

Davis v Graham Court Owners Corp.

2019 NY Slip Op 31092(U)

April 12, 2019

Supreme Court, New York County

Docket Number: 153293/2014

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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MELVYN DAVIS,

Plaintiff,

- v -

GRAHAM COURT OWNERS CORP, BENNETT SCHWARZMANN,
and MARJORIE MILLER,

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69,
70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90, 91, 92, 93, 94, 95, 96, 97, 98,
99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119

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

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiff's motion for summary judgment in its
favor against defendant Graham Court Owners Corp. and for
summary judgment dismissing the first counterclaim of defendants
Bennett Schwarzmann and Marjorie Miller is denied; and it is
further

ORDERED that the cross motion of defendant Graham Court
Owners Corp. for summary judgment is denied.

DECISION

In this action involving a landlord-tenant dispute,
plaintiff moves, pursuant to CPLR 3212, for summary judgment
against defendant Graham Court Owners Corp. (Graham Court) and
for summary judgment dismissing the first counterclaim of

defendants Bennett Schwarzmann (Schwarzmann) and Marjorie Miller (Miller) (together, the Subtenants). The Subtenants oppose the motion, and Graham Court opposes and cross-moves for summary judgment.

Background

Plaintiff is the tenant of apartment 8I (the Apartment) in a building located at 1925 Seventh Avenue, also known as 1925 Adam Clayton Powell Jr. Boulevard, New York, New York (the Building). Graham Court owns the Building, and nonparty Residential Management NY Inc. manages it. Records from the State of New York Division of Housing and Community Renewal (DHCR) show that the Apartment was last registered as a rent stabilized unit in 2002, with legal rent at \$500.07 per month. Graham Court filed no annual rent registration statements with DHCR between 2003 and 2010.

In November 2002, plaintiff executed a written lease (the Lease) for a five-year term, commencing May 1, 2003, with monthly rent at \$2,001. Paragraph 31 of the Lease reads, in part, that "this [Apartment] is a non-stabilized apartment and is not subject to the Rent Stabilization Code, Rent Control, DHCR or any governmental agency". Plaintiff alleges that he was not provided with a rent stabilization rider.

Since the Lease stated that plaintiff would take possession of the Apartment "as is," he undertook certain improvements to

make it habitable. Affidavits from workmen who worked on the Apartment, and proposals and invoices show that plaintiff paid over \$85,000 for the work. The work included sanding and refinishing wood floors; installing kitchen appliances, such as a wine refrigerator and a washer/dryer combination; updating and/or installing electrical wiring and outlets to accommodate "a big screen plasma TV" and other devices; installing a dining room chandelier and two remote-controlled ceiling fans; and the "[a]ssembly & [i]nstallation of (13) imported . . . wall sconces w/ dimmers".

In January 2007, Graham Court began receiving J-51 tax benefits.

Plaintiff renewed the Lease in May 2008 for a three-year term, with monthly rent set at \$2,225. He executed a second lease renewal in May 2011 for another three-year term with a one-year option to renew, with rent at \$2,400 per month. Plaintiff allegedly exercised the option to renew sometime in 2014. Both lease renewals state that the Apartment was not subject to rent stabilization or rent control, and neither renewal contained rent stabilization riders.

In 2011, Graham Court registered the Apartment with DHCR. Plaintiff maintains that Graham Court did not provide him with an initial apartment registration. He states that the annual rent Graham Court had registered with DHCR was false because

DHCR's records listed the Apartment's monthly rent at \$2,335, when in fact, the rent was \$2,400.

On September 21, 2006, plaintiff secured written consent from nonparty Sam Becker (Becker), the managing agent for the Building, to sublet the Apartment for one year, provided that "[t]he person that Mr. Davis subleases to will have a clean credit record and a clean criminal record" (the Sublet Letter). Plaintiff maintains that Graham Court modified their agreement when Becker, as Graham Court's agent, struck out the language "for one year" on the Sublet Letter. Plaintiff sublet the Apartment to at least three different subtenants between 2006 and 2011.

In June 2011, the Subtenants sublet the Apartment from plaintiff for a three-year term commencing August 1, 2011 for \$4,200 per month. The sublease (the Sublease) identified plaintiff as the landlord and designated P.O. Box 29, Suffern, New York as his address. Despite Graham Court's consent as evidenced in the Sublet Letter, plaintiff alleges that, on January 7, 2014, he was served with a Notice to Cure a violation of paragraph 12 of the Lease, which prohibited an assignment of the Lease or a sublet of the Apartment. Graham Court then served plaintiff with a Notice of Termination, dated February 11, 2014 and effective March 31, because he failed to cure the violation.

Procedural History

Plaintiff commenced this action against Graham Court and the Subtenants and seeks the following: (1) a declaration that the Lease as renewed is null and void, that plaintiff is the rent stabilized tenant for the Apartment, that he is entitled to monthly rent of no more than \$500.07, or an amount to be determined by the court, and directing Graham Court to furnish plaintiff with a new rent stabilized lease; (2) damages on his claim for rent overcharge for the four-year period immediately preceding the date of the filing of the complaint, or earlier if permissible by law; (3) a declaration that plaintiff is not in default of the Lease; (4) a declaration that Graham Court's Notice to Cure and Notice of Termination are defective as a matter of law and that Graham Court is barred from relying on them or on an alleged illegal sublet or assignment as a predicate for a summary holdover proceeding; (5) a stay tolling the expiration of the Notice to Cure in order to permit plaintiff reasonable time to cure any alleged default; (6) recovery of his attorneys' fees pursuant to paragraph 15 of the Lease and Real Property Law § 234; (7) an injunction enjoining Graham Court from taking any action to terminate plaintiff's tenancy and evict him from the Apartment; (8) a declaration that plaintiff is the rent stabilized tenant for the Apartment, that the Subtenants have no possessory rights to the Apartment as of

July 31, 2014, an injunction directing them to vacate and surrender the Apartment, and an order directing the Sheriff to place plaintiff in possession of the Apartment; (9) damages on his claim for fraud based upon Graham Court's misrepresentation that the Apartment was not rent stabilized; (10) common-law indemnification from Graham Court against the Subtenants' counterclaims; and (11) use and occupancy from the Subtenants from March 1, 2014 to the present.

Graham Court asserts 12 affirmative defenses and eight counterclaims in its answer, including an allegation that plaintiff profited from subletting the Apartment in contravention of the Rent Stabilization Law. Graham Court seeks a judgment of possession, use and occupancy, and recovery of its legal fees.

The Subtenants assert three counterclaims in their answer - illusory tenancy, rent overcharge, and the recovery of attorneys' fees under Real Property Law § 234.

Discussion

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (see Zuckerman

v City of New York, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (see CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (id., citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Vega, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

CPLR 3001 provides, in part, that the "court may render a declaratory judgment having the effect of a final judgment 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." A declaratory judgment action requires an actual controversy (see Long Is. Light. Co. v Allianz Underwriters Ins. Co., 35 AD3d 253, 253 [1st Dept 2006], appeal dismissed 9 NY3d 1003 [2007]). Relief is limited to a declaration of the parties' legal rights based on the facts

presented (see Thome v Alexander & Louisa Calder Found., 70 AD3d 88, 99-100 [1st Dept 2009], lv denied 15 NY3d 703 [2010]).

A. Plaintiff's Motion for Summary Judgment

Plaintiff did not specify on which of his claims he seeks summary judgment. However, the court gleans from his moving papers that he is seeking relief as to a declaratory judgment that the Lease as renewed is null and void, that he is entitled to a rent stabilized lease at the legal rent, and an assessment of damages for rent overcharge.

1. Plaintiff seeks a judgment declaring that the Apartment was and is subject to the Rent Stabilization Law. An apartment subject to the Rent Stabilization Law may be removed from rent regulation only "through regular, officially authorized means" (Draper v Georgia Props., 94 NY2d 809, 810 [1999]). The Rent Regulation Reform Act (RRRA), enacted in 1993, provides that a rent stabilized apartment may be deregulated in one of two ways: "(1) in vacant apartments where the legal regulated rent was \$2,000 per month or more; and (2) in occupied apartments where the legal regulated rent was \$2,000 per month or more and the combined annual income of all occupants exceeded \$ 250,000 per year" (Roberts v Tishman Speyer Props., L.P., 13 NY3d 270, 282 [2009], citing Administrative Code §§ 26-504.1 and 26-504.2). T

The \$2,000 deregulation threshold includes increases for vacancies and major capital improvements (see Altman v 285 W.

