SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

----------X

MARCIA MEYERS,

Plaintiff,

Index No. 116747/2010

Motion Seq: 006
DECISION, ORDER & JUDGMENT

HON. ARLENE P. BLUTH

-against-

FOUR THIRTY REALTY, LLC,

Defendant.

----------X

The motion by defendant for summary judgment dismissing plaintiff's claims and a declaration that the apartment is exempt from rent regulation is granted.

Background

This action concerns plaintiff's tenancy at apartment 8E, located at 430 East 86th Street, New York, New York. The apartment is owned by defendant, Four Thirty Realty, LLC. Plaintiff signed a free-market lease commencing her tenancy on December 22, 2004 and signed several successive leases each with a rent between $3,700.00 per month and $4,100.00 per month. From the time plaintiff commenced her lease up until the tax year of 2006/2007, the building was receiving J-51 tax benefits. However, the Department of Housing and Community Renewal ("DHCR") deregulated this apartment pursuant to an order dated February 3, 1995 (NYSCEF Doc. No. 100).

The subject apartment used to be occupied by a rent controlled tenant before it became subject to rent stabilization in 1988. And as defendant points out, there was no such thing as a deregulation threshold until 1993.

On December 30, 2010, after the Court of Appeals decided *Roberts v Tishman Speyer Properties, L.P.*, (13 NY3d 270, 890 NYS2d 388 [2009]), plaintiff filed this action seeking 1) a declaration that the apartment is rent stabilized, 2) injunctive relief directing defendant to register the apartment as rent stabilized and provide plaintiff with a lease reflecting proper legal rent and 3) compensation for rent overcharges since 2004 including treble damages and attorneys' fees.

Defendant previously moved for summary judgment to dismiss plaintiff's complaint; that motion was denied. Defendant appealed and the appellate court affirmed the denial.

Defendant now moves, this time after plaintiff filed the note of issue, for summary judgment dismissing plaintiff's causes of action regarding rent overcharges and for a declaration that the apartment is deregulated. Defendant argues that these claims should be dismissed because, notwithstanding the fact that the building was in receipt of J-51 tax benefits, the 1995 DHCR deregulation order should be given deference. Defendant contends that if this Court finds the apartment is rent stabilized, then the base date to be used to calculate any overcharges should be December 30, 2006 at the rent of $3,700.00. Defendant also argues that plaintiff's overcharge claim is time-barred under CPLR 213-a.

Plaintiff insists that this motion should be denied as the apartment was improperly deregulated while the building was receiving J-51 tax benefits. Plaintiff further urges that the DHCR order should not determine whether the apartment is deregulated or not because it is based on unreliable rent increases and conflicts with legal precedent. Plaintiff maintains that this Court is not constrained to looking at four years prior to the 2006 base date and that defendant has no proof its rent increases were set in accordance with rent regulation schemes. Plaintiff contends that her claims are not barred because CPLR 213-a only limits time in terms of the

damages that she may seek not whether the apartment is rent stabilized.

Discussion

As an initial matter, this Court rejects plaintiff's argument that defendant's motion is improper because defendant already filed a motion for summary judgment. The First Department affirmed the denial of defendant's initial motion for summary judgment on the ground that " a determination of the proper base date rent would be premature and must await further discovery" (NYSCEF Doc. No. 87 at 3 [First Department Decision]). Clearly, the First Department anticipated that defendant might make another motion for summary judgment *after* discovery was completed. That is what defendant did here: file a motion for summary judgment after the note of issue was filed.

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a

summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"In 2009, the Court of Appeals decided *Roberts* . . . [and] held that owners of rent-stabilized apartments in buildings receiving J-51 benefits remain subject to rent stabilization for at least as long as the J-51 benefits are in force. . . . *Roberts* expressly left open certain important issues . . . [and] did not address other consequent issues" (*Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105, 110, 50 NYS3d 377 [1st Dept 2017]). The First Department later concluded in 2011 that *Roberts* has retroactive application (*see Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 196, 928 NYS2d 515 [1st Dept 2011]).

The central question on this motion is whether the fact that the building was still receiving J-51 tax benefits when DHCR deregulated the apartment voids DHCR's order. DHCR's order noted that the "owner filed a timely Petition for deregulation of the subject apartment" and that the "Petition was served on the tenant together with a notice requesting that the tenant respond to the Petition" (NYSCEF Doc. No. 100). "The tenant did not answer the owner's petition and has failed to provide income verification information" (*id.*). The order deregulated the apartment upon the expiration of the existing lease and included information about how the tenants could file a petition for administrative review ("PAR") to challenge the decision (*id.*). There is no evidence in the record before this Court that the tenants living in the

apartment at the time (identified as John & Charlotte Wickham) ever filed a PAR.

In *Gersten*, cited above, the First Department concluded that a previous DHCR deregulation order remained in effect despite the fact that it was issued while the building was in receipt of J-51 benefits (*id.* at 201-207). The tenants in *Gersten* sought a declaration that their apartment was rent stabilized despite the existence of an earlier DHCR order deregulating the apartment (*id.* at 201). The *Gersten* Court stressed that it gave preclusive effect to the prior DHCR order under the principle of administrative finality (*id.*). The First Department observed that there was an "elaborate statutory scheme" with respect to luxury deregulation threshold that provided tenants with "ample opportunity to challenge the prior owner's application for luxury decontrol as being precluded by the receipt of J-51 benefits" (*id.* at 202-03).

Obviously, the circumstances in this case are somewhat different– the plaintiff in this action, unlike the tenants in *Gersten*, moved into the apartment long after DHCR deregulated the apartment and did not have an opportunity to challenge the deregulation order. But there is no reason to confine the First Department's decision in *Gersten* to situations where the same plaintiff lived in the apartment when the deregulation order was issued (*see e.g., Leight v W7879 LLC,* 128 AD3d 417, 7 NYS3d 891 [1st Dept 2015] [finding that apartments were not rent stabilized where DHCR issued deregulation orders despite the fact that the building was receiving J-51 benefits]). The Court in *Leight* granted the owner's motion to dismiss even though it found that collateral estoppel did not apply, concluding that the tenants "failed to establish, as a matter of law, that their apartments became re-regulated upon plaintiffs' execution of subsequent market rate leases" (*id.* at 418-19).

The fact is that the tenant living in apartment 8E could have challenged DHCR's deregulation order when it was issued. Although plaintiff was not a party to the proceeding that resulted in the deregulation order (unlike the tenants in *Gersten*), the Court finds that there is no reason to disturb a DHCR order issued in 1995.

Plaintiff can only speculate that the "February 3, 1995 DHCR Order of deregulation is not determinative because it is entirely based on the unreliable alleged legal rent" (NYSCEF Doc. No. 114 at 14). Plaintiff has no knowledge or evidence that the DHCR deregulation order was improper; plaintiff can only offer wild theories about what happened more than two decades ago. And plaintiff fails to sufficiently distinguish the holding in *Gersten* that a DHCR order can be upheld under certain circumstances despite the Court of Appeals' ruling in *Roberts*.

The Court finds that the First Department decision in *Gersten* compels the Court to enforce the deregulation order issued for the apartment at issue here. The purpose of administrative finality is to allow all parties to move on rather than force them to reconstruct circumstances that occurred decades ago. And this proceeding provides the ideal instance to enforce DHCR's order. Rather than require the parties to make arguments about the validity of a rental history dating back to the 1980s, long before plaintiff signed her free market lease, the Court finds that DHCR's deregulation order compels dismissal of this case.

Summary

The Court's decision is *not* based on principles of collateral estoppel– it is undisputed that plaintiff was not living in the apartment when it was deregulated. But the Court sees no reason to disturb DHCR's order, which is now over 20 years old. The evidence suggests that in

1995, the owner did what it was supposed to do to get the apartment deregulated. The owner completed the necessary procedures and the tenants living in the apartment at the time did not participate in the process.

The fact that defendant did not include the DHCR order in its first motion for summary judgment does not compel the Court to deny defendant's motion because plaintiff does not dispute its authenticity. Because plaintiff has not prevailed and the apartment is declared deregulated, plaintiff is not entitled to legal fees.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant 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; and it is further

ADJUDGED and DECLARED that Apartment 8E at 430 East 86th Street, New York, New York is exempt from rent stabilization.

Dated: July 3, 2018
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH
J.S.C.