

Jazilek v Abart Holdings, LLC

2009 NY Slip Op 31847(U)

August 13, 2009

Supreme Court, New York County

Docket Number: 110012/05

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 110012/2005

JAZLIEK, ROGER

vs

ABARY HOLDINGS LLC

Sequence Number : 005

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

~~_____~~

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED
AUG 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: August 13, 2009

J. Gische
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----x

ROGER JAZILEK,
Plaintiff,

-against-

ABART HOLDINGS, LLC,
Defendant.

-----x

DECISION/ ORDER
Index No.: 110012/05
Seq. No. : 005

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's n/m (3212) w/MBT affirm, JB affid, exhs	1
Def's x/m w/AH affirm, exhs	2
Pltf's opp w/MBT affirm, exhs	3

FILED
AUG 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Plaintiff Robert Jazilek ("Jazilek") seeks a declaratory judgment that he is the legal rent stabilized tenant of apartment 1-B ("apartment"), located at 50 East 3rd Street, New York, New York (1st cause of action). Abart Holdings, LLC is the owner of that building ("landlord"). Jazilek has asserted three other causes of action. They are for a permanent injunction requiring defendant to provide him with a rent stabilized lease (2nd cause of action), a money judgment for rent overcharges (3rd cause of action) and legal fees (4th cause of action).

Before answering, the landlord moved to dismiss the complaint. That motion was denied for reasons set forth in the court's October 4, 2006 decision and order ("prior order"). The landlord appealed the court's prior order. It was reversed by the Appellate Division, First Department, and the complaint was dismissed (Jazilek v. Abart Holdings,

LLC, 41 AD2d 124 [1st Dept 2005]). Jazilek appealed the dismissal of his complaint by the Appellate Division, First Department and the Court of Appeals reversed the order, reinstating Jazilek's complaint, and remitting the case to this court for further proceedings (Jazilek v. Abart Holdings, LLC, 10 NY3d 943 [2008]).

Jazilek now moves and landlord cross moves for summary judgment, based upon the Court of Appeals' decision. Issue has been joined, but the note of issue has not yet been filed. Since these motions comply with the requirements of CPLR § 3212, they will be decided on the merits. The court's decision is as follows:

Arguments

It is unrefuted that Beverly Nelson *nee* Beverly Brindisi ("Brindisi") was the tenant of apartment 1-B pursuant to a rent stabilized lease with landlord's predecessor in interest, non-party Windo, Co. That lease, dated November 3, 1981, was renewed by the landlord and Brindisi; the most recent lease renewal was for the term expiring October 31, 2003.

Before the lease term expired, the landlord served Brindisi and Jazilek with a Notice to Cure dated February 12, 2002¹ notifying them that Brindisi had illegally sublet the apartment to Jazilek and that this was a breach of her lease. Brindisi was provided with an opportunity to cure the breach (on or before March 4, 2002). The landlord then served Brindisi and Jazilek with a Notice of Termination². After the termination notice was served, Brindisi wrote to the landlord surrendering the apartment. In her letter

¹A copy of this notice was not provided to the court by either side.

²Neither side has provided the court with a copy of this notice either.

dated March 22, 2002, Brindisi requested that "[i]f possible, I would appreciate your entering into a lease for this apartment with Roger Zazliek (*sic*)."

Immediately thereafter, the landlord brought a holdover proceeding in housing court against Jazilek (Abart Holdings LLC v. Robert Jazilek, Civil Court, New York County, Housing Part, L&T Index No. 65091/02). In the petition, the landlord alleged that Brindisi had not maintained the apartment as her primary residence, she had subleased the apartment for a longer time than allowed by law, and she had not obtained the prior written consent of the landlord before subleasing it. RSC § 2525.6 [a]; RSC § 2524.3 [a]; RPL § 226-b. Brindisi was not a named respondent in that summary proceeding; only Jazilek was named. Jazilek appeared in court without a lawyer.

