

**Sciarra v 531 East 83rd Street Owners Corp.**

2003 NY Slip Op 30121(U)

August 25, 2003

Supreme Court, New York County

Docket Number:

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT; **WALTER B. TOLUP**

PART 15

Justice

0106770/2002

SCIARRA, TONI  
vs  
531 EAST 83RD ST. OWNERS COW.

INDEX NO. \_\_\_\_\_  
MOTION DATE 1/10/03

SEQ 1  
SUMMARY JUDGMENT

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**SCANNED**

SEP 08 2003

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE

\_\_\_\_\_

*WBT*  
\_\_\_\_\_  
**WALTER B. TOLUP** J.S.C.  
 NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: IAS PART 15

-----x  
 TONI SCIARRA a/k/a TONI SCIARRA POYNTER

Plaintiff,

**Index No.** 106770/2002

**Mtn Seq.**

-against-

531 EAST 83<sup>rd</sup> STREET OWNERS CORP.,  
 EAST END AT 83<sup>rd</sup> STREET, INC., and  
 FLORENCE TESSLER,

Defendants.

-----x  
**WALTER B. TOLUB, J.:**

Defendants move and plaintiffs cross move **for** summary judgment in this plenary action to enforce a Fair Market Rent Appeal (FMRA) order.

Facts

In May 1982, Troy Ventures, Inc., as agents for 531 Equities, executed a lease between plaintiff and a Mr. Peter Donhauser as tenants, for apartment 5B located at 531 East 83<sup>rd</sup> Street (the building). Plaintiff commenced occupancy of apartment 5B (the apartment) in June, 1982. **At** some point during **1989**, although it is unclear from the papers **when**, defendant Florence Tessler (Tessler) acquired the shares allocated to plaintiff's apartment as **well** as the unit's proprietary lease.

At some point after commencing occupancy, plaintiff filed a Fair Market Rent Appeal (FMRA) with the Division of Housing and Community **Renewal (DHCR)** **alleging** that the rent **charged by defendant** Tessler exceeded the apartment's fair market **rent**. In 1987, while

plaintiff's FMRA was pending, defendant 531 East 83<sup>rd</sup> Street Owners Corp. ("Owners") was created, and at some point thereafter it appears that defendant Owners became the landlord of the building.

By order dated November 10, 1989, the DHCR awarded plaintiff an overcharge of \$39,660.11 for the period from June 1, 1982 to November 30, 1989. Pursuant to this order, defendant Tessler was directed to refund or fully credit the amount overcharged. This order was issued "without prejudice to any action a tenant might have against any owner who was not joined as a party to this proceeding" (Notice of Motion, Ex. D).

In response to this determination, defendant Tessler filed a PAR challenging the award. This petition was denied on July 3, 1997, and defendant Tessler c/o MB Management Company was directed to refund \$39,600.11 in rent to plaintiff-tenant. Plaintiff-Tenant was also informed via this order that in the event that Owner failed to refund the rent overcharge within 60 days, "tenant may bring an appropriate action in a court of competent jurisdiction" (Notice of Motion, Ex. A).

While the PAR was pending, several events transpired with regard to the subject building and the ownership of the apartment. First, it appears that at some point during the 1990's the building underwent a conversion from a rental property to a cooperative. Second, in 1992, defendant Owners created defendant East End at 83<sup>rd</sup> Street, Inc. ("East End"). Perhaps most importantly, on March 3,

1997, defendant East End<sup>1</sup> acquired **the** stock and proprietary lease for plaintiff's apartment as a direct result **of** defendant Tessler's failure to pay maintenance on the apartment.

In August 1997, following the denial of defendant Tessler's PAR, defendant East End commenced an Article 78 proceeding challenging the denial of the PAR. The Article 78 proceeding was withdrawn on February 11, 1998 and plaintiff was so notified by letter dated April 28, 1998 (received May 7, 1998).

On March 28, 2002 this action was commenced against defendants seeking to enforce the Fair Market Appeal overcharge award. The instant motion followed.

#### Discussion

A motion for summary judgment limits this Court's role to finding issues, and not resolving them. **The** movant's success **is** therefore dependent on the submission of evidence sufficient to demonstrate an absence of any triable issues of fact, thereby demonstrating entitlement to judgment as a matter of law (Sillman v Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [1957]; see generally, Barr, Altman, Lipshie and Gerstman; New York Civil Practice Before Trial [James Publishing 2001-2002] §37:91-92). The opposing party bears the burden **of** producing evidentiary proof in

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'The court notes that defendants' papers indicate that defendant East End was at one time a wholly owned subsidiary of defendant Owners. However, **no** evidence has been presented as to when, as alleged, this relationship was severed.

admissible form that is sufficient to establish the existence of material issues of fact requiring trial. **Mere** conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). Accordingly, **if** there is any doubt that triable issues of fact exist, then **summary** judgment will not be granted.

*Statute of Limitations*

Defendants, in their instant motion, contend that the statute of limitations governing the enforcement of a rent overcharge award is covered by CPLR 213-a, or alternatively, CPLR 214(2), and under either of these statutes, plaintiff's action is time-barred. In opposition to defendants' motion and in support of its own, plaintiff contends that CPLR 213(1) is the applicable statute, rendering the instant action **viable**.

