

Kreisler v B-U Realty Corp.

2019 NY Slip Op 32920(U)

October 3, 2019

Supreme Court, New York County

Docket Number: 161021/2014

Judge: Debra A. James

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

INDEX NO. 161021/2014

STUART KREISLER, ELIZABETH BONBREST, and KEGA-
SP LTD.,

MOTION DATE 12/21/2017

Plaintiffs,

MOTION SEQ. NO. 003

- v -

B-U REALTY CORP. and PAUL BOGONI,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117, 118, 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, 144, 145, 146, 147, 148, 150

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

ORDER

Upon the foregoing documents, it is

ORDERED that the cross motion of defendants to the extent that it seeks to renew the order dated April 27, 2017, is denied; and it is further

ORDERED that the cross motion of defendants to the extent that it seeks to resettle the order dated April 27, 2017, to the extent that it dismissed the action against defendant Irene Bogoni is granted, and the complaint against her is dismissed, and her name shall be removed from the caption in this case; and it is further

ORDERED that such claims against defendant Irene Bogoni are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Irene Bogoni dismissing the claims made against her in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that motion of plaintiffs for summary judgment on the third cause of action of the complaint is granted; and it is further

DECLARED and ADJUDGED that defendants are directed to offer plaintiff a rent stabilized lease for apartment 9C in the building known as 945 West End Avenue located in the County, City and State of New York, at the current legal regulated rent and subject to the protections of the Rent Stabilization Law;

ORDERED that defendants are directed to register apartment 9C with the DHCR forthwith utilizing such legal regulated rental amount on the registration statement; and it is further

ORDERED that to the extent that it seeks to confirm the Report dated November 17, 2017 of the Special Referee, the motion of plaintiffs is granted, but to the extent that it seeks to vacate or reject part of the Report, the motion is denied; and it is further

ORDERED that the plaintiffs are entitled to recover treble damages from the defendants; and it is further

ORDERED that plaintiffs shall submit a proposed order on notice, with an accounting setting forth the calculations, as directed in the below Decision, within thirty (30) days of service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear at a status conference in IAS Part 59, 60 Centre Street, Room 331, on November 14, 2019, 2:30 PM.

DECISION

In this residential landlord/tenant action, plaintiffs Stuart Kreisler, Elizabeth Tracy Bonbrest and Kega-SP Ltd. (plaintiffs) move to partially confirm and partially deny the November 21, 2017 report of Special Referee Ira Gammerman, while remaining defendants B-U Realty Corp. and Paul Bogoni (defendants) cross-move for leave to renew their prior motion for summary judgment to dismiss the complaint (together, motion sequence number 003). The motion and the cross motion are disposed of in accordance with this decision.

Background

The court has reviewed the facts of this case in prior decisions and incorporates the findings herein.

In summary, in this action, plaintiffs seek to recover damages for rent overcharges relating to apartment 9C, a five-

room unit in a residential, rent-regulated apartment building located at 945 West End Avenue in the County, City and State of New York (the building).

Individual plaintiffs Stuart Kreisler (Kreisler) and Elizabeth Tracy Bonbrest (Bonbrest) are the occupants of apartment 9C, and corporate co-plaintiff Kega-SP Ltd. (Kega), a limited partnership that Kreisler formed, is the unit's tenant of record.

Defendant B-U Realty Corp. (B-U) is the building's owner, and co-defendant Paul Bogoni is B-U's principal.

In its decision dated April 27, 2017, the court granted plaintiffs' motion for summary judgment (motion sequence number 001) to the extent of: (1) awarding plaintiffs a declaratory judgment that apartment 9C is a rent stabilized unit subject to the protections of the Rent Stabilization Law (RSL); (2) committing the issue of determining apartment 9C's past and present legal regulated rent to a Special Referee to hear and report on (with the additional direction that defendants issue plaintiffs a rent-stabilized lease for apartment 9C that contains a monthly rent in the amount that the Special Referee determines to be the unit's current legal regulated rent); and (3) holding the remainder of plaintiffs' motion (which sought money damages, court costs and attorney's fees) in abeyance pending receipt of the Special Referee's report (motion sequence number 001).

Special Referee Gammerman held hearings on October 10 and November 21, 2017, and on the latter date issued a report on the record. Unfortunately, that report did not contain the calculations that the court had requested in its reference order. Instead, it simply contained Special Referee Gammerman's partial factual findings and recommendations. This court held a subsequent hearing on June 18, 2018.

In the meantime, on September 13, 2018, the Appellate Division, First Department, issued an order that denied defendants' appeal of this court's April 27, 2017, decision and unanimously affirmed that decision. See Kreisler v B-U Realty Corp., 164 AD3d 1117 (1st Dept 2018). Of particular relevance, the First Department found that this court had not "erred in directing the Special Referee to use the default formula of 9 NYCRR § 2522.6 (b) (2) to determine plaintiffs' base rent, on the theory that such rent was the product of a fraudulent scheme to deregulate the apartment." 164 AD3d at 1117. Now before the court are plaintiffs' pending motion to partially confirm and partially deny Special Referee Gammerman's November 21, 2017 report, and defendants' cross motion for leave to renew their prior request for summary judgment to dismiss the complaint (motion sequence number 003).

DISCUSSION

CPLR 4403 provides that:

"Upon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part, the verdict of an advisory jury or the report of a referee to report; may make new findings with or

without taking additional testimony; and may order a new trial or hearing. The motion shall be made within fifteen days after the verdict or the filing of the report and prior to further trial in the action. Where no issues remain to be tried the court shall render decision directing judgment in the action."

"[G]enerally, courts will not disturb the findings of a referee 'to the extent that the record substantiates his findings ... [although] they may reject findings that are not supported by the record.'" See Kardanis v Velis, 90 AD2d 727, 727 (1st Dept 1982); quoting Holy Spirit Assn. for the Unification of World Christianity v Tax Comm. of the City of N.Y., 81 AD2d 64, 71 (1st Dept 1981), rev'd on other grounds 55 NY2d 512 (1982); see also Continental Cas. Co. v Lecei, 65 AD3d 931, 932 (1st Dept 2009). Here, a review of the transcripts of the referee's hearings discloses the existence of at least one "issue [which] remain[s] to be tried." That issue specifically regards the application of 9 NYCRR § 2522.6, which provides, in pertinent part, as follows:

"(a)

Where the legal regulated rent or any fact necessary to the determination of the legal regulated rent, . . . is in dispute between the owner and the tenant, or is in doubt, or is not known, the DHCR at any time upon written request of either party, or on its own initiative, may issue an order in accordance with the applicable provisions of this Code determining the facts, including the legal regulated rent,

"(b)

(1) Such order shall determine such facts or establish the legal regulated rent in accordance with the provisions of this Code. Where such order establishes the legal regulated rent, it shall contain a directive that all rent collected by the owner in excess of the legal regulated rent established under this section for such period as is

provided in section 2526.1(a) of this Title, or the date of the commencement of the tenancy, if later, either be refunded to the tenant, or be enforced in the same manner as prescribed in section 2526.1(e) and (f) of this Title. Orders issued pursuant to this section shall be based upon the law and Code provisions in effect on March 31, 1984, if the complaint was filed prior to April 1, 1984.

“(2) Where either:

* * *

“(iii) the base date rent is the product of a fraudulent scheme to deregulate the apartment; . . .

* * *

“(3) These amounts are:

“(i) the lowest rent registered pursuant to section 2528.3 of this Title for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment; or

“(ii) the complaining tenant's initial rent reduced by the percentage adjustment authorized by section 2522.8 of this Title; or

“(iii) the last registered rent paid by the prior tenant (if within the four year period of review); or

“(iv) if the documentation set forth in subparagraphs (i) through (iii) of this paragraph is not available or is inappropriate, an amount based on data compiled by the DHCR, using sampling methods determined by the DHCR, for regulated housing accommodations.”

9 NYCRR § 2522.6 (emphasis added).

Here, plaintiffs state that they “moved into [apartment 9C] in 2010 pursuant to a written lease agreement, dated January 20, 2010, . . . for a term commencing on February 1, 2010 and ending on January 31, 2011 at a monthly rental rate of \$4,700.00.”

At the first hearing before Special Referee Gammerman, plaintiffs' counsel identified apartment 2B in the building as being "comparable" to apartment 9C because: 1) it also had a lease term that commenced on February 1, 2010; and 2) the building's "B" and "C" lines of apartments both have five rooms. However, a discrepancy arose with respect to what the "legal regulated rent" for apartment 2B was on February 1, 2010. Plaintiffs' counsel presented a copy of the building's "registration rent roll report" that showed all of the registered rents for the building's apartments between 1985 and 2017. That report indicated that, on July 7, 2010, defendants had registered apartment 2B's legal regulated rent at \$1,311.47 per month, but that, in their subsequent registration filing on May 13, 2011, defendants then stated that apartment 2B's legal regulated rent was \$1,254.73 per month (i.e., an amount inexplicably lower by \$56.74 per month).

Plaintiffs' counsel argues that the lower (second) figure should be used as apartment 2B's legal regulated rent for purposes of comparing it to apartment 9C, while defendants' counsel argued that the higher (first) figure should be used. At the second hearing before him, Special Referee Gammerman recommended: 1) that this court should accept apartment 2B as "comparable" to apartment 9C; and 2) that the court should fix apartment 2B's legal regulated rent at \$1,311.47 per month because "the base date is the 6th of November 2010, four years prior to the filing of the complaint [and] the rent in effect on

that date for apartment 2B is \$1,311.47 a month." Special Referee Gammerman then "left it to the parties . . . to compute the appropriate rent increases from that date on." They did not do so.

In their motion, plaintiffs first argue that "the report's recommendation that apartment 2B be used to establish the 'comparable' rent should be confirmed." Defendants respond that "the court should apply the default formula in effect at the time of the allegations."

Defendants specifically assert that, on January 8, 2014, 9 NYCRR § 2522.6 was amended to its current form (reproduced supra), but that the earlier version of the statute provided that an order to fix an apartment's legal regulated rent via the DHCR's default formula "shall establish the legal regulated rent on the day of the complaining tenant's tenancy, or the date four years prior to the date of the filing of an overcharge complaint . . . whichever is most recent."

Defendants next contend that this constitutes a significant change in the law regarding the calculation of rent overcharges, with the "old law" being exemplified in the holding of Thornton v Baron (5 NY3d 175 [2005]), and a "newly emerged methodology" for making these calculations being set forth in such decisions as Olsen v Stellar W. 110, LLC (96 AD3d 440 [1st Dept 2012]).

Both of defendants' contentions lack merit. In the first place, defendants' allegation of a change in the statutory language is meaningless under the facts of this case.

Plaintiffs' tenancy in apartment 9C commenced on February 1, 2010. Plaintiffs never filed a rent overcharge complaint with the DHCR, but they did commence this action on November 5, 2014, and the date four years prior to such commencement would have been November 5, 2010. That date plainly falls within plaintiffs initial 2010-2011 lease term for apartment 9C. Therefore, both dates would yield the same legal regulated rent figure under the (purportedly) "old" DHCR default calculation formula. This is also the same figure that would be computed using the "current" version of 9 NYCRR § 2522.6, which only looks to "the date the complaining tenant first occupied the apartment." Therefore, defendants' "change in the law" argument is meaningless under the facts of this case.

Defendants analysis of the governing case law is also incorrect. The court's review of the governing precedent indicates that there is no "newly emerged methodology" for calculating legal regulated rent under the DHCR's default formula. The Appellate Division, First Department's, recent decision in Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal (164 AD3d 420 [1st Dept 2018]) plainly acknowledges that the Court of Appeals' rule in Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin. (15 NY3d 358 [2010]) is still the rule that courts follow when applying the DHCR default formula in cases where a landlord has engaged in "a fraudulent scheme to evade rent regulation." 164 AD3d at 425. In Grimm, the Court of

Appeals stated that “[t]he legal rent should be established by using the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the base date.” 15 NY3d at 366, fn 1. Here, apartment 2B and apartment 9C have the same number of rooms. Therefore, it appears that Special Referee Gammerman’s recommendation that apartment 2B may be properly used as a “comparable” unit to apartment 9C has a sound legal basis. Accordingly, the court shall grant so much of plaintiffs’ motion as seeks an order to confirm this portion of the Special Referee’s report.

