Barker v 301 303 311 W. 111, LLC
2012 NY Slip Op 30715(U)
March 19, 2012
Supreme Court, New York County
Docket Number: 115331/10
Judge: Paul Wooten
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SCANNED ON 3/23/2012

[* 1]

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ERIN BARKER, JUSTIN D'AMBROSIO and ERIC LAUGEL,
Plaintiffs,

INDEX NO. 115331/10

-against-

MOTION SEQ. NO. 002

301 303 311 WEST 111, LLC,
Defendant.

The following papers numbered 1 to 3 were read on plaintiffs' motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

In this residential landlord/tenant action, plaintiffs move for summary judgment on the complaint. For the following reasons, this motion is granted in part, and denied in part.

BACKGROUND

Plaintiffs Erin Barker, Justin D'Ambrosio and Eric Laugel (tenants) are the occupants of unit 4B in a residential apartment building (the building) located at 311 West 11th Street New York, New York (*see* Notice of Motion, exhibit D ¶ 5). Defendant 301 303 311 West 111, LLC (landlord) is the building's owner (*id.*, ¶ 7). Tenants took possession of apartment 4B pursuant to a lease (the lease) whose initial term ran from July 15, 2008 to July 14, 2009, and specified a monthly rent of $2,100.00 (*see* Notice of Motion, Crumiller Affirmation, ¶ 5; exhibit A). Tenants note that the lease states that apartment 4B is not subject to rent stabilization, and also provides as follows:

"19. Fees and Expenses
A. Owner's Right. You must reimburse Owner for any of the following fees and expenses incurred by Owner:

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> 5) Any legal fees and disbursements for legal actions or proceedings brought by Owner against You because of a Lease default by You or for defending lawsuits brought against Owner because of Your actions.
>
> ***
>
> B. Tenant's Right. Owner agrees that, unless subparagraph 5) of this Article 19 has been stricken out of the Lease, You have the right to collect reasonable legal fees and expenses incurred in a successful defense by You of a lawsuit brought by Owner against You, or brought by You against Owner to the extent provided by Real Property Law, section 234" (*id*.; exhibit A).

Tenants assert that they have paid landlord $2,100.00 per month in rent for the entire term of their occupancy to date (*id*.; Crumiller Affirmation, ¶ 7). However, tenants also assert that they researched apartment 4B's rent history with the New York State Division of Housing and Community Renewal (DHCR), and learned that is was registered as rent stabilized through July 31, 2008, and that its last legal regulated rent was listed as $898.29 per month (*id*., ¶ 8). Tenants presented a copy of a DHCR "registration apartment information" sheet that indicates: 1) that landlord had registered apartment 4B as rent stabilized from July 30, 1999 through July 31, 2008; 2) that the previous tenant of record (through July 31, 2008) was one Detra Adgerson (Adgerson); and 3) that Adgerson's final lease ran from April 1, 2008 through March 31, 2009 and had a legal regulated rent of $898.29 per month; and 4) that apartment 4B was not registered as rent stabilized in 2009 or afterwards (*id*.; exhibit B). Tenants have also presented a copy of a letter, dated May 9, 2011, from landlord's attorney that purports to offer them the opportunity to pay $1,291.76 in monthly rent -- a figure lower than the $2,100.00 per month that they claim to have paid (*id*.; exhibit C). Landlord objects to the inclusion of this correspondence on the ground that it was "intended for settlement purposes only" and inadmissible in this action (*see* Singer Affidavit in Opposition, ¶ 3).

Tenants commenced this action on November 19, 2010 by filing a summons and complaint that sets forth causes of action for: 1) a declaratory judgment; 2) an injunction; 3)

willful rent overcharge; and 4) attorney's fees. Landlord initially failed to respond, and tenants filed a motion for a default judgement, to which landlord responded with a motion for leave to file a late answer (motion sequence number 001). On February 24, 2011, the County Clerk accepted the parties' stipulation to withdraw their respective motions, and to permit landlord to file its answer. That answer, dated February 18, 2011, sets forth one affirmative defense that tenants' claim for attorney's fees is improper because there is no contractual provision authorizing such a claim (*id.*; exhibit E).

Thereafter, on March 8, 2011, tenants served their discovery demand on landlord (*see* Notice of Motion, exhibit F). Tenants claim that landlord ignored this demand and the subsequent correspondence from their attorneys that requested landlord to comply with the demand (*id.*; Crumiller Affirmation, ¶¶ 16-25; exhibit G). Landlord asserts that it is "still waiting for records from our bank, and are searching our files for the records requested by plaintiffs, and [that] the time to produce them has not yet been reached" (*see* Singer Affidavit in Opposition, ¶ 8). Tenants respond that the preliminary conference order that this Court signed on June 8, 2011 reiterated that the demand had already been served and provided that all discovery was to be completed by October of 2011 (*see* Crumiller Reply Affirmation, ¶¶ 21-26; exhibit H).

Tenants now move for summary judgment, in whole or in part, on their rent overcharge claim, and for an order to strike landlord's first (and only) affirmative defense. On September 28, 2011, the parties executed a stipulation in which Landlord consented that its first affirmative defense be stricken.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party

moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

Here, tenants style their motion as requesting either: 1) the entry of a money judgment in the amount of $92,836.32, representing an estimated 35 months[1] worth of overcharge calculated as the difference between the $2,100.00 monthly rent that tenants claim to have

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[1] Tenants claim that they were overcharged for the period from July 2008 through February 2011 (*see* Crumiller Affirmation, ¶ 31).

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paid, and the $1,101.76 that they claim was the actual legal rent;[2] or 2) the entry of a money judgment for $75,166.32, representing 35 months worth of overcharge calculated as the difference between the $2,100.00 monthly rent that tenants claim to have paid, and the $808.24 overcharge that, they allege, the landlord "admits"[3] to having imposed (*see* Crumiller Affirmation, ¶¶ 31-36). In either case, this constitutes a request for summary judgment on tenants' third cause of action, which alleges a willful rent overcharge (*id.*; exhibit D, ¶¶ 18-23).

The rule in New York State is that "once the occurrence of a rent overcharge has been established, it becomes incumbent upon the landlord to establish by a preponderance of the evidence that the overcharge was not willful" (*Matter of Obiora v New York State Div. of Hous. & Community Renewal*, 77 AD3d 755, 756 [2d Dept 2010]). Here, however, both of tenants' points of argument presume the existence of the overcharge and center instead, on the correct method of its calculation. Tenants' moving papers fail to address their claims for declaratory and injunctive relief, both of which also depend upon a finding of an overcharge. However CPLR 3212(b) empowers a court presented with a motion for summary judgment to search the record and grant summary judgment to any party entitled to such relief "with respect to a cause of action or issue that is the subject of the motions before the court" (*Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996]). Here, as discussed below, tenants are entitled to a declaration that they were overcharged, but not to either of the proposed money judgments.

As previously mentioned, tenants base their motion mainly on the DHCR "registration apartment information" sheet (*see* Notice of Motion, exhibit B). The Court notes that this

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[2] Tenants posit that landlord is entitled to a "longevity increase" that would have raised the legal, regulated rent from the $898.29 monthly figure listed on the DHCR "registration apartment information" sheet to $1,101.76, and resulted in a monthly overcharge of $998.24 (*see id.* at ¶¶ 31-33).

[3] Tenants plead, in the alternative, that the May 9, 2011 letter from landlord's attorney contains an "admission" that they were overcharged by at least $808.24 per month, given that landlord was evidently willing to accept $1,291.76 per month in rent instead of the $2,100.00 that it had been charging (*see id.* at ¶¶ 34-36).

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document contains a disclaimer, printed prominently on each of its four pages, that states as follows:

> "Advisory Note: This document merely reports the statements made by the owner in the registration(s) filed by such owner and does not reflect changes in rent occurring after April 1 of each year. DHCR does not attest to the truthfulness of the owner's statements or the legality of the rents reported in this document. Furthermore, this document does not necessarily reflect modifications to the lawful rent or other registration information as a result of orders issued by DHCR, or a finding that a registration has not been filed" (*see* Notice of Motion, exhibit B).

