

**Ryan v Salva Realty Corp.**

2011 NY Slip Op 31918(U)

July 11, 2011

Supreme Court, New York County

Docket Number: 603015/08

Judge: Doris Ling-Cohan

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

**DORIS LING-COHAN**

PRESENT: \_\_\_\_\_  
J.S.C. \_\_\_\_\_  
Justice

PART 36

*Sharon Ryan*

INDEX NO. 603015/08

- v -

*Salva Realty Corp. and  
Salva Delaware, LLC*

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 8 were read on this motion ~~to~~ for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1, 2, 3, 4, 5</u>
<u>6</u>
<u>7, 8</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion for summary judgment is decided in accordance with the attached Decision/Order.

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

**FILED**

JUL 13 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: \_\_\_\_\_  
*[Signature]*

\_\_\_\_\_  
**DORIS LING-COHAN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X

SHARON RYAN,

Plaintiff,

Index No.: 603015/08  
DECISION/ORDER

-against-

Motion Seq. No.: 003

SALVA REALTY CORP. and SALVA  
DELAWARE, LLC,

Defendants.

-----X

HON. DORIS LING-COHAN, J.S.C.:

In this residential landlord/tenant action, plaintiff moves for partial summary judgment on her first cause of action for willful rent overcharge and to dismiss defendants' affirmative defenses relating to such rent overcharge claim (motion sequence number 003)<sup>1</sup>. For the following reasons, the motion is granted in part and denied in part.

The issue presented by this motion is whether plaintiff has established as a matter of law that her apartment is subject to rent stabilization and that the landlord willfully overcharged her rent.

**FILED**

BACKGROUND

JUL 13 2011

Plaintiff Sharon Ryan (Ryan) is the tenant of apartment 4F in a residential apartment building (the building) located at 546-548 Broadway (a/k/a 88 Crosby Street) in the County, City and State of New York. See Notice of Motion, Exhibit L (amended complaint), ¶ 1. Defendant Salva Delaware, LLC, a Delaware limited liability corporation, is the building's current owner,

NEW YORK  
COUNTY CLERK'S OFFICE

<sup>1</sup> The court notes that plaintiff also asserts a claim for constructive eviction based upon an alleged water leak which rendered the subject premises uninhabitable, however, such claim is not the subject of the within motion for summary judgment.

while co-defendant Salva Realty Corp. (collectively, Salva or landlord), a New York corporation, is the building's former owner and current management company.<sup>2</sup> *Id.*, ¶¶ 2-3.

Ryan took possession of apartment 4F pursuant to a lease (the lease) that she originally executed as a co-tenant with non-party Sandi Fellman (Fellman) and Salva, in June of 2006. *Id.*, ¶ 10; Exhibit E. On or about November 26, 2007, Fellman assigned the lease to Ryan in an "assignment and assumption agreement" (the assignment), also executed by Salva. *Id.*, ¶ 11; Exhibit E. The lease, whose term ran from July 1, 2006 through February 28, 2010, provided that Ryan was to pay monthly rent of \$5,700, from July 1, 2006 through June 30, 2007, and \$5,922 per month, from July 1, 2007 through June 30, 2008. *Id.*, ¶ 13. Ryan contends, however, that apartment 4F was actually governed by the Rent Stabilization Law, with a lawful monthly rent of \$511.41. *Id.*, ¶¶ 4-9.

Ryan claims that apartment 4F was originally classified as a loft unit, but was converted to rent stabilization by an order issued by the New York City Loft Board (the Loft Board) on February 16, 2005 (the first Loft Board order). *Id.*; Bernstein Affirmation, ¶ 11; Exhibit N. On February 24, 2005, the Loft Board also issued a supplemental order that fixed the initial regulated rent for apartment 4F at \$511.41 for the period of February 1, 2005 through January 31, 2006 (the second Loft Board order), and also provided that:

Salva Realty is directed to register Unit 4F ... with the New York City Division of Housing and Community Renewal [DHCR]. Further, the owner is directed to provide the residential occupant of the above listed unit with residential leases subject to the provisions regarding evictions and regulations of rent set forth in the

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<sup>2</sup> Ryan makes these allegations in her complaint, however, Salva denies them to the extent that it disputes the date when Salva Delaware assumed ownership of the building from Salva. This dispute is set forth in several of Salva's affirmative defenses that are not at issue in this motion.