Jazilek and the landlord settled that holdover proceeding. As per their written stipulation, dated April 2, 2002, which was "so ordered" by the Hon. Paul D. Alpert ("stipulation"), the parties agreed that the landlord would offer, and Jazilek would accept, a two year lease in his own name, commencing April 15, 2002 through April 14, 2004. Although the rent was set at \$2,200 per month, the landlord gave Jazilek a "preferential" rent of \$1,800 for the first 2 year term only. The 2002-2004 lease (dated April 2, 2002) is an unregulated, market rate lease. It was renewed thereafter in March 2004 with an increase in rent to \$2,299, but a "preferential" rent of \$1,881. The rider to the April 2002 lease provides as follows:

"The legal regulated rate is \$2,200. During the term of this lease, the landlord shall accept a lower preferential rent of \$1,800. At the expiration of the lease, the preferential rent shall expire and the tenant shall pay the landlord the legal regulated rent plus any lawful adjustment."

The rider to the March 2004 lease is identical, but for the sums therein:

"The legal regulated rate is \$2,299. During the term of this lease, the landlord shall accept a lower preferential rent of \$1,881. At the expiration of the lease, the preferential rent shall expire and the tenant shall pay the landlord the legal regulated rent plus any lawful adjustment."

In denying the landlord's prior motion to dismiss, this court held that the stipulation might be void, if plaintiff could prove his facts at trial, that the landlord had charged him a higher rent than allowable by law as consideration for allowing Jazilek to remain in the apartment as a tenant, and not pursuing the eviction proceeding against him. The Appellate Division disagreed with this court and dismissed the complaint finding that Jazilek had "no legal right to tenancy or status as a tenant, rent stabilized or otherwise" and therefore the agreement the parties had negotiated was a binding agreement, "permitting [Jazilek] tenancy at the pleasure of the landlord . . ."

In reversing the Appellate Division's order, reinstating the complaint, and remitting the case to the Supreme Court for further proceedings, the Court of Appeals made the following determination:

"After tenant-of-record surrendered possession of a rent-stabilized apartment, landlord entered into a so-ordered stipulation with tenant, who had been subletting the apartment, for an unregulated lease purporting to fix rent at a sum that exceeded the legal limit under the Rent Stabilization Code. Although tenant was not "of-record" upon entering the agreement, the so-ordered stipulation violates the Rent Stabilization Code and is void as against public policy (*see Riverside Syndicate, Inc. v. Munroe*, 10 NY3d 18 [2008]; Rent Stabilization Code [9 NYCRR] § 2520.13). Tenant was not required to proceed in Housing Court in this instance (*see Riverside*; *see also Teitlebaum Holdings v. Gold*, 48 NY2d 51, 54 [1979])."

In light of the Court of Appeals' decision, plaintiff argues that he is entitled to

summary judgment on all his claims, not only because the stipulation is void, but also because the landlord gave him an unregulated lease and charged him a market rate rent even though the apartment has not been deregulated. Jazilek collaterally argues that although the stipulation is void, and the rent the landlord specified in the lease unenforceable, the tenancy established by the lease is nonetheless enforceable.

In opposition to the tenant's motion and in support of its own cross motion for summary judgment, the landlord proffers many of the arguments that it previously presented to the Appellate Division, First Department, which that court agreed with, but the Court of Appeals rejected. Principal among them is that the landlord is entitled to summary judgment enforcing the agreement, as written because stipulations are favored by the courts and this agreement was the product of arm's length negotiations to settle the housing court case.

The landlord does not deny that it charged Jazilek a "premium" rent, or that Brindisi's rent was \$812.34 when she surrendered the apartment. Landlord, however, argues that it had the right to do so because Jazilek was not a tenant, but that status was conferred by mutual agreement. Thus, the landlord argues that if the stipulation is unenforceable, then the lease agreement is likewise unenforceable, and therefore, the parties must be restored to their original positions as they existed when they appeared in the housing court holdover proceeding. Moreover, according to landlord, this dispute belongs in housing court where the parties can either re-settle their dispute or proceed to trial.

