

Tribeca 103 LLC v Torreano
2012 NY Slip Op 33828(U)
November 15, 2012
Civil Court, New York County
Docket Number: 62285/12
Judge: Timmie Erin Elsner
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART F

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TRIBECA 103 LLC,

Petitioner,

-against-

L&T Index No. 62285/12

JOHN TORREANO AND JUDITH PANAS,

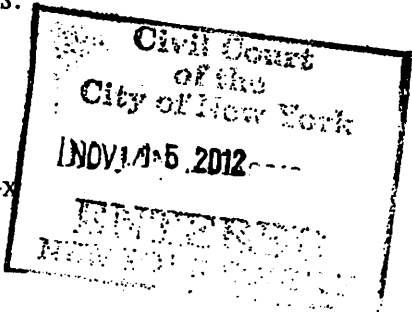
Respondent,

DECISION / ORDER

“JOHN DOE” and “JANE DOE”,

Respondents-Undertenants.

PREMISES: Apartment 3/4th Floor
103 Franklin Street
New York, New York 10013



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HON. TIMMIE ERIN ELSNER, J.H.C.

Recitation, as required by CPLR §2219(A), of the papers considered in the review of respondents’ motion for summary judgment pursuant to CPLR §3212; and petitioner’s cross-motion for, *inter alia*, summary judgment pursuant to CPLR §3212:

Papers	Numbered
Respondents’ Notice of Motion; Affidavit and Affirmations in Support and Annexed Exhibits	1
Petitioner’s Cross-Motion; Affirmation and Affidavit in Support of Cross-Motion and in Opposition to Respondents’ Motion and Annexed Exhibits..	2
Respondents’ Affirmation in Opposition to Petitioner’s Cross-Motion and in Further Support of its Motion and Annexed Exhibits	3
Petitioner’s Reply Affirmation in Support of its Motion and in Further Opposition to Respondents’ Motion	4

Upon the foregoing papers, the Decision/Order of this Court is as follows:

PROCEDURAL HISTORY AND BACKGROUND

Petitioner, Chelsea Partners LLC, (“petitioner”) commenced this holdover proceeding on, or about, April 12, 2012 against John Torreano and Judith Panas, the rent-stabilized tenants of record (“respondents”) for premises located at 103 Franklin Street, 3rd/4th Floor, New York, New York (“premises”) on the basis that respondents failed to execute renewal leases. Respondents submitted a verified answer with seven affirmative defenses and two counterclaims. By motion, dated May 22, 2012, respondents seek summary judgment and petitioner cross-moves for summary judgment pursuant to CPLR Section 3212.

In 1983, the subject building was registered as an Interim Multiple Dwelling (“IMD”) with the New York City Loft Board (the “Loft Board”). By Order, dated March 20, 2008, the Loft Board removed the building from its jurisdiction. Subsequently, the subject building was transferred to the jurisdiction of the New York State Division of Housing and Community Renewal (“DHCR”). The Loft Board also set the initial legal regulated rent for the premises at \$723.86 per month for the period February 1, 2007 through January 31, 2009 and directed petitioner to provide respondents with a rent-stabilized lease.

On or about July 18, 2008, petitioner’s counsel sent an initial lease to respondents’ counsel however, respondents’ counsel rejected the terms of the lease. Counsel for the parties extensively negotiated extensively the terms of the lease for over two years. On or about July 21, 2010 and after the initial lease period had expired, petitioner sent respondents a revised initial lease for the period February 1, 2007 through January 31, 2009 and a lease renewal for the period commencing February 1, 2009 through January 31, 2011. On August 5, 2010, respondents signed the initial and renewal leases and petitioner received them in December 2010.

After the leases were executed, the parties had realized that there were errors and omissions in the renewal lease. Petitioner noticed that it had neglected to include a provision for payment of a security deposit. Respondents' counsel objected to petitioner's method of calculating the rent increase in the renewal. Petitioner submitted an amended lease renewal to respondents. After extensive correspondence and communication between counsel for petitioner and respondents, the parties were able to resolve most of the issues however they failed to agree on the final amount of the rent increase. On or about November 1, 2011, petitioner offered respondents a second renewal lease for a one-year or two-year term commencing February 1, 2012.¹ Respondents signed neither the amended renewal lease nor the second renewal lease.

