

Amwest Realty Assoc., LLC v Sargeant
2019 NY Slip Op 30136(U)
January 18, 2019
Civil Court of the City of New York, New York County
Docket Number: 56391/17
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 118

AMWEST REALTY ASSOCIATES, LLC X

Petitioner-Landlord

HON. SABRINA B. KRAUS

-against-

DECISION & ORDER
Index No.: L&T 56391/17

MICHAEL SARGEANT & JONATHAN SABALLOS
171 West 81st Street , Apt. 1E
New York, New York 10024

Respondents- Tenants
_____ X

BACKGROUND

Petitioner commenced this summary nonpayment proceeding against Michael Sargeant (Sargeant) and Jonathan Saballos (Respondent), the tenants of record of Apt. 1E at 171 West 81st Street, New York, New York 10024 (Subject Premises) based on the allegation that Respondents have failed to pay rent due for the Subject Premises. The primary issue for trial centered on the whether the Subject Premises is exempt from rent regulation and whether the rent sued for was legal.

PROCEDURAL HISTORY

The petition was filed March 3, 2017 and sought \$6235.00 in rent for January and February 2017. Proof of service was filed March 13, 2017. Respondent appeared *pro se* on March 20, 2017, and filed an answer asserting a general denial. Sargeant has never answered or appeared herein. An initial court date was set for March 27, 2017.

On May 1, 2017, Respondent appeared by counsel, and the parties entered into a stipulation waiving traverse, and agreeing to allow Respondent to amend his answer. The proceeding was adjourned to June 13, 2017.

On May 15, 2017, Respondent filed an amended answer, demand for a bill of particulars and counterclaims. The pleadings asserted that the Subject Premises is subject to Rent Stabilization and was improperly deregulated, in addition to counterclaims for rent overcharge, treble damages and attorneys' fees.

On June 13, 2017, Respondent moved for an order permitting discovery on the issue of the status of the Subject Premises. On September 22, 2017, the motion was granted by the court (Lau, J), and the proceeding was marked off calendar pending discovery. On November 16, 2017, Respondent moved for re-argument or a clarification of the nature of documents that Petitioner was obligated to produce. That motion was granted by the court (Lau, J) on January 3, 2018, and the proceeding remained off calendar.

The parties stipulated to restore the proceeding to the court's calendar on April 13, 2018. On June 5, 2018, the proceeding was transferred to Part X for assignment to a trial Judge. The same day the trial was assigned to Part R. The parties entered into a pre-trial order and a trial date was set for September 25, 2018. On September 25, 2018, the trial was adjourned to January 14, 2019.

On January 14, 2019, the proceeding was transferred from Part R to Part 118 for trial. The court held the trial and adjourned the proceeding to January 18, 2019 for the submission of post-trial memoranda.

On January 18, 2019, the parties submitted post trial memos.

FINDINGS OF FACT

Petitioner is the owner of 171 West 81st Street, pursuant to a deed dated July 6, 1989 (Ex 6). Respondent and Sargeant became the tenants of record of the Subject Premises, pursuant to a lease dated April 23, 2014 (Ex 5). The lease was for a one year term through June 30, 2015, at a monthly rent of \$3300. The lease was renewed by Respondent in the spring of 2016. The renewal was for a term through April 30, 2017, at a monthly rent of \$3495 (Ex 12).

There is a valid MDR on file with HPD (Ex 7). The MDR lists Stellar Management (Stellar) as the managing company for the subject building and Arianit Jakupaj (AJ) as the registered managing agent.

The certificate of occupancy for the building was admitted into evidence (Ex 8) and shows that the building was built in 1963, and has a total of 20 units, on five floors.

Petitioner seeks rent for January 2017 through January 2019. There was no evidence of any agreement to pay rent between the parties, either written or oral, for the period of May 2017 through January 2019.

From January 2017 forward Respondent paid only \$681.00. This amount was paid in increments between March and April 2017 (Ex 3).

The last rent-stabilized tenant for the Subject Premises was Marvin Maler. The last lease signed by Maler was for a rent of \$646.55 through a term ending July 31, 2013 (Ex 13). A building wide rent registration was entered into evidence for 1984 through 2017 (Ex 4). Maler is first listed as a registered tenant in connection with a lease ending July 31, 1986 at a rent of \$239.42.

In May 2013, Petitioner registered Maler's rent as \$645.55.

Petitioner presented the testimony of three witnesses at trial Jon Kratz (Kratz), Albino Galabaya (Albino), and AJ.

Kratz is employed by Stellar Management (Stellar), the managing agent for Petitioner, as a Project Manager on the construction team for Stellar. Kratz oversees apartment renovations as part of his duties. Kratz testified primarily in general terms of procedures during apartment renovations.

Kratz testified that after Maler vacated in the fall of 2013, he received a vacancy report and went to inspect the Subject Premises. Kratz testified it was clear that the Subject Premises needed a gut renovation. Kratz had plans drawn up and hired an architect. Kratz testified that he decided on a scope of work, in conjunction with the owner, and that after receiving a number of bids the job was awarded to a contractor.

Kratz oversaw the renovations for the Subject Premises. The renovations included new sub floors and white oak floors, new sheetrock, a new bathroom and kitchen, new electrical wiring new refrigerator, stove and dishwasher, new closet doors and hardware, and reconfiguration of the Subject Premises into a two bedroom apartment.

Kratz testified that he visited the Subject Premises at least four times during the renovations, and that on three of those occasions he took pictures. Kratz testified that it was his standard practice to take pictures at the beginning, middle and end of the construction.

Kratz testified that the construction was done between November 2013 and January 2014. Kratz stated he visited the Subject Premises at the beginning of the construction in November 2013, and took photos (Ex 9H - 9L). Kratz went back on December 19, 2013 and

took photos of what he called the middle of the construction (Ex 9E through 9G), and then again on January 28, 2014, which he described as the end stage of construction (Exs 9A through 9D). Kratz testified that approximately two weeks after his January 2014 visit, the renovations were completed and the property manager took photos showing the completed renovations at this time (Exs 10A-10C).

Petitioner submitted five checks in evidence which Petitioner asserts were payment for the renovations to the Subject Premises.

Four checks drawn off a North Fork Bank Account (Ex 2):

Check No 57501, dated July 29, 2013, in the amount of \$23,628.00; and
Check No 57546, dated September 12, 2013, in the amount of \$10,606.60; and
Check No 57624, dated November 21, 2013 in the amount of \$15,830.76; and
Check No 57731, dated March 17, 2014, in the amount of \$10,767.32

In addition to Check No 832, dated August 10, 2017, in the amount of \$10,767.32 drawn off BankUnited account of Stellar Management and deposited into a New York Community Bank account(Ex 1). No where on the face of the checks is there any reference to the Subject Premises or the invoice the checks were purportedly submitted to prove payment of.

Kratz testified that payments for renovation work are usually done in two parts with 50% being paid upon deposit, and the balance being paid upon completion. However, Kratz' testimony about the payments in this case were inconsistent with the balance of his testimony. Kratz testified that if the contractor wasn't paid upon completion he would have heard about it, but then when confronted with the fact that the last alleged check to the contractor was dated in 2017, Kratz had no reasonable explanation. Nor did Kratz state why there were five separate payments alleged in this renovation when the standard practice was for two payments.

Petitioner submitted an invoice dated July 17, 2013 (Ex 11). The invoice is from CMS Renovation and lists work proposed to be done in the Subject Premises. The invoice is for a total of \$71,000.00. Albino testified that he was paid in full for the invoice. The court does not credit this testimony. Petitioner's witnesses acknowledged there were differences between the scope of work in the invoice and the work actually done, but Petitioner's witnesses also asserted, without contradiction, that the work actually done cost more than the amount set forth in the invoice.

No receipts were submitted into evidence for any of the materials used for the construction. The items alleged purchased include new cabinets, dishwasher, stove, refrigerator, microhood, pedal sink, new toilet etc. Albino provided no explanation for the absence of said receipts.

Although Kratz gave the impression that Albino was one independent contractor among many who bid for the job, Albino testified that he is a salaried employee for Stellar. Albino testified that he receives a salary of approximately \$100,000.00 per year, as an employee of Stellar, and that he typically earns another \$200,000.00 annually for doing apartment renovations for Stellar. Albino stated he is a full time employee of Stellar and has a regular Monday through Friday work schedule. Albino does not work or perform renovations for any other management companies. Albino is clearly an interested witness.

During the period that Albino received the alleged payments for the renovations, Albino worked through three different corporations. CMS Renovations, the corporation that four of the five checks were made payable to, was incorporated in April 2010, and dissolved on December

30, 2015. ¹ A second company called G&G Remodeling Inc. was incorporated on April 27, 2015, and is still listed as an active corporation, and most recently a third corporation entitled RAC Renovation Inc. was incorporated on January 5, 2018, and remains active. Albino testified that he was the owner of all three corporations. Albino gave no reason for changing from one company to the next.

Albino testified that he went to the Subject Premises two to three times a week, while the construction was taking place, and that he went at the beginning of the work and when the work was completed. Albino acknowledged that he is not a licensed contractor. While the invoice put in evidence contains a signature, Albino did not recognize who's signature that was. Albino testified that he typically does the renovations without any signed contract and that the invoice was not created by Albino, but by an employee. Albino acknowledged that the invoice could contain errors. Albino could not recall when the work took place, or all of the work was done. Albino could not recall whether he obtained any permits from DOB for work done in the Subject Premises. The court found Albino's testimony about the invoice, checks and renovations lacked credibility.

Respondent submitted into evidence a printout from DOB related to work in the Subject Premises (Ex A). The DOB document shows that an architect filed a plan for the renovation of the Subject Premises on or about August 8, 2013. The filing indicated that \$26,010.00 was the estimated total cost of the renovation. The filing further indicated that the work would include

¹ The court takes judicial notice of the filing dates and dissolution dates for all three of Albino's corporations from the information maintained on the New York State, Department of State, Division of Corporations website.

the installation or replacement of lighting fixture and or controls. The DOB record indicates that the job was closed on October 7, 2013, due to inactivity.

Petitioner's final witness was AJ. AJ is employed by Stellar as a managing agent. AJ has been employed by Stellar for 14 years, and has been assigned to the subject building for the last three to four years. AJ testified that he was not involved with the renovation for the Subject Premises. AJ testified that he calculated the rent increase for the Subject Premises after Maler vacated by adding increases for longevity, vacancy and Individual Apartment Improvements (IAIs). The only document that AJ relied upon for the IAIs was the invoice.

At the close of Petitioner's case, the Court granted Petitioner's motion to amend the petition to seek all rent due through January 2019.

Respondent also testified. Respondent testified that he moved into the Subject Premises in 2014 with Sargeant. Respondent stated Sargeant left after a few months, and that he has not seen Sargeant since Sargeant permanently vacated.

Respondent testified that when he moved into the Subject Premises, the apartment was brand new. Respondent testified that some of the items listed on the invoice were not done as part of the renovation and specifically that the Subject Premises has no crown molding, no bathtub, and no bathroom vanity. Respondent has not made any alterations to the Subject Premises since he moved in. Respondent submitted photos in evidence showing what the Subject Premises looks like.

DISCUSSION

The Court Finds that Petitioner Failed to Establish by a Preponderance of Credible Evidence That the Subject Premises Is Exempt from Rent Regulation

RSC § 2522.4(a)(1) provides that an owner is entitled to a rent increase for an IAI when improvements are installed in the Housing Accommodation. For IAI rent increases that take effect on or after September 24, 2011, in a building that contains 35 or fewer apartments, the permitted increase in the legal regulated rent is 1/40th of the total cost incurred by Petitioner (Id; *see also* DHCR Operational Bulletin 2016-1). Increases are based on the total substantiated cost of the improvements including the installation cost but excluding finance charges (Id).

For apartments which are deregulated pursuant to high rent-vacancy, a listing of IAIs and their total cost are to be included in the notice of deregulation served on the tenant.

DHCR Operational Bulletin 2016-1 further provides:

Claimed individual apartment improvements are required to be supported by adequate and specific documentation, which should include:

1. Cancelled check(s) (front and back) contemporaneous with the completion of the work or proof of electronic payment;
2. Invoice receipt marked paid in full contemporaneous with the completion of the work;
3. Signed contract agreement; and
4. Contractor's affidavit indicating that the installation was completed and paid in full.

Petitioner is required to submit as many of the listed forms of proof as it is able to provide, and if unable to provide these items, Petitioner is required to provide an explanation (Id). Review of IAIs is a fact intensive and case specific process. There is no inflexible rule to be applied in evaluating a claim for an IAI rather the court must consider the persuasive force of the evidence submitted by each party (*Jemrock Realty Co v Krugman* 13 NY3d 924).

If the court finds that the proof is not adequate, the court may deny the IAI increase in its entirety or disallow the unsubstantiated costs depending on the evidence submitted (DHCR Operational Bulletin 2016-1).

Furthermore where, as in the case at bar, the costs of the IAI are paid to a person or organization sharing an identity of interest with the owner or managing agent, heightened scrutiny of the IAIs is warranted (id; *125 St. James Place LLC v. New York State Div. of Hous. & Cmty. Renewal*, 158 A.D.3d 417 (2018)). The DHCR bulletin defines identity of interest to include situations where the person receiving payment for the IAI is the employee of the managing agent and the payments to them are in addition to their salary.

Finally, any demolition work performed by the owner or an employee of the owner during the course of assigned duties does not qualify as an IAI.

Maler had a legal regulated rent of \$645.55 a month. Upon Maler's vacancy, Petitioner was entitled to increase the rent \$104.90, representing a vacancy allowance of 16.25%. In addition, Petitioner was entitled to a longevity increase of \$108.45, calculated as \$3.87 (.6% of \$645.55) per year for 28 years (RSC § 2522.8).

These two increases together would bring the legal rent up to \$858.90 per month. Therefore, in order for the Subject Premises to become deregulated based upon a high rent deregulation, Petitioner must establish IAIs totaling at least \$65,684.00 (\$1642.10 x 40). Improvements totaling \$65,684.00 would entitle Petitioner to increase the rent by an additional \$1642.10 a month, which would put the legal regulated rent over the threshold of \$2500 [9 NYCRR § 2520.22(r)(5)].

The court finds that Petitioner failed to establish said expenditures.

There were many weak areas in Petitioner's proof. The invoice (Ex 11) does not appear to be created in the regular course or business, it was not marked paid, and no witness who created the invoice or signed the invoice was presented by Petitioner. Not all of the checks are contemporaneous with the work, and there is no indication on the checks that they are related to the invoice submitted or connected to the Subject Premises. Finally, the contractor is full time employee of the managing agent and no receipts for any of the materials or individual costs were submitted. The court does not give great weight to the invoice, or the testimony of Albino.

Notwithstanding the little weight the court gives to the invoice and Albino's testimony, it is uncontested that Petitioner in fact did do substantial and extensive renovations to the Subject Premises. Respondent did not challenge this allegation, but in fact supported it by his testimony that he was given a brand new apartment when he moved in. The photos entered in evidence further show that substantial work was done.

Respondent did not provide any independent evidence regarding the value of the IAIs. Respondent did show there were discrepancies between the work listed on the invoice and the work done, but it was undisputed that said discrepancies would only have resulted in a higher cost.

While not all of the checks submitted by Petitioner were contemporaneous with the work at least two of the checks were. The check for \$15,830.76 was dated November 21, 2013, and corresponds with what Kratz testified to as the beginning of the renovation and the check dated March 17, 2014 , for \$10,767.32, corresponds with Kratz' testimony about the payment being released once the apartment was ready to be rented. Respondent executed the lease in April

2014. Those two checks together total \$26,598.08, a figure very close to the estimated cost of the project indicated by Petitioner in its DOB filing (Ex A).

The court finds that Petitioner did establish by a preponderance of credible evidence that it spent at least \$26,598.08 on IAIs, entitling Petitioner to an increase of \$664.95. This was established by the testimony of both parties verifying the renovations, and the before and after pictures including an explanation of how the configuration of the apartment was changed.

Based on said finding the court finds the legal rent for the Subject Premises is \$1523.85.

RESPONDENT HAS ESTABLISHED IT CLAIM FOR OVERCHARGE

The statute of limitations for rent overcharge is four years (CPLR § 213-a).

Respondent's claim in this proceeding may go back to the inception of Respondent's tenancy which was less than four years prior to the first month of rent sued for by Petitioner in this proceeding.

Respondent paid a total of \$109,361.55 in rent for the months May 2014 through December 2016 (Ex 3). This includes \$4746.55 of the \$6600.00 security deposit paid by Respondent (9 NYCRR §2505.4), as well as the first month's rent which was actually paid in April 2014.

Respondent made only minor payments in amounts under the legal rent after this period so there is no overcharge collected after December 2016. The legal rent for said 32 month period totals \$48,763.20. Thus there was an overcharge for this period in the amount of \$60,598.35.

RESPONDENT IS ENTITLED TO TREBLE DAMAGES

The court finds that the overcharge was willful. The court's finding that the Subject Premises remains governed by Rent Stabilization is based largely on the finding that Albino was not a credible witness, that he is an employee of Stellar and the defects in the documentation as noted above. Petitioner has the burden of establishing that the overcharge was not willful.

Rent Stabilization Code §26-516(a) provides in pertinent part:

.... any owner of housing accommodations who, upon complaint of a tenant is found after a reasonable opportunity to be heard, to have collected an overcharge above the rent authorized for a housing accommodation shall be liable to the tenant for a penalty equal to three times the amount of such overcharge. ... If the owner establishes by a preponderance of the evidence that the overcharge was not willful, the state division of housing and community renewal shall establish the penalty as the amount of the overcharge plus interest

As Petitioner failed to establish that the overcharge was not willful, Respondent is entitled to treble damages [*125 St. James Place LLC v. New York State Div. of Hous. & Cmty. Renewal*, 158 A.D.3d 417 (2018)].

a penalty of three times the overcharge may not be based upon an overcharge having occurred more than two years before the complaint is filed or upon an overcharge which occurred prior to April 1, 1984; and

As noted above, the court deems Respondent's overcharge complaint is deemed asserted as of January 2017, the first month for which rent was sought in this proceeding. From January 2015 to December 2016, the total rent collected by Petitioner was \$77,765.00. The total rent due was \$36,572.40. The overcharge for said period is \$ 41,192.60.

Based on the foregoing the court finds Respondent is entitled to treble damages in the amount of \$123,577.80.

CONCLUSION

Based on the foregoing, the petition is dismissed as Petitioner failed to prove the Subject Premises is exempt from Rent Stabilization. Respondent's counterclaim for rent overcharge is granted to the extent set forth above. Respondent may either offset the amount of the overcharge and penalties against the rent pursuant to DHCR regulations or seek to enter a judgment against Petitioner for said amount.

Respondent is clearly the prevailing party herein and may move for attorneys' fees. Any post trial motions should be returnable before Housing Court in Part R.

This constitutes the decision and order of the court.

Dated: New York, New York
January 18, 2019

Sabrina B. Kraus, JCC

TO: CULLEN & ASSOCIATES, PC
Attorneys for Petitioner
BY: ROBERT MARINO, Esq.
132 Nassau Street - Suite 1220
New York, New York 10038
212.233.9772

NEW YORK LEGAL ASSISTANCE GROUP
Attorneys for Respondent
By: MARK HESS, Esq.
7 Hanover Square - 7th Floor
New York, New York 10004
212.613.7318

