

Altman v 285 W. Fourth LLC

2014 NY Slip Op 32702(U)

October 9, 2014

Supreme Court, New York County

Docket Number: 155942/14

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 58

-----X

RICHARD ALTMAN,

Plaintiff,

-against-

285 WEST FOURTH LLC,

Defendant.

-----X

**DECISION, ORDER &
JUDGMENT**
Index No. 155942/14

DONNA MILLS, J.:

Plaintiff Richard Altman brings this action for a declaratory judgment that he is the legal rent-stabilized tenant of apartment 8 located at 285 West 4th Street, New York, New York, a building owned by defendant 285 West Fourth LLC. Plaintiff also seeks an injunction requiring defendant to tender him a rent-stabilized lease, for a determination of lawful rent, for a money judgment for an overcharge, and other relief.

Plaintiff now moves, pursuant to CPLR 602 (b), for an order consolidating this action with a summary proceeding commenced by the defendant in the Housing Part of the Civil Court of the City of New York, on July 11, 2014, entitled *285 West Fourth LLC v Altman*, L&T Index No. 70967/14. Plaintiff also moves, pursuant to CPLR 3211 (a) (7) and (b), to dismiss defendant's first and second counterclaims and its first, third, fourth, fifth, sixth and seventh affirmative defenses. Defendant cross-moves for summary judgment dismissing the complaint and for monetary damages on its first and second counterclaims.

FACTS

The essential facts are not in dispute. In November 2003, plaintiff entered into a sublease agreement with one Keno Ride (Rider), who, at that time, was the prime tenant of record of the apartment. Rider was a tenant of the apartment pursuant to a rent-stabilized lease which he had previously entered into with Equity Properties Corp. (Equity Properties), the prior owner of the building. At the time of the subleasing, Rider's rent was \$1,829.49 per month, and his lease was set to expire on October 31, 2005. The term of plaintiff's sublease was from December 1, 2003 until October 31, 2005. Plaintiff agreed to pay Rider a monthly rent of \$2,012.44, representing the latter's monthly rent plus 10% (\$182.95), allegedly because the apartment was furnished presumably pursuant to Section 26-511 (c) (12) (a) of the New York City Administrative Code. Plaintiff alleges that a copy of the written sublease was submitted to Equity Properties for its approval, but that the landlord never objected or even responded.

In December 2004, 10 months after plaintiff commenced his sub-tenancy, Equity Properties commenced a summary non-payment proceeding (L&T Index No. 105090/04) against both him and Rider, claiming it was entitled to the additional 10% that plaintiff was paying Rider, namely \$182.95 a month, since December 2003, together with \$2,012.44 for the month of December 2004 (Cmplt., Ex. B). The non-payment proceeding was settled on March 8, 2005, pursuant to a written stipulation of settlement (2005 Stipulation), whereby Rider, then living in California, agreed to surrender all of his

rights to the apartment effective March 18, 2005 (*id.*, Ex. C). The 2005 Stipulation further provides that:

- “5. On April 1, 2005, landlord to deliver standard form of decontrol lease to respondent Altman. The lease commencement date shall be 3/18/05. Its expiration date shall be October 31, 2006.
- 6. The monthly rent under the lease shall be \$2,428.62 for the months of 4/05, 5/05, 6/05, 7/05, 8/05, 9/05, and 10/05. Monthly rent for the remaining rents under the lease, 11/05 through and including 10/31/06 shall be \$2261.25.”

(*id.*, Ex. C). Plaintiff, an attorney, represented himself in this proceeding. On March 16, 2005, Rider executed a “Surrender Agreement,” in which he gave “possession of the leased Premises and the keys to the Landlord,” agreed that he had “done nothing which would give anyone a claim against the Premises, other than a sublease to Richard A. Altman, which sublease expires on October 13, 2005,” and each side was released from all obligations of the lease (*id.*, Ex. C).

Thereafter, plaintiff signed a lease with Equity Properties for a term beginning on March 18, 2005 and ending on October 31, 2006 (Cmplt., Ex. D). The title of the lease is “Standard Form of Apartment Lease (For Apartments Not Subject to the Rent Stabilization Law)” (*id.*). Attached thereto was a “Deregulation Rider For First Unregulated Tenant” signed by plaintiff. It provides that:

“This apartment is not regulated under the rent control or rent stabilization laws of New York State because the legal rent was or became \$2000 or more on vacancy.”