Plaintiffs’ motion next argues that “the rental amount recommended by the report should be rejected,” however, because “there are two different rents registered for apartment 2B at the time that plaintiffs first occupied [apartment 9C],” and Special Referee Gammerman inexplicably recommended that the court adopt the higher of those two amounts, rather than the lower, as specified by the statute. Defendants respond that “while it is true that a year after the tenant moved into [apartment 2B] a lower rent was mistakenly registered of \$1,254.73” per month, this was an “incorrect rent registration,” and the tenant’s actual rent was \$1,311.47 per month, as reflected on the 2010-2011 lease for apartment 2B (a copy of which defendants produced).

In this instance, the court finds that the facts of the case favor defendants’ argument. 9 NYCRR § 2522.6 (b) (3) (i) provides that an apartment’s base date legal regulated rent

should be fixed as "the lowest rent registered . . . for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment." Here, plaintiffs took occupancy of apartment 9C on February 1, 2010, on which date the tenants of apartment 2B also executed a two-year renewal lease for that unit at a monthly rent of \$1,311.47. That rent for apartment 2B was reflected on the annual registration statement for that unit which defendants filed five months later on July 7, 2010. It is true that the next registration statement that defendants filed for apartment 2B on May 13, 2011 listed the unit's rent at \$1,254.73 per month. However, by that time, plaintiffs' initial one-year lease term for apartment 9C had already expired; specifically, on January 31, 2011. Therefore, the \$1,254.73 monthly rent for apartment 2B cannot be said to have been "in effect on the date the complaining tenant [i.e., plaintiffs] first occupied the apartment [i.e., apartment 9C]." Instead, it is clear that the \$1,311.47 monthly rent that is reflected on both the February 1, 2010 renewal lease for apartment 2B and the unit's subsequent July 7, 2010 registration statement is the "amount in effect" at the time that plaintiffs took possession of apartment C. Therefore, the court concludes that apartment 2B's February 1, 2010 monthly rent of \$1,311.47 is the "comparable" amount that should be used to set apartment 9C's base date legal regulated rent under 9 NYCRR § 2522.6. This is the "lowest rent registered" that is referenced in subparagraph 2522.6 (b) (3)

(i). The fact that defendants would subsequently re-register apartment 2B at a still lower monthly rent is of no moment, since that re-registration did not occur until after the expiration of plaintiffs' initial lease term (i.e., after they "first occupied the apartment"). It is also significant that defendants engaged in "a fraudulent scheme to avoid rent regulation," and it should not be wondered at that they filed inaccurate rent registrations for the building's apartments in furtherance of that scheme. Plaintiffs may deem it suspicious that there was a subsequent lower rent registration for apartment 2B. However, fraud is fraud, and the court need not speculate further beyond the statutory language. Therefore, the court rejects plaintiffs' argument, and adopts defendants' position that the \$1,311.47 monthly rental figure is "comparable." Accordingly, the court grants so much of plaintiffs' motion as seeks an order to confirm the portion of the Special Referee's report that recommends fixing the base date legal regulated rent for apartment 9C at \$1,311.47 per month.

Unfortunately, the above rulings do not completely dispose of plaintiffs' motion to confirm. In its order of April 27, 2017, the court also directed the Special Referee to: (1) calculate the amount of the rent overcharge that defendants had imposed on plaintiffs after fixing the base date legal regulated rent for apartment 9C; (2) issue a recommendation as to whether that overcharge was "willful," and, if so, to calculate the

treble damages that plaintiffs would be liable for; and (3) include in his recommendation directions that defendants must issue plaintiffs a rent-stabilized lease with a monthly rent that reflects apartment 9C's current legal regulated rent and that defendants must submit a registration for apartment 9C to the DHCR that also reflects that rent (motion sequence number 001). The report that Special Referee Gammerman made on the record on November 21, 2017 did not include any of these items. Therefore, there are no relevant findings for the court to confirm on these points, and the court must make other provisions.

With respect to the amount rent overcharge that defendants have imposed on plaintiffs to date, the court directs plaintiffs to present an accounting on notice of the calculation of the amount utilizing a base date legal regulated rent for apartment 9C of \$1,311.47 per month, and thereafter providing for all legally permissible increases. The court also directs that with such accounting, plaintiffs submit a proposed order for the court's consideration that sets forth those calculations and the final, current overcharge amount.

With respect to the issue of treble damages based on "willfulness," the court finds for plaintiffs. The parties adequately briefed this issue in their submissions on their respective motions. Plaintiffs argued that 9 NYCRR § 2526.1 (a) (1) provides that all rent overcharges are presumed to be willful, and to be punishable by treble damages, unless "the

owner establishes by a preponderance of the evidence that the overcharge was not willful," but that defendants have failed to do so. See plaintiffs' mem of law at 8-10. Defendants responded that the burden of proof is actually on plaintiffs, because "the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law." The defendants are incorrect. It is plain that they bear the burden of proof to rebut the presumption of "willfulness." See e.g. Matter of 10th St. Assoc., LLC v New York State Div. of Hous. & Community Renewal, 110 AD3d 605 (1st Dept 2013). It is also plain that defendants failed to submit any factual evidence on the issue of willfulness, apart from Bogoni's self-serving statement that "there are disputed material facts as to my willfulness." These alleged "disputed material facts" are, in turn, derived from his refuted denial that he ever engaged in a fraudulent scheme to illegally deregulate the building's apartment. The court already determined that defendants did engage in such a scheme, and the First Department has upheld the court's finding. Kreisler v B-U Realty Corp., 164 AD3d at 1117. Therefore, as defendants have failed to meet their statutory burden of proof, they are subject to treble damages for their rent overcharge to plaintiffs, pursuant to 9 NYCRR § 2526.1 (a) (1). As a result, the court directs that plaintiffs include a treble damages calculation in their proposed order.

Finally, the court directs that plaintiffs include in their proposed order a provision that the issue of attorney's fees shall be severed and determined at a separate hearing.

In their cross motion, defendants raise several arguments that evidently seek leave to renew their earlier motion for summary judgment to dismiss the complaint. The court uses the term "evidently," because defendants' current cross motion plainly requests summary judgment to dismiss the complaint and asserts the same arguments as they made in their earlier cross motion (motion sequence number 001), but the current motion does not address the statutory requirements of a motion to renew or reargue, which, as set forth in CPLR 2221, provide, in pertinent part:

"(d) A motion for leave to reargue:

"1. shall be identified specifically as such;

"2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and

"3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

"(e) A motion for leave to renew:

"1. shall be identified specifically as such;

"2. shall be based upon new facts not offered on the prior motion that would change the prior determination or

shall demonstrate that there has been a change in the law that would change the prior determination; and

"3. shall contain reasonable justification for the failure to present such facts on the prior motion."

Defendants do not specifically identify their current cross motion as being one for reargument or renewal. Nevertheless, it fails under either standard.

Defendants cross motion fails as a motion for reargument because there are no "matters of fact or law . . . overlooked or misapprehended by the court in determining the prior motion" herein. This is borne out by the First Department's decision that unanimously affirmed the court's prior motion decision. Kreisler v B-U Realty Corp., 164 AD3d at 1117. In particular, defendants' cross motion devotes a great deal of argument to the allegation that there is no evidence of a "fraudulent scheme to illegally deregulate the building's apartments," whereas the First Department's decision specifically found that there is sufficient evidence of such a scheme herein.

Defendants cross motion fails as a motion to renew because it does not assert either "new facts . . . that would change the prior determination or . . . a change in the law that would change the prior determination." Defendants' cross motion does not assert any new facts, but merely disputes the court's findings regarding the old ones. However, as was discussed in the preceding paragraph, the First Department has already upheld this court's factual findings. Therefore, the court denies defendants' cross motion in full.

As regards "a change in the law," defendants' cross motion cites the First Department's recent decision in Fox v 12 E. 88th LLC (160 AD3d 401 [1st Dept 2018]), for the proposition that, because Kega is a corporate entity, it is "not entitled to the protections of the [RSL]" and neither are Kreisler or Bonbrest, because they "are not tenants at all." However, the Fox holding does not support this conclusion. In its earlier decision, the court cited the First Department's older decision in Matter of Schwartz Landes Assoc. v New York City Conciliation & Appeals Bd. (117 AD2d 74 [1st Dept 1986]) that held that a corporate entity may be the tenant of record of a rent regulated apartment as long as the corporation designates the specific employees who it permitted to occupy the unit. Fox recognizes that same rule to still be good law, even though it does not specifically cite Matter of Schwartz Landes Assoc., 160 AD3d at 402. Therefore, defendants have failed to assert a "change in the law" that would support a motion to renew.

10/3/2019
DATE

Debra A. James
DÉBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE