SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
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KEREN BEN-HORIN and ADAR EARON,

Index No.155256/14

Plaintiffs,

-against-

COSO 120 WEST 105, LLC,

Defendant.
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JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3212, plaintiffs move for summary judgment declaring that their apartment is subject to coverage under the Rent Stabilization Law of 1969 (RSL) and Rent Stabilization Code (RSC) and was not deregulated prior to plaintiffs' tenancy. Plaintiffs seek an injunction compelling defendant Coso 120 West 105, LLC (Coso) to register the subject apartment with the New York State Division of Housing and Community Renewal (DHCR) as rent stabilized and to issue plaintiffs a rent-stabilized renewal lease. Finally, plaintiffs seek damages for rent overcharge, treble damages and attorneys' fees.

The motion is granted in part.

Background

Plaintiffs, tenants of apartment 6E (the Apartment) located at 120 West 105th Street in Manhattan (the Building) since March 2011, commenced this action alleging that the Building's prior owner improperly removed the Apartment from

rent stabilization and that they have been overcharged rent for the last seven years.

In large part, the facts are undisputed. Pursuant to DHCR's rent registration records, the Apartment was rent stabilized since 1984 (Affirmation in Support [Sup], Ex B). In 1989, the Apartment was occupied by Eric Wakin with a legal regulated rent of $978.50 (*id.*). In 1993, 1995 and 1996, rent registration records reflect that the Apartment was temporarily exempt from rent stabilization due to occupancy by a not-for-profit organization (*id.*).

The next DHCR rent registration, which was filed in 2006, set forth that Geneva Schauffler was the rent-stabilized tenant pursuant to a two-year lease with a monthly rent of $2,350.00 (Sup, Ex B).

In 2007, the Apartment was registered as vacant, with a legal regulated rent of $2,350. No registration statements were filed thereafter (Sup, Ex B).

From May 2007 through 2010, the Apartment was occupied by Heidi Gorton pursuant to a deregulated vacancy lease and two renewal leases that were "not subject to rent regulation laws" (Sup, Ex G at 13 ["Fair Market Lease"]).

Plaintiffs took possession of the Apartment in March 2011, pursuant to a free-market lease with a monthly rent of $2,000 (Sup, Ex H at 13). Plaintiffs renewed their lease in 2012 through 2014, paying a monthly rent of $2,050 (Sup, Ex I).

In 2012, the then-owner sold the Building to DHNY APT I LLC (DHNY) pursuant to a Joint Chapter 11 Plan of Reorganization (Sup at ¶ 9). Defendant Coso purchased the Building from DHNY in September 2013 (*id.*).

In February 2014, plaintiffs entered into a one-year lease with Coso with a monthly rent of $2,475. They have been paying that amount monthly ever since (Sup at ¶ 10, Ex I).

Plaintiffs commenced this action alleging that the Apartment remains subject to rent stabilization with a legal regulated rent of $978.50 and seek damages for overcharged rent since March 2011. Plaintiffs contend that the 2006 registration by the prior owner was improper as Schauffler was not provided a rent-stabilized lease.

Defendant contends that the Apartment was lawfully and properly deregulated (Affirmation in Opposition [Opp] at ¶ 27). Alternatively, defendant urges that it is shielded from any liability with respect to plaintiffs' rent overcharge claim (*id.*).

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues(*see Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden is on the movant to make a prima facie showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts. Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Rent Stabilization and Base Rent

It is undisputed that in 1993, 1995 and 1996, the Apartment was temporarily exempt from rent stabilization due to occupancy by a not-for-profit organization (Sup, Ex B). The former 9 NYCRR 2526.1(a)(3)(iii), which was applicable until January 8, 2014, governed the landlord's right to

recover a negotiated first rent following a vacancy and provided:

> (iii) Where a housing accommodation is vacant or temporarily exempt from regulation of this Title on the base date, the legal regulated rent shall be the rent agreed to by the owner and the first rent stabilized tenant taking occupancy after such vacancy or temporary exemption, and reserved in a lease or rental agreement; or, in the event a lesser amount is shown in the first registration for a year commencing after such tenant takes occupancy, the amount shown in such registration, as adjusted pursuant to this Code"

(9 NYCRR 2526.1[a][3][iii]; Opp at ¶ 32; *Esposito v Larig*, 52 Misc 3d 67 [App Term 2, 11 & 13 Jud Dist 2016]). By its terms, this provision is applicable only where the first tenant after a vacancy is a "rent stabilized tenant."

Plaintiffs maintain that the lease provided to Schauffler was not rent stabilized because the lease did not contain the necessary rent stabilization rider. In fact, her lease explicitly stated that "TENANT ACKNOWLEDGES THAT THIS LEASE IS NOT SUBJECT TO THE RENT STABILIZATION LAW AND IS A FREE MARKET RENT APARTMENT" (Opp, Ex E at ¶¶ 34, 42).

An owner is required to "furnish to each tenant signing a vacancy or renewal lease, a rider in a form promulgated or

approved by the DHCR, in larger type than the lease, describing the rights and duties of owners and tenants as provided for under the RSL . . . The rider shall be attached as an addendum to the lease" (9 NYCRR 2522.5[c][1]). There is no proof that a rider accompanied Schauffler's lease. Because the first tenant after the vacancy was not rent stabilized, the prior owner was not entitled to have the rent agreed upon ($2,350) considered the "legal regulated rent" (Opp, Ex E; *Gordon v 305 Riverside Corp.*, 93 AD3d 590, 592-93 [1st Dept 2012][9 NYCRR 2526.1(a)(3)(iii) inapplicable when first tenant after vacancy was not offered a rent-stabilized lease]; *Esposito v Larig*, 52 Misc 3d 67, 69 [App Term 2, 11 & 13 Jud Dist 2016]).

The rent registration that was on file subsequent to the vacancy, moreover, was a nullity (*see Jazilek v Abart Holdings, LLC*, 72 AD3d 529, 531 [1st Dept 2010]). The landlord's failure to *properly and timely* file the annual rent registration statement results in "the rent being frozen at the level of 'legal regulated rent in effect on the date of the last preceding registration statement'" (*Jazilek v Abart Holdings, LLC*, 72 AD3d 529, 531 [1st Dept 2010]; *Bradbury v 342 West 30th Street Corp.*, 84 AD3d 681, 683-84 [1st Dept 2011];

Altman v 285 W. Fourth, LLC, 127 AD3d 654 [1st Dept 2015] rev'd on other grounds 2018 NY Slip Op 02829 [2018][20% vacancy increase should have been considered in determining legal regulated rent at the time of vacancy]). The last proper legal regulated rent for the Apartment was $978.50, which was associated with the registration in effect in 1989. Accordingly, the Apartment did not become subject to high-rent-vacancy deregulation before plaintiffs' tenancy and remained rent stabilized when plaintiffs entered into occupancy (*Altman v 285 W. Fourth, LLC*, 2018 NY Slip Op 02829 [2018][explaining that between 1997 and 2011 to become subject to high-rent-vacancy deregulation, legal regulated rent must be $2,000]).

Renewal Lease and Registration with DHCR

For the reasons set forth above, plaintiffs are rent-stabilized tenants and defendant must offer them a proper rent-stabilized lease and rider at the appropriate legal regulated rent (see 9 NYCRR 2523.5[a]; 9 NYCRR 2523.5[c][1]; 9 NYCRR 2522.5[b][1]).

Additionally, pursuant to 9 NYCRR 2528.1, defendant must register the Apartment with DHCR.

Overcharge

Plaintiffs commenced this action in 2014, three years after they occupied the Apartment, and urge that defendant is liable for rent overcharges throughout their tenancy (see 9 NYCRR 2526.1[a][2][no overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed]). Plaintiffs maintain that defendant "willfully overcharged" them and that they are entitled to overcharges and treble damages from March 2011 (Sup Memorandum [Memo] at 18).

Defendant argues that it is exempt from its predecessors' overcharges and treble damages because it purchased the Building pursuant to a commercial sale following a judicial sale. It further urges that if it is liable for any overcharge, it can only be from the date it took possession of the Apartment, September 11, 2013 (Opp at ¶¶ 54-66; 9 NYCRR 2526.1[f][2]).

The judicial-sale exemption applies to successor purchasers where the appropriate rental records are not available (*Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 549 [1997]; *Grimm v New York State Div. of Hous. & Community Renewal*, 4 AD3d 295 [1st Dept 2004]; 9

NYCRR 2526.1[f][2]). The purpose of the exemption is to provide some equitable protection when a full rental history is unavailable. The exemption further prevents inequitable carryover liability in the context of a judicially-ordered sale because the debtor/owner would have no incentive to furnish records to the purchaser and because such liability would have an adverse impact on marketability in such sales (*Gaines*, 90 NY2d at 549). The Court of Appeals concluded that "[t]hese bases apply with equal, if not greater force to a successor purchaser after a judicial sale" (*id.* at 551).

Here, there is no allegation or proof that defendant purposefully attempted to circumvent the rent stabilization laws or that there was any collusion between defendant and the prior owners. Rather, the evidence establishes that one previous owner attempted to deregulate the Apartment after a vacancy and offered the first tenant after the vacancy an inappropriate "rent stabilization lease" and registered the Apartment at the agreed upon-rent.

Defendant's managing agent, Harry Tawil, swears that it was "provided minimal documentation" and that it only obtained further documentation after this action was commenced (Tawif

Affidavit at ¶¶ 8-9). The judicial-sale exemption is triggered where "no records sufficient to establish the legal regulated rent were provided at a judicial sale" (emphasis added 9 NYCRR 2526.1[f][2][I]). Here, it was only after the purchase from its predecessor and after this action was commenced that defendant obtained relevant documents for the Apartment (Tawil Affidavit at ¶¶ 9-10; see generally *Cooke v New York State Div. of Hous. & Community Renewal*, 179 Misc 2d 418 [1999][no claim that purchaser had knowledge of the overcharge or had any records at the time of the judicial sale]). If defendant had merely viewed the rent history of the Apartment, there would be no indication of anything improper. And, even if defendant had obtained the necessary documents, it was not clear that the Apartment was improperly deregulated by a lease purporting to be a "rent stabilized lease," a fact which has only now been established.

It follows that defendant is liable for all rent overcharges since September 11, 2013, with interest from the date of the first overcharge and for attorneys' fees pursuant

Real Property Law § 234. The amount of the rent overcharge is **$81,254.**[*]

Accordingly, it is

ORDERED that plaintiffs' motion is granted; and it is further

ADJUDGED and DECLARED that the Apartment was not properly deregulated prior to plaintiffs' tenancy rendering it subject to coverage under rent stabilization laws; and it is further

ORDERED and ADJUDGED that defendant must properly register the Apartment with DHCR; and it is further

ORDERED and ADJUDGED that defendant must offer plaintiffs a proper rent-stabilization lease; and it is further

ORDERED and ADJUDGED that plaintiffs are awarded $81,254.00 for overcharges with interest from September 11, 2013 and costs; and it is further

ORDERED that the parties appear for a hearing on attorneys' fees on June 26, 2018 at 2:15 PM at 60 Centre

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[*]Rent Overcharge from September 2013 through March 2014 [6 months][$2,050-978.50 = $1,071.50 x 6 = $6,429] + April 2014 through May 2018 [50 months][$2,475 - 978.50 = $1,496.50 x 50 = $74,825][$6,429 + $74,825 = **$81,254**] (9 NYCRR 2526.1[a][1]; *Matter of Duell v Condon*, 84 NY2d 773 [1995]; Sup, Ex H at ¶ 17[C][3]).

Street in room 228. Copies of all bills and documents that plaintiffs intend to introduce into evidence must be exchanged and submitted to the court (hand delivered to the Part Clerk) no later than June 15, 2018 at 3:30 PM. If the parties resolve the issue or if both parties stipulate to address it on papers as opposed to at a hearing, they must inform the court no later than June 15, 2018 at 3:30 PM; and it is further

ORDERED that the Clerk of the Court enter judgment accordingly.

This is the decision, order and judgment of the Court.

Dated: June 6, 2018

HON. JENNIFER G. SCHECTER