At the outset, this court notes that plaintiff's action seeks to enforce a FMRA overcharge award, not to commence an action for residential rent overcharge. Accordingly, CPLR 213-a, which sets forth the applicable statute of limitations for commencing rent overcharge actions, is inapplicable (CPLR 213-a; Math v. Goldman, 272 A.D.2d 108 [1<sup>st</sup> Dept. 2000]; Rosado v. Vaccaro, 2003 WL 21709912 [App. Term 2<sup>nd</sup> and 11<sup>th</sup> Dist. 2003]).

CPLR 214[2], while seemingly logical, **is** also inapplicable. The three year **statute** of limitation provided under CPLR 214[2] applies only to those actions seeking "to recover upon a liability,

penalty or forfeiture created **or** imposed by statute except as provided in sections 213 and 215" (CPLR 214{2}).

FMRA overcharge awards are governed by the New **York** City Rent Stabilization Laws (RSL) and Code (RSC)([RSL] Administrative Code of the City of New York § 26-513; § **RSC** 2526.1(e)). Pursuant to the RSL, a successful tenant in an FMRA overcharge action may either collect the overcharge award by deducting a percentage from their rent, or they may commence a plenary action to enforce the award. Under either situation, the statute neither proscribes a statute of limitation (RSL 26-513; Goldman, 272 A.D.2d 108), nor does it create the type of liability, penalty or forfeiture that would warrant the application of CPLR 214{2}.

Where a statute of limitation is not specifically established by **law**, CPLR 213(1) provides **that** the applicable statute of limitations period is six years. In the instant action, plaintiff commenced an FMRA action that was decided in 1989. However, by virtue of the PAR commenced by defendant Tessler in 1989 and the subsequent Article 78 commenced by defendant **East** End in 1997, plaintiff was effectively prevented from enforcing **the** FMRA order until February, 1998. Applying the six year statute **of** limitations per CPLR 213(1), plaintiff had until February 2003 to commence the instant action. Having established *that* plaintiff's plenary action to enforce the FMRA order is not barred by the applicable statute of limitations, this court now turns to the issue of successor

liability.

*Successor Liability*

Pursuant to New York Law, absent evidence of acquisition of a property by judicial sale, "a current landlord is generally liable for overcharges collected by a predecessor landlord after April 1, 1984" (Fullan v. 142 East 27<sup>th</sup> Street Associates, 282 A.D.2d 275 [1<sup>st</sup> Dept. 2001]; 9 NY ADC 2526.1(f)(2)(I)). In the case before this court, it is undisputed that the 1989 FMRA order and subsequent PAR rendered defendant Tessler liable to plaintiff for rent overcharges in the amount of \$39,660.11. It is also undisputed that while the PAR was pending, defendant East End acquired the subject apartment from defendant Tessler. Upon acquisition, which was not a result of a judicial sale, defendant East End thus also became liable for the overcharge penalties assessed against defendant Tessler.

Several issues however, remain unresolved. First, from the papers presented, this court remains uncertain as to whether defendant Owners is additionally liable for the overcharge penalties assessed as against defendant Tessler. Although defendant Owners claims that it has never owned the subject apartment and is no longer affiliated with defendant East End, to date, no evidence has been presented that fully absolves defendant Owners of liability. Moreover, this court remains uncertain as to whether defendant Tessler has ever remitted any overcharge payments to plaintiff. Again, **despite defendant Tessler's claims** that she

has paid plaintiff **some** of the overcharge payments owed, no evidence supporting that contention has been submitted to this court. Inasmuch as there remain questions concerning the liability of defendants **Tessler** and East End, as **well** as the possibility of liability as against defendant Owners, summary judgment at this juncture is denied.

*Attorneys' Fees and Interest*

Regardless of how the issue of liability as among the defendants is resolved, plaintiff, as a successful tenant in an FMRA overcharge is entitled to prejudgment interest under CPLR 5001(a) on the refund of the excess rent awarded to her (CPLR 5001(a); Busbee v. Ken-Rob Company, 280 A.D.2d 406 [1<sup>st</sup> Dept. 2001]; Chechak v. Hakim, 269 A.D.2d. **333** [1<sup>st</sup> Dept. 2000]). However, as plaintiff has yet to recover any **of** the monies owed her, it is this court's position that interest owed to plaintiff shall be calculated from the date of the Rent Administrator's order, and not as plaintiff now contends, from the midpoint of the date of the sent overcharge.

Additionally, as plaintiff was **compelled** to bring a plenary action to enforce the FMRA award, plaintiff is also entitled to reasonable attorneys' fees pursuant to her apartment lease and Real Property Law § 234 (Chechak v. Hakim, 269 A.D.2d. **333** [1<sup>st</sup> Dept. 2000])). These fees shall **be** calculated upon submission of affidavits from plaintiff's **counsel** at the conclusion of this

action.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied; and it **is** further

ORDERED that plaintiff's cross-motion for summary judgment is denied; and it **is** further


ORDERED that upon determination of liability for **the** rent overcharge, prejudgment interest on the FMRA rent overcharge shall be awarded pursuant to CPLR 5001(a) and calculated from November 10, 1989 (the FMRA rent overcharge award date); and it is further

ORDERED that upon conclusion of this matter, and upon submission of sufficient information by plaintiff's counsel, this court will **address** an **award** of reasonable attorneys' fees pursuant to RPL § 234.

Counsel for the parties are directed to appear for a Preliminary Conference at I.A. Part 15, Room 335, 60 Centre Street, New York, New York on September 19, 2003 at 11:00 a.m.

This memorandum opinion constitutes the decision **and order** of the Court.

Dated: 8/25/03

  
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HON. WALTER B. TOLUB, J.S.C.