

Brown v 321 E. 9th St., LLC

2018 NY Slip Op 30226(U)

February 8, 2018

Supreme Court, New York County

Docket Number: 155564/2017

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

-----X
KAFI DREXEL BROWN,

Plaintiff,

Index No.:155564/2017
DECISION/ORDER

-against-

321 EAST 9TH STREET, LLC, JOHN HUSIAK and
CHRISTINE HORDIJENKO,

Defendants.
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HON. ROBERT D. KALISH, J.S.C.:

In this residential landlord/tenant action, plaintiff Kafi Drexel Brown (“Brown”) moves for summary judgment and/or partial summary judgment on the complaint. For the following reasons, this motion is denied and the instant complaint is dismissed.

BACKGROUND

Brown is the tenant of record of apartment 6 in a building located at 321 East 9th Street in the County, City and State of New York (the “Building”). Defendant 321 East 9th Street, LLC (“321”) is the corporation that owns the Building, co-defendant Christine Hordijenko (“Hordijenko”) is a principal of 321, and co-defendant John Husiak (“Husiak”) is the Building’s registered managing agent (collectively, “Defendants”).

Brown initially took possession of apartment 6 pursuant to a lease that commenced on February 1, 2007 (the “Lease”). The Lease set a monthly rental charge of \$2,600.00 and recited that apartment 6 is “a market value deregulated apartment and is not subject to NYS Rent Stabilization regulations.” Brown alleges that this deregulation was illegal, that apartment 6 is, in fact, still rent stabilized, and that Brown is owed a credit for the rent overcharges.

Brown has presented a copy of the 2015 rent registration record for apartment 6 that Defendants filed with the New York State Division of Housing and Community Renewal (“DHCR”). The document shows that, as of May 31, 2002, the apartment’s registered rent was \$1,231.69 per month but that, from September 24, 2003, onward, the apartment was listed as “exempt” from rent registration requirements due to “high rent vacancy.” Brown has also presented several documents that she obtained from the New York City Department of Buildings (“DOB”) that consist of: 1) a 2002 application for, and a subsequent order approving, the issuance of a work permit for work to be done in apartment 6, as well as the work permit itself; 2) copies of plans filed in connection with that work; and 3) various certifications filed in connection with that work. The work that the DOB permit approved consisted of the following:

“Alteration Type 2 - General construction. Replace existing apartment door. Replace existing lavatory in bathroom on existing roughing. Plaster and paint walls and ceiling to match existing. No change in use, egress or occupancy.”

Brown alleges that the only evidence of the expenses that Defendants incurred as a result of this work consists of an estimate (annexed to the application) of \$1,000.00 to replace the bathroom sink. Brown further alleges that Husiak, who submitted the application, committed fraud in deregulating apartment 6 by subsequently asserting Defendants’ right to a “high rent vacancy” increase to the legal rent that was falsely based on work where the work’s cost was either unsubstantiated or far less than Defendants claimed.

Defendants deny having committed any fraud, and present documents to substantiate the cost of the aforementioned work in apartment 6. These consist of: (1) a letter, dated August 3, 2017, to Husiak from one Sergei Malsev (“Malsev”), the contractor who performed the work in apartment 6, that details the jobs that he and his employees performed there between June and

October 2002 and estimates that the total fee for labor “would have been a minimum of \$22,500.00 . . . [which] was fully paid”(although he did not retain any records going back to that year); (2) an invoice from A&S Electric, Inc. showing part payment by Husiak of a total bill for electrical work of \$7,247.34; (3) several paid invoices issued to Husiak by Bowery Building Supply, Inc. for various items of construction material, each of which is earmarked for apartment 6; (4) a quantity of receipts from Home Depot, IKEA and Sam’s Club (all located in Long Island City, NY) that show that Husiak made numerous purchases of construction material, building supplies and cleaning supplies during late 2002; (5) several receipts for “waste disposal” that Husiak paid to a company called “Mudanzas Ecatepec”; (6) several paid invoices issued to Malsev from Lendy Electric Equipment & Supply Corp. for electrical supplies; (7) a cash invoice from SOLCO Plumbing Supply, Inc. for plumbing supplies; and (8) a paid receipt issued to Husiak by Statewide Fireproof Door Co., Inc. for an apartment door. Husiak estimates that the final cost of the material and the electrical work was approximately \$20,000.00 and that the cost of the labor for the other work was an additional \$20,000.00 but concludes that a “conservative approach to the calculation” would yield a figure of “\$30,000.00 for the total renovation costs.”

Brown commenced this action on June 19, 2017, by filing a summons and complaint that sets forth causes of action for: 1) declaratory judgment/permanent injunction; 2) money damages (rent overcharge); 3) money damages (violation of General Obligations Law [GOL] § 7-103); and 4) attorneys fees. On August 4, 2017, Defendants filed an answer with affirmative defenses and a counterclaim for legal fees. Now before the Court is Brown’s motion for summary judgment on the complaint, and Defendants’ opposition papers, which request summary judgment dismissing the complaint, even though they are not denominated as a cross-motion for

such relief.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. (*See, e.g., Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. (*See, e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). As was previously mentioned, Brown's complaint asserts four causes of action.

Brown's first claim is a combined request for a declaratory judgment that apartment 6 is rent stabilized, and a permanent injunction to restore the apartment to rent-stabilized status. 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 the respective rights of all of the affected parties under a lease. (*See Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 [1926]). Here, Brown specifically seeks a declaration that "she is a protected tenant under the [Rent Stabilization Code ("RSC")] and [Rent Stabilization Law ("RSL")], and a mandatory injunction directing defendants to treat her as a rent regulated tenant and to comply with the RSC and RSL

in all respects.” (Notice of motion, exhibit A, ¶ 50.) Brown argues that she is entitled to the protection of these laws because Defendants’ purported high-rent deregulation of apartment 6 was done illegally, so the “landlord was not entitled to collect increased rent.” (*Id.*; exhibit H [plaintiff’s mem of law] at 6-12.)

Brown notes that § 26-504.2 (a) of the RSC provides that:

“‘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”

NYC Admin Code § 26-504.2 (a). Here, the DHCR’s rent registration records for apartment 6 show that its last registered rent-stabilized rent was \$1,231.69 per month through May 31, 2002, after which it is listed as “exempt - high rent vacancy” beginning on September 24, 2003. (*See* notice of motion, exhibit D.) Further, Brown’s initial February 1, 2007 lease provided for a non-regulated rent of \$2,600.00 per month.

The last rent-stabilized rent for apartment 6, of \$1,231.69 per month, was well below the statutory \$2,000.00 per month deregulation threshold. Brown argues that merely including a 20% vacancy increase (\$246.00) onto that monthly rental amount would still leave it below the \$2,000.00 threshold (\$1,477.69). Nevertheless, in the following year (2003), Defendants ceased filing rent registrations for apartment 6 with the DHCR on the ground that it was “exempt” due to a “high rent vacancy.” In the absence of any additional permitted increases, it would have been mathematically impossible for apartment 6’s legal registered rent to have exceeded the

deregulation threshold (\$2,000.00) in 2003.

Brown notes that § 26-517 (e) of the RSC provides, in part, that:

“The failure to file a proper and timely initial or annual rent registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement or if no such statements have been filed, the legal regulated rent in effect on the date that the housing accommodation became subject to the registration requirements of this section.”

NYC Admin Code § 26-517. Thus, as a result of this statutory prohibition, Brown would normally be correct in asserting that defendants’ failure to file rent registration statements for apartment 6 after 2003 would result in the apartment’s rent being frozen at its last registered, rent-stabilized amount, as a matter of law. (*See, e.g., Jazilek v Abart Holdings, LLC*, 72 AD3d 529 [1st Dept 2010]). Yet this does not end the current inquiry.

Defendants argue that Brown is not entitled to the declaration that she seeks because RSC § 26-516, which imposes a four-year statute of limitations on rent overcharge claims, bars both Brown’s second cause of action (rent overcharge) and her other claims, all of which depend upon a finding of rent overcharge. Defendants note that apartment 6 was deregulated in 2003, while Brown commenced this action fourteen years later in 2017, and that appellate case law holds that only the presence of “indicia of fraud” will permit a fact finder to “look back” beyond the four-year limitations period to determine whether or not an apartment was properly deregulated. (*See, e.g., Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358 [2010]).

Defendants further argue that there are no such indicia present in this case, and that, therefore, Brown’s rent overcharge claim is not cognizable. (*See CPLR 213-a.*) CPLR 213-a

provides:

“An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action.”

