

<b>Dodos v 244-246 E. 7th St. Invs., LLC</b>
2019 NY Slip Op 31543(U)
May 31, 2019
Supreme Court, New York County
Docket Number: 153378/2018
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

DEAN DODOS,

Plaintiff,

- v -

244-246 EAST 7TH STREET INVESTORS, LLC, EAST NOHO CORP.,

Defendants.

-----X

INDEX NO. 153378/2018

MOTION DATE

MOTION SEQ. NO. 001, 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 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 were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83 were read on this motion to/for SUMMARY JUDGMENT

In this residential rent overcharge action, co-defendant East Noho Corp. (ENC) moves, pursuant to CPLR 3211, to dismiss the complaint as against it (motion sequence number 001), and co-defendant 244-246 East 7th Street Investors, LLC (Investors) moves separately, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it (motion sequence number 002). After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Dean Dodos (Dodos) is the tenant of apartment 13, a rent-stabilized unit in a residential apartment building located at 244 East 7th Street in the County, City and State of New

York (the building). *See* notice of motion (motion sequence number 001) exhibit A (complaint),

¶ 1. ENC is the building's former owner, and Investors is the building's current owner. *Id.*, ¶¶ 2-3, 11-13. ENC acquired title to the building via a deed dated July 9, 1975, and transferred title to Investors on June 21, 2017 via a deed recorded on July 28, 2017. *Id.*

Dodos initially took possession of apartment 13 on July 1, 2016 pursuant to a two-year lease that he executed with ENC. *See* notice of motion, exhibit A (complaint), ¶ 14. That lease specified a monthly rent of \$2,600.00 and contained a rent stabilization rider (the rider). *Id.*, exhibit B. The rider recited that: 1) the previous tenant's legal regulated rent was \$1,798.13 per month; 2) that rent was augmented by a statutorily permitted 20% vacancy increase of \$359.63 per month; 3) ENC had also expended a total of \$22,236.63 in "individual apartment improvement" (IAI) renovations to apartment 13, which entitled it to a further rent augmentation of \$555.96 per month; 4) as a result of these increases, apartment 13's new legal regulated rent was \$3,825.65 per month; but 5) ENC nevertheless agreed to charge Dodos a "preferential rent" of \$2,600.00 per month. *Id.*

The rider appears to claim the same \$555.96 IAI rent increase three times, with the same figures appearing under the headings for "bathroom renovation," "kitchen renovation," and "other." *Id.* It is not certain why this was done. If the figures are added in the way that they are recorded on the lease - \$1,798.13 legal regulated rent + \$359.63 vacancy increase + \$555.96 IAI increase + \$555.96 IAI increase + \$555.96 IAI increase - then they a yield a total monthly rent of \$3,825.64. However, if the IAI increase is only added in once, then the total monthly rent amounts to \$2,713.72. Dodos maintains that, despite containing a rent stabilization rider, his initial lease with ENC did *not* also contain a preferential rent rider. *See* Weissman affirmation in opposition (motion sequence number 001), ¶¶ 8-11. He also asserts that, after his initial lease

term expired and Investors had purchased the building, Investors offered him a renewal lease with a monthly rent of \$3,825.65. *Id.*, ¶ 12. Further, Dodos claims that neither ENC nor Investors ever registered apartment 13's rent with the New York State Division of Housing and Community Renewal (DHCR), and avers that some of the work that was done in apartment 13 did not qualify as IAIs, because it consisted of “repairs” or “maintenance,” rather than “renovations,” as these terms are defined in the Rent Stabilization Code (RSC). *Id.*, ¶¶ 51-167.

ENC asserts that it *had* registered apartment 13 with the DHCR on June 17, 2016 with a rent-stabilized monthly rent of \$1,798.13, and that it was not obligated to file a new apartment registration until July 31, 2017. *See* notice of motion (motion sequence number 001), Johnson affirmation, ¶¶ 5-7; exhibit C. ENC also argues that that registration properly reflected apartment 13's legal regulated rent of \$1,798.13 per month as of April 1, 2016, and that it did not include either the subsequent vacancy increase or the IAI increases because those events had not happened yet (the previous tenant vacated and ENC undertook the renovation work between April 2 and June 30, 2016). *Id.*, ¶¶ 7-8. ENC offers copies of receipts and cancelled checks that it claims are related to the IAI work. *Id.*, exhibit D.

Investors argues that, because both Dodos's lease and the rider are silent as to whether his \$2,600.00 preferential rent was to endure for the initial lease term or the duration of his tenancy, paragraph 20 of the rider instead authorized Investors to terminate the preferential rent and to charge Dodos the legal maximum. *See* notice of motion (motion sequence number 002), ¶ 15. Investors asserts that it did so by offering Dodos a renewal lease on January 18, 2018 with a monthly rent of \$3,825.65. *Id.*, ¶ 18; exhibit G. Investors also admits that all of ENC's rent calculations were correct. *Id.*, ¶¶ 4-14.

In any case, Dodos commenced this action on April 12, 2018 (before his lease expired on June 30, 2018) by filing a summons and complaint that sets forth causes of action for: 1) rent overcharge and a declaratory judgment; 2) an injunction; and 3) legal fees. *See* notice of motion (motion sequence number 001) exhibit A (complaint). Investors filed an answer with counterclaims on June 7, 2018 but ENC has not answered. Instead, on that same day, ENC filed a “motion to dismiss in lieu of answer,” pursuant to CPLR 3211 (motion sequence number 001). Investors then filed a motion for summary judgment to dismiss the complaint on August 6, 2018 (motion sequence number 002). Although discovery has yet to be conducted in this action, defendants’ respective dismissal motions are now before the court.