Emergency Tenant Protection Act of 1974 ...

*Id.*, ¶ 12; Exhibit O. Ryan has presented a copy of the DHCR's rent registration records for apartment 4F that shows that, in 2005, Salva retroactively registered it for 2004 at a monthly rent of \$511.41, but failed to register the apartment, during 2005, 2006 and 2007. *Id.*, ¶ 13; Exhibit P. This evidence forms the basis of Ryan's overcharge claim.

Ryan notes that Salva claims to have deregulated the apartment, but argues that Salva's attempts to do so had no legal effect. *Id.*, ¶ 17. Specifically, Ryan contends that Salva failed to either execute a "purchase of improvements" from Charles Furer (Furer), the apartment's prior occupant, or to make individual apartment improvements to the subject apartment, either of which acts may have resulted in legal deregulation of the subject apartment. *Id.*

With respect to the purchase of improvements, Ryan has presented copies of e-mail correspondence between Furer and Salva which, she asserts, demonstrate that the two never effectuated a "purchase of improvements." *See* Notice of Motion, Bernstein Affirmation, ¶¶ 22-31. These documents show that, in February 2009, after Furer had vacated the subject apartment, Salva sent Furer a blank Loft Board "sales record" form (which is used for recording the sale and purchase of improvements to an apartment) and a \$100.00 check to induce him to sign it. *Id.*; Exhibits X, Y, Z, DD, EE. It also discloses that Furer was reluctant to sign a blank form but would ultimately do so if Salva would send him a larger check. *Id.* It appears that Furer never signed the form. Ryan notes that Salva has not submitted a deregulation application to either the DHCR or the Loft Board in connection with its purported "purchase of improvements." *Id.*; Bernstein Affirmation, ¶¶ 17-44.

To support her claim that Salva made no "individual apartment improvements" to her

unit, Ryan has presented affidavits and receipts from the repair companies involved that state that the type of work Salva allegedly performed, was not statutorily defined “improvements,” but was, rather, merely, building-wide repair work. *See* Notice of Motion, Bernstein Affirmation, ¶¶ 17-44; Demarinis Affidavit; Egozi Affidavit; Exhibits A, B, C, D.

Salva denies all of Ryan’s contentions, and asserts that it did execute a “purchase of improvements” from Furer. *See* Chetrit Affirmation in Opposition, ¶¶ 31-76. Salva asserts that, on January 23, 2006, Furer executed a stipulation of settlement in a proceeding before the Civil Court of the City of New York (Index Number L&T 95850/05), wherein Salva paid Furer \$100,000.00 to leave the apartment by March 31, 2006. *Id.*, ¶ 33. Salva alleges that this act of payment constituted a “purchase of improvements” that resulted in the deregulation of apartment 4F, by operation of law. *Id.*, ¶ 32. Salva has presented a copy of that stipulation, a copy of a subsequent stipulation that extended Furer’s time to vacate until April 30, 2006, and a copy of Furer’s vacate notice, which indicates that he ultimately surrendered possession of the apartment on June 1, 2006. *Id.*; Exhibits F, G. Salva has also presented copies of correspondence with Furer in which Furer details the improvements made to apartment 4F, during his years of occupancy. *Id.*; Exhibit E. Significantly, however, the January 23, 2006 stipulation with Furer failed to contain specific language that the payment being made by Salva to Furer, was for the “purchase of improvements”.

Salva also argues, in the alternative, that it did not overcharge Ryan because her legal rent had been raised over the rent-stabilization threshold by virtue of: 1) a 20% vacancy increase that Salva was entitled to upon Furer’s leaving the apartment; and 2) increases for certain “individual apartment improvements” that Salva performed in apartment 4F, before Ryan took possession.