Before proceeding with a factual analysis, it would be helpful to review the controlling Court of Appeals holdings on this issue. In 2005, in *Thornton v Baron* (5 NY3d 175, 181 [2005]), the Court of Appeals held that a lease whose illegal rent reflects “an attempt to circumvent the Rent Stabilization Law in violation of the public policy of New York. . . [is] void at its inception” and any rent registration statement listing the illegal rent is “also a nullity.” The Court reasoned that it “surely was not the intention of the Legislature” to permit “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.” 5 NY3d at 181. *Thornton* involved a particular type of rent fraud commonly known as an “illusory prime tenancy.”

Five years later, in *Grimm* (which defendants cite, and which followed *Thornton*), the Court of Appeals rejected the argument that “looking back” past the four-year statute of limitations should only be permitted in cases where an “illusory prime tenancy” is alleged, and held instead that such “looking back” is permissible whenever fraud is alleged in connection with

a rent overcharge claim. (15 NY3d at 366-367). The *Grimm* Court specifically held that a “combination of factors” amounting to “substantial indicia of fraud” could constitute sufficient “evidence of a landlord’s fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization” so as to justify and compel the finder of fact to make an inquiry beyond the four-year statute of limitations to determine whether or not such fraud had actually been perpetrated and resulted in a rent overcharge. *Id.*

The *Grimm* decision took pains to state that the Court, itself, did not make the determination regarding the existence of fraud, and also to state that “fraud” could be found to exist in a number of factual scenarios, not just in “illusory prime tenancy” schemes, but reserved those actual inquiries to the finder of fact - i.e., the DHCR and/or the trial court. (*Id.*) Without setting a bright-line rule, the Court did, however, opine that the “combination of factors” present in *Grimm* could be found to constitute sufficient evidence of fraud. (*Id.*) Those factors included: 1) that “the tenants immediately preceding petitioner paid significantly more than the previously registered rent”; 2) that those tenants “were [also] not given a rent-stabilized lease rider”; 3) that “those tenants were informed that their rent would be higher but for their performance of upgrades and improvements at their own expense”; 4) that “[a]lmost simultaneously with the substantial increase in the rent for the affected unit, the owner ceased filing annual registration statements . . . [but] later filed several years’ registration statements retroactively after receiving petitioner’s overcharge complaint”; and 5) that “petitioner’s [own] initial lease did not contain a rent-stabilized rider.” (*Id.*) The Court emphasized that, while “[g]enerally, an increase in the rent alone will not be sufficient to establish a ‘colorable claim of fraud.’” the foregoing “combination of factors” could establish such a claim. *Id.*

Five years after *Grimm*, in *Conason v Megan Holding, LLC* (25 NY3d 1 [2015]), the Court of Appeals found that a similar “combination of factors” existed where the plaintiff alleged that the landlord “created an entirely fictitious tenant . . . and at least one entirely fictitious apartment renovation . . . in order to boost the regulated rent” over the \$2,000.00 per month deregulation threshold. 25 NY3d at 9. Regarding the effect of the combination of these two factors, the Court specifically found that:

“Here, tenants do not just make a generalized claim of fraud. They instead advance a colorable claim of fraud within the meaning of *Grimm* - i.e., tenants alleged substantial evidence pointing to the setting of an illegal rent in connection with a stratagem devised by [landlord] to remove tenants’ apartment from the protections of rent stabilization.”

(25 NY3d at 16.)

Thus, the rule of *Thornton* and its progeny may be summarized as follows: whenever a tenant’s cause of action for rent overcharge makes more than “a generalized claim of fraud,” and instead sets forth a “combination of factors” from which it may be reasonably inferred that a landlord has engaged in “a stratagem to remove an apartment from rent stabilization,” the finder of fact must make an inquiry into the existence of the alleged fraud, and will not be bound by the RSL’s four-year statute of limitations when doing so. It is against the backdrop of this rule that the Court considers Defendants’ dismissal argument.

Defendants argue that “Plaintiff’s entire case rests upon the unfounded allegation that Defendant embarked on a fraudulent scheme to deregulate the subject premises,” and that “there was fraud [merely] because the rent increased and because defendant advised her of the deregulation . . . even though it didn’t have any obligation to do so.” In the main, Defendants argue that Brown’s allegations constitute only “a generalized claim of fraud.” Brown replies that

she has alleged multiple acts by Defendants that disclose an illicit scheme to deregulate apartment 6 by inflating and/or falsifying the cost of the work that was performed there in 2002. After reviewing the evidence at hand, the Court must disagree.

Looking back at the record, Defendants have presented statements, invoices and receipts to support Husiak's "conservative calculation" of "\$30,000.00 for the total renovation costs." These include the statement from the contractor (Malsev) that labor costs for the work were "a minimum of \$22,500.00"; an invoice stating that the cost of the electrical work was \$7247.34; invoices from small suppliers for construction materials totaling over \$1840.00; and invoices from large suppliers for construction and cleaning materials totaling over \$7,430.00.

The Court notes that the invoices from the small suppliers are all handwritten and indicate that the purchases were made in late 2002 in connection with apartment 6. The Court also notes that the invoices from the large suppliers were generated by cash registers, were made during late 2002 and do not contain any reference to apartment 6, although Husiak signed as the purchaser on all of them, and he avers that he made the purchases in connection with apartment 6. The Court finally notes that, if this evidence is accepted as accurate, it indicates that Defendants spent over \$39,000.00 in renovation costs on apartment 6 in 2002.

In her reply papers, Brown attacks the veracity of Defendants' evidence, and argues that "defendants have not met their IAI [individual apartment improvement] burden of proof." Brown presents copies of DHCR regulations regarding acceptable proof of a landlord's expenditures on IAIs, which include: 1) contemporaneous cancelled checks; 2) contemporaneous paid in full invoices; 3) signed contracts; and 4) sworn contractors' affidavits. Brown then specifically argues that Defendants' evidence is insufficient because: 1) there are no cancelled

checks; 2) the invoice for the electrical work is not marked “paid in full”; 3) the invoices from the large suppliers (Home Depot, IKEA and Sam’s Club) are neither itemized nor do they indicate that the items were purchased in connection with the work performed in apartment 6; 4) the invoices from the small suppliers are not “signed contracts,” and are not marked “paid in full”; 5) many of the receipts may reflect purchases that Husiak made for his personal use, rather than in connection with the work in apartment 6 (such as purchases of cleaning supplies and gasoline for his car); and 6) some of the supplies purchased were items that would have been likely to be used in performing routine apartment “repair” work, rather than “renovation” work, and their purchase, therefore, should not count toward the cost of a rent-increasing IAI. Brown finally argues that this evidence is legally insufficient because the rules set forth in the DHCR’s most recent operational bulletins regarding the calculation of IAIs require building owners who seek to claim IAIs to itemize the improvements that they allege to have made, to provide clear proof of the cost of (and payment for) those items, and to present this proof to an affected tenant in a lease rider and/or notice of deregulation. Brown also asserts that applicable appellate holdings requires strict adherence to these rules.

Brown is incorrect, as a matter of law. *Matter of Acevedo v New York State Div. of Hous. & Community Renewal* (67 AD3d 785 [2d Dept 2009]), the Second Department decision which Brown cited in her reply brief as an example of such appellate case law, itself relied on the First Department’s initial decision in *Jemrock Realty Co. LLC v Krugman* (64 AD3d 290, 296-297 [1st Dept 2009]) (“*Jemrock I*”), in holding that, whenever a landlord seeking to claim an IAI submits “facially invalid” documentation, the courts will require the landlord “to submit a breakdown of the claimed expenses to allow the DHCR to distinguish between repairs and renovation.”

(*Matter of Acevedo*, 67 AD3d at 786-787). However, the Court of Appeals subsequently overruled *Jemrock I* and held that:

“This case turns on the factual issue of whether the landlord's expenditures for “improvements” were at least equal to the amount (approximately \$30,000) necessary to bring the legal rent above the luxury decontrol threshold. Contrary to the contentions of both parties, and to the majority and dissenting opinions at the Appellate Division, the resolution of that issue is not governed by any inflexible rule either that a landlord is always required, or that it is never required, to submit an item-by-item breakdown, showing an allocation between improvements and repairs, where the landlord has engaged in extensive renovation work. The question is one to be resolved by the factfinder in the same manner as other issues, based on the persuasive force of the evidence submitted by the parties.