(*id.*). The rider further provides that the last regulated rent of the apartment was

\$1,829.49, and that after adding the statutory vacancy allowance of 23.6%, the new rent became \$2,261.25 and the apartment was deregulated.

In November 2005, plaintiff was again back in Civil Court when Equity Properties commenced a non-payment proceeding (L&T Index No. 101845/05) alleging that plaintiff was in arrears in the payment of rent since September 2005 (Cmplt., Ex. E). A second non-payment proceeding was brought in May 2006 (L&T Index No. 071815/06) by the defendant, who had since purchased the building on or about March of 2006. This second petition alleged that plaintiff was in arrears since January 2006. In both of these petitions, counsel for the landlord alleged that the apartment was subject to the Rent Stabilization Law (RSL). However, DHCR had been notified that the apartment had been decontrolled in 2005 due to "high rent vacancy" (*id.*, Ex. F).

On February 14, 2007, plaintiff and defendant entered into a written agreement (the 2007 Agreement), which recites that the March 2005 lease is a "Fair Market Lease" which expired by its terms on October 31, 2006 (Cmplt., Ex. G, ¶ 1). In the 2007 Agreement, plaintiff acknowledged and agreed that defendant had no obligation to offer him a renewal lease, but was willing to offer plaintiff a two-year "Fair Market Renewal Lease," commencing November 1, 2006 at a monthly rental of \$2,600 (*id.*, ¶ 5). A material inducement to defendant agreeing to offer plaintiff a renewal lease was plaintiff's specific acknowledgment that the apartment "is a free market apartment and is not subject to rent regulation of any kind, including Rent Stabilization" (*id.*, ¶ 6).

Plaintiff also agreed to:

“refrain from filing or making any claim of rent overcharge, fair market rent appeal, and any and all other conceivable judicial or administrative proceedings challenging the non regulated status of the [apartment] or the rent set forth in the Lease or Renewal Lease”

(*id.*). The 2007 Agreement is signed by plaintiff “Individually and in his capacity as Attorney” (*id.* at 5), and recites that it was entered into “after extensive negotiations, throughout which the parties were represented and advised by legal counsel” of their choice (*id.*, ¶ 4).

Thereafter, the parties entered into seven subsequent renewal leases; the last renewal lease is dated August 10, 2013 and provides for a monthly rent of \$3,800 (Torres Aff., Ex. E). Defendant alleges that from 2008 through 2014, it brought 10 additional non-payment proceedings against plaintiff (Answer, ¶ 25; Torres Aff., ¶ 19 & Ex. G). In each of these petitions, defendant pled that the apartment was not subject to rent stabilization, and plaintiff never challenged the same (Answer, ¶¶ 26, 27; Torres Aff., ¶ 20 & Ex. H).

Plaintiff commenced this lawsuit on June 17, 2014. Defendant served and filed an answer on or about July 15, 2014 asserting two counterclaims for sanctions pursuant to 22 NYCRR § 130-1.1 and fraud in the inducement. Defendant also commenced, on or about July 8, 2014, yet another non-payment proceeding against plaintiff in Civil Court (L&T Index No. 70967/14) alleging that plaintiff is in arrears of his current monthly rent of \$3,800 since May 14, 2014. This latest petition alleges that the apartment is exempt from

rent stabilization, because the apartment became vacant after 1994 and the vacancy rent was \$2,000 or more (*see* Rader Affirm., Ex. A, ¶ 7).

DISCUSSION

Plaintiff argues that the 2005 Stipulation and the 2007 Agreement are both void, because an apartment cannot be deregulated by private agreement. Plaintiff relies on *Jazilek v Abart Holdings, LLC* (10 NY3d 943 [2008]), in which the Court of Appeals held that a so-ordered stipulation between the landlord and a subtenant in Housing Court purporting to increase the rent beyond the \$2,000 threshold and deregulate a rent-stabilized apartment was void. Plaintiff argues that vacancy deregulation pursuant to the RSL can occur if, and only if, the legal regulated rent was more than \$2,000 at the time Rider surrendered his rights to the apartment and the apartment actually became vacant. In other words, plaintiff contends that (1) his continued occupancy and (2) the fact that Rider's rent was only \$1,829.49 at the time Rider surrendered his rights to the apartment did not entitle the landlord to a vacancy decontrol. Plaintiff also contends that defendant has admitted in the summary proceeding it commenced in 2006 that the apartment was rent-stabilized and that defendant should be estopped from now arguing to the contrary.

