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

PRESENT: Hon. BARBARA R. KAPNICK PART 12

Justice

LEVINSON JORDAN

-v-

390 WEST END ASSOCIATES

INDEX NO. 103213/02

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision.

FILED

JUN 16 2004

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: 6/9/04

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

BARBARA R. KAPNICK J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORR: IAS PART 12

X

JORDAN LEVINSON,

Plaintiff,

-against-

390 WEST END ASSOCIATES, LLC,

Defendant.

----------X

DECISION/ORDER
Index No. 103213/02
Motions Seq. Nos. 001, 002 and 003

BARBARA R. KAPNICK, J.:

Motions sequence numbers 001, 002 and 003 are consolidated for disposition.

Plaintiff Jordan Levinson is the tenant of apartment 7KS in the building owned by defendant 390 West End Associates, LLC at 390 West End Avenue, New **York**, New York, pursuant to a Lease agreement dated July 1, 1991 for a two year term commencing July 1, 1991, and renewals executed in 1993, 1995, 1997 and 1999.

Defendant claims that plaintiff was the first tenant to occupy the apartment after it was vacated **by** a rent controlled tenant who, according *to* defendant, paid rent at the rate of $903.31/month. [1] Plaintiff, however, contends that the prior tenant was paying $593.41/month which, according to plaintiff, was the maximum legal rent for the premises prior to 1991.

---

[1] Defendant has annexed a copy of a page from the 1991 Master Building Rent Schedule allegedly filed with DHCR which purportedly shows that the rent for the subject apartment was $903.31.

The 1991 Lease nonetheless provided that the apartment was exempt from rent stabilization because plaintiff was not maintaining the apartment as his primary residence, and rent was set at a fair market rent ($1,600.00/month), an amount which plaintiff contends was well in excess of the legal regulated rent.[2] The amount of rent was increased upon each renewal of the Lease in amounts consistent with the allowable rent stabilized increases.

The terms of the Lease were ratified pursuant to a Consent Judgment signed by the Hon. Xavier C. Riccobono on April 18, 1991 in a prior action brought by 390 West, End Associates against Levinson.[3] However, the Lease was subsequently declared null and void as against public policy and the consent judgment was vacated by Order and Judgment of the Hon. Diane A. Lebedeff dated May 15, 2001, rearg. denied by Order dated December 11, 2001. [390 West End Associates, LLC v. Jordan Levinson, Index No. 007149/91].[4]

Justice Lebedeff declined to set the regulated rent for the subject apartment, noting that the issues were particularly complex and suitable for resolution by DHCR. See also, 390 West

---

[2] Plaintiff claims that he was advised in 1991 by the owner's representative that the only way he could obtain the premises was to agree to the terms of the Lease, pay $30,000.00 in "key" money, and allow himself to be sued and agree not to contest the Landlord's claim that the premises was to be used by him as a non-primary residence.

[3] There is no dispute that plaintiff was represented by counsel when he agreed to settle the prior action.

[4] Similar consent judgments involving other apartments in the same building were also vacated on the ground that the Leases violated public policy. See, 390 West End Associates v. Harel, 298 A.D.2d 11 [1st Dep't 20021; 390 West End Associates v. Baron, 274 A.D.2d 330 [1st Dep't 20001.

End Associates v. Zouker, 302 A.D.2d 227 (1st Dep't 2003), in which the Appellate Division, First Department, noted that the fixing of rent under the Rent Stabilization Law and the award of refunds and penalties for any overcharges, if warranted, would be decided by DHCR.