Most of the critical facts of this are either unrefuted or have been established by the moving parties. Jazilek has established (and it is unrefuted) that Brindisi was the

rent stabilized tenant of apartment 1-B for several years. She had an unexpired rent stabilized lease in effect when the landlord sent out its notices to cure and then terminate. It is also unrefuted that Jazilek occupied the apartment before the notices were sent and Brindisi surrendered the apartment.

It is unrefuted that although Jazilek had a lease effective April 18, 2002, when the landlord filed the 2003 annual rent registration for the apartment on April 20, 2004, he not only listed the legal rent as \$812.34 through October 31, 2003, but also identified Brindisi as the legal tenant. By then, however, not only did Jazilek have a lease in his own name, the actual rent he was paying was much higher.

The 2004 annual rent registration accurately identifies Jazilek as the tenant of apartment 1-B, with a lease commencing April 18, 2002, expiring April 17, 2004. It also correctly reflects the rent that he was paying at that time, i.e. a \$2,200 "legal rent," but with a "preferential" rent of \$1,880 per month. The apartment status is listed as rent stabilized in that filing. The landlord did not file annual rent registrations for the apartment after 2004.

Jazilek contends (and the landlord agrees) that there were no renovations or structural changes made to the apartment which would have resulted in lawful rent increases for things like major capital improvements ("MCI's") or individual apartment improvements ("IAI's"). The landlord acknowledges the sole basis for the increased, and deregulated rent was its acceptance of Jazilek as the legal tenant of the apartment and resolution of the housing court action.

This action was commenced by filing on July 20, 2005. Jazilek argues that he was overcharged and the "base date" for calculating his overcharge claim is four years

prior to his filing, or July 20, 2001. RSC § 2520.6 [f]. Jazilek is not claiming there were any overcharges in 2001 or 2002, while Brindisi was the tenant. He claims that the overcharge began when he was offered the deregulated lease in his own name in April 2002 and continue thereafter. Jazilek alleges that the false filings in 2003 and 2004, coupled with the failure to file annually thereafter are a complete bar to the landlord collecting any increases in rent after April 2002, meaning his rent is frozen as of that date. Jazilek further argues that his legal rent should be set at \$812.34 per month plus the allowable vacancy increase of 20% which the landlord could have charged him when he first became a tenant, for a total rent obligation of \$974.81 per month.

In January 2007, while this action was pending, the landlord brought a non-payment proceeding against Jazilek in housing court (Abart Holdings, LLC v. Jazilek, L&T54091-07). The petition identified "Jazilek [as] the tenant of apt 1-B. . . pursuant to a written lease." It also states that the apartment is "not subject to any form of rent regulation due to luxury deregulation" and "the subject premises is registered with the Department of Housing and Preservation Code Enforcement." That case was settled by the parties. Jazilek (who was represented by a lawyer) consented to a money judgment being entered against him for unpaid rent due through November 30, 2007 (\$44,093.20), with a warrant of eviction to issue forthwith, but execution stayed in light of the then pending appeal to the Court of Appeals.

Discussion

Since each side seeks summary judgment, each bears the initial burden of making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v.

New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. See: Hindes v. Wejsz, 303 A.D.2d 459 (2nd Dept 2003).

There is no factual dispute that the subject apartment is rent stabilized. Landlord makes no claim that it ever became destabilized or deregulated for any reason. Thus, when Brindisi surrendered the apartment, but Jazilek remained as an occupant, the landlord had two choices. It could either challenge Jazilek's right to stay in the apartment and try to evict him, or it could accept him as a new tenant and offer him a rent stabilized lease in his own name. The landlord decided to accept Jazilek as a tenant, however, it did not offer him a rent stabilized lease. It offered Jazilek a non-regulated lease as if the apartment had been destabilized. There was no legal basis for charging Jazilek a rent higher than allowed under the rent stabilization laws. There were no MCI's or IAI's applicable to the apartment that would have justified the higher rent nor did the landlord ever notify Brindisi that it was seeking to destabilize the apartment. RSL § 2422.5 [g]; see, Spaeda v. Bakirtiy, 186 Misc2d 557 (New York City Civil Court, New York Co., 2000). These circumstances alone justify a determination that there was an overcharge.

In finding the housing court stipulation void in the context of a motion to dismiss, the Court of Appeals focused on Jazilek's waiver of the benefits rent regulation. By law, Jazilek had no right to (and could not) waive the protections of the rent stabilization law

which require the landlord of a rent stabilized apartment to give its tenant a rent regulated, not market rate, lease unless the conditions for deregulating the apartment have been satisfied. RSC § 2530.13; Jazilek v. Abart Holdings, LLC, 10 NY3d at 944; Druckler v. Mauro, 30 AD3d 37 (1st Dept 2006) *app disp* 7 N.Y.3d 844 (2006); Georgia Props., Inc. v. Dalsimer, 39 AD3d 332 (1st Dept 2007). The decision to accept a market rate lease, thereby waiving rent protection, does not belong to an individual tenant at any given time because it affects all subsequent tenancies as well. *see*, Riverside Syndicate, Inc. v. Munroe, 10 NY3d at 22. Thus, any argument by the landlord, that the parties' housing court stipulation is still enforceable, is devoid of merit. That issue has been foreclosed by the Court of Appeals' decision in this very case, finding that the settlement agreement setting a non-regulated rent, is void as against public policy.

By reinstating the complaint and remitting the case to this court for further proceedings, the Court of Appeals decided that Jazilek had stated the causes of action pled which include a declaration that he is the legal rent stabilized tenant of apartment 1-B, a permanent injunction requiring defendant to provide him with a rent stabilized lease and a money judgment for rent overcharges. Although the court found the stipulation was void as against public policy, it left open the issue for this court to decide whether Jazilek is entitled to a rent stabilized lease and if so, what the legal rent is. The Court of Appeals did not resolve nor address the issue of Jazilek's status as a tenant. Furthermore, for reasons that will be made clear below, there is no basis for this case to be referred to housing court, as urged by the landlord.

The court rejects landlord's argument, that because the housing court stipulation is void, there is no landlord-tenant relationship between Abart and Jazilek. Although a

tenant cannot, by statute³, waive the benefits of the rent stabilization laws, it is not against public policy for a landlord to offer an existing occupant a new lease in his or her own name to resolve a dispute about whether he or she was an illegal occupant. Unlike the agreement in Riverside, the landlord's acceptance of Jazilek as the new tenant of the apartment after Brindisi left is not "something the law undisputably did not and does not permit." Riverside Syndicate v. Munroe, 10 NY3d at 23. To the contrary, it embodies the spirit of the Rent Stabilization Law, which is to provide an adequate supply of affordable housing in the City of New York. Drucker v. Mauro, 30 A.D.3d 37 (1st Dept. 2006).

The court finds that, as a matter of law, there is still a landlord tenant relationship between Abart and Jazilek although the stipulation to pay a higher rent and accept a deregulated lease is void. Jazilek and Abart established a landlord-tenant relationship once the landlord accepted Jazilek as its tenant. The apartment that landlord rented to Jazilek is rent stabilized and both parties are bound by the rent stabilization laws and regulations. As a matter of law, the landlord was required to offer - and Jazilek was entitled to receive - a rent stabilized, not market rate, lease. RSC § 2522.5; Levinson v. 390 West End Associates, L.L.C., 22 A.D.3d 397 (1st Dept. 2005). Moreover, since this

³RSC § 2520.13 provides as follows:

"An agreement by the tenant to waive the benefit of any provision of the RSL or this Code is void; provided, however, that based upon a negotiated settlement between the parties and with the approval of the DHCR, or a court of competent jurisdiction, or where a tenant is represented by counsel, a tenant may withdraw, with prejudice any complaint pending before the DHCR."

action is for a declaration of rights, and this court has original general jurisdiction over all matters, including those involving housing disputes, there is no reason why (as urged by the landlord) this case has to be referred to housing court for final resolution.

The issue of whether Jazilek knew or did not know what the legal rent for the apartment was is tangential to the disputes before the court. In any event, there is no indication that Jazilek knew he was being charged a higher rent than allowed by law. There is no representation to that effect in the settlement agreement. In housing court petition, the apartment is identified as being rent stabilized, but the landlord states that it is "entitled to past and present use and occupancy since December 2001 in an amount equal to at least \$2,000 per month." The petition does not explain that the use and occupancy demanded is higher than the registered rent, giving the impression that the \$2,000 per month sought as use and occupancy is the legal rent. .

Since the parties' agreement, to establish a landlord - tenant relationship, is not contrary to public policy, it can and must be effectuated by having the landlord now provide Jazilek with the rent stabilized lease which he is entitled to by operation of the law. 132132 LLC v. Strasser, 19 Misc.3d 658 *aff'd as modified* ---Misc3d --- (N.Y.Sup.App.Term, 2009), Slip Copy, 2009 WL 2390850, August 04, 2009. Having decided that Jazilek is entitled to a rent stabilized lease in his own name, the court must determine what the legal rent for apartment 1-B is, and whether there was an overcharge. see, Thornton v. Baron, 4 AD3d 258, 259 (1st Dept 2004) *aff'd* 5 NY3d 175 (2005).

Where a landlord is found to have collected an overcharge above the legal rent

for an apartment, the landlord "shall be ordered to pay to the tenants a penalty equal to three times the amount of such overcharge. . . ." RSL § 2526.1. A rent overcharge is presumed willful unless a landlord proves "by a preponderance of the evidence" that it was not. *see*, 9 NYCRR § 2506.1; Miller v. Div. of Hous. & Community Renewal, 289 A.D.2d 20 (1st Dept 2001). The statute of limitations applicable to a rent overcharge complaint is four years. RSL § 26-516 [a][2]; Thornton v. Baron, 4 AD3d at 259 *affirm'd* 5 NY3d 175 at 180. RSL § 26-516 [a] [i] provides that the legal regulated rent for purposes of determining an overcharge is the rent indicated in the annual registration statement filed four years prior to the most recent registration statement plus any subsequent lawful increases and adjustments. Jazilek filed his complaint on July 20, 2005. Therefore, the legal rent for the apartment is established by examining the rental history for the four year period prior to that filing which is July 20, 2001, provided those records are reliable. Thornton v. Baron, *supra*.

No argument is made by Jazilek, nor does it appear, that the landlord overcharged the prior tenant (Brindisi) in 2001 or 2002. The certified annual rent registrations for the apartment have been provided. The 2001 registered rent was \$766.36. The lease was renewed and the rent was increased to \$812.34 in 2002 it was \$812.34. The progression is consistent with guideline increases and these records appear reliable. Thus, the legal rent in April 2002 for apartment 1-B was \$812.34.

When Jazilek became the new tenant, the landlord had the right to charge him \$812.34, plus an allowable rent adjustment for a vacancy lease. RSC § 2522.8. Since the lease term the parties agreed to was for two (2) years, the adjustment would have

been equal to 20% of the legal regulated rent (i.e. \$162.47), making the new rent \$974.81. There was no legal basis for the landlord to charge Jazilek \$2,200 per month in rent, and the \$1,800 "preferential rent" was also higher than the legal registered rent. Thus, the legal collectible rent for the apartment that the landlord could charge Jazilek in April 2002 as a new tenant was \$974.81 per month, even though the registered rent was \$812.34 per month.

