SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 4
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ARNOLD ROSSMAN, Index No. 108350/2011

Plaintiff

- against - DECISION AND ORDER

WINDERMERE OWNERS LLC and
WINDEMERE CHATEAU, INC.,

Defendants

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FRANK P. NERVO, J.S.C.:

I. BACKGROUND

Plaintiff, a tenant in defendant Windemere Owners LLC'S building, seeks a rent stabilized lease and recovery of rent overcharges. Defendant Windemere Chateau, Inc., sold the building to Windemere Owners in November 2010. Plaintiff entered a lease with Windemere Chateau beginning in October 2009 for Apartment 19K in the building at a rate of $2,100.00 per month.

Windemere Chateau had registered Apartment 19K with the New York State Division of Housing and Community Renewal (DHCR) in 1984 as rent stabilized with a monthly rent of $742.56. In 2002 the stabilized rent for this apartment was registered as $1,222.68. In June 2003 Windmere Chateau registered Apartment 19K as exempt from rent stabilization on grounds of "high rent

vacancy" and "improvements" with a legal regulated rent of $2,000.00 or more. Defendants claim Windemere Chateau legally deregulated Apartment 19K because Windemere Chateau spent $31,586.13 on individual apartment improvements (IAIs) in that apartment to raise the monthly rent from $1,222.68 in 2002 to over $2,000.00.

Plaintiff claims defendants are not entitled to a rent increase because the amounts claimed did not result in IAIs with respect to the subject apartment or were spent on duplicative improvements. Plaintiff seeks treble damages for the claimed overcharges and attorney's fees, as well as a rent stabilized lease.

II. DEFENDANTS' IMPROVEMENTS

Defendants are entitled to a rent increase equal to 1/40th of the total cost of any qualifying improvement made or new furnishings installed in Apartment 19K. N.Y.C. Admin. Code § 26-511 (c) (3); 9 N.Y.C.C.R.R. § 2522.4 (A) (1). Defendants are not entitled, however, to an increase for any improvements or replacements to furnishings and equipment that have yet to exceed their useful life. N.Y.C. Admin. Code § 26-511 (c) (3); 9 N.Y.C.R.R.§ 2522.4 (A) (11). Nor are defendants entitled to an increase for any work constituting repair or regular maintenance of the apartment. *Jemrock Realty Co., LLC v. Krugman*, 72 A.D.3d 438, 440 (1st Dep't 2010); *Graham Ct. Owners*

Corp. v. Division of Hous. & Community Renewal, 71 A.D. 3d 515, 515 (1st Dep't 2010); 3d 515, 515 (1st Dep't 2010); *Yorkroad Assoc. v. New York State Div. of Hous. & Community Renewal*, 19 A.D. 3d 217, 218 (1st Dep't 2005); *Mayfair York Co. v. New York State Div. of Hous. & Community Renewal*, 240 A.D. 2d 158, 158 (1st Dep't 1997). Defendants must substantiate the IAIs with documentation demonstrating what work actually was performed and the amounts spent. *Altschuler v. Jobman 478/480, LLC.*, 135 A.D. 3d 439, 440 (1st Dep't 2016), *72A Realty Assoc. v. Lucas*, 101 A.D.3d 401, 402-403 (1st Dep't 2012); *Yorkroad Assoc. v. New York State Div. of Hous. & Community Renewal*, 19 A.D. 3d at 217-218; *Ador Realty, LLC v. Division of Hous. & Community Renewal*, 25 A.D. 3d 128, 138-39 (2d Dep't 2005), but need not present an item-by-item breakdown of the cost of each improvement. *Jemrock Realty Co., LLC v. Krugman*, 13 N.Y. 3d 924, 926 (2010).

Based on the evidence adduced at trial, defendants failed to substantiate H.F.M. Company Inc.'s bill for $18,996 in general contracting work in plaintiff's apartment, dated April 1, 2002 (Plaintiff's Exhibit 13, in evidence) or Lorenz Corp.'s bill for $8950.13 dated 3-1-2002 (Plaintiff's Exhibit 11, in evidence).

In substantiation of the IAIs on H.F.M.'s invoice, reported to have been performed at apartment 19K, defendant's witness Howard Molen testified that he was, and remains, the owner of

H.F.M. Company, Inc.; that prior to the date of this invoice, his personnel broke up the floor in the bathroom in order that the plumbing contractor could replace the pipes in the bathroom, and then poured an approximately four inches thick cement base upon which his company installed new ceramic floor tiles.

Mr. Molen testified the exact same procedure was performed in the kitchen of apartment 19K, albeit with a concrete thickness of two to two-and-a-half inches. Mr. Molen also avers his company replaced the oak flooring in the living room and wood moldings, as further noted on Exhibit 13.

On cross-examination, Mr. Molen conceded he personally performed no work on this apartment, or any of the many others at this building that he and his firm contracted to work in; that he did not personally observe any of the concrete flooring being installed; made no final job inspection for any of the apartments in the building; took no photos of the work during its progress; and was convicted under RICO statutes of the felony "commercial bribery".

The court is constrained to find Molen's testimony that the work billed for on April 1, 2002 was actually furnished is based upon nothing more than, at best, his presumption that the work was done because he billed for it.

Plaintiff's witness, Yoel Borgenicht, testified with respect to the IAIs billed for by H.F.M.

Mr. Bogenicht is the president of King Rose Construction, a commercial and residential renovation contractor, and has provided renovation services to the National Aeronautics and Space Administration (NASA), Columbia University, The LeFrak Organization, the Federal Reserve Bank, the federal courts of the Southern and Eastern Districts of N.Y., and other notable property owners or managers. As part of this business, Mr. Borgenicht provides cost estimates for renovation of real property located in New York City, and retains electrical, plumbing and other subcontractors as necessary. Mr. Borgenicht has maintained this business for ten years and is the holder of a Certificate of Construction Management from Columbia University, is a Federal Registered Contractor, and holds licenses issued by the New York City Department of Buildings and New York City Department of Consumer Affairs.

In 2013 this witness personally examined plaintiff's apartment 19K at 666 West End Avenue, and provided his expert opinion as to the value of the repairs done to the apartment to that time. This opinion is synopsized in plaintiff's exhibit 16 in evidence. In Borgenicht's expert opinion the total value of renovations to the apartment is $10,906.04 inasmuch as a number of the repairs or renovations alleged by defendant were either not performed as represented or not done at all. Borgenicht determined that the floor in the bathroom was not broken up to

accommodate plumbing changes and replaced with a poured concrete floor and that, in fact, the new floor tile in the bathroom was installed directly on top of the existing tile as evidenced by the elevation of the floor being nearly equivalent to the height of the adjacent door saddle. Borgenicht calculates a gross repair and replacement cost of $3738.90 with respect to the bathroom of 19K, including all costs of material and labor, for the installation of new wall tile and a toilet.

With respect to the kitchen, Mr. Borgenicht opines the costs for repairs and replacements total $7,168.04 for defendant's replacement and installation of a refrigerator, range, stainless steel sink and ceramic tile floor, including all new appliances, materials, delivery and labor.

Borgenicht's estimated cost for the repairs and improvements made to the kitchen and bathroom of apartment 19K is, therefore $10,906.84 in 2013 dollars.

With respect to the plumbing services billed for by Lorenz Corp (invoice dated 3/1/2002), Mr. Borgenicht accepts as accurate the representation that a new shower body and plumbing were installed in the bathroom including all concomitant fixture valves, as well as the installation of a new waste line for the new sink and new faucet in the kitchen. Borgenicht opines the material costs to be $1000.00, and labor costs of two skilled

plumbers for, at most, five eight-hour working days, at $95.00 per hour for both plumbers, totaling $3,800.00.

With respect to the invoice costs statement of services rendered by H.F.M. Company, Inc. dated 4/1/02, Borgenicht opines based on his inspection of apartment 19K that there was no evidence of new oak flooring in the apartment and that, in fact, the present floor had all the indicia of having been installed at the initial construction of the building based upon the appearance of the noticeably tighter grain in the wood than what is observed contemporarily. He further observed all wood mouldings (baseboards, door casings and trim) were many decades old as evidenced by their early 20th century style and the many layers of pain they bore.

Addressing the invoice and statement of services rendered by Contractors Electrical Service, Inc. dated 2/21/2002, Borgenicht opines the total charge of $3,640.00 for these services to be reasonable. Borgenicht also opines that the work represented is a partial rewiring as a complete rewiring would require "removing every single piece of wiring in the apartment that feed outlets, switches, light fixtures, appliances" requiring the chopping into walls, which did not occur here; the Contractors Electrical Service, Inc. invoice refers specifically to installing new switches and outlets to existing wiring,

except where it notes the installation of a new line in three instances, for an air conditioner, range hood, and refrigerator.

Further to the credibility of the invoices submitted by plumbing contractor Lorenz (plaintiff's Exhibit 6 in evidence) is the prior testimony of Apryl Clay who self-identified as Tenant Services Coordinator, an employee of the managing agent, at the subject building. By correspondence dated June 8, 2012, Apryl Clay advises of "discrepancies discovered in plumbing work done prior to (defendant's) taking ownership." There is no dispute that the invoicing for plumbing work that presents prior discrepancies is that of Lorenz Corp.

