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

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BRIAN BURROWS, CRAIG CHUNG, OLECIA CHUNG, SAM WALLER

Plaintiff,

- v -

75-25 153RD STREET, LLC,

Defendant.

INDEX NO. 160082/2020

MOTION DATE 08/09/2021

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) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for DISMISS.

Plaintiffs Brian Burrows, Craig Chung, Olecia Chung, and Sam Waller ("Plaintiffs") bring claims on their own behalf, and on behalf of a putative class of current and former tenants of 75- 25 153rd Street (the "Building"), which is located in Queens. Defendant is the owner and operator of the Building, which participates in the 421-a program. Pursuant to that program's rules, Defendant is required to provide the Building's tenants with the protections of rent stabilization.

Defendant moves pursuant to CPLR §3211 (a)(1), (5) and (7) to dismiss plaintiffs' Brian Burrows, Craig and Olecia Chung, and Sam Waller (collectively "Plaintiffs") rent overcharge claims; to dismiss Plaintiff Sam Waller's ("Waller") separate claim asserting that Defendant incorrectly increased rent when renewing Waller's rent-stabilized lease after the enactment of the Housing Stability and Tenant Protection Act of 2019 ("HSTPA"); to dismiss Plaintiffs' claims for a declaratory judgment that their apartments are rent-stabilized; to dismiss Plaintiffs' "Count

Three" as duplicative of Plaintiffs' "Count Two"; and granting such other relief as this Court deems just and proper.

Background

Plaintiffs allege that Defendant engaged in two distinct "preferential rent" ruses in violation of the 421-a program. First, Plaintiffs argue that the initial legal regulated rent for an apartment in a 421-a building must be the "monthly rent charged and paid by the tenant," and all subsequent rent increases must be derived from that first amount. Further, a landlord may not utilize a preferential rent as the initial legal regulated rent in a 421-a building. Plaintiffs contend that Defendant registered with an initial "preferential rent," and a higher legal regulated rent, and that by registering the Building's units in such fashion, the Defendant was able to, and did, calculate rent increases in excess of those that were legally permissible.

Second, Plaintiffs allege that Defendant utilizes what amounts to a "double" preferential rent, which is based upon Plaintiff Waller's receipt of rent concessions of two months. Plaintiffs argue that in Plaintiff Weller's renewal lease, commencing after Housing Stability & Tenant Protection Act of 2019's ("HSTPA") enactment, Defendant pulled the concessions, and wrongfully increased his rent from approximately $3,600 to $3975.00, for a one-year renewal. According to Plaintiffs, under HSTPA, Plaintiff Waller's monthly rent should have been increased only 1.5%, not by more than 10%.

Plaintiff Brian Burrows resides in Apartment 302 at the Building. Apartment 302's rent history with Department of Homes and Community Renewal ("DHCR") lists that the first tenant in possession was provided with a legal regulated rent of $5,000 and a preferential rent of $1,999 (NYSCEF Doc. No. 1). Plaintiffs contend that had the initial legal regulated rent been registered properly, the legal regulated rent would have been $1,999, not $5,000.

Plaintiffs Craig and Olecia Chung reside in Apartment 437 at the Building. Apartment 437's rent history with DHCR indicates that the first tenant in possession was provided with a legal regulated rent of $3,000, and a preferential rent of $1,650. (*Id.*). Plaintiffs allege that had the initial legal regulated rent been registered properly, the correct number would have been $1,650, not $3,000.

Plaintiff Sam Waller resides in Apartment 309 at the Building. Apartment 309's rent history with DHCR indicates that the first tenant in possession was provided with a legal regulated rent of $6,000 and a preferential rent of $3,119. (*Id.*). Plaintiffs allege that had the initial legal regulated rent been registered properly, the correct number would have been $3119, not $6,000. In addition, Plaintiffs contend that in violation of HSTPA, Defendant pulled the rent concession for Plaintiff Waller's lease commencing August 2019, and increased the amount charged from approximately $3,600 to $3,975. (*Id.*).

Plaintiffs[1] allege four causes of action: (1) violation of Rent Stabilization Law ("RSL") §26-512, in that Defendant overcharged Plaintiffs in an amount equal to the difference between their monthly rents and the appropriate legal regulated rent-stabilized rents; (2) declaratory judgment adjudging and determining: a) the apartments of Plaintiffs are each subject to the RSL and RSC; b) Plaintiffs are each entitled to a rent-stabilized lease in a form promulgated by DHCR; c) the amount of the legal regulated rent for the apartments of Plaintiffs; and, d) Plaintiffs and members of the Sub-Class are not required to pay any rent increases unless and until legally permissible rent-stabilized lease offers are made to, and accepted by, Plaintiffs; (3) declaratory judgment adjudging and determining: a) the apartments of Plaintiffs are subject to the RSL and RSC and any purported deregulation by Defendant was invalid as a matter of law;

[1] Plaintiffs make these claims on behalf of themselves and members of the Sub-Class.

b) Plaintiffs are each entitled to a rent-stabilized lease in a lease form promulgated by DHCR; c) the amount of the legal regulated rent for the apartments of Plaintiffs; d) any leases offered by Defendant to Plaintiffs are invalid and unlawful unless they are offered on lease forms and terms prescribed by DHCR; and Plaintiffs are not required to pay any rent increases unless and until legally permissible rent-stabilized lease offers are made to, and accepted by, said Plaintiffs; and (4) attorney fees. (*Id.*)

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"]).