#### LEGAL CONCLUSIONS

At the outset, this Court notes that Dodos opted to file his rent overcharge claim in Supreme Court rather than with the DHCR. The Appellate Division, First Department, has long recognized that this court and that agency have concurrent jurisdiction over rent overcharge claims. *See e.g., Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 91 (1<sup>st</sup> Dept 2013), *affd* 24 NY3d 382 (2014). However, the First Department also recognizes that the Supreme Court may invoke the doctrine of primary jurisdiction to transfer a rent overcharge claim to the DHCR, even where the claim was first filed in court, where the claim’s resolution mainly involves the interpretation and application of the RSC, which is the agency’s particular field of expertise. *See e.g., Collazo v Netherland Prop. Assets LLC*, 155 AD3d 538, 538 (1<sup>st</sup> Dept 2017), citing *Olsen v Stellar W. 110, LLC*, 96 AD3d 440, 441-442 (1<sup>st</sup> Dept 2012). After reviewing Dodos’s claim, this Court believes that this is the most provident way to proceed.

Although Dodos's complaint essentially sets forth a claim for rent overcharge, the body of the complaint sets forth three separate causes of action, which is improper. Rent overcharge is a purely statutory claim authorized by Rent Stabilization Law (RSL) § 26-516 and codified in RSC § 2526.1, and all of the forms of relief to which a rent overcharge claimant is entitled for a violation (including money damages, treble damages, declaratory and injunctive relief and legal fees) are plainly set forth in the statutes. There is thus no need to plead separate causes of action.

Instead, a rent overcharge claimant is required to make two factual showings: what was the apartment's "legal regulated rent," and what "payments in excess" of that amount (if any) the claimant made. RSC § 2526.1 (a) (1). The former item is generally determined by reference to the apartment's "base date rent" (i.e., the rent specified on the DHCR registration in effect on the "base date" four years prior to the date that the rent overcharge claim was filed) as augmented by "any subsequent lawful increases and adjustments." RSC § 2526.1 (a) (3) (i). The fixing of the "base date rent" and the assessment of the validity of any later "increases and adjustments" are matters within the DHCR's administrative purview. Of particular relevance to this case, the DHCR is often called on to apply the RSC's rules that govern vacancy increases (RSC § 2522.8) and IAIs (RSC § 2522.4). Regarding the latter, the DHCR has promulgated Operational Bulletin 2016-1 (replacing the older Policy Statement 90-10), which sets forth the agency's specified acceptable forms of proof of payment for alleged IAI work. *See* notice of motion (motion sequence number 001), exhibit C.

Here, Dodos alleges that some of the work items that ENC performed in apartment 13 did not qualify as IAIs, and that some of the proofs of payment that ENC has submitted are insufficient. *See* Weissman affirmation in opposition (motion sequence number 001), ¶¶ 62-186. The DHCR has the particular expertise to answer these questions via application of the RSC and

its own regulations. *See e.g., Matter of Bronx Boynton Ave. LLC v New York State Div. of Hous. & Community Renewal*, 158 AD3d 589 (1<sup>st</sup> Dept 2018). Once the agency has done so, it will then be in a position to determine the correct “legal regulated rent” for apartment 13 at the inception of Dodos’s tenancy, and whether ENC collected “amounts in excess” of it that amount to a rent overcharge. This necessarily bears on the viability of Dodos’s claim against ENC.

The DHCR is likewise in a better position to assess the adequacy of Dodos’s claim against Investors, since the agency is charged with enforcing the RSC’s rules regarding preferential rents (RSC § 2521.2). Dodos argues that the rent on his initial (vacancy) lease did not qualify as a “preferential rent” because it was both an improper amount itself, and was based on an improper “legal regulated rent” of \$3,825.65 per month. *See Weissman* affirmation in opposition (motion sequence number 002), ¶¶ 18-61-50. The viability of this argument depends on the application of RSC § 2521.2 and the rules set forth in DHCR Fact Sheet #40, governing preferential rents. *See* notice of motion (motion sequence number 001), exhibit A. These matters are within the DHCR’s purview, and their resolution will affect the viability of Dodos’s overcharge claim against Investors, which seeks to collect the allegedly improper “legal regulated rent” of \$3,825.65 per month from him.

Finally, this Court believes that the DHCR is in the best position to determine and calculate the amount of treble damages, if any, that the RSC allows for “willful” rent overcharges. RSC § 2526.1 (a) (2) (i). These observations all militate in favor of transferring Dodos’s claim to the DHCR pursuant to the doctrine of primary jurisdiction. The Supreme Court should retain jurisdiction over rent overcharge claims only where they involve class action complaints (*see e.g., Hess v EDR Assets LLC*, 171 AD3d 498 [1<sup>st</sup> Dept 2019]), allegations of fraud (*see e.g., Matter of Park v New York State Div. of Hous. & Community Renewal*, 150

AD3d 105 [1<sup>st</sup> Dept 2017]) or the interpretation of statutes or case law that is outside of the DHCR's special field of competence (see e.g., *Roberts v Tishman Speyer Props., L.P.*, 62 AD3d 71 [1<sup>st</sup> Dept 2009], *affd* 13 NY3d 270 [2009]). Since none of those circumstances exist herein, this Court, in its discretion, refers the foregoing issues to DHCR for determination. (see *Davis v Waterside Hous. Co.*, 274 AD2d 318, 318-319 [1<sup>st</sup> Dept 2000]).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion to dismiss by defendant East Noho Corp. (motion sequence number 001) and the motion for summary judgment by defendant 244-246 East 7th Street Investors, LLC (motion sequence number 002) are granted and the complaint is dismissed, without prejudice, and plaintiff is directed to file an appropriate claim with the New York State Division of Housing and Community Renewal; and it is further

ORDERED that this constitutes the decision and order of the court.

5/31/2019  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: