

Nuur v 223 Ave. B, LLC
2021 NY Slip Op 32141(U)
October 19, 2021
Supreme Court, New York County
Docket Number: 157017/2016
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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DEGANIT NUUR

Plaintiff,

- v -

223 AVENUE B, LLC,

Defendant.

INDEX NO. 157017/2016

MOTION DATE 07/19/2021

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

-----X
HON. SHAWN KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 145, 146, 147 were read on this motion to/for LEAVE TO FILE

Upon the foregoing documents, it is

Defendant 223 Avenue B, LLC moves for leave to file a motion for Summary Judgment pursuant to CPLR § 3212 based upon a change in the law; and for an Order granting leave for the issuance of an Order allowing the Defendant to make a motion for a rent deposit pursuant to RPAPL §745(2) for all arrears due and owing through March 2021, and payment of rent *pendente lite*; and for such other, further and different relief the Court deems just and proper.

Plaintiff opposes the motion and cross moves to restore this action to the trial calendar and for such other and further relief as this Court may deem just and proper.

Defendant contends that the Court of Appeals' decision in *Matter of Regina Metro Co. LLC v. NY State Div. of Hous. & Community Renewal*, 35 NY3d 332 (2020) (hereinafter "Regina") created a change in the law, which supports Defendant's request for leave to file a summary judgment motion. Defendant argues that Regina held that a prior claim for rent

overcharge is limited to a four-year lookback period, unless a claim of fraud is substantiated. In
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opposition, Plaintiff contends that not only is the present motion untimely, but that there are substantiated claims for fraud.

Background

Plaintiff is the current tenant of 223 Avenue B, Apt. # 5, New York, NY, 10009 (hereinafter the “subject apartment”) and seeks a judgment declaring that her apartment is rent stabilized and an injunction directing the Defendant to issue to her a proper rent stabilized lease for the subject premises. Plaintiff also alleges that she has been charged rent by the Defendant in amounts prohibited by the Rent Stabilization Law (“RSL”). She seeks money judgments in the amount of such overcharges, plus treble damages and attorney’s fees as provided by the RSL.

On or about June 1, 2012, Plaintiff commenced occupancy in the subject apartment pursuant to a one-year lease effective June 1, 2012 through May 31, 2013, with a monthly rent of \$2,150.00. Plaintiff contends that according to the records of New York State Division of Housing and Community Renewal (“DHCR”), the subject apartment was rented to Pedro Pagan until July 31, 2005 at a monthly rent of \$325.56, as it was subject to the RSL. Plaintiff contends that discovery has revealed incomplete rent histories, with two on file with DHCR. In response, Defendant argues that the apartment is correctly registered under the designation of “Apt.5” from 1984-2001 and 2004, and designated as “Apt.05” from 2002- 2003, and 2005-2009. Further, Defendant states that the subject apartment was registered from 1984 until it was deregulated on May 1, 2007.

Timeliness

Defendant maintains that On April 2, 2020, after the Note of Issue was filed on April 27, 2018 and the time to make a CPLR §3212 Summary Judgment motion expired, the Court of Appeals issued its decision in *Regina*, which precipitated present motion. Defendant further

contends that the COVID-19 pandemic made it impossible for it to file the present, which was filed on March 31, 2021, any earlier.

Due to the COVID-19 pandemic and Pursuant to Executive Law Section 29-a, on March 20, 2020 Governor Andrew Cuomo issued Executive Order 202.8, tolling New York's statute of limitations and other procedural deadlines until April 19, 2020. Subsequent Executive Orders further extended the initial toll of motion filing that Governor Cuomo signed at the beginning of the COVID-19 pandemic to November 3, 2020 (*see* Executive Orders 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, and 202.67).

Leave to file a summary judgment motion can be granted only upon a showing of good cause “for the delay in making the motion” (*Brill v City of New York*, 2 NY3d 648, 652, 781 NYS2d 261 [2004]). Under the standard announced in *Brill*, leave to file a late motion for summary judgment under CPLR §3212(a) requires a showing of a satisfactory explanation for the delay in filing the motion. In the absence of such a showing, a late summary judgment motion may not be considered, even if it appears to have merit and the delay has not prejudiced the adversary (*see Brill*, 2NY3d at 652; *Dettmann v Page*, 18 AD3d 422, 794 NYS2d 406, 406 [2005]).

Defendant filed the present motion on March 31, 2021, eleven months after *Regina* was decided. Accounting for the tolling of filings due to the COVID-19 pandemic, Defendant had several months in which to make the present motion and does not provide any reason for this additional delay. Defendant has not demonstrated good cause for the delay.

Use and Occupancy

Defendants move for leave to make a motion for a rent deposit pursuant to RPAPL §745(2) for all arrears due and owing through March 2021 and for payment of rent *pendente lite*.

Defendants submit the affidavit of James Guarino, managing member of Defendant 223 Avenue B, LLC., along with a rental history in support of their demand for an award of past due and prospective rent and/or use and occupancy *pendente lite*. Defendants argue that they are entitled to these payments if only to maintain the status quo until rendition of a judgment in the matter. They contend that plaintiff should not be able to reap the benefits of occupancy while avoiding the payment for use of the premises.

The last signed lease between the parties, commenced on June 1, 2015 and ended on May 31, 2017, at a monthly rent of \$2,500.00. (NYSCEF Doc. No. 136). The Plaintiff continues as month-to-month tenant as she has paid \$2,500.00 a month after her lease expired. Defendant contends that Plaintiff has not paid rent or use and occupancy for April, May, June and July of 2020 and again for January, February and March 2021, and asks the court to order payment of rent *pendente lite*.

“A court has broad discretion in awarding use and occupancy *pendente lite*” (43rd St. Deli, Inc. v Paramount Leasehold, L.P., 107 AD3d 501, 501 [1st Dept 2013]; see Kingsley v 300 W. 106th St. Corp., 162 AD3d 420, 421 [1st Dept 2018]; Alphonse Hotel Corp. v 76 Corp., 273 AD2d 124, 124 [1st Dept 2000]). Rent paid under the prior lease can be useful in setting use and occupancy (see Kuo Po Trading Co. v Tsung Tsin Assn., 273 AD2d 111, 112 [1st Dept 2000]; Ampim v 160 East 48th Street Owner II LLC, No. 154979/2017, 2021 WL 3513915 [2021]). Though the issue of setting the amount of use and occupancy may be referred to a Special Referee, the court finds that it would be an unnecessary delay and hardship to send the issue to a Special Referee when the litigation has been pending since 2016 and the Note of Issue has been filed since 2018.

Use and occupancy *pendente lite* shall be set at \$2,500, without prejudice to the rights of either party with respect to the ultimate determination of any of the issues in this action (*see Levinson v 390 W. End Assoc., LLC*, 22 AD3d 397, 402 [1st Dept 2005]).

The Court notes that this dispute has been pending since 2016 and Plaintiff had paid rent for four years, until stopping in April 2020 for a few months and then paying rent again until stopping again in January 2021. It would be unfair for Plaintiff to remain in possession of the Apartment without paying for its use (*id.* at 403; *see also 255 Butler Assoc, LLC v 255 Butler, LLC*, 173 AD3d 651, 653-654 [2d Dept 2019]). While Plaintiff argues that Defendant's liability for overcharges may exceed the amount Plaintiff owes for this period, there is no proof that Defendant may ultimately be unable to satisfy a final judgment against it in this action (*Levinson v 390 W. End Assoc., L.L.C.*, 22 AD3d at 403). If the Plaintiff is successful in demonstrating a fraudulent scheme to deregulate and is awarded overcharges, she may be provided with a refund or a rent credit if the overcharges exceed the amount of use and occupancy she pays *pendente lite* (*255 Butler Assoc, LLC v 255 Butler, LLC*, 173 AD3d at 654; *43rd St. Deli, Inc. v Paramount Leasehold, L.P.*, 107 AD3d at 501).

Cross Motion

Plaintiff cross moves to restore this matter to the trial calendar. However, as the matter has not been removed from the trial calendar, the cross motion is denied as moot.

Accordingly, it is hereby

ORDERED that Defendant's motion for leave to file for summary judgment is denied; and it is further

ORDERED that Defendant's motion for use and occupancy is granted solely to the extent that Plaintiff shall make payment for use and occupancy, including any prior months of missed rent, in the amount of \$2,500; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

10/19/2021
DATE


SHAWN KELLY, J.S.C.

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