

Altschuler v Jobman 478/480, LLC
2013 NY Slip Op 32323(U)
September 26, 2013
Sup Ct, New York County
Docket Number: 603556/2009
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA

PART 19

Justice

Index Number : 603556/2009
ALTSCHULER, LANE
vs.
JOBMAN 478/4780, LLC
SEQUENCE NUMBER : 005
COMPEL DISCLOSURE

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). _____

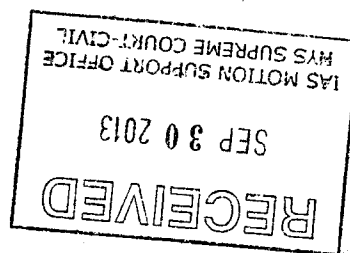
Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 9/26/13
which disposes of motion sequence(s) no. 005 and 006

FILED

OCT 01 2013

**NEW YORK
COUNTY CLERK'S OFFICE**



Dated: 9/26/13

(Signature), 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

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

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

-----X
LANE ALTSCHULER,

Plaintiff,

Index Number: 603556/2009

Submission Date: 5/22/13

- against -

JOBMAN 478/480, LLC.,

DECISION AND ORDER

Defendant.
-----X

For Plaintiff:

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

Papers considered in review of this motion to compel disclosure (motion seq. no. 005):

Notice of Motion/Affirmation of Counsel/Memo of Law.....1
Affirm. of Counsel in Opp. to Motion.....2

Papers considered in review of this motion for a so-ordered subpoena (motion seq. no. 006):

Notice of Motion/Affirmation of Counsel/Memo of Law.....1
Affirm. of Counsel in Opp. to Motion.....2

FILED
OCT 01 2013

HON. SALIANN SCARPULLA, J.:

**NEW YORK
COUNTY CLERK'S OFFICE**

Motion sequence numbers 005 and 006 are consolidated for disposition.

In this rent overcharge action, plaintiff Lane Altschuler ("Altschuler") moves:

(1) for an order compelling defendant Jobman 478/480, LLC ("Jobman") to produce documents in response to Altschuler's Second Notice to Produce; and (2) for a so-ordered subpoena directing Division of Housing and Community Renewal ("DHCR") to produce documents sufficient to determine the proper base rent under DHCR's default formula.¹

¹ The DHCR default formula is "the lowest rent charged for a rent-stabilized apartment with same number of rooms in the same building on the relevant base date." *Thorton v. Baron*, 5 N.Y.3d 175, 180 n.1 (2005); *Levinson v. 390 West End Assocs., LLC*, 22 A.D.3d 397, 401 (1st Dep't 2005).

Altschuler is a tenant residing in 478 Central Park West, Apt. 5A, New York, NY (“the Apartment”). In the complaint, Altschuler alleged that Jobman unlawfully charged market rate rents even though the Apartment is rent-stabilized.

In my January 16, 2013 decision and order, I granted Altschuler’s cross-motion for summary judgment on his rent overcharge claim as to the issue of liability. I further found that I must disregard the free market rent in effect on the base date in calculating the rent overcharge and that I must determine the proper base rent. I then ordered an immediate trial on damages to determine the amount of the rent overcharge, treble damages, and attorney’s fees. Subsequently, on February 11, 2013, I so-ordered a stipulation allowing Altschuler to move for damages discovery within forty-five days.

On February 11, 2013, Altschuler served Jobman with a Second Notice to Produce requesting documents concerning the Apartment and all comparable units in the building including lease agreements, rent rolls, registration statements, and other documents concerning deregulation, adjustments, and improvements to the units.²

On March 15, 2013, Jobman responded to the Second Notice to Produce. Although Jobman acknowledged that Altschuler is entitled to documents concerning the Apartment, Jobman objected to Altschuler’s requests for documents concerning other

² Altschuler also seeks documents concerning the adjacent building, 480 Central Park West, on the grounds that this building is also owned by Jobman and currently for sale with 478 Central Park West as a single condominium offering.

comparable units in the building as overbroad, burdensome, and not relevant to issues in this action.

On March 8, 2013, Altschuler's counsel wrote to DHCR requesting the proper base rent for the Apartment under the default formula in order to calculate the amount of the rent overcharge. By letter dated March 26, 2013, DHCR stated that it could not provide the default formula rent for the Apartment without a so-ordered subpoena.

Altschuler now moves to compel Jobman to produce documents necessary to calculate the base rent under the default formula and for a so-ordered subpoena to DHCR. Altschuler argues that the default formula applies in this case because the Court found, in its January 16, 2013 decision and order, that the Apartment was improperly deregulated and that fraud had tainted the base rent amount in effect on November 20, 2005.

In opposition, Jobman argues that the motions should be denied because the proper base rent should not be determined by using the default formula. Specifically, Jobman argues that Altschuler failed to allege circumstances that warrant the application of the default formula such as an illusory tenancy or that Jobman circumvented the laws.

Jobman claims that this is "a *Roberts* type J-51 case" and that it deregulated the Apartment in good faith reliance on DHCR's advisory opinion which was overturned by *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270 (2009). Jobman contends that the default formula does not apply to *Roberts* type cases, and that the proper base rent should instead be determined by reviewing the rental history of the Apartment.

Discussion

CPLR § 213(a) and RSL § 26-516 provide that a rent overcharge claim is subject to a four-year statute of limitations. Consistent with the statute of limitations, a rent overcharge claim is calculated using the legal regulated rent in effect on the “base date” – the date four years prior to the filing of the complaint – plus any lawful increases and adjustments. RSC § 2520.6(f); RSL § 26-516(a)(i). Under CPLR § 213(a), 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. *See also* RSL § 26-516(a)(2).

However, where a rent overcharge complaint alleges fraud, the court must look beyond the four year base date and examine the entire rental history to “ascertain whether the rent on the base date is a lawful rent.” *Grimm v. State Div. of Hous. & Cmty. Renewal Office of Rent Admin.*, 15 N.Y.3d 358, 366 (2010). Where the court finds that no reliable rent records exist and that fraud has tainted the base rent, the court employs the default formula to set the proper base rent. *Thorton v. Baron*, 5 N.Y.3d at 181; *Grimm*, 15 N.Y.3d at 367.

Further, in *72A Realty Associates v. Lucas*, the First Department recently held that 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.” 101 A.D.3d 401, 403 (1st Dep’t 2012).

In my prior decision, I found that the Apartment was improperly deregulated in 2000 because Jobman received J-51 benefits from 1997 to 2011. I further found that Altschuler is entitled to recover any rent overcharges occurring after November 20, 2005, and that I must disregard the free market rent of \$3,500 in effect on that date when calculating the amount of the rent overcharges.

Based on the parties’ submissions, I find that the proper base rent must be determined using DHCR’s default formula. In reviewing the rental history of the Apartment, I find that the default formula applies because no reliable rent records exist after 1995 from which the proper base rent can be determined. The Apartment was improperly deregulated between 1995 and 1996 when Jobman raised the rent from \$422.02 to more than \$2,000, and the Apartment was improperly deregulated again in 1998 and 2000. As no reliable records exist as to rental history, the application of the DHCR’s default formula is warranted to determine the proper base rent on November 20, 2005.³

³ Although Jobman has repeatedly claimed that it deregulated the Apartment in good faith reliance on the DHCR advisory opinion, Jobman has not presented any evidence to support this claim. Furthermore, as stated in my previous decision, the Apartment could not have been lawfully deregulated under the DHCR advisory opinion because the building was rent-stabilized solely based on its receipt of J-51 benefits. *Roberts*, 13 N.Y.3d at 286.

Jobman argues that the proper base rent should be determined by examining the Apartment's rental history, but Jobman does not offer any insight as to the amount of the proper base rent. Given the irregular rental history of the Apartment from 1995 to 2005, and the absence of documents to support any of the rent increases, the court cannot determine from the rental history what the base rent would have been if the Apartment had not been improperly deregulated.

For the above stated reasons, I grant Altschuler's motion for a so-ordered subpoena to DHCR in order to obtain the necessary documents to determine the proper base rent amount under the default formula, but only with respect to rents charged for comparable apartment units in 478 Central Park West.

Based on my decision to grant Altschuler's motion for a so-ordered subpoena, I deny Altschuler's motion to compel Jobman to produce documents necessary to determine the proper base rent. Altschuler's motion to compel is duplicative and burdensome because it seeks information that will be provided by DHCR.

In accordance with the foregoing, it is

ORDERED that plaintiff Lane Altschuler's motion to compel Jobman to comply with the Second Notice to Produce (motion seq. no. 005) is denied; and it is further

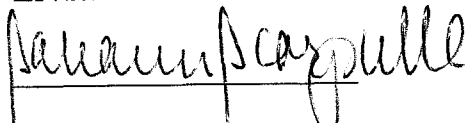
ORDERED that plaintiff Lane Altschuler's motion for a so-ordered subpoena directing DHCR to produce documents sufficient to determine the Apartment's proper base rent under the default formula (motion seq. no. 006) is granted as described above; and it is further

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
September 26, 2013

ENTER:


Saliann Scarpulla, J.S.C.

FILED
OCT 01 2013
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