

Altschuler v Jobman 478/480, LLC

2013 NY Slip Op 30208(U)

January 16, 2013

Supreme Court, New York County

Docket Number: 115350/09

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
J.S.C.
Justice

PART 19

Index Number : 603556/2009
ALTSCHULER, LANE
vs.
JOBMAN 478/4780, LLC
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is DETERMINED IN
ACCORDANCE WITH THE ACCOMPANYING DECISION / ORDER.

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

FILED

JAN 18 2013

NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED

JAN 18 2013

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 1/16/13

Saliann Scarpulla
J.S.C.

- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

-----X
LANE ALTSCHULER,

Plaintiffs,

Index Number: 115350/09
Submission Date: 8/1/12

- against -

JOBMAN 478/480, LLC.,

DECISION AND ORDER

Defendant.

-----X

For Plaintiffs:
Bernstein Liebhard LLP
10 East 40th Street
New York, NY 10016

For Defendant:
Belkin Burden Wenig & Goldman, LLP
270 Madison Avenue
New York, NY 10016

FILED

JAN 18 2013

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Papers considered in review of this motion for summary judgment:

Notice of Motion/Affidavit in Supp.....	1
Notice of Cross-Motion.....	2
Memo. in Opp. to Defendant's Mot and in Supp. Cross-Motion.....	3
Affirm. of Counsel in Opp. to Motion and in Supp. Cross-Motion.....	4
Affidavit of Lane Altschuler.....	5
Reply Memo. in Supp. Motion and Opp. to Cross-Motion	6
Reply Affidavit of Andrea Lutsky in Supp. Motion and Opp. to Cross-Motion.....	7
Reply Memo. in Supp. Cross-Motion and Opp. to Motion	8
Reply Affirm. of Counsel in Supp. Cross-Motion and Opp. to Motion.....	9

HON. SALIANN SCARPULLA, J.:

In this rent overcharge action, defendant Jobman 478/480, LLC ("Jobman") moves for summary judgment dismissing plaintiff's complaint pursuant to CPLR § 3212.

Plaintiff Lane Altschuler ("Altschuler") cross-moves for summary judgment and an immediate trial on damages pursuant to CPLR § 3212.

Altschuler is a tenant residing at 478 Central Park West, New York, NY, a building owned and operated by Jobman. Altschuler became a tenant of the building in

September 2000, upon signing a two-year lease agreement for Apartment 5A (“the Apartment”), with a monthly rent of \$3,400 for the first year and \$3,550 for the second year.

Altschuler subsequently signed eight one-year lease agreements from 2002 to 2010 for the monthly rent amounts of: \$3,500 per month (for the periods of October 1, 2002 to September 30, 2003; October 1, 2003 to September 30, 2004; October 1, 2004 to September 30, 2005; October 1, 2005 to September 30, 2006); \$3,550 per month (for the period October 1, 2006 to September 30, 2007); \$3,750 per month (for the period October 1, 2007 to September 30, 2008); \$3,850 per month (for the period October 1, 2008 to September 30, 2009); and \$3,750 per month (for the period October 1, 2009 to September 30, 2010).¹ Altschuler alleges that none of the leases contained a rent-stabilized rider.

On November 20, 2009, Altschuler commenced the instant rent overcharge action against Jobman. Altschuler claims that the Apartment is rent-stabilized, and Jobman unlawfully deregulated the Apartment and charged him market rate rents in all of the leases from 2000 to 2010. According to Altschuler, Jobman was prohibited from deregulating the Apartment because Jobman receives J-51 tax benefits from the City.

¹ After Altschuler filed the complaint and his lease expired on September 30, 2010, he became a month-to-month tenant at the rate of \$3,750 per month. In September 2011, Altschuler continued his monthly tenancy at a rate of \$2,836.52, the last legal rent registered with the Division of Housing and Community Renewal (DHCR) in 2000.

In his complaint, Altschuler seeks (1) money damages for his rent overcharges; treble damages based on willful overcharges from March 2009 to the present; attorney's fees; and (2) a declaratory judgment that the Apartment is rent-stabilized and will continue to be rent-stabilized until the expiration of the J-51 benefits in 2017-2018, or alternatively, until Altschuler ends his tenancy of the Apartment.

In the current motion for summary judgment, Jobman argues that Altschuler's rent overcharge claim must be analyzed using "the four-year rule." Under the four-year rule, a plaintiff's rent overcharge claim is: (1) limited to overcharges starting from the four-year period prior to the filing of the complaint, and (2) calculated using the legal registered rent amount that was in effect four years prior to the filing of the complaint.

