

Arnold v 4-6 Bleecker St. LLC
2019 NY Slip Op 32453(U)
August 19, 2019
Supreme Court, New York County
Docket Number: 158541/2013
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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INDEX NO. 158541/2013

PETER ARNOLD, ELI LAZARUS, SEAN ROCHA,
MICHAEL SCHILLER,

MOTION DATE

Plaintiffs,

MOTION SEQ. NO. 012, 013

- v -

4-6 BLEECKER STREET LLC, 316 BOWERY REALTY
CORP., WALSAM 316 LLC, WALSAM 316 BOWERY
LLC, WALSAM BLEECKER LLC, LAWBER BOWERY
LLC, 316 BOWERY NEXT GENERATION LLC

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion Sequence 012) 417, 418, 419, 420, 421, 422, 423, 424, 425, 442, 475, 476, 481, 482, 483, 489, 490, 491, 492, 493, 494, 495, 496, 517

were read on this motion to/for Summary Judgment after joinder.

The following e-filed documents, listed by NYSCEF document number (Motion Sequence 013) 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 443, 477, 478, 479, 480, 484, 485, 486, 487, 488, 518

were read on this motion to/for Summary Judgment after joinder.

In this rent overcharge matter, Plaintiffs' respective motions in Motion Sequence (MS) 012 and MS 013 seek entry of a judgment against defendants and request a hearing on attorneys' fees. Defendants 316 Bowery Realty Corp, Walsam 316 LLC, Walsam Bowery LLC, Walsam Bleecker LLC, and 316 Bowery Next Generation LLC (collectively "Defendants")¹, all represented by the same counsel, oppose the motions. Defendants' opposition is untimely.

BACKGROUND

In September 2013, Plaintiffs who are residential tenants in the building known as 4-6 Bleecker Street, commenced this action for a declaration that their

¹ Defendants are represented by the law firm of Rosenberg & Estis, P.C., who also represents defendant Lawber Bowery, which is not included in this opposition. In the Affirmation by Defendants' attorney, Bradley Silverbush, the defendants here are grouped and referred to as the Walsam Defendants. In other motions, Mr. Silverbush refers to these defendants as the "Bowery Defendants", which includes Lawber Bowery LLC (NYSCEF 475).

apartments were subject to the Rent Stabilization Law and sought to recover the alleged overcharged rent from defendant 4-6 Bleecker Street LLC (Bleecker), the net lessee, and defendant 316 Bowery Realty Corp. (Bowery Realty), the building owner. Defendants moved for summary judgment and Plaintiffs cross-moved for the same. Another justice of this court found in favor of Plaintiffs declaring that Plaintiffs' respective apartments were protected by the Rent Stabilization Law and granted partial summary judgment on the issue of liability on their rent overcharge claims, but stated that discovery was needed to determine the legal regulated rent for Plaintiffs' respective apartments (NYSCEF # 419 - Order of Hon. Joan A. Madden, dated October 14, 2015, and entered January 13, 2016).²

While Justice Madden found in favor of Plaintiffs, Justice Madden stated that an award for the rent overcharge could not be made based on the record before the court (*id.* at 11). Noting that the rental history for certain apartments were "neither reliable nor adequate," and the registration history "inconsistent and incomplete," Justice Madden opined that "the DHCR's default formula may be 'the appropriate vehicle for fixing the base date rent'" (*id.*).

In a subsequent motion (MS 006), Plaintiffs informed that no additional evidence exists and argued for the application of the Division of Housing and Community Renewal's (DHCR) default formula as codified in section 2526.1(g) of the Rent Stabilization Code (RSC) for the determination of the legal rent for their apartments (NYSCEF # 287 – Decision and Order of Hon. Joan A. Madden, dated May 31, 2017). Defendants opposed Plaintiffs' argument. Justice Madden, finding Defendants' arguments "not persuasive", a "rehash" on Defendants' prior motions to reargue and renew, "bare and conclusory" (*id.* at 7), determined that the default formula codified in RSC § 2526.1(g)(1) to be the methodology to calculate Plaintiffs' rent overcharge – that is, "the legal rent for their apartments is the lowest rent registered for an apartment in the building comparable to their own apartments on the date they first took occupancy" (*id.* at 9). And Justice Madden concluded that Plaintiffs are entitled to treble damages (*id.* at 12).

