

Gordon v 305 Riverside Corp.

2011 NY Slip Op 31860(U)

June 30, 2011

Supreme Court, New York County

Docket Number: 103229/2010

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN
J.S.C.

PART 11

Index Number : 103229/2010
GORDON, DAVID
vs.
305 RIVERSIDE CORP.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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 *is determined in accordance with the annexed decision/order.*

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

FILED

JUL 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 30, 2011

[Signature]
HON. JOAN A. MADDEN
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
COUNTY OF NEW YORK: PART 11

-----X
DAVID GORDON and SUSAN SIEGEL,

Plaintiffs,

INDEX NO. 103229/10

-against-

305 RIVERSIDE CORP., a/k/a 305 RIVERSIDE
DR. CORPORATION,

Defendant.

-----X
JOAN A. MADDEN, J.:

FILED
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NEW YORK
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In this action by the tenants of a rent stabilized apartment seeking declaratory and injunctive relief, as well as damages for rent overcharges, defendant/landlord moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint in its entirety. Plaintiffs/tenants oppose the motion on several grounds, including prematurity, but are not cross-moving for any affirmative relief.

Plaintiffs commenced this action on March 11, 2010 by filing a summons and complaint asserting a first cause of action for declaratory judgment as to the maximum legal rent for their apartment, and a declaration that the \$3,095, \$3,330 and \$3,500 monthly rents collected by defendant since March 2006 "are erroneous, unlawful and/or constitute an overcharge"; a second cause of action for an injunction directing defendant to furnish them with a rent stabilized lease stating the "proper, lawful maximum legal rent," and to properly register the apartment with the New York State Division of Housing & Community Renewal ("DHCR") as a rent stabilized apartment at the "correct maximum legal rent"; a third cause of action for damages for rent overcharges, including treble damages for willful overcharge; and a fourth cause of action for

reasonable attorney's fees pursuant to the Rent Stabilization Law.

In seeking summary judgment dismissing the complaint, defendant acknowledges that as a result of the Court of Appeals decision in Roberts v. Tishman Speyer Properties, LP, 13 NY3d 270 (2009), plaintiffs' apartment is rent stabilized and is not subject to luxury deregulation.¹ In Roberts v. Tishman Speyer Properties, LP, the Court of Appeals held that landlords are not entitled to take advantage of the luxury decontrol provisions of the Rent Stabilization Law ("RSL") while simultaneously receiving tax incentive benefits under New York City's J-51 program, even if their buildings were already subject to the RSL before their participation in the J-51 program. Prior to that decision, the RSL was misinterpreted as the receipt of J-51 benefits precluding luxury decontrol only if the receipt of such benefits had been the *sole* reason for the apartment being subject to rent regulation. In accordance with the prior misinterpretation, in July 2006, defendant registered plaintiffs' apartment as "permanently exempt" due to "high rent vacancy"; in 2007 and 2008 the apartment was listed as "exempt" and "reg not required." Defendant concedes that it received J-51 tax benefits from 1999 through 2010, and for that reason plaintiffs' apartment is exempt from luxury decontrol, and is protected by the rent stabilization laws.

While defendant acknowledges that the apartment is rent stabilized, significant questions remain as to amount of rent which constitutes the legal regulated rent for the apartment, the method for determining the base rent and the legal regulated rent, and the ultimate issue as to whether plaintiff has been overcharged. Relying on the four-year statute of limitations for rent

¹No issue as to retroactive application of holding in Roberts is raised in this action, as defendant concedes that plaintiffs' apartment is "retroactively rent stabilized."

overcharge claims, defendant argues that the monthly rent of \$3,095.00, as provided in the lease dated February 8, 2006 for the lease term commencing March 15, 2006, “is the base date legal regulated rent and as such the court should declare same to the base date legal rent and find that no overcharge has occurred in this matter.” Defendant asserts that it has recalculated the “legal regulated rent,” and has served and filed an amended 2006 registration showing the regulated status of the apartment and the legal regulated rent of \$3,095, and has also served and filed registration statements for 2007, 2008 and 2009, listing the “legal regulated rent” as \$3,095, \$3,272.96 and \$3272.96, respectively. Defendant further asserts that it sent plaintiffs a renewal lease offer dated April 1, 2010, providing for a one-year renewal lease at the monthly rent of \$3371.15, and a two-year renewal lease at the monthly rent of \$3469.34.

In opposing the motion, plaintiffs argue that defendant “attempts to mislead” the court in setting the four-year “base date” as March 15, 2006 or March 24, 2006, by asserting that the instant action was “commenced” either upon service of the summons and complaint on March 16, 2010, or upon filing of proof of service on March 24, 2010. Citing the commencement by filing rule of CPLR 304, plaintiffs assert that this action was actually commenced on March 11, 2010 with the filing of the summons and complaint, and that the four-year “base date” for setting the maximum legal regulated rent is March 11, 2006.

Plaintiffs also contend that the monthly rent of \$3,095 in the 2006 lease is not the “base date” rent for the purposes of determining the legal regulated rent, since the lease term did not commence until March 15, 2006, which is after the applicable base date of March 11, 2006. Plaintiffs object that defendant has not produced any evidence as to the rental history and rent amount on the March 11, 2006 base date, or any evidence to support the “massive 218.20%

increase from its 2005 DHCR filing showing the legal rent of \$1,481.42 to the \$3,095 rent charged to Plaintiffs commencing March 15, 2006.” Plaintiffs argue that in the absence of a base date rental history, the Court is obligated to determine the base date rent by employing the DHCR “default formula” articulated in Thornton v. Baron, 5 NY3d 175 (2005). Plaintiffs also contend that summary judgment is premature, as discovery will produce relevant and admissible evidence pertaining to the purportedly illegality of the March 15, 2006 rent amount, and potentially as to base date rent on March 11, 2006.