“Here, the Appellate Term, modifying the contrary decision of Civil Court, found that the landlord had met its burden of showing that its expenditures on improvements exceeded the requisite amount. The Appellate Division erroneously decided this question as a matter of law, and did not exercise its power to review the facts. We remit to the Appellate Division so that it may do so.”

(*Jemrock Realty Co. LLC v Krugman*, 13 NY3d 924, 926 [2010] [internal citation omitted]).

On remand (“*Jemrock II*”), the First Department adopted this rule and held that:

“Exercising our authority to review the record developed at trial and render the judgment warranted by the facts, we find that landlord’s expenditures for improvements were sufficient to bring the legal rent for the unit above the luxury decontrol threshold. The trial evidence established, and it is not disputed, that the renovations included installing new kitchen cabinets, countertops and appliances; installing a ceramic tile floor; replacing kitchen and bathroom plumbing; rewiring the apartment's electrical lines and replacing electrical outlets, switches and fixtures; and replacing moldings. On the other hand, the repairs included repairing the kitchen underflooring; repairing walls; refinishing the wood floors; and plastering and painting of the entire apartment. Such evidence, in our view clearly establishes that landlord's expenditures for ‘improvements’ viz-a-viz repairs were at least equal to \$30,000, the amount necessary to bring the legal rent above the luxury decontrol threshold..”

(*Jemrock Realty Co., LLC v Krugman*, 72 AD3d 438, 440 [1st Dept 2010] [internal citation omitted]).

Among the types of work that may qualify as an IAI resulting in an increase to an apartment's rent are: "complete bathroom modernization or renovation"; "complete kitchen modernization or renovation"; "new subflooring"; "new dropped and/or soundproof ceilings"; "security alarm"; "plastering and painting if part of a major renovation"; and "installation of sheetrock if done throughout the apartment." Defendants have presented Malsev's affidavit that he supplied the labor to perform these types of work in apartment 6, and Husiak's affidavit that he purchased and supplied the materials necessary to perform the work, as well as a quantity of receipts issued to Husiak.

Contrary to Brown's assertion, most of those do include a notation that the purchases were made in connection with apartment 6. Those which do not were both contemporaneous with the performance of the work between June and October 2002, and included material which might reasonably be used in connection with such work. Further, Husiak himself attested that he made the subject purchases to further the subject work. Brown's assertion that he made those purchases for a different purpose is speculative and conclusory, at best. It is well settled that conclusory assertions which are unsupported by evidence are insufficient to sustain a motion for summary judgment. (*See, e.g., Mason v Dupont Direct Fin. Holdings, Inc.*, 302 AD2d 260 [1st Dept 2003]).

In the Court's view, moreover, the documentary proof that Defendants have presented herein is sufficient to defeat Brown's motion for summary judgment, because it establishes, by at least a preponderance of the evidence, that qualifying IAI work was performed in apartment 6 prior to her tenancy and that significant expenditures were made in connection with that work. The fact that additional, non-IAI-qualifying work also appears to have been performed at that

time is of no moment, because Brown has failed to argue persuasively that, or how, such work accounted for the bulk of the labor or the material that Defendants claim to have paid for, and that its cost should therefore be discounted as the basis for an IAI.

Indeed, even if the Court were to proceed based upon the “conservative calculation” of \$30,000.00 in IAI costs that Defendants propose, the result would not help Brown, because one fortieth of \$30,000.00 is \$750.00, and adding \$750.00 to the 2002 registered monthly rent (\$1,231.69) and a 20% vacancy increase (\$246.00), would have pushed the allowable rent above the \$2,000.00 monthly high-rent deregulation threshold (\$2,227.69). The Court, thus, concludes that, despite Brown’s initial showing, Defendants established that they were in fact entitled to claim a sufficiently large IAI increase to apartment 6’s last legally registered rent-stabilized rent to qualify the apartment for high rent deregulation.

At oral argument on this motion, on December 11, 2017, counsel for Brown - in addition to questioning Defendants’ calculation of the IAIs - challenged the propriety of including the aforementioned 20% vacancy increase. Council specifically relied on the language of RSC § 26-517 (e) that provides that “[t]he failure to file a proper and timely . . . annual rent registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement.” Counsel argued that Defendant’s acted improperly by not filing a DHCR registration statement for apartment 6 in 2003, reasoning that a 20% vacancy increase (i.e., \$246.00) over the previous year’s lawful registered rent of \$1,231.69 would still have left the apartment below the \$2,000.00 per month deregulation threshold (i.e., \$1477.69). This being so, defendants would have been forbidden from collecting any other increases that might be ascribed

to IAIs.

