Similis Mgt., LLC v Dzganiya
2020 NY Slip Op 34484(U)
April 14, 2020
Civil Court of the City of New York, New York County
Docket Number: 70345/16
Judge: Kimon C. Thermos

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART D

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SIMILIS MANAGEMENT LLC, **INDEX #: 70345/16**

Petitioner, **DECISION / ORDER**
MOTION SEQS. 4 & 5

-against-

HON. KIMON C. THERMOS

NINO DZGANIYA,

Respondent.

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Recitation, as required by CPLR §2219(a), of the papers considered in review of the instant motions.

Papers	**Numbered**
Notice of Motion, Affirmation, Affidavit, Memo of Law and Annexed (Ex. A-HH)	1
Notice of Cross-Motion, Affirmation, Affidavit, Memo of Law and Annexed (Ex. A-B)	2
Affirmation in Opposition and Reply, Memo of Law and Annexed (Ex. A-H)	3
Affirmation in Further Support of Cross-Motion, Memo of Law and Annexed (Ex. C-H)	4
Affirmation in Sur-Reply and Annexed (Ex. A)	5

Appearing for Petitioner: Kucker & Bruh, LLP, By: Robert H. Berman, Esq.
Appearing for Respondent: Mobilization for Justice, Inc., By: Tiffany M. Femiano, Esq.

Upon the foregoing cited papers and after oral argument, the Decision/Order on this motion and cross-motion is as follows:

In this nonpayment proceeding, Respondent moves for an Order, pursuant to CPLR §3212, granting summary judgment, in her favor, on her illegal rent and rent overcharge counterclaim; and Petitioner cross moves for summary judgment, pursuant to CPLR §3212, in its favor, as well as a final judgment of possession, a warrant of eviction and an award of legal fees.

In her motion, Respondent claims, *inter alia*, that Petitioner fraudulently overcharged her in violation of the Rent Stabilization Law ("RSL"); as such, she does not owe the amount alleged in the petition. More specifically, Respondent argues that Petitioner falsely represented the legal regulated rent ("LLR") for the subject premises to the New York State Division of Homes and Community Renewal ("DHCR"), first when a prior long-term rent stabilized tenant, N. Ortiz, vacated in 2011 and again in 2014 upon the vacatur of N. Rodriguez, the rent stabilized tenant directly preceding Respondent's tenancy. Respondent first entered into possession in May 2014 at $1,625.00 monthly. Prior to her tenancy, N. Rodriguez was charged $1,500.00 monthly and, prior to that, N. Ortiz was charged $863.49 monthly. Respondent challenges N. Rodriquez's LLR of $1,500.00 and her LLR of $1,625.00 by, *inter alia*, contesting Petitioner's contention that it completed Individual Apartment Improvements ("IAIs") in the subject apartment in or about July 2011 totaling at least $8,121.92 which substantiate the reported LLRs, particularly since she claims that the apartment was in "very poor condition" when she took possession. In doing so, Respondent disputes the statements made by Chaim Englander, one of Petitioner's principals and the managing agent of the subject premises, during his deposition taken by Respondent on August 29,

2018 pursuant to Court Order dated October 3, 2017 as well as repair receipts received from Petitioner through court-ordered discovery pursuant to said Order.

In her motion papers, to which she annexed both Mr. Englander's deposition transcript and Petitioner's repair receipts, Respondent asserts that

> "Petitioner has filed improper registrations that reflect exaggerated claims of IAIs. Additionally, Petitioner has falsified registrations, and consistently made outright misrepresentations by [sic] to Respondent and to the DHCR, including that the Subject Premises' LRR is $1,625.00 per month."

(pg. 13 of the Memo of Law annexed to Respondent's motion).

> "Petitioner has brazenly alleged fraudulent non-existent IAIs and has failed to file proper and timely registrations with DHCR for the apartment... Preceding Respondent's tenancy, Petitioner used IAIs as a way to justify exorbitant increases in the subject premises' LRR. Although Petitioner claims to have completed the IAIs in the subject premises, Petitioner never registered these alleged IAIs with DHCR. Significantly, much of the IAIs that Petitioner claims to have completed in the subject apartment in 2011 constitute mere repairs, which Petitioner cannot count toward increasing the subject premises' LRR. Further the purported invoices and receipts do not unequivocally indicate that all of the money allegedly spent was actually spent on IAIs that were performed in the subject premises."

(pg. 3 of the Memo of Law annexed to Respondent's motion).

Respondent further argues that, in its Order dated October 3, 2017, the Court (J. Stanley), in granting Respondent's motion seeking leave to conduct discovery, found that Petitioner engaged in a fraudulent scheme to increase the LLR, which is now the law of the case.

In disputing Respondent's contentions, Petitioner argues, *inter alia*, that, pursuant to the then-applicable Rent Guidelines, it was permitted to increase Respondent's LRR to $1,743.75 for the rent stabilized apartment. However, it charged Respondent $1,625.00 monthly instead. Petitioner further argues that, after the 32-year tenancy of the prior tenant, N. Ortiz, it completed substantial improvements in the subject apartment in 2011, which totaled at least $8,121.92 as demonstrated by the receipts and invoices that it produced to Respondent during the course of discovery. Petitioner alleges that the substantial improvements cost more than $8,121.92 as testified by Chaim Englander, which could have been included, but Petitioner felt it was not necessary to justify the additional amount, although proof of same could be provided if sought, because the $8,121.92 in substantial improvements justify the LRR charged to Respondent. Moreover, Petitioner avers that there was no fraudulent scheme to deregulate the subject premises, since the LRR is well below the high rent threshold and the subject apartment remains undisputedly rent stabilized.

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of a triable issue of fact or if there is even arguably such an issue. *Hourigan v. McGarry, 106 A.D.2d 845, appeal dismissed 65 N.Y.2d 637 (1985); Andre v. Pomeroy, 35 N.Y.2d 361 (1974)*. The function of the court is to determine whether any issues of fact exist that preclude summary

resolution of the dispute between the parties on the merits. *Consolidated Edison Co. v Zebler, 40 Misc.3d 1230A (Sup. Ct. NY 2013); Menzel v Plotnick, 202 A.D.2d 558 (2nd Dept. 1994)*. The Court must accept, as true, the non-moving party's recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Warney v Haddad, 237 A.D.2d 123 (1st Dept. 1997); Assaf v Ropog Cab Corp., 153 A.D.2d 520 (1st Dept. 1989)*. The movant must submit admissible evidence to demonstrate prima facie entitlement to summary judgment as a matter of law and the absence of any issues of fact that require a trial. *Zuckerman v City of New York, 49 N.Y.2d 557 (1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986)*. The movant's failure to make such a showing mandates denial of summary judgment, regardless of the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr., supra; Alvarez v Prospect Hosp., supra*. Once a prima facie showing has been made, the burden shifts to the non-moving party to submit admissible evidence sufficient to raise a triable issue of fact. *Giuffrida v. Citibank Corp., 100 N.Y.2d 72 (2003); Zuckerman v. City of New York, supra.*

Despite Respondent's contention, the new amendments to the Rent Stabilization Code enacted as the Housing Stability and Tenant Protection Act of 2019 ("HSTPA") do not apply in this matter, since the overcharges alleged by Respondent purportedly occurred before the passage of HSTPA. See, the recent Court of Appeals' decision in *Matter of Regina Metro. Co. v DHCR, 2020 NY Lexis 779 (2020)*, in which the Court, in determining cases sent to it before the enactment of HSTPA where the central issue involved how to calculate the legal regulated rent to determine whether a recoverable overcharge occurred, held that the overcharge calculation and treble damages provisions in Part F of the HSTPA may not be applied retroactively and, therefore, the issues in the cases must be resolved pursuant to the law in effect when the alleged overcharges occurred.

Under the prior law, which is controlling herein pursuant to *Matter of Regina, supra.*, the statute of limitations on rent overcharge claims is four years from the date that the claim is asserted [*CPLR §213-a.*], precluding examination of an apartment's rental history more than four years prior to the filing date of the overcharge complaint, which is called the base date. *Matter of Grimm v State of NY Div of Hous. & Community Renewal Off. of Rent Admin., 15 N.Y.3d 358 (2010). See also, RSC §2526.1(a)(2).* An exception to this rule is specified in *RSC §2526.1(a)(2)(iv),* which states that "...the rental history of the housing accommodation pre-dating the base date may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the housing accommodation...rendered unreliable the rent on the base date." The Court of Appeals has held that "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." *Matter of Grimm, 15 N.Y.3d at 367.*

In this matter, the Court finds that triable issues of fact remain as to whether Petitioner engaged in a fraudulent scheme in order to ultimately deregulate the subject apartment by, *inter alia*, charging increases for IAIs that did not qualify as such, thereby overcharging Respondent. These remaining material issues preclude the grant of summary judgment to both parties.

Contrary to Respondent's contention, the Court, in its Order dated October 3, 2017 merely found that there was sufficient indicia of fraud to warrant leave to conduct discovery beyond the four-year period under CPLR 213-a. The Court did not make a final determination as to whether Petitioner acted fraudulently. As that issue was not clarified during the discovery process, such determination must be made by the trier of fact.

Accordingly, Respondent's motion and Petitioner's cross-motion are denied, in their entirety.

The parties are directed to appear on June 30, 2020, at 9:30 a.m., in Part D, Room 524, for settlement or trial, or as may be rescheduled by the Clerk of the Court given the current state of emergency, notices of which will be mailed to all parties.

This constitutes the Decision and Order of the Court.

Dated: April 14, 2020
New York, New York

KCT

Kimon C. Thermos, J.H.C.