The instant action

Plaintiff's complaint seeks a judgment: (i) declaring that the legal monthly rent for the premises is $593.41 (first cause of action); (ii) granting a mandatory injunction compelling defendant to issue a rent stabilized lease to plaintiff at the monthly rate of $593.41 (second cause of action); (iii) awarding damages in an amount to be determined at trial for no less than $150,000 for actual damages and no less than $450,000 for statutory treble damages (third cause of action); (iv) awarding legal fees in the amount of at least $20,000 incurred by plaintiff as a result of defendant's wrongful conduct in collecting rent in an amount in excess of that permitted by law (fourth cause of action); (v) awarding actual damages in the amount of at least $150,000 incurred as a result of defendant's fraudulent conduct. (Specifically, plaintiff claims that defendant filed false registrations for the apartment with DHCR by improperly registering the apartment as being "Temp. Exempt" in 1995 through 1998) (fifth cause of action); (vi) awarding actual damages in the amount of at least $150,000 incurred as a result of defendant's deceptive acts or practices in violation of section 349 of the General Business Law (sixth cause of action); and (vii) awarding actual damages in the amount of $30,000 based on the wrongful imposition of a rent

overcharge against plaintiff by collecting 'key money' in the amount of $30,000 as a precondition to permitting plaintiff to take occupancy of the premises (seventh cause of action).

Defendant has asserted counterclaims seeking a judgment: (i) declaring that the legal regulated monthly rent for the apartment is $2,060.93 for a two-year lease and $2,022.05 for a one-year lease (first counterclaim); (ii) directing plaintiff to sign either the one-year rent stabilized lease or the two-year rent stabilized lease and directing plaintiff to vacate the apartment in the event that plaintiff fails to execute either of these leases (second counterclaim); (iii) in the event plaintiff fails to vacate the apartment, granting a judgment of ejectment and and Order directing the Sheriff of New York County to evict plaintiff from the apartment and deliver vacant possession of the apartment to defendant (third counterclaim); (iv) granting a money judgment in a sum certain of at least $21,387.08 for past due use and occupancy at the rate of $1,944.28 per month which was the last legal rent for the apartment as registered with DHCR, from June 2001 through May 31, 2002, together with legal interest from June 1, 2001 (fourth counterclaim); (v) granting a money judgment for any rent and/or use and occupancy that accrues during the pendency of this litigation at the rate of at least $2,022.05 per month, from July 1, 2001 (fifth counterclaim); and (vi) granting a money judgment for legal fees in an amount to be determined at trial, but in no event less than $25,000 together with legal interest from June 1, 2001 (sixth counterclaim).

Motion Sequence No. 01

Plaintiff now moves for an order:

(1) granting summary judgment on his first cause of action declaring the legal rent to be the last legal registered rent -- i.e., $593.41/month, the rent charged to the prior tenant;

(2) granting summary judgment on his second cause of action compelling defendant *to* issue a rent stabilized lease at the legal monthly rent;

(3) granting summary judgment on his third cause of action alleging a rent overcharge and entering judgment in the amount of $460,986.03, together with interest at the rate of 9% from June 30, 2001; or, in the alternative,

(4) granting summary judgment on his first cause of action and scheduling a hearing for the purpose of determining the initial rent stabilized rent to be charged to plaintiff pursuant to the formula applied by the Hon. Marylin Diamond in Thornton **v.** Baron, Index No. 119776/96, decision dated February 14, 2002 (Sup. Ct., N.Y. Co.), aff'd, 4 A.D.2d 326 (1st Dep't 2004) and compelling defendant to issue a lease for the rent determined therein; and

(5) granting summary judgment on his third cause of action alleging a rent overcharge and entering a judgment in an amount to determined **by** the Court.

Defendant contends that it has properly offered a rent-stabilized lease to plaintiff for the subject apartment at a rate that follows the NYC Rent Guidelines Board increases for a one or two year renewal lease over the previous registered rent, and cross-moves for an order:

(1) granting defendant summary judgment dismissing the first three causes of action on the ground that they do not state a legal basis for relief; and

(2) granting partial summary judgment in favor of defendant on its first through fifth counterclaims.

Pursuant to RSC § 2520.6(e) "Legal regulated rent" is defined as "[t]he rent charged on the base date set forth in subdivision (f) of this section, plus any subsequent lawful increases and adjustments".

RSC § 2520.6(f) ("Base date") provides that

> For the purpose of proceedings pursuant *to* sections 2522.3 and 2526.1 of this Title, base date shall mean the date which is the most recent of:
>
> (1) the date four years prior to the date of the filing of such appeal or complaint;
>
> (2) the date on which the housing accommodation first became subject to the RSL; or
>
> (3) April 1, 1984, for complaints filed on or before March 31, 1988 for housing accommodations for which initial registrations were required to be filed by June 30, 1984, and for which a timely challenge was not filed.

Defendant contends that the 'base date' in this action for the determination *of* the 'legal regulated rent' (RSC § 2520.6[e]) is the date the apartment was declared by Justice Lebedeff to **be** subject *to* rent stabilization (i.e., May 2001) *or* at most, four years prior to the filing of plaintiff's complaint in this action (i.e., February 1998).

Defendant relies on the decision of the Appellate Division, First Department in 390 West End Associates v. Harel, supra at 17, for the proposition that "the rent for any renewal lease for this unit must be set in the amount of the legal stabilized rent at the time the parties entered the initial deregulated lease" (emphasis supplied).

However, the Appellate Division, First Department, recently clarified that "[i]n the absence of any indication that the parties even raised the question of rent, much less the method for determining prospective rent, the parting observation ... that it should 'be set in the amount of the legal stabilized rent at the time the parties entered the initial deregulated lease' can only be read as dictum." Thornton v. Baron, 4 A.D.2d 258; 772 N.Y.S.2d 326 at 328 (1st Dep't 2004).

Rather, the Appellate Division found that the four-year statute of limitations applicable to residential rent overcharge complaints (CPLR § 213-a) governed and that the legal regulated rent must be determined by using the default formula employed by DHCR. Thornton v. Baron, Supra at 327.[5]

[5] "Under this default formula, the base date rent is determined by using the lowest rent stabilized rent for an apartment in the same building with the same number of rooms as the subject apartment on the base rent date". See, Thornton v. Baron, Index No. 119776/96, decision dated February 14, 2002, at p.3 (Sup. Ct., N.Y. Co.; Diamond, J.).

Accordingly, based on the oral argument held on the record on May 14, 2003 and October 29, 2003 and all the papers submitted, including counsel's letters addressing the applicability of the Appellate Division's Decision dated February 26, 2004 in the Thornton case, those portions of plaintiff's motion seeking summary judgment on his first cause of action declaring the **legal** rent to be the last legal registered rent (i.e., the rent charged to the last prior tenant prior to 1991) and seeking summary judgment on his second cause of action compelling defendant to issue a rent stabilized lease at said monthly rent are denied.

Likewise, that portion of plaintiff's motion seeking summary judgment on his third cause of action alleging a rent overcharge is denied.

That portion of plaintiff's motion seeking, in the alternative, a hearing before this Court for the purpose of determining the initial rent stabilized rent *to* **be** charged to plaintiff pursuant to the formula applied by Justice Diamond in Thornton v. Baron, supra, is granted onlv to the extent of remanding that issue to DHCR since the rent regulation matters at issue, including the application of DHCR's own default formula, are matters particularly within the agency's expertise. See, Davis v. Waterside Housing Co., 274 A.D.2d 318 (1st Dep't 2000).

Therefore, those portions of plaintiff's motion seeking an order compelling defendant to issue a lease for the rent to be determined based on the application of said formula and entering a

judgment in the amount of any rent overcharge are held in abeyance pending the determination by DHCR.

Those portions of defendant's cross-motion seeking summary judgment dismissing the first three causes of action are granted only to the extent set forth above.

Those portions of defendant's cross-motion seeking partial summary judgment on its first counterclaim declaring that the legal regulated monthly rent for the apartment is $2,060.93 for a two-year lease and $2,022.05 for a one-year lease, and on its second through fifth counterclaims which are premised on the rent **being** set at said amounts are denied, since said rental amounts have not been calculated in accordance with DHCR's default formula.

Motion Sequence No. 02

Plaintiff next moves for an order pursuant to CPLR § 3025 granting him leave to amend the complaint in order to assert an eighth cause of action alleging breach of contract on the ground that defendant, by obtaining the right to commence a non-primary residence proceeding and the right to seek 'luxury decontrol' of the premises, has deprived him *of* the consideration he received as a result of the initial 1991 Lease and the Consent Judgment

Defendant opposes the motion on the grounds that plaintiff is seeking to amend his complaint more than one year after the action was commenced and that the proposed cause of action is inconsistent with plaintiff's original theory of liability (i.e., that the

rental charged under the agreement was excessive and that he should be accorded rent stabilized rights).

However, pursuant to CPLR § 3025(b), leave to amend the pleadings "shall be freely given upon such terms as may be just..." Here, defendant cannot claim any undue prejudice **by** the plaintiff's delay in moving for leave to amend his complaint *since* the proposed eighth cause of action arises out of the same facts as plaintiff's other claims.

Moreover, CPLR § 3014 expressly authorizes a party to plead separate cause of actions, in the alternative, "regardless of consistency".

Accordingly, plaintiff's motion for leave **to** amend the complaint is granted. The Proposed Amended Complaint, in the form annexed to the moving papers, is deemed served nunc pro tunc as of the date of service of the Notice of Motion.

Defendant cross-moves for an order directing plaintiff to pay outstanding and prospective use and occupancy, pending the final determination of this action (including any appeals), in the amounts of: (a) $36,941.32 for the period, July 1, 2001 through January 31, 2003 (19 months); and (b) $1,944.28 per month prospectively commencing February 1, 2003, without prejudice to the rights of either side to challenge the correctness of said amounts.

Plaintiff argues in opposition to the cross-motion that: (i) the applicable rent for the premises is either $593.41 or $903.31, not $1,944.28/month; and (ii) he does not owe defendant use and occupancy since defendant has collected an overcharge, which if trebled, would amount to damages, including interest, of $339,381.27.

However, there is no dispute that plaintiff has failed to pay *any* rent on the premises for almost three years, and there has yet to **be** any determination that defendant is entitled to recover treble damages against plaintiff based on a rent overcharge. Therefore, defendant's cross-motion is granted onlv to the extent of directing plaintiff to pay use and occupancy to defendant in the amount of $903.31/month, commencing July 1, 2004 and thereafter as it becomes due, pending DHCR's determination of the legal regulated rent and the amount of any overcharge, without prejudice to the rights of either party.

Motion Sequence No. 003

Plaintiff moves by order to show cause for a: order pursuant to CPLR § 2201 staying the administrative proceedings filed by defendant before DHCR (under Docket Numbers RF410445LD and RI-420008-AD)[6] pending a final determination of the motions for summary judgment which are presently pending before the Court, on

[6] In those respective proceedings, defendant seeks high income rent deregulation *of* the apartment premised on defendant's contention that the monthly legal regulated rent exceeds $2,000.00 and seeks an administrative determination as to the amount of the legal regulated rent,

the ground that the relief sought before DHCR is identical to the relief sought herein by defendant in its counterclaim for a declaration as to the legal rent for the subject premises.

The motion is denied as moot since the summary judgment motions have been decided herein.

Moreover, this Court has already ruled that DHCR is the proper entity to determine the complex and technical issues raised in plaintiff's rent overcharge claim, See, Wong v. Gouverneur Gardens Housing Corp., 308 A.D.2d 301, 303 (1st Dep't 2003) which held that

> "'[W]hile concurrent jurisdiction does exist, where there is an administrative agency which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort *to* a judicial tribunal should be withheld pending resolution of the administrative proceeding'" (citations omitted).

See also, Davis v. Waterside Housing Co., supra at 318-319.[7]

Accordingly, this Court shall stay the instant action (except with respect to enforcement of this Court's directive as to the payment of use and occupancy pending DHCR's determination of the pending petitions or further order of this Court.

This constitutes the decision and order of this Court.

FILED
JUN 16 2004
COUNTY CLERK'S OFFICE

Date: June 7, 2004

R. KAPNICK
J.S.C.

Barbara R. Kapnick
J.S.C.

[7] In addition, DHCR has exclusive jurisdiction to determine the luxury *decontrol* petition. See, N.Y.C. Admin. Code ss 26-504.1 and 26-504.3(b) and (c).