

Meyers v Four Thirty Realty LLC
2020 NY Slip Op 32552(U)
July 14, 2020
Supreme Court, New York County
Docket Number: 116747/2010
Judge: Francis A. Kahn III
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 14

Justice

MARCIA MEYERS Plaintiff,
INDEX NO. 116747/2010
MOTION DATE N/A, N/A
MOTION SEQ. NO. 007 008

- v -

FOUR THIRTY REALTY LLC, Defendant. DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 156, 157, 158, 159, 162, 173, 180, 181 were read on this motion to/for AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 008) 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 160, 161, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 175, 176, 177, 178, 179, 184 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents the motions are determined as follows:

This action concerns the regulatory status of an apartment located at 430 East 86th Street, Apt. 8E, New York, New York. Plaintiff began leasing the apartment from Defendant owner in 2004 for an ostensibly market rate monthly rent of \$3,700.00. Plaintiff and Defendant entered into numerous successive leases with rent increases which raised the monthly rental to \$4,425.65 as of 2017.

Plaintiff commenced this action seeking declaratory relief determining the regulatory status of the apartment, the amount of its rent as well as injunctive relief and an award of monetary damages based upon an alleged rent overcharge. Plaintiff asserts Defendant "improperly and fraudulently" removed the apartment from rent stabilization by claiming application of the "luxury deregulation" provisions of the Rent Regulation Reform Act of 1993 (see RSL §§26-504.1, 26-504.2) while receiving tax benefits under New York City's J-51 program (see Roberts v Tishman Speyer Props., L.P., 13 NY3d 270 [2009]). The within matter has been actively litigated for nearly a decade. In that time there have been, including the present applications, five summary judgment motions and two appeals.

Presently before the court is Plaintiff's motion to amend her complaint based upon the enactment of the Housing Stability and Tenant Protection Act ("HSTPA"), to strike the note of issue and to compel further disclosure. Defendant moves, for the fourth time, for summary judgment declaring the amount of the regulated rent on the "base date" of the apartment as

\$3,700.00, that all increases are based upon that amount and for dismissal of the claims for treble damages and attorney's fees.

The branch of Plaintiff's motion "to amend paragraphs 43, 44 and 45 of her complaint to reflect the HSTPA's extension of the statute of limitations for rent overcharge from four (4) years to six (6) years" is denied. While this motion was *sub judice* the Court of Appeals issued its decision in *Regina Metropolitan Co. LLC, v New York State Division of Housing and Community Renewal*, __NY3d__, 2020 NY Slip Op 02127 [2020] wherein it held that "overcharge calculation amendments [in HSTPA] cannot be applied retroactively to overcharges that occurred prior to their enactment". As such, the proposed amendment is clearly devoid of merit and cannot be permitted (*see generally Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011]). Moreover, the branches of the motion to strike the note of issue and to compel further disclosure based upon these amendments are denied based upon the foregoing determination.

Turning the Defendant's motion for summary judgment, the Appellate Division, First Department has determined, on two occasions, that Plaintiff is entitled to a rent-stabilized lease based upon an express concession by Defendant herein (*see Meyers v Four Thirty Realty, LLC*, 173 AD3d 543 [2018]; *Meyers v Four Thirty Realty*, 127 AD3d 501 [1st Dept 2015]). Left open by those decisions were determination of the proper base date rent since it required finding whether the reliability of the rent on the base date was tainted by a fraudulent scheme by Defendant to deregulate the apartment. Also undetermined is "whether plaintiff's overcharge claims are barred by the statute of limitations and whether any such overcharge was willful entitling plaintiff to treble damages" (*see Meyers v Four Thirty Realty*, 127 AD3d 501 [1st Dept 2015]).

In the Court Appeals decision in *Regina*, supra, the court took the opportunity to "clarify that, under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in *Roberts* overcharge cases, absent fraud" (*Regina*, supra). Therefore, for Defendant to be entitled to the summary declaration as to the base date rent it seeks, Defendant must prove, in the first instance, it did not engage in a fraudulent scheme to deregulate the apartment.

Movant met its burden with the submission of an affidavit of David Ayala ("Ayala"), the Division of Housing and Community Renewal ("DHCR") documentation and the circumstances of this case. Ayala's affidavit and the decision of DHCR dated February 3, 1995 demonstrates that deregulation of the apartment was not fraudulent or willful as it was obtained with DHCR's guidance and assent (*see Raden v W 7879, LLC*, 164 AD3d 440 [1st Dept 2018]). The Court of Appeals observed about *Raden* in *Regina* that since deregulation occurred "in 1995 — prior to the formal guidance DHCR issued the following year that such deregulation was proper — does not constitute evidence of a fraudulent scheme to deregulate. Rather, during a time of uncertainty concerning the scope of the J-51 benefit scheme, the owners correctly anticipated the interpretation DHCR would ultimately adopt concerning the luxury deregulation provisions." (*Regina*, supra, fn. 8). Indeed, the *Regina* court further noted that "the fraud exception to the lookback rule is generally inapplicable to *Roberts* overcharge claims" (*id*).

In opposition, Plaintiff failed to raise an issue of fact that the apartment was deregulated via fraud. To the extent that the Appellate Division, First Department noted in its 2015 decision that discovery of whether the apartment was moved out of rent control because of improvements was explained with the submission of the DHCR Form RA-42V-NYC which establishes the apartment was vacancy decontrolled and became rent stabilized in 1992.

Plaintiff's reliance on the applicability of HSTPA and its provisions for opposition is, as noted above, incorrect. Further, the argument that issues of fact exist concerning the amount of the base date rent are misplaced. In *Regina* the court rejected the reconstruction method which had been adopted by other courts (*see eg 72A Realty Assoc. v Lucas*, 101 AD3d 401, 402 [1st Dept 2012]), as violative of the statutory scheme and also noted that the alternative calculation methods contained in the pre-HSTPA law (*see eg RSC §§2522.1[a][3][ii]*, 2522.6) were "inapplicable by their terms in an overcharge case, such as a *Roberts* case, where the base date rent is the result of a mere mistaken overcharge (not fraud) and the rent charged on the base date is known" (*Regina*, supra, fn. 11).

Here, the base date rent is known and documented by the DHCR rental history which provides that in 2006, four years prior to the commencement of this action, the rent for the subject apartment was \$3,700.00. Adoption of this market base date rent is expressly authorized by *Regina* since "no exception [to the standard lookback provision] is justified by the fact that the inflated base date rent in *Roberts* cases resulted from improper deregulation" (*Regina*, supra).

As to the actual amount of any overcharge, although Defendant proffered a calculation of its assertion of rents due under pre-HSTPA law and those paid, the summary stopped at 2010. Further, the DHCR summary is three years out of date and there is no admissible proof annexed to these moving papers of rent actually paid from 2006 to date. Thus, movant has failed to establish, as a matter of law, the amount of the overcharge, if any.

The branch of the motion to dismiss the claims for treble damages is granted based upon the determination, supra, that that any overcharge was not the product of fraudulent or willful acts by Defendant (*see Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 398 [2014]).

The branch of the motion to dismiss the claim for attorney's fees is denied as an award of same in a rent overcharge case is discretionary where an overcharge is found (*see RSC §2526.1[d]*). Defendant admits in its moving papers to overcharging the Plaintiff by \$1,679.64. However, as the actual amount of the overcharge is not established, the court will reserve its exercise of discretion on this issue until after the overcharge calculation is made.

Accordingly, Plaintiff's motion to amend her complaint is denied. Defendant's motion for summary judgment is granted only to the extent that it is

ADJUDGED and DECLARED that Apartment 8E of 430 East 86th Street, New York, New York is subject to rent stabilization and Plaintiff is entitled to a rent stabilized lease, and it is

ADJUDGED and DECLARED that the legal regulated rent for Apartment 8E is \$3,700.00 for the base date of December 30, 2006 and that subsequent increases are based upon the percentages promulgated by the City of New York Rent Guidelines Board, and it is

ORDERED that the calculation of any rent overcharge and award of attorney's fees shall be determined at trial.

7/14/2020
DATE

Francis A. Kahn III
FRANCIS A. KAHN III
HON. FRANCIS A. KAHN III
J.S.C.

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