Crockett v 351 St. Nicholas Ave. LLC
2019 NY Slip Op 31177(U)
April 25, 2019
Supreme Court, New York County
Docket Number: 159061/2017
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH — PART IAS MOTION 18EFM

Justice

---X

SCOTT CROCKETT

Plaintiff,

- v -

351 ST. NICHOLAS AVENUE LLC,

Defendant.

---X

INDEX NO. 159061/2017

MOTION DATE 02/06/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing papers, plaintiff moves for an order: i) granting summary judgment in favor of plaintiff, ii) striking defendant's affirmative defenses; iii) a declaration that plaintiff is entitled to a rent stabilized lease; iv) a declaration that plaintiff's initial rent should be set to $175.69 per month as set forth in the Rent Reduction Order; v) awarding plaintiff $235,549.20 in damages representing the amount of rent overcharged and treble damages; and vi) awarding plaintiff attorneys' fees and costs.

BACKGROUND

Plaintiff is a tenant in a building owned by defendant located at 351 St. Nicholas Avenue in the County, City and State of New York (the premises). Plaintiff entered into possession of the apartment on or about May 10, 2010. The term of the lease was for one year, with the legal rent set at $2,100 per month and a preferential rent of $1,672 per month. The lease did not state that the apartment was rent-stabilized, and it was not

accompanied by a rent-stabilized lease rider. The plaintiff continued to pay rent pursuant to the following executed leases: March 21, 2011 including a rider dated April 25, 2011, with legal rent set at $2,146.50 and preferential staying the same;[1] January 16, 2014 with legal rent set at $2,362.32 and preferential rent of $2,000 per month; January 15, 2015 with legal rent set at $2,386.84 and preferential rent of $2,075 per month; May 1, 2016, including a rider, with the legal rent set at $2,836 and preferential rent of $2,175; February 20, 2017 with only the preferential rent increasing to $2,250 per month; and May 22, 2018, which only stated that the rent was $2,250 per month.

In April of 1997, prior to defendant's acquisition of the premises, the Department of Housing and Community Renewal (DHCR) investigated a complaint at the building and found that the owner had failed to cure certain violations in the building. The DHCR issued a Rent Reduction Order (reduction order) which stated in part:

> "the legal regulated rent is reduced to the level in effect prior to the most recent guidelines increase for the tenant[']s lease which commenced before the effective date of this order, except: if a Major Capital Improvement (MCI) increase has been granted for the subject premises, and the owner has already begun to collect an Owner Individual (OI) increase...However, no other increases may be collected after the effective date of this rent reduction order... until an order is issued restoring the rent."

(NYSCEF Doc. No. 13, p. 3).

The reduction order did not fix the legal regulated rent at a particular amount, but rather indicated that the legal regulated rent would be the level in effect prior to the most recent guidelines increase for the tenant's lease which commenced before the effective date of the order of April 1, 1997. As noted on the reduction order itself, DHCR provides

[1] Upon expiration of the 2011 lease, plaintiff paid defendant monthly until 2014.

landlords the opportunity to file a petition for Administrative Review of the order within 35 days of the issuance of the order. It appears that the then-owner did not file a petition.

The building began receiving benefits under the J-51 tax program in 2005/2006 and continued to do so until 2016/2017. The benefits are reflected in the NYC Department of Finance's J-51 Benefit History printout (NYSCEF Doc. No. 4) as well as on defendant's tax bills for the years the benefit was received (NYSCEF Doc. No. 27).

According to the DHCR's records, plaintiff's apartment was rent controlled in 1984, with rent set at $163.43 per month. No registration statements were filed until 2002, when the apartment was registered as rent stabilized with Elizabeth Quiller as the tenant and a legal rent of $700 per month. In the years 2003-2006 Ms. Quiller was still the tenant and was registered as paying $175.69 per month. From the years 2007-2010, the apartment was listed as vacant. In 2011, the owner of the premises before defendant[2] registered the apartment as rent stabilized, reflecting plaintiff as the tenant and setting the legal regulated rent at $2,100 per month and a preferential rent of $1,672 per month. No registration statements have been filed with DHCR since then. Plaintiff continues to reside in the apartment and pay rent according to the leases stated above.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (Dallas-Stephenson v Waisman, 39 AD3d 303, 306 [1st Dept 2007]). The movant's

[2] Defendant acquired the premises from HP Building – 351 St Nicholas LLC (HPB) on or about December 27, 2011.

burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh, 22 NY3d 470, 475 [2013] [internal quotation marks and citation omitted]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (People ex rel. Spitzer v Grasso, 50 AD3d 535, 545 [1st Dept 2008], quoting Zuckerman, 49 NY2d at 562). "[A] motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (Scott v Long Is. Power Auth., 294 AD2d 348 [2d Dept 2002]).

I. Declaratory judgment regarding rent-stabilized lease

Plaintiff seeks a declaratory judgment asserting that his tenancy is governed by Rent Stabilization Law (RSL) and is therefore entitled to a rent-stabilized lease. Plaintiff asserts two grounds for declaratory judgment. First, plaintiff maintains that defendant was receiving J-51 tax benefits at the time his tenancy commenced, therefore defendant was subject to RSL's provisions prohibiting rent increases. Second, plaintiff points to the reduction order issued by DHCR on March 16, 1998, which explicitly prohibits any rent increase until a Rent Restoration Order (restoration order) is issued.

J-51 Benefits

New York City's J-51 tax abatement program provides incentives for owners to rehabilitate and improve their buildings (Roberts v Tischman Speyer Properties, L.P., 62 AD3d 71 [1st Dept 2009], affd 13 NY3d 270 [2009]). "One of the caveats of the program was that the rent deregulation of residential units in buildings receiving J-51 benefits was prohibited" (id. at 74). Additionally, a building receiving J-51 benefits will be subject to rent stabilization for the duration of the period in which such benefits are received (id.) and this principle may be applied retroactively (Gersten v 56 7th Ave. LLC, 88 AD3d 189, 195 [1st Dept 2011]).

While an owner is only bound by RSL until the J-51 benefits expire, when a tenant is in occupancy at the time an apartment is improperly deregulated by an owner receiving J-51 benefits, the tenant retains its rent-regulated status for the duration of its tenancy (72A Realty Assoc. v Lucas, 101 AD3d 401, 401-402 [1st Dept 2012] ["tenant is entitled to rent-stabilized status for the duration of her tenancy and to collect any rent overcharges, as her apartment was improperly deregulated by landlord while it was receiving J–51 tax benefits"]).

Plaintiff alleges that the prior owner, HPB, began receiving J-51 benefits in 2005/2006 and defendant continued to receive the same benefits after it acquired the premises until the 2016/2017 tax year. In support of his motion, plaintiff submits defendant's tax bills, and a J-51 benefit history printout from the NYC Department of Finance. Both documents clearly state that defendant, and HPB, were receiving J-51 benefits every year from 2005/2006 until 2016/2017. The benefits were administered in

connection with alleged construction being done in the building. Accordingly, plaintiff established prima facie that his apartment is entitled to be rent-stabilized due to defendant's receipt of J-51 benefits (see e.g., Roberts, 13 NY3d 270).

In opposition, defendant argues that they were advised by HPB that an application for J-51 benefits had been submitted, but that the application was to be withdrawn. Defendant maintains that they had no further communication with HPB regarding the J-51 benefits and, because the application was supposed to be withdrawn, the only tax abatement it received was "temporary" (NYSCEF Doc. No 33, ¶19).

This is insufficient to raise an issue of fact regarding its receipt of benefits under the program. First, defendant acknowledges that they had notice of their participation in the program. (id. at ¶14; ¶19). Additionally, defendant cites no legal authority supporting the argument that "temporary" benefits exempt a landlord from having to comply with RSL.

Contrary to defendant's assertion, the fact that the building was substantially rehabilitated after January 1, 1974 does not exempt plaintiff's apartment from rent stabilization. As a preliminary matter, it is not clear that the premises was substantially rehabilitated as no details, contracts, or bills were submitted. Regardless, section 5 (a)(5) of the Emergency Tenant Protection Act of 1974 (as added by L. 1974, ch. 576, § 4) exempts housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January 1,1974. "Where an owner, however, receives J–51 benefits in connection with such a renovation, the building will indeed be rent stabilized, for a period of time, by virtue of RSL (Administrative Code) § 26–504(c),

which covers '[d]welling units in a building or structure receiving the benefits of section 11–243'" (Gersten, 88 AD3d at 194). Here, defendant's predecessor received the J-51 benefits because the premises were being "rehabilitated" (NYSCEF Doc. No. 45, p. 3). While the construction was signed off on in 2010, defendant continued to receive J-51 benefits until 2016/2017 (NYSCEF Doc. No. 20, ¶41; ¶3).

As plaintiff's apartment was improperly deregulated during plaintiff's tenancy, and during which period defendant was receiving J-51 tax benefits, the tenancy is subject to RSL and plaintiff is entitled to rent-stabilized leases throughout his tenancy (see Roberts, 13 NY3d 270; Gersten, 88 AD3d 189 [applying Roberts retroactively]).

Rent Reduction Order

In the instant matter, it is undisputed that a rent reduction order was issued in 1998, with an effective date of April 1, 1997 and that no rent restoration order was issued. Plaintiff argues that because DHCR never issued the restoration order, defendant and HPB were prohibited from increasing the rent. In opposition, defendant argues that they were not aware of the reduction order; that they had restored the services, therefore no restoration order was required; and that, in any event, vacancy increases are permitted even when a rent reduction order is in place. Defendant also argues that the service at issue was a *de minimis* condition, and that the reduction order was deemed null and void when the building fell in to tax foreclosure and the City became the owner in 2003.

Pursuant to Administrative Code of the City of New York § 26-514, owners who fail to maintain essential services are not entitled to benefit from guideline increases and are barred from applying or collecting any further rent increases. "Both the agency's

policy and the Code provide that once a rent reduction has been issued, no further rent increases may be collected until a rent restoration order is issued" (Zumo Mgt. Inc. v State Div. of Hous. & Community Renewal, 183 Misc 2d 107, 112 [Sup Ct Queens County 1999]). Contrary to defendant's contention, even when services have been restored, "it is clear that rent restoration is permitted only upon a determination by DHCR that a landlord is entitled to restoration" (130 E. 18th, L.L.C. v Mitchel, 50 Misc 3d 55, 57 [App Term, 11th & 13th Jud Dist 2015] citing Rent Stabilization Code [RSC] [9 NYCRR] § 2523.3 ["nor shall any owner be entitled to a rent restoration based upon a restoration of services unless such restoration of services has been determined by the DHCR"]; DHCR Policy Statement 90–2 ["where DHCR determines that an owner has failed to maintain services, such owner shall not be entitled to a rent restoration until he or she has made an application and DHCR issues an order restoring the rent"]). Further, rent reduction orders are a matter of public record and defendant fails to support the assertion that lack of knowledge is a defense to complying with a reduction order.

A *de minimis* condition is one that the DHCR deems is not worthy of a rent reduction order. Defendant argues that the condition at bar is *de minimis*, but such a determination is solely within the DHCR's discretion, not the courts (see Mitchel, 50 Misc 3d 55; see also Rent Stabilization Code [RSC] [9 NYCRR] § 2523.3). Even though defendant directs the Court to various decisions regarding *de minimis* conditions, those were determinations made by the DHCR via the Administrative Review process. The premises previous owner had the opportunity to file a petition for an Administrative Review and seemingly chose not to.

