SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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KYLE JEKIELEK, JON JEKIELEK

Plaintiffs,

- v -

260 PARTNERS, L.P.,

Defendant.

INDEX NO. 161176/2017

MOTION DATE 09/23/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiffs' motion for summary judgment is granted.

Background

This rent overcharge case arises out of an apartment rented by plaintiffs who claim their apartment received J-51 benefits and was illegally deregulated by defendant under high rent vacancy deregulation.

Defendant took title for the premises located at 260 Convent Avenue, New York, New York in 1994. The apartment was treated as rent stabilized until 2007. In 1995, defendant filed a rent registration statement increasing the legal rent from $529.32 to $1,200.00 per month. Defendant contends this increase was due to it spending approximately $25,600 on individual apartment improvements ("IAIs") entitling defendant to collect rent at 1/40 of the property value.

In 2002, defendant increased the rent again from $1,376.27 to $1,855.08. Although defendant provides no evidence, defendant contends this increase was also due to modest IAIs and a vacancy lease. On August 13, 2008, defendant filed a rent registration statement alleging that the apartment was exempt from rent regulation due to high rent vacancy deregulation. One year later, the Court of Appeals decided *Roberts v Tishman Speyer Properties, L.P.* (13 NY3d 270, 918 NE2d 900 [2009]), in which it held that rent-regulated apartments could not be removed from rent stabilization while still receiving J-51 benefits. Furthermore, the First Department decided the *Roberts* decision retroactively applied (*see Gersten v 56 7th Ave. LLC*, 88 AD2d 189 [1st Dept 2011]).

Defendant admitted to knowing about the *Roberts* ruling in 2009 (NYSCEF Doc. No. 147 at 38-9). Still, defendant continued to operate the premises as deregulated. On November 21, 2012, plaintiffs signed an initial lease with defendant for a one-year term to commence on December 1, 2012. The monthly rent was listed at $2,800.00 and the lease contained a rider entitled "Deregulated Status" which represented to the plaintiffs that the unit was not rent stabilized. Defendant extended the lease to plaintiffs on one-year terms at least three separate times. Each extension failed to recognize the rent stabilized status of the unit and did not disavow the previous 2012 rider.

In June of 2016, defendant registered the unit as rent stabilized and offered lease extensions to plaintiffs in compliance with renewals for rent stabilized units. In 2018, defendant remitted a refund of rent totaling $6,044.21 and noted the rent overcharge. Plaintiffs immediately contacted defendant and claimed that the refund was not in full satisfaction of defendant's liability. Plaintiffs vacated the unit in November 2020.

Plaintiffs claim that defendants engaged in fraudulent misconduct by failing to register the unit as rent stabilized despite being aware of the *Roberts* and *Gersten* decisions. Because of this failure, plaintiffs assert the base rent for purposes of calculating the amount overcharged should be based on the default formula as outlined by the Rent Stabilization Code. Plaintiffs also assert that defendant waived its argument that the claim is barred by statute of limitations by failing to address the argument in its Answer. Plaintiffs contend that defendant's failure to submit a statement of material facts entitles them to summary judgment. Furthermore, plaintiffs argue that defendant's refunded amount was based on rent increases from 2007 until 2015 for which defendant has failed to produce evidence of rental histories or agreements establishing the rent at that time.

Defendant asserts it was waiting on formal guidance from DHCR before changing the registration of any of its units because *Roberts* and *Gersten* did not address how landlords should proceed following the decisions.

In reply, plaintiffs indicate that this Court ruled on a similar argument from defendant in *Najera-Ordonez et al v 260 Partners, L.P. et al.*, Index No. 160546/2017. In that case, the Court found that defendant engaged in fraudulent conduct and knew about the *Roberts* decision but failed to act for over 7 years constituted sufficient evidence of fraudulent conduct.

***Najera-Ordonez* Decision**

Najera-Ordonez is a class action suit brought against this defendant alleging that after the *Roberts* decision, defendant continued deregulating units in its building. Specifically, defendant deregulated eight units in the years after *Roberts* (*Najera-Ordonez*, Index No. 168546/2017 at 1) Although the manager of Beach Lane Management (the managing agent of 260 Partners) testified that he knew of the *Roberts* decision in 2009, the units were not re-registered even after

the 2011 *Gersten* decision (*id*. at 2). In 2015, defendant issued refunds and re-registered units in a nearby building but failed to do so for 260 Convent (*id*.). DHCR issued guidance in 2016, entitled "J51 FAQ", advising landlords to re-register units; however, defendant waited over six months to register the units at issue (*id*.). When defendant finally re-registered the units, defendant utilized preferential rents in violation of DHCR guidance and recorded rents that were much higher than those being paid by the tenants (*id*.). The Court found these undisputed facts sufficiently demonstrated a fraudulent scheme to deregulate the apartments and granted plaintiffs summary judgment.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably

conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

This Court finds that the defendants did not raise an issue of material fact to survive summary judgment. Defendant's failure to file a Statement of Material Facts is not dispositive with respect to whether plaintiff's summary judgment motion should prevail. In any event, the Court can overlook that mistake (*see* 22 NYCRR 202.1).

The central issue in this motion is whether defendant's conduct demonstrates a fraudulent scheme to deregulate the apartments. Defendant admitted that it was aware of the *Roberts* ruling in 2009 (NYSCEF Doc. No. 147 at 37). Still, defendant waited over 7 years after the *Roberts* decision to register the apartment unit as rent stabilized, contending that all along it was awaiting guidance from DHCR (NYSCEF Doc. No. 135 at 10). Despite knowing its units were subject to rent stabilization, defendant issued leases to plaintiffs from 2012 until 2015 that affirmatively misrepresented the deregulated status of the apartment unit.

Defendant's contention that it was waiting for guidance from DHCR makes little sense, though, when it appears that in 2015, the same year defendant issued a lease reaffirming the deregulated status of plaintiff's unit, defendant registered units in another building as rent stabilized (*id*. at 11). In other words, in 2015 defendant knew the apartments had to be registered as stabilized; while it was re-registering apartments in another building, it was entering into a non-stabilized lease with the plaintiffs here. Plaintiffs successfully demonstrated that defendant engaged in a fraudulent scheme to deregulate plaintiff's apartment unit.

Defendant did not justify the increase in rent from 2001-2002. Defendant did not produce proof of significant improvements to the unit that would validate a 35% increase in rent and

produced no documentation related to the rental history from that period. Defendant asserts the IAIs were valued at $5,500, but states "we have been unable to find backup—15+ years after the fact—on these modest expenditures" (NYSCEF Doc. No. 173 at 2). Casting aside defendant's ability to meticulously produce receipts from more than 20 years ago, even with documentation proving the $5,500 value, the 2002 increase is astonishingly high. Documentation of IAIs and rental histories are necessary to calculate the appropriate overcharge amount. Even a good faith tender of a refund and a rent adjustment, as defendant did here, will not absolve a party of liability when it engaged in overtly fraudulent conduct like the defendant did here. Additionally, the existence of such fraudulent conduct requires the default formula for calculations. Therefore, under the circumstances, defendant's refund is unsatisfactory.

Finally, defendant failed to claim the statute of limitations bars plaintiff's claims in its answer to the complaint. Statute of limitations is an affirmative defense and is waived if not asserted (*Robinson v Canniff*, 22 AD3d 219 [1st Dept 2005]). Because of this failure, defendant waives this defense.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment is granted and plaintiffs are entitled to reasonable legal fees pursuant to Rent Stabilization Law §26-516(a)(4) and Rent Stabilization Code §2526.1(d); and it is further

ORDERED that defendant's affirmative defenses are severed and dismissed; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) the issue of calculating the amount owed to plaintiff by using the default formula, and

(2) the issue of reasonable legal fees to be awarded to plaintiff; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

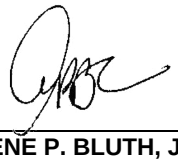
ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and

the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.



10/21/2022
DATE

ARLENE P. BLUTH, J.S.C.

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