

Ahroid v 158-160 W. 76th St., LLC

2008 NY Slip Op 31924(U)

July 1, 2008

Supreme Court, New York County

Docket Number: 0103711/2007

Judge: Judith J. Gische

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

PRESENT: DOROTHY J. GISCHE
Justice

PART 10

Index Number : 103711/2007
AHROLD, KYLE W.
vs
158-160 WEST 76TH STREET
Sequence Number : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

is 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

~~NOT TO BE REPRODUCED OR TRANSMITTED IN ANY MANNER WITHOUT THE ACCOMPANYING MEMORANDUM DECISION~~

FILED
JUL 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: JUL 01 2008 _____ *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

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

-----x
Kyle W. Ahrold,
Plaintiff,

-against-

158-160 West 76th Street, LLC and
Nicola S. Brusco,

Defendants.
----- x

DECISION/ ORDER

Index No.: 103711/07
Seq No.: 002

Present:

Hon. Judith J. Gische
J.S.C.

Pursuant to CPLR 2219(a) the following numbered papers were considered by the court in connection with these motions:

Papers	Numbered
Defs' n/m §3211 w/NEB affirm, exhs	1
Plt's opp w/DLF affirm, exh	2
Defs' reply w/NEB affirm, exhs	3
Transcript 4/24/08	4

FILED
JUL 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

Gische, J.:

Plaintiff Kyle W. Ahrold ("Ahrold") is the rent controlled tenant residing in apartment B ("apartment B") at a multifamily residential building located at 160 West 76th Street in Manhattan ("building"). Defendant 158-160 West 76th Street, LLC, ("160 West") is the owner and landlord of the building. Ahrold seeks to recover monetary damages for rent overcharges. Now before the court is 160 West's pre-answer motion to dismiss the complaint. Though no particular section of CPLR 3211 is cited, the motion is apparently based upon CPLR 3211 (a) (7) [failure to state a cause of action] because 160 West argues that this court's prior order (discussed *infra*) rendered

Ahrold's overcharge complaint academic.

Having already set forth the details of the underlying dispute in this court's prior decision/order dated September 28, 2007 ("remand order") they will not be repeated here, but only summarized.

Arguments

Ahrold has occupied apartment B at the building for more than 30 years. Initially the rent was \$625 per month pursuant to a negotiated a lease. On April 5, 1976 DHCR's predecessor in interest ("HDA") issued an order "fixing Maximum Rent" at \$625 per month. Starting in 1988, the owner first submitted and was granted an order of eligibility permitting increases in the rent for the apartment. In the ensuing years, 160 West continued to apply for, and receive approval of, such increases.

By 2004, according to 160 West's calculations, the rent for apartment B was \$2,024.16, and therefore qualified for luxury decontrol. 9 NYCRR § 2200.2 (f). 160 West filed an application for such decontrol, but it was denied by DHCR in its "Order Determining Facts or Establishing Maximum Rent," issued June 8, 2006 under docket number TK 420010 AD ("the June 8, 2006 order"). According to DHCR, before the owner could apply for rent increases, it had to establish the maximum base rent ("MBR") for the apartment according to a statutory formula, despite HDA's having already issued an order in 1976 setting the "maximum rent." Thus, DHCR in first denying the luxury decontrol and then establishing an MBR for the apartment, *nunc pro tunc*, effectively recalculated the rent for the apartment. The "new" rent ("MCR") was \$1,391.70 effective January 1, 2006, considerably less than what Ahrold was paying at

that time.

That decision prompted Ahrold to file a rent overcharge complaint with the agency on July 14, 2006 [UG 420030 R] ("rent overcharge complaint"). That complaint, which is also the subject matter of this action and this motion to dismiss, was decided by DHCR in its order issued January 31, 2007 ("the rent overcharge order"). Based upon the June 8, 2006, the DHCR found that the rent for Ahrold's apartment was \$1,420.60 effective January 1, 2007, and therefore he had been overcharged. The decision is based on the MCR set by DHCR following the denial of the luxury decontrol application. 160 West filed a petition for administrative review ("PAR") of that rent overcharge order on February 21, 2007. That PAR remains undecided.

In its remand order, this court vacated the orders by DHCR establishing the MBR for this apartment (order dated June 1, 2006) and setting the MCR (order dated June 8, 2006). It also vacated a third order, dated November 21, 2006 to the extent DHCR decided that the landlord had not timely challenged the order setting the MBR.

Significantly, this court has not decided what the legal rent for apartment B was in 2004 or thereafter. Nor has it decided whether proper increases were taken and if the apartment qualifies for luxury decontrol. Instead, the court directed that DHCR reconsider the issue of luxury decontrol, calculating the rent using the "maximum rent" set by HDA in 1976 as the basis for increases from 1988 forward. Although the court denied Ahrold's petition challenging DHCR's authority to retroactively calculate the MBR for his apartment, the court expressly allowed this plenary action for rent overcharge to continue. The court noted that the issues of luxury decontrol and

overcharge are inter-related. Although 160 West sought to stay this plenary action for an overcharge claim, the court denied the motion, setting this matter down for a conference to determine what issues, if any remained for it to decide.

160 West now argues that this overcharge action must be dismissed because Ahrold has no claims against it. 160 West contends that because this case is premised on the now vacated orders, Ahrold has no overcharge claim. The owner contends that it has documented "to the penny" every increase in rent over the past 30 years, and aside from the now vacated DHCR decision denying its luxury decontrol application, there is no other basis for Ahrold's rent overcharge claim.

In opposition, Ahrold first argues that his overcharge complaint with DHCR [UG 420030 R] was not the subject of either petition before the court, nor of the court's remand order. Ahrold also argues that DHCR has not yet determined what the legal rent for apartment B is and its "new" determination may still result in a substantial rent overcharge claim in his favor which the agency cannot then reduce to a money judgment in his favor. The court heard oral argument on this motion and both sides addressed the impact of the applicable four (4) year statute of limitation found in CPLR § 213-a and Rent Stabilization Law Section § 26-516 (a) (2). While they disagreed whether this case should continue beyond the pleading stage, both sides agreed that dismissal of this action will result in Ahrold's losing his "place" in terms of the statute of limitations for this plenary action.

The complaint herein sets forth three (3) causes of action, all of which rely upon the now vacated decisions by the DHCR setting the MBR (June 1, 2006), the MCR

(June 8, 2006), and the rent overcharge order (January 31, 2007). Among the allegations in the complaint are that:

"13. On or about January 31, 2007, the DHCR Rent Administrator issued an Order of Disposition of Tenant's Complaint of Alleged Violation [. . .] which made a disposition of Plaintiff's rent overcharge complaint and determined the maximum collectible monthly rents for the Apartment during the period of 1989-2006 to be as follows . . ." [the MCR is then set forth for each year starting 1989 as calculated by the DHCR using the MBR it set in its June 1, 2006 Order]"

"14. The difference between the total amount of rent collected during the period of January 1989 through July 2006 and the maximum collectible rent for each of those months determined by the DHCR Rent Administrator's Order is \$80,674.75."

"15. Accordingly, defendants engaged in illegal rent overcharges in the amount of \$80,674.75."

"16. The DHCR Rent Administrator's Order, along with determining the maximum collectible rent for each month during the relevant time period, states in relevant part that 'if the owner has collected more than the legal rent, the tenant (s) have the right to sue for damages' . . ." and "DHCR, in issuing the Order, was acting within its statutory and regulatory authority . . ."

In his overcharge complaint to the agency, Ahrold states that the rent overcharge arises from the owner's improper calculation of the latest MBR as well as the DHCR's determinations contained in the June 8, 2006 order setting the MCR for the apartment at \$1,391.70 as of January 2006, \$1,294.60 as of January 2005, and \$1,204.28 as of January 2004.

Discussion

On a motion to dismiss pursuant to CPLR § 3211 (a) (7) the pleading is to be afforded a liberal construction, the facts as alleged in the complaint must be accepted

by the court as true, and they are to be accorded every favorable inference. Leon v. Martinez, 84 NY2d 83 (1994); Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997). The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one. Leon v. Martinez, 84 N.Y.2d supra at 87-88.

First, the court addresses 160 West's argument that because the court vacated the prior order of DHCR setting the MBR and MCR, the tenant has no overcharge claim. This court has not decided what the legal rent for apartment B is, but remanded that issue to the agency for it to make the necessary calculations using the maximum rent set by HDA in 1976. The court has, however, foreclosed any claims by Ahrold that he has been overcharged rent based upon DHCR's June 8, 2006. Also foreclosed are any claims by Ahrold arising from the agency's rent overcharge order (January 31, 2007) because the underpinnings of that overcharge decision are based upon the erroneous and now vacated June 1 and June 8, 2006 orders.

The complaint in this plenary action rests upon those vacated orders as well. Although the court remanded the issue of rent overcharge to the DHCR for it make the necessary rent calculations, it is now up to DHCR to also decide what to do with Ahrold's complaint. In remanding the overcharge complaint, this court did not make any decision about whether it was viable in light of the dismissed orders. This court did not remand the complaint with any instructions as to whether it should be broadly or narrowly construed. That is within the province of that agency. Here, however, 160 West convincingly argues that aside from the erroneous and now vacated orders,

Ahrold sets forth no facts whatsoever tending to show he has a cause of action for an overcharge claim, other than those prompted by the vacated orders. Although plaintiff could have provided an affidavit to remedy any defects in the complaint, he has not done so. Leon v. Martinez, supra at 87-88. Nor is there any motion to amend the complaint. It is not inconsistent for this court to dismiss this plenary action while allowing DHCR to consider the overcharge claim before it on the merits.

Ahrold's attorney's affirmation, that maybe the DHCR will find an overcharge, and therefore this case should be permitted to proceed or at least be stayed until the DHCR's investigation is completed, is insufficient to defeat 160 West's motion to dismiss. Allowing the complaint its most liberal construction, Ahrold has no overcharge claim at the present time, based upon the allegations in the complaint. The complaint is based upon erroneous orders that have been vacated.

Although Ahrold has raised other arguments related to the statute of limitations applicable to a rent overcharge claim, and that he cannot obtain a money judgment for overpayments, and other relief, this arguments are not only ineffective against defendants' motion but also premature. Until DHCR decides what the legal rent for the apartment is, and whether there is an overcharge, there is no statute of limitations issue for the court to decide or money judgment for the court to enter.

For the reasons stated, defendants' motion to dismiss the complaint at the pleading stage is granted. The clerk shall enter judgment in favor of defendants 158-160 West 76th Street, LLC and Nicola S. Brusco against plaintiff Kyle W. Ahrold.

Conclusion


Defendants' motion is granted and the complaint is dismissed. The clerk shall enter judgment in favor of defendants 158-160 West 76th Street, LLC and Nicola S. Brusco against plaintiff Kyle W. Ahrold.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
July 1, 2008

So Ordered:



Hon. Judith J. Gische, JSC

FILED
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NEW YORK