The terms of this disclaimer clearly preclude tenants from relying on it as conclusive proof of an overcharge. Instead, by its plain language, it merely constitutes evidence of "statements made by the owner" to the DHCR in the annual apartment registrations for unit 4B. However, as was previously mentioned, those statements include an allegation that a rent stabilized renewal lease had been issued to Detra Adgerson that ran from April 1, 2008 through March 31, 2009, with a legal regulated monthly rent of $898.29. However, tenants have also presented their own initial lease, which ran from July 15, 2008 through July 14, 2009 and had a non-regulated monthly rent of $2,100.00. This evidence discloses an overlap in the lease terms and a significant disparity in the monthly rent charges. Landlord offers no explanation for these facts. Under the circumstances, the Court concludes that the only reasonable explanation is that tenants were indeed overcharged and are therefore, entitled to summary judgment on their first cause of action for a declaratory judgment.

Declaratory judgment is a discretionary remedy which the court may grant "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (CPLR 3001; *see e.g. Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 681, 682 [1st Dept 1999]). Further, it has long been the rule that, in an action for declaratory judgment, the Court may properly determine respective rights of all of the affected parties under a lease (*see Leibowitz v Bickford's Lunch Sys.*, 241 NY 489,

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501 [1926]). Here, the Court determines and declares that apartment 4B is a rent stabilized unit, and that landlord willfully charged tenants rent in excess of the amount permitted by law. However, this does not end the inquiry.

As previously discussed, tenants first request for a money judgment for the instant rent overcharge was calculated by adding a "longevity increase" to the last known legally regulated monthly rent of $898.29 to come up with a figure of $1,101.76 that they then subtract from their actual monthly rent of $2,100.00. 9 NYCRR § 2522.8 (a) (2) (ii) does indeed permit a landlord to collect a "longevity increase" of .6 percent of an apartment's previous legal regulated rent where the landlord has not collected a vacancy increase for a period of eight years (*see e.g. Matter of H.O. Realty Corp. v State of N. Y., Div. of Hous. & Community Renewal*, 46 AD3d 103 [1st Dept 2007]; *Matter of Ador Realty, LLC v State of N.Y., Div. of Hous. & Community Renewal*, 25 AD3d 128, 131-132 [2d Dept 2005]). However, as previously indicated, there is a paucity of evidence in the matter now before the Court that makes the application of this statute problematic.

Firstly, the disclaimer in the DHCR "registration apartment information" sheet precludes tenants from using it as conclusive proof that the last legal regulated rent for apartment 4B was, in fact, $898.29 per month. To establish this, tenants will need to present an actual DHCR-issued registration record or rent history. Secondly, tenants aver that they paid landlord monthly rent of $2,100.00 during the operative period, but they have not presented copies of cancelled checks or any other form of receipt to establish said payments. This is necessary to calculate the amount of any final money judgment. Thirdly, the apparent overlap between the term of Adgerson's last tenancy and tenants' first term of possession precludes a clear determination, at this juncture, of whether landlord was entitled to, ever applied for, or ever did in fact collect either a vacancy increase or a longevity increase for apartment 4B. The evidence at hand merely suggests that a longevity increase was warranted on the grounds of no vacancy

increase for eight years, however a factual determination on this point must be made (*see Ador Realty, LLC*, 25 AD3d at 131-132). Thus, the Court cannot accept tenants' proposed calculation of the money judgment for the instant rent overcharge. Instead, the Court finds that the matter should be submitted to a Special Referee to hear and report on. Therefore, the Court finds that tenants' request for summary judgment on their third cause of action for a money judgment should be held in abeyance pending the acceptance of said Referee's report.

The Court notes that tenants' second point of argument proposed an alternative calculation of the money judgment amount, which was based on the landlord's "admission" in its settlement letter of May 9, 2011 that it had overcharged them at least $808.24 per month, in view of landlord's evident willingness to accept $1,291.76 per month in rent. However, landlord correctly points out that CPLR 4547 renders settlement offers "inadmissible as proof of liability for or ... the amount of damages." The fact that landlord then cited the factually inapposite decision in *Brooklyn Union Gas Co. v American Home Assur. Co.* does not render the statute any less effective (23 AD3d 190 [1st Dept 2005]). Therefore, the Court rejects tenants' argument and their proposed alternative method of calculating the overcharge amount.

The Court further notes that tenants' alternative argument made mention of the possibility that landlord might be justified in seeking to augment its rental charge with major capital improvement (MCI) increases for work that it had performed in apartment 4B. As the Appellate Division, Second Department, made clear in *Matter of Rockaway One Co., LLC v Wiggins*, in order to obtain an MCI increase, a landlord must seek prior permission from the DHCR through its normal application process (35 AD3d 36, 41-42 [2d Dept 2006]). Here, there is no proof or even suggestion that landlord ever adhered to that application process. As a result, landlord would not now be entitled to MCI increases for apartment 4B, and the Court rejects tenants' contention as meritless.

As previously indicated, tenants' moving papers raise no argument with respect to their

second and fourth causes of action for injunctive relief and attorney's fees. Under these circumstances, the Court cannot resolve tenants' request for an injunction. However, the Court believes that the issue of the calculation of attorney's fees due to tenants may also be heard and reported on by a Special Referee. Accordingly, the Court finds that tenants' motion for summary judgment should be denied with respect to their second cause of action, and held in abeyance with respect to the fourth.

The remainder of tenants' motion seeks summary judgment to dismiss landlord's sole affirmative defense that tenants' fourth cause of action (i.e., for attorney's fees) is improper because there is no contractual provision authorizing such a claim. However, as previously mentioned, on September 28, 2011, the parties executed a stipulation in which landlord agreed to this relief. The portion of tenants' motion that seeks that same relief is now duplicative and, therefore, improper. Accordingly, the Court denies this portion of tenants' motion.

CONCLUSION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion by plaintiffs Erin Barker, Justin D'Ambrosio and Eric Laugel for summary judgment, pursuant to CPLR 3212, is granted to the extent that the branch of said motion which seeks a declaratory judgment with respect to the subject matter of the complaint's first cause of action is granted with costs and disbursements to plaintiffs as taxed by the Clerk; and it is further

ADJUDGED and DECLARED that apartment 4B in the building located at 311 West 11th Street New York, New York is subject to the Rent Stabilization Law and that defendant 301 303 311 West 111, LLC has charged said plaintiffs rent for that unit in excess of the amount permitted by said Rent Stabilization Law and applicable Code provisions in an amount to be determined; and it is further

ORDERED that the issues of the determination of the amount of the aforementioned

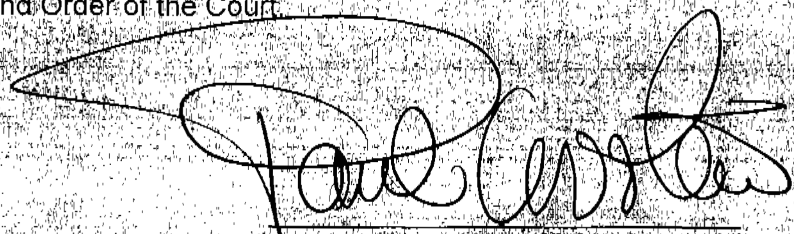
rent overcharge and of any attorney's fees due to plaintiffs as a result of the instant action are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the branches of the instant motion which seeks summary judgment with respect to the complaint's third cause of action for a money judgment, and fourth cause of action for attorney's fees are held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the plaintiffs shall, within 30 days from the date of this order, serve a copy of this order with notice of entry upon the defendant and, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that the remainder of the instant motion is denied.

This constitutes the Decision and Order of the Court.



Dated: 3-19-12

PAUL WOOTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).