

Cenpark Realty LLC v Applbaum
2020 NY Slip Op 30023(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 152938/2014
Judge: Tanya R. Kennedy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

-----X
CENPARK REALTY LLC,

Plaintiff,

-against-

ALLEN APPLBAUM and BARBARA APPLBAUM,

Defendants.
-----X

DECISION AND ORDER

Index Number 152938/2014
Motion Seq. Nos. 006 and
007

HON. TANYA R. KENNEDY, J.S.C.:

This action arises out of a lease Defendants, Allen Applbaum and Barbara Applbaum, (“Defendants”) entered with Plaintiff, Cenpark Realty LLC (“Plaintiff”) for a residential condominium unit located at 360 Central Park West, New York, New York. The question before this Court is the applicability of the recently enacted Housing Stability and Tenant Protection Act of 2019.

In motion sequence number 006, Plaintiff moves, pursuant to CPLR 4403, for an order confirming Special Referee Phyllis Sambuco’s April 24, 2019 Report and Recommendation (“Report”), and Defendants cross move for an order: (a) rejecting the Report, to the extent that it recommended the denial of their request for costs and attorneys’ fees, and upon rejecting said portion of the Report, granting Defendants their costs and attorneys’ fees; and (b) granting them an assessment of damages to the extent of (i) finding that the legal regulated rent was \$7,500 per month through May 2017 and (ii) directing Plaintiff to refund to Defendants all overcharges from September 2011 to May 2017, along with treble damages on the amount overcharged from September 2011 to May 2017, and interest on the amount overcharged from September 2011 to February 2012.

In motion sequence number 007, Plaintiff moves for an order: (a) granting leave to renew the parties' prior motions for summary judgment, and upon granting leave to renew, vacating the December 18, 2017 decision and order of the Hon. Ellen Coin and issuing a new decision and order; (b) modifying the ad damnum clause of Defendants' counterclaims to request recovery of overcharge penalties from March 2008 through May 2017; and (c) staying the issuance of any order confirming the Report.

Motion sequence number 007 is predicated on the applicability herein of the recently enacted Housing Stability and Tenant Protection Act of 2019, L. 2019, ch. 361 (the "HSTPA"). The HSTPA, by its terms, applies to all "*claims pending* or filed on or after" the time of enactment (HSTPA §1, Part F, §7) (emphasis added). Motion sequence numbers 006 and 007 are consolidated for disposition.

Justice Coin held in her December 18, 2017 decision and order that the four-year look-back period provided for in then-Rent Stabilization Law §26-517(a)(2) and CPLR 213(a), were applicable, and referred to the Special Referee to hear and report with recommendations, the issue of the legal regulated rent for Defendants' apartment on November 5, 2010, and the issue of Defendants' reasonable attorneys' fees (*see* Decision and Order, NYSCEF Doc. No. 175). Justice Coin previously determined that the apartment was declared to be rent stabilized and that Plaintiff "acted fraudulently from 2012 through the filing of its complaint in 2014" [and] "failed to establish a rent-stabilized rent in 2012, once it became clear that it acted improperly in 2000" (*id.*, P. 3-4).

The parties appeared before Special Referee Phyllis Sambuco on May 24, 2018 (*see* Transcript, NYSCEF Doc. Nos. 214). Both parties agreed that the legal rent for the apartment was \$7,500.00 per month, as of November 5, 2010, and that the sole remaining issue before the

Special Referee was the Defendants' attorneys' fees (*id.*).

Plaintiff argues herein that “[t]he only remaining issue was a mathematical calculation based upon the four-year rule” as of the date of Justice Coin’s December 18, 2017 decision and order, and that “there is no claim pending to which the HSTPA is to be applied” (*see* Goldman Opposing Affirmation, ¶9, NYSCEF Doc. No. 208). However, Defendants maintain, *inter alia*, that this is a pending case, and that the “determination of the legal regulated rent, and the calculation of the amount of the overcharges, which was decided prior to the enactment of the HSTPA, must be decided anew in light of the HSTPA” (*see* Languedoc Reply Affirmation, ¶5, NYSCEF Doc. 217).

DISCUSSION

In *Simpson v 16-26 E. 105, LLC* (176 AD3d 418, n 1 [1st Dept 2019]), the Appellate Division, First Department, stated that the HSTPA “extended the statutory lookback period for overcharge proceedings from four to six years for all actions pending on or after June 14, 2019” (internal quotation marks and citations omitted). However, in *Dugan v London Terrace Gardens, L.P.* (177 AD3d 1, 10 [1st Dept 2019]), the Appellate Division, First Department, stated that “the legislature expressly made [HSTPA] applicable to *pending claims*” (emphasis added).

This Court need not decide whether the HSTPA only applies to claims that remain open. Inasmuch as the Special Referee’s report has not been judicially confirmed, the issues Justice Coin submitted to the Special Referee to hear and report, with recommendations, are still pending. Moreover, the determination of the legal regulated rent, and the amount of rent overcharges to be refunded to Defendants is a prerequisite for the assessment of treble damages, as then-permitted by statute and the case law Justice Coin cited, and is now required, in the event of willful

overcharges, pursuant to HSTPA §4(a)(2). Accordingly, the HSTPA applies not only to Defendants' claims for attorneys' fees, but also to Defendants' overcharge claim, which are still pending, notwithstanding the parties' agreement as to the legal regulated rent.

Nonetheless, to the extent Defendants seek treble damages for the two-year period preceding March 2012, the requested relief is overbroad. Justice Coin held, in line with binding precedent, that Plaintiff's overcharges were not willful prior to 2012. While the HSTPA provides that owners have the burden of showing that they are not liable for treble damages where overcharges are not willfully imposed, Plaintiff satisfied such burden due to Justice Coin's prior decision. Justice Coin indicated in her decision that landlords were entitled to rely upon the then-policy of DHCR that the receipt of J-51 tax benefits did not preclude the decontrol of an apartment, pursuant to the luxury decontrol provisions of Rent Stabilization Law §26-504.2(a) until March 2012, when the appeal from the First Department appeal in *Matter of Gersten v 56 7th Ave. LLC* (88 AD3d 189 [1st Dept 2011]) was withdrawn.

Therefore, Defendants are no more entitled to treble damages for overcharges prior to 2012, pursuant to the HSTPA, than they were entitled to such damages prior to the enactment of this statute. However, the HSTPA unequivocally extends the look-back period from four to six years. As such, Defendants are entitled to refunds of rent overcharges, as of November 5, 2008, rather than as of November 5, 2010, as provided for by Justice Coin's prior decision.

The HSTPA provides that absent an applicable registration history, a court is to "consider all available rent history which is reasonably necessary to make such determination" (HSTPA, §1, Part F, §5[h]). The HSTPA is a remedial statute, and accordingly, it may be applied retroactively (*see e.g. People ex rel Rosa v Warden, Edgecombe Correctional Facility*, 80 AD3d 525, 526 [1st

Dept 2011]). It would be improper to calculate the rent as of March 2008, pursuant to the default method, as Defendants urge (*see* Languedoc Reply Affirmation, ¶39, NYSCEF Doc. 217), because Defendants' rent was lawful at the time of the initial lease period.

In support of their argument for application of the default method, Defendants cite *Jazilek v Abart Holdings, LLC* (72 AD3d 529 [1st Dept 2010]). Unlike the circumstances herein, the default method was used in *Jazilek*, as well as in the seminal case of *Thornton v Baron* (5 NY3d 175 [2005]), because the landlords therein acted fraudulently in setting the rent. Accordingly, those cases are not instructive.

In the hearing before Special Referee Sambuco, the parties agreed that the legal regulated rent was \$7,500 per month, as of November 2010. Therefore, this matter will be referred back to the Special Referee to report on, among other things, the legal regulated rent for the two years preceding March 2012, on the basis of the legal regulated rate of \$7,500 a month, as of November 2010.

Justice Coin ruled that Defendants were entitled to their attorneys' fees, and she referred the issue regarding the amount of such fees to the Special Referee. The Special Referee recommended that Defendants' request for an award of attorneys' fees be denied because Justice Coin precluded such relief in an earlier decision, which constituted law of the case (*see* Report, P. 6-7, NYSCEF Doc. No. 204). Regardless of the propriety of that determination, HSTPA §1, Part F, §4(a)(4) provides that:

“An owner found to have overcharged shall be assessed the reasonable costs and attorney's fees of the proceeding, and interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five thousand four of the civil practice law and rules.”

As such, Defendants are entitled to their attorneys' fees and costs from the commencement

of this action.

The parties appear to have agreed upon the amount of Defendants' reasonable attorneys' fees, up to those incurred by the present motions. Therefore, the parties are encouraged to present the Special Referee with an agreement consistent with this decision and order.

Accordingly, it is hereby

ORDERED that motion sequence number 006, the motion of Plaintiff Cenpark Realty LLC, and the cross-motion of Defendants are denied as moot; and it is further

ORDERED that the issues of: (1) the amount of attorneys' fees incurred by the Defendants from the inception of this action; (2) the legal regulated rent for Defendants' apartment for the two years commencing on November 1, 2008, based upon a legal regulated rent of \$7,500 per month at the end of that two-year period; (3) the total amount of refund owed by Plaintiff to Defendants, less such amount as Plaintiff has already paid to Defendants; (4) the amount of interest, at the statutory rate, owed by Plaintiff on the total amount of refunds that have been paid and those remaining due; and (5) the amount of treble damages owed by Plaintiff from March 6, 2012 through May 2017 are referred back to Special Referee Phyllis Sambuco to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

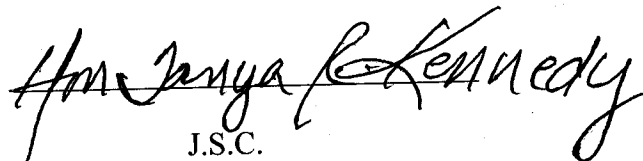
ORDERED that motion sequence number 007 is held in abeyance pending the report of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible 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 Special Referee Sambuco.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
January 6, 2020

ENTER:



J.S.C.

TANYA R. KENNEDY
J.S.C.