lease stated that Mr. Davis would take possession of the apartment "as is," and he undertook many substantial and expensive improvements to make the apartment habitable.

On September 21, 2006, Mr. Davis received written consent from Graham Court's managing agent, Sam Becker, to sublet the Apartment ("the Sublet Letter"). Mr. Davis sublet the Apartment to at least three different subtenants between 2006 and 2011. The last sublease was between Mr. Davis and defendants Bennett Schwarzmann and Marjorie Miller ("the Subtenants").

In January 2007, Graham Court began receiving J-51 tax benefits. In May 2008, Mr. Davis renewed his lease from Graham Court for a three-year term, with a monthly rent set at $2,225. In

[1] The Court notes that there was an unusually long break in the middle of the trial as a result of the COVID-19 pandemic and subsequent court closures. Trial testimony was taken on the following days: January 17, 2020; January 22, 2020; January 23, 2020; January 24, 2020; November 3, 2021; November 4, 2021; November 5, 2021; and November 8, 2021.

May 2011, Mr. Davis executed another lease renewal for another three-year term with a one-year option to renew, with a monthly rent set at $2,400.

In 2011, Graham Court registered the Apartment with the Division of Housing and Community Renewal ("DHCR"). Graham Court listed the Apartment's monthly rent with DHCR at $2,335. Prior to 2011, the last registration Graham Court filed with DHCR for the Apartment indicated that in 2002 the legal rent was $500.07 per month.

In January 2014, Graham Court served Mr. Davis with a Notice to Cure, alleging that he violated his lease by subletting the Apartment. On February 11, 2014, Graham Court then served plaintiff with a Notice of Termination.

Mr. Davis then commenced the instant action seeking, inter alia, a declaration that plaintiff is the rent stabilized tenant for the Apartment, a declaration that Graham Court's Notice to Cure and Notice of Termination are defective as a matter of law, and for damages from Graham Court for rent overcharge. Graham Court counterclaimed for, inter alia, use and occupancy from Mr. Davis.

The Partial Settlement

During the trial, a partial settlement was reached between Mr. Davis, Graham Court, and the Subtenants. As part of the partial settlement: (1) Mr. Davis stipulated that he was surrendering all rights to the Apartment in exchange for a payment from the Subtenants; and (2) Graham Court stipulated that it would issue a two-year rent stabilized lease to the Subtenants at a monthly rent to be determined by this Court following the trial's conclusion.

Following the partial settlement, the only causes of action left for this Court to rule on are: (1) Mr. Davis' cause of action for rent overcharge; and (2) Graham Court's counterclaim against Mr. Davis for use and occupancy.

Inappropriate Contact with Court by Graham Court

After the conclusion of the trial but before the Court issued this Decision and Order, this Court received three emails directly from Joshua Frankel, the Secretary for Graham Corp. In such emails, Mr. Frankel inappropriately and vaguely seemed to threaten the Court and its staff. After being informed by the Court, through his counsel, that direct communication from a client was improper, Mr. Frankel sent his third email to the Court, in which he insinuated he had the power to "remove judges." Although such behavior had no effect whatsoever on the Court's final findings of facts and conclusions of law, for the sake of total transparency, and because some of Mr. Frankel's communications were sent ex-parte, the Court offers the above summary.

Findings of Fact

During discovery, Graham Court submitted an affidavit of Mr. Frankel who swore that "any records of said renovations [to the Apartment] no longer exist and/or are no longer in Defendant Graham Court Owners' Corp.'s and Residential Management's possession." NYSCEF Doc. 54. Shortly before the trial commenced, Graham Court alleged to have just discovered its records at a storage unit regarding improvements to the Apartment, notwithstanding Mr. Frankel's prior affidavit to the contrary. Over Mr. Davis' objection, the Court denied Mr. Davis' motion in limine to preclude such newly discovered documents.

Mr. Davis testified, credibly, that at the time he signed the Initial Lease, the apartment was uninhabitable. As Mr. Davis was under the impression that the Apartment was subject to market rates, he spent over $85,000 on improvements to the Apartment, believing he would be able legally to recoup those expenses when he subsequently sublet the Apartment. Mr. Davis testified that Samuel Becker, Graham Court's managing agent, advised him that if he wanted to make the apartment habitable, Mr. Davis would have to make the investments. Mr. Davis' former contractor, Randy Delfish, and a construction worker, Edward Blount, confirmed the extensive work done to make the Apartment habitable, for which Mr. Davis paid. The uninhabitable initial condition of the Apartment was also confirmed by the testimony of real estate broker Danni Tyson, who visited the Apartment just prior to Mr. Davis signing the Initial Lease.

Mr. Davis testified that Sam Becker, on behalf of Graham Court, modified the Sublet Letter he initially provided by striking out the language "for one year." Mr. Davis offered into evidence a copy of the Sublet Letter with such modification initialed by Mr. Becker. Mr. Davis further testified that each time he entered into a new sublease, he contacted Mr. Becker to inform him of such fact, and that Mr. Becker never objected to a sublet at any point. Additionally, Leo Klein, a friend of Mr. Davis' with a background in construction, testified that he heard Mr. Becker specifically acknowledge Mr. Davis' right to sublet in a telephone call with Mr. Davis. Thus, the Court finds that Graham Court gave Mr. Davis permission to sublet the Apartment indefinitely.

Mr. Frankel was the sole witness who testified on behalf of Graham Court. He testified that Graham Court lawfully deregulated the apartment in 2001, just prior to offering Mr. Davis a lease, by investing $60,000 in "Individual Apartment Improvements." Mr. Frankel opined that because the last legal rent (registered with DHCR in 2002) was $500.07, Graham Court was permitted to raise the legal rent to an unregulated amount of $2001 [$500.07 plus 1/40 of $60,000 ($1500) plus a 20% vacancy allowance ($100.01)]. However, Mr. Frankel was unable to offer admissible evidence to demonstrate that Graham Court made any such improvements, beyond installation of kitchen cabinets, which, by itself, certainly cannot meet the requisite threshold for deregulating the apartment.

The Court generally found Mr. Frankel's testimony to be incredible. Further, Ms. Tyson, a real estate broker who has lived in the subject building for 30 years, whom the Court found to be credible, testified that she had personally witnessed Mr. Frankel lie under oath in a number of other judicial proceedings. Additionally, as was solicited upon cross-examination, this Court notes that Mr. Frankel's credibility has been called into question on other occasions, including in Graham Ct. Owner's Corp. v Taylor, where the Appellate Division, First Department affirmed the opinion of the trial court who found Frankel's testimony to be "entirely incredible" and specifically held that Frankel "lied repeatedly and obviously" at trial. 115 AD3d 50, 54 (1st Dep't 2014).

In any event, the Court need not rely on Mr. Frankel's testimony on this issue, as the direct evidence offered on this issue demonstrates that Graham Court entered into a deregulated lease with Mr. Davis at $2,001 *before* any such alleged capital improvements were made. The lease was entered into in November of 2002, and the renovations to the Apartment were not completed until at least six months after that time, and they were paid for, almost exclusively, by Mr. Davis.

Thus, Graham Court committed fraud by deregulating the Apartment before having spent the money upon which this relied. Furthermore, as noted supra, the credible evidence indicates that Graham Court, through its agents, advised Mr. Davis that he would have to pay for any

improvements to the Apartment himself. Moreover, there was ample testimony that at the time Mr. Davis took possession of the Apartment it was uninhabitable, and that most of improvements to the Apartment, with the exception of purchase of the kitchen cabinetry, was paid for and installed by Mr. Davis or his contractors.

The Court finds that the credible evidence demonstrated that Mr. Davis was not aware the Apartment was rent-stabilized at any point before he signed any of his leases or subleases. In fact, the credible testimony demonstrated that Mr. Davis did not become aware of the Apartment's rent stabilized status until Graham Court served him with a Notice to Cure in January 2014. The credible testimony also demonstrates that Graham Court attempted to conceal the Apartment's rent stabilized status from Mr. Davis.

Conclusions of Law

In Matter of Regina Metro Co., LLC v New York State Div. of Hous. & Community Renewal, 35 NY3d 332, 361 (2020), the Court of Appeals clarified that "under pre-HSTPA [Housing Stability and Tenant Protection Act] law, the four-year lookback rule and standard method of calculating legal regulated rent govern in *Roberts* overcharge cases, absent fraud."

