

**Tomic v 92 E. LLC**

2016 NY Slip Op 32398(U)

December 7, 2016

Supreme Court, New York County

Docket Number: 151152/2015

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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LISA TOMIC and GORAN TOMIC,

Plaintiffs,

Index No. 151152/2015

-against-

**DECISION/ORDER**

92 EAST LLC,

Defendant.  
-----X

**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for

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Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs commenced the instant action seeking, *inter alia*, reimbursement for alleged rent overcharges. They now move for an Order granting them leave to renew and reargue this court's most recent decision in this action, dated May 17, 2016 (the "Decision"), and granting them leave to amend their complaint. For the reasons set forth below, plaintiffs' motion is granted in part and denied in part.

The relevant facts and procedural history of this case are as follows. Defendant is the current landlord and owner of a residential apartment building located at 92 East Broadway, New York, NY 10002 (the "building") having purchased the building on or about February 20, 2014. Plaintiffs are the current tenants of Apartment 4 (the "Apartment") in the building. Plaintiffs first entered into possession of the Apartment in May 2007 pursuant to a fair market residential lease agreement with defendant's predecessor-in-interest, The Third Dynasty Realty Corp. ("Dynasty"), commencing May 1, 2007 and ending April 30, 2008 with a rent in the amount of \$1,700.00 per

month. Over the next three years, plaintiffs' rent remained stagnant at \$1,700.00 per month. Plaintiffs then entered into a one-year lease commencing May 1, 2011 and ending April 30, 2012 with a rent in the amount of \$1,800.00 per month. Over the next two years, plaintiffs' rent remained stagnant at \$1,800.00 per month. Plaintiffs then entered into another one-year lease with defendant commencing May 1, 2014 and ending April 30, 2015 with a rent in the amount of \$1,872.00 per month.

Prior to plaintiffs' tenancy, the Apartment was registered as rent stabilized with a monthly rent of \$267.23. After a former tenant vacated the Apartment in 2007, the Apartment was removed from rent regulation by Dynasty based on Dynasty's contention that it renovated the Apartment and that these renovations coupled with two statutory rent increases increased the legal regulated rent for the Apartment beyond \$2,000.00.

On or about February 3, 2015, plaintiffs commenced the instant action alleging that the Apartment is still subject to the Rent Stabilization Law ("RSL"), that no rent registrations were filed since 2007, in violation of the RSL, and seeking to recover a rent overcharge calculated from May 1, 2007, the beginning of their tenancy in the Apartment, treble damages and attorney's fees. Thereafter, both the plaintiffs and defendant moved for summary judgment. Defendant argued that it was entitled to summary judgment on the ground that the Apartment is permanently exempt from rent stabilization as a result of the high rent vacancy decontrol that occurred prior to May 1, 2007 based on the alleged improvements made to the Apartment by Dynasty. Further, defendant argued that it was entitled to summary judgment dismissing this action as the rent increases at issue are beyond the four-year statute of limitations for such claims. Plaintiffs disputed the deregulation of the Apartment in 2007. Specifically, plaintiffs challenged defendant's contention that

approximately \$70,000.00 worth of renovation work was done to the Apartment in 2007 to increase the legally allowable rent to over \$2,000.00 per month and disputed defendant's contention that the action was time-barred.

In a decision dated July 23, 2015, this court denied both motions for summary judgment holding that the action was not time-barred because the RSL's four-year statute of limitations is limited to calculating a rent overcharge claim and does not apply when the court is determining whether an apartment is regulated in the first instance. This court also found that there were triable issues of fact, including whether the Apartment is exempt from rent stabilization based on the high rent vacancy decontrol said to have occurred in 2007 due to the alleged improvements made to the Apartment.

Plaintiffs then moved for an Order pursuant to CPLR § 2221(e) granting them leave to renew that decision and upon renewal, granting plaintiffs' motion for summary judgment based on new facts not known to plaintiffs when they made their motion for summary judgment. Specifically, plaintiffs provided the court with a letter dated December 29, 2015 from defendant's counsel to plaintiffs' counsel pursuant to which defendant offered to reimburse plaintiffs for rent overcharges in the amount of \$741.00 for the years 2011 through 2015 based on the fact that defendant is unable to prove that the alleged improvements were actually made to the Apartment as defendant had not received any documentation from Dynasty, the prior owner, regarding such improvements. Pursuant to the letter, defendant also conceded that the Apartment is now regulated under the RSL.

In a decision dated April 13, 2016, this court granted plaintiffs' motion insofar as it granted plaintiff leave to renew this court's decision based on defendant's letter and admission that it cannot

prove that the improvements to the Apartment were ever made and upon renewal, granted plaintiffs summary judgment on their first cause of action to collect rent overcharges from May 1, 2007, the beginning of plaintiffs' tenancy in the Apartment; granted plaintiffs summary judgment on their third cause of action for attorney's fees and interest; and denied plaintiffs summary judgment on their cause of action for treble damages.

However, the court then *sua sponte* recalled its decision and upon further consideration, issued the Decision at issue in the instant motion, which granted plaintiffs summary judgment on their first cause of action for reimbursement of a rent overcharge, but only calculated from the base date of February 3, 2011, four years prior to the commencement of the instant action. Specifically, the court found that pursuant to the four-year statute of limitations set forth in the CPLR and RSL, plaintiffs were only entitled to collect any rent overcharges which occurred within four years prior to the commencement of the overcharge proceeding. The court declined to review the rental history of the Apartment prior to the base date of February 3, 2011 in order to determine whether the amount of the rent on the base date was lawful on the ground that "plaintiffs [] failed to sufficiently establish a colorable claim of fraud" as fraud was not sufficiently pled in the complaint and plaintiffs failed to offer any evidence of the defendant's fraudulent deregulation scheme to remove the Apartment from the protections of rent stabilization. Additionally, this court granted plaintiffs summary judgment on their third cause of action for attorney's fees and interest. However, this court denied plaintiffs summary judgment on their cause of action for treble damages on the ground that "there is an issue of fact as to whether the rent overcharge was 'willful' under the law" based on the well-settled statutory and case law that places the burden on the owner to establish that the overcharge was not willful.

Plaintiffs now move to renew and reargue this court's Decision denying plaintiffs summary judgment on their cause of action for treble damages and declining to review the rental history of the Apartment in order to calculate the correct amount of overcharges to which plaintiffs are entitled. Additionally, plaintiffs move to amend their complaint to add allegations of fraud perpetrated by the defendant.

The court first turns to plaintiffs' motion for an Order pursuant to CPLR § 3025(b) granting them leave to amend their complaint to add allegations of fraud against the defendant. Pursuant to CPLR § 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1<sup>st</sup> Dept 2010) (internal citations omitted). Moreover, on a motion for leave to amend, the movant is not required to establish the merit of the proposed new allegations "but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *Id.*

"Rent overcharge claims are generally subject to a four-year statute of limitations" which must be calculated from the "base date," or "the 'date four years prior to the date of the filing of [the overcharge] complaint' plus any subsequent lawful increases." *Matter of Grimm v. State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 N.Y.3d 358, 364-65 (2010). *See also* RSC § 2526.1(a)(2). However, the RSC has carved out an exception to the rule that a court may not review the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action in order to calculate the amount of an overcharge. Pursuant to RSC § 2526.1(a)(2)(iv), "the rental history of the housing accommodation pre-dating the base date may be examined for the limited purpose of determining whether a

fraudulent scheme to destabilize the housing accommodation...rendered unreliable the rent on the base date.” The Court of Appeals has held that “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 [further inquiry]. What is required is evidence of a landlord’s fraudulent deregulation scheme *to remove* an apartment from the protections of rent stabilization.” *Matter of Grimm*, 15 N.Y.3d at 367 (emphasis added). In order to advance a colorable claim of fraud within the meaning of *Matter of Grimm*, a tenant must allege “substantial evidence pointing to the setting of an illegal rent in connection with a stratagem devised by [the landlord] *to remove* tenants’ apartment from the protections of rent stabilization.” *Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 16 (2015) (emphasis added).

The law is clear that a new owner of a residential property will be held responsible, under a carry-over theory of liability, for rent overcharges collected by the prior owner. Indeed, pursuant to RSC § 2526.1(f)(2)(i),

For overcharge complaints filed or overcharges collected on or after April 1, 1984, a current owner shall be responsible for all overcharge penalties, including penalties based upon overcharges collected by any prior owner....

This carry-over liability also applies to fraudulent conduct by a prior landlord. *See Helfand v. Division of Housing and Community Renewal*, 182 Misc.2d 1, 6 (Sup. Ct. N.Y. County 1999)(“under the rent stabilization scheme the new owner steps into the shoes of the prior owner and...is bound by the misfeasance of his predecessor in interest”); *see also Morton v. 338 West 46<sup>th</sup> Street Realty, LLC* 45 Misc.3d 544, 552 (Civ. Ct. N.Y. County 2014)(denying summary judgment as against current owner based on “issue of fact as to whether the predecessor-owner engaged in a fraudulent scheme to deregulate the building”).

Here, plaintiffs' motion to amend their complaint is granted to the extent that plaintiffs may amend their complaint to add allegations that Dynasty, the prior owner, engaged in a fraudulent scheme to remove the Apartment from rent regulated status. It is undisputed that the Apartment was removed from the protections of rent stabilization by Dynasty in 2007 after Dynasty allegedly made improvements to the Apartment and not by defendant. It is also undisputed that plaintiffs resided in the Apartment for seven years before defendant purchased the building in 2014. The Court of Appeals has made clear in *Matter of Grimm* and its progeny that the fraud exception to the four-year look-back period must be applied and construed narrowly and only in circumstances where the tenant alleges sufficient evidence to establish that the defendant engaged in a scheme to remove the apartment from the protections of rent stabilization. Thus, in order for the defendant to be held liable under a carry-over theory of liability for any fraud perpetrated by Dynasty in removing the Apartment from the protections of rent stabilization, the complaint must allege that Dynasty did indeed fraudulently remove the Apartment from the protections of rent stabilization. However, none of the complaints filed in this action, including the proposed amended complaint, contain allegations that Dynasty fraudulently removed the Apartment from rent stabilization based on improvements to the Apartment which were never done. Rather, as to Dynasty, the complaints merely assert that Dynasty wrongfully overcharged the plaintiffs. Moreover, with regard to fraud, the proposed amended complaint asserts only that defendant engaged in fraudulent conduct in that it knew that the Apartment was subject to rent regulation when it bought the building and that despite such knowledge, defendant continued to collect excessive and unlawful rental amounts from the plaintiffs. Thus, the plaintiffs are granted leave to amend their complaint to allege that Dynasty engaged in a fraudulent scheme to remove the Apartment from rent stabilization based on the

court's finding that, pursuant to *Matter of Grimm*, such allegations would be sufficient to assert carry-over liability against the defendant under the RSC for any fraud perpetrated by Dynasty.

The court next turns to plaintiffs' motion for an Order pursuant to CPLR § 2221(d) granting them leave to reargue this court's Decision. On a motion for leave to reargue, the movant must show that the court overlooked or misapprehended matters of fact or law. See CPLR § 2221(d)(2).

In the present case, plaintiff is granted reargument solely to the extent that this court recalls that part of its Decision which stated that "even if the court were to consider any allegations of fraud made in plaintiffs' motion to renew, the court would still find that plaintiffs have failed to establish a colorable claim of fraud as they have failed to provide any 'evidence of [defendant's] fraudulent deregulation scheme to remove [the] [A]partment from the protections of rent stabilization.'" The foregoing was an incorrect statement of the law. As the court explained in its analysis of plaintiffs' motion to amend, a tenant may assert a claim for liability against a new owner for the fraudulent deregulation of an apartment by a prior owner based on a theory of carry-over liability if the tenant alleges the fraud committed by the prior owner in the complaint. There is no requirement that plaintiffs prove that the defendant was involved or had knowledge of an alleged fraudulent deregulation scheme perpetrated by Dynasty to remove the apartment from the protections of rent stabilization.

The court next turns to plaintiffs' motion for an Order pursuant to CPLR § 2221(e) granting them leave to renew this court's Decision. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and...shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR §

2221(e) (2)-(3).

Here, plaintiffs' motion to renew this court's decision is denied as they have failed to offer any new facts or a change in the law that would change this court's prior determination. Plaintiffs move to renew this court's decision asserting that this court erred in denying plaintiffs summary judgment on their claim for treble damages. The court denied plaintiffs' motion for summary judgment on their claim for treble damages on the ground that there was an issue of fact as to whether the overcharge was willful. In support of their renewal motion, plaintiffs provide their affidavits along with an e-mail and text exchange and renewal leases which they allege show that the defendant was aware that the Apartment was subject to rent stabilization coverage when defendant offered plaintiffs the leases, thus demonstrating that any overcharge was willful. Specifically, plaintiffs point to the fact that in 2014, defendant provided them with renewal leases at rental increases which were identical to the allowable rent stabilization increases stated in the guidelines. However, such evidence fails to establish that defendant's overcharge, to the extent there was one in 2014, was willful as it fails to demonstrate that defendants knew the Apartment was subject to rent stabilization coverage at the time it purchased the building. Initially, the law is clear that offering a tenant a renewal lease at a rent consistent with the amount of the rent stabilization guidelines does not create a rent stabilized tenancy nor does it demonstrate that the landlord believed the apartment to be rent stabilized. *See Mayflower Assoc. v. Gray*, NYLJ March 1, 1994 at 21, Col. 1 (App. Term 1<sup>st</sup> Dept.); *see also Ruiz v. Chwatt Assocs.*, 247 A.D.2d 308 (1<sup>st</sup> Dept 1998). Further, the renewal leases were not offered on a DHCR-issued renewal lease form, they did not give the plaintiffs an option to renew at the one- or two-year monthly rate and they did not include the rent stabilization renewal lease rider. Thus, the existence of these renewal leases

