

Leheup v Direct Realty, LLC

2008 NY Slip Op 32028(U)

July 18, 2008

Supreme Court, New York County

Docket Number: 0104572/2007

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Index Number : 104572/2007

LEHEUP, ANDREA

INDEX NO. _____

vs

MOTION DATE _____

DIRECT REALTY

MOTION SEQ. NO. _____

Sequence Number : 001

MOTION CAL. NO. _____

SUMMARY JUDGEMENT

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: 7/18/08

Ley
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 2

ANDREA LEHEUP,

Plaintiff,

INDEX NO.
104572/07

-against-

MOTION SEQ. NO. 001

DIRECT REALTY, LLC,

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and no party has appeared to be heard in person. To
obtain a copy of this judgment, a representative must
appear in person at the Judgment Clerk's Desk (Room
1419).

YORK, J.:

In this landlord-tenant action, plaintiff Andrea Leheup (plaintiff) seeks a declaratory judgment, injunctive relief, an award for overcharged rent, and attorney's fees. Defendant Direct Realty, LLC (defendant), moves for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's verified complaint, on the ground that plaintiff's apartment is deregulated, as a matter of law, and, hence, plaintiff is not entitled to the relief that she seeks in her complaint. Plaintiff cross-moves for partial summary judgment, pursuant to CPLR 3212, declaring that plaintiff's apartment is subject to rent stabilization. For the reasons that follow, defendant's motion is denied, and plaintiff's cross-motion is granted.

BACKGROUND

Plaintiff and defendant entered into a written lease agreement, dated August 15, 2005 (the lease), for apartment 3R (the subject apartment) in a building located at 336 West 46th

Street, New York, New York (the subject building) (Sukky Aff., exhibit C). The lease was for a one-year term, from September 1, 2005 to August 31, 2006, at a "base [monthly] rent" of \$2,065.00, which was unilaterally reduced by defendant to \$1,800.00, on condition that plaintiff makes timely monthly rent payments (Suky Aff., exhibit C).

Defendant purchased the subject building in February 2004. The building was vacant since 1999 (see id., ¶¶ 4-5, exhibit A). The first tenants to occupy the subject apartment, under defendant's ownership, were Osler and Anna Guzon (the Guzons), who entered into a written lease agreement with defendant for a one-year lease, from August 6, 2004 to August 5, 2005, at a "base [monthly] rent" of \$2,065.00, which was unilaterally reduced by defendant to \$1,750.00 per month, on condition of timely monthly rent payments by the Guzons (see id., ¶¶ 7-8, exhibit B). At the expiration of their lease, the Guzons vacated the subject apartment, and, on September 1, 2005, plaintiff's lease commenced (see id., ¶¶ 9-10, exhibit C).

With respect to the subject apartment's other prior tenants, the registration rent roll report by the New York State Division of Housing and Community Renewal (DHCR) for the subject building indicates that George Van Custen (Van Custen) was the tenant of the subject apartment in 1984, 1985, and from 1992 to 1999 (Tzortzatos Aff., exhibit F, at 3, 4, 11-18). For all of these

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years, the subject apartment was registered with DHCR as rent-stabilized (id.). No annual registration documents were previously filed with DHCR for calendar years 1986 through 1991 (see id. at 5-10). In 1984, Van Custen paid a monthly rent of \$200.10, in 1985, \$213.10, and in 1998, \$444.42 (see id. at 3-4, 17). DHCR annual registration records do not state the amount of rent that Van Custen paid in 1999 (id. at 18). DHCR records further reflect that the subject apartment, as well as the entire subject building, were vacant in 2000, 2001, 2002, and 2003 (see id. at 19-22).

In October 2007, defendant filed annual registration documents with DHCR, for the subject building and the subject apartment, for years 2004, 2005, and 2006 (Suki Aff., ¶ 13, exhibit D). In January 2008, defendant filed registrations for the subject apartment for calendar years 1986 through 1991 with DHCR (Tzortzatos Reply Aff., ¶ 25, exhibit B).