Although the landlord filed an annual rent registration for 2003, the information it contained was erroneous, possibly false. It was filed February 2, 2004, after Jazilek was the tenant. The registration, however, lists Brindisi as the tenant with a legal registered rent of \$812.34 per month. No explanation is provided by the landlord for why this erroneous filing was made and it has not been corrected despite the passage of time. The 2004 registration is completely false because it misstates the legal rent for the apartment. It is, therefore, a nullity and it is as if no registration was filed that year. *see, Thornton v. Baron*, 5 NY3d at 181.

The penalty for a failure to properly and timely comply with the annual rent registration requirements of RSC § 2528.3 is a rent freeze barring an owner from applying for or collecting any rent in excess of: the base date rent, plus any lawful adjustments allowable prior to the failure to register, until the registration is completed. RSC § 2528.4; Yorkroad Associates v. New York State Div. of Housing and Community Renewal, 19 A.D.3d 217 (1st Dept 2005). Once the landlord files the late registration, the sanctions are eliminated prospectively. RSL § 26-517 [e]. Applying the law to the facts of this case, the rent for apartment 1-B is frozen at \$974.81. Until such time as it

properly registers the rent, the landlord cannot collect any prospective rent increases.

Jazilek has established that he was overcharged rent. For the 82 month period commencing April 2002 ending January 2009, he paid \$102,714.10 in rent. The legal rent for that 82 month period was \$79,934.42 (i.e. \$974.81 x 82 months). The difference between the amount the landlord could have legally collected, but Jazilek paid is \$22,779.62. None of these facts are challenged by landlord. It only claims that by returning the overcharge to Jazilek he can be made whole. This is an incorrect statement of the law, and since Jazilek has proved he was overcharged rent, he is entitled to summary judgment on his overcharge claim.

RSL § 26-516 [a] provides for the imposition of treble damages where there has been an overcharge, unless the owner establishes by a preponderance of the evidence that the overcharge was not "willful." Round Hill Management Co. v. Higgins, 177 A.D.2d 256 (1st Dept 1991). Willfulness is "intentionally doing an act and knowing that the act is being done." Matter of Lavanant v. State Div. of Housing and Community Renewal, 148 A.D.2d 185 (1st Dept 1989) (internal citations omitted). Once an overcharge is established, it is presumed to have been willful. Sohn v. New York State Div. of Housing and Community Renewal, 258 A.D.2d 384 (1st Dept 1999); Yorkroad Associates v. New York State Div. of Housing and Community Renewal, 19 A.D.3d 217 (1st Dept 2005). The burden then shifts to the landlord who must submit evidence rebutting the tenant's allegations that the overcharge was willful. RSL § 2526.1; Matter of Lavanant v. State Div. of Hous. & Community Renewal 148 A.D.2d 185 at 189. If that burden is not met, and the overcharge is found willful, then treble damages may be

imposed. Mangano v. New York State Div. of Housing and Community Renewal, 30 A.D.3d 267 (1st Dept 2006).

Treble damages are, however, available only for the two years preceding the filing of the complaint. RSL § 26-516[a][2][i]; Mangano v. New York State Div. of Housing and Community Renewal, supra. Since this action was commenced July 20, 2005, the overcharges for the months of April 2002 through June 2003 are not subject to these statutory penalties. Those overcharges are equal to the rent Jazilek was charged (15 months x \$1800 = \$27,000) minus the collectible rent (15 months x \$974.81 = \$14,622.15), or the sum of \$12,377.85. Prejudgment interest is also available at the rate set forth in CPLR § 5004 from the date of the first overcharge, which is April 18, 2002.

In deciding whether treble damages are justified for the remaining overcharges for the months of July 2003 through January 2009 in the amount of \$10,401.77 (i.e. \$22,779.62 - \$12,377.85), the court considers the landlord's own admissions, that it did overcharge Jazilek by giving him a lease with a "premium" rent, rather than a stabilized lease. The landlord argues in its defense, however, that the settlement agreement was approved by the housing court (Judge Alpert) and that it (Abart) acted in a manner that was consistent with the law in effect at the time. These arguments are without merit.

Assuming the landlord is referring to the provisions of RSL § 2520.13, that allows a tenant to waive the protections of the rent stabilization laws or code if the tenant has a matter pending before the DHCR, that exception does not apply to the facts of this case. Here, Jazilek had no pending claim before the DHCR to settle, nor was the settlement reviewed by DHCR. *compare*, Pessin v. New York State Div. of Housing and

Community Renewal, 19 AD3d 280 (1st Dept 2005). Rather, it was the landlord who commenced a holdover action against Jazilek in housing court seeking to evict him. In any event, the Court of Appeals has already determined that the parties' stipulation setting the rent at market rate is void, even though it was approved by the housing court. Thus, the approval by the housing court is not a valid defense, shielding the landlord against the imposition of treble damages, if warranted.

Arguments that the law has "changed" since parties settled in housing court are misplaced. RSL § 2520.13 was enacted long before the parties entered into the settlement agreement and the courts in the First Department have consistency held that the statutory protections of the rent stabilization law and code cannot be waived, nor can apartments be removed from the rent regulation scheme without adherence to the strict requirements set forth in the law. *see*, 390 W. End Assoc. v. Harel, 298 A.D.2d (1st Dept 2002); 390 W. End Assoc. v. Baron, 274 A.D.2d 330 (1st Dept 2000); Draper v. Georgia Props., 94 NY2d 809 (1999); Abright v. Shapiro, 214 A.D.2d 496 (1st Dept 1995); Spaeda v. Bakirtiy, 186 Misc 2d 557 (N.Y. City Civ Ct, 2000); Matter of Michael Lee (DHCR), 3/10/93 NYLJ 25, (col. 5); Matter of Yanni (DHCR), 194 A.D.2d 375 (1st Dept 1993) *lv. den* 82 N.Y.2d 662 (1993); Bruenn v. Cole, 165 A.D.2d 443 (1st Dept 1991).

Although Mr. Haruvi, the landlord's principal, has provided his sworn statement that the overcharge was "unintentional," this is a bald statement, offered without any supporting evidence in admissible form, let alone a compelling explanation. The landlord has not, for example, explained why it charged Jazilek rent as if he were a

deregulated tenant. The landlord has also failed to address why it filed an annual registration statement identifying Brindisi as the tenant with a stabilized rent although Jazilek already had a lease and was being charged a deregulated rent. Mr. Haruvi even acknowledges that certain language was incorporated into the parties' stipulation so that Jazilek could not "some day in the future challenge the lease rate." Mr. Haruvi also admits "[t]he lease rate was a necessary and material part of the agreement" and that "[t]he lease rate was the sole benefit of the bargain to the defendant [landlord] . . ."

Jazilek has proved that he was offered a market rate lease, not a rent stabilized lease, for a rent stabilized apartment. He has also proved he was charged more than the legal, registered rent. In doing so, Jazilek has proved the landlord overcharged him and the overcharge was intentional. In opposition, the landlord has failed to raise triable issues of fact that would require the denial of Jazilek's motion for summary judgment. The landlord's defense, that the overcharge was unintentional is offered without any evidentiary proof in admissible form. Zuckerman v. City of New York, *supra*. Jazilek's motion for summary judgment on the issue of treble damages is granted and the landlord's cross motion is denied. Jazilek has proved he is entitled to summary judgment on his claim for treble damages for overcharges for the months of July 2003 through January 2009, or the sum of \$31,205.31 (i.e. \$10,401.77 x 3).

The court notes that there is money judgment against Jazilek for unpaid rent in the amount of \$44,093 through January 2007 at the increased rent of \$1,881 per month. Although the judgment granted herein may be subject to an offset because of the extant money judgment against Jazilek in the 2007 housing court action, there is no motion

before the court for such relief, nor does the court have any information about how much is owed on that judgment, which has been accruing interest.

