

305 Riverside Corp. v Sandlow
2016 NY Slip Op 33079(U)
March 14, 2016
Civil Court of the City of New York, New York County
Docket Number: 79162/2015
Judge: Jack Stoller
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Court/County: NYSup / New York

Case Title: _____

Docket Number: 106025/2011

Judge: Jack Stoller

EXPERT(s): _____

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART C

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305 RIVERSIDE CORP.,

Petitioner,

Index No. 79162/2015

- against -

DECISION/ORDER

THOMAS SANDLOW and JOAN NEAL SANDLOW,

Respondents.

----- X
Present: Hon. Jack Stoller

Judge, Housing Court

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

Papers	Numbered
Notice of Motion and Supplemental Affidavit and Affirmation Annexed....	1, 2, 3
Affirmation In Opposition	4
Affidavit In Further Support of Motion	5

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

305 Riverside Corp., the petitioner in this proceeding ("Petitioner"), commenced this summary proceeding against Thomas Sandlow and Joan Neal Sandlow, the respondents in this proceeding ("Respondents"), seeking a money judgment and possession of 305 Riverside Drive, Apt. 7A, New York, New York ("the subject premises") on the basis of nonpayment of rent. Respondents interposed an answer alleging, *inter alia*, rent overcharge. Petitioner now moves for summary judgment in its favor.

There is no dispute on the record on this motion practice that, prior to Respondents' occupancy, the subject premises was subject to the Rent Stabilization Law with a monthly rent of \$1,551.40 as of 1997; that Petitioner subsequently deemed the subject premises to be exempt

from the Rent Stabilization Law by virtue of a vacancy and a rent increase above \$2,000.00 prior to Respondents' occupancy pursuant to N.Y.C. Admin. Code §26-504.2(a) and registered the subject premises with the New York State Division of Housing and Community Renewal ("DHCR") pursuant to 9 N.Y.C.R.R. §2528.3 as exempt; that Respondents' first lease at the subject premises commenced on February 1, 2005 with a rent of \$3,750.00; that Petitioner had been a recipient of a tax abatement pursuant to N.Y.C. Admin. Code §11-243 known colloquially as a "J-51"; that Respondents commenced an action against Petitioner in New York County Supreme Court in 2012 ("the Supreme Court action") seeking, *inter alia*, a declaration that the subject premises is subject to the Rent Stabilization Law and damages sounding in rent overcharge; and that Petitioner conceded in the course of motion practice in the Supreme Court action that the subject premises is subject to the Rent Stabilization Law due to the J-51 tax abatement. The outcome of Petitioner's motion essentially hinges on whether Petitioner eliminates issues of material fact as to whether it has been overcharging Respondents in violation of the Rent Stabilization Law.

The legal regulated rent for the purposes of determining an overcharge shall be deemed to be the rent charged on the base date, plus in each case any subsequent lawful increases or adjustments. 9 N.Y.C.R.R. §2526.1(a)(3)(I). The base date is four years prior to the filing of a rent overcharge claim. 9 N.Y.C.R.R. §2520.6(f)(1). As the rent for the subject premises has not increased by any impermissible amount since Respondents' initial lease in 2005, more than four years before Respondents asserted their cause of action for rent overcharge by commencement of the Supreme Court action in 2012 or the interposition of their defense in this matter, Petitioner

argues that it is entitled to summary judgment in its favor on the issue of rent overcharge. Petitioner's argument logically applies even if Petitioner impermissibly increased the rent for the subject premises by an amount greater than that permitted by the Rent Stabilization Law prior to the commencement of Respondents' tenancy. However, the improper treatment of a rent-stabilized apartment as deregulated when a J-51 tax abatement applied to it, together with a lack of clarity as to the establishment of rent on the base date warrant the examination of the rent history for any available time period. 72A Realty Assoc. v. Lucas, 101 A.D.3d 401, 402 (1st Dept. 2012). Petitioner's failure to register the information required by 9 N.Y.C.R.R. §2528.3 for the subject premises in the years immediately prior to Respondent's tenancy¹ evinces the same kind of lack of clarity referred to in 72A Realty Associates, supra.

Petitioner argues that the decision in Matter of Boyd v. New York State Div. of Hous. & Community Renewal, 23 N.Y.3d 999, 1000 (2014) effectively abrogated 72A Realty Assoc., supra, insofar as it reversed an Appellate Division's endorsement of an examination of a history of rents at an apartment for more than four years for an apartment that a J-51 tax abatement applied to. However, the focus of Boyd, supra, was whether a tenant's subjective evaluation of individual apartment improvements presented enough of a *prima facie* showing of fraud to justify an examination of the rent history for more than four years. The dissenting opinion at the Appellate Division, whose position on the issue prevailed at the Court of Appeals, found it "significant" that the landlord therein complied with rent registration requirements, Matter of

¹ Petitioner was required to file the current rent with its registrations. 9 N.Y.C.R.R. §2528.3(a). Petitioner did not do so. From 1997 through 2007, the registrations merely state that the subject premises is exempt from registration requirements.

Boyd v. New York State Div. of Hous. & Community Renewal, 100 A.D.3d 594, 597 (1st Dept. 2013) (Gische, J. Dissenting), *rev'd*, 23 N.Y.3d 999, 1000 (2014), such that a lack of clarity as found in 72A Realty Assoc., *supra*, would not apply in Boyd, *supra*. As noted above, Petitioner's failure to comply with the registration requirements of 9 N.Y.C.R.R. §2528.3 in the years immediately prior to Respondents' tenancy contributes to the same kind of lack of clarity that the Court found significant in 72A Realty Assoc., *supra*.

The distinction outlined above underscores the difficulty the Court has with interpreting Boyd, *supra*, so as to somehow overturn 72A Realty Assoc., *supra*, without actually coming out and saying so. A judicial opinion, like a judgment, must be read as applicable only to the facts involved and is an authority only for what is actually decided. Roffe v. Hewitt, 227 N.Y. 486, 494 (1920). While dictum in a Court of Appeals decision carries considerable weight, it is not controlling. Adirondack Trust Co. v. Farone, 245 A.D.2d 840, 842 (3rd Dept. 1997). Therefore, in order for a statement of the law made by the Court of Appeals to have binding precedential effect, it must have addressed an issue that was before that Court. Robinson Motor Xpress. Inc. v. HSBC Bank. USA, 37 A.D.3d 117, 123 (2nd Dept. 2006). A case, therefore, is precedent only as to those questions presented, considered, and squarely decided. Wellbilt Equip. Corp. v. Fireman, 275 A.D.2d 162, 168 (1st Dept. 2000), People v. Bourne, 139 A.D.2d 210, 216 (1st Dept.), *leave to appeal denied*, 72 N.Y.2d 955 (1988).

The Court also finds significant that the Appellate Division recently approvingly cited 72A Associates, *supra*, in support of an examination of a rent history for more than four years, due in part to a landlord's failure to provide information for rent-stabilized apartments in annual

registrations with DHCR for a number of years, as Petitioner also neglected to do herein.

Altschuler v. Jobman 478/480, LLC., _ A.D.3d _, 22 N.Y.S.3d 421, 429 (App. Div. 1st Dept. 2016). See Also Mevers v. Four Thirty Realty, 127 A.D.3d 501, 502 (1st Dept. 2015) (the Court examined a history of rent charged for an apartment for more than four years because of a landlord's failure to register a rent-stabilized apartment with DHCR on the basis of ostensible vacancy deregulation for an apartment that a J-51 tax abatement applies to).

Petitioner also argues that judicial estoppel precludes Respondents' rent overcharge causes of action, insofar as Court in the Supreme Court action found that Respondents' inquiry is limited to the commencement of their first lease in 2005. Petitioner relies in particular on the following language from an order therein ("the prior order"):

[Respondents] seek[] a rent overcharge determination either from February 1, 2005 or the four years prior to instituting this action. Since [Respondents are] willing to limit inquiry into [their] damages for an alleged rent overcharge to the four years preceding the commencement of this action, this court concludes that a determination of the lawful rent and any overcharge is limited to the four years prior to the institution of the instant lawsuit.

The prior order further denied Petitioner's summary judgment to this point "[s]ince neither party has provided sufficient evidence for the court to make that determination."