According to defendant, the apartment was deregulated by operation of law when the prime tenant, Rider, surrendered his rights to the apartment in March 2005 and the prior landlord entered into a new lease with plaintiff at a lawful monthly rent exceeding \$2,000 after adding the statutory vacancy increase. Defendant contends that the *Jazilek*

case is distinguishable on its facts, and that even if any of the non-payment petitions did erroneously state that the apartment was subject to rent stabilization, it is well settled that a rent-regulated tenancy cannot be created by waiver or estoppel.

Beginning in 1993, the New York State Legislature enacted the Rent Regulation Reform Act (RRRA) which amended the RSL to provide for the deregulation of certain high rent apartments (*Roberts v Tishman Speyer Props., L.P.*, 62 AD3d 71, 77 [1st Dept], *aff'd* 13 NY3d 270, 280 [2009]). Both the RSL and the Rent Stabilization Code (RSC) exclude housing accommodations which become vacant between June 19, 1997 and June 24, 2011 and the legal regulated rent is \$2,000 or more per month (NYC Admin Code §§ 26-403 [e] [2] [k], 26-504.2 [a]; 9 NYCRR § 2520.11 [r] [4]). According to the First Department:

“The high rent or luxury decontrol provisions of the RRRA, as amended in 1997, now exclude housing accommodations from the scope of the RSL when either: the legal regulated rent is \$2,000 or more and the combined household income exceeds \$175,000 for two consecutive years (RSL § 26-504.1) or the tenant vacates the apartment and the legal rent, plus vacancy increase allowances and increases permitted for landlord improvements, is \$2,000 or more (RSL §§ 26-504.2; 26-511[c][5-a]) [emphasis added].”

(*Roberts v Tishman Speyer Props., L.P.*, 62 AD3d at 78).

Plaintiff’s counsel is correct that the controlling statute is section 26-504.2 (a) of the New York City Administrative Code, entitled “Exclusion of high rent accommodations.” However, he quotes only a portion of the statute. The first sentence of this statute reads in full:

“Housing accommodations” shall not include: any housing accommodation which becomes vacant on or after April first, nineteen hundred ninety-seven and before the effective date of the rent act of 2011 and where at the time the tenant vacated such housing accommodation the legal regulated rent was two thousand dollars or more per month; *or, for any housing accommodation which is or becomes vacant on or after the effective date of the rent regulation reform act of 1997 and before the effective date of the rent act of 2011, with a legal regulated rent of two thousand dollars or more per month* [emphasis added].”

As one commentator explained:

“In New York City, rent-stabilized units that became vacant became vacant between April 1, 1997, and June 18, 1997, could be deregulated only if they were renting for \$2,000 prior to vacancy. Under the Rent Regulation Reform Act of 1997, units . . . that were vacant on or after June 19, 1997, may be deregulated if the rent after vacancy reaches the \$2,000 threshold through the application of rent-guidelines vacancy increases, a vacancy bonus, and/or individual apartment increases.”

(Daniel Finkelstein & Lucas A. Ferrara, *Landlord and Tenant Practice in New York* § 11:109 at 11-60 [West’s NY Prac Series, vol F, 2005]).

The RSC makes the distinction between pre- and post- June 19, 1997 vacancies even clearer. Section 2520.11 (r) of the Rent Stabilization Code excludes housing accommodations which:

“(3) became vacant on or after April 1, 1997 but before June 19, 1997, where the legal regulated rent at the time the tenant vacated was \$2,000 or more per month; or

(4) became or become vacant on or after June 19, 1997 but before June 24, 2011, with a legal regulated rent of \$2,000 or more per month.”

In this case, there is no dispute that, at the time Rider surrendered his rights to the apartment, his rent was \$1,829.49 (Cmplt., ¶ 14). Plaintiff also admits that Equity

Properties “was entitled to increase the last rent paid by Rider by 20% when it entered into a new lease with plaintiff” (*id.*, ¶ 65; *see also* RRRA of 1997 [L 1997, ch 116] [for a two-year lease, landlord can add a 20% vacancy increase]). Accordingly, Rider’s rent of \$1,829.49 plus a 20% statutory vacancy increase,¹ exempted the apartment from the RSL.

