

Charron v 706 Realty Co., LLC
2008 NY Slip Op 31297(U)
May 2, 2008
Supreme Court, New York County
Docket Number: 0105488/2007
Judge: Barbara Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. BARBARA R. KAPNICK

PRESENT:

PART 12

Justice

Index Number : 105488/2007

CHARRON, MARJORIE

vs.

706 REALTY

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 105488-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

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.
Settle Order

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

Dated: 5/2/08

[Signature]

BARBARA R. KAPNICK ^{J.S.C.}
 FINAL DISPOSITION NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
MARJORIE CHARRON,

Plaintiff,

-against-

706 REALTY CO., LLC,

Defendant.

DECISION

Index No. 105488/07

Motion Seq. No. 001

-----X
BARBARA R. KAPNICK, J.:

In this action, plaintiff Marjorie Charron, a rent stabilized tenant, seeks to recover amounts due her from her landlord, defendant 706 Realty Co., LLC, pursuant to an Order of the Division of Housing and Community Renewal (DHCR) dated February 6, 2006 for rent overcharges in the sum of \$10,778.74 for the period June 1, 2001 through May 31, 2003 with interest, together with legal fees, expenses and treble damages (first cause of action),¹ an update of the overcharge award for the period June 1, 2003 to the present with interest, legal fees, expenses and treble damages (second cause of action), and legal fees and expenses pursuant to Real

¹ DHCR established the initial fair market rent for the subject premises, 706 Riverside Drive, Apartment 6C to be \$1337.09 effective June 1, 2001 and directed the landlord to refund to the tenant the sum of \$10,778.74. Defendant then brought an Article 78 proceeding seeking to set aside the DHCR's decision and to remand the matter to the agency to consider new comparable rents offered by the landlord. That proceeding was dismissed by Decision of the Hon. Sheila Abdus-Salaam dated July 28, 2006.

Property Law § 234 for this action and prior proceedings (third cause of action).

Defendant now moves for summary judgment dismissing plaintiff's Complaint on the ground that the landlord has tendered 'in good faith' the full amount of the overcharges, plus interest (i.e., two checks in the amounts of \$8,709.16 and \$21,171.21, for a total sum of \$29,880.37), thus negating plaintiff's right to recover treble damages.

Plaintiff, who returned the checks by letter dated July 30, 2007, opposes the motion and cross-moves for summary judgment enforcing the award, together with the amounts due for additional overcharges occurring after the DHCR award, along with treble damages, legal fees and interest, on the ground that payment was not made until after the commencement of this action, the amount forwarded to plaintiff did not constitute the full payment due, and said payment was unlawfully conditioned on plaintiff providing a release. See, *Matter of East 163rd St v New York State Div. of Hous. & Community Renewal*, 4 Misc3d 169 (Sup. Ct., Bronx Co. 2004), in which the court found, inter alia, that DHCR's rejection of the landlord's claim of a 'good faith' attempt to cure the overcharge as insufficient had a rational basis on the record and was neither

arbitrary nor capricious because the rent adjustment was not timely under DHCR's Policy Statement 89-2.

DHCR's Policy Statement 89-92 (February 27, 1989) - 'Application of the Treble Damage Penalty', provides, in relevant part, as follows:

The owner must prove by a preponderance of the evidence that the overcharge was not a willful act. This simply means that where an owner submits no evidence or where the evidence is equally balanced, the overcharge is deemed to be willful...

DHCR has determined that the burden in establishing lack of willfulness shall be deemed to have been met and, therefore, the treble damage penalty is not applicable, in some situations, where it is apparent or where it is demonstrated that an overcharge occurred under certain specified circumstances. Examples of such circumstances are as follows:

* * *

2) Where an owner adjusts the rent on his or her own within the time afforded to interpose an answer to the proceeding and submits proof to the DHCR that he or she had tendered, in good faith, to the tenant a full refund of all excess rent collected, plus interest.

Based on the papers submitted and the oral argument held on the record on March 5, 2008, this Court finds that defendant has failed to meet its burden of proving by a preponderance of the evidence that the overcharge was not a willful act since there is no dispute that it failed to adjust the rent on its own within the time afforded to interpose an answer to the administrative

proceeding and did not attempt to make any payment to plaintiff on the DHCR award until after the commencement of this action. Plaintiff is, therefore, entitled to recover treble damages.

The defendant's motion is accordingly denied and plaintiff's cross-motion for summary judgment is granted.

Plaintiff shall submit an Order on Notice delineating the specific amounts sought for each category of damages with reference to the appropriate back-up material. Defendant shall be permitted to submit a Counter-order. The Court reserves the right to schedule further oral argument on the Order(s) or send the damages issue to a Referee for a hearing.

Settle Order.

Date: May 2, 2008



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.