Fourth LLC, 31 NY3d 178, 185-186 [2018], rearg denied 31 NY3d 1136 [2018]). The permissible rent increase following a vacancy is 20% on a two-year lease (id. at 184, citing Administrative Code § 26-511 [c] [5-a]). A landlord also is entitled to a rent increase for completing individual apartment improvements (IAIs) and major capital improvements (see Administrative Code § 26-511 [c] [6] and [c] [13]). The legal regulated rent for an individual apartment in a building with 35 or fewer apartments shall increase by 1/40th of the total cost of the IAIs to that apartment (see Administrative Code § 26-511 [c] [13]).

An owner seeking to assert a rent increase based upon IAIs must provide probative evidence of the value of the improvements, such as “bills from a contractor, an agreement or contract for work in the apartment, or records of payments” (Altschuler v Jobman 478/480, LLC., 135 AD3d 439, 440 [1st Dept 2016], lv denied 29 NY3d 903 [2017], quoting 72A Realty Assoc. v Lucas, 101 AD3d 401, 402-403 [1st Dept 2012]; Matter of 985 Fifth Ave. v State Div. of Hous. & Community Renewal, 171 AD2d 572, 574-575 [1st Dept 1991], lv denied 78 NY2d 861 [1991] [stating that “the burden is upon the owner to justify the increase sought by presenting documentary support therefore, and it must submit all relevant invoices, bills, cancelled checks and/or other material”]). An owner need not provide a line-item breakdown of the work, so long as the evidence submitted is

"persuasive" on the issue (Jemrock Realty Co. LLC v Krugman, 13 NY3d 924, 926 [2010]).

In addition, the work must constitute an improvement within the meaning of Rent Stabilization Code (9 NYCRR) § 2522.4 (a) (1), which allows a rent increase "where there has been a substantial increase . . . of dwelling space or an increase in the services, or installation of new equipment or improvements, or new furniture or furnishings, provided in or to the tenant's housing accommodation, on written tenant consent to the rent increase." Work that qualifies as an improvement includes "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" (Jemrock Realty Co. LLC v Krugman, 72 AD3d 438, 440 [1st Dept 2010], lv dismissed 15 NY3d 866 [2010]). However, normal maintenance and repair does not constitute an improvement (see Matter of 125 St. James Place LLC v New York State Div. of Hous. & Community Renewal, 158 AD3d 417, 417 [1st Dept 2018] [stating that painting, plastering and repairing wood floors fell within normal maintenance]; Matter of Mayfair York Co. v New York State Div. of Hous. & Community Renewal, 240 AD2d 158, 158 [1st Dept 1997] [rejecting a rent increase because

painting, skim coating, partial floor replacement and partial rewiring constituted normal maintenance and repair]).

The evidence establishes that the legal regulated rent for the Apartment in 2002 was \$500.07, and that Graham Court was entitled to a 20% vacancy increase when the former tenant vacated the Apartment. As for the IAIs, plaintiff asserts that Graham Court has a history of claiming credit for IAIs that were never made so it could push the legal rent above the deregulation threshold and cites Matter of Graham Ct. Owners Corp. v Division of Hous. & Community Renewal (71 AD3d 515 [1st Dept 2010]) in support. Underlying that decision was an Article 78 proceeding involving a tenant in a rent stabilized apartment at the Building who had asserted a rent overcharge claim against Graham Court (see Matter of Graham Ct. Owners Corp. v Division of Hous. & Community Renewal, Sup Ct, NY County, November 24, 2008, Stone, J., index No. 103432/2008). Graham Court had argued that it was entitled to a rent increase based on major capital improvements to the tenant's apartment, but DHCR's rent administrator concluded that Graham Court's documents detailing its expenditures, alleged to have totaled \$60,000, were not credible. The tenant in that action averred that he paid to upgrade the electrical wiring in the kitchen, and that Graham Court's employees performed the claimed capital improvement work for no additional pay. In a footnote, the trial court noted

that Graham Court had submitted an affidavit from its contractor falsely stating that it installed sheetrock throughout the apartment even though no new sheetrock was found after an inspection. Graham Court's expenditures totaled \$49,000, which was far less than the amount necessary to raise the legal rent above the \$2,000 threshold to deregulate that apartment. On appeal, the Court found that Graham Court's painting, plastering and floor maintenance work did not constitute capital improvements and concluded that DHCR properly rejected Graham Court's documentation for those claimed IAIs (Matter of Graham Ct. Owners Corp., 71 AD3d at 515-516; see also Graham Ct. Owners Corp. v Taylor, 34 Misc 3d 153[A] [App Term, 1st Dept 2012] [stating on the appeal in a related holdover proceeding that "[the] landlord, in connection with prior proceedings before DHCR, (falsely) asserted that its own contractors had effectuated the electrical work"])).

