SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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IEDA ROSA,

Plaintiff,

Index No.: 151687/16
DECISION/ORDER

-against-

KOSCAL 59, LLC,

Defendant.

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HON. JOAN M. KENNEY, J.S.C.:

In this residential landlord/tenant action, defendant moves to dismiss the complaint, pursuant to CPLR 3211 (motion sequence number 001). For the following reasons, this motion is denied.

BACKGROUND

Plaintiff Ieda Rosa (Rosa) is the tenant of apartment 3 in a building (the building) located at 346 East 59th Street in the County, City and State of New York. *See* notice of motion, Rosenblum affirmation, ¶ 11. Defendant Koscal 59, LLC (landlord) is the building's owner. *Id.*; Zachariadis aff, ¶ 1. Rosa alleges that her apartment is rent-stabilized.[1] She states that she took possession of apartment 3 in February 2009 pursuant to a non rent-stabilized lease that set forth her initial rent at $2,095.00 per month, and that she, thereafter, signed seven subsequent renewal leases, of which the most recent one recites her monthly rent as $2,525.00. *See* complaint, ¶¶ 7-16. Rosa further states that her attorney's research at the New York State Division of Housing

[1] All of allegations recited herein are set forth in Rosa's complaint. Because neither party thought it necessary to annex a copy of that complaint to their moving papers, however, the court was forced to retrieve that complaint from its online archive in order to read the allegations. The parties are admonished to include properly labeled exhibits attached to any future motion practice in this action.

and Community Renewal (DHCR) disclosed that, in 1984, the tenant of apartment 3 had a legal registered rent of $324.30 per month, and that, after that tenant vacated the apartment, the landlord simply began to raise the rent with no regard for the legal limits on rent increases. *Id.*, ¶¶ 17-18. Rosa asserts that her attorney recently submitted a Freedom of Information Law (FOIL) request to the DHCR that resulted in an negative response to her request for any paperwork filed by the landlord in connection with its purported initial vacancy increase, or for any of the other rental increases that it subsequently made to apartment 3. *Id.*, ¶¶ 19-38. For its part, landlord presents an affidavit from its officer/managing agent Anthony Zachariadis (Zachariadis) who denies Rosa's allegations of impropriety. *See* notice of motion, Zachariadis aff, ¶¶ 1-20.

Tenant commenced this action on February 24, 2016 by filing a summons and complaint that sets forth causes of action for: 1) a declaratory judgment; 2) injunctive relief; 3) rent overcharge; and 4) attorney's fees. *See* complaint. Landlord has not yet filed an answer, but has instead chosen to submit the instant motion to dismiss (motion sequence number 001).

DISCUSSION

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." *See Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 (2106), citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002). It has been held, however, that where the documentary evidence submitted flatly contradicts the plaintiff's factual claims, the entitlement to the presumption of truth and the favorable inferences are both rebutted. *Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 (1st Dept 2001) *affd as mod sub*

nom Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 (2002), citing *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1st Dept 1994). Here, landlord raises seven arguments to support its request to dismiss Rosa's complaint. The court will address each of them in turn.

First, landlord argues that "plaintiff is time barred," because her complaint is essentially a fair market rent appeal that is governed by a four-year statute of limitations. *See* notice of motion, Rosenblum affirmation, ¶¶ 13-18. Landlord cites to the decision of the Appellate Division, First Department, in *Matter of Schutt v New York State Div. of Hous. & Community Renewal* (278 AD2d 58 [1st Dept 2000]), for the rule that the four-year statute of limitation period set forth in the Rent Regulation Reform Act of 1997 (RRRA) governs Fair Market Rent Appeal (FMRAs). That rule is not in question. What is in question, however, is landlord's assertion that Rosa's complaint constitutes a FMRA. Rosa states that it does not. She claims, instead, that it is an "action to determine the proper regulatory status of the subject premises," to which the aforementioned four-year statute of limitations period is *not* applicable. *See* Zekaria affirmation in opposition, ¶ 14. The court observes that the first and second causes of action in Rosa's complaint both clearly question the regulatory status of apartment 3, and request declaratory and injunctive relief based on a proposed determination that apartment 3 is rent-stabilized. *See* complaint, ¶¶ 39-45. The First Department has also observed that the "courts have uniformly held that landlords must prove the change in an apartment's status from rent-stabilized to unregulated even beyond the four-year statute of limitations for rent overcharge claims." *See Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 199(1st Dept 2011), citing *East W. Renovating Co. v New York State Div. of Hous. & Community Renewal*, 16 AD3d 166, 166 (1st Dept 2005). Thus, Rosa is correct to assert that the four-year statute of limitations that landlord

refers to is inapplicable in an action such as this one. The court also notes that *Matter of Schutt*, to which landlord cited, involved an actual FMRA that had been filed with, and decided by, the DHCR, whereas here, Rosa has never been to the DHCR. In any case, the court concludes that there is no basis for landlord's self-serving assertion that Rosa's complaint is "essentially a FMRA," and rejects landlord's first dismissal argument.

Next, landlord argues that the "initial rent-stabilized rent was established in the first rent-stabilized lease." *See* notice of motion, Rosenblum affirmation, ¶¶ 19-23. Landlord specifically asserts that the "registration apartment information" for apartment 3 that it requested from the DHCR is sufficient proof that landlord had properly established an "initial legal regulated rent" of $900.00 per month, via an agreement with the tenant who occupied apartment 3 at the time it initially became rent-stabilized in 1986. *Id.* Rosa responds that the Rent Stabilization Law (RSL) requires landlords to file an "RR-1 initial registration form" with the DHCR when they first register an apartment as rent-stabilized in order to establish that the monthly rent they seek to impose was calculated according to regulations. *See* Zekaria affirmation in opposition, ¶¶ 15-23. Rosa is correct. RSL § 26-517 specifically requires landlords to file initial registration statements with the DHCR. *See also Matter of Sherry House Assoc. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 54 (1st Dept 2000). Here, Rosa has alleged that landlord failed to do so. Landlord has only presented a subsequent registration statement. The Court of Appeals has held that a "CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, * * * may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326

(2002), citing *Leon v Martinez*, 84 NY2d 83, 88 (1994). Here, landlord's subsequent registration statement does not constitute proof that it filed an initial registration statement. Therefore, landlord has not established that Rosa's claim is barred by the documentary evidence, and the court rejects landlord's second dismissal argument.

Next, landlord argues that "[the] facts do not support [a] fraud cause of action." *See* notice of motion, Rosenblum affirmation, ¶¶ 24-37. This argument is easily disposed of. Rosa's complaint does not include a cause of action for fraud. It includes claims for a declaratory judgment, an injunction, rent overcharge and attorney's fees. The only time the term "fraud" is used is in connection with Rosa's overcharge claim. As used therein, "fraud" is not a cause of action, but rather a term of art that refers to part of the Court of Appeals' holding in *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.* (15 NY3d 358, 365-366 [2010]), specifically, the part that dealt with the intervenor-appellant landlord's "allegedly fraudulent scheme to deregulate" the respondent-tenant's apartment. Here, too, Rosa's complaint alleges such a scheme. *See* complaint, ¶¶ 20-38. Whether or not the facts bear out Rosa's allegation is irrelevant in a motion to dismiss, pursuant to CPLR 3211, since such a motion is directed to the pleadings, rather than to the evidence. Therefore, the court rejects landlord's third dismissal argument as inapposite.

Next, landlord argues that "[the] rent overcharge claim is time barred" by the applicable four-year statute of limitations. *See* notice of motion, Rosenblum affirmation, ¶¶ 38-43. The court notes that Rosa took possession of apartment 3 in February 2009, and commenced this action on February 24, 2016, seven years later. Rosa responds to landlord's argument by asserting that the four-year statute of limitations is not applicable in this action. *See* Zekariah

affirmation in opposition, ¶¶ 42-46. Rosa is correct. In *Conason v Megan Holding, LLC* (25 NY3d 1, 14 [2015]), the Court of Appeals plainly stated that:

> "we decline[] to read the four-year limitations period in a way that would allow 'a landlord whose fraud remains undetected for four years-- however willful or egregious the violation--[to], simply by virtue of having filed a registration statement, transform an illegal rent into a lawful assessment that would form the basis for all future rent increases [internal citation omitted].'"

Here, Rosa's complaint alleges that landlord engaged in a "scheme . . . to improperly destabilize the apartment and charge plaintiff an unlawful rent." *See* complaint, ¶ 47. Accepting this allegation as true, as the court must for the purposes of this motion, it is clear that Rosa has alleged sufficient grounds to obviate the use of the four-year statute of limitations that governs overcharge claims. Therefore, the court rejects landlord's statute of limitations argument.

Next, landlord argues that it "has not collected excess rent," and avers that the building "was properly deregulated 11 years ago in 2005, and the rent collected thereafter . . . were properly contracted free market rents, not subject to rent regulation." *See* notice of motion, Rosenblum affirmation, ¶¶ 44-48. This is plainly a factual assertion. However, landlord has not yet filed an answer in this action, much less submitted to the discovery process, and so there is currently no evidence before the court upon which to base this factual assertion. In any case, this is a dismissal motion, directed to the pleadings rather than to the proof, and landlord's factual assertion does nothing but contradict Rosa's allegations of a rent overcharge. It is, therefore, an insufficient legal argument, and the court rejects it.

Next, landlord argues that "a declaratory judgment cause of action has not been established." *See* notice of motion, Rosenblum affirmation, ¶¶ 49-51. Declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the

parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *see e.g. Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 681 (1st Dept 1999). It has long been the rule that, in an action for declaratory judgment, the court may properly determine respective rights of all of the affected parties under a lease. *See Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 (1926). Here, Rosa's complaint states that:

> "40. Plaintiff respectfully requests a declaratory judgment declaring the rights of the parties to this action, and in particular, declaring the subject premises to be subject to rent stabilization and declaring plaintiff to be the lawful rent stabilized tenant of the subject premises.
>
> 41. Plaintiff respectfully requests that the court declare and fix the maximum legal rent for the subject premises, under the rent stabilized status of such premises, and the facts adduced at trial concerning the unlawful rent increases made by defendant.
>
> 42. Plaintiff respectfully requests that this court declare that the aforementioned monthly rents charged by defendant and paid by plaintiff for the period of four (4) years prior to the commencement of this proceeding were erroneous, unlawful and/or constitute overcharges."

See complaint, ¶¶ 40-42. This plainly constitutes a request for a declaration of the parties' rights under the lease to apartment 3. As such, it clearly makes out a proper claim for declaratory relief. Defendant nonetheless asserts that "plaintiff has not presented a single fact or any evidence which would warrant this court finding that the subject dwelling is still subject to rent stabilization." *See* notice of motion, Rosenblum affirmation, ¶ 50. However, "[i]f a right to a declaration is shown but depends on contested facts, the case should go to trial even though a particular declaration sought would not be warranted." *Plaza Mgt. Co. v City Rent Agency*, 31 AD2d 347, 350 (1st Dept 1969), *affd* 25 NY2d 630 (1969), *citing Rockland Light and Power Co. v City of New York*, 289 NY 45 (1942). Therefore, defendants' argument is unavailing, as a

matter of law, at this juncture, and the court rejects it.

Next, defendant argues that "plaintiff fails to state a basis for injunctive relief." *See* notice of motion, Rosenblum affirmation, ¶¶ 52-53. However, defendant presents no legal argument to support this statement. The Court of Appeals has held that "[t]he party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005), citing *Doe v Axelrod*, 73 NY2d 748, 750 (1988). Here, Rosa's complaint sets forth all of these allegations. *See* complaint, ¶¶ 5-38. It then requests injunctions requiring landlord to issue Rosa a proper rent-stabilized lease, and to register her apartment as rent-stabilized with the DHCR. *Id.*, ¶¶ 44-45. The court notes that landlord does not repeat its objection to this cause of action in its reply papers. In any case, landlord's argument is both unsupported and contradicted by the text of the complaint, and, therefore, the court rejects it.

Finally, landlord argues that "plaintiff should be denied legal fees," because "plaintiff failed to set forth a cause." *See* notice of motion, Rosenblum affirmation, ¶ 54. However, Rosa's complaint specifically states:

> "52. The Rent Stabilization Law and Code authorize recovery of reasonable attorney's fees by tenants in connection with the prosecution of a rent overcharge claim, in the event that an overcharge is determined to have occurred."

See complaint, ¶ 52. Rosa is correct. *See* Rent Stabilization Law (RSL) § 26-516 (a) (4). Therefore, the court rejects landlord's final dismissal argument. Accordingly, because landlord has failed to establish a single one of its dismissal arguments, the court finds that landlord's

motion should be denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of defendant Koscal 59, LLC is denied; and it is further

ORDERED that said defendant is directed to serve an answer to the complaint within 20 days from the date of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 304 located at 71 Thomas Street, NYC 10013 at 9:30 a.m.. on May 11, 2017.

Dated: New York, New York
March 20, 2017

ENTER:

Hon. Joan M. Kenney, J.S.C.