

Galicia v Rota Holding Corp. #2

2007 NY Slip Op 30725(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 0103507/2006

Judge: Jane S. Solomon

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

PRESENT: Solomon

PART 55

Index Number : 103507/2006

GALICIA, LUIS F.

vs
ROTA HOLDING CORP. #2

Sequence Number : 001

AMEND

INDEX NO. _____

MOTION DATE 11-6-06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ papers, numbered 1 to 16 were read on this motion to/for amend judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-4

5-15

16

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.

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

FILED
APR 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/12/07

JANE S. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----X

LUIS F. GALICIA,

Plaintiff,

-against-

ROTA HOLDING CORP. #2,

Defendant.

INDEX NO. 103507/06

DECISION AND ORDER

FILED

APR 16 2007

NEW YORK
COUNTY CLERK'S OFFICE

-----X
JANE S. SOLOMON, J.

Plaintiff Luis F. Galicia ("Plaintiff") moves (1) to amend the default judgment in his favor entered on March 14, 2006, to include statutory interest, and (2) for an award of attorney's fees. Defendant Rota Holding Corp. #2 ("Defendant") cross-moves to vacate the judgment. For the reasons described herein, Plaintiff's motion is granted in part and Defendant's motion is denied.

Background

Plaintiff has lived in a studio apartment of less than 250 square feet located at 335 West 19th Street, Apartment B6, in Manhattan (the "Apartment") continuously since July 31, 2003. Defendant owns the dwelling. The Apartment is subject to the New York State Rent Stabilization Law and Code. Plaintiff's initial written one-year lease provided for a monthly rental of \$1,000; two subsequent written one-year renewals increased the monthly rental to \$1,097.23 and to \$1,135.63, respectively. Since August 1, 2006, Plaintiff has remained in the Apartment without a

written lease due to a dispute with Defendant over the rental amount.

In or around August 2004, Plaintiff believed that his rent was higher than permitted by the Rent Stabilization Law, and he filed a complaint with the New York State Division of Housing and Community Renewal ("DHCR"). Plaintiff alleges that in evaluating his complaint, DHCR mailed him at least two notices, and mailed Defendant at least five notices. Defendant contends that it did not receive any of these notices. Specifically, Plaintiff states that on September 27, 2004, DHCR mailed a complete copy of his rent overcharge complaint to Defendant in care of its managing agent Metro Development, Inc. ("Metro") at its undisputed office address, 42-25 21st Street, Long Island City, New York 11101. Defendant denies receiving this notice.

On November 15, 2004, DHCR sent Plaintiff a request for additional information and documents, to which he responded on November 29, 2004. On January 6, 2005, DHCR sent Defendant a "Request for Additional Information/Evidence," in care of Metro by certified mail, return receipt requested. The returned receipt bears the signature of Defendant's office receptionist, Yalitzza Ramos, and indicates that she signed for it on January 7, 2005. Nevertheless, in her August 11, 2006 affidavit, Yalitzza Ramos states unequivocally that she did not receive any documents from DHCR pertaining to the Apartment.

On March 11, 2005, DHCR sent Plaintiff a "Request for Additional Information/Evidence," to which he responded on March 25, 2005. On March 11, 2005 DHCR also sent a "Request for Additional Information/Evidence" together with a "Final Notice to Owner-Imposition of Treble Damages on Overcharge" to Defendant in care of Metro at its undisputed office address. Defendant also denies receiving this notice.

On May 31, 2005, DHCR again sent to Defendant, at Metro's office, a "Final Notice to Owner - Imposition of Treble Damages on Overcharge" by certified mail, return receipt requested. This Final Notice stated, *inter alia*, that Defendant had to "provide a base-date lease, in effect on 09/23/00, or an overcharge as listed on the reverse side of this notice may be granted." The return receipt bears the signature of Yalitzza Ramos, indicating that she signed for the mailing on June 2, 2005. Nevertheless, as with the January 6, 2005 notice, Yalitzza Ramos states unequivocally in her affidavit that she did not receive this document. Defendant's managing agent, Kenneth Schubach, also denies any knowledge of it in his affidavit.

Finally on or about August 4, 2005, DHCR issued its "Order Finding Rent Overcharge," which calculated the monthly rent for the first two years of Plaintiff's tenancy at \$445.89. DHCR awarded Plaintiff \$14,465.40 for the overcharge, plus \$28,930.80 for treble damages, totaling \$43,396.20. The same was

mailed to Defendant care of Metro at its office address and to Plaintiff. The Order stated plainly that "[i]n the event that a Petition for Administrative Review against this Order is not filed within thirty-five (35) days of its issuance," Defendant would be required to roll back the rent for the Apartment to \$445.89, and Plaintiff would be entitled to file and enforce the order as a judgment. Defendant has not filed a Petition for Administrative Review ("PAR"), and claims that it did not receive the Order.

Thereafter, Plaintiff began sending monthly checks in the amount of \$445.89 for his rent to Defendant. Defendant accepted and deposited the checks, but the monthly rent coupons sent to Plaintiff all showed \$1,135.63 as the amount due pursuant to the most recent lease renewal. Defendant did not otherwise inquire as to why Plaintiff was paying the decreased amount.