The doctrine of judicial estoppel or the doctrine of inconsistent positions precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed. Wells Fargo Bank N.A. v. Webster Bus. Credit Corp., 113 A.D.3d 513, 516 (1st Dept.), *leave to appeal denied*, 23 N.Y.3d 902 (2014), Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae, 243 A.D.2d 168, 177 (1st Dept.), *appeal dismissed*, 92

N.Y.2d 962 (1998). Petitioner has not proven that Respondent assumed a position in the Supreme Court action that the Court should not examine a history of rents before 2005. Assuming *arguendo* that Respondents only sought damages for such a time period, such a request for relief can theoretically be distinct from examining the history of rents charged prior to a time when Respondents seek damages. The prior order stated that Respondents requested the former, but did not state that Respondents requested the latter. Petitioner therefore does not demonstrate an entitlement to summary judgment on this issue on this record. People v. Grasso, 50 A.D.3d 535, 545 (1st Dept.), *aff'd*, 11 N.Y.3d 64 (2008) (a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact as to the claims at issue).

Not only does Petitioner fail to show on its motion that Respondents sought to limit their inquiry into the history of rents charged to 2005, but Petitioner also fails to show that Respondents secured a judgment in their favor, Pierre v. Mary Manning Walsh Nursing Home Co., Inc., 93 A.D.3d 541, 542 (1st Dept. 2012), Baje Realty Corp. v. Cutler, 32 A.D.3d 307, 310 (1st Dept. 2006), without which the doctrine of judicial estoppel does not apply. Carr v. Caputo, 114 A.D.3d 62, 71 (1st Dept. 2013), *leave to appeal dismissed*, 23 N.Y.3d 996 (2014). The prior order denied Petitioner's motion for summary judgment, which does not amount to a securing of a judgment in Respondents' favor. A denial of summary judgment does not have preclusive effect. Franco v. Jay Cee of N.Y. Corp., 36 A.D.3d 445, 447 (1st Dept.), *leave to appeal denied*, 2007 N.Y. App. Div. LEXIS 6472 (1st Dept. 2007). Accordingly, the prior order also does not collaterally estop Respondents from seeking an examination of the registration history for the subject premises for more than four years in this matter. Liddle, Robinson & Shoemaker v.

Shoemaker, 309 A.D.2d 688, 691 (1st Dept. 2003)(preclusion applies to issues that were actually litigated, squarely addressed and specifically decided).

For the same reason, any dismissal of the Supreme Court action² does not collaterally estop Respondents, as such a dismissal, as per an order Petitioner annexes to its motion, would have been made for Respondents' failure to prosecute. A dismissal of a proceeding pursuant to CPLR §3404, i.e., inactivity, does not bar a new action on the same cause because such a dismissal is not on the merits. Freeman's Beverages, Inc. v. National Cash Register Co., 50 A.D.2d 1075 (4th Dept. 1975). Compare Holley v. Mandate Realty Corp., 121 A.D.2d 202, 204 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 721 (1987)(*res judicata* is not a defense when the first action was dismissed for failure to prosecute, as such a disposition was not on the merits).

As Petitioner has not proven that judicial estoppel or collateral estoppel precludes Respondents from examining the history of rents charged at the subject premises for more than four years prior to the interposition of Respondents' rent overcharge defense, and as prevailing appellate authority permits such an examination under the particular circumstances set forth herein, Petitioner has not eliminated fact issues as a matter of law Respondents' extant cause of action in rent overcharge, particularly as the record contains no explanation for the increase in rent from \$1,551.40 in 1997 to \$8,750.00 in 2005. Accordingly, the Court denies Petitioner's motion for summary judgment without prejudice to the causes of action, defenses, or theories of the case of either party to this proceeding.

This case is now in a trial-ready posture. The Court sets the matter down for a trial to

² The parties dispute whether the Court dismissed the Supreme Court action.

May 15, 2016, in Room 844, Part C of the Courthouse located at 111 Centre Street, New York,
New York.

This constitutes the decision and order of this Court.

Dated: New York, New York
March 14, 2016



HON. JACK STOLLER
J.H.C.