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

PRESENT: LOUIS B. YORK J.S.C. PART 2

Index Number : 104572/2007

LEHEUP, ANDREA

VS.

DIRECT REALTY

SEQUENCE NUMBER : 002

COMPEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
JAN 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/9/09

LOUIS B. YORK J.S.C.

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

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,

-against-

DIRECT REALTY, LLC,

Defendant.

INDEX NO. 104572/07

MOTION SEQ. NO. 002 and 003

YORK, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition. Familiarity with a prior decision and order of this court, dated July 18, 2008 (the July 18, 2008 Order), in motion sequence 001 is presumed. In this landlord-tenant action, plaintiff Andrea Leheup (plaintiff) seeks a declaratory judgment, injunctive relief, an award for overcharged rent, and attorney's fees in connection to her apartment 3R (the subject apartment) at 336 West 46th Street, New York, New York (the subject building).

In motion sequence number 002, plaintiff moves, pursuant to CPLR 3124 and 3126, for an order to compel defendant to provide information regarding the other five residential apartments in the subject building, and if defendant fails to comply with such order, to strike defendant's answer. Defendant cross-moves, pursuant to CPLR 3103, for a protective order denying plaintiff disclosure as to any apartments of the subject building other than plaintiff's.

In motion sequence number 003, defendant moves, pursuant to CPLR 2221, for leave to reargue the July 18, 2008 Order and, upon reargument, for an order granting summary judgment in favor of defendant. Defendant also seeks an order directing plaintiff to pay all outstanding use and occupancy as well as use and occupancy pendente lite.

BACKGROUND

The records of the New York State Division of Housing and Community Renewal (DHCR) indicate that in 1984, 1985, and from 1992 to 1999, the subject apartment was registered as rent-stabilized, and that in 2000, 2001, 2002, and 2003, the entire subject building was vacant.

Defendant purchased the subject building in February 2004. The first tenants to occupy the subject apartment, under defendant's ownership, were Osler and Anna Guzon (the Guzons), who entered into a written, non-rent-stabilized lease agreement with defendant for a one-year lease, from August 6, 2004 to August 5, 2005. The Guzons' rent was $1,750.00 per month. At the expiration of their lease, the Guzons vacated the subject apartment.

Plaintiff and defendant then entered into a written, non-rent-stabilized lease agreement, dated August 15, 2005, for the subject apartment 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.

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. 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. The third cause of action is a claim for damages, for defendant's alleged improper rent overcharges, and the fourth cause of action seeks an award of attorney's fees for the prosecution of this action.

In the July 18, 2008 Order, this court denied defendant's motion for summary judgment and granted plaintiff's cross motion for partial summary judgment and declared that the subject apartment is subject to rent stabilization.

DISCUSSION

Defendant's Motion to Reargue

Defendant moves, pursuant to CPLR 2221, for leave to reargue the July 18, 2008 Order and, upon reargument, for an order granting summary judgment in favor of defendant. Contrary to defendant's assertion, the records of the County Clerk demonstrate that the July 18, 2008 Order was not entered either on July 21, 2008 or since then. A court, however, can "review

its own decision prior to entry and settlement of an order" (*see e.g. Lovell v Jimal Holding Corp.*, 127 AD2d 747, 748 [2d Dept 1987]).

A motion for leave to reargue must "be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]; *Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434 [2d Dept 2005]).

Defendant argues that this court misapprehended the requirements of Rent Stabilization Code (RSC) 9 NYCRR § 2526.1 (a) (3) (iii) and misapplied case law in determining that the Guzons were not the first rent-stabilized tenants after vacancy and that, as a result, following the Guzons' departure, the subject apartment remained rent-stabilized. The court, however, finds defendant's arguments unavailing and sees no reason to revisit the July 18, 2008 Order on the issue of the status of the subject apartment.

Defendant further urges this court to address plaintiff's claim of rent overcharge, which was not done in the July 18, 2008 Order. The court notes at the outset that the issue of rent overcharge received only a cursory treatment in the parties' papers in the prior motion and cross motion. The court, however, has discretion and jurisdiction to address this issue now, given

the centrality of the question of rent overcharge to this action (*see e.g. Rivera v Benaroti*, 29 AD3d 340, 341 [1st Dept 2006] ["[a] motion for reargument is addressed to the discretion of the court"]; *see also Wolfisch v Mailman*, 182 AD2d 533, 533 [1st Dept 1992] ["[t]he Supreme Court has statutory jurisdiction to entertain an action to recover a rent overcharge . . ."]).

Given that the court is not changing its position as to the status of the Guzons' tenancy, the court finds defendant's contention – that the Guzons' rent should be considered the legal regulated rent within the meaning of RSC § 2526.1. (a) (3) (iii) and, hence, should be used for the purposes of high-rent deregulation – without merit.