FACTS

As a result of the May 31 order, the parties agreed to have the building inspected by Lauren Silk, a licensed residential real estate broker for over eleven years and a practicing commercial real estate attorney for more than three years, to assess comparable apartments to those of Plaintiffs (NYSCEF # 422 and # 436 – Silk Report, ¶ 1). Silk looked at other apartments in the building and considered the

² Defendants appealed the October 2015 Order, along with the Order entered September 23, 2016, denying renewal of the October 2015 Order. The Appellate Division, First Department, dismissed the appeal of the October 2015 Order as untimely; and affirmed the September 2016 Order (NYSCEF # 412; *Arnold v 4-6 Bleecker Street LLC*, 2018 NY App Div Lexis 6790).

size, location, number of rooms in making her assessment. Silk issued a Broker Report on her findings that offered comparables on Plaintiffs' respective apartments based on DHCR's rent roll (*id.* at 4; NYSCEF # 425 – DHCR Rent Roll Report). Plaintiffs now seek entry of a judgment on the overcharge damages.

The instant motions (MS 012 and MS 013) reflect Silks' findings on the rents in the apartments at 4-6 Bleecker Street that are comparable to Plaintiffs' respective apartments (Silk Report). Defendants offer no opposition to the method or the calculations for the overcharge and treble damages.

A review of Plaintiffs' calculations for the four apartments at issue show that, in arriving at the amount of the overcharge, Plaintiffs first calculated Silk's comparable base rents to the number of months and years that each of the Plaintiffs resided in their apartment. The amount of rent paid for those periods are supported by Plaintiffs' respective affidavits and leases (NYSCEF ## 77-80). Plaintiffs calculated the overcharge amount from four years prior to the commencement of this action to the last day Plaintiffs paid rent (RSL § 26-516[a][2]; *Zafra v Pilkes*, 245 AD2d 218 [1st Dept 1997]). Plaintiffs then added up the amount of their respective monthly rent and set off that total amount against the amount of the comparable rent total to arrive at the overcharge amount for each plaintiff.

Plaintiffs' calculation of treble damages was limited to the two years prior to the commencement of the case in September 2011 through October 2015 (RSL § 26-516[a][2]). Interest was then assessed for the months that were excluded from the treble damages calculation (RSL § 26-516[a]; RSC § 2526.1[d]).

In sum, Plaintiffs properly calculated the overcharges, interest, and treble damages to arrive at the total amount due to each of the four Plaintiffs pursuant to RSL § 26-516[a][2]. The amount due to plaintiff Arnold is \$299,993.76; the amount due to plaintiff Schiller is \$333,405.72; the amount due to plaintiff Lazarus is \$37,548.38; and the amount due to plaintiff Rocha is \$111,349.06.

These amounts are exclusive of attorney's fees. The award of attorney's fees was addressed in Justice Madden's Order dated May 31, 2017 (NYSCEF # 287 or # 434). Upon awarding Plaintiffs treble damages, Justice Madden stated that "under the circumstances presented, Plaintiffs are entitled to an award of reasonable attorney's fees" (May 31, 2017 order at 12).

However, with the recent passage of the Housing Stability and Tenant Protection Act of 2019 (HSTPA), the amounts due to Plaintiffs must be amended. As required by CPLR 4511(a), this court takes judicial notice of the public statutes of New York (*see Chanler v Manocherian*, 151 AD2d 432, 433 [1st Dept 1989] ["refusal to take judicial notice of pertinent laws and regulations constitutes reversible error"]). The HSTPA amended Section 26-516(a) of the Administrative Code of the

City of New York to expand the overcharge period from four (4) to six (6) years before the filing of an overcharge complaint, and the treble damages period to also six (6) years (HSTPA, Part F, Sec. 4). As the HSTPA was passed during the pendency of this matter, Plaintiffs may recalculate the amounts owed on the overcharge and treble damages amounts.

Defendants' Objections

Defendants' opposition is untimely even after they were afforded a lengthy extension to submit opposition papers (NYSCEF # 484). Plaintiffs complain that this delay is typical of Defendants' tactics throughout this action (*id.*, ¶¶ 27-28).

A review of Defendants' opposition confirms Plaintiffs' complaints about Defendants' late submission. Plaintiffs Lazarus and Rochas rejects Defendants' opposition (NYSCEF # 481 – Notice of Rejection). Plaintiffs Arnold and Schiller objects to the untimely opposition but did not formally reject it. As the opposition is twenty-seven days late, it is rejected as untimely. Even if it were not rejected, the opposition warrants dismissal as the contentions are without merit, unsupported, or belied by the record. Because Defendants tend to repeat their arguments, their objections will be laid out in an effort to fend off repetitive arguments in their future motions in this matter.

Defendants objections to MS 12 and 13 are: (1) the motions are premature as discovery is incomplete; (2) a pending motion precludes Plaintiffs' motions; (3) Silk is not qualified to value the apartments; (4) Defendants' attorneys were denied access to inspect the premises with their own expert; (5) res judicata and collateral estoppel bar Plaintiffs' instant summary judgment motion since Justice Madden denied summary judgment as to a determination of the legal rent and directed discovery (NYSCEF # 475, ¶ 26); and (6) Plaintiffs lacks evidentiary proof to support a summary judgment motion.

1. Discovery

Defendants argue that discovery is needed, demanded, and ignored in this overcharge matter, hence Plaintiffs' instant motions should be stayed pending discovery. A review of the motions in this matter shows that this "discovery is needed" argument is not a new one. This discovery argument, which stemmed from Justice Madden's Decision and Order (MS 002) declaring that Plaintiffs' apartments are protected by the Rent Stabilization Law and that treble damages are warranted, appears in MS 006, 010, and 011 (NYSCEF ## 49, 185, 372, 379, 387, and 516). Enough has been said on Defendants' recurring discovery arguments.

2. Pending Motion

The objection that a pending motion precludes Plaintiffs' instant motion is moot. That pending motion (MS 011) was Defendants' motion to reargue/renew this court's May 15, 2018 Order on motion (MS 010) which was brought by a different party, not Defendants, and which Defendants neither joined nor opposed (NYSCEF # 516 – Decision and Order dated April 12, 2019). Motion 11 was decided by Decision and Order dated April 12, 2019. Notably, the April 12 order denied Defendants' request for discovery against Plaintiffs "as the parties agreed and stipulated that the only discovery remaining or needed relates to the defendants' cross-claims. The discovery pertaining to Plaintiffs was complete" (*id.*).

3. Admissibility of Silk's Report

Silk's qualification as an expert witness was not contested. Indeed, no objection was raised on Silk's ability at the inspection or after the issuance of Silk's report until these defendants' late opposition to the instant motions. The objections to Silk and her report are conclusory and unsupported. In any event, Defendants' argument goes to the weight and not the admissibility of Silk's report.

4. Denial of Access to the Premises for an Inspection

Defendants' assertion that they were denied access to inspect the premises with their own expert is belied by the record. Nithin Jayadeya, from Rosenberg and Estis, the firm representing Defendants, confirmed two agents and himself as the attendees at the inspection (NYSCEF # 495 – Defendants' email confirming their attendance at the inspection). At the inspection, Jayadeva was seen taking measurements of the apartments (NYSCEF # 485 – Allen Affirmation, ¶¶ 6-8; # 489 – Kassenoff Affirmation, ¶¶ 33-34).

5. Res Judicata and Collateral Estoppel

The claim that Plaintiffs' instant motions are barred by res judicata and collateral estoppel is without merit or support, and is belied by Justice Madden's several orders in this action. In a June 13, 2017 order, Justice Madden, referring to her decisions and orders dated May 31, 2017, September 22, 2016, and October 14, 2015, stated that

"[a]s a result of [those] prior decisions, the only remaining issue with respect to Plaintiffs' claims, is the amount of Plaintiffs' damages which the Court determined cannot be calculated in the absence of a prima facie showing on the issue of comparability. With the exception of that one issue, Plaintiffs' claims have been fully and finally resolved in their favor. . . ."

(*Arnold v 4-6 Bleecker Street, LLC*, 2017 WL 2556188, **2).

The instant motions address “the only remaining issue” in Justice Madden’s June 13 order, which is “the amount of Plaintiffs’ damages” (*id.*).

6. *Lack of Evidence*

The assertion that Plaintiffs lack evidentiary proof rests solely on boiler-plate recitation of the law on summary judgment standards. The argument is without any allegations on the supposed insufficiency or infirmities of Plaintiffs’ submissions. Defendants’ “lack of evidence” argument is lacking in merit.

CONCLUSION

Accordingly, Plaintiffs are to settle order within twenty days (20) of this order; it is further

ORDERED that the branch of Plaintiffs’ motion for hearing to on attorneys’ fees against defendants pursuant to the May 31, 2017 order of the Hon. Joan A. Madden (NYSCEF #434) is granted, and the issue of the amount of such attorneys’ fees is hereby referred to a Special Referee to hear and report; it is further

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report on the issues of ascertaining and computing the amount due from defendants to Plaintiffs for attorneys’ fees and costs; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) 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 the Court at www.nycourts.gov/suptctmanh at the “References” link under “Courthouse Procedures”), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiffs shall, within 15 days for the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (which can be accessed 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 Referee Part; it is further

ORDERED that plaintiffs shall serve a proposed accounting within 30 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of plaintiffs’ papers and the foregoing papers

shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; it is further

ORDERED that, the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon defendants and the Clerk of the Court within 7 days of entry.

This constitutes the Decision and Order of the court.

8/19/2019
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE