Gridley v Turnbury Vil. LLC
2019 NY Slip Op 34158(U)
October 2, 2019
Supreme Court, Queens County
Docket Number: 700027/19
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **ALLAN B. WEISS** IA PART 2

DAVID GRIDLEY on behalf of himself and all others similarly situated,

Plaintiff,

-against-

TURNBURY VILLAGE LLC,

Defendants.

Index Number: 700027/19

Motion Date: 6/26/19
Motion Seq. No. 1 & 3

Motion Date: 7/10/19
Motion Seq. No. 2

The following papers EF numbered below read on (1) this motion (sequence no. 1) for an order pursuant to CPLR 902 determining whether this action may be maintained as a class action, (2) this motion (sequence no. 2) by plaintiff David Gridley for an order pursuant to CPLR 3211(b) dismissing the affirmative defenses raised by defendant Turnbury Village, LLC, (3) this motion (sequence no. 3) by defendant Turnbury Village, LLC for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint against it or alternatively for summary judgment pursuant to CPLR 3212 dismissing the complaint against it and (4) on this cross motion by defendant Turnbury Village LLC for an order, inter alia, consolidating the three motions for simultaneous disposition

Motion Sequence No. 1	Papers Numbered
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Answering Affidavits - Exhibits	
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Motion Sequence No. 2

Notice of Motion - Affidavits - Exhibits	25-31
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Motion Sequence No. 3

Notice of Motion - Affidavits - Exhibits	41-54
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Upon the foregoing papers it is ordered that the motion by plaintiff Gridley for an order pursuant to CPLR 3211(b) dismissing the defendant's affirmative defenses is granted to the extent that the fourth, fifth, sixth, and tenth affirmative defenses are dismissed. The motion by defendant Turnbury Village, LLC for summary judgment dismissing the complaint against it is granted. The plaintiff's motion for class action certification is denied. The cross motion is denied as moot.

I. The Allegations of the Complaint

Plaintiff David Gridley resides in Apartment 2M of a building owned by defendant Turnbury Village LLC located at 35-30 81st Street, Jackson Heights, New York. The defendant owner receives tax abatements and/or benefits under the J-51 Program, and landlords of buildings in the J-51 Program are required to register their apartments with the New York State Division of Housing and Community Renewal (DHCR). The defendant owner did not register Apartment 2M with DHCR from 2008-2015, and his apartment was wrongfully listed as "exempt" in DHCR's rent history. The full rental history from the base date was not provided for Apartment 2M. The defendant owner did not give plaintiff Gridley a rent-stablized lease when he moved into Apartment 2M, but rather a purported "free market" lease. The defendant's failure to comply with the rent stabilization regulations was part of a fraudulent scheme to deregulate the apartments in the building, and so the "default formula" found in RSC § 2522.6(b)(3) applies to Apartment 2M. The use of the default formula will result in a legal regulated rent lower than the rent being charged for the plaintiff's apartment.

II. The Allegations of the Defendant

Plaintiff Gridley's lease began to run in June, 2015, and the defendant owner registered Apartment 2M with DHCR in 2016, approximately three years before Gridley began the instant action. The defendant owner had stopped registering plaintiff Gridley's apartment and twenty-five other apartments in the building when they reached the applicable "high rent" decontrol threshold applicable under the Rent Stabilization Law (RSL). DHCR directives at the time provided that even if a building was receiving J-51 tax benefits, upon reaching the high rent decontrol threshold, the apartment was decontrolled and need not be registered. The defendant owner did not know that DHCR's position would later on be determined to be wrong. The actual rent charged to defendant Gridley "was always significantly below the allowed legal rent, for the reason that these are low-rent apartments in a low-rent neighborhood." The plaintiff does not dispute the defendant's computation showing that his apartment had in fact reached the vacancy decontrol threshold.

In 2016, DHCR notified approximately 4,000 property owners that if they were receiving J-51 benefits, their apartments had to be registered even when the high rent decontrol threshold had been crossed. Defendant Turnbury immediately registered such apartments. DHCR did not require prior year registrations, just a late registration in 2016 and a timely registration each year thereafter. Defendant Turnbury complied. Indeed, defendant Turnbury also went further than required by law and registered Apartment 2M and all other apartments that should have been registered for all of the missed years before 2016.

III. Discussion

A. The Plaintiff's Motion to Dismiss the Affirmative Defenses (Seq.# 2)

A party moving pursuant to CPLR 3211(b) for an order dismissing an affirmative defense has the burden of demonstrating that the defense is without merit as a matter of law either because a defense has not been stated or the defense has no application under the factual circumstances of the case. (*Shah v. Mitra*, 171 AD3d 971 [2nd Dept. 2019]; *Bank of Am., N.A. v. 414 Midland Ave. Assocs., LLC*, 78 AD3 d 746, [3nd Dept 2010]; *see, Vita v. New York Waste Services, LLC*, 34 AD3d 559 [2nd Dept 2006]; *Santilli v. Allstate Ins. Co.*, 19 AD3d 1031 [4th Dept 2005].)

The first affirmative defense (failure to state a cause of action) is not subject to a CPLR 3211(b) motion. A plaintiff cannot test the sufficiency of his own complaint: (*Jacob Marion, LLC v. Jones*, 168 AD3d 1043 [2nd Dept. 2019].)

The second affirmative defense, which asserts that the plaintiff's claims are barred by specified statutes and regulations, has merit, as discussed in connection with the defendant's motion for summary judgment.

The third affirmative defense – that "Defendant has registered all of the subject apartments with DHCR" – has relevance to the plaintiff's allegations of fraud and to the defendant's defenses based on applicable regulations, as discussed in connection with the defendant's motion for summary judgment.

The fourth affirmative defense, which denies that the New York State Supreme Court has jurisdiction over some or all of the plaintiff's claims, has no merit. This court may determine all causes of action unless its jurisdiction has been specifically proscribed .(*Colgate v. Broadwall Mgmt. Corp.*, 51 AD3d 437 [1st Dept 2008]), which is not the case here. "There is no constitutional or legislative proscription against Supreme Court's subject matter jurisdiction in controversies concerning a rent overcharge." (*Colgate v. Broadwall Mgmt. Corp., supra* , 437.) Moreover, considering the facts and law, this case does not require the special expertise of an administrative agency, and the doctrine of primary jurisdiction does not apply. (*See, Lauer v. New York Tel. Co.*, 231 AD2d 126 [3rd Dept 1997].) The court also notes that the defendant has brought a motion for summary judgment on other grounds, thereby in effect waiving its reliance on the doctrine of primary jurisdiction. (*See, Knauer v. Anderson*, 2 AD3d 1312 [4th Dept 2003].)

The fifth affirmative defense – that " the rent overcharge claim and other claims may be required to be determined by [DHCR] in the first instance" – amounts to just another invocation of the doctrine of primary jurisdiction and has no merit. This case largely involves the reading, analysis, and interpretation of case law, statutes, and regulations, and there is no need for the special competence of DHCR in that regard. *(See, Regina Metro. Co., LLC v. New York State Div. of* Hous. *& Cmty. Renewal*, 164 AD3d 420 [1st Dept2018].)

The sixth affirmative defense, failure to exhaust administrative remedies, has no merit. There is nothing in the relevant statutes or regulations which requires the plaintiff to first seek the application of the "default formula" (discussed in connection with the defendant's motion for summary judgment) from the DHCR. (*See, Patti Ann H. v. New York Med. Coll.*, 88 AD2d 296, 300 [2nd Dept 1982], aff'd, 58 NY2d 734[1982] ["the doctrine of exhaustion of administrative remedies only applies where a claim is cognizable in the first instance by an administrative agency alone"].)

The seventh affirmative defense, alleging compliance with DHCR's regulations, directives, and communications, has relevance to the plaintiff's claim that the defendant engaged in a scheme to defraud tenants entitled to the protection of the Rent Stabilization Law.

The eighth affirmative defense based on the statute of limitations is validly stated at least to the extent that, absent fraud, there is no authority to go beyond the four year period provided in CPLR 213-a . (*See, Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal, supra.*)

The ninth affirmative defense – that '[t]he claims are not amenable to class action treatment" – was a matter in dispute and possibly had to be considered in connection with the question of class action certification.

The tenth affirmative defense based on waiver, estoppel, and equitable principles are not adequately stated. Affirmative defenses which merely plead conclusions of law without supporting facts are insufficient . (*See, Becher v. Feller*, 64 AD3d 672 [2nd Dept 2009]; *Fireman's Fund Ins. Co. v. Farrell*, 57 AD3d 721 [2nd Dept 2008]; *Cohen Fashion Optical, Inc. v. V & M Optical, Inc.*, 51 AD3d 619 [2nd Dept 2008].) Moreover, these equitable defenses have no application under the facts of this case and in light of relevant law .

B. The Defendant's Motion for Summary Judgment Dismissing the Complaint (Seq.#3)

The court will deem the defendant's motion to be one for summary judgment on, inter alia, CPLR 3211(a) grounds. (*See, Oppenheimer v. State*, 152 AD3d 1006 n1 [3rd Dept 2017]; *Matter of Andrews v. State of New York*, 138 AD3d 1297n 1[3rd Dept 2016].)