Defendant further argues that if the Guzons were not the first rent-stabilized tenants, then plaintiff becomes the first rent-stabilized tenant after vacancy, and her monthly rent of $1,800.00 is the legal regulated rent within the meaning of RSC 2526.1 (a) (3) (iii). Accordingly, defendant contends, plaintiff was not overcharged. Additionally, defendant posits that since the base rent amount pursuant to the lease agreement between plaintiff and defendant is $2,065.00 per month, the subject apartment qualifies for high-rent deregulation, which renders the overcharge claim meritless.

Plaintiff contends that her rent overcharge claim is valid and that the court should apply the so-called DHCR default

formula, as the Court of Appeals did in *Thornton v Baron* (5 NY3d 175, 181 [2005]), to determine rent overcharge. Pursuant to the DHCR default formula, the rent amount for an apartment on the base date is determined by using "the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date" (*see Thornton*, 5 NY3d at 180 n 1).

In *Thornton*, in 1992, a landlord leased a rent-stabilized apartment, for which the previous tenant paid $507.85, to a new tenant for $2,400.00 per month. The landlord obtained a consent judgment from the Supreme Court, New York County, declaring that the apartment was exempt from rent stabilization, based upon a representation that the tenant did not intend to use it as his primary residence and that he would sublet it only to those who would not be using the apartment as their primary residence. The landlord then filed with DHCR annual rent registration statements, reflecting the agreed-upon rent with the tenant and listing the apartment as temporarily exempt from rent stabilization. The tenant meanwhile sublet the apartment for $3,250.00 per month to subleasees, who, despite statements to the contrary in their sublease, used the apartment as their primary residence. Subleasees brought an action claiming rent overcharges and seeking to compel the landlord to offer them a rent-stabilized lease at $507.85 per month. The landlord

conceded that the apartment was rent-stabilized, but argued "that the legal rent was to be calculated from a base date rent of $2,496 – the rent reflected in the annual registration statement filed in 1996, four years before [subleasees] filed their amended complaint" (*Thornton*, 5 NY3d at 179).

The *Thornton* Court held that for the purposes of establishing the legal regulated rent, the apartment's rental history before 1996, or 4 years before filing the amended complaint, could not be examined, pursuant to Rent Stabilization Law 26-516 (a) (i). Accordingly, the Court disregarded the rent of $507.85, in effect in 1992. However, the Court refused to honor the rent of $2,496.00, declared the tenant's lease "void at its inception," and held that since the rent was illegal, the DHCR rent registration statement filed in 1996 was a nullity (*Thornton*, 5 NY3d at 181). Since no reliable rent records were available, the Court held that DHCR's default formula should be used to establish the base date rent (*id.*).

Similarly, in *Levinson v 390 West End Associates, LLC* (22 AD3d 397 [1st Dept 2005]), another case relied by plaintiff, a landlord and a tenant entered into a lease, which falsely provided that the tenant did not intend to use the apartment as his primary residence, and, therefore, the apartment would be exempt from rent stabilization during his tenancy (*id.* at 398). The tenant's initial rent was $1,600 per month, as opposed to

$903.31 paid by the prior tenant. The landlord and tenant obtained a consent judgment from the Supreme Court, New York County, stating that the apartment was exempt from rent stabilization during the tenant's tenancy. The *Levinson* court analogized its case to *Thornton*, held that the DHCR registration statements filed as of the base date were unlawful, and applied the *Thornton* default formula in establishing the base date rent (*id.* at 401).

Unlike in *Thornton* or *Levinson*, this case does not involve an apartment, uninterruptedly occupied, which a landlord attempts to remove from rent stabilization under a pretext that the premises will not be used as the new tenant's primary residence. Rather, this case involves a vacancy on the base date, which triggers the application of RSC § 2526.1 (a) (3) (iii) (see July 18, 2008 Order, at 7). Therefore, here, defendant was authorized to charge any rent "agreed to by the owner and the first rent stabilized tenant taking occupancy after . . . vacancy" (RSC § 2526.1 [a] [3] [iii]). The *Thornton* and *Levinson* Courts held that the respective DHCR base-date rent registrations were a nullity because they reflected illegal rents. This issue is irrelevant here, because defendant was authorized to charge any amount of rent agreed to by the first rent-stabilized tenant.

This court previously held that the Guzons were not the first rent-stabilized tenants and that the apartment remained

rent stabilized following their vacancy (*see* July 18, 2008 Order, at 9). Plaintiff is the next tenant after the Guzons, and, indisputably, she agreed to pay her rent. Plaintiff then, as a matter of law, is "the first rent stabilized tenant taking occupancy after . . . vacancy." Accordingly, pursuant to RSC § 2526.1 (a) (3) (iii), the monthly rent of $1,800.00, agreed to by defendant and plaintiff, is "the legal regulated rent," which defeats plaintiff's claim of rent overcharge.

Outstanding and Pendente Lite Use and Occupancy

Defendant seeks to require plaintiff to pay outstanding use and occupancy, as well as use and occupancy pendente lite, pursuant to the letter agreements executed by both parties, dated October 26, 2007 and October 8, 2008 (*see* Myers Aff., exhibit I, Nachtome Aff., exhibit A). The parties have not apprized the court whether plaintiff made payment to defendant, pursuant to the October 8, 2008 letter (Nachtome Aff., exhibit A). The parties are directed to contact this part to schedule a compliance conference in order to address this issue.

The court has considered all the parties' other arguments (motion sequence 003) and finds them without merit.

Plaintiff's Motion to Compel Discovery and Defendant's Cross-Motion for a Protective Order

In motion sequence number 002, plaintiff moves, pursuant to CPLR 3124 and 3126, for an order to compel defendant to provide information regarding the other five residential apartments in

the subject building, and if defendant fails to comply with such order, to strike defendant's answer. Defendant cross-moves, pursuant to CPLR 3103, for a protective order denying plaintiff disclosure as to any apartments of the subject building other than plaintiff's.

Timeliness of Service of Initial Motion Papers on Defendant

Defendant argues that plaintiff's motion must be denied because she failed to timely serve her original motion papers on defendant, in violation of CPLR 2103 (b) (6) and 2214. Since plaintiff served her motion papers via express mail, pursuant to CPLR 2214 (b) and 2103 (b) (6), she had to serve them at least 9 days before the return date of July 17, 2008, or no later than July 8, 2008. Pursuant to CPLR 2103 (b) (6), service by overnight service is complete upon deposit of an envelope into the custody of such service, "prior to the latest time designated by the overnight delivery service for overnight delivery." Although an affidavit of Michael Venezia, dated August 13, 2008 (Venezia Affidavit), states that on July 8, 2008, he deposited an express mail envelope with plaintiff's motion papers in a US Postal Service mailbox on the corner of Broadway and Duane Street, it does not specify that he did so prior to the latest time for mail pickup at that location. Accordingly, the Venezia Affidavit is insufficient to establish that service was timely.

However, even if plaintiff were late in service of her

initial motion papers, such lateness is usually treated by the courts as a procedural, not jurisdictional, defect, and is typically disregarded, unless there is substantial prejudice to an opponent (*see e.g. National Microtech, Inc. v Satellite Video Servs., Inc.*, 107 AD2d 860, 861 [3d Dept 1985]; *see also Dinnocenzo v Jordache Enters.*, 213 AD2d 219, 219-220 [1st Dept 1995]). Here, defendant received plaintiff's motion papers prior to the return date and, on the return date, appeared in court and requested an adjournment, which was granted. Plaintiff contends, and defendant does not dispute, that defendant was provided with additional 14 days to respond to plaintiff's motion. Accordingly, defendant was not substantially prejudiced by the short notice, if any (*see Dinnocenzo*, 213 AD2d at 219-220; *see also Matter of Rustine v Patterson*, 82 AD2d 969 [3d Dept 1981]).

Plaintiff's Motion to Compel

Plaintiff seeks to compel discovery with respect to the other five apartments in the subject building so that she can properly prepare her claim for rent overcharge and to calculate the base date rent pursuant to the *Thorton* formula. This court's dismissal of plaintiff's cause of action sounding in rent overcharge renders plaintiff's motion moot.

Plaintiff also claims that she needs the information about the other five units in order to verify defendant's assertion that the building was vacant from 1999 to 2004. Plaintiff did

not raise this issue in opposition to defendant's motion for summary judgment (motion sequence 001), nor in opposition to defendant's motion to reargue (motion sequence 003). Defendant previously submitted DHCR records indicating that the subject apartment was vacant in 2000, 2001, 2002, 2002, and 2003 (*see* July 18, 2008 Order, at 3). Plaintiff, however, failed to submit any evidence demonstrating that the subject apartment was not vacant. Accordingly, plaintiff's motion to compel is denied and defendant's cross-motion for a protective order is granted.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendant Direct Realty, LLC's motion (motion sequence 003) for leave to reargue, pursuant to CPLR 2221, is granted and on reargument the order of this court, dated July 18, 2008, is modified to read that defendant Direct Realty, LLC's motion for summary judgment (motion sequence 001) is granted to the extent that the third cause of action of plaintiff's complaint is severed and dismissed, and is otherwise denied; and it is further

ORDERED that a compliance conference is scheduled in this Part, at 71 Thomas Street, New York, NY, Room 205, on January 28, 2009 at 2:00 p.m. in order to address defendant's claims for outstanding and pendente lite use and occupancy, and it is further

ORDERED that plaintiff Andrea Leheup's motion (motion sequence 002), to compel disclosure, pursuant to CPLR 3124 and 3126, is denied and defendant Direct Realty, LLC's cross-motion, pursuant to CPLR 3103, is granted and defendant is granted a protective order with respect to plaintiff's demand for discovery regarding other units in the subject building; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 1/9/09

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.