Although similar, this action is factually distinguishable. While plaintiff claims that he renovated the apartment, his deposition testimony shows that Graham Court tiled the walls and floors in the bathrooms and installed new toilets and vanities. Graham Court also tiled the kitchen floor and installed new kitchen cabinets, albeit without countertops. The types of work Graham Court completed at the Apartment differs from the maintenance work described in Matter of Graham Ct. Owners Corp.

(71 AD3d at 515-516). DHCR (and the trial court) in that action also considered the monetary value of Graham Court's work, assessed after an inspection, to determine whether a rent increase was justified. In this action, Frankel's affidavit attesting to the value of the Graham Court's work performed before plaintiff's tenancy, standing alone, is plainly insufficient (see Altschuler, 135 AD3d at 440; Parkside Group v Leader, 58 Misc 3d 160[A], *1 [App Term, 1st Dept 2018]; Graham Ct. Owners Corp. v Green, 11 Misc 3d 131[A], *1 [App Term, 1st Dept 2006] [stating that the "landlord failed to establish the existence of apartment improvements justifying the rent increase under Rent Stabilization Code [9 NYCRR] § 2522.4 [a] [1]" with "adequate documentation . . . [or a] witness affiliated with the contractor . . . [to] demonstrate the nature and scope of the work performed"). Nevertheless, plaintiff ignores the effect of Graham Court's IAIs on the legal rent and fails to ascribe a monetary value to them. Therefore, plaintiff is not entitled to a declaration that the Apartment was subject to the Rent Stabilization Law in 2003.

Plaintiff, though, has demonstrated that the Apartment became subject to the Rent Stabilization Law as of January 2007. Owners who receive J-51 tax benefits "subject their properties to the [Rent Stabilization Law]" (Gersten v 56 7th Ave. LLC, 88 AD3d 189, 194 [1st Dept 2011], appeal withdrawn 18 NY3d 954

[2012])). Therefore, "units not otherwise subject to rent stabilization become rent-stabilized" (id.). Graham Court has conceded that the Apartment was subject to rent stabilization when it began receiving J-51 tax benefits in January 2007 (see Administrative Code §§ 11-243 and 26-504 [c]). Although Frankel did not state when Graham Court has or will cease receiving those tax benefits, a printout from the New York City Department of Finance shows that the benefits expire 14 years after the 2006/2007 tax year.

Despite the foregoing, the court declines to issue a declaration in plaintiff's favor at this time. "A declaratory judgment should not be granted where the action serves to increase rather than to decrease litigation or where it results in trying a controversy piecemeal" (Smith v Western Union Tel. Co., 276 App Div 210, 211-214 [1st Dept 1949], affd 302 NY 683 [1951]). Given the issues of fact as to whether the Apartment was properly deregulated in 2003, issuing a judgment declaring that the Apartment was rent stabilized as of January 2007 would result in granting plaintiff declaratory relief in piecemeal fashion. Additionally, for the reasons set forth below, plaintiff has not demonstrated that he is entitled to a judgment declaring that he is the rent stabilized tenant for the Apartment or that he is entitled to a new rent stabilized lease. Similarly, his request for a permanent injunction enjoining

Graham Court from evicting him based upon an alleged violation of the Lease must be denied at this time. Accordingly, plaintiff's motion for summary judgment on the first cause of action is denied.

2. The inquiry on a rent overcharge claim "is a fact-based inquiry that relies primarily on objective evidence to determine the lawful rent that should be charged for the premises" (Matter of H.O. Realty Corp. v State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 103, 107 [1st Dept 2007]). A tenant who prevails on a rent overcharge claim is entitled to recover as damages the overcharge plus interest or treble damages where the overcharge was willful (see Administrative Code § 26-516 [a]). CPLR 213-a provides a four-year statute of limitations for actions for a residential rent overcharge and states that the "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" (see also Administrative Code § 26-516 [a] [2]). For the court to look beyond that four-year period, there must be "substantial indicia of fraud" (Matter of Grimm v State of New York Div. of Hous. & Community Renewal Off. of Rent Admin., 15 NY3d 358, 366 [2010]). As plaintiff alleges that he did not receive a rent stabilization rider or written notice of the prior legal rent as required (see Administrative Code §§ 26-511 [d] and 26-504.2

[b]), together with the fact that he paid for certain improvements, the court is not limited to examining only the four-year period immediately preceding the date of the complaint (Matter of Grimm, 15 NY3d at 366; see also Gersten, 88 AD3d at 199 [stating that “[a] tenant should be able to challenge the deregulated status of an apartment at any time during the tenancy”]).

Here, plaintiff has not dispelled all questions of fact as to whether he is entitled to recover on a rent overcharge. The claim is predicated upon the allegation that Graham Court improperly deregulated the Apartment. As with declaratory judgment claim, plaintiff failed to establish that the market rent for the Apartment in 2003 was not legally permissible. Moreover, if the Apartment was properly deregulated in 2003, then Graham Court could rent the Apartment at a market rate from 2003 to 2007, until the J-51 tax benefits came into effect. Consequently, plaintiff’s motion for summary judgment on the second cause of action is denied.

3. “An illusory tenancy is defined generally as a residential leasehold created in a person who does not occupy the premises for his or her own residential use and subleases it for profit, not because of necessity or other legally cognizable reason”

(Matter of Badem Bldgs. v Abrams, 70 NY2d 45, 52-53 [1987]; Matter of Avon Furniture Leasing v Popolizio, 116 AD2d 280, 284

[1st Dept 1986], lv denied 68 NY2d 610 [1986] [defining an “illusory tenant” . . . [as] a party who, while assuming the guise of a ‘prime tenant’, enters into a sublease arrangement which has the effect, directly or indirectly, of evading the requirements of the Rent Stabilization Law”]. Illusory tenancies “are condemned because they permit the unscrupulous to use the provisions of the rent stabilization laws for financial gain, at the expense of those entitled to the laws’ protections . . . and thereby frustrate the laws’ purposes” (Matter of Badem Bldgs., 70 NY2d at 53).

An illusory tenancy arises in one of two situations: (1) where the prime tenant acts as a straw man, or alter ego for the landlord, by subleasing the apartment, thereby allowing the landlord to circumvent the rent stabilization or rent control laws, and (2) where the prime tenant subleases a rent stabilized or rent controlled apartment for profit (Conti v Citrin, 132 Misc 2d 834, 836 [Sup Ct, NY County 1985], affd 121 AD2d 852 [1st Dept 1986], lv dismissed 69 NY2d 742 [1987] [citations omitted]). Factors for the court to consider in determining whether a tenancy is illusory include “the intent of the asserted tenant to resume occupancy of the premises and the degree of control exercised by the tenant” (Bruenn v Cole, 165 AD2d 443, 445 [1st Dept 1991]). Additional factors include “whether the subtenant reasonably expected to continue in

possession indefinitely as a rent-regulated tenant when the sublease ends . . . [and] whether the prime tenant profited by overcharging the subtenant" (Art Omi, Inc. v Vallejos, 15 Misc 3d 870, 875-876 [Civ Court, NY County 2007], affd 21 Misc 3d 129[A] [App Term, 1st Dept 2008]). The court may also take into account whether the prime tenant and the landlord colluded in a scheme "to defeat the rights of the occupant," although this last factor is not an essential prerequisite to a determination on the issue (Bruenn, 165 AD2d at 447; Matter of Avon Furniture Leasing, 116 AD2d at 285 [finding that an illusory tenancy had been established in the absence of evidence of collusion where the owner "derived substantial benefits from the scheme and was aware of the nature of [the prime tenant's] activities"]). If an illusory tenancy is found, any lease is considered "void as against public policy" (Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 425, 429 [1st Dept 2007], affd 11 NY3d 589 [2008]).

The averments in plaintiff's affidavit support his contention that he was not an illusory tenant. A "hallmark of an illusory tenancy" is whether a "subtenancy was, from its inception, set up to permit the prime tenant to improperly profit by violating the rent regulations" (Primrose Mgmt. Co. v Donahoe, 253 AD2d 404, 405 [1st Dept 1998], affg 175 Misc 2d 503 [App Term, 1st Dept 1997]). Plaintiff states that he was not

told the Apartment was rent stabilized when he leased it in 2003 or when he renewed the Lease in 2008 and in 2011. He believed he was the prime tenant of a non-rent stabilized unit with an unlimited right to sublet the Apartment.

Nevertheless, the Subtenants have raised a triable issue of fact in opposition. Plaintiff's assertion that he always intended to reside at the Apartment is belied by the following facts: he has not resided in the Apartment since 2008; he has maintained residences in Suffern or Tuxedo Park for more than 10 years; he received his mail in Suffern and was registered to vote there; he requested permission to sublet the Apartment for an indefinite period; and the Sublease term expired three months after the second lease renewal expired, notwithstanding the one-year option to renew. Moreover, plaintiff's testimony that he rented the Apartment so that he could take advantage of a potential cooperative or condominium conversion only bolsters the merits of the Subtenants' counterclaim. While the record does not suggest that Graham Court profited from plaintiff's subletting activities, the Subtenants raised a triable issue of fact as to whether the Building's superintendent and other employees were aware of their subtenancy at a time when the Apartment was subject to rent regulation (see Primrose Mgt. Co., 253 AD2d at 405 [stating that, although evidence of collusion is unnecessary, a claim of an illusory tenancy requires, at a

minimum, an owner's constructive knowledge of the subleasing arrangement])). Indeed, plaintiff agrees that the Building's managing agent and its superintendent knew that the Subtenants occupied the Apartment. Thus, plaintiff's motion for summary judgment dismissing the Subtenant's first counterclaim must be denied.

B. Graham Court's Cross Motion for Summary Judgment

Graham Court argues that it is entitled to summary judgment against plaintiff on the grounds that he illegally sublet the Apartment in contravention of the Rent Stabilization Law, and that it is entitled to a judgment of possession. As with plaintiff's motion, Graham Court did not identify on which counterclaim or affirmative defense it seeks relief.

The Rent Stabilization Law (Administrative Code) § 26-511 (c) (12) imposes several conditions upon the tenant who wishes to sublet his or her rent stabilized unit. As is relevant here, a "tenant may not sublet the unit for more than a total of two years, including the term of the proposed sublease, out of the four-year period preceding the termination date of the proposed sublease" (Administrative Code § 26-511 [c] [12] [f]; 9 NYCRR § 2525.6 [c]). The rent charged to the subtenant cannot exceed the legal rent plus 10% (Administrative Code § 26-511 [c] [12] [a]; 9 NYCRR § 2525.6 [b]). In addition, the tenant must show "that at all times he or she has maintained the unit as his or

her primary residence and intends to occupy it as such at the expiration of the sublease" (Administrative Code § 26-511 [c] [12] [b]; 9 NYCRR § 2525.6 [a]). Therefore, a two-year sublet is permitted, but an assignment of the prime tenant's lease is not (see Bruenn, 165 AD2d at 488).

A "rent-stabilized tenant who sublets [his or] her apartment at market rates to realize substantial profits not lawfully available to the landlord, and does so systematically, for a substantial length of time, places [himself or] herself in jeopardy of having [his or] her lease terminated on that ground" (Goldstein v Lipetz, 150 AD3d 562, 563 [1st Dept 2017], appeal dismissed 30 NY3d 1009 [2017] [collecting cases]). In that instance, there is no "right to cure" (id.), because "profiteering tenants who sublease their apartments forfeit their rights [under the Rent Stabilization Law] and are subject to eviction" (BLF Realty Holding Corp. v Kasher, 299 AD2d 87, 91 [1st Dept 2002], lv dismissed 100 NY2d 535 [2003]).

Here, plaintiff sublet the Apartment for more than two years after 2007, when the Apartment became rent stabilized. Additionally, a comparison of the monthly rent charged to plaintiff under the second lease renewal and the monthly rent charged to the Subtenants under the Sublease reveals a difference of \$1,800, which is well over the 10% maximum

permissible under the Rent Stabilization Law (Administrative Code) § 26-511 (c) (12).

Graham Court's claim that plaintiff violated the Rent Stabilization Law, though, is premised upon the assumption that plaintiff was aware that the Apartment was rent stabilized when he sublet it. Frankel avers that, "[a]s required by law and per office policy, Residential . . . as [Graham Court's] agent . . . mailed the annual DHCR registration statements to the subject premises addressed to Plaintiff". Graham Court, however, offered no proof of Residential's mailing procedures to show that the registration statement was properly addressed and mailed to plaintiff (DeLuca v Smith, 146 AD3d 732, 732 [1st Dept 2017]).