[\* 6]

*Id.*; Chetrit Affirmation in Opposition, ¶¶ 36-40, 66-76. In support, Salva has presented an itemized list of work that was allegedly carried out during the month of June 2006, and the receipts of payment therefor. *Id.*, ¶ 38; Exhibit H. As previously mentioned, Ryan claims that Salva only performed building-wide repair work, rather than “individual apartment improvements”, to unit 4F and thus, cannot claim increases to the rent based upon such improvements.

Ryan’s complaint sets forth causes of action for willful rent overcharge, a declaratory judgment, a permanent injunction and several claims for money damages. *Id.*; Exhibit L. In its answer, Salva asserts the following affirmative defenses: 1) failure to state a claim; 2) inability to cure; 3) estoppel; 4) no rent overcharge by reason of the landlord’s “purchase of fixtures and improvements”; 5) no rent overcharge by reason of the landlord’s forgiveness of the prior tenant’s rent debt; 6) no rent overcharge by reason of vacancy decontrol and “individual apartment improvements”; 7) illegal sublet; 8) failure to provide access; 9) the doctrine of unclean hands; 10) an adequate remedy at law exists; 11) absence of justiciable controversy; 12) severe prejudice precluding injunctive relief; 13) no fraud by Salva Delaware; 14) no fraud by Salva; 15) no fraud by Salva Delaware and/or Salva; 16) no exercise of dominion or control over Salva by Salva Delaware; 17) no injury; 18) no proximate cause; 19) Salva and Salva Delaware are separate entities; and 20) no merger between Salva and Salva Delaware; and counterclaims for: 1) attorneys’ fees; 2) a declaratory judgment; and 3) an order of ejectment. *Id.*; Exhibit M.

Ryan now moves for summary judgment on her first cause of action for willful rent overcharge, and to dismiss Salva’s first, third, fourth, fifth and sixth affirmative defenses, which relate to such overcharge claim.

## DISCUSSION

Summary judgment is "a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue." *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). As has been repeatedly held, the court's function in a summary judgment motion is issue finding, not issue determination, and this relief is inappropriate where the issue is merely arguable, since it serves to deprive a party of his day in court. *Fogel v. Hertz International, Ltd.*, 141 AD2d 375 (1st Dept 1988). Further, the court is to draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility. *See Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338 (1974). *Robinson v Strong Mem. Hosp.*, 98 AD2d 976 (4th Dept 1983).

Applying such principles, here, as detailed below, and as argued by Salva, there are factual issues as to whether the subject apartment is subject to rent stabilization and as to Ryan's willful rent overcharge claim, which preclude the granting of summary judgment; Ryan is, however, entitled to summary judgment of dismissal of several of Salva's affirmative defenses.

As previously mentioned, Ryan's first cause of action is a claim of willful rent

overcharge. See Notice of Motion, Exhibit L, ¶¶ 4-19. Although the DHCR is the usual forum for determining overcharge complaints in the first instance, the Appellate Division, First Department, has specifically held that a tenant may elect to pursue overcharge and treble damages claims in the Supreme Court of the State of New York as well. See *Wolfisch v Mailman*, 196 AD2d 466, 466 (1st Dept 1993). A claim of rent overcharge is a statutory violation, regarding which the Rent Stabilization Code (RSC) provides that:

(a) (1) Any owner who is found ..., after a reasonable opportunity to be heard, to have collected any rent or other consideration in excess of the legal regulated rent shall be ordered to pay to the tenant a penalty equal to three times the amount of such excess ... . In no event shall such treble damage penalty be assessed against an owner based solely upon the owner's failure to file any timely or proper rent registration statement. If the owner establishes by a preponderance of the evidence that the overcharge was not willful, ... the penalty [shall be established] as the amount of the overcharge plus interest, which interest shall accrue from the date of the first overcharge on or after the base date, at the rate of interest payable on a judgment pursuant to section 5004 of the Civil Practice Law and Rules, and the order shall direct such a payment to be made to the tenant.

(a) (2) A complaint pursuant to this section must be filed with the DHCR within four years of the first overcharge alleged, and no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed; additionally:

(i) a penalty of three times the overcharge may not be based upon an overcharge having occurred more than two years before the complaint is filed or upon an overcharge which occurred prior to April 1, 1984; and  
(ii) the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section, and section 2522.3 of this Title, shall not be examined. This subparagraph shall preclude examination of a rent registration for any year commencing prior to the base date, as defined in section 2520.6(f) of this Title, whether filed before or after such base date... .

(a) (3) (i) The legal regulated rent for purposes of determining an overcharge shall be deemed to be the rent charged on the base date, plus in each case any subsequent lawful increases and adjustments.

RSC § 2526.1. In order to obtain treble damages, Ryan must establish as a matter of law that

Salva imposed an “overcharge,” and that it did so “willfully.”

Regarding the overcharge component, Ryan has presented the Loft Board orders that fixed the base rent for apartment 4F at \$511.41 for the period of February 1, 2005 through January 31, 2006, and has shown that Salva failed to register the apartment with the DHCR in either 2005, 2006 or 2007. *See* Notice of Motion, Exhibits N, O. Ryan has also established that she became a co-tenant of apartment 4F on July 1, 2006 and paid monthly rent of \$5,750 from then until June 30, 2007, and \$5,922.50 per month thereafter; she became the sole tenant of record on November 26, 2007, via assignment, after which she continued paying the \$5,922.50 monthly rent until June 30, 2008.<sup>3</sup> *Id.*; Exhibits E, F.

In its opposition papers, Salva does not challenge the accuracy of any of the foregoing documentary evidence. However, as further detailed below, in reviewing Salva’s affirmative defenses, Salva has raised factual issues as to whether there was an overcharge, including whether the subject apartment has been luxury decontrolled by virtue of the alleged improvements made to the subject apartment by Salva and the applicable vacancy increases.

Also, as to the willfulness component, which would entitle Ryan to treble damages, there is a further factual issue. Ryan has presented proof that Salva failed to register apartment 4F with the DHCR during the years of 2005, 2006 and 2007. In *Draper v Georgia Properties, Inc.* (230 AD2d 455, 460 [1st Dept 1997] *aff’d* 94 NY2d 809 [1999]), the Appellate Division, First Department found that RSC § 2526.1 (a) (1) “creates a presumption of willfulness in rent overcharge cases that the owner/landlord must rebut by a preponderance of the evidence.” The

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<sup>3</sup> Ryan acknowledges that, after that date, she stopped paying. *Id.*; Ryan Affidavit, at 2 n 1.

application of this presumption is limited, however, by the statutory directive that “[i]n no event shall [a] treble damage penalty be assessed against an owner based solely upon the owner’s failure to file any timely or proper rent registration statement.” RSC § 2526.1(a) (1).

Here, as additional proof of willfulness, Ryan offers the copies of the February 2009 correspondence between Furer and Salva, in which Furer declined to sign the Loft Board sales record. *See* Notice of Motion, Exhibits X, Y, Z, DD, EE. Ryan asks the court to infer willfulness on the ground that these documents show that Salva was clearly trying to obtain the necessary legal documentation to support a plan to impose an overcharge on her. *See* Memorandum of Law in Support of Motion, at 12. However, in opposition, Salva has submitted proof to support its claim that despite the failure to include specific language in the January 23, 2006 landlord-tenant stipulation with respect to the purchase of Furer’s alleged improvements, it was its intent to purchase Furer’s rights and improvements, with Salva’s \$100,000 payment to Furer and the waiver of past due rent, and therefore, arguably, any alleged overcharge was not willful. In particular, Salva refers to the correspondence with Furer, in which Furer appears to acknowledge Salva’s ability to charge rent above the rent stabilized amount, as a result of his vacatur and the payment of the \$100,000. *See* Chetrit Affidavit in Opposition, Exhibit E. As further explained below, while the Court may not look to the intent of Salva and Furer with respect to the specific provisions of the January 23, 2006 stipulation, with respect to the element of willfulness and an award of treble damages, intent is relevant.

As previously noted, Salva asserts several affirmative defenses to Ryan’s overcharge claim in its first, third, fourth, fifth and sixth affirmative defenses. Salva’s first affirmative defense argues that the amended complaint “fails to state a claim upon which relief may be

granted.” See Notice of Motion, Exhibit M (amended answer), ¶ 7. Ryan argues that this defense is merely a conclusory allegation, unsupported by any evidence, that should be dismissed. See Memorandum of Law in Support of Motion, at 24. The court notes that Ryan has sufficiently stated a claim based upon alleged willful overcharge and, therefore, this affirmative defense is without merit. Significantly, in its opposition, Salva did not raise any argument in support of its first affirmative defense. Therefore, the court deems that Salva has abandoned this defense, and accepts Ryan’s characterization of it as “conclusory.” The Appellate Division, First Department, has held that it is appropriate to grant summary judgment dismissing affirmative defenses that consist solely of conclusory statements. See e.g. *Manufacturers Hanover Trust Co. v Restivo*, 169 AD2d 413 (1st Dept 1991). Therefore, Ryan is granted summary judgment of dismissal of Salva’s first affirmative defense.

Salva’s third affirmative defense argues that Ryan is estopped from asserting the rent stabilized status of apartment 4F because a paragraph in the rider to her lease provides that “the rent regulatory provisions under the Loft Law and/or the Rent Stabilization Law shall not apply...”. See Notice of Motion, Exhibit M (amended answer), ¶ 12. Ryan argues that, pursuant to RSC § 2520.13, any lease provision that purported to waive the protections of the Rent Stabilization Code is void as against public policy. See Memorandum of Law in Support of Motion, at 23. Salva’s opposition papers are, again, silent on this issue. The court notes that Ryan’s reading of the law is correct in that the lease rider provision that Salva relies on is clearly void. See *Drucker v Mauro*, 30 AD3d 37 (1st Dept 2006). Therefore, Salva’s third affirmative defense lacks merit and is therefore dismissed.

Salva’s fourth affirmative defense argues that there was no willful rent overcharge

because apartment 4F had been legally deregulated prior to the inception of Ryan's tenancy via the January 23, 2006 stipulation of settlement between Salva and Furer, which constituted a "purchase of improvements." *See* Notice of Motion, Exhibit M (amended answer), ¶¶ 15-20. This Court disagrees. Based upon the within submissions, as detailed below, as a matter of law, Salva did not effectuate a "purchase of improvements", by the signing of the January 23, 2006 stipulation with Furer.

Multiple Dwelling Law (MDL) § 286 (6) provides that:

Notwithstanding any provision of law to the contrary, a residential tenant qualified for protection pursuant to this chapter may sell any improvements to the unit made or purchased by him to an incoming tenant provided, however, that the tenant shall first offer the improvements to the owner for an amount equal to their fair market value. Upon purchase of such improvements by the owner, any unit subject to rent regulation solely by reason of this article and not receiving any benefits of real estate tax exemption or tax abatement, shall be ... rented at market value subject to subsequent rent regulation if such building had six or more residential units at such time. The Loft Board shall establish rules and regulations regarding such sale of improvements which shall include provisions that such right to sell improvements may be exercised only once for each unit subject to this article, and that the opportunity for decontrol or market rentals shall not be available to an owner found guilty by the loft board of harassment of tenants.

MDL § 286 (6). As such, the Loft Board has established regulations governing "purchases of improvements," among which are the following requirements: 1) that a landlord wishing to purchase an outgoing tenant's improvements to an apartment unit must send the tenant notice of its intent to exercise its right of first refusal to do so; 2) that the tenant must then make an offer of sale to the landlord; 3) that the landlord must accept that offer within 30 days or be deemed to have waived its right to purchase; 4) that the parties must establish the fair market value of the improvements by listing all of them and presenting receipts for the work done or other proof of

payment therefor; and 5) that the parties must file proof of the existence and fair market value of the improvements with the Loft Board on a disclosure form. 29 RCNY §§ 2-07 (f), (g).

However, in *Thorgeirsdottir v New York City Loft Bd.* (161 AD2d 337 [1st Dept 1990] *aff'd for reasons stated* 77 NY2d 951 [1991]), the Appellate Division, First Department, reviewed those Loft Board regulations and stated that:

We conclude that the emphasized portions of [the Loft Board regulations] ... constitute an impermissible contraction of the statutory command that *deregulation shall occur at purchase*. It is well settled that an administrative agency may only promulgate rules to implement a law as enacted; it has no authority to fashion any rule out of harmony or in conflict with the statute. The Loft Board has no authority to add additional conditions or to impose further qualifications to an entitlement or status declared by the statute

[emphasis added, internal citations omitted]. Thus, in *Thorgeirsdottir*, the Appellate Division found that the landlord's late compliance with the Loft Board regulations would not result in cancelling the deregulation of the subject apartment and returning it to rent-stabilized status, although it might well require the landlord to pay a penalty to the Loft Board. The *Thorgeirsdottir* holding made it plain that the operative act as to deregulation was the execution of a "purchase." *Thorgeirsdottir v New York City Loft Bd.*, 161 AD2d at 337. As such, this Court must look to the alleged "purchase" to determine whether, as a matter of law, a "purchase of improvements" was effectuated.

In this case, admittedly, Salva did not comply with MDL § 286 (6) with respect to the "purchase of improvements" and instead relies upon the January 23, 2006 stipulation of settlement between Salva and Furer. Salva contends that, despite the admitted failure to comply with the Loft Board regulations, the court in *Thorgieirsdottir* states that this is not fatal to the owner's ability to collect market rent from the incoming tenant. Salva argues that, although

particular language as to the “purchase of improvements” is absent from the Furer stipulation, it was both Salva and Furer’s intent that, by signing the stipulation of settlement, Salva was purchasing Furer’s rights and improvements to the subject apartment. In support, Salva proffers unauthenticated correspondence<sup>4</sup> from Furer which Salva argues shows that Furer appeared to understand Salva’s intentions: “[n]ow [Salva] has clear sailing to charge whatever [it] can get away with - \$4000.00 vs \$500.00 - not bad.” See Chetrit Affidavit in Opposition, Exhibit E. However, as mentioned above, the *Thorgeirsdottir* court specifically held that, as a matter of law, the operative act as to deregulation was the execution of a “purchase”, regardless of the parties’ intentions.

Here, the language of the Furer stipulation is clear and unambiguous in that it did not include a provision that Salva was purchasing Furer’s improvements by the payment of the agreed upon sum. In fact, the stipulation specifically and unambiguously states that “[i]n consideration of [Furer] vacating the [p]remises, [Salva] shall pay to [Furer] the total amount of \$100,000.00 and waive rent that is owed through March 2006 in the amount of \$10,664.74.” See, Notice of Motion, Exhibit Q (Furer stipulation), ¶ 14.

It is well settled that “ ‘the construction of an unambiguous contract is a question of law for the court to pass on, and...circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where...the intention of the parties can be gathered from the instrument itself.’ ” *Maysek & Moran, Inc. v S.G. Warburg & Co.*, 284 AD2d 203, 204 (1<sup>st</sup> Dep’t 2001), quoting *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d

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<sup>4</sup> Such correspondence is apparently addressed to Martin Meltzer, Salva’s former attorney, but no authentication is provided and thus would not be admissible in any event.