Counsel for defendants responded that they did submit an “exit registration” with the DHCR in 2003. After colloquy, it was established that an “exit registration” is simply a yearly DHCR registration form on which the building owner checks off a box that states that the building is no longer subject to rent regulation, for one of several reasons. Brown did not deny that defendants filed this “exit registration” in 2003, but instead claimed that defendants should have filled it out as a regular registration statement, since the lawful monthly rent was still below \$2,000.00, even including a 20% vacancy increase. Counsel for defendants responded that they filed the form as a “exit registration” after factoring in all of the increases for IAIs and vacancy, and obtaining a resulting figure over \$2,000.00. Counsel for defendants denied the validity of Brown’s reading of RSC § 26-517 (e), and asserted that the statute contains no requirement that a landlord make a separate DHCR filing that only specifies an apartment’s rent, before making a separate filing for IAI increases.

Brown cited *Jazilek v Abart Holdings, LLC* (72 AD3d at 529) and *Altman v 285 W. Fourth LLC* (143 AD3d 415 [1st Dept 2016]) to support her reading of RSC § 26-517 (e). However, in both of those cases, the First Department found that it was permissible to include the 20% vacancy increases when determining an apartment’s lawful regulated rent. Two more recent First Department cases, *Matter of 18 St. Marks Place Trident LLC v State of New York Div. of Hous. & Community Renewal, Off. of Rent Admin.* (149 AD3d 574 [1st Dept 2017]) and *Taylor v 72A Realty Assoc., L.P.* (151 AD3d 95 [1st Dept 2017]), also appear to favor defendants’ interpretation of the statute. In any case, the court finds that Brown failed to establish any legal grounds to support her assertion that the 2003 20% vacancy increase should have not been

included when calculating the lawful registered rent for apartment 6. Accordingly, the court reaffirms its earlier determination that Defendant has established that apartment 6 qualified for high rent deregulation.

This being the case, the four-year statute of limitations governing rent overcharge claims *does* bar Brown's cause of action for rent overcharge. Brown first raised that claim fourteen years after it was purported to have occurred, and there are no "indicia of fraud" that would justify "looking back" beyond the four-year limitations period. Indeed, the evidence discloses that there was simply no overcharge.

As such, the Court finds that Brown is not entitled to summary judgment on her second cause of action. Because Brown's other causes of action all depend upon a finding of rent overcharge, which the evidence does not justify, the court finds that Brown is not entitled to summary judgment on those claims, either. Accordingly, the court denies Brown's motion in full.

As a final matter, CPLR 3212 (b) empowers a court presented with a summary judgment motion to search the record and grant summary judgment to any party, including a non-moving party, which is entitled to such relief. (*See, e.g., Levin v 117 Ltd. Partnership*, 291 AD2d 304 [1st Dept 2002]; citing *Merritt Hill Vineyards Inc. v Windy Hgts. Vineyard, Inc.*, 61 NY2d 106 [1984]). However, a court may grant summary judgment in favor of a nonmoving party "only with respect to a cause of action or issue that is the subject of the motions before the court." (*Dunham v Hilco Const. Co., Inc.*, 89 NY2d 425, 429-430 [1996]). Here, although Defendants have only submitted an affirmation and an affidavit in opposition to Brown's motion, rather than a cross-motion, Defendants' counsel's affirmation contains the request "that the court search the

record and grant summary judgment in favor of Defendants” to dismiss the complaint. (See Brent affirmation in opposition, at 8.) This request is proper pursuant to CPLR 3212 (b). The Court has already found that Brown is not entitled to summary judgment on any of her claims because they are barred by the statute of limitations and belied by the evidence. Therefore, the Court finds that defendants are entitled to a concomitant finding of summary judgment to dismiss those claims. Accordingly, the Court grants Defendants’ request to dismiss the instant complaint.

CONCLUSION

Accordingly, it is

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Kafi Drexel Brown is denied; and it is further

ORDERED that defendants’ request for summary judgment is granted pursuant to CPLR 3212 (b) and the instant complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
February 8, 2018

ENTER:


HON. ROBERT D. KALISH
J.S.C.