More importantly, it appears that Graham Court attempted to conceal the Apartment's rent stabilized status from plaintiff. Graham Court admitted that the Apartment was subject to rent regulation beginning in 2007 because of the J-51 tax abatements, and yet, it failed to register the Apartment with DHCR until 2011, when the second lease renewal took effect and two years after *Roberts* (13 NY3d 270) was decided. Further, paragraph 31 of the second lease renewal reads that "[plaintiff] and [Graham Court] both agree that this [Apartment] is a non-stabilized apartment . . .". Graham Court has not explained why it offered plaintiff a non-rent stabilized lease renewal at a time when it

received benefits from the J-51 program. Plaintiff only learned that the Apartment was rent stabilized when Graham Court served him with a Notice to Cure in 2014. Thus, the facts herein do not establish that plaintiff elected to commercialize a rent stabilized apartment "in a manner which defrauded his landlord as well as his subtenant" (Continental Towers Ltd. Partnership v Freuman, 128 Misc 2d 680, 689 [App Term, 1st Dept 1985]). While Frankel denies that plaintiff sought "permission to sublet the [Apartment] beyond the initial request in September 2006", the parties' conflicting statements raise a credibility issue, which cannot be resolved on a motion for summary judgment (see S.J. Capelin Assoc. v Globe Mfg. Corp., 34 NY2d 338, 341 [1974]). A question of fact also exists as to whether plaintiff breached paragraph 12 of the Lease, which expressly prohibits an assignment or a sublet. If an agreement transfers a lessee's entire interest in the leasehold to another, then it is an assignment, but the agreement is a sublease if the lessee retains a reversionary interest (Bruenn, 165 AD2d at 448). While the term of the Sublease expired three months after the second renewal term expired, plaintiff alleged that he exercised the one-year option to renew contained in the second lease renewal. As such, plaintiff appears to have retained a reversionary interest in the leasehold.

Moreover, plaintiff states that Becker, on Graham Court's behalf, modified the Sublet Letter to grant plaintiff the right to sublet for an unlimited period. Therefore, at the time plaintiff entered into the Sublease with the Subtenants, he believed that he could charge market rent and sublet the Apartment for longer than a one-year term.

Finally, Graham Court has not adequately addressed the merits of the Subtenants' cross claim (denominated as a first counterclaim) of an illusory tenancy. Although "a sublease can convey no more than the rights afforded to the tenant" (Bruenn, 165 AD2d at 448-449), where a prime tenant is considered an illusory tenant, a subtenant may be granted protection under the Rent Stabilization Law (Matter of Perl binder v New York City Conciliation & Appeals Bd., 67 NY2d 697, 699 [1986]; see also Yellon v Reiner-Kaiser Assoc., 89 AD2d 561, 563 [2d Dept 1982])). As the Subtenants have raised a triable issue of fact on the counterclaim and cross claim for an illusory tenancy, Graham Court is not entitled, at this juncture, to a judgment of possession.

As for Graham Court's assertion that the court should award it a money judgment for use and occupancy, this branch of the motion is denied. A landlord's claim for use and occupancy may be predicated upon a written agreement (see Real Property Law § 220) or upon a theory of quantum meruit as against those with

whom the landlord is not in contractual privity (see Carlyle, LLC v Beekman Garage LLC, 133 AD3d 510, 511 [1st Dept 2015]).

Although Graham Court did assert a cross claim for use and occupancy against the Subtenants, the parties do not dispute that the Subtenants have occupied the Apartment since 2011.

Graham Court has established that it has not received any payments for use and occupancy since January 2014.

Nonetheless, questions of fact exist as to what amount constitutes fair use and occupancy. If the Apartment was rent stabilized in 2003, as plaintiff suggests, it follows that use and occupancy ought to be the legal regulated rent for the Apartment. However, as neither plaintiff nor Graham Court established that the Apartment was properly deregulated, the \$500.07 amount is not a reliable indicator of what the legal rent should have been. Likewise, if the legal rent at the time the Apartment allegedly re-entered rent regulation in 2007 was

improper, then the \$2,225 monthly rent, as indicated in the DHCR records, is also an improper amount to use as a base for calculating use and occupancy. Hence, Graham Court's motion for a money judgment for use and occupancy payments must be denied at this time.

4/12/2019
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

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