¹ Petitioner proffered a one or two-year lease commencing February 1, 2012, however the first renewal lease covered the period from February 1, 2009 through January 31, 2011.

RELEVANT STATUTES AND REGULATIONS

RENT STABILIZATION CODE (RSC)

RSC § 2523.5 Notice for renewal of lease and renewal procedure states, in pertinent part:

(a) On a form prescribed or a facsimile of such form approved by the DHCR, dated by the owner, every owner, other than an owner of hotel accommodations, shall notify the tenant named in the expiring lease not more than 150 days and not less than 90 days prior to the end of the tenant's lease term, by mail or personal delivery, of the expiration of the lease term, and offer to renew the lease or rental agreement at the legal regulated rent permitted for such renewal lease and otherwise on the same terms and conditions as the expiring lease. . . . Pursuant to the provisions of Section 2522.5(b)(1) of this Title, the owner shall furnish to such tenant a copy of the fully executed renewal lease form bearing the signatures of the owner and tenant within 30 days of the owner's receipt of the renewal lease form signed by the tenant. Upon execution by the owner and delivery to the tenant, such form shall constitute a binding renewal lease. . . . Upon failure of the owner to deliver a copy of the fully executed renewal lease form to the tenant within 30 days from the owner's receipt of such form signed by the tenant, such tenant shall not be deprived of any of his or her rights under the RSL and this Code and the owner shall be barred from commencing any action or proceeding against the tenant based upon non-renewal of lease, pursuant to section 2524.3(f) of this Title. In the event that such notice is given to the tenant after the expiration of the lease, the provisions of subdivision (c) of this section shall govern.

* * *

(c)(1) Where the owner fails to timely offer a renewal lease or rental agreement in accordance with subdivision (a) of this section, the one- or two-year lease term selected by the tenant shall commence at the tenant's option, either (i) on the date a renewal lease would have commenced had a timely offer been made, or (ii) on the first rent payment date occurring no less than 90 days after the date that the owner does offer the lease to the tenant. . . .

RSC § 2524.3 Proceedings for eviction - wrongful acts of tenant states, in pertinent part:

Without the approval of the DHCR, an action or proceeding to recover possession of any housing accommodation may only be commenced after service of the notice required by Section 2524.2 of the Part (Termination Notice), upon one or more of the following grounds, wherein wrongful acts of the tenant are established as follows:

* * *

(f) The tenant has refused . . . to renew an expiring lease in the manner prescribed in such notice at the legal regulated rent authorized under this Code and the RSL, and otherwise upon the same terms and conditions as the expiring lease. This subdivision (f) does not apply to permanent hotel tenants, nor may a proceeding be commenced based on this ground prior to the expiration of the existing lease term.

NEW YORK CITY RENT GUIDELINE BOARD

2008 Apartment & Loft Order #40

Order Number 40 - Apartments and Lofts, rent levels for leases commencing October 1, 2008 through September 30, 2009.

[T]he Rent Guidelines Board (RGB) hereby adopts the following levels of fair rent increases over lawful rents charged and paid on September 30, 2008. These rent adjustments will apply to rent stabilized apartments with leases commencing on or after October 1, 2008 and through September 30, 2009. Rent guidelines for loft units . . . are also included in this order.

ADJUSTMENT FOR RENEWAL LEASES (APARTMENTS)

Where heat is neither provided nor required to be provided to a dwelling unit by an owner from a central or individual system, the adjustments are as follows:

For a one-year renewal lease commencing on or after October 1, 2008 and on or before September 30, 2009: 4.0%

For a two-year renewal lease commencing on or after October 1, 2008 and on or before September 30, 2009: 8.0%

Provided, however, that where the most recent vacancy lease was executed six years or more prior to the date of the renewal lease under this Order, the following shall instead apply:

For a one-year renewal lease commencing on or after October 1, 2008 and on or before September 30, 2009: 4.0% or \$40, whichever is greater.

For a two-year renewal lease commencing on or after October 1, 2008 and on or before September 30, 2009: 8.0% or \$80, whichever is greater.

* * *

ANALYSIS

Pursuant to CPLR Section 3212, summary judgment is a drastic remedy that deprives litigants of their day in court, and it “should only be employed when there is no doubt as to the absence of triable issues.” *See Andre v Pomeroy*, 35 NY2d 361 [1974]; *see also, Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2d Dept 2004]. The court’s function is not to determine credibility, but to determine if there exists a triable issue, or if arguably there is a genuine issue of fact. *See S.J. Capelin Assocs., Inc. v Global Mfg. Corp.*, 34 NY2d 338 [1974]. The movant has the initial burden of proving entitlement to summary judgment and upon such proof, the opposing party must show facts sufficient to require a trial of any issue of fact. *See Winegrad v New York Univ. Med. Center*, 64 NY2d 851 [1985](*citing, Zuckerman v City of New York*, 49 NY2d 557 [1980].)

A. *The Initial Lease and the Renewal Lease.*

RSC Section 2523.5 provides, among others, that a landlord “shall notify the tenant named in the expiring lease not more than 150 days and not less than 90 days prior to the end of the tenant’s lease term . . . of the expiration of the lease term, and offer to renew the lease or rental agreement at the legal regulated rent permitted for such renewal lease and otherwise **on the same terms and conditions as the expiring lease** [*emphasis added*]. RSC Section 2523.5(a) further provides that if a landlord fails to offer timely a renewal lease, then “the one- or two-year lease term selected by the tenant shall commence at the tenant’s option, either (I) on the date a renewal lease would have commenced had a timely offer been made, or (ii) on the first rent payment date occurring no less than 90 days after the date that the owner does offer the lease to the tenant.”

It is clear that both parties were represented by able counsel, who negotiated the terms of the

initial lease extensively and held numerous discussions over several years in their attempts to resolve a myriad of issues including the amount of the rent increase. During this lengthy process, discussions which resolved some issues created new ones. By the time the parties agreed to the terms of the initial lease and the first renewal lease in December 2010, the initial lease period (February 1, 2007 through January 31, 2009) had long expired and the parties were a year and ten months into the first renewal lease which had commenced on February 1, 2009.²

It is undisputed that petitioner timely provided an initial lease pursuant to the Loft Board Order, however respondents objected to the terms of the lease. A renewal lease could not be offered until the terms of the initial lease had been settled because, pursuant to RSC Section 2325.5, the renewal lease had to be "on the same terms and conditions as the expiring lease." Respondents' counsel could have objected to the retroactivity of the renewal lease but failed to do so. Pursuant to RSC Section 2523.5(c)(1), where a landlord fails to timely offer a renewal lease, respondents have the option of selecting a one or two-year lease renewal to commence on either the date a renewal lease would have commenced had a timely offer been made or on the first rent payment date occurring no less than 90 days after the date that the owner does offer the lease to the tenant. Here, respondents selected a two-year lease term to begin on February 1, 2009 through January 31, 2011. Based on the unique circumstances in this proceeding and because respondents' counsel never objected to the retroactive aspect of the initial lease and the renewal lease, this court finds that the initial lease and the first renewal lease executed by both parties are enforceable albeit without prejudice to respondents' claims relating to the amount of the rent.

² The court notes that the Loft Board Order, dated March 20, 2008, removing the premises from its jurisdiction and directing petitioner to provide a rent-stabilized lease to respondents for the period February 1, 2007 through January 31, 2009, was itself retroactive.

On or about November 1, 2011, petitioner offered respondents a second renewal lease offer for a one-year or two-year term commencing February 1, 2012. RSC Section 2523.5 provides, among others, that a landlord shall notify the tenant the expiration of the lease term and an offer to renew the lease or rental agreement at the legal regulated rent [*emphasis added*]. Respondents did not sign the second renewal lease as respondents objected to the rent set forth in the first renewal lease, the amended first renewal lease, and the second renewal lease. Whether respondents lawfully refused to execute the second renewal lease because the legal regulated rent was improper is the subject of the discussion below.

