Littger v Martin
2020 NY Slip Op 31268(U)
May 6, 2020
Supreme Court, Kings County
Docket Number: 520143/17
Judge: Carolyn E. Wade

At an IAS Part 84 of the Supreme Court of the State of New York, County of Kings, at the Courthouse, 360 Adams Street on the 6th day of May, 2020.

PRESENT:

HON. CAROLYN E. WADE,
Justice

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STEPEHEN LITTGER,

Plaintiff,

against

ELCORNO MARTIN,

Defendant.

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Decision and Order

Index No. 520143/17

Motion Sequence No.1

The following e-filed papers read herein:	NYSCEF Doc. Nos.
Notice of Motion, Affidavits (Affirmations) and Exhibits Annexed	27 – 36, 37
Opposing Affirmation and Exhibits Annexed	38-42
Reply Affirmation	43

Upon the foregoing papers, in this action seeking damages for building violations including treble damages for overcharged rent imposed by Elcorno Martin (defendant) on the rent-stabilized apartment of Stephen Littiger (plaintiff), plaintiff moves, in motion (mot. seq.) one, for summary judgment, or, alternatively, to strike defendant's answer and affirmative defenses.

Factual Allegations

Plaintiff moved into 789 Franklin Avenue, apartment #3D in Brooklyn on September 15, 2015, pursuant to a September 11, 2015 one-year residential, rent-stabilized lease (NYSCEF Doc. No. 36, annexed to plaintiff's motion papers, NYSCEF Doc. Nos. 27-36). The apartment, pursuant to the lease, was taken in "as is" condition with rent listed as $1,600 per month and with payment of a one-month $1,600 security deposit. In addition, plaintiff was also required to

deposit the lease's last month rent with defendant.

Plaintiff correctly alleges that the lease contained no rider specifying how the rental amount was calculated, which, in fact, violated the New York Rent Stabilization Law (RSL), codified in Administrative Code of City of NY § 26-511(d), and the New York Rent Stabilization Code (RSC) § 2522.5 (c), codified in Administrative Code § 2522.5 (c), and that the two months' security deposit in fact violated RSC § 2525.4 (9 NYCRR 2525.4) .

Plaintiff further alleges that when he took occupancy the apartment appeared to have been painted, but no major renovations had been done. The appliances, he claims, were old, the windows needed replacement and the complaint also alleges 35 then-open violations on the building, including 10 hazardous, Class C violations. Hence, plaintiff contends that defendant was only entitled to increase the rent by the vacancy allowance set by the Rent Guidelines Board (RGB) and not by any rental increases for apartment improvements.

The Division of Housing and Community Renewal (DHCR) rent history (NYSCEF Doc. No. 32, exh D, annexed to plaintiff's motion papers and NYSCEF Doc. No. 41, exh C, annexed to defendant's opposition papers, NYSCEF Doc. Nos. 38-42) shows that the previous tenant paid $869.24 in rent. Plaintiff contends that, pursuant to RGB Order #46, in effect when plaintiff executed the lease with defendant, the allowable vacancy increase for a one-year lease was 18.25%, which would have permitted defendant to charge approximately $1030.00 as the monthly rent.

In opposition, defendant submitted counsel's affirmation alleging that service of the complaint was improper; that plaintiff failed to submit his overcharge claim within four years, thus making the claim untimely; that defendant was entitled to an additional 4.2 % longevity rent increase above the 18+% vacancy increase and was also entitled to rental increases for improvements to the apartment as evidenced by receipts (annexed as NYSCEF Doc. No. 42, exh

D to defendant's opposition papers). Defendant contends that the submitted bills at least create a factual issue as to whether there were improvements to the apartment that substantiate the rental increase; and, in any event, that plaintiff did not establish entitlement to summary judgment or dismissal of affirmative defenses.

In reply, plaintiff concedes that defendant was entitled to an additional 4.2% longevity increase. As such, by plaintiff's formula, the legal rent would be approximately $1067.00 per month (18.5% + 4.2% = 22.7% of $869.24 = $197.32 allowable rent increase).

Plaintiff argues that defendant submitted no affidavit supporting any of the assertions in counsel's affirmation. The submitted receipts do not in any way indicate that the materials and labor provided applied to plaintiff's apartment. Also, there is no affidavit from defendant stating that he made any improvements to the apartment, nor from anyone who allegedly performed work in the apartment or who had any knowledge of any work or improvements performed. Plaintiff's affidavit, supported by photographs of the apartment, states that it was not renovated, and defendant does not contradict this assertion.