On or about March 14, 2006, Plaintiff went to the New York State County Clerk's office to reduce the DHCR Order to a judgment, pursuant to the procedures for enforcing the judgment as explained to him by DHCR employees. Plaintiff listed the exact amount of the DHCR award, and the Clerk issued judgment in that amount. On or about April 5, 2006, Plaintiff spoke to an attorney about his difficulties in enforcing the judgment, and the attorney agreed to represent him. The attorney then mailed the judgment and DHCR Order to Defendant at its office address by

certified mail. Defendant claims that this was the first it learned of the DHCR complaint and Order.

On June 20 and July 5, 2006, respectively, Plaintiff served information subpoenas and restraining notices on JP Morgan Chase Bank and HSBC Bank, N.A., where it believed Defendant maintained bank accounts. At about this time, Plaintiff's attorney decided that given the amount of time he had spent on this case, attorney's fees should be sought from Defendant. He also realized that Plaintiff was entitled to interest from the date of DHCR's award.

After failing to settle the dispute, Plaintiff now moves to amend the judgment to include post-award statutory interest and an award for attorney's fees. Defendant cross-moves to vacate the default judgment.

Discussion

Statutory Interest

It is well established that a tenant is entitled to statutory interest on a rent overcharge award from the date of DHCR's determination of the award until the date the landlord pays it. See Waverly Assoc. v. New York State Div. of Housing and Community Renewal, 12 A.D.3d 272 (1st Dep't. 2004); N.Y.C. Admin. C. § 26-516(a)(4). The Court of Appeals has also held that a tenant's entitlement to statutory interest covers the entire award, namely the trebled amount. See Mohassel v.

Fenwick, 5 N.Y.3d 44 (2005). Thus, that part of Plaintiff's motion seeking to amend the judgment to include interest on \$43,396.20, calculated from August 4, 2005, is granted.

Attorney's Fees and Expenses

Although Plaintiff prosecuted his initial rent overcharge complaint with the DHCR and obtained the judgment *pro se*, he argues that attorney's fees and expenses are justified in this case because he needed to retain an attorney to collect on the judgment and reply to Defendant's cross-motion. Plaintiff argues that his lease gave him "the right to collect reasonable attorneys fees and expenses incurred in a successful defense by [Plaintiff] of a lawsuit brought by [Defendant] against [Plaintiff] or brought by [Plaintiff] against [Defendant] to the extent provided by Real Property Law, section 234." He contends that attorney's fees also are authorized by the Rent Stabilization Law, N.Y.C. Admin. C. § 26-516(a)(4), the Rent Stabilization Code, 9 NYCRR § 2526.1, (d) and Real Property Law § 234.

Defendant's argument that no attorney's fees can be awarded because Plaintiff may not be paying any is unpersuasive. It is well settled that a tenant may recover *pro bono* attorney's fees under Real Property Law § 234. See Semfeld v. I.S.T.A. Holding Co., Inc., 235 A.D.2d 345 (1st Dep't 1997). However, Defendant is correct in arguing that attorney's fees would have

only been available if requested prior to entering judgment. Accordingly, Plaintiff's motion to amend the judgment to include attorney's fees is denied.

Defendant's Cross-Motion

Defendant cross-moves pursuant to CPLR §§ 317 and 5015(a)(1) and (4) to vacate and set aside the default judgment on the ground that it has a reasonable excuse for not responding to Plaintiff's complaint and the notice sent by DHCR. Defendant alleges that it never received the notices sent by DHCR, and therefore was unable to respond. It has submitted an affidavit from its managing agent, Kenneth Schubach, as well as affidavits from three of its receptionists, including Yalitzza Ramos, to support this contention. It also argues that it has a meritorious defense to the underlying DHCR rent overcharge complaint based on the method used to calculate the overcharge.

Defendant's cross-motion is properly viewed as an Article 78 proceeding to review the decision of an administrative agency. This court cannot review DHCR's decision until administrative remedies have been exhausted by way of a PAR. See 112 MacDougal St. Realty Ass'n v. New York State Div. of Hous. & Community Renewal, 244 A.D.2d 296 (1st Dep't 1997); 9 NYCRR § 2510.12. Defendant has failed to file a PAR. Moreover, Defendant's claim that it never received notices from DHRC is belied by the signature of its receptionist Yalitzza Ramos on two

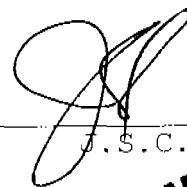
return receipts for the DHCR mailings. Therefore, the cross-motion is denied. Accordingly, it hereby is

ORDERED that Defendant's cross-motion is denied; and it further is

ORDERED that that part of Plaintiff's motion seeking to amend the judgment entered on March 14, 2006 is granted to the extent that statutory interest is awarded, and the motion is otherwise denied, and the Clerk of the Court is directed to issue an amended judgment for \$43,396.20, with interest calculated from August 4, 2005, together with costs and disbursements as taxed.

Dated: April 12, 2007

ENTER:



J.S.C.

JANE S. SOLOMON

FILED

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