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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN Justice

PART 36

Dignam + Leopard

-v-

305 Riverside Corp. a/k/a 305 Riverside Dr. Corp.

INDEX NO. 105503/12

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to 5, were read on this motion to/for renew/reargue + cross motion to strike

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1, 2

Answering Affidavits — Exhibits No(s). 5

Replying Affidavits Cross-Motion, Aff + Exhibits No(s). 3,4

Upon the foregoing papers, it is ordered that this motion ~~is~~ + cross-motion are

denied in accordance with the attached memorandum decision

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

FILED

APR 22 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/15/13

J.S.C.
DORIS LING-COHAN

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: IAS PART 36

----------X

MARK DIGNAM and LAURA LEOPARD,

Plaintiffs,

-against-

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

Defendant.

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Index No.: 105503/10
DECISION/ORDER

Motion Seq. No: 002

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

In this action, commenced by two residential tenants against their landlord, defendant/landlord moves for leave to renew and/or reargue a portion of this court's decision dated April 16, 2012, and plaintiffs/tenants cross move for an order to strike certain discovery. For the following reasons, both motions are denied.

BACKGROUND

Plaintiffs Mark Dignam (Dignam) and Laura Leopard (Leopard) are tenants of apartment 9E, in a residential apartment building (the building), located at 305 Riverside Drive in the County, City and State of New York. *See* Notice of Motion, Paul Affidavit, Exhibit A (complaint), ¶¶ 3-11. Defendant 305 Riverside Corp. a/k/a 305 Riverside Dr. Corporation (305 Riverside) is the building's owner and landlord. *Id.*, ¶ 4.

On April 22, 2010, plaintiffs commenced this action by serving a summons and complaint setting forth causes of action for: 1) a declaratory judgment that apartment 9E is rent stabilized; 2) an injunction requiring 305 Riverside to register apartment 9E as a rent stabilized unit; 3) rent overcharge; and 4) attorney's fees. *See* Notice of Motion, Paul Affidavit, Exhibit A.

Defendants answered on August 12, 2010. *Id.*, Exhibit B.

On April 16, 2012, this court issued a decision that denied 305 Riverside's motion for summary judgment to dismiss the complaint and granted plaintiffs' cross-motion for partial summary judgment on the complaint (motion sequence number 001). *See* Notice of Motion, Welikson Affirmation, Exhibit A (decision). The court's April 16, 2012 decision stated, in relevant part, as follows:

> 305 Riverside ... seeks to dismiss the balance of plaintiffs' first cause of action on the ground that the declaration that they seek would require the examination of rent records older than those permitted by the applicable four-year statute of limitations. *See* Memorandum of Law in Opposition to Cross Motion, at 2-11. Plaintiffs reply that the law permits the court to look beyond the four-year statute of limitations in order to ascertain whether a rent calculation was the product of fraud. *See* Sokolski Affirmation in Reply, ¶ 15. Plaintiffs are correct.
>
> In *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.* (15 NY3d 358, 362 [2010]), the Court of Appeals squarely held that:
>
> > On this appeal, we are asked to determine whether the rationale employed in *Thornton v. Baron* ... which allowed the parties to look back farther than four years, applies in a situation where it is alleged that the standard base date rent is tainted by fraudulent conduct on the part of a landlord. We conclude that it does, and that such base date rent may not be used as a basis for calculating subsequent regulated rent if fraud is indeed present [internal citation omitted].
>
> Here, 305 Riverside argues that "there is no fraudulent scheme alleged or shown with respect to this action." *See* Memorandum of Law in Opposition to Cross Motion, at 8-10. Plaintiffs reply that the unexplained increase of Shapiro's and Benezra's rent from $1,098.00 to $1,800.00 in 2004, and the subsequent further increase of apartment 9E's rent to $2,600.00 when Abrahami [a prior tenant] took possession of it in 2005, "clearly warrants ... an inquiry into the circumstances, because ... the lack of evidence to support the rent increase[s] ... indicate[s] fraud." *See* Sokolski Affirmation in Reply, ¶ 16.
>
> In *Grimm*, the Court of Appeals also held that:

> Generally, an increase in the rent alone will not be sufficient to establish a "colorable claim of fraud," and a mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further. What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization. As in *Thornton*, the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date.

Id. at 367. The evidence at hand - which consists of documents evincing significant unexplained rent increases - may not be sufficient to "indicate fraud," as plaintiffs argue; however, it is sufficient to warrant a further inquiry herein, as to whether 305 Riverside was engaged in a "fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization", when it made the subject increases. Therefore, the court rejects 305 Riverside's statute of limitations argument, and that portion of its motion that seeks to dismiss the balance of plaintiffs' first cause of action is denied.

April 16, 2010 decision, at 6-7.

In its current motion, 305 Riverside seeks leave to reargue its earlier application for summary judgment on the ground that the court misapprehended the controlling law and leave to renew its prior application, arguing that "newly discovered evidence," consisting of the following, warrants a change is this court's prior decision and a dismissal of plaintiff's complaint: 1) a DHCR rent registration statement for apartment 9E covering the years 2000 through 2008; 2) a contract to perform certain repair work in the apartment; 3) a copy of DHCR policy statement 90-10; and 4) several cancelled checks allegedly relating to the work described in the contract. *Id.*; Exhibits E, F, G. Plaintiffs cross move for an order to strike and/or preclude 305 Riverside's purported new evidence.

DISCUSSION

CPLR 2221 requires different showings to be made in support of motions to renew and motions to reargue.

Defendant's Motion to Reargue

A motion for leave to reargue may be granted only upon a showing "'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.'" *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992), quoting *Schneider v Solowey*, 141 AD2d 813 (2d Dept 1988). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." *Id.* at 27, citing *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 (1st Dept 1984). Nor does a reargument motion provide a party "'an opportunity to advance arguments different from those tendered on the original application.'" *Rubinstein v Goldman*, 225 AD2d at 328, quoting *Foley v Roche*, 68 AD2d at 568.

In seeking reargument, 305 Riverside asserts that the court misapprehended the holding of *Matter of Grimm v State of N.Y. Div. of Hous. & and Community Renewal Off. of Rent Admin.* (15 NY3d at 362, *supra.*) by "impermissibly expanding the *Grimm* criteria." *See* Amended Notice of Motion, Welikson Affirmation, ¶ 7. 305 Riverside argues that it was error for this court to decline to apply the four-year statute of limitations set forth in Rent Stabilization Law § 26–516(a)(2). According to 305 Riverside, in the absence of "a colorable claim of fraud" (as opposed to the mere "significant unexplained rent increases"), this court may not look beyond the four-year statute of limitations to determine if the rent currently being charged is lawful. *Id.*, ¶¶ 12-18. 305 Riverside cites several appellate holdings that it asserts support the proposition that "substantial indicia of fraud" must always be shown to exist before the statute of limitations may be circumvented. *Id.*, ¶¶ *19-25; see, e.g. Thornton v Baron*, 5 NY3d 175 (2005); *Matter of*

Gomez v State of N.Y. Div. of Hous. & and Community Renewal, 79 AD3d 878 (2d Dept 2010); *72A Realty Assoc. v Lucas,* 32 Misc 3d 47 (App Term 1st Dept 2011).

Plaintiffs respond that they have in fact asserted more than unsubstantiated and conclusory allegations of fraud, as argued by 305 Riverside, which correctly persuaded this court that it must investigate the legality of the base date rent, by looking beyond the four-year look-back period. *See* Notice of Cross Motion, Sokolski Affirmation, ¶19. Specifically, plaintiff noted that the same factors that existed in *Grimm*, exist in this case: (1) previous tenants who paid substantially more than the previously registered rent ($2,600 charged to Abrahami in 2005 following the last registered rent of $1098.86 for 2004); (2) the tenant in 2004 appears to have paid $1,800, when the legal rent was $1098.86; (3) neither plaintiffs, nor the tenant prior to plaintiffs were provided with rent stabilized leases or rent stabilized lease riders; and (4) simultaneously with the increase to Abrahami in 2005, defendant ceased filing annual registration statements with the DHCR. Plaintiffs also argue that 305 Riverside has misinterpreted the holding of *Grimm*, which, they assert, does *not* limit the holding of *Thornton v Baron*. *Id.*, ¶¶22. After reviewing the extant case law, the court agrees with plaintiffs.

Plaintiffs correctly note that *Thorton* dealt with the scenario in which an unlawful deregulation of a rent stabilized apartment unit is effected via a fraudulent "illusory prime tenancy" scheme. *See* Notice of Cross Motion, Sokolski Affirmation, ¶ 16. However, this is certainly not the *only* type of scheme which allegedly unscrupulous landlords may use to illegally deregulate apartments. In fact, the Court of Appeals in Grimm, specifically declined to constrain the holding in Thorton to the "narrow set of circumstances described in that case...[and instead held] that, where the overcharge complaint alleges fraud, as here, DHCR has an obligation to

ascertain whether the rent on the base date is a lawful rent". *Grimm*, *supra*, 15 NY3d at 366. Morevoer, recent appellate case law indicates that it is permissible to look past the four-year statute of limitations period when *other* types of schemes are employed. For example, in *Cintron v Calogero*, 15 NY3d 347 (2010), the Court of Appeals considered a scenario in which the landlord had sought to bar the consideration of any DHCR rent reduction orders that had been entered more than four years prior to the base rent date that the landlord asserted was operative. The Court of Appeals denied the landlord's application, finding that, because Rent Stabilization Law § 26-514 mandates that DHCR rent reduction orders give rise to a "continuing obligation," it would "thwart the goals of the Legislature", to apply the four-year statute of limitations in a way so as to obviate the effect of such orders. *Id.*, at 355-356. Thus, this court was correct to determine that, while the evidence supplied "is not sufficient to 'indicate fraud,' ... it is sufficient to warrant a further inquiry" into the matter to determine whether the rent being charged by 305 Riverside is in fact the lawful rent. Therefore, the court rejects 305 Riverside's reargument request as meritless.

305 Riverside also argues that this court erred in determining that plaintiffs had established a statutory and/or contractual basis to support their cause of action for legal fees. The court's April 16, 2012 decision indicated that plaintiffs were justified in relying upon Rent Stabilization Law § 26-516 (a) (4) and 9 NYCRR 2526.1 (d), to support their legal fees claim. *See* Notice of Motion, Welikson Affirmation, Exhibit A. However, 305 Riverside now argues that "only DHCR may assess attorney's fees in an overcharge complaint." *Id.*; Welikson Affirmation, ¶ 26. This argument by 305 Riverside is rejected, as no provision of either statute purports to limit this court's adjudicatory powers to less than those afforded the DHCR.

Moreover, if such a provision did exist, it would plainly fall afoul of this State's constitution, which established this court as enjoying powers of general jurisdiction in all matters of law and equity, save claims against the state. NY Const. Art. 6, § 7. Therefore, the portion of 305 Riverside's motion that seeks leave to reargue is denied.

Defendant's Motion to Renew

A motion to renew must be based on "material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court." *In re Beiny*, 132 AD2d 190, 209-210 (1st Dept 1987), *citing Foley v Roche*, 68 AD2d 558, 568 (1st Dept 1979). "Renewal is not available as a 'second chance' for parties who have not exercised due diligence in making their first factual presentation." *Chelsea Piers Mgt. v Forest Elec. Corp.*, 281 AD2d 252 (1st Dept 2001), citing *Rubinstein v Goldman*, 225 AD2d 328 (1st Dept 1996).

In seeking renewal, 305 Riverside argues that this court should grant its previous motion for summary judgment based on allegedly "new evidence". 305 Riverside argues that its alleged new documentary evidence regarding individual apartment improvements, shows that it performed certain repair/renovation work in apartment 9E in *2004*, and contends that such work justified its raising the apartment's base rent, thus, the rent being charged plaintiffs is the lawful rent. *See* Amended Notice of Motion, Welikson Affirmation, ¶¶, 4, 27-37. However, evidence from *2004* can hardly be considered "new documentary evidence", as asserted by 305 Riverside. Moreover, 305 Riverside does not argue that it recently became aware of such evidence, or that it recently obtained such evidence, thus, such evidence clearly appears to have been in 305

Riverside's possession at the time it filed its prior motion for summary judgment. As stated, a motion for renewal, is not to be utilized to provide the movant with a second chance, for not supplying proof which was in existence and in its possession at the time of filing of the initial motion, and to assert new arguments. The court notes that, generally, parties are entitled to one motion for summary judgment. *See National Enterprises Corp.v. Dechert Price & Rhoads*, 246 AD2d 481 (1st Dept)(multiple summary judgment motions should be discouraged absent newly discovered evidence or sufficient cause).

Moreover, even if this court were to consider 305 Riverside's alleged new evidence, such evidence does not establish 305 Riverside's entitlement to dismissal, *as a matter of law*. Specifically, much of the alleged "new documentary evidence" is not in admissible form as required, to provide a sufficient basis to grant summary judgment in favor of 305 Riverside on its claim that the rent currently being charged is lawful. *See Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065 (1979). While an affidavit by 305 Riverside's agent is supplied in support of the within motion, no proper evidentiary foundation is laid for each of the exhibits, authenticating each document. The "Registration of Apartment Information" from DHCR is not certified and, significantly, fails to confirm the calculations in rent, as alleged by 305 Riverside. [Exh. A, Amended Notice of Motion]. Moreover, there is no indication or proof that the cancelled checks supplied in the moving papers were in fact issued to the non-party contractor, for improvements actually made to the subject apartment. Additionally, it is unclear from the proof submitted, which consists merely of an unauthenticated "proposal for Construction Services at : 305 Riverside Drive, Apt. #9E", without any supporting testimony as to whether such alleged construction work, costing allegedly a lump sum amount of $39,850, was for

improvements to the subject apartment, as opposed to mere repairs. [Exh. B, Amended Notice of Motion]

Further, it would be unjust to, in essence, provide defendant 305 Riverside with a second opportunity to seek summary judgment, based upon documentary proof which it is *undisputed that it refused to exchange* with plaintiffs during the course of discovery, due to defendant's position that such proof was not relevant to this case.[1] Thus, that portion of 305 Riverside's motion for renewal is denied.

Plaintiffs' Cross-Motion to Preclude

Plaintiffs' cross-motion which seeks an order striking defendant's new evidence from the record and precluding defendant from offering evidence of individual apartment improvements, due to its refusal to disclose and turn over such information and documentation during discovery is denied as plaintiffs' discovery related motion is not supported by an affirmation of good faith as required. *See* 22 NYCRR §202.7(a). 22 NYCRR §202.7(a), provides, in relevant part that no motion relating to discovery shall be filed unless it includes, "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion". Such affirmation "shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions". 22 NYCRR §202.7[c]. Here, no such affirmation is supplied.

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[1] During the course of discovery, defendant failed to supply rent records or other documentary proof during the course of discovery beyond the four-year statue of limitations which it argued applied in this case; however, as indicated above and in this court's decision dated April 12, 2012, the four year statute is not a bar to looking beyond such time period to determine if the rent being charged plaintiffs is lawful.

Moreover, while the discovery contained in 305 Riverside's motion was provided post note of issue, plaintiffs have not alleged that they have been prejudiced. Further, it should come as no surprise to plaintiffs that, based upon this court's decision dated April 12, 2012, 305 Riverside supplied additional documentary discovery, since the parties' counsel *specifically* discussed the potential for supplemental documentary discovery, at the deposition of 305 Riverside's witness on January 31, 2012, dependant upon this court's determination of 305 Riverside's motion for summary judgment. *See* Exh. J, Notice of Cross-Motion, Ari Paul EBT, at 50, lines 20-25; at 51, lines 2-9; at 52, lines 14-16.

DECISION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 2221, of defendant 305 Riverside Corp. a/k/a 305 Riverside Dr. Corporation is, in all respects, denied; and it is further

ORDERED that the cross motion of plaintiffs Mark Dignam and Laura Leopard is, in all respects, denied; and it is further

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

Dated: New York, New York
April 15, 2013

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

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