Moreover, plaintiff contends that defendant's receipts exhibit does not meet the requirements for proof of individual apartment improvements (IAI) pursuant to RSC (9NYCCR) § 2522.4 (a) (1), as none of the bills indicate any more than that they were sent to defendant, and no notations delineate for what apartment(s) or property the labor and materials were provided. Moreover, a review of the bills shows many of them have no possible relevance to plaintiff's apartment (e.g., swimming pool equipment).

Defendant's argument that plaintiff's action is untimely because he failed to act within four years after the prior tenant executed a lease at a rental not being disputed here, is factually and legally incorrect and implausible. Plaintiff recounts that he executed his lease in September 2015 without having been provided the apartment's rental history. He discovered the rent

overcharge and brought this action in 2017, clearly less than four years from any time in which plaintiff had any connection to the property and less than four years from the time the rent was increased from $869.24 per month to $1,600.00 per month.

Discussion

Summary Judgment Standard

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]). Failure to make this prima facie showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). "[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

Summary judgment is a "drastic remedy" that "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than

issue-determination, is the key to the procedure" (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957] [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

There is no dispute that plaintiff's apartment is a rent-stabilized apartment and that any rent increases must be predicated on the statutory vacancy increases in effect when he executed his lease. Here, defendant was entitled to a rent increase from the base rent of the prior tenant, $869.24 per month. The RSC § 2522.8 (a) (1) (2) pertinently states that:

> "(a) The legal regulated rent for any vacancy lease entered into after June 15, 1997, shall be as hereinafter provided in this subdivision. The previous legal regulated rent shall be increased by the following:
>
> (1) if the vacancy lease is for a term of two years, 20 percent of the legal regulated rent; or
>
> (2) if the vacancy lease is for a term of one year, the increase shall be twenty percent of the previous legal regulated rent less an amount equal to the difference between
>
> (i) the two year renewal lease guideline promulgated by the rent guidelines board applied to the previous legal regulated rent; and
>
> (ii) the one year lease renewal guideline promulgated by the rent guidelines board applied to the previous legal regulated rent."

The parties also agree that the defendant was entitled to an additional 4.2% longevity increase, over and above the legal vacancy renewal increase for a one-year lease.

However, the defendant has failed to substantiate the basis for any rental rate increases for alleged IAIs to plaintiff's apartment. The bills submitted do not reference plaintiff's

apartment, and no affidavit was submitted by defendant or any person with knowledge connecting the bills to any actual work or improvements to plaintiff's apartment.

The defendant building owner in a rent overcharge action has the "burden of proving the cost of the renovations made to the apartment to justify the rent it charged plaintiff" (*Bradbury v. 342 W. 30th St. Corp.*, 84 AD3d 681, 683 [1st Dept. 2011]). To meet that burden, the owner must present "documentary support therefor, [including] . . . all relevant invoices, bills, cancelled checks and/or other material" (*Matter of 985 Fifth Ave. v. State Div. of Hous. & Community Renewal*, 171 AD2d 572, 574–575 [1st Dept. 1991], *lv denied* 78 NY2d 861 [1991]; *see DiLorenzo v Windermere Owners LLC*, 174 AD3d 102, 109-110 [1st Dept 2019] quoting DHCR Policy Statement 90–10 [June 26, 1990]:

> ["Any claimed . . . individual apartment improvement cost must be supported by adequate documentation which should include at least one of the following: 1) Cancelled check(s) contemporaneous with the completion of the work; 2) Invoice receipt marked paid in full contemporaneous with the completion of the work; 3) Signed contract agreement; 4) Contractor's affidavit indicating that the installation was completed and paid in full"]).

Altschuler v. Jobman 478/480, LLC., 135 AD3d 439, 440 [1st Dept. 2016], *lv dismissed* 28 NY3d 945 [2016], *lv denied* 29 N.Y.3d 903 [2017] [affidavit "unsupported by bills from a contractor, an agreement or contract for work in the apartment, or records of payments" is inadequate basis for claimed improvements]; *72A Realty Assoc. v. Lucas*, 101 AD3d 401, 402–403 [1st Dept. 2012] [absence of any record evidence in support of landlord's renovation claim, such as bills from contractor or records of payment for renovations]).

It has long been clear that the burden is on the owner to establish by proper documentation that the IAIs were actually performed (*see Matter of 985 Fifth Ave., Inc. v State Div. of Hous. & Community Renewal*, 171 AD2d at 574-575). Defendant's exhibits,

unsupported by affidavit or clear documentation of work allegedly performed, is inadequate to establish that any IAIs were in fact done in plaintiff's apartment (*see Matter of 8 Yorkroad Assoc. v New York State Div. of Hous. & Community Renewal*, 19 AD3d 217, 218 (1st Dept 2005) (disallowance for rent increases for various alleged IAIs proper where "no invoices or proof of payment were submitted for the claimed work"). Here, defendants submit only a completely conclusory affirmation from counsel with no supporting documentation as proof that any improvements were actually made (*DiLorenzo*, 174 AD3d at 113).

Lirakis v 180 Seventh Ave. Assoc., LLC, 12 Misc 3d 1173(A), 2006 NY Slip Op 51211(U), *4 (Civ.Ct., NY County) *affd* 15 Misc 3d 128(A), 2007 NY Slip Op 50551(U) (App Term, 1st Dept 2007) has explained that:

> "A landlord has the burden of proof based on the preponderance of the credible evidence to establish the existence of improvements justifying a 1/40th rent increase under 9 NYCRR 2522.4(a)(1). *See 212 W. 22 Realty, LLC v. Fogarty*, 1 Misc 3d 905A[, 2003 NY Slip Op 51517(U), *6] (NY Civ. Ct. 2003). Specifically, a landlord must: (1) prove that there was a vacancy to a rent stabilized apartment prior to the commencement of the new tenancy; (2) prove that it installed new equipment and/or completed work which constituted improvements and it did not amount to normal maintenance, ordinary repair and decorating; (3) specifically itemize the nature and scope of the new equipment installed and/or the work completed; and (4) confirm the costs by adequate documentation. *See 212 W. 22 Realty, LLC v. Fogarty*, 1 Misc 3d 905A[, 2003 NY Slip Op 51517(U),*6] (NY Civ. Ct. 2003)"

(see also Ecumenical Cmty. Dev. Org., Inc. v. GVS Properties II , LLC, 168 AD3d 522, 523 [1st Dept 2019] [landlords "made a prima facie showing of the claimed improvements by submitting a detailed invoice from the contractor identifying the apartment and itemizing all work done"]; *Matter of Rockaway One Co., LLC v Wiggins*, 35 AD3d 36, 42 [2d Dept 2006]

> ["in evaluating the legitimacy of an IAI increase, the court is required to determine (1) whether the owner made the improvements to the apartment during the relevant time period, (2) whether those improvements constitute legitimate individual apartment improvements within the meaning of the regulations, (3) the total cost of the improvements, (4) one fortieth of that cost, and (5) the sum of one fortieth of the costs plus the monthly rent level after any other increases to which the owner may be entitled]).

However, "to allow a landlord to significantly increase the legal rent on a unit merely by the expedient of modifying the unit's dimensions in a minor manner would encourage subterfuges as a means of improperly manipulating rent stabilization" *Devlin v. New York State Div. of Hous. & Community Renewal,* 309 AD2d 191, 194 (1st Dept, 2003), *lv denied* 2 NY3d 705 [2004]).

Plaintiff noted in his affidavit that the apartment had been painted when he took occupancy and that during his tenancy two of three defective windows were (inadequately) replaced. These events do not provide a basis for the rental increase when plaintiff executed the subject lease. Defendant failed to establish that any work purportedly performed in plaintiff's apartment constituted improvements rather than ordinary repairs required by law (*see Matter of Yorkroad Assoc.,* 19 AD3d at 218 [invoices for plastering, replacing window glass, refinishing a floor and painting had been correctly disallowed because they were not for improvements, but rather for repairs or normal maintenance]; *Matter of Mayfair York Co. v. New York State Div. of Hous. & Community Renewal,* 240 AD2d 158 (1st Dept. 1997); *Matter of Linden v. New York State Div. of Hous. & Community Renewal*, 217 AD2d 407 (1st Dept. 1995). The *Mayfair York* decision distinguished between repairs, such as painting, partial floor replacement, and partial rewiring, and improvements that entitle a landlord to an IAI. Painting and repairs to broken or defective items do not constitute improvements but rather repairs for which a landlord cannot

receive an IAI increase. In addition, here, the window replacements occurred after plaintiff occupied the apartment and were not done and not a part of the contract when the rent increase was made. Hence, plaintiff is entitled to summary judgment considering the absence of a triable factual issue