The Court of Appeals decision in *Jazilek v Abart Holdings, LLC* (10 NY3d 943) does not support plaintiff’s claim for rent stabilization coverage. In that case, the original tenant’s legal rent was \$812.34 at the time he vacated the apartment and in settlement of a holdover proceeding against the allegedly illegal subtenant, Jazilek, the owner offered him a two-year unregulated, market-rate lease in his name. Although the highest possible legal rent at the time was only \$974.81, after applying the 20% vacancy increase (*see Jazilek v Abart Holdings, LLC*, 72 AD3d 529, 531 [1st Dept 2010]), Jazilek’s rent was set at \$2,200 per month with a preferential rent of \$1,800 for the first two-year term only. The landlord’s sole basis for the rent increase was the Housing Court stipulation of settlement. The Court of Appeals ruled that since the new rent being charged Jazilek “exceeded the legal limit under the Rent Stabilization Code,” the Housing Court stipulation violates the law and “is void as against public policy” (10 NY3d at 944).

Plaintiff’s second argument is that there had been no actual vacancy of the apartment due to his own continued occupancy, first as a subtenant of Rider and then as a

¹ Although Equity Properties applied a 23.6% vacancy increase (*see* Cmplt., Ex. D), even using the lower 20% figure which plaintiff admits is proper (*id.*, ¶ 65), it raised the legal regulated rent to over \$2,000 per month.

tenant in this own right pursuant to the March 2005 lease with Equity Properties. To support this argument, plaintiff relies on *132132 LLC v Strasser* (19 Misc 3d 658 [Civ Ct, NY County 2008], *aff'd* 24 Misc 3d 140(A) [App Term, 1st Dept 2009]). In the *Strasser* case, the original or statutory tenant did not vacate or surrender possession of the apartment at the time the landlord added a co-tenant and offered the two gentlemen a five-year unregulated lease at a monthly rental of \$2,200. In rejecting the landlord's claim that this new rent qualified the apartment for luxury deregulation, the court explained:

"It is clear from the aforementioned that a vacancy increase may be permissible even when there is no hiatus in the tenant of record's occupancy; however, this increase, in and of itself, does not remove the apartment from rent stabilization. Quite the contrary, where there is no hiatus in possession or actual physical vacancy of the premises by the original tenant, vacancy decontrol cannot apply."

(19 Misc 3d at 660, citing *Matter of Ghigone v Joy*, 55 NY2d 853 [1982]).

Likewise, in *Valsac 906 LLC v Orenstein* (42 Misc 3d 1206 [A], 2014 NY Slip Op 50000 [U] [Civ Ct, NY County 2014]), the court held that a landlord had illegally deregulated an apartment where, as here, the original tenant signed a surrender agreement and then a new unregulated ten-year lease was entered into with the tenant and her roommate. However, in that case, the court found that the tenant did not actually vacate the apartment and that her surrender "was never actually intended" and "was merely a paper fiction" (42 Misc 3d 1206[A], *6).

In the present case, there is no dispute that the original tenant, Rider, surrendered his rights to the apartment, both on paper and in fact, in March 2005. Although plaintiff,

at that time, alleges that he had a continued right to possession of the apartment as the legal subtenant of Rider, his rights as a subtenant were subordinate to Rider's lease and the sub-tenancy was set to expire on October 31, 2005. The landlord was under no legal obligation to offer him a renewal lease (*see* NYC Admin Code § 26-511 [c] [12] [g] ["The subtenant shall have no right to a renewal lease."]). However, plaintiff chose not to litigate the 2005 summary non-payment proceeding to its conclusion. He voluntarily signed the 2005 Stipulation, by which he agreed to the termination of Rider's tenancy and thus his sub-tenancy, and agreed to enter into a new lease agreement with the then landlord providing for an additional year of occupancy of the apartment. Thus, although plaintiff never actually gave up possession of the apartment, his legal right to occupancy of the apartment changed from that of a subtenant to a prime tenant. In addition, the 2005 Stipulation never took away any of plaintiff's legal rights, because measuring his tenancy rights as of the date he first took occupancy in December 2003, plaintiff was initially entitled to receive only a deregulated lease of the type he was offered in March 2005 (*see 126 W. 25th St. Realty Co. v Chea*, 40 Misc 3d 141 [A], 2013 NY Slip Op 51485 [U] [App Term, 1st Dept 2013]). Under these circumstances, the court finds that there was a vacancy within the meaning of section 26-504.2 (a) of the New York City Administrative Code.