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." Further, 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]).

Rent Overcharge Claims

Defendant alleges that Plaintiffs' apartments have always been registered and treated as rent-stabilized and Plaintiffs' claim of rent overcharge is time-barred by the applicable four-year statute of limitations. In the alternative, Defendant claims that even assuming Plaintiffs' allegations to be true, Plaintiffs have never been overcharged, as Defendant never charged or collected the registered legal regulated rents. Instead, Defendant argues that Plaintiffs have always been charged and paid a preferential rent that is lower than the legal regulated rent, even when the legal regulated rent is recalculated based on the actual rent paid by the initial tenants.

In opposition, Plaintiffs contend that Defendant improperly used preferential rent as the first rent. Further, Plaintiffs maintain that they have provided a "sufficient indicia of fraud" to allow the court to look back past the four-year look back limit dictated in *Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 35 N.Y.3d 332 [130

N.Y.S.3d 759, 154 N.E.3d 972] (2020) (herein "*Regina*") (*see Butterworth v 281 St. Nicholas Partners, LLC*, 160 AD3d 434, 434 [1st Dept 2018] ["sufficient indicia of fraud" allows court to look back beyond four years]).

In *Regina*, the Court of Appeals held that "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" (*Regina*, 35 NY3d at 355). The Court further stated that the lookback was "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 limitation" (*id*). Moreover, in Regina, the Court stated that elements of fraud consist of evidence of the defendant's intentional misrepresentation of a material fact and the plaintiff's reliance and resulting injury (35 NY3d at 356, n 7).

Plaintiffs have successfully pled a cause of action for rent overcharge. Despite Defendant's contentions, the evidence submitted does not conclusively demonstrate the insufficiency of Plaintiffs' allegations.

Waller's Individual Claim

Plaintiff Waller alleges that the rent concession of two free months granted in his 2017 lease (in addition to a preferential rent) must be treated as a preference such that, upon renewing Waller's lease after the enactment of the HSTPA, Defendant was required to (i) average Waller's rent concession of two free months' over the term of his lease to calculate the purported "net effective rent" for that term, and then (ii) base any rental increase for Waller's 2019 renewal lease off of the purported "net effective rent" of "approximately $3,600," rather than the preferential rent of $3,950 that was actually charged to and paid by Waller prior to the renewal.

After *Regina*, the First Department ruled that the four-year lookback applies not only to deregulation cases, 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 would be determined by using DHCR's "default formula" (*435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC*, 183 AD3d 509, 510 [1st Dept 2020]). Here, relying on the StreetEasy advertisements, Plaintiff argues that the initial rent registrations were fraudulent because they used rent concessions, instead of "net effective rent" (a term not used in the relevant statutes), thus tainting the rent history.

In enacting the HSTPA, the Legislature amended RSL § 26-511(c)(14) to prohibit a landlord from revoking a tenant's preferential rent upon a lease renewal and instead, required a landlord, upon renewing a tenant's lease, to base any rental increase off of the preferential rent that was actually charged to and paid by the tenant prior to the renewal. Plaintiff Waller seeks a determination equating a two-month rent concession with a preferential rent (*see Chernett v Spruce 1209, LLC*, 2021 NY Slip Op. 31064[U], 8 [Sup Ct, NY County 2021]).

Defendant also contends that this court should defer to DHCR's determination in Fact Sheet #40, regarding the distinction between "rent concession" and "preferential rent", which is strongly opposed by Plaintiffs. The fact sheet identifies two types of concessions. One type of concession is where the prorated amount is charged which according to this fact sheet "is really the same as a preferential rent and will be treated as the same manner" (*id.*). The other type of concession is "a concession for specific months, as for example, where the lease provides that the tenant will not have to pay rent for one or more specified months during the lease term. This type of concession is not considered a preferential rent" (*id.*). Despite Defendant's arguments, the fact remains that Plaintiffs have produced evidence that the units were marketed on

StreetEasy at the "net effective rent." Accordingly, Defendant's motion is denied as there remain issues precluding dismissal.

Declaratory Judgment

Defendant moves to dismiss Plaintiffs' claims for a declaratory judgment finding that the apartments were rent-stabilized and that any purported deregulation was invalid, as there is no justiciable controversy. As discussed above, Defendant has not sufficiently demonstrated that "there is no justiciable controversy." Accordingly, Defendant's motion to dismiss Plaintiffs' claims for declaratory judgment are denied.

Count Three

Additionally, Defendant moves to dismiss count three as duplicative of count two. Though similar, Plaintiffs seek two different declarations in counts two and three. Accordingly, Defendant's motion to dismiss count three as duplicative is denied.

It is hereby,

ORDERED Defendant's motion to dismiss is denied.

11/18/2021
DATE

SHAWN KELLY, J.S.C.

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