In the case at bar, Constantine Papamichael, a member of the defendant LLC, swears: " [P]laintiff's initial rent was substantially lower than the amount that would have been the legal regulated rent for the year he moved in, and every renewal offer has still maintained plaintiff's rent at a level lower than the legal regulated rent." She further alleges that because of market forces, whether rent stabilized or not, Turnbury apartments could not be leased for much more, if at all, than the amount for which the landlord was actually leasing them.

The plaintiff did not submit any proof, nor does he even make the allegation, that defendant Turnbury ever charged him in excess of the legal regulated rent either before or after 2016, the year when defendant Turnbury registered Apartment M with DHCR. Indeed, the plaintiff's attorney makes this admission: "In sum, in one respect Defendant is correct. Their belated admissions indicate that had they followed the law, the legal regulated rent would be higher than Plaintiff Gridley's current rent, which is calculated based on market conditions in the Building's neighborhood."

In *Roberts v. Tishman Speyer Properties, L.P.* (13 NY3d 270 [2009]), the Court of Appeals held that a landlord could not avail himself of the luxury decontrol provisions of the Rent Stabilization Law (RSL) and at the same time receive tax incentive benefits under the City of New York's J-51 program for rehabilitation and major capital improvement and conversion projects. In continuing litigation between the same parties, the Appellate Division, First Department held that *Roberts* should be given retroactive application. (*Roberts v. Tishman Speyer Properties, L.P.*, 89 AD3d [1st Dept 2011].)The plaintiff alleges

that for approximately seven years after the *Roberts* decision, defendant Turnbury deregulated his apartment and failed to file a registration statement concerning it.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***." (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986].) Defendant Turnbury successfully carried this burden through, inter alia, the submission of an affidavit from Constantine Papamichael, a member of defendant Turnbury. New York State rent stabilization laws and applicable New York City regulations provide a comprehensive framework for dealing with rent overcharge claims where, as in the case at bar, an owner of a rent-stabilized apartment (1) fails to timely register, (2) subsequently cures its failure to register, and (3) during the period of non-registration, did not charge rent in excess of the legal rent under the rent stabilization law. Defendant Turnsbury made a primary facie showing that under the regulatory scheme it has no liability in this case.

Section 2509.3, "Penalty for failure to register," of the Rent Stabilization Regulations provides in relevant part: (a) The failure to properly and timely comply, on or after the base date, with the rent registration requirements of this Part shall, until such time as such registration statement is completed, bar an owner from applying for or collecting any rent in excess of the base date rent, plus any increases allowable prior to the failure to register. Such a bar includes but is not limited to rent adjustments pursuant to section 2502.7 of this Title. The filing of a late registration shall result in the prospective elimination of such sanctions, and for proceedings commenced on or after July 1, 1991, provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration, an owner, upon the service and filing of a late registration, shall not be found to have collected rent in excess of the legal regulated rent at any time prior to the filing of the late registration. Nothing herein shall be construed to permit the examination of a rental history for the period prior to four years before the commencement of a proceeding pursuant to sections 2502.3 and 2506.1 of this Title." (Emphasis added.) Defendant Turnsbury, invoking the protection of Section 2509.3, submitted proof that for the period from 2008 to 2015, when the plaintiff's apartment was not registered with DHCR, it never charged him rent in excess of the legal regulated rent.

While the plaintiff admits that he has never been charged rent in excess of what he could have been charged under the rent-stabilization regulations, he argues that the "default formula" established by Rent Stabilization Code § 2522.6 should be applied in this case and that application of the default formula will result in a significant reduction of his rent. The plaintiff further argues that the default formula requires comparing plaintiff's apartment to the building's rent-stabilized units and that he cannot calculate the amount of the rent reduction that he deserves until after the completion of discovery.

Rent Stabilization Code § 2522.6, " Orders where the legal regulated rent or other facts are in dispute, in doubt, or not known, or where the legal regulated rent must be fixed," provides in relevant part: "(b) ***(2) Where either:(i) the rent charged on the base date cannot be determined; or (ii) a full rental history from the base date is not provided; or (iii) the base date rent is the product of a fraudulent scheme to deregulate the apartment; or (iv) a rental practice proscribed under section 2525.3(b), (c) and (d) of this Title has been committed, the rent shall be established at the lowest of the following amounts set forth in paragraph (3) of this subdivision. (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." (Emphasis added.) (*See, Grimm v. State Div. of Hous. & Cmty. Renewal Office of Rent Admin.*, 15 NY3d 358 [2010].)