In reply, defendant continues to assert that the action was commenced by service on March 16, 2010, and that plaintiff’s overcharge claim was “interposed” on that date. In the alternative, defendant assumes that plaintiffs’ position as to the March 11, 2006 base date is correct, and argues that plaintiffs were not overcharged since the \$3,095 rent amount in the initial lease is the base date rent and the legal regulated rent. Citing to the allegations in the complaint, defendant asserts that “it is beyond dispute that using the Plaintiff’s base date, the apartment was vacant on March 11, 2006.” Defendant argues since the apartment was vacant on the base date, once the apartment became rent stabilized subsequent to the Roberts decision, the \$3,095 rent in the parties’ lease became the base date legal rent. Defendant also argues that the default formula articulated in Thornton v. Baron, *supra*, is not applicable since “there is a base date rent established in this matter.” Defendant further argues that this case does not involve a fraudulent scheme to evade or circumvent rent regulation, since it deregulated plaintiffs’ apartment “in conformance with and consistent with a long history of belief by owners, tenants and the DHCR and the Court that such deregulation was proper.”

Based on the record, the court finds that defendant fails to make a sufficient prima facie showing that it is entitled to judgment as a matter of law dismissing the complaint. At the outset, the court determines that the base date is March 11, 2006, as plaintiffs commenced this action for rent overcharges when it filed the summons and complaint on March 11, 2010. Section 2530.6(f) of the Rent Stabilization Code defines “base date” as the “date four years prior to the date of the filing of such appeal or [rent overcharge] complaint.” Section 2430.6(3) defines “legal regulated rent” as the “rent charged on the base date set forth in subdivision (f) of this section, plus any subsequent lawful increases and adjustments.” Where, as here, the tenants have instituted an action in court asserting a rent overcharge claim, for purposes of determining the legal regulated rent, the base date is four years prior to commencement of the action, which under CPLR 304 is four years prior to the filing of the summons and complaint. See Jenkins v. Fieldbridge Assocs. LLC, 65 AD3d 169 (2nd Dept 2009).

It is not disputed that the apartment was vacant on the March 11, 2006 base date, as the term of plaintiff’s tenancy did not commence until March 15, 2006.² Contrary to defendant’s assertion, in view of the undisputed fact that plaintiffs’ initial lease was not a rent stabilized lease, the \$3,095

²On February 22, 2010, DHCR responded to plaintiffs’ request for the Registration Apartment Information for their apartment. That document shows that the landlord filed registrations in July 2004 and July 2005, listing the same rent stabilized tenant, with the 2005 lease ending on May 31, 2005. The legal regulated rent was listed as \$1,360.84 for 2004, and \$1418.42 for 2005. The 2006 registration filed on July 10, 2006, listed the apartment status as “PE,” which means permanently exempt, and stated “high rent vacancy,” but does not list any rent amount. For 2007 and 2008, the apartment is listed as “exempt apartment – reg not required.”

As noted above, defendant asserts that after receiving the summons and complaint in this action, it filed an amended registration for 2006, and registrations for 2007, 2008 and 2009, all of which reflect the rent stabilized status of the apartment. While defendant submits copies of those statements, those copies are not date-stamped as received by DHCR.

rent amount in that lease cannot constitute the base rent or the legal regulated rent. Section 2526.1(a)(3)(iii) of the Rent Stabilization Code provides that

[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 rent agreement [emphasis added].

Here, typed on the top of the first page of the parties' lease is the statement, "This lease is not subject to rent regulation." Typed on the last page of the lease is the statement, "This apartment is not subject to rent regulation since the monthly rent is, at least, \$2,000 which classifies this unit as a luxury deregulated apartment." Thus, notwithstanding the fact that plaintiffs were the first tenants after the vacancy to occupy the apartment, since it is undisputed that plaintiffs were provided with a lease explicitly stating that the apartment was exempt from rent regulation, the court cannot conclude that plaintiffs qualify, within the meaning of section 2526.1(a)(3)(iii), as the "first rent stabilized tenants taking occupancy after such vacancy," so as to be bound by the rent amount originally agreed to in that lease as the "legal regulated rent."

In light of the foregoing, defendant has failed to establish as a matter of law that the base rent and the legal regulated rent is \$3,095, and for that reason defendant is not entitled to summary judgment. With the exception of determining that RSC § 2526.1(a)(3)(iii) is not applicable, the court, at this time, makes no further determination as to the appropriate method for calculating the base rent or legal regulated rent, and whether the rent history outside the four-year look back period can be considered. Since the parties have not conducted any discovery, the record is not sufficiently developed to resolve those issues at this time. The court notes that the complaint not only alleges fraud in connection with the destabilization of plaintiffs' apartment, but also alleges that the rent

amount of \$3,095 and subsequent rent amounts charged, "are erroneous and lack legal and/or factual justification."

Accordingly, it is

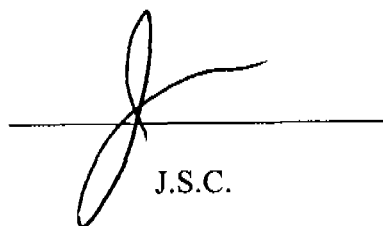
ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on July 21, 2011 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order.

DATED: June 30, 2011

ENTER:



J.S.C.

FILED

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