SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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BRIAN BURROWS, CRAIG CHUNG, OLECIA CHUNG, SAM WALLER

Plaintiff,

- V -

75-25 153RD STREET, LLC,

Defendant.

INDEX NO. 160082/2020

MOTION DATE 08/09/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. SHAWN KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73
were read on this motion to/for RENEW/REARGUE

Defendant moves pursuant to CPLR §2221(d), for leave to reargue the Decision and Order dated November 18, 2021 (NYSCEF Doc. No. 42), which denied Defendant's motion to dismiss plaintiffs' Brian Burrows, Craig and Olecia Chung, and Sam Waller (collectively "Plaintiffs") rent overcharge claims and denying its motion to dismiss Plaintiff Sam Waller's ("Waller") separate claim asserting that Defendant incorrectly increased rent when renewing Waller's rent-stabilized lease after the enactment of the Housing Stability and Tenant Protection Act of 2019 ("HSTPA").

Defendant argues that Court overