

Cohen v 305 Riverside Corp.

2014 NY Slip Op 30764(U)

March 28, 2014

Sup Ct, New York County

Docket Number: 102468/2012

Judge: Milton A. Tingling

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MILTON A. TINGLING
J.S.C.
Justice

PART 44

Cohen
305 Riverside

INDEX NO. 102468/12
MOTION DATE 7/22/13
MOTION SEQ. NO. 1

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 in accordance
with annexed decision. Conference on 6/23/14.

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

FILED

MAR 28 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/25/14

met, 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
JUSTIN COHEN AND OLIVIA SERAFINI-SAULI,

Index No. 102468/2012

Plaintiffs,

-against-

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

Decision

FILED

MAR 28 2014

Defendant.

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiffs move for an Order compelling Defendant, its principals, officers, directors, agents, managers and/or employees to disclose evidence and or documents that Defendant did not provide in discovery or alternatively, for preclusion of such evidence and, or documents; and granting Plaintiffs such other and further relief this Court deems just and proper.

In May 1998, Defendant 305 Riverside Dr. Corporation filed a Petition for High Income Rent Deregulation for 305 Riverside 11B, New York, NY 10025, from here on known as the subject premises, which was granted by the DHCR. Plaintiffs Justin Cohen and Olivia Serafini-Sauli entered into a non rent stabilized lease with the Defendant in 2010 for the subject premises. In 2012, Plaintiffs filed a lawsuit against Defendant. They alleged that because Defendant was a beneficiary of the New York City's J-51 tax benefit program, from the tax year 1999-2000 through the tax year 2009-2010, the subject premises was ineligible for high rent deregulation and the alleged deregulation was a nullity.

Plaintiffs served Defendant with a Demand for Discovery and Inspection, in which they sought information regarding the rental history, including records from more than four years prior to the filing of the Plaintiffs' complaint. Defendant contended that under Rent Stabilization Law §26-516 (a)(2), and additionally Rent Stabilization Code §2526.1(a) (2)(ii) and CPLR §

213-a, Plaintiffs were not entitled to records going beyond four years prior to the filing of their complaint, from here on known as the base date (April 18, 2008) and the rent on the base date would be the legal rent for the purpose of the lawsuit.

Rent Stabilization Law §26-516(a) (2) provides that:

“No award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed ... This paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing”.

Plaintiffs filed a motion for an Order to compel disclosure of the requested documents or for preclusion of them. Defendant filed an Affirmation in Opposition in response. Plaintiffs then filed an Affirmation in Reply, to which the Defendant filed a Sur-Reply Affirmation. Plaintiffs then filed an Affirmation in Sur-Sur-Reply.

Plaintiffs allege that Defendant has a long history of attempting to unlawfully deregulate apartments and/or unlawfully treating rent stabilized apartments as market rate units. Plaintiffs claim that Defendant has treated the subject premises as a market rate unit, with knowledge that it is ineligible for rent deregulation due to its J-51 benefits. Plaintiffs allege that this constitutes fraud and therefore, under the law, they are entitled to rental history prior to the base date.

Plaintiffs allege their claim Defendant has acted fraudulently is supported by the fact that several lawsuits have been brought against the Defendant by tenants alleging rent overcharge. Plaintiffs further allege that Defendant's failure to properly and timely file annual registration statements support a finding that Defendant has acted fraudulently.

Plaintiffs also contend that the Court ruled in *72A Realty Assocs. v. Lucas* that when an apartment was wrongfully deregulated while the landlord was in receipt of J-51 benefits, the apartment's entire rental history should be examined to determine the credibility of the alleged base date rent. Plaintiffs contend that the ruling applies here. In addition, Plaintiffs claim that the March 16, 1999 DHCR deregulation order for the subject premises stated that the order would take effect following the expiration of the existing lease. Plaintiffs contend that Defendant has not provided a date for when the existing lease expired, thus not providing an accurate date for when the deregulation order took effect. Plaintiffs allege that the DHCR registration history for the subject premises showed that Defendant listed it as temporarily exempt due to "OWNER OCCUPIED/EMPLOYEE" by virtue of a lease existing from May 1, 1997 to April 30, 1999. Plaintiffs claim that Defendant deemed the subject premises "temporarily exempt" when it submitted its petition for deregulation. This, they claim, further calls the credibility of the base date into question.

Defendant contends that the law requires more than just mere fraud to permit an investigation of an apartment's rental history past the base date, but rather evidence of a landlord's fraudulent scheme to deregulate. Defendant contends that there is no evidence on the record that it acted fraudulently, let alone evidence of a fraudulent scheme to deregulate.

Defendant contends that this case is readily distinguishable from *Lucas* because unlike in *Lucas*, where the basis for deregulation was a vacancy when the legal regulated rent was \$2,000 or more, the basis of deregulation here was a lawful Order by DHCR. Defendant also claims that the *Lucas* decision was based in part on a finding that the record did not clearly establish the validity of the rent increase that brought the rent stabilized amount above \$2000, and that in the

present action, the DHCR unequivocally found that the legal regulated rent was \$2,000 or more on the applicable date.

The question raised before this Court is whether the law entitles the Plaintiff to go beyond the statutory limit and examine the subject premises' rental history prior to the base date.

It is well established that when there is evidence of a landlord's fraud on the record, plaintiffs are entitled to rental history records preceding the statutory limit (see Thornton v. Baron, 800 N.Y.S.2d 118 (N.Y. Ct. App. 2005)). In Grimm v. DHCR, the Court of Appeals stated that an increase in rent alone is insufficient to establish a "colorable claim of fraud" (see Grimm v. DHCR, 912 N.Y.S.2d 491 (Court of Appeals 2010)). There needs to be evidence of the "landlord's fraudulent scheme to remove an apartment from the protections of rent stabilization" (see Grimm v. DHCR, *supra*). If such evidence exists, then the "excluded" rental history can be examined for the sole purpose of determining the reliability of the base date rent (see Grimm v. DHCR, *supra*).

Here, Defendant was in receipt of J-51 benefits while treating the subject premises as deregulated. Landlords who are beneficiaries of J-51 tax benefits are ineligible for high rent deregulation (see Roberts v Tishman Speyer Properties, L.P., 932 N.Y.S.2d 45 (1st Dept. 2011); Gersten v 56 7th Ave., LLC, 928 N.Y.S.2d 515 (1st Dept. 2011)). Defendant filed its petition for deregulation in 1998, several years before the *Roberts* decision was made. Therefore, it cannot be concluded that Defendant filed its petition for deregulation with knowledge that it was ineligible for deregulation due to its J-51 benefits. Furthermore, the mere fact that Defendant was in receipt of J-51 benefits while treating the subject premises as deregulated does not, on its own, demonstrate that Defendant was making a willful misrepresentation. Therefore, the evidence and allegations made in regard to Defendant's J-51 benefits do not constitute sufficient evidence of a

fraudulent scheme to destabilize. Likewise, the fact that Defendant has been sued before for rent overcharge and the fact Defendant has made late registration statements, while questionable, do not sufficiently suggest a fraudulent scheme to destabilize because they do not even sufficiently demonstrate that Defendant had intent to defraud.

Thus, it is apparent that the evidence presented by the Plaintiffs do not meet the standard for fraud required by the law.

In *72A Realty v. Lucas*, the Appellate Division upheld the trial court's ruling that apartments in buildings receiving J-51 benefits are retroactively exempt from rent destabilization (see *72A Realty v. Lucas*, 955 N.Y.S.2d19 (N.Y. Ct. App. 2012)). However, it overturned the trial court's ruling that the statutory base date should be applied, stating that "While that date is correct under CPLR 213-a, in light of the improper deregulation of the apartment and given that the record does not clearly establish the validity of the rent increase that brought the rent-stabilized amount above \$2,000, the free market lease amount should not be adopted, and the matter must be remanded for further review of any available record of rental history necessary to set the proper base date rate" (see *72A Realty v. Lucas*, *supra*).

Here, rent deregulation of the subject premises came about as a result of a DHCR order, not a vacancy like in *Lucas* (see *72A Realty v. Lucas*, *supra*). However, this does not exclude the subject premises from retroactive exemption because the Appellate division did not limit its ruling to apartments that became deregulated as a result of a vacancy (see *72A Realty v. Lucas*, *supra*). The issue here is whether the record clearly establishes the validity of the base date rent. The fact that a DHCR order deregulated the subject premises does not, by itself, conclusively establish that the base date rent is reliable. Plaintiffs allege that Defendant failed to make timely registration statements. A landlord's failure to register, on its own, is not sufficient to question

the validity of a base date rent (see Rosenzweig v. 305 Riverside Corp., 35 Misc.3d 51103 (N.Y. Sup. Ct. 2012); Dodd v. 98 Riverside Drive, LLC., 2012 N.Y. Slip Op 31653 (N.Y. Sup.Ct. 2012); Baron v Laurence Towers Co, LLC., 2012 N.Y. Slip Op 32177 (N.Y. Sup. Ct. 2012)).

Plaintiffs also allege Defendant has not provided an actual date for when the Deregulation order took effect. Plaintiffs further allege Defendant listed the subject premises as temporarily exempt due to "OWNER OCCUPIED/EMPLOYEE" when it submitted its deregulation petition. Because the record is not clear as to when the deregulation order was effectuated, the validity of the 2008 base date rent is questionable.

Thus, in light of the improper deregulation of the subject premises and given that the record does not clearly establish the validity of the base date rent, the Court finds that that any available rental history should be searched to determine the validity of the base date rent. The Court's ruling should not be construed as a finding of wrong doing on the part of the Defendant.

Accordingly, this Court grants Plaintiffs' request for an Order directing Defendant to provide Plaintiffs with discovery pertaining to the rents and rent increases taken in which the subject premises remains unregistered and during which the subject premises was treated as unregulated by the defendant, and discovery regarding the history which led to the rent exceeding the \$2,000 per month threshold . This constitutes the Decision and Order of the Court.

Handwritten initials

FILED

MAR 28 2014

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J.S.C.

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