Jazilek also seeks payment of his legal fees by the landlord. Under the rent stabilization law and code, a landlord found to have overcharged for rent may be assessed the reasonable costs and attorney's fees of the proceeding. RSL § 26-516 [a][4]; RSC § 2526.1 [d]; 132132 LLC v. Strasser, ---Misc3d---(N.Y. Sup. App. Term, 2009), Slip Copy 2009 WL 2390850, August 04, 2009. Jazilek's attorney, Michael B. Terk, Esq., provides an affirmation of services, with supporting billing statements, indicating his fees for services were \$30,545.86. None of these bills are challenged by the landlord as unreasonable, nor has it requested a hearing to determine their reasonableness. Attorney time was billed at \$300 an hour and the legal assistant was billed at \$75 per hour. Given the age of this case, and the results Jazilek achieved, the court finds that no hearing is necessary because the fees are prima facie reasonable. Jazilek is also granted summary judgment on the issue of legal fees to be paid by the landlord.

Summary

Jazilek has proved apartment 1-B is rent stabilized, and never became destabilized or deregulated. He has also proved he was offered a deregulated lease, but was entitled to a rent stabilized lease when the landlord agreed to accept him as a new tenant. The legal rent for this apartment is \$974.81, based upon the legal registered rent for the apartment when Brindisi surrendered the apartment (\$812.34) plus the allowable vacancy increase of 20%. The landlord must offer Jazilek a rent

stabilized lease at that rent. The rent is frozen at that rate, and the landlord cannot collect rent increases until the missing registrations are filed and other requirements of RSL are met.

Jazilek has proved a total rent overcharge of \$22,779.62 and the court has determined the overcharge was willful; therefore Jazilek has also proved his entitlement to treble damages of \$31,205.31. He is also entitled to a money judgment for the overcharge not subject to treble damages (i.e. \$12, 377.85) with interest from April 18, 2002. Having prevailed on his overcharge claim, and also proved the legal fees charged by his attorney are reasonable the landlord must also pay Jazilek's legal fees of \$30,545.86.

Conclusion

IT IS HEREBY

ORDERED that plaintiff Roger Jazilek's motion for summary judgment is granted in all respects and the cross motion by defendant Abart Holdings, LLC is denied in all respects; and it is further

ORDERED that no later than Ten (10) Days after being served with a copy of this decision and order with Notice of Entry, defendant Abart Holdings, LLC shall provide plaintiff with a rent stabilized lease in his name; and it is further

ORDERED that the legal rent for apartment 1-B, 50 East 3rd Street, New York, New York is \$974.81 per month and the landlord shall register the subject premises with DHCR as a rent stabilized unit with a \$974.81 per month legal rent no later than Ten (10) Days after being served with a copy of this decision and order with Notice of Entry; and it

is further

ORDERED that Clerk shall enter a money judgment in favor of plaintiff Roger Jazilek, against defendant Abart Holdings, LLC, in the amount of Twelve Thousand Three Hundred Seventy Seven and 85/100 Dollars (\$12, 377.85) representing the overcharge from April 2002 through June 2003 not subject to treble damages together with interest (CPLR § 5004) from April 18, 2002; and it is further

ORDERED that Clerk shall enter a money judgment in favor of plaintiff Roger Jazilek, against defendant Abart Holdings, LLC, for treble damages in the sum of Thirty One Thousand Two Hundred Five and 31/100 (\$31,205.31) representing the overcharged and collected (rent paid) rent from July 2003 to January 2009; and it is further

ORDERED that Clerk shall enter a money judgment in favor of plaintiff Roger Jazilek, against defendant Abart Holdings, LLC, in the amount of legal fees of Thirty Thousand Five Hundred Forty Five and 86/100 dollars (\$30,545.86) as legal fees to be paid by the landlord; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
August 13, 2009

So Ordered:



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

FILED
AUG 18 2009
COUNTY CLERKS OFFICE
NEW YORK