B. *The Legal Regulated Rent in the Renewal Leases.*

Here, the facts are largely undisputed. By Order, dated March 20, 2008, the Loft Board: removed the premises from its jurisdiction; set the initial legal regulated rent at \$723.86 for the period February 1, 2007 through January 31, 2009; and ordered petitioner to provide respondents with a rent-regulated lease. Neither party objected to nor appealed the Loft Board's Order.

Petitioner determined it was entitled to an \$85.00 increase in the first renewal lease based upon Rent Guidelines Board ("RGB") Order No. 40. RGB Order No. 40 provides, in pertinent part:

Where heat is neither provided nor required to be provided to a dwelling unit by an owner from a central or individual system, the adjustments are as follows:

For a one-year renewal lease commencing on or after October 1, 2008 and on or before September 30, 2009: 4.0%

For a two-year renewal lease commencing on or after October 1, 2008 and on or before September 30, 2009: 8.0%

Provided, however, that where the most recent vacancy lease was executed six years or more prior to the date of the renewal lease under this Order, the following shall instead apply:

For a one-year renewal lease commencing on or after October 1, 2008 and on or before September 30, 2009: 4.0% or \$40, whichever is greater.

For a two-year renewal lease commencing on or after October 1, 2008 and on or before September 30, 2009: 8.0% or \$80, whichever is greater [*emphasis added*].

It is the petitioner's position that it was entitled to calculate the rent increase where the most recent vacancy increase was executed six years or more prior to the date of the renewal increase. Respondents' counsel contends that the vacancy lease provision is inapplicable and that a flat rate of 8% (or \$61.53) should be applied. The difference between petitioner's legal regulated rent increase (\$80.00) and respondents' (\$61.53) is \$18.47.

Based upon the plain meaning of the language contained in the RGB Order No. 40, this court finds that a flat rate of 8% is applicable in calculating the rent increase for the premises. The vacancy lease provision is inapplicable as the premises became subject to rent stabilization on March 20, 2008. Prior to this date, the premises was subject to the Loft Board's jurisdiction. The vacancy provision is applicable to situations where the premises have been rent-stabilized for more than six years and was intended to rectify an economic inequity in long term rent-stabilized tenancies due to the unavailability of a vacancy increase. In calculating the initial stabilized rent for the premises, the Loft Board took the inequities into consideration.

Using the above criteria, the proper increase for the first renewal lease for the period of February 1, 2009 through January 31, 2011 is \$61.53 ($\$723.86 * 8\% = \61.53) for a total legal regulated rent of \$785.39. Based on the prior legal regulated rent of \$785.39, the expiration date of the first renewal lease, and RGB Order No. 42, the increase for a two-year lease commencing

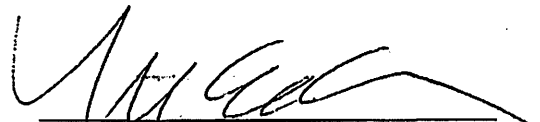
February 1, 2011 through January 31, 2013 is \$35.34 ($\$785.39 * 4.5\% = \35.34) for a total regulated rent of \$820.73.

Finally, the court finds that petitioner timely offered the second renewal lease which was to commence on February 1, 2012. Pursuant to RSC Section 2523.5, respondents had the option of selecting a one- or two-year lease term to begin either on the date a renewal lease would have commenced or on the first rent payment date occurring no less than 90 days after the date the owner offered the lease to the tenant. It was respondents' obligation to select which he or she deemed appropriate. Despite this, given the fact that the legal regulated rent reflected in the second lease renewal was improper, respondents were within their rights to reject same.

CONCLUSION

Respondents' motion for partial summary judgment is granted. Petitioner's cross-motion for summary judgment is denied. The within proceeding is dismissed without prejudice to respondents' rights as the prevailing party to move for reasonable legal fees incurred herein. This constitutes the court's order and decision.

Dated: New York, New York
November 15, 2012



TIMMIE ERIN ELSNER, J.H.C.