Finally, the court rejects plaintiff's contention that defendant is estopped from claiming that the apartment was deregulated in March 2005, because the petition in the

non-payment proceeding defendant filed against plaintiff in May 2006 (L&T Index No. 071815/06) alleged that the apartment was subject to the RSL. Even if the record does not reflect that this was an inadvertent error on the part of defendant's then counsel, the law is clear that rent-stabilized status cannot be created or defeated by waiver or estoppel (*546 W. 156th St. HDFC v Smalls*, 43 AD3d 7, 11 [1st Dept 2007]).

For the foregoing reasons, the court grants summary judgment to defendant dismissing the complaint in its entirety. Plaintiff's request for consolidation of this action with the latest Housing Court proceeding is denied as moot.

Defendant's first counterclaim seeks damages in the form of costs and reasonable attorneys' fees in the defense of this action pursuant to 22 NYCRR § 130-1.1 (a). A lawsuit is frivolous if it is "completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law" (*Mascia v Maresco*, 39 AD3d 504, 505 [2d Dept 2007], quoting 22 NYCRR § 130-1.1 [c] [1]). The authority to impose sanctions is left to the court's discretion (*see Landes v Landes*, 248 AD2d 268, 269 [1st Dept 1998]). While the court has determined that defendant is entitled to dismissal of plaintiff's claims, his arguments regarding the vacancy of the apartment are not frivolous within the meaning of 22 NYCRR § 130-1.1 (c) (1). This counterclaim is, therefore, dismissed.

The second counterclaim alleges fraud in the inducement based on the 2007 Agreement, and seeks an award of punitive damages against plaintiff for bringing this

action. This counterclaim is also dismissed. In addition to the provisions of the 2007 Agreement quoted above, this agreement includes the following additional provision:

“In the event Altman shall make any complaint or do anything whatsoever in contravention of the foregoing paragraph or Agreement, then and in that event it shall be conclusively presumed that he entered into this Agreement and the Renewal Lease referred to herein with the present intention of making such complaint and that he has therefore obtained the benefits of this Agreement and such Renewal Lease by fraud in the inducement. *Accordingly, in the event of such a breach, the Renewal Lease shall be deemed null and void ab initio, any monies paid by Altman to Landlord pursuant to this Agreement and the Renewal Lease shall be deemed use and occupancy and not rent and Altman shall be conclusively presumed to be a licensee and not a tenant.*”

(Cmplt., Ex. G, ¶ 7 [emphasis added]). Thus, the 2007 Agreement prescribes its own remedy for a breach by the plaintiff. In addition, punitive damages are generally not recoverable for breach of a contract where the tortious conduct is not directed at the public generally (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff’s motion for consolidation and/or summary judgment is granted only to the extent of dismissing defendant’s first and second counterclaims and the motion is denied in all other respects; and it is further

ORDERED that defendant’s cross motion for summary judgment is granted to the extent of dismissing the complaint, adjudging the issue of rent stabilization in defendant’s

favor, and the motion is denied in all other respects; and it is further

ADJUDGED AND DECLARED that the plaintiff Richard Altman is not entitled to the protection of rent stabilization in connection with his occupancy of the premises located at 285 West 4th Street, Apt. 8, New York, New York 10014, as those premises became an exempt housing accommodation in March of 2005 pursuant to section 26-504.2 (a) of the New York City Administrative Code; and it is further

ADJUDGED that defendant 285 West Fourth LLC, having an address at 145 Huguenot Street, Room 503, New Rochelle, New York 10801, do recover from the plaintiff, Richard Altman, having an address at 285 West 4th Street, Apt. 8, New York, New York 10014, costs and disbursements in the amount of \$_____ as taxed by the Clerk, and that defendant have execution therefore.

Dated: October 9, 2014

ENTER:



J.S.C.
DONNA M. MILLS, J.S.C.

Clerk