

Stuart v Wai Chan

2007 NY Slip Op 30513(U)

March 30, 2007

Supreme Court, New York County

Docket Number: 0103769/2006

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 103769/2006

STUART, GREGORY

vs
CHAN, WAI

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 12/18/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

____ 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

1-3

4-9

10-12

Cross-Motion: Yes No

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

N.B. -- Preliminary Conference is scheduled for 4/23/07 at 12 noon

FILED
APR 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/30/07

[Signature]
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
GREGORY STUART,

Plaintiff,

DECISION and ORDER

-against-

Index No. 103769/06

WAI CHAN and WAI CHAN FAMILY REVOCABLE
LIVING TRUST AND WING HING CHAN, AS
TRUSTEE,

Defendants.
-----X

FILED
APR 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.:

Plaintiff, Gregory Stuart, commenced this action seeking monetary damages, including treble damages, for rent overcharges for his rent-stabilized apartment, which was owned at all relevant times by defendant Wai Chan.¹ Plaintiff now moves for summary judgment for the relief demanded in the complaint. Defendant Wai Chan cross-moves for summary judgment dismissing plaintiff's claim for treble damages. For the reasons that follow, plaintiff's motion is denied and defendant's cross motion is granted.

The underlying facts are not in dispute. Plaintiff took possession of apartment # 3 at 208 Grand Street in Manhattan on April 18, 2002, at a monthly rent of \$1,200.² He paid two months' rent as a security deposit. Plaintiff paid his rent from May 2002 until August 2003, for a total of 16 months. Thereafter, plaintiff apparently took possession of another apartment in the building.

¹ Defendant claims that he transferred title to the building in August 2006 to the Wai Chan Family Revocable Living Trust and Wing Hing Chan, as Trustee. The file of the New York County Clerk reveals that, after this motion was submitted, the parties submitted a stipulation amending the caption to add the trust as a defendant in this action.

² Neither party has provided the lease agreement.

Plaintiff subsequently filed this action on March 20, 2006.

Records maintained by the New York State Division of Housing and Community Renewal (DHCR) reflect that the subject apartment was initially registered as rent stabilized in 1984. The tenant in the apartment at the time, Souk Fung Lee, had a one-year lease with a monthly rent of \$70. The apartment was also listed as rent stabilized in 1985. Mr. Lee remained as the tenant of record in the apartment and had a monthly rent of \$80. DHCR records further show that in 1986, the apartment was again listed as rent stabilized with the same tenant as the tenant of record. The rent remained unchanged at \$80 per month. No other DHCR records exist for the apartment (Deutschmeister Affirm., Exh. B, at 3-5).

Plaintiff claims that the amount of the overcharge is the difference between the amount of his monthly rent (\$1,200) and the last registered rent on file with DHCR (\$80), or \$1,120, multiplied by 16 months, which is \$17,920. Plaintiff seeks treble damages of this amount – for a total of \$53,760. The court notes that in plaintiff's moving papers, he initially sought an additional \$1,200 for paying two months' rent as a security deposit, rather than one month's rent. However, in a supplemental affirmation, plaintiff's counsel withdrew the claim for this amount, representing that this amount is being sought in a non-payment proceeding brought in Housing Court.

Defendant argues that there are triable issues of fact as to whether the apartment was rent stabilized or rent controlled in the 1980s. He states that he mistakenly registered the subject apartment as rent stabilized in 1984, 1985, and 1986, as he is an immigrant from China who

speaks little English and did not understand the DHCR rent registration form (Chan Aff., ¶ 13).³ Defendant avers that the tenant of record in the apartment at the time, Mr. Lee, was a rent-controlled tenant, who occupied the apartment for approximately 30 years and died sometime around 1996 (*id.*, ¶ 12). Following the tenant's death, the apartment remained vacant, during which time his family members used the apartment. Because the apartment was in a state of disrepair, he substantially renovated the apartment by putting in a new kitchen and bathroom, new plumbing, and electrical and mechanical systems as well as new walls and floors (*id.*, ¶ 26). After the renovation, defendant rented the apartment to a woman in 2000 at a monthly rent of \$1,100, who lived there for one and a half years (*id.*, ¶ 27). It is at this point that defendant claims that the apartment became subject to rent-stabilization registration requirements. Defendant then rented the apartment to plaintiff in April or May 2002 (*id.*).

It is well settled that rent stabilization coverage is a matter of statutory right and cannot be created by waiver or estoppel (*see Matter of Jo-Fra Props., Inc.*, 27 AD3d 298, 299 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]; *Ruiz v Chwatt Assocs.*, 247 AD2d 308 [1st Dept 1998]). Thus, defendant's registration of the subject apartment as rent stabilized in 1984, 1985, and 1986 did not confer rent stabilization status on the apartment.

However, the parties do not dispute that in 1996, the rent-controlled tenant died. As a matter of law, the apartment, therefore, became decontrolled and subject to rent stabilization (*see*

³Defendant points out that other apartments in the building were inadvertently listed as rent stabilized on DHCR records in 1985. For example, his own apartment was listed as rent stabilized on DHCR records in 1985, although it was exempt as owner occupied (Chan Aff., ¶ 14). Another apartment was listed as rent stabilized that same year, despite the fact that it was occupied by his housekeeper (*id.*, ¶ 15). Eight other rent-controlled apartments were mistakenly listed as rent stabilized in 1985 and 1986 on DHCR records (*id.*, ¶¶ 16-23).

Unconsolidated Laws §§ 8623 [a], 8625; Rent Stabilization Law [RSL] [Administrative Code of the City of New York] § 26-501, *et seq.*). Whether the apartment was rent stabilized in the 1980s is irrelevant. Upon vacancy decontrol, the owner is required to file a rent-stabilization registration statement with DHCR (*Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101, 102 [1st Dept 2003]). Under the Rent Stabilization Law and Code, initial stabilized rents for decontrolled apartments are set by the owners and are registered with DHCR (RSL § 26-512 [b] [2]; Rent Stabilization Code [RSC] [9 NYCRR] § 2521.1 [a] [1]).

“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[] [Fair Market Rent Appeal] FMRA” at DHCR (*Verbalis*, 1 AD3d at 102). The landlord is required to serve the first rent-stabilized tenant with a notice of initial regulated rent, advising the tenant of the initial stabilized rent and of his or her right to challenge that rent in an FMRA (*id.*). If the landlord properly serves the tenant with the notice, the tenant has 90 days within which to file an FMRA (RSC § 2523.1). However, if the landlord fails to serve the notice on the first rent-stabilized tenant, the right to challenge the rent passes to subsequent tenants until the initial, lawful stabilized rent is established by DHCR (*Verbalis*, 1 AD3d at 103; *Matter of Weinreb Mgt. v State Div. of Hous. & Community Renewal*, 231 AD2d 473, 474 [1st Dept 1996]). A subsequent tenant has four years to file an FMRA after the vacancy which caused the decontrol (RSC § 2522.3 [c] [2]). Though it appears that defendant never served the first rent-stabilized tenant with a notice of the initial stabilized rent, the rent cannot be established in an FMRA, because the time to file an FMRA expired in 2000 (*see e.g. Wasserman*

v Gordon, 24 AD3d 201, 202 [1st Dept 2005]).

An overcharge claim, such as plaintiff's claim herein, is to be distinguished from an FMRA. Overcharge complaints challenge the rent charged by the landlord as being in excess of the "legal regulated rent" (the initial stabilized rent, plus authorized percentage increases) (*Verbalis*, 1 AD3d at 103; *see also* RSC §§ 2520.6 [e], 2526.1 [a] [3] [i]). Where the landlord has overcharged the tenant, the tenant is entitled to treble damages, unless the landlord is able to prove that the overcharge was not willful (*Verbalis*, 1 AD3d at 103; *see also* RSC § 2526.1 [a] [1]).

Although the apartment became rent stabilized as a matter of law, the legal rent for the apartment cannot be determined on these papers. CPLR 213-a expressly precludes "examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action" (*see also* RSL § 26-516 [a] [2]). Thus, the rental history of the apartment in 1984, 1985, and 1986 is not competent evidence of the legal rent for the apartment on the base date of March 20, 2002, four years prior to the commencement of the action (*see Hatanaka v Lynch*, 304 AD2d 325, 326 [1st Dept 2003]). When there are no reliable rent records available for the base date, the current legal rent must be determined in accordance with the default formula developed by DHCR, i.e., "the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date" (*Thornton v Baron*, 5 NY3d 175, 180 n 1 [2005]; *Wasserman*, 24 AD3d at 202). Here, plaintiff has not provided any competent evidence to determine the legal rent according to this formula. Accordingly, plaintiff's motion must be denied.

Defendant's cross motion is granted. Treble damages for willful overcharges are

available only for two years preceding the filing of the complaint (RSL § 26-516 [a] [2] [i]; RSC § 2526.1 [a] [2] [i]; *Matter of Mangano v New York State Div. of Hous. & Community Renewal*, 30 AD3d 267, 268 [1st Dept 2006]). Plaintiff does not allege that any overcharges occurred within two years of the filing of the complaint, at the very latest by March 20, 2004. He only alleges that defendant overcharged him from May 2002 through August 2003.

Accordingly, it is

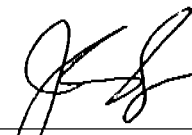
ORDERED that the motion by plaintiff Gregory Stuart for summary judgment is denied; and it is further

ORDERED that the cross motion by defendant Wai Chan for partial summary judgment dismissing the second cause of action for treble damages is granted; and it further is

ORDERED that counsel shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, NY on April 23, 2007 at 12 noon.

Dated: March 30, 2007

ENTER:



J.S.C.

JANE S. SOLOMON
FILED
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