The default formula applies in a situation where an owner engaged in a fraudulent scheme to deregulate an apartment. (*See, Kreisler v. B-U Realty Corp.*, 164 AD3d 1117 [1st Dept 2018] [default formula applied where "[t]he record reflects evidence of a fraudulent scheme to deregulate plaintiffs' apartment, as well as other apartments in the building, including evidence of defendants' failure, while in receipt of J–51 tax benefits, to notify plaintiffs their apartment was protected by rent stabilization laws or to issue them a rent-stabilized lease, and further reflects that defendants only addressed the issue when their conduct, which violated [*Roberts*]), came to light in connection with an anonymous complaint, which in turn triggered the involvement of an Assemblyman in 2014"].) Plaintiff Gridley has attempted to invoke the default formula on the ground of fraud solely on the basis of defendant Turnbury's failure to register his apartment until approximately seven years after the *Roberts* case. There is some case law besides *Kreisler* which lends apparent support to his position. In *Nolte v. Bridgestone Assocs. LLC* (167 AD3d 498, 498–99 [1st Dept 2018]), for example, the Appellate Division, First Department stated: " The [motion] court properly examined the rental history of the subject apartment beyond the four-year statutory limitations period (CPLR 213–a) upon finding that defendant was engaged in a fraudulent scheme to deregulate apartments. The record shows that defendant failed to promptly register the apartment and 30 other apartments in the building as rent-stabilized in March 2012, when the applicability of [the *Roberts* case] was clear." (Citations omitted.) In *EMA Realty, LLC v. Leyva* (64 Misc.3d 11, 15 [AT 2, 11, &13 2019]), the court stated : " the timing of the filing of a landlord's corrected registrations in a J-51 case is critical, as a delay may even be used as a factor to find a willful overcharge, allowing the imposition of

treble damages and attorney's fees." On the other hand, in *Park v. New York State Div. of Hous. & Cmty. Renewal* (150 AD3d 105, 114-115, [1st Dept 2017]), the Appellate Division, First Department also found : " in this case, there is simply no evidence or indicia that the owner engaged in a fraudulent deregulation scheme to remove the apartment from the protections of the rent stabilization law . *** DHCR rationally concluded that there was no fraud in the owner's failure to re-register the apartment until 2012, when the issue of the retroactive application of Roberts became apparent." A delay in registration may be excusable and not the product of fraud. Moreover, defendant Turnsbury successfully distinguished the *Kreisler* case, the First Department case relied upon by the plaintiff, on several grounds, including an actual rent overcharge. Finally, there is Court of Appeals and Second Department precedent which can be read as demanding "substantial indicia of fraud" to justify a departure from the usual rent calculation regulations. (*See, Grimm v. State Div. of Hous. & Cmty. Renewal Office of Rent Admin.*, 15 NY3d 358 [2010]; *Watson v. New York State Div. of Hous. & Cmty. Renewal,* 109 AD3d 833[2nd Dept 2013].) The plaintiff did not submit evidence showing that he can meet that standard.

In the case at bar, this court concludes that the plaintiff failed to raise a genuine issue of fact concerning whether the default formula is applicable on the ground of fraud. The plaintiff was never charged rent in excess of that which he could have been charged under the rent stabilization laws, and he never demonstrated that the defendant had something to gain by delaying the registration of his apartment. As for precedent, the Appellate Division, First Department cases are not entirely harmonious, and *EMA Realty*, an Appellate Term case from the Second Department, merely states that "a delay may even be used "as a factor to find a willful overcharge." The plaintiff cannot defeat the defendant's motion for summary judgment because of the delay factor alone. This is especially true because of other factors in this case. The first other factor is, of course, that the plaintiff's apartment had reached the vacancy decontrol threshold, but he was never charged a rent in excess of that which he could have been charged under the rent stabilization regulations. As a second factor, in January, 2016, DHCR sent approximately 4,000 notices to landlords informing them that all apartments in buildings receiving J-51 tax benefits remained subject to rent stabilization regulations despite the high rent threshold and that annual registration statements were required. Defendant Turnbury immediately complied with the requirement.

This court concludes that the plaintiff cannot successfully invoke the default formula, and, as a consequence, his complaint must be dismissed pursuant to Section 2509.3 of the rent regulations.

C. The Plaintiff's Motion for Class Action Certification (Seq.#1)

Because the causes of action asserted by the proposed class representative have been dismissed, the motion for class action certification must be denied as moot. (*See, Moore v. Liberty Power Corp., LLC*, 72 A.D.3d 660 [2nd Dept 2010]; *Tepper v. Cablevision Sys. Corp.*, 19 AD3d 585 [2nd Dept 2005].)

D. The Defendant's Cross Motion to Adjourn and Consolidate Pending Motions

The court has simultaneously reached the three pending motions, which were fully submitted, and there is no need for the order the defendant seeks via the cross motion.

Dated: October 2, 2019

J.S.C.

FILED
OCT - 9 2019
COUNTY CLERK
QUEENS COUNTY