Jobman claims that Altschuler has no rent overcharge claim under the four-year rule. Jobman argues that the rent overcharge claim must be calculated using the legal registered rent amount for November 2005, which is \$3,500.² According to Jobman, Altschuler was not overcharged because the difference between the legal registered rent in November 2005 and his actual monthly rent is \$0, and all subsequent lease increases were within the allowable limits under the Rent Guidelines.

In opposition, Altschuler argues that the four-year rule does not apply to determine the amount of his rent overcharge claim. First, Altschuler argues that his overcharge

² Jobman registered the November 2005 rent amount with DHCR on April 17, 2012.

claim must be calculated using the “rent indicated in the annual registration statement filed four years prior to the most recent registration statement” as specified in RSL § 26-516(a). Under that definition, Altschuler claims that the relevant rent amount is \$422.02, the rent indicated in the 1995 annual registration statement filed five years prior to the most recent registration statement in 2000.³ Altschuler submits a copy of the DHCR registration history for the Apartment (as of March 3, 2012):

Registration Year	Apartment Status	Legal Regulated Rent
1995	Vacant	\$422.04
1996	Exempt	High Rent Vacancy
1997	Rent Stabilized	\$2,300.95
1998	Rent Stabilized	\$2,010.85
1999	Exempt	High Rent Vacancy
2000	Rent-Stabilized	\$2,836.52
2001	Exempt	High Rent Vacancy
2002 - 2011 ⁴	Exempt	No Registration Required

Second, Altschuler further argues that the four-year rule does not apply when the legal registered rent amount under that rule has been tainted by the fraudulent conduct of

³ Altschuler claims that the 1995 annual registration statement must be used because no 1996 annual registration statement exists.

⁴ Jobman subsequently filed several rent registration statements with DHCR on April 17, 2012, which amended the rent history of the Apartment. For 2001, 2002, 2006, and 2011, the apartment’s status was amended to “rent stabilized” and the legal regulated rent was amended to list the respective amounts, \$3,400, \$3,550, \$3,500, and \$3,750.

the owner. Altschuler specifically claims that the November 2005 legal registered rent (\$3,500) must not be used because it has been tainted by Jobman's fraudulent conduct. Altschuler alleges that, prior to his tenancy, Jobman unlawfully deregulated the Apartment in 1995, by raising the rent from \$422.04 to more than \$2,000, which exceeded any allowable increases under the Rent Guidelines. Based on this past fraudulent conduct, Altschuler argues that his rent overcharge claim should be calculated using the 1995 legal registered rent (\$422.02).

Altschuler also argues that he is entitled to a declaratory judgment that the Apartment is rent-stabilized until the J-51 benefits expire in 2017-2018, or alternatively, until Altschuler vacates the Apartment. Altschuler submits a copy of the J-51 Benefit History Summary for the building, 478 Central Park West (Block 1844, Lot 29), which shows that in Tax Year 1997/1998, the building received a J-51 exemption of \$216,750 (14 years) and a J-51 abatement of \$38,434.54 (20 years). The summary further showed that in Tax Year 2010-2011, \$54,900 remained from the J-51 exemption granted in 1997/1998. In Tax Year 2011-2012, the building received no J-51 benefits.

Altschuler claims that, in the event that Jobman no longer receives J-51 benefits, the Apartment cannot be deregulated because he never received notice in any of his leases that the Apartment would be subject to deregulation after the J-51 tax benefits expired.

* 7]

In its reply, Jobman argues that it deregulated the Apartment in 1995, in accordance with existing DHCR regulations at the time, which permitted luxury decontrol of the Apartment even while the owner was simultaneously receiving J-51 tax benefits. In addition, Jobman claims that it is now entitled to deregulate the Apartment because it no longer receives J-51 benefits.

Discussion

A. The J-51 Program and Rent Stabilization Law

New York City's J-51 program provides tax benefits to property owners who complete eligible rehabilitative projects in multiple dwelling buildings. N.Y.C. Administrative Code § 11-243. To receive J-51 tax benefits, an owner must register the building's rental units with DHCR, and in general, the rental units are subject to rent stabilization during the period when the owner receives J-51 benefits. N.Y. City R. & Regs. tit. 28 § 5-03(f).

In 1993, the Legislature enacted the Rent Regulation Reform Act ("RRRA"), which provided that certain rent-stabilized units could be deregulated if one of two circumstances apply: (1) in vacant apartments where the legal rent is \$2,000 per month or more, or (2) in occupied apartments where the legal rent is \$2,000 per month or more, and the combined annual income of all occupants exceeded \$250,000 per year (collectively, these provisions are referred to as "luxury decontrol"). Rent Stabilization Law (RSL) §§

26-504.1, 26-504.2.⁵ However, the RRRRA also specified that property owners were prohibited from using luxury decontrol in units subject to rent-stabilization “by virtue of receiving tax benefits” under the J-51 program. RSL §§ 26–504.1, 26–504.2(a).

In 1996, the DHCR issued an advisory opinion interpreting the RRRRA. The advisory opinion stated that property owners participating in the J-51 program were prohibited from using luxury decontrol if the unit was subject to rent stabilization solely because of its receipt of J-51 benefits, but otherwise permitted to use luxury decontrol if the unit was subject to rent stabilization for a reason other than receipt of J-51 benefits.

In 2009, the Court of Appeals ruled in *Roberts v. Tishman Speyer Properties, L.P.* that the DHCR’s advisory opinion was incorrect, and in fact, the RRRRA prohibited property owners from using luxury decontrol to deregulate any units while receiving J-51 tax benefits, regardless of the reason for the unit’s rent-stabilization. 13 N.Y.3d 270 (2009). Subsequently, the First Department found that *Roberts* applies retroactively. *Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189, 198 (1st Dep’t 2011); *Roberts v. Tishman Speyer Properties, L.P.*, 89 A.D.3d 444, 445 (1st Dep’t 2011).

⁵ Pursuant to the Rent Act of 2011, these provisions have been modified such that a rent-stabilized unit may deregulated if one of two circumstances apply: (1) in vacant apartments where the legal rent is \$2,500 per month or more (effective to proceedings filed after June 24, 2011), or (2) in occupied apartments where the legal rent is \$2,500 per month or more, and the combined annual income of all occupants exceeded \$200,000 per year in each of the two preceding calendar years (effective to proceedings filed after July 1, 2011).

* 9]

CPLR § 213(a) and RSL § 26-516 provide that a rent overcharge claim is subject to a four-year statute of limitations. Specifically, these two statutes provide that: (1) a rent overcharge action must be commenced within four years of the first overcharge alleged, and (2) the court is precluded from examining any rental history of the unit prior to the four-year period immediately preceding the commencement of the action. CPLR § 213(a) and RSL § 26-516(a)(2). In general, a rent overcharge claim is calculated using the legal registered rent amount that was in effect on the “base date” – the date four years prior to the filing of the complaint. RSC § 2520.6(f). Collectively, these provisions are referred to as the “four-year rule.”

In some circumstances, the court must look beyond the four-year rule to calculate a rent overcharge claim. First, in cases where an owner improperly deregulated a unit and the record fails to establish the validity of the rent increase that brought the rent-stabilized amount above the regulated threshold amount, the court must disregard the free market lease amount in effect on the four-year base date and must instead review “any available record of rental history necessary to set the proper base date rate.” *72A Realty Associates v. Lucas*, 955 N.Y.S.2d 19, 21 (1st Dep’t 2012).

Second, in cases where a tenant’s overcharge claim alleges fraud and there is doubt as to whether the legal registered rent on the base date is lawful, the court may examine the rental history prior to the four-year base date “for the limited purpose of determining

whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date.” *Grimm v. State Div. of Hous. & Cmty. Renewal Office of Rent Admin.*, 15 N.Y.3d 358, 367 (2010). In such cases, the court generally applies the DHCR default formula – “the lowest rent charged for a rent-stabilized apartment with same number of rooms in the same building on the relevant base date.” *Levinson v. 390 West End Associates, LLC*, 22 A.D.3d 397, 662 (1st Dep’t 2005).

B. Defendant’s Motion and Plaintiff’s Cross-Motion for Summary Judgment

A movant seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

1. Rent Overcharge Claim

Here, I find that plaintiff Alschuler has demonstrated his entitlement to judgment as a matter of law on his rent overcharge claim, and defendant Jobman has failed to demonstrate a triable issue of fact.

Alschuler established that Jobman improperly deregulated the Apartment in 2000. The record shows that Jobman received J-51 benefits from 1997-2011. Thus, the

Apartment was subject to rent-stabilization from the inception of Altschuler's tenancy in 2000 until at least 2011.

