

Parise v Carlamy Realty LLC

2018 NY Slip Op 32564(U)

October 10, 2018

Supreme Court, New York County

Docket Number: 152681/2016

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 152681/2016

LAURIE PARISE, ARTHUR JENS, CHARLES AN MOTION DATE 09/27/2018

Plaintiff,

MOTION SEQ. NO. 003

- v -

CARLAMY REALTY LLC, WEBER FARHAT REALTY
MANAGEMENT INC.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The motion by defendant Carlamy Realty LLC (“Carlamy”) for partial summary judgment is denied.

Background

This action arises out of plaintiffs’ tenancies at a building owned by Carlamy located at 286 Eighth Avenue in Manhattan. Plaintiffs Parise and Jens moved into apartment 2F in 1996 and paid an initial monthly rent of \$2,400. Plaintiff An moved into apartment 3F in 2004 (after briefly living in apartment 3R) and paid an initial monthly rent of \$2,800.

Carlamy moves for summary judgment on plaintiffs’ third (rent overcharge) and fourth (attorneys’ fees) causes of action. Carlamy contends that plaintiffs’ rent overcharge claim is time-barred under CPLR 213-a because plaintiffs’ tenancies began more than four years before this case was commenced. Carlamy emphasizes that plaintiffs Parise and Jens started living in their apartment in 1996 pursuant to a market rate lease. Carlamy maintains that the attorneys’

fees cause of action is incidental to the rent overcharge claim and is therefore time-barred as well.

In opposition, plaintiffs contend that the Court can look past the four-year statute of limitations because there is a colorable claim of fraud. Specifically, plaintiffs insist that Carlamy falsely claimed that the building was commercial when it was a residential building with six or more units (thus subjecting it to rent-stabilization). Plaintiffs attach documents purporting to be fraudulent building plans and certificates of occupancy, a false application to DOB and incorrect rent rolls. Plaintiffs complain that they have not yet had an opportunity to ask Carlamy about these rent rolls at a deposition. Plaintiffs also contend that, in 2001, the owner of the building asked Jens and Parise to move their bed to the living room and conceal other items to hide the fact that they had a bedroom from an inspector.

In reply, Carlamy contends that there were five units in the building when Jens and Parise moved in (1996) until the third floor was split in 1999, creating two apartments on that floor. Carlamy then claims that even if there were six units at the start of the Parise/Jens tenancy in 1996, there would still be no rent overcharge because the monthly rent exceeded the high rent luxury deregulation threshold of \$2,000. Carlamy also submits the affidavit of Margaret Kerns, who allegedly lived in the building from 1987 to 1997, who insists that the third floor only had one residential unit (thereby supporting Carlamy's claim that the building had only five apartments).

Discussion

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 a 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], *aff’d* 99 NY2d 647, 760 NYS2d 96 [2003]).

While there is a four-year statute of limitations with respect to rent overcharge claims (*see* CPLR 213-a), “the Court of Appeals has carved out an exception for cases where there is evidence that a landlord engaged in a fraudulent scheme to evade rent regulation (*Matter of Regina Metropolitan Co., LLC v New York State Div. of Hous. and Community Renewal*, 164 AD3d 420, 424 [1st Dept 2018]). “The Court of Appeals has continued to require a showing of fraud or intentional wrongdoing before courts may allow any look back at a unit’s rental history beyond the four-year limitations period” (*id.* at 425). “[I]n the absence of fraud, this Court has declined to look back more than four years before the filing of the overcharge complaint to set the base date rent” (*id.* at 426).

Here, the Court finds that there are issues of fact with respect to whether Carlamy engaged in a fraudulent scheme to evade rent regulation. As an initial matter, the DOB application filed in 2001 indicates that the landlord sought to convert the building from commercial to residential (*see* NYSCEF Doc. No. 63). Schedule A (the final two pages of this exhibit) lists the existing status of the building's units and the proposed future use (*id.*). Floors 2 and 3 are listed as commercial (offices) with plans to convert it to residential (*id.*) even though it is undisputed that Parise and Jens lived on the second floor starting in 1996 and Kerns lived on the third floor beginning in 1987. Both tenancies predate *this 2001 application*. The Court also observes that Kerns' affidavit claims that she lived in the apartment from 1987 to 1997 but the certificate of occupancy dated December 1989 states the *entire building* was commercial (compare NYSCEF Doc. 77 with NYSCEF Doc. No. 61).

And Plaintiff Jens claims that in "2001 or early 2002, Mr. DaSilva [the landlord] told my wife and I that he was having an inspection done and asked us to move our bed to the living room and move other items so it did not look like a bedroom. I asked him why and he told me that a banker was coming to inspect the building for financing and could we please just help him out" (NYSCEF Doc. No. 49, ¶ 23).

These are clear issues of fact with respect to Carlamy's alleged scheme to evade rent regulation. Classifying a building as commercial for decades when, in fact, it has residential units creates the impression that the landlord is trying to avoid the law. Allegedly demanding that tenants move their bed so it didn't look like a bedroom is even more suspicious. A jury might find that purposely misrepresenting the use of a building was an effort to evade rent regulation or the jury could conclude that the landlord simply did not know what he was doing. But the Court cannot make that determination on a motion for summary judgment.

The question of how many units is also an issue of fact—plaintiffs claim there were six or more units and defendants claim that there were five.¹ Even though Carlamy claims it has rent rolls suggesting there were only five units, the fact is that the Court cannot summarily ignore plaintiffs' sworn affidavits. That would require a credibility determination which is inappropriate on a motion for summary judgment.

The Court recognizes that plaintiffs signed leases that were already above the high rent deregulation threshold. But a property owner cannot evade a rent overcharge claim by simply offering an initial free market lease that is higher than the deregulation threshold. If the rent charged should have been lower because the building should have been subject to rent regulation, then Carlamy might have overcharged plaintiffs.

Summary

This matter presents a unique factual scenario where the units were always treated as free market. Unlike many of the seminal cases in this area such as *Regina* or *Matter of Grimm v State of New York Div. of Hous. and Community Renewal* (15 NY3d 358 [2010]), there is no evidence that this building was ever subjected to rent stabilization. And the question here is whether plaintiffs have raised an issue of fact with respect to whether Carlamy engaged in a fraudulent scheme to completely evade rent regulation. The Court finds that there are issues of fact relating to whether Carlamy purposefully misrepresented the number of units in the building and the status of the building as commercial.

Although the purpose of the statute of limitations in rent overcharge cases is to prevent honest landlords from having to keep records forever (*Regina*, 164 AD3d at 427), the fact is that Carlamy made too many suspicious mistakes and these errors create issues of fact about whether

¹ This issue is critical in this case because a building becomes potentially subject to rent stabilization laws once it has six or more units.

Carlamy was trying to evade rent regulation laws. Carlamy might argue that it made mistakes and had no intention of evading rent regulation laws. But that is a question for the jury to decide.

Accordingly, it is hereby

ORDERED that the motion by Carlamy Realty LLC for partial summary judgment is denied.

Next Conference: 12-⁰⁴18@ 2:15 p.m.

10-10-18
DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input checked="" type="checkbox"/>	NON-ARLENE P. BLUTH
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	