McDonald v Jbam Trg Spring, LLC
2020 NY Slip Op 32498(U)
July 29, 2020
Supreme Court, New York County
Docket Number: 152553/2016
Judge: Alan C. Marin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DANA MCDONALD,

Plaintiff,

-against-

JBAM TRG SPRING, LLC,

Defendant.

DECISION and ORDER
Index no. 152553/2016
Motion no. 003

The Court has considered efiled documents 132 through 188.

Dana McDonald has brought suit against her current landlord, Jbam Trg Spring, for overcharges on the two apartments she lived in at 55 Spring Street in Manhattan. Motion 003 was brought by the defendant for a declaratory judgment that Ms. McDonald's current apartment was properly deregulated for "high rent/vacancy" and that the overcharge claim on the prior apartment has been resolved.

Ms. McDonald lived in unit 6 from February 1, 2007 through April 1, 2014. Plaintiff had begun a one-year lease from February 1, 2014 to January 31, 2015, when she moved into unit 4 with a lease from April 1, 2014 through March 31, 2015. The defendant had taken title to the building on June 15, 2015.

On April 2 of this year, the Court of Appeals held that in calculating rent overcharges, the base rent for an apartment is the rent actually charged four years prior to the filing of the complaint, even if going further back reveals that the figure was erroneous - - except in the case of fraud (*Matter of Regina Metropolitan Co., LLC v New York State Division of Housing and Community Renewal*, 2020 WL 1557900). Ms. McDonald filed her complaint on March 24, 2016.

Regina's limiting of the lookback period to four years included what are known as *Roberts* overcharge cases. *Roberts v Tishman Speyer Props.*, L.P., 13 NY3d 270, decided in 2009, had made it clear that each apartment in a building benefitting from New York City's J-51 tax abatement program was subject to rent stabilization. From the 1996-1997 New York City fiscal year through June 30, 2007, the 55 Spring Street building received tax abatements under the J-51 program. Following the expiration of the J-51 tax abatement for a building, an individual apartment remains stabilized until the first vacancy (see *Townsend v B-U Realty*, 67 Misc3d 1228 (A), June 10, 2020).

McDonald was in unit 6 prior to the expiration of the J-51 program and would have been rent stabilized as long as she stayed in that apartment. Oral argument in this matter was held on June 17, 2020, and the Court, in light of the *Regina* decision, applied a four-year lookback and held that defendant's check to plaintiff for $45,709.15 covered the overcharges on unit 6,[1] and further, that there was insufficient proof of fraud by defendant with respect to that unit.

* * *

Justice Carmen St. George, by Decision and Order, dated January 23, 2018, ruled that the rent stabilized status of unit 6 did not transfer to unit 4 (58 Misc 3d 1213 [A]). Such does not end the inquiry on whether Ms. McDonald's current apartment is rent stabilized.

Until the enactment of the Housing Stability and Tenant Protection Act of 2019 (HSTPA), so-called "luxury deregulation" had been part of the Rent Stabilization Law since 1993. It permitted a rent-stabilized unit to be deregulated when the monthly rent exceeded a given threshold, which was $2,000 for apartments that become vacant in the 1997-2011 period and (1) the tenant vacated or (2) the tenants' income exceeded a particular amount (the high income alternative is not part of this case).

Rent Stabilized Status of Unit 4

As indicated, at least through June 30, 2007, all apartments in the building should have been rent-stabilized. That unit 4 was apparently improperly de-regulated during the J-51 period does not, in the absence of fraud, expand the lookback date of March 24, 2012 for Ms. McDonald.

For a rent stabilized apartment to be high rent/vacancy deregulated, the last legal stabilized rent plus the 20% vacancy increase must be at least $2,000 monthly (*Altman v 285 West 4th LLC*, 31 NY3d 178). The lease from August 1, 2011 to July 31, 2013, encompassing our lookback date, was already at $2,000 monthly (document 28). Such is unaffected by the preferential rate of $1,950. Moreover, plaintiff does not contest that defendant's alternate calculation using the figure of $903.88 from the 1996 registered rent roll (see footnote 3), and applying the Rent Stabilization Board promulgated increases, would yield a rent above $2,000, resulting in de-regulation upon vacancy.

In any event, unit 4 was vacated on about February 1, 2014, had been market rate for a number of

[1] In a subsequent submission, defendant contended that the $45,709.15, including interest, was excessive because it covered 14 months that should not have been.

Regina did not affect the applicability to pending cases of the following language that was inserted to section 26-516 of the Administrative Code of the Code of the City of New York by section 4 of HSTPA: "After a complaint of rent overcharge has been filed . . . the voluntary adjustment of the rent and/or the voluntary tender of a refund of rent overcharges shall not be considered . . . as evidence that the overcharge was not willful." It was not; the $45,709.15 figure was supported by credible evidence.

years, and the apartment was offered to Dana McDonald on that basis. Plaintiff's first lease in unit 4 was signed February 14, 2014 for a one-year term from April 1, 2014 to March 31, 2015 at a rent of $2,500 a month, with a preferential rent rider of $2,300. On February 19, 2015, Ms. McDonald signed another one-year lease, beginning April 1, 2015 with a monthly rent of $3,500 - - and no preferential reduction.

Fraud

The *Regina* court stated that: "The rule that emerges from our precedent is that, under the prior law, review of rental history outside the four-year lookback period was permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate and, even then, solely to ascertain whether fraud occurred – not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations" [*5].[2]

To demonstrate fraud, plaintiff in its pre-Regina memorandum of law points to what it terms a history of overcharging on both units;[3] Justice St. George's reference to a colorable claim of fraud; and the notice on the top of both leases in large type and capital letters, which read that, "This apartment is not subject to rent regulation."

Whether Ms. McDonald was fraudulently induced to move to apartment 4 from an apartment that would have been rent stabilized as long as she lived there is not at issue. Plaintiff's memorandum of law provides: "Her change of apartments was by mutual consent and agreement between her and the landlord" (document 179, p 13).

Plaintiff argues that "There has been no showing by Defendant of the prior landlord's lack of willfulness, the burden of which falls to the current owner. Rent Stabilization Law §26-516 (a)" (*id*, p 18). Section 26-516 (a) provides only that: "If the owner establishes by a preponderance of the evidence that the overcharge was not willful the state division of housing and community renewal shall establish the penalty as the amount of the overcharge plus interest."

Other than going back to prior rent history, plaintiff does not present any specifics.[4] There is no

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[2] The *Regina* Court continued: "In fraud cases, this Court sanctioned use of the default formula to set the base date rent. Otherwise, for overcharge calculation purposes, the base date rent was the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges were to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period. Tenants were therefore entitled to damages reflecting only the increases collected during that period that exceeded legal limits."

[3] Plaintiff references that the building's 1997 rent roll, registered with DHCR, shows unit 4 renting at its legal regulated rent (LRR) of $903.88, and the following year when vacant, with an LRR of $1,450, and then in 1999, rented with an LRR of $1,750 (citing to document 173).

[4] On this and generally, see *Corcoran v Narrows Bayview Co., LLC*, 1st Dept, May 28, 2020.

basis to impute such to Jbam Trg Spring, LLC. Plaintiff does not challenge the affidavit of defendant's current managing agent, David Cohen: "Based on the records that I received . . . there is no evidence that Defendant knew of any potential claim by Plaintiff relating to the rent regulated status [of either apartment] . . . or overcharge claims" (document 181, ¶ 4).

Regina cited *Matter of Grimm v State of N.Y. Division of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 367, which stated:

> Generally, an increase in the rent alone will not be sufficient to establish a "colorable claim of fraud," and a mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further. What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization. As in *Thornton*, the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date.

In *Thornton v Baron*, 5 NY3d 175, 177, "The owner hit upon a scheme to remove a number of its apartments from rent regulation" by manipulating the statutory exemption for non-primary residences. At least six leases had clauses that the apartment was not to be used as a primary residence, but each tenant, or subtenant, used it as a primary residence and was charged market rate. As for Jbam Trg Spring, there is insufficient evidence of fraud on its part.

This Court finds no comparable case in which a tenant was directed to pay back rent for the difference between the market rate/lease rent and an agreed-upon use and occupancy payment during the pendency of a lawsuit to determine whether an apartment was rent stabilized. (See the June 30, 2016 stipulation, document 147).[5] No such differential back payments shall be required of Dana McDonald.

Counsel Fees

A prevailing tenant has the right to attorneys' fees where the lease grants a comparable right to the landlord (Real Property Law §234; *Graham Court Owner's Corp. v Taylor*, 24 NY3d 742). Plaintiff has not prevailed with respect to unit 4. As for unit 6, defendant submits a case in which the landlord, awarded $62,000 and the tenant $4,800, was, not surprisingly, deemed the prevailing party (*Peachy v Rosenzweig*, 215 AD2d 301, 1st Dept). Our case is obviously more balanced, although the First Department a few years later, in upholding the legal fees awarded the landlord, described it as having prevailed upon the "central litigated issues" (*501 East 87th St. Realty Co., LLC v Ole Pa Enterprises*, 304 AD2d 310, 311).

[5] Paragraph 4 of the stipulation provides that "Payment of use and occupancy is without prejudice to the rights and claim[s] of all parties in the action and shall not be deemed to extend or reinstate plaintiff's tenancy."

With that said, plaintiff's counsel should submit to the Court and defendant's counsel by email on or before September 10, 2020 (not to be uploaded), its ledger showing legal fees and expenses allocable (to the extent feasible) to unit 6. The Court will schedule a hearing thereon.

* * *

NOW therefore, in view of the foregoing,

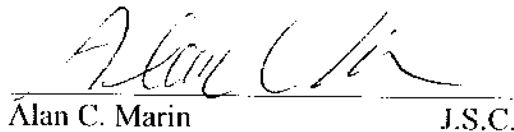
IT IS ORDERED, that defendant's motion no. 003 is granted in that: i) it is declared that the claim for rent overcharges on plaintiff's prior unit 6 have been resolved as set forth above; and ii) it is declared that unit 4 is and was not subject to rent regulation during the tenancy of plaintiff Dana McDonald, except that she shall not be liable for any payment for the period from April of 2016 through August of 2020 above the amount set forth in the parties' June 30, 2016 stipulation; and

IT IS FURTHER ORDERED that plaintiff's cross-motion is denied, except as to the award of attorneys fees in connection with unit 6, which shall be subject to a hearing.

ENTER

ALAN C. MARIN
JUSTICE OF THE SUPREME COURT

July 29, 2020



Alan C. Marin J.S.C.