Pursuant to CPLR § 213(a), Altschuler's rent overcharge claim is limited to any overcharges occurring after November 20, 2005, the date four years prior to the filing of the complaint. However, as a result of Jobman's improper deregulation of the Apartment and given that the record does not clearly establish the validity of the 1995 rent increase that brought the rent-stabilized amount above \$2,000, I find that the court must disregard the free market lease amount of \$3,500 that was in effect on November 20, 2005. *72A Realty Associates*, 955 N.Y.S.2d 19, 21 (1st Dep't 2012). Instead, the court must review "any available record of rental history necessary to set the proper base date rate." *Id.*

Moreover, Altschuler also demonstrated a colorable claim of fraud which further requires the court to disregard the \$3,500 rent amount on the base date. In addition to the significant rent increase in 1995, there are other factors that suggest the existence of a fraudulent scheme to deregulate the Apartment, such as the additional deregulations in 1998 and 2000, and Jobman's failure to file rent registration statements in 2001, 2002, 2006, and 2011, until Altschuler filed his complaint. *Grimm*, 15 N.Y.3d at 366.

Furthermore, Jobman's argument that it deregulated the Apartment in reliance on the 1996 DHCR advisory opinion is without merit. The record indicates that the Apartment was rent-stabilized solely because Jobman received J-51 benefits. Thus, even

under the 1996 advisory opinion, Jobman would have been prohibited from relying upon luxury decontrol to deregulate the Apartment.

Based upon a review of the parties' submissions, I find that there are triable issues of fact related to the amount and extent of Altschuler's damages for rent overcharges, treble damages, and attorney's fees.

Accordingly, defendant Jobman's motion for summary judgment dismissing the rent overcharge claim is denied, and plaintiff Altschuler's cross-motion for summary judgment on his rent overcharge claim is granted on the issue of liability and set down for an immediate trial on damages.

2. Declaratory Judgment

CPLR § 26-504(c) provides that upon the expiration or termination of J-51 benefits, a unit subject to rent stabilization as a result of J-51 benefits continues to be rent stabilized until: (1) the occurrence of the first vacancy of the unit after the benefits are no longer being received; or (2) if each lease and renewal "for the tenant in residence at the time of the expiration of the tax benefit period has included a notice in at least twelve point type informing such tenant that the unit shall become subject to deregulation upon the expiration of such tax benefit period and states the approximate date on which such tax benefit period is scheduled to expire, such dwelling unit shall be deregulated as of the end of the tax benefit period."

The Apartment at issue remains rent-stabilized until Altschuler vacates the Apartment, because although Jobman is no longer receiving J-51 benefits, Jobman failed to provide the requisite notice, in Altschuler's lease and renewals, stating that the Apartment would become subject to deregulation upon expiration of the J-51 tax benefits. *Gersten*, 88 A.D.3d at 200; *E. W. Renovating Co. v. New York State Div. of Hous. & Cmty. Renewal*, 16 A.D.3d 166, 167 (1st Dep't 2005).

Accordingly, defendant Jobman's motion for summary judgment dismissing the declaratory judgment claim is denied, and plaintiff Altschuler's cross-motion for summary judgment on his declaratory judgment claim is granted.

In accordance with the foregoing, it is

ORDERED that defendant Jobman 478/480, LLC's motion for summary judgment is denied; and it is further

ORDERED that plaintiff Altschuler's cross-motion for summary judgment on his rent overcharge claim (first cause of action) is granted on the issue of liability; and it is further

ORDERED that plaintiff Altschuler's cross-motion for summary judgment on his declaratory judgment claim (second cause of action) is granted; and it is further

ORDERED that an immediate trial on damages shall be had before the court; and it is further

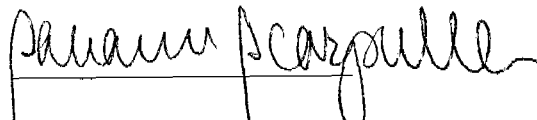
ORDERED that plaintiff Altschuler shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefore, and said Clerk shall cause the matter to be placed upon the calendar for such trial; and it is further

ORDERED that a final judgment on all claims shall be entered after the immediate trial on damages.

This constitutes the decision and order of this Court.

Dated: New York, New York
January 18, 2013

ENTER:


Saliann Scarpulla, J.S.C.

FILED
JAN 18 2013
NEW YORK
COUNTY CLERK'S OFFICE