

Wasserman v Baron

2004 NY Slip Op 30173(U)

March 8, 2004

Supreme Court, New York County

Docket Number:

Judge: Joan Madden

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

PRESENT: HON. JOAN A. MADDEN
J.S.C.
Justice

PART 11

Steven M. Wasserman

INDEX NO. 102239/61

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

Amirah Baron

FILED

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 _____

MAR 22 2004
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is determined in accordance with the annexed decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: March 19, 2004

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
STEVEN M. WASSERMAN and CATHY
BERNSTEIN,

Plaintiffs,

INDEX NO. 102239/01

-against-

AMIRAM BARON, BERNARD WEBER, ZIPORA
WEBER, SUITE 2B MANAGEMENT, NASON
GORDON and 390 WEST END ASSOCIATES, L.L.C.,

Defendants.

-----X
JOAN A. MADDEN, J.:

Defendants 390 West End Associates, L.L.C. and Nason Gordon move for an order “modifying” so much of this Court’s decision and order dated December 1, 2003, directing plaintiffs to pay defendants interim use and occupancy in the sum of \$724.84 per month, prospectively, commencing with December 2003. Defendants also seek an order “modifying” the statement in the decision and order that the last rent controlled rent in 1992 was \$724.84.¹

First, as to the issue of *interim* use and occupancy, in their prior motion defendants made absolutely no request that the Court award *interim* use and occupancy in the event the parties’ respective motions for summary judgment were denied. Defendants simply moved to dismiss the complaint, and for the ultimate relief sought in their first counterclaim for a declaratory judgment, and for the ultimate relief sought in their second counterclaim for a money judgment against

¹While defendants move for an order “modifying” this Court’s prior order, they cite to no provision of the CPLR to support the requested relief. Presumably, defendants are moving pursuant to CPLR 2221(a), which permits a party to move “for leave to renew or reargue a prior motion” or for leave “to stay, vacate or modify, an order.”

plaintiffs for “past due rent or use and occupancy.” The Court in its discretion directed plaintiffs to begin paying interim use and occupancy, as plaintiffs had not paid rent since September 2000, and the issue of the legal amount of rent needed to be determined by DHCR. The Court dismissed the tenants’ complaint and the landlord’s counterclaims without prejudice to the commencement of a Fair Market Rent Appeal before DHCR. Since that dismissal was explicitly “without prejudice,” neither the landlord’s counterclaims for rent arrears nor the tenants’ claims for rent overcharges were determined on the merits. Miller Manufacturing Co., Inc. v. Zeiler, 45 NY2d 956, 958 (1978). As the resolution of those claims and counterclaims turns on DHCR’s determination of the legal regulated rent, those claims and counterclaims should likewise be presented to DHCR in the Fair Market Rent Appeal. See Verbalis v. New York State Division of Housing & Community Renewal, 1 AD3d 101 (1st Dept 2003); Haberman v. Wright, 121 AD2d 187, 189 (1986).

Defendants assert that the prior decision and order directing plaintiffs to pay prospective use and occupancy in the monthly amount of \$724.84, “allows plaintiffs to reap an enormous windfall, while simultaneously, severely prejudicing the owner.” Defendants argue that use and occupancy should be retroactive from September 2000, and that the amount should be increased to either \$2,704.97 (what Baron last paid in 2000), \$2,205.89 (halfway between \$2,704.97 and \$724.84), or \$2,205.89 (defendants’ calculation of the “fair market rent” in 1997). The Court does not agree, as the \$724.84 amount was based upon the record as presented in the prior motion and cross-motion, where defendants argued that the legal regulated was \$2,704.97, the amount last paid by Baron, and plaintiffs argued that based on Baron’s illusory tenancy, the legal regulated rent should be \$724.84, the amount paid by the last rent controlled tenant in 1992, just before the

illusory tenancy began. The Court determined as follows:

The tenants argue that since Baron's tenancy was a nullity, the legal rent stabilized rent should be the last rent controlled rent in 1992, just before the commencement of Baron's first lease, which was \$724.84. On the other hand, the landlord asserts that lawful rent is the last amount charged to Baron in December 2000, which was \$2,704.97. The Court finds neither position legally supportable, as the parties have failed to account for the fact that plaintiffs are the first rent stabilized tenants to take occupancy of an apartment that was vacancy decontrolled.

The parties do not dispute that prior to Baron's lease, the apartment was occupied by a rent controlled tenant who vacated the premises. By virtue of that tenant's vacancy, the apartment became decontrolled and subject to rent stabilization. The owner was then required to file a rent stabilization registration statement with the New York State Division of Housing & Community Renewal ("DHCR"), disclosing the amount of rent charged for the apartment. Under the rent stabilization law, the landlord fixes the initial fair market rent for a decontrolled apartment. "To protect against rent-gouging by landlords and to insure that stabilized rents do not exceed fair-market levels, the apartment's initial decontrolled rent is made subject to the tenant's right to challenge that rent in a FMRA [Fair Market Rent Appeal]." Verbalis v. New York State Division of Housing & Community Renewal, ___ AD2d ___, NYLJ, November 10, 2003, p. 26, col. 1 (1st Dept); Ramlie v. Soufer Family L.L.C., 287 AD2d 388 (1st Dept 2001). Once the apartment becomes part of the rent stabilization system, the Rent Stabilization Code requires the landlord to serve the first rent stabilized tenant with a notice of the initial regulated rent, advising that the tenant has the right to file a FMRA challenging that rent within 90 days. If a landlord fails to serve that notice on the first-stabilized tenant, the tenant's right to file a FMRA continues indefinitely, and can even pass to subsequent tenants until DHCR ultimately establishes the initial fair market rent.

* * *

Whereas here, there is no question that landlord never served notice of the initial stabilized rent on plaintiffs, plaintiffs are the apartment's first rent stabilized tenants, and as such cannot assert a claim for rent overcharge, but instead must file a FMKA with the DHCR. Ramlie v. Soufer Family L.L.C., supra; see also 390 West End Assocs v. Zouker, 302 AD2d 227 (1st Dept 2003). As a FMRA, plaintiffs are not entitled to seek treble damages or attorney's fees. Mendelson v. Empire Assoc. Realty Co. Assn., supra. Thus, plaintiffs' complaint and defendants' counterclaims must be dismissed without prejudice to the commencement of a FMRA proceeding before DHCR. Ramlie v. Soufer Family L.L.C., supra. However, as plaintiffs have paid no rent since September 2000, beginning with December 2003, plaintiffs shall commence paying defendant 390 West End Associates, LLC, use and occupancy in the amount of \$724.84 per month, until the DHCR proceeding is finally resolved.

Finally, the Court makes no determination as to method of setting the initial fair market rent where it appears that the landlord has substantially profited by means of an invalid lease arrangement which created an illusory tenancy that began in 1992, but plaintiffs' lease and rent stabilized tenancy did not commence until 1997. This issue is more appropriately left for determination by DHCR and ultimately subject to judicial review pursuant to CPLR Article 78. The Court notes, however, that the landlord has engaged in identical or nearly identical conduct with respect to other apartments in the same building. See e.g. 390 West End Associates v. Zouker, supra; 390 West End Assocs. V. Harel, 298 AD2d 11 (1st Dept 2002); 390 West End Assocs. v. Shlomo Baron, 274 AD2d 330 (1st Dept 2000); 390 West End Ave. Assocs v. Youngstein, 221 AD2d 292 (1st Dept 1995).

Under these circumstances, the Court is not persuaded that it overlooked or misapprehended relevant facts, or misapplied any controlling principle of law, in directing plaintiff to pay prospective use and occupancy in the amount of \$724.84, until the DHCR proceeding is finally resolved. Foley v. Roche, 68 AD2d 558, 567 (1st Dept 1979).

Defendants further contend that the Court's prior decision and order incorrectly stated that \$724.84 was the last rent controlled rent in 1992. Defendants assert that \$724.84 was the rent controlled rent in 1984, when the apartment was first registered with DHCR. Defendants submit a 1901 Maximum Basic Rent Building Rent Schedule, which, according to defendants, shows that the last rent controlled rent for Apt. #4M, immediately prior to Baron's first lease in 1992, was \$1,030.70. Acknowledging that this document was deliberately omitted from their prior motion papers, defendants argue that this information was unnecessary for the determination of their rent arrears counterclaim, which sought rent in the monthly amount of \$2,794.97, the amount last paid by Baron in 2000. This argument is rather disingenuous, in light of plaintiffs' consistent position in their prior cross-motion, that the legal stabilized rent should be set at the last rent controlled rent just before Baron's first lease in 1992, which plaintiffs asserted was \$724.84. Although

defendants' opposed plaintiffs' cross-motion, they neither refuted nor corrected plaintiffs' assertion as to the \$724.84 amount for 1992.

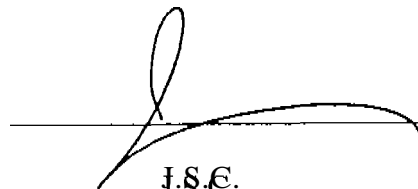
In any event, based on this new information revealed post-decision, this Court must now clarify that notwithstanding any statements in the prior decision and order which can be perceived to the contrary, the Court is not making any factual findings or legal determinations as to the amount of the last rent controlled rent in 1992 or in any other year. These issues should be resolved by DHCR.

Accordingly, it is hereby

ORDERED that defendants' motion is denied.

DATED: *March 8, 2004*
~~February~~, 2004

ENTER:


J.S.C.

FILED
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