The first cause of action of the four-count complaint seeks a declaration that the subject apartment is rent-stabilized and that the current rent charged by defendant is unlawful (Tzortzatos Aff., exhibit G, ¶¶ 35-39). The second cause of action seeks injunctive relief directing defendant to provide plaintiff with a rent-stabilized lease agreement and to register the subject apartment with DHCR as rent-stabilized (id., ¶¶ 40-42). The third cause of action is a claim for damages, for

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defendant's alleged improper rent overcharges (id., ¶¶ 43-46), and the fourth cause of action seeks an award of attorney's fees for the prosecution of this action (id., ¶¶ 47-51).

In her cross motion, plaintiff seeks only a declaration that the subject apartment is rent-stabilized.

DISCUSSION

To obtain summary judgment, the movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). "[T]o defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact" (id. [citing CPLR 3212 (b)] [internal quotation marks omitted]).

In this case, the parties are not in disagreement over any material facts. Accordingly, the court only needs to resolve the pertinent issues of law (see e.g. S.J. Capelin Assoc. v Globe Mfg. Corp., 34 NY2d 338 [1974]).

Here, both plaintiff and defendant agree that the subject apartment enjoyed rent-stabilized status until the Guzons vacated it. The issue is whether the subject apartment became deregulated after the Guzons' departure, due to high-rent deregulation. Defendant contends that it did, whereas plaintiff argues that it did not.

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Defendant argues that McKinney's Uncons Laws of NY, Rent Stabilization Code (RSC) § 2526.1 (a) (3) (iii), applies here. That section provides that where an apartment is vacant on the base date, the legal regulated rent is the rent agreed to by the landlord and the first rent-stabilized tenant taking occupancy after the vacancy. The base date for purposes of review is four years prior to the filing of a rent overcharge claim. In this case, according to defendant, that is April 3, 2003, when indisputably the subject apartment was vacant. Additionally, defendant maintains, the fact that the subject apartment was vacant from 1999 to 2004 renders consideration of the rental history prior to 2003 essentially irrelevant, because the rent amount that defendant charged the Guzons was sanctioned by RSC § 2526.1 (a) (3) (iii). Defendant contends that, although it failed to give the Guzons a rent-stabilized lease, with all of its provisions and recitation of rights, the Guzons should nonetheless be considered rent-stabilized tenants within the meaning of RSC § 2526.1 (a) (3) (iii). Since the Guzons rent was \$1,750.00, following their departure, defendant could have raised the rent to \$2,047.50, pursuant to the Rent Guideline Board regulations. The premises would have then been rendered exempt from rent regulation, based upon high-rent deregulation upon the commencement of plaintiff's tenancy, pursuant to the Administrative Code of the City of New York § 26-504.2 and Rent

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Stabilization Code § 2520.11 (r) (4).

Plaintiff, on the other hand, maintains that hers is not a rent-overcharge complaint, but rather one to determine the regulatory status of the subject apartment (Zekaria Aff., ¶¶ 7-12). Accordingly, plaintiff contends, the court can consider the subject apartment's rental history beyond the four-year limitations period (see id.).

Secondly, plaintiff contends that RSC § 2526.1 (a) (3) (iii), relied on by defendant, is inapplicable here, because that statute pertains to rent-overcharge proceedings and not to determining whether a unit is subject to rent stabilization. Therefore, according to plaintiff, the proper definition of the "legal regulated rent" should come from McKinney's Uncons Laws of NY § 26-512 (e), which in turn refers to Uncons Law § 26-517 (e). Uncons Law § 26-517 (e) provides, in pertinent part, that an owner's "failure to file a proper and timely . . . annual rent registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement . . ." (Uncons Law § 26-517 [e]). Accordingly, plaintiff contends that the prior owner's failure to file annual registrations from 1986 to 1991 with DHCR renders the rent of the subject apartment frozen at its 1985 level, or \$213.10.

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Finally, plaintiff contends that, even if RSC § 2526.1 (a) (3) (iii) were to apply, the Guzons cannot be considered rent-stabilized tenants, because the Guzons never received a proper lease with a rent-stabilized rider and information as to their rights as rent-stabilized tenants. As plaintiff puts it, "[t]he Guzons could not have been rent-stabilized tenants unless they knew it" (Zekaria Reply Aff., ¶ 6). Therefore, plaintiff argues that RSC § 2526.1 (a) (3) (iii) does not apply to the rent that defendant charged the Guzons.

Plaintiff is correct that the courts may consider past rental history events beyond the four-year period, not to calculate rent overcharge, but rather to determine whether premises in question is subject to rent regulation (see East W. Renovating Co. v. New York State Div. of Hous. & Community Renewal, 16 AD3d 166, 167 [1st Dept 2005]; see also Tribeca M. Corp v Haller, 11 Misc 3d 133(A), 2006 NY Slip Op 50444[U] [App Term, 1st Dept 2006]).

In this case, however, the court need not examine the rental history of the subject apartment beyond the four years, since the parties are in agreement that the subject apartment was rent-stabilized up until the Guzons vacated it in 2005. Additionally, RSC § 2526.1 (a) (3) (iii) applies here because the subject apartment, as demonstrated by the DHCR records, was vacant in 2000, 2001, 2002, and 2003 (Suki Aff., exhibit F at 19-22). Therefore, what matters here is the first rent agreement following

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this extended vacancy, which was the Guzons' lease. Accordingly, the gap in the DHCR annual registration statements from 1986 to 1991 is irrelevant. Additionally, the court notes that the annual registration statements have since been filed with DHCR.

To determine whether the subject apartment became deregulated following the Guzons' departure, by virtue of high-rent deregulation, the court needs to establish first whether the Guzons' tenancy satisfied the requirements of RSC § 2526.1 (a) (3) (iii), and whether the rent that they paid can be considered the "legal regulated rent." In determining the Guzons' status as tenants, the court is not deciding their rights or lack thereof, since the Guzons are not parties to this action. Rather, the court must determine the status of the Guzons' tenancy only to the extent that it affects plaintiff's.

RSC § 2526.1 (a) (3) (iii) provides

[w]here a housing accommodation is vacant or temporarily exempt from regulation pursuant to section 2520.11 of this Title on the base date, the legal regulated rent shall be the rent agreed to by the owner *and the first rent stabilized tenant taking occupancy after such vacancy or temporary exemption*, and reserved in a lease or rental agreement . . . (emphasis added).

New York courts have required literal compliance with this statute (see Blumenthal v Chung Fu Lam, 17 Misc 3d 233, 235-236 [Civ Ct, NY County 2007] [tenant was not "the first rent-stabilized tenant," pursuant to RSC § 2526.1 (a) (3) (iii), where tenant remained in his apartment after a temporary exemption from

rent stabilization ended and did not agree to rent offered by landlord]; see also Grogan v. Laura Shapiro Kramer Assoc., Civ Ct, New York County, July 28, 2006, Finkelstein, J., index No. L&T 52173/06, at 4-5 [where tenants of an apartment are not offered a rent-stabilized lease following an extended vacancy of the apartment, those tenants' rent cannot form the basis of the legal regulated rent]).

Here, defendant indisputably failed to provide the Guzons a rent-stabilized lease (Suki Aff., exhibit B). Therefore, for the purposes of RSC § 2526.1 (a) (3) (iii), the Guzons were not "the first rent stabilized tenant[s] taking occupancy after . . . vacancy" (RSC § 2526.1 [a] [3] [iii]). Accordingly, the Guzons' \$1,750.00 rent cannot be considered the "legal regulated rent" and, hence, cannot be used for the purposes of high-rent deregulation. Consequently, following the Guzons' vacancy, the subject apartment did not lose its rent-stabilized status due to high-rent deregulation (see Grogan at 5).

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant Direct Realty, LLC's motion for summary judgment is denied; and it is further

ORDERED that plaintiff Andrea Leheup's cross-motion for partial summary judgment is granted; and it is

ADJUDGED AND DECLARED that apartment 3R at 336 West 46th Street, New York, New York, is subject to rent stabilization; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 7/18/08

ENTER:

Lu
J.S.C.

LOUIS B. YORK
J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 147B).