Submitted in evidence as Plaintiff's Exhibit 7 is the May 7, 2014 deposition of Hillel Katz. Hillel Katz testified that in 2011 he was the project manager for defendants and as part of his duties he conducted an onsite visit of the property. Hillel Katz did not identify which apartments he examined and, consequently, his testimony to the effect that all renovations he observed were "superficial" and "not high-end" is of no probative value.

The burden is on the landlord in a residential rent overcharge proceeding to prove all claimed improvements. In view of the totality of the evidence in this case, the court finds the defendant-landlord has failed to meet that burden. While on cross examination the plaintiff's expert, Yoel

Borgenicht, conceded he did not do any invasive tests of the walls or floors of apartment 19K as part of his examination, asserting his expertise and knowledge of residential construction procedures, as well as their readily observable results, render invasive testing unnecessary.

Further, defendants failed to offer any evidence that the IAI work claimed in 2002 did not duplicate the IAI work in 1994 and 1997 as noted on the DHCR rent history (plaintiff's Exhibit 3 in evidence), or that the work in 1994 and 1997 of unknown nature outlasted its useful life. N.Y.C. Admin. Code § 26-511 (c)(3); 9 N.Y.C.R.R. 2522.4 (a) (11). Since defendants failed to substantiate that H.F.M. Company's work actually was completed in apartment 19K, that defendants actually incurred $18,996.00 for work by H.F.M. Company in that apartment, and that this work was not duplicative of previous IAIs, defendants are not entitled to a rent increase for the $18,996.00 billed for improvements. Similarly, defendants failed to substantiate their claim of plumbing work valued at $9,944.59, nor their claim for electrical work by Contractors Electrical Service for $3,640.00 as an allowable IAI.

Therefore, defendants illegally removed apartment 19K from rent stabilization, N.Y.C. Admin Code § 26-504.2; 9 N.Y.C.R.R. § 2520.11 (r)(4), entitling plaintiff to a rent stabilized lease and damages for any rent paid over $470.72 per month.

III. PLAINTIFFS DAMAGES

Plaintiff may collect treble damages for defendants' overcharges if they were willful. N.Y.C. Admin. Code § 26-516 (a); 9 N.Y.C.R.R §§ 2506.1 (a) (1), 2526.1 (a) (1). Defendants' overcharges are presumed willful, a presumption that defendants must rebut. *Altman v. 285 W. Fourth LLC*, 143 A.D. 3d 415, 415 (1st Dep't 2016); *Delaj v. Bronx Park E. Hous., Inc.* 117 A.D. 3d 546, 546 (1st Dep't 2014); *H.O. Realty Corp. v. State of N.Y. Div. of Hous. & Community Renewal*, 46 A.D. 3d 103, 107 (1st Dep't 2007); *425 3rd Ave. Realty Co. v. New York State Div. of Hous. & Community Renewal*, 29 A.D. 3d 332, 333 (1st Dep't 2006).

Based on the evidence adduced at trial, defendants failed to rebut the presumption that their overcharges were willful. *Altman v. 285 W. Fourth LLC*, 143 A.D.3d at 415; *Mangano v. New York State Div. of Hous. & Community Renewal*, 30 A.D. 3d 267, 268 (1st Dep't 2006); *425 3rd Ave., Realty Co. v. New York State Div. of Hous. & Community Renewal*, 29 A.D. 3d at 333; *Sohn v. New York State Div. of Hous. & Community Renewal*, 258 A.D. 2d 384, 384 (1st Dep't 1999). Since defendants did not substantiate that the improvements claimed actually were made or were allowable IAIs, and defendants offered no further evidence of a good faith belief that the improvements were allowable or actually were performed, defendants failed to carry their burden

to rebut the presumption of willfulness. Consequently, plaintiff is entitled to treble damages for any rent he paid in excess of the legal rent of $470.72, as set hereinafter set forth. Plaintiff is also entitled to reasonable attorneys' fees inasmuch as he has prevailed on his central claims. N.Y.C. Admin. Code §26-516(a)(4); 9 N.Y.C.R.R. §§2506.1(d), 2526.1(d); *Community Counseling & Mediation Servs. V. Chera*, 115 A.D.3d 589, 590 (1st Dep't 2014); *542 Ea. 14th St. LLC v. Lee*, 66 A.D.3d 18, 24-25 (1st Dep't 2009); *Solow Mgt. Corp. v. Tanger*, 19 A.D.3d 225, 225 (1st Dep't. 2005).

The landlord's act of illegally de-stabilizing the subject apt based on an inflated claim of improvements mandates imposition of treble damages. *See, e.g., Linden v. DHCR,* 217 AD2d 407 (1st. Dept. 1995); *Sohn v. DHCR,* AD2d 384 (1st Dept. 1999) (treble damages imposed, landlord failed to document the improvements); *Maya Realty Assoc. v. DHCR*, 261 AD2d 405 (2nd Dept. 1999) (same); *985 Fifth Ave v. DHCR*, 171 AD2d 572 (1st Dept. 1991) (same); *Merit Management LLC v. DHCR*, 278 AD2d 178 (1st Dept. 2000) (same); *Jewnandan v. DHCR*, 275 AD2d 415 (2nd Dept. 2000) (same); *Artnor Realty Co. v. DHCR*, 265 AD2d 183(1st Dept. 1999) (same); *Ador Realty LLC v. DHCR*, 25 AD2d 128 (2nd Dept. 2005) (same).

The parties have stipulated that the default formula rent for the subject apt is $470.72 (Ex.1 ¶4(b), the rent properly utilized to compute plaintiff's overcharge damages.

As this action was commenced on July 20, 2011, plaintiff is entitled to overcharge damages for all rent payments from July 20, 2007 forward.

During this period, plaintiff signed four leases with landlord, each for a one-year term. (Plaintiff's exhibit 2 in evidence.) The lease rents in effect during this period were $2,227.68, $2,316.79, $2,455.80 and $2,800. The $2,800 rent continued through the present.

The $2,227.68 rent resulted in a $1,756.96 overcharge. (2,227.68 lease rent - 470.72 default rent = $1,756.96 overcharge)

The 2,316.79 rent resulted in a $1,846.07 overcharge (2,316.79 lease rent - 470.72 default rent = $1,846.07 overcharge)

The 2,455.80 rent resulted in a $1,985.08 overcharge (2,455.80 lease rent - 470.72 default rent = $1,985.08 overcharge)

The 2,800.00 rent resulted in a $2,329.28 overcharge (2,800.00 lease rent - 470.72 default rent = $2,329.28 overcharge)

Under NYC Admin Code § 26-516 (a) (2) (k) there is a two year limitation period for treble damages. (There is a four year limitation period for overcharges in general.)

As this action was commenced on July 20, 2011, plaintiff is entitled to a trebling of all overcharge payments made on or after July 20, 2009. (The plaintiff's rent payments were stipulated by the parties, Ex. 1, ¶4(c)

Based on the default formula, and the overcharge numbers set forth above, and with imposition of treble damages on all overcharge payments subsequent to July 20, 2009, a total of $818,165.64 in overcharge damages, including trebling, results, as follows:

08-7-11/07:

2,227.68 lease rent - 470.72 lawful rent =

1,756.96 overcharge x 4 months = 7,027.84

12/07-11/08:

2,316.79 lease rent - 470.72 lawful rent =

1,846.07 overcharge x 12 months = 22,152.84

12/08-07/09:

2,455.80 lease rent - 470.72 lawful rent =

1,985.08 overcharge x 8 months = 15,880.64

(The following payments occuring after July 20, 2009 are subject to trebling.)

08/09-11/09:

2,455.80 lease rent - 470.72 lawful rent =

1,985.08 overcharge x 4 months =

7,940.32 x 3 = 23,820.96

12/09-11/10:

2,455.80 lease rent - 470.72 lawful rent =

1,985.08 overcharge x 12 months =

23,820.96 x 3 = 71,462.88

12/10-12/18:

2,800 lease rent - 470.72 lawful rent =

2,329.28 overcharge x 97 months =

225,940.16 x 3 = 677,820.48

TOTAL OVERCHARGE DAMAGES, WITH TREBLING: $818,165.64

LEGAL FEES

When a landlord overcharges a tenant, the tenant is entitled to an award of attorney fees from the landlord, 9 NYCRR § 2526.1 (d).

Plaintiff is also entitled to reasonable attorneys fees because she prevailed on her central claims. N.Y.C. Admin. Code § 26-516 (a) (4); 9 N.Y.C.R.R. §§ 2506.1 (d), 2526.1(d).

For all the reasons explained above, the Clerk of the Court shall enter a judgment in favor of plaintiff ARNOLD ROSSMAN against defendants Windermere Owners LLC and Windemere Chateau, Inc., jointly and individually, for $818,165.64. Defendant

Windemere Owners LLC also shall provide to plaintiff a rent stabilized lease for apartment 19K with a monthly rent of $470.72 commencing in January 2019.

The court severs plaintiff's claim for attorney's fees and interest on the award. The parties shall appear January 18, 2019 to stipulate that the issue of reasonable attorneys' fees and interest be referred to a Special Referee to hear and determine or otherwise set the procedure for the determination of this issue. C.P.L.R. § 4317 (a) and (b). This decision constitutes the court's order and judgment on damages apart from attorney's fees.

DATED: January 4, 2019

FRANK P. NERVO, J.S.C.