With respect to defendant's argument regarding the *in rem* tax proceedings, it is true that that tenancies in City-owned buildings are not subject to Rent Stabilization Laws (Administrative Code § 26-403 [e][2][f]). However, upon a subsequent sale, the units resume their stabilized status at the last rents charged by, or on behalf of, the City (643 Realty LLC v Thadal, 15 Misc 3d 131[A] [App Term, 2d & 11th Jud Dist 2007]; see Rent Stabilization Law of 1969 [Administrative Code] § 26–507[a]). Accordingly, plaintiff's branch of the motion seeking declaratory judgment that plaintiff is entitled to a rent-stabilized lease is granted.

II. Declaratory judgment regarding rent amount and overcharges

Having established that plaintiff's tenancy was subject to RSL from the onset, plaintiff is entitled to overcharges and a declaration that rent shall be set at $175.69, the last lawful rent imposed on his apartment (Gersten, 88 AD3d 189; Lucas, 101 AD3d 401). In addition to declaratory judgment, by his own calculations, plaintiff is seeking $106,693.36 in overcharges for the four-year period prior to the commencement of the complaint. In making this motion, plaintiff submits his calculation of the overcharge amount, using records from DHCR, showing rental history for his apartment. Plaintiff uses the amount of the last legal regulated rent filed with DHCR, $175.69. Defendant opposes and argues that the Court should not consider the reduction order as it is twenty years old. Defendant also argues that absent proof of fraud, there is an absolute bar on the examination of rental history beyond the four-year base date.

Defendant correctly notes that regardless of the forum in which it is commenced, a rent overcharge claim is subject to a four-year statute of limitations (see Rent

Stabilization Law of 1969 [Administrative Code] § 26-516 [a][2]). However, the Court of Appeals has carved out an exception for cases where there is evidence that a landlord engaged in a fraudulent scheme to destabilize an apartment (Grimm v State Div. of Hous. and Community Renewal Off. of Rent Admin., 15 NY3d 358 [2010]). Plaintiff claims that defendant engaged in a fraudulent scheme by improperly increasing the rent, failing to file annual registration statements, and failing to use proper rent-stabilized leases. These allegations are sufficient indicia of defendant's fraud and defendant failed to adequately refute these claims (see Altschuler v Jobman 478/480, LLC., 135 AD3d 439 [1st Dept 2016]).

As set forth above, RSL §26-514 expressly prohibits a landlord "from applying or collecting any further rent increases." Defendant contends that despite the clear language of the statute, and the reduction order, it wasn't until a 2014 Amendment to RSC § 2523.4 (a) (1) that a landlord was precluded from receiving vacancy increases for an apartment even when a reduction order is in effect. This argument was already rejected by the court in Mitchel, which held that "there has never been language in RSL § 26–514 or RSC § 2523.4 (a)(1) from which a court could conclude that the phrases 'any further rent increases' or 'any further increases in rent' referred only to increases set by the Rent Guidelines Board and not to increases set by statute or regulation" (Mitchel, 50 Misc 3d at 58). This argument also ignores that the J-51 benefits precluded defendant from increasing rent as well. Accordingly, plaintiff is entitled to a declaration that rent remain at $175.69 per month.

With respect to the overcharges, CPLR § 213(a) and RSL § 26-516 provide that a rent overcharge claim is subject to a four-year statute of limitations. Specifically, the statute says that a court is precluded from examining rental history of the unit prior to the four-year period immediately preceding the commencement of the action. Typically, a rent overcharge claim is calculated using the legal registered rent amount that was in effect on the base date – the date four years prior to the filing of the complaint (RSC § 2520.6 [f]). As plaintiff points out, in some cases a court must look beyond the four-year period to calculate an overcharge claim, such as where an owner improperly deregulated a unit. In those cases, the court must disregard the free market lease amount and must instead review "any available record of rental history necessary to set the proper base date rate" (Lucas, 101 AD3d 402). Where a false amount was listed on DHCR registration, "the rent reverts back to the last legal amount" (Ernest and Maryanna Jeremias Family Partnership, LP v Matas, 39 Misc 3d 1206[A] [Civ Ct Kings County 2013]; see Thornton v Baron, 5 NY3d 175 [2005]).

In the present case, because the vacancy increases were prohibited by the reduction order and the J-51 program, the last legal rent of $175.69 is the base amount the Court must use in calculating overcharges as it is the last amount properly registered with the DHCR. Additionally, plaintiff has demonstrated that defendant engaged in fraud which requires the court to disregard the $2,100 rent amount on the base date. As such, and in the absence of compelling counter calculations, the Court adopts the calculations of plaintiff and grants that branch of the motion seeking damages in the amount of $106,693.36 in overcharges.

III. Treble damages and attorney's fees and costs

Administrative Code § 26-516 provides that a landlord is liable to the tenant for a penalty three times the amount of a rent overcharge, as well as reasonable costs and attorneys' fees of the proceeding. An owner may avoid the penalty if it establishes by preponderance of the evidence that the overcharge was not willful. The statute "creates a presumption of willfulness in rent overcharge cases that the owner/landlord must rebut by a preponderance of the evidence" (Draper v Georgia Properties, Inc., 230 AD2d 455, 460 [1st Dept 1997], affd 94 NY2d 809 [1999]). In the case at bar, the only evidence submitted to rebut a finding of willfulness is the affidavit of Dan Rozenblatt (Rozenblatt), a member of the defendant company, and letters from HPB stating that the application for the J-51 benefits was being withdrawn. Rozenblatt's affidavit stated that they were not aware of the reduction order, and that they believed the J-51 benefits were withdrawn. However, plaintiff submitted copies of defendant's tax bills, up to tax year 2016/2017, which explicitly reflect abatements under the J-51 tax program. In response, defendant failed to raise to an issue of material fact regarding its participation. Accordingly, plaintiff's part of the motion seeking treble damages and attorney's fees is granted.

IV. Strike defendant's affirmative defenses

Plaintiff moves to strike all of defendant's affirmative defenses as they fail as a matter of law. The first, second, third, fourth, and sixth affirmative defenses all rest on the assertion that the rent reduction order is, or should be, no longer in effect. Having concluded that the order is in effect and shall remain so until a restoration order is issued, these affirmative defenses are dismissed. The fifth affirmative defense states that the

building was removed from rent stabilization. However, for the reasons set forth above, the apartment is still subject to RSL and was not removed from rent stabilization.

The seventh affirmative defense states that RSL does not apply because the building was substantially rehabilitated after January 1, 1974. As discussed above, an exception applies when an owner is receiving benefits under the J-51 program in connection with that rehabilitation. Therefore, the seventh affirmative defense is dismissed. The eighth affirmative defense, whereby defendant maintains that it did not willfully overcharge, is dismissed as defendant failed to show by a preponderance of evidence that the overcharge was not wilful (Administrative Code § 26-516). The ninth affirmative defense is similarly dismissed as defendant and HPB were prohibited from seeking vacancy increases pursuant to the reduction order. Finally, as the Court concluded that plaintiff is entitled to summary judgment, defendant's tenth affirmative defense, that the complaint fails to state a cause of action, is dismissed.

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion that seeks summary judgment in plaintiff's favor on the first cause of action of the complaint and a declaratory judgment with respect to the subject matter of that cause of action is granted; and it is further

ADJUDGED and DECLARED that plaintiff is entitled to a rent-stabilized lease and an initial rent in the amount of $175.69 per month pursuant to an active Rent Reduction Order; and it is further

ORDERED that the branch of plaintiff's motion seeking summary judgment on his second cause of action is granted; and it is further

ORDERED that plaintiff is awarded a judgment in the amount of $106,693.36 in overcharges, plus treble damages and attorney's fees as determined by a JHO/Special Referee; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the issues below, except that, in the event of and upon filing of a stipulation of the parties, as permitted by CPLR 4317, the JHO/Special Referee shall determine the aforesaid issue; and it is further

ORDERED that the following issues are hereby submitted to the JHO/Special Referee: (1) the calculation of treble damages; and (2) the calculation of attorneys' fees; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for

the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules).

This constitutes the decision and order of the Court.

4/25/2019
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE