

Carey v 514 4th Ave Realty Corp.
2021 NY Slip Op 32872(U)
December 23, 2021
Supreme Court, Kings County
Docket Number: Index No. 503821/2021
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of December 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
BRIDGET CAREY,

Index No. 503821/2021

Plaintiff,

DECISION AND ORDER

-against-

Motions Sequence #1

514 4TH AVE REALTY CORP.

Defendant.
-----X

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	5-12,
Opposing Affidavits (Affirmations).....	14,
Affirmation or Affidavit in Reply	15,
Memorandum of Law.....	16

After a review of the papers and oral argument the Court finds as follows:

Plaintiff Bridget Carey (hereinafter the “Plaintiff”) commenced this action in relation to various causes of action including rent overcharge, treble damages related to the failure to provide a lease rider, excess security deposit, injunctive relief and attorney’s fees. The Plaintiff alleges in her Verified Complaint that the Defendant, 514 4th Avenue Realty Corp. (hereinafter the “Defendant”), unlawfully overcharged her for rent as part of a lease agreement between the parties, and also failed to provide a required lease rider that explained the legal regulated rent for the subject apartment located at 2021 78th Street, Apartment 4, Brooklyn, New York (the “Premises”).

The Plaintiff now moves (motions sequence #1) for an order striking defendant's Answer, dismissing defendant's Counterclaims, and granting summary judgment to the Plaintiff for the relief demanded in the Complaint. The Plaintiff contends that the lease agreement that she was provided with by the Defendant failed to include a lease rider as required by § 26-511(d) of the New York City Rent Stabilization Law. The Plaintiff also contends that the amount charged in the lease agreement was not explained and that DHCR records indicate that the Plaintiff was overcharged. The Plaintiff relies primarily on her own affidavit, DHCR records, and the lease at issue. The Defendant opposes the motion and argues that it should be denied. The Defendant contends that the motion is premature and that the amount charged does not constitute an overcharge.

As an initial matter, it should be noted that “the plaintiff's motion was not premature since the defendant[s] failed to demonstrate that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff.” *Turner v. Butler*, 139 AD3d 715, 716, 32 N.Y.S.3d 174, 175 [2d Dept 2016]. In the instant proceeding, the Defendant is the owner of the Premises and as a result essentially the custodian of that information which is at issue in the instant matter. Any information relating to payments made, leases agreed to and documentation provided to regulatory agencies should be in the Defendant's possession. The Defendant does not dispute this. As a result, the instant matter is not premature as generally understood by CPLR 3212(f).

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it “should only be employed when there is no doubt as to the absence of triable issues of material fact.” *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary

judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party.” *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

First Cause of Action-Rent Overcharge

Turning to the merits of the Plaintiff’s application in relation to her first cause of action, the Court finds that she has met her *prima facie* burden regarding her claim for rent overcharge. It is well settled that a tenant may raise a claim of rent over charge in court. See *Matneja v. Zito*, 163

A.D.3d 802, 803, 82 N.Y.S.3d 433 [2d Dept 2018]. The Plaintiff argues that she was overcharged rent and that this is supported by the lease agreement she signed and the rent registration with the New York State Division of Housing and Community Renewal (hereinafter "DHCR"). In her affidavit the Plaintiff states that "I entered possession of the subject premises - 204 13th street, Apt. C-4, Brooklyn, NY 11215 - pursuant to a written lease agreement dated June 22, 2019 for the one-year term beginning July 1, 2019 and ending June 30, 2020 at a monthly rent in the sum of \$1,650.00." The Plaintiff thereafter states that "Defendant (sometimes hereinafter referred to as "landlord") did not attach the required Lease Rider for Rent Stabilized Tenants as required by § 26-511(d) of the New York City Rent Stabilization Law." The Plaintiff also states that "[t]he DHCR records indicate that the legal regulated rent for the subject premises prior to the commencement of my lease was \$925.56 monthly." (See Plaintiff's Motion, Plaintiff's Affidavit, Paragraphs 5-7). These statements are supported by a review of the DHCR records annexed by the Plaintiff that show that the last registered tenant prior to her tenancy was registered at a monthly rent of \$925.56 through at least March 31, 2017. (See Plaintiff's Motion, DHCR Rent History, Exhibit 3). A review of the Rent Guidelines Board Order No. 50 for leases starting between October 1, 2018 and September 30, 2019, provides that no vacancy increases are generally permitted and a 1.5% increase is allowed for one year leases. Accordingly, based upon this evidence, the legal regulated rent for the apartment would have been \$939.44.

In opposition, the Defendant has failed to raise a material issue of fact in relation to the Plaintiff's first cause of action for rent overcharge. In opposition to the Plaintiff's motion, the Defendant relies solely on the affidavit of Hemiar Hidias, the manager of the Premises, and the annexed Answer. In his affidavit Hemiar Hidias states that "[a]s indicated by that answer, I have good meritorious defenses to this action which the Plaintiff disagrees with, however her mere

assertions are legally insufficient to sustain summary judgment even this motion were made properly in a period pursuant to the rules of this court.” (See Affirmation in Opposition, Affidavit of Hemiar Hidas, Paragraph 5). The affidavit provides almost no details in response to the Plaintiff’s claims, including Plaintiff’s allegations as they relate to Defendant having failed to provide the Plaintiff with the necessary lease rider as required by § 26-511(d) of the New York City Rent Stabilization Law. As part of the annexed Answer, the Defendant provides that “[t]he tenancy immediately prior to the Plaintiff Bridget Carey was that of Nada Ahmed.” The Answer also states that “[t]he lease dated July 11, 2018 was for the lawful rent of \$1,503.84 per month.” The Answer also provides that “[t]enant-Plaintiff entered into the lease for the Apartment C4 on June 22, 2019. The rental increase from that of Nada Ahmed was within Rent Stabilization guidelines for 2019.” However, there is no amended DHCR registration provided by the Defendant, and the Answer provides no explanation of how the Defendant calculated the rent amount. The Defendant argues that the rent charged to the Plaintiff of \$1,650.00 was based upon a purported prior lease reflecting a monthly rent of \$1,503.84. As indicated, the prior monthly rent was subject to a 1.5% increase as provided by Order No. 50. The Defendant provides no explanation why the prior rent purportedly offered to Nada Ahmed was \$1,503.84 when the last registered rent with DHCR prior to the Plaintiff’s tenancy appears to have been listed as \$925.56 per month. Even assuming that the \$1,503.84 monthly rent relating to Nada Ahmed was the proper legal rent, the Plaintiff should have been provided a one year lease for no more than \$1,526.40, not \$1,650.00. Accordingly, the Defendant has failed to raise a material issue of fact on the Plaintiff’s first cause of action for a rent overcharge. To the extent that the Court determines that there is rent due even after an overcharge claim has been found, the amount due will be determined at trial. *See Guzzo v. 250 East Houston Street Associates, L.P.*, No. 155684/2019, 2020 WL

5946133, [Supreme Court, N.Y County, 2020]. As a result, damages relating to this claim will be determined at trial.

Second Cause of Action-Treble Damages

The Court finds that there is an issue of fact regarding the Plaintiff's application for summary judgment in relation to her second cause of action seeking treble damages. The Plaintiff argues that the Defendant's actions were willful and as a result the Plaintiff is entitled to treble damages. *See Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 364, 154 N.E.3d 972, 987, *reargument denied sub nom. Raden v. W7879, LLC*, 35 N.Y.3d 1079, 154 N.E.3d 12 [2020], *and reargument denied sub nom. Taylor v. 72A Realty Assocs., L.P.*, 35 N.Y.3d 1081, 154 N.E.3d 14 [2020]. As stated above, the Court has found that the Defendant has apparently failed to properly register the Premises with the DHCR for the years 2018, 2019 and 2020. What is more, the Defendant has not shown that this registration was corrected or amended with the DHCR and merely provides that a previous tenant rented the apartment at what the Defendant contends was a legal rent. While this creates a presumption of willfulness which could ultimately entitle the Plaintiff to treble damages "[t]he application of this presumption is limited, however, by the statutory directive that "[i]n no event shall [a] treble damage penalty be assessed against an owner based solely upon the owner's failure to file any timely or proper rent registration statement." RSC § 2526.1(a) (1)." *Ryan v. Salva Realty Corp.*, No. 603015/08, 2011 WL 2838405 [Supreme Court, NY County 2011]. What is more, Courts have held that "[w]hether landlord willfully collected an overcharge is a triable issue not susceptible to summary judgment." *11 Jones St. Assocs. v. Orbach*, 168 Misc. 2d 511, 512-13, 646 N.Y.S.2d 916 [1st Dept, App. Term 1996]. Accordingly, the Court finds that there is a material issue of fact

regarding whether the Defendant acted with willfulness in order to be assessed treble damages.

This issue will be addressed at trial.

Third Cause of Action- Excess Security Deposit

Turning to the merits of the Plaintiff's application in relation to her third cause of action, the Court finds that she has met her *prima facie* burden regarding her claim for excess security deposit. The Rent Stabilization Code §2525.4 provides in pertinent part that no landlord shall receive or retain a security deposit "which exceeds the rent for one month; provided, however, that where a greater security deposit was paid by the tenant in continuous occupancy since the date the housing accommodation became subject to the RSL, such deposit may continue in effect during the term of such lease and any renewals thereof with the same tenant." As such, the Plaintiff argues that she paid the Defendant a security deposit in the sum of \$1,650.00 and that this amount is in excess of what was allowed under the rent guidelines. Her reasoning being that the deposit was in relation to the monthly rent amount and the rent was subject to an overcharge claim. In support of her position, the Plaintiff relies on her own affidavit, the Lease, and the DHCR rent history. In her affidavit the Plaintiff states that she is owed an "excess security deposit paid in the sum of \$710.56 (\$1,650.00 minus \$939.44)." This evidence, taken together, is sufficient for the Plaintiff to meet her *prima facie* burden regarding this claim.

In opposition, the Defendant fails to raise a material issue of fact regarding Plaintiff's claim. A review of the affidavit of Hemiar Hidas or of the Defendant's Answer provides no response to the claim that the Defendant sought excess security deposit other than the general response that the rent sought was legal and did not constitute an overcharge. Damages relating to this claim will be determined at trial.

Fourth Cause of Action- Injunctive Relief

The Court finds that the Plaintiff has failed to meet her *prima facie* burden regarding her fourth cause of action for injunctive relief. Plaintiff seeks injunctive relief in the form of an order directing the Defendant to properly register the Premises with DHCR and to provide the Plaintiff with a renewal lease as required by law. “The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.” *Inc. Vill. of Lindenhurst v. One World Recycling, LLC*, 186 A.D.3d 1498, 1500, 131 N.Y.S.3d 365, 368 [2d Dept 2020]. In the instant matter, the Plaintiff has failed to show a danger of irreparable injury in the absence of an injunction directing the Defendant to properly register the Premises with DHCR and provide the Plaintiff with a renewal lease as required by law at this time. The Plaintiff may seek to address this relief at the time of trial.

Fifth Cause of Action- Attorney’s Fees

The Court finds that the Plaintiff has met her *prima facie* burden regarding the Plaintiff’s fifth cause of action for attorney’s fees. NYC Administrative Code § 26-516(a)(4) does provide that “a landlord found to have overcharged ‘may be assessed the reasonable costs and attorney's fees of the proceeding.’” *See Sandlow v. 305 Riverside Corp.*, 69 Misc. 3d 893, 924–25, 131 N.Y.S.3d 783, 808 [Supreme Court, NY County, 2020], quoting NYC Administrative Code § 26-516(a)(4). Counsel for the Plaintiff does not submit an affirmation of fees and disbursements. However, as stated above, the Plaintiff was granted summary judgment on her rent and security deposit overcharge claim and damages are to be determined at trial.

In opposition, the Defendant fails to raise a material issue of fact regarding this claim. The affidavit of Hemiar Hidas and the Defendant's Answer are silent on the claim that the Plaintiff should be compensated for attorney's fees, other than the general response that the rent sought was legal and did not constitute an overcharge. Damages relating to all of the claims, including treble damages, if any, will be determined at trial and the Plaintiff's attorney's fees and disbursements can be addressed at that time.

Striking defendant's Answer and dismissing defendant's Counterclaims

The Plaintiff also seeks an order striking the Defendant's affirmative defenses and dismissing the Defendant's counterclaims. CPLR 3211(b) provides in pertinent part that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." "[W]hen moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law.'" *Crego v. Christoffersen*, 70 AD3d 769, 769, 896 N.Y.S.2d 363, 365 [2d Dept 2010], quoting *Vita v. New York Waste Servs., LLC*, 34 A.D.3d 559, 824 N.Y.S.2d 177 [2d Dept 2006].

The Defendant's first affirmative defense, that there was no overcharge, fails to detail how the Defendant arrived at the monthly rent that was included in the Lease. Based upon the Court's finding of summary judgment in favor of the Plaintiff in relation to her cause of action for rent and security deposit overcharge, the Court finds that the Defendant's affirmative defense arguing that there was no rent overcharge is dismissed. However, the Plaintiff has failed to provide sufficient evidence to dismiss the Defendant's second affirmative defense of nonpayment of rent. The Plaintiff's affidavit does not directly address whether she paid the Defendant rent, excess or otherwise, during the time of her tenancy. What is more, as explained above, to the extent that the

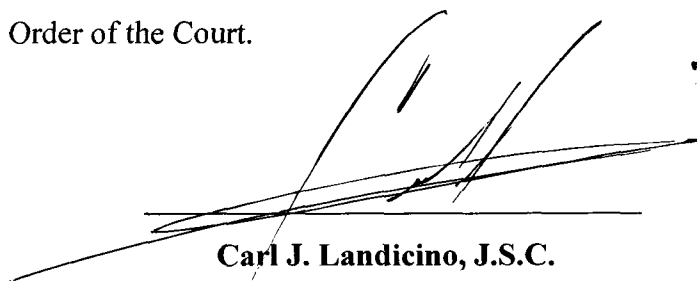
Court determines that there is rent due even after an overcharge claim has been found, that rent due can be determined at trial and serve to offset the Plaintiff's damages claim. *See Guzzo v. 250 East Houston Street Associates, L.P.*, No. 155684/2019, 2020 WL 5946133, [Supreme Court, N.Y County, 2020]. Moreover, the Court finds that the Defendant's first counterclaim for attorney's fees and the second counterclaim alleging that the instant proceeding is frivolous are also dismissed.

Based on the foregoing, it is hereby ORDERED as follows:

Plaintiff's motion (motion sequence #1) is granted to the extent that summary judgment is granted as it relates to the Plaintiff's claim for rent overcharge, for excess security deposit, and for attorney's fees. Any damages related to these claims will be assessed at trial. The motion is denied as it relates to the Plaintiff's application for summary judgment on the remaining causes of action. The Plaintiff's application to dismiss the Defendant's affirmative defenses and counterclaims is granted solely to the extent that the Defendant's first affirmative defense and first and second counterclaims are dismissed.

This Constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
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