514, 515 (1<sup>st</sup> Dep't 1995). Looking at the four corners of the Furer stipulation of settlement, it is clear that the waived rental arrears and the payment of \$100,000 was made to Furer in return for his agreement to vacate and surrender possession of the subject apartment<sup>5</sup>, and not for the "purchase of improvements". As the language of the stipulation is unambiguous, this Court may not look to extrinsic evidence such as the intent of the signatories. *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002).

Further, Ryan notes that, in another case in this court, *Walsh v Salva Realty Corp.*, Index No. 102525/08, Feinman, J., Salva's counsel presented the plaintiff in such case with a stipulation of settlement similar to the one that it executed with Furer, but one that specifically recited that the parties intended to effectuate a "purchase of improvements" by their contract. See Plaintiff's Reply Memorandum, at 6; Chetrit Affidavit in Opposition, Exhibit O. Here, unlike the *Walsh* case, there is no filing with the Loft Board or any other evidence of a "purchase of improvements", aside from Salva's self-serving statements as to Salva's intent, which as stated above, will not be considered when interpreting unambiguous contract provisions.<sup>6</sup> For the forgoing reasons, there was no "purchase of improvements" from Furer as a matter of law. Thus, Salva's fourth affirmative defense is dismissed.

Salva's fifth affirmative defense argues that there was no willful rent overcharge because apartment 4F was legally deregulated via the portion of the Furer stipulation that provided for

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<sup>5</sup> The Court notes that landlords routinely make payments, as a "buy-out", to tenants in the Civil Court, Housing Part for the tenant's vacatur to recover possession of rent stabilized apartments. Without specific language in the stipulation of settlement, the Court cannot hold, as a matter of law, that each of these routine "buy-outs" constitutes a "purchase of improvements".

<sup>6</sup> Further, even if the Court were to consider the extrinsic evidence as argued by defendant, such extrinsic evidence is ambiguous, at best.

Salva to forgive Furer some \$10,664.74 in rental arrears; an act that amounted to a “constructive purchase of improvements.” *See* Notice of Motion, Exhibit M (amended answer), ¶¶ 21-26.

Ryan argues that a constructive purchase of improvements will only be found to occur where the negotiations for a purchase of improvements have been initiated, but not completed, and the tenant then abandons the premises while owing substantial rent arrears. *See* Memorandum of Law in Support of Motion, at 12. Ryan then notes that Furer did not abandon apartment 4F. *Id.* Salva does not address this argument in its opposition papers, and Ryan does not expand on it in her reply papers. Ryan’s reading of the law is correct. *See e.g. Matter of Swing v New York City Loft Bd.*, 180 AD2d 529 (1st Dept 1992). As it is undisputed that Furer did not abandon apartment 4F, Salva’s forgiveness of his rent arrears debt cannot be deemed a “constructive purchase of improvements.” Therefore, Salva’s fifth affirmative defense lacks merit and is dismissed.

Salva’s sixth affirmative defense argues that, in the event the court determines that a willful rent overcharge took place, apartment 4F was still legally deregulated by virtue of Salva’s entitlement to certain rent increases that raised the base rent over the \$2,000 per month rent stabilization threshold; specifically, a vacancy increase, and increases for making “individual apartment improvements.” *See* Notice of Motion, Exhibit M (amended answer), ¶29. Both parties argue voluminously over these issues in their respective memoranda. As previously indicated, however, there are factual issues as to whether the improvements made to the subject apartment by Salva qualify as “Individual Apartment Improvements” pursuant to Rent Stabilization Code §2522.4, as the parties’ evidence is conflicting. *See Jemrock Rlty v. Krugman*, 13 NY3d 924 (2010). Thus, the portion of plaintiff’s motion which seeks summary

judgment of dismissal of Salva's sixth affirmative defense is denied.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Sharon Ryan is granted only to the extent that defendants' first, third, fourth and fifth affirmative defenses are dismissed; and it is further

ORDERED that, within 30 days of entry of this order, defendants shall serve a copy upon plaintiffs with notice of entry.

Dated: New York, New York  
July 11, 2011

  
Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\ryanvsalva.lane.wpd

**FILED**

**JUL 13 2011**

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