After Regina, the Appellate Division, First Department ruled that the four-year lookback applies not only to deregulation, but also applies where a landlord was proven to have engaged in a fraudulent scheme to raise the "pre-stabilization rent," and the lawful rent on the base date "must be determined by using the default formula devised by DHCR, and plaintiff's recovery would be limited to those overcharges occurring during the four-year period immediately preceding plaintiffs' rent challenge." 435 Central Park W. Tenant Assn. v Park Front Apts., LLC, 183 AD3d 509, 510 (1st Dep't 2020).

As the evidence adduced at trial overwhelmingly supports the conclusion that Graham Court engaged in willful fraud by improperly deregulating the Apartment when it had not conducted substantial improvements that would have qualified as the necessary "Individual Apartment Improvements," and as the record further establishes that Graham Court intentionally deceived Davis about the status of the Apartment and encouraged him to expend his own money to make the Apartment habitable, it is necessary to use the default formula to determine the base rent. To do otherwise would reward an "unscrupulous landlord" who "could register a wholly fictitious, exorbitant rent and, as long as the fraud is not discovered for four years, render that rent unchallengeable." Thornton v Baron, 5 NY3d 175, 181 (2005); see also Conason v Megan Holding, LLC, 25 NY3d 1 (2015).

> The default formula provides for the base date to be established at the lowest of 1) the lowest registered rent for a comparable apartment in the building at the time the complaining tenant moved in, 2) the complaining tenant's initial rent reduced by a certain percentage, 3) the last registered rent paid by the prior tenant within the lookback period, or 4) if none of those is appropriate, an amount set by DHCR based on its relevant data.

Simpson v 16-26 E. 105, LLC, 176 AD3d 418, 419 (1st Dep't 2019).

As there was insufficient testimony regarding the registered rents for comparable apartments in the building, the Court is constrained to look to the last legal registered rent for the prior tenant, which was $500.07.

Accordingly, the legal rent for the Apartment is hereby ordered to be set at $500.07.

As the Court finds willful fraud on the part of Graham Court, Mr. Davis is entitled to treble damages for the four years prior to his complaint being filed. As Mr. Davis concedes that he stopped paying rent in January 2014, he is entitled to the difference between what he paid and what he should have been charged, as follows:

- $20,999.16 from May 2010 to April 2011 [($2,250 – $500.07) x 12 months] and;
- $60,797.76 from May 2011 to January 2014 [($2400 - $500.07) x 32 months]

The total in rent overcharge owed to Mr. Davis is $81,796.92. As Mr. Davis is entitled to treble damages, this results in a total due to him of $245,390.76.

However, Graham Court is entitled to use and occupancy at the rate of $500.07 for 84 months (from January 2014 through December 2021) for a total owed to Graham Court of $42,005.88.

Accordingly, deducting the use and occupancy due to Graham Court from the Damages owed to Mr. Davis, Mr. Davis is entitled to a total judgment from Graham Court in the amount of $203,384.88.

As the prevailing party, Mr. Davis is entitled to reasonable attorney's fees, as demanded in his complaint and based on reciprocal rights to attorneys' fees within the meaning of Real Property Law § 234. Graham Ct. Owner's Corp. v Taylor, 24 NY3d 742, 748 (2015).

Reasonable attorney's fees shall be determined at an inquest by a special referee upon Mr. Davis filing a Note of Issue with Notice of Inquest, a copy of this Decision and Order, and payment of any necessary fees. Plaintiff must file such Note of Issue within 60 days of this Decision and Order, and failure to do so timely shall result in automatic disposal of this case.

Conclusion and Order

Thus, for the reasons stated herein, the legal rent of the Apartment is hereby ordered to be set at $500.07 per month, and the Clerk is hereby ordered to enter judgment in favor of Plaintiff Melvyn Davis and against Defendant Graham Court Owners, Corp. in the amount of $203,384.88.

DATE: 12/3/2021

ARTHUR ENGORON, JSC

Check One: [ ] **Case Disposed** [X] **Non-Final Disposition**

Check if Appropriate: [X] **Other (Specify** Attorney's fees inquest remaining **)**