Both the *Mayfair York* and *Linden* decisions separately upheld imposing treble damages if the landlord took an increase for normal repairs (*see also Ernest & Maryanna Jeremias Family Partnership, LP v. Matas*, 39 Misc 3d 1206[A], 2013 NY Slip Op 50505[U], *4-*5 (Civ. Ct., Kings County 2013).

Here, too, the overcharge was willful, and plaintiff is entitled to treble damages. Defendant has not established that the $1,600 per month rental amount charged to plaintiff resulted from any good faith attempt to comply with Rent Stabilization Laws, compounded both by defendant's failure to have provided plaintiff with the apartment's rental history and a rent stabilization rider as well as by the taking of an extra month's security deposit. Awarding treble damages is appropriate where a landlord fails to establish, by a preponderance of the evidence, that the numerous rent overcharges were not willful (*see Matter of Yorkroad Assoc.*, 19 AD3d at 217-218; *425 3rd Ave. Realty Co. v. New York State Div. of Hous. & Community. Renewal*, 29 AD3d 332, 333[1st Dept. 2006] ["Invoices for painting, plastering and floor polishing, among other things, were correctly disallowed because they were for ordinary maintenance and repair, rather than for improvements [and] . . . tenant's written consent to the claimed improvements was never obtained"]).

Turning to the plaintiff's alternative request to dismiss defendant's affirmative defenses including the defense of plaintiff's purported lack of jurisdiction over defendant, the decision in *Interlink Metals & Chems. v Kazdan*, (222 AD2d 55, 58 [1st Dept 1996]) explained that "[a]

defense based upon lack of personal jurisdiction is deemed waived if the defendant fails to assert it, with specificity, in its answer or in connection with a preanswer motion based upon a ground set forth in CPLR 3211 (a)." "Similarly, CPLR . . . 3211 (e) provides that within sixty days of serving an [a]nswer, that alleges improper service of the pleadings, the Respondent must move to dismiss on that ground or the defense is deemed waived (*Teachers Fed. Credit Union v. Jones*, 23 Misc 3d 1234[A], 2009 NY Slip Op 50967[U] [App Term, 2d Dept 2009])" (*H & H Realty LLC v. Wesley*, 31 Misc 3d 1234[A], 2011 NY Slip Op 50992[U] [Civ. Ct., Kings County 2011], Wade, J.). Here, defendant made no dismissal motion which thus waives the lack of jurisdiction defense, but granting the summary judgment portion of plaintiff's motion moots reaching this alternative relief plaintiff sought as to the lack of jurisdiction defense and all other affirmative defenses.

Conclusion

Plaintiff is entitled to summary judgment on the rent overcharge issue, including treble damages for defendant's willful breach of the rent stabilization laws as authorized by Administrative Code § 26-516 (a) with the amount to be determined upon calculation of the proper rent and any legal increases incurred upon plaintiff's lease renewals of the subject apartment. The parties are directed to submit their calculations as to the damages to be awarded for submission to a referee to hear and report the amount of damages. Accordingly, it is

ORDERED that plaintiff's summary judgment motion, mot. seq. one, is granted; and it is further

ORDERED that a judicial hearing officer or special referee shall be designated to hear and report to this court; and it is further

ORDERED that the calculation of rent overcharges, treble damages and attorneys' fees, if any, is referred to a judicial hearing officer or special referee to hear and report, except that, in

the event of and upon filing a stipulation of the parties, as permitted by CPLR 4317, the judicial hearing officer or special referee, or another person so designated to serve as judicial hearing officer or special referee, shall determine the aforesaid issues; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this order with notice of entry, upon the defendant; and it is further

ORDERED that counsel for both parties shall, within 30 days of service of this order with notice of entry, submit to the court the specific calculations for damages pursuant to this order, including the statutory authority; methodology of such calculations and the dates during which such damages were incurred.

This constitutes the decision and order of the court.

HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE