

Sandlow v 305 Riverside Corp.
2012 NY Slip Op 30788(U)
March 26, 2012
Sup Ct, NY County
Docket Number: 106025/11
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
Justice

PART 8

Index Number : 106025/2011
SANDLOW, THOMAS
VS.
305 RIVERSIDE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 106025/11
MOTION DATE 2/2/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 16, were read on this motion to/for summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits + memo + law No(s). 1-7
Answering Affidavits — Exhibits + X Motion No(s). 8-12
Replying Affidavits + app to X motion No(s). 13-16

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

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).

Dated: 3/26/12

Joan M. Kenney, J.S.C.
JOAN M. KENNEY

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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 8

-----x

THOMAS SANDLOW,

Plaintiff,

DECISION, ORDER &
JUDGMENT

Index No.: 106025/11

-against-

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

-----x

JOAN M. KENNEY, J.:

Defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff cross-moves, pursuant to CPLR 3212, for partial summary judgment finding that plaintiff is the rent-stabilized tenant of a rent-stabilized apartment.

FACTUAL BACKGROUND

This action involves a landlord-tenant dispute in which the plaintiff tenant seeks: (1) a declaration that his apartment is rent-stabilized and that the monthly rents collected by defendant landlord since February 1, 2005 are erroneous, unlawful and/or constitute an overcharge; (2) injunctive relief directing landlord to register the premises as a rent-stabilized unit with the New York State Division of Housing and Community Renewal (DHCR) at the lawful rent; (3) all overcharges plus treble damages for all wilful overcharges; and (4) attorney's fees.

This litigation results from the ruling of the Court of Appeals in *Roberts v Tishman Speyer Properties, L.P.* (13 NY3d 270 [2009]), which held, in sum and substance, that properties that receive J-51 tax benefits could not deregulate apartments therein as long as such

tax benefits are in effect.

Tenant is challenging the regulatory status of the apartment known as 7A, 305 Riverside Drive, New York, New York 10025. In particular, tenant claims that the subject apartment is rent-stabilized, based upon landlord's receipt of J-51 tax benefits during the time in which tenant first took occupancy of the unit. It is tenant's position that, despite the ruling in the *Roberts* case, landlord has refused to abide by the Court's decision.

Defendant landlord maintains that the present action is time-barred, being subject to the four-year statutory period mandated for such actions by section 213-a of the CPLR. Moreover, landlord asserts that, even if the present action were not time-barred, there has been no rent overcharge, stating that tenant may go back only four years to determine the correct rent, which, in the instant matter, makes his monthly rent correct. Lastly, since landlord maintains that there was no rent overcharge, tenant would not be entitled to attorney's fees.

In support of his cross motion, and in opposition to landlord's motion, tenant contends that landlord does not dispute any of the facts presented in the complaint, and landlord admits that it receives J-51 tax benefits. Further, the lease fails to contain the required J-51 notice that the apartment remains subject to rent stabilization despite the expiration of the J-51 tax period. Motion, Ex. C (lease).

In opposition to tenant's cross motion, and in reply, landlord

concedes that *Roberts* is retroactive in its applicability and does not oppose tenant's request that the apartment be found to be rent-stabilized. However, landlord still contends that the action is time-barred by the application of CPLR 213-a, since the first rent overcharge occurred more than four years prior to tenant filing the instant action.

Landlord argues that tenant has failed to produce any evidence as to what the true base rent should be, which, according to landlord, is four years from the date of filing the current action: May 2007. Tenant is claiming a rent overcharge from February 1, 2005. Specifically, paragraph 40 of the complaint states:

"Plaintiff respectfully requests that this Court declare that the aforementioned monthly rents charged and collected by Defendant since February 1, 2005, or four years prior to the commencement of this action, are erroneous, unlawful and/or constitute an overcharge."

The main thrust of landlord's argument is that the calculation of the base rent must be based on the rent in effect four years prior to the filing of the present action, not February of 2005. Additionally, landlord says that because tenant has affirmatively stated that this is not an action for rent overcharges, he is not entitled to treble damages or attorney's fees.

The court notes that discovery has yet to take place in this matter.

DISCUSSION

"The proponent of a summary judgment motion must make 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 [internal quotation marks and citation omitted]."

Santiago v Filstein, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

At the outset, the court rejects landlord's claim that the suit is barred by the four-year statute of limitations mandated for rent overcharge claims under CPLR 213-a.

CPLR 213-a states:

"An action on a residential rent overcharge shall be commenced 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 any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action."

As recently stated by the Appellate Division in *Gersten v 56 7th Avenue LLC* (88 AD3d 189, 199 [1st Dept 2011]), in determining a challenge to a rent overcharge claim based on the statute of limitations, "a tenant should be able to challenge the deregulated

status of an apartment at any time during the tenancy. Indeed, courts have uniformly held that landlords must prove the change in an apartment's status from rent-stabilized to unregulated even beyond the four-year statute of limitations for rent overcharge claims [citing *East West Renovating Co. v New York State Division of Housing & Community Renewal*, 16 AD3d 166 (1st Dept 2005)."]

Therefore, this action is not time-barred for the determination as to the regulated status of the apartment. Since landlord has admitted that the apartment is rent-stabilized, he has rendered moot any question as to the apartment's status. However, the issue as to the calculation of the correct stabilized rent remains to be determined.

For the purpose of calculating the correct rent, tenant's

"rent overcharge claim is subject to a four-year statute of limitations (see Rent Stabilization Law of 1969 ...). The Rent Regulation Reform Act of 1997 'clarified and reinforced the four-year statute of limitations applicable to rent overcharge claims ... by limiting examination of the rental history of housing accommodations prior to the four-year period preceding the filing of an overcharge complaint' [internal citations omitted]."

Matter of Cintron v Calogero, 15 NY3d 347, 353 (2010).

Not only has tenant has proffered no reason why the court should go outside the four-year look-back period (72A Realty Associates v Lucas, 32 Misc 3d 47 [App Term, 1st Dept 2011]), but, as indicated in the complaint, tenant seeks a rent overcharge determination either from February 1, 2005 or the four years prior to instituting this action. Since tenant is willing to limit the

inquiry into his damages for an alleged rent overcharge to the four years preceding the commencement of this action, the court concludes that a determination of the lawful rent and any overcharge is limited to the four years prior to the institution of the instant lawsuit. *78/79 York Associates v Rand*, 180 Misc 2d 316 (App Term, 1st Dept 1999).

However, in order to determine the correct rent and whether there has been any wilful rent overcharge, entitling tenant to both treble damages and attorney's fees, evidence must be presented on these issues. See *Matter of Obiora v New York State Division of Housing and Community Renewal*, 77 AD3d 755 (2d Dept 2010); *Matter of Graham Court Owners Corp. v Division of Housing and Community Renewal*, 71 AD3d 515 (1st Dept 2010).

The only evidence of the rent charged has been provided by landlord, consisting of a copy of the lease for the period February 1, 2005 through January 31, 2007 (Motion, Ex. C.), and its annual apartment registrations for the years 2007 through 2011, which indicates a different, albeit unchanging, rent from the rent appearing in the lease, with no evidence as to how that difference was calculated. Motion, Ex. D. Even though tenant has not provided any evidence in admissible form to dispute these amounts, defendant has not met its burden of demonstrating the method of calculation used and whether such calculation conforms to rent stabilization requirements. Moreover, no discovery has yet taken place in this matter.

Excluding the issue of the rent-regulated status of the apartment, all of the causes of action are based on what would be the lawful rent for the unit and what, if any, increases from that amount are permissible under rent-regulation law. Since neither party has provided sufficient evidence for the court to make that determination, the remainder of both the motion and the cross motion must be denied. Accordingly, it is

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

ORDERED that the portion of plaintiff's cross motion seeking a declaration that his apartment is rent-stabilized is granted; and it is further

ADJUDGED and DECLARED that apartment 7A, 305 Riverside Drive, New York, New York 10025 is a rent-stabilized apartment.

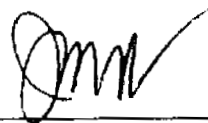
And it is further

ORDERED that the remainder of plaintiff's cross motion is denied; and it is further

ORDERED that the parties appear for their compliance conference on May 24, 2012 at 10:00 a.m. as previously directed.

Dated: March 26, 2012

ENTER:



Joan M. Kenney, J.S.C.