John Manning Irrevocable Trust v Biggart
2019 NY Slip Op 31256(U)
May 3, 2019
Supreme Court, New York County
Docket Number: 159180/2016
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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JOHN MANNING IRREVOCABLE TRUST,

Plaintiff,

- v -

VERONIKA BIGGART aka RURNGRONG PHOEWHAWM,

Defendant.

INDEX NO. 159180/2016

MOTION DATE 08/17/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143 were read on this motion to VACATE & REARGUE.

Horing Welikson & Rosen, P.C., Williston Park (Renee Digrugilliers, Esq.), for plaintiff John Manning Irrevocable Trust.
Goddard Riverside Law Project, New York (Aaron Kratzat, Esq.), for defendant Veronika Biggart.

Gerald Lebovits, J.:

This case involves a dispute over the lawful rent charged by plaintiff, John Manning Irrevocable Trust (Manning), to defendant, Veronika Biggart, for an apartment in a building owned by Manning. Manning has charged $1500 per month since Biggart signed the lease. The parties now dispute whether that rent is lawful under the Rent Stabilization Law and its implementing regulations, the Rent Stabilization Code. Manning seeks a declaratory judgment that the lawful rent-stabilized rent is $1500 per month.

Additionally, it is undisputed that Biggart's apartment is rent-stabilized, and that the lease Biggart signed when she began renting the apartment did not comply with the requirements of the Rent Stabilization Law. Manning also seeks a declaratory judgment that Biggart is required to execute a rent-stabilized lease to remain in the apartment. Biggart contends that she is not required to sign a lease because she is a permanent tenant within the Rent Stabilization Code's meaning.

Manning moved for summary judgment on its declaratory judgment claims. Biggart filed papers opposing summary judgment but failed to appear for oral argument on the motion. This court granted summary judgment upon Biggart's default and concluded that Manning was

entitled to summary judgment on the merits. The court directed the parties to settle an order reflecting this determination.

Biggart now moves to stay settlement of the order, to vacate her default, and to reargue the court's merits determination that Manning is entitled to summary judgment. Manning moves for leave to reargue this court's conclusion that Manning had made alterations to Biggart's apartment that would ordinarily require Manning to obtain a certificate of occupancy.

A. Biggart's Motion to Vacate Her Default

Biggart moves under CPLR 5015 (a) to vacate the court's determination that summary judgment for Manning was warranted in light of Biggart's failure to appear for argument on Manning's motion. The motion is granted.[1]

A party moving to vacate a default must establish that it had a reasonable excuse and a potentially meritorious claim or defense. (*Rogers v. 66 E. Tremont Heights HDC*, 69 A.D.3d 510, 510-511 [1st Dept. 2010]).

Biggart's counsel has submitted a detailed and credible affidavit explaining the basis for his failure to realize that argument had been scheduled on the motion — principally, that his practice is almost entirely in Housing Court and that he was unfamiliar with the process by which oral arguments are scheduled (and counsel alerted) under Supreme Court's electronic filing system. (*See People's United Bank v. Latini Tuxedo Mgmt. LLC*, 95 AD3d 1285, 1286 [2d Dept 2012].) The court also notes that counsel has not previously missed appearances in this case and that counsel promptly moved to vacate the default.

Biggart has established a reasonable excuse for her default. And the legal arguments in counsel's affidavit further meet the minimal showing of merit required on a motion to vacate a default and restore the case to the calendar. (*Polir Constr., Inc. v Etingin*, 297 AD2d 509, 512 [1st Dept 2002].)

B. Biggart's Motion for Leave to Reargue

This court's earlier determination also held that on the merits Manning is entitled to summary judgment on its request for a judgment declaring that (i) the lawful regulated rent is $1500 per month and (ii) defendant is required to execute a rent-stabilized lease. (*See* NYSCEF No. 117.) Biggart moves under CPLR 2221 for leave to reargue the court's determination on

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[1] This motion is somewhat irregular, procedurally speaking. Defendant has moved to vacate this court's prior determination under CPLR 5015 (a) (1), which permits a court to relieve a party from a previously rendered "judgment or order." Here, though, this court has not yet rendered an order. Instead, it previously issued a decision in which it directed the parties to "settle order." (*See* NYSCEF No. 117.) Defendant now seeks to vacate that decision prior to settlement. Nonetheless, since both "parties have proceeded as if an order had been settled" on this court's prior decision, the court will consider the merits of defendant's CPLR 5015 motion. (*See Trophy Prods v Cinema-Vue Corp.*, 53 AD2d 18, 22 [1st Dept 1976].)

both branches of this declaratory judgment. The court grants leave to reargue but adheres to its original decision.

1. The Apartment's Lawful Regulated Rent

At argument on Manning's motion for summary judgment, the court noted that it had previously found there to be insufficient indicia of fraud to warrant considering the apartment's rental history beyond the four-year lookback period (during which the rent charged by Manning was at all times $1500 per month). (*See* NYSCEF No. 124, at 4-5, citing *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366-367 [2010] [argument transcript]; NYSCEF No. 78 [order holding that defendant had not identified sufficient indicia of fraud].) Nor did defendant identify any additional evidence in opposing summary judgment to justify looking beyond the four-year period. (NYSCEF No. 124, at 5.)

In seeking reargument, Biggart asserts that the court failed to consider her argument that Manning had not submitted evidence of improvements to the apartment, or some other non-fraudulent basis for increasing the apartment's rent. But Manning plainly *did* submit that evidence in support of its summary judgment motion (*see* NYSCEF No. 100, at 14-30 [evidence regarding improvements and their cost]); and this court considered and rejected Biggart's argument that this evidence was insufficient to support a rent increase (*see* NYSCEF No. 124, at 5). In any event, *Grimm* held that "an increase in the rent alone" — for example "upon installation of improvements to an apartment" — would "not be sufficient to establish a colorable claim of fraud." (15 NY3d at 367 [quotation marks omitted].)

Defendant also argues that this court did not take into account the First Department's conclusion in *Taylor v 72A Realty Assocs.* that a court may go beyond the four-year lookback period even absent fraud, where doing so is necessary to determine the "legally permissible rent-stabilized rent." (151 AD3d 95, 105-106 [1st Dept 2017].) This argument is true so far as it goes, but it does not go very far: the First Department has since repudiated that aspect of its decision in *Taylor*. (*See Raden v W 7879, LLC*, 164 AD3d 440, 441-442 [1st Dept 2018]; *Regina Metropolitan Co. v New York State Div. of Hous. & Community Renewal*, 164 AD3d 420, 426-428 [1st Dept 2018].)

Regardless, even if plaintiff were required under *Taylor* to establish the apartment's legally permissible rent-stabilized rent, it met that burden: Manning submitted evidence at summary judgment that it was permitted under the Rent Stabilization Code to have increased the monthly rent from $900 to $1500 due to a vacancy increase and the documented cost of improvements.

Biggart has not challenged this evidence directly. Instead, she contends that under the First Department's decision in *Jazilek v. Abart Holdings, LLC*, Manning was still barred by the Rent Stabilization Code from increasing the rent due to the cost of improvements, in light of plaintiff's undisputed failure to timely file the required rent registration statement. (*See* 72 AD3d 529, 531 [1st Dept 2010].) This court disagrees.

Biggart is correct that a building owner's failure "to properly and timely comply" with the applicable rent-registration requirements ordinarily "bar[s] an owner from applying for or collecting any rent" in "excess of the base date rent." (9 NYCRR 2528.4 [a].) But this provision has a crucial exception: Where "increases in the legal regulated rent were lawful except for the failure to file a timely registration," an owner who has belatedly filed a proper rent registration "shall not be found to have collected a rent in excess of the legal regulated rent at any time prior to the filing of the late registration." (*Id.*; *see also 215 W. 88th Street Holdings LLC* v *New York State Div. of Hous. & Community Renewal*, 143 AD3d 652, 653 [1st Dept 2016] [describing this provision].)

The First Department holds that a rent registration statement is "proper" for purposes of the regulation where it "record[s] the actual amount of rent charged to the tenant" and was "not the product of fraudulent leases or otherwise" a "legal 'nullit[y].'" (*Matter of Enriquez v New York State Div. of Hous. & Community Renewal*, 166 AD3d 404, 404 [1st Dept 2018].) *Jazilek*'s holding is limited to situations akin to the facts of that case — circumstances in which the lease was the product of fraud or in which the lease or the rent registration statement was a legal nullity (or both). (*See id.* [citing *Jazilek*].) And Biggart's allegation of fraud is insufficient to raise a factual dispute.

It is undisputed that in 2015 — prior to the present litigation — Manning filed proper rent registration statements covering the period of Biggart's tenancy. And as discussed above, any increase in rent reflected in those statements was "lawful except for the failure to file a timely registration." (9 NYCRR 2528.4 [a].) The filing of the statements "retroactively relieved" Manning of any rent overcharge claim by Biggart arising out of the failure to have filed the statements timely. (*215 W 88th Street Holdings*, 143 AD3d at 653.)

2. Whether Biggart is a "Permanent Tenant"

With respect to Manning's claim for a declaratory judgment regarding the lease, the question is whether Biggart is living in a "hotel," legally speaking. If she is, she qualifies as a "permanent tenant" under 9 NYCRR 2520.6 (j), and need not sign a new lease.

The court noted at oral argument on Manning's summary judgment motion that a housing accommodation is generally not considered a "hotel" if the four services itemized in 9 NYCRR 2521.3 (a) are not provided by the landlord to the tenant and included in the rent. (*See id.* § 2520.6 [b].)

Biggart now correctly contends that 9 NYCRR 2521.3 (c) carves out an exception from that rule for single-room-occupancy (SRO) facilities, which are treated as hotels even if the four listed services aren't provided. And in this case, the other units in her building are technically SRO units (though in practice they are occupied collectively by the family for whose benefit the plaintiff trust was established).

It is undisputed, though, that *Biggart's* unit is a conventional apartment. Her argument is thus that she should be treated as if she were living in an SRO unit because *other* units in her

building are SROs. The court disagrees. An individual should not be afforded the additional legal protections afforded to SRO residents if she does not herself live in an SRO unit.

Defendant relies on the assertion that whether a unit is an SRO, legally speaking, is required to be determined building by building, not unit by unit. But she adduces no authority for the proposition that SRO-status *must* be assessed building-wide. At most, she cites the decision of Housing Court in *Smiley v. Williams*, 26 Misc 3d 170 (Civ Ct, New York County 2009), arguing that the court in that case found an individual in a similar position as she to be a permanent tenant. But *Smiley* did not address whether the tenant in that case should be treated as an SRO resident despite living in an ordinary apartment. Indeed, the *landlord* in that case appears to have alleged that the building as a whole should be treated as an SRO, which obviously is not the case here. (*See Smiley*, 26 Misc.3d at 174.)

Defendant also infers from the language of certain statutory and regulatory provisions that they envision a building-by-building determination, and argues that every unit in *her* building must therefore be treated as an SRO. This court is not persuaded.

That determining a unit's SRO status is most readily done building-wide in many (or most) circumstances does not necessarily mean the determination must be made building-wide in *every* instance — even cases like this one in which unrebutted evidence has established that a particular unit is not actually an SRO.

Biggart is undisputedly living in an ordinary apartment. She is not one of the "historically vulnerable and marginalized SRO dwellers" for whom the "permanent hotel tenants" category was created in order to provide them needed "extra protection." (*Crossbay Equities LLC v Balzano*, 2015 NY Slip Op 1400654, at *4 [Civ Ct, New York County 2015] [quotation marks omitted].) Rather, she is an apartment-dweller who is behind on her rent. She does not identify any reason why it would make sense to treat her as an SRO resident regardless.

Indeed, requiring SRO-status determinations always to be made building-by-building would entail significant line-drawing problems — for example, the issue of how many units in a building would have to be SROs before the whole building would be deemed an SRO facility. Biggart does not attempt to provide an answer to that problem.

The court concludes that Biggart's unit was not rendered part of an SRO facility within the meaning of 9 NYCRR 2521.3 (c) by the mere fact that other units in the building (but not hers) are SROs. And since Biggart does not live in an SRO facility, and undisputedly does not receive the services itemized in § 2521.3 (a), she is not living in a hotel. The court therefore adheres to its original decision that defendant is not a permanent tenant within the meaning of 9 NYCRR 2520.6 (j) and that she must execute a rent-stabilized lease.

C. Manning's Cross-Motion to Reargue

Finally, Manning cross-moves to reargue the court's conclusion at argument on the summary judgment motion that Biggart's apartment had undergone alterations that would ordinarily require a new certificate of occupancy before Manning could collect rent. The court

grants reargument. Biggart claims that Manning's changes to her apartment before she moved in (including building a ceiling over the stairwell of the apartment) were unlawful and required Manning to have obtained a certificate of occupancy. However, as Manning points out, Biggart has submitted no concrete evidence to support that claim. Moreover, the Department of Buildings has inspected the apartment on multiple occasions, and never identified any violation related to the ceiling "alteration."

Absent proof that the changes made to the apartment required Manning to obtain a certificate of occupancy in the first place, Biggart's argument that Manning is barred from collecting rent due to the absence of a certificate of occupancy is without merit.

Accordingly, it is

ORDERED that Biggart's motion to vacate her default is granted; and it is further

ORDERED that Biggart's motion for leave to reargue this court's determination of August 8, 2018, is granted but that, upon reargument, the court adheres to its original decision; and it is further

ORDERED that Manning's cross-motion to reargue this court's determination of August 8, 2018, regarding the need to obtain a certificate of occupancy is granted and upon reargument the court holds that Manning's changes to Biggart's apartment did not oblige Manning to obtain a certificate of occupancy; and it is further

ORDERED that Biggart's motion to stay settlement of an order reflecting this court's determination of August 8, 2018, is denied, and the parties are hereby directed to settle that order.

5/3/2019
DATE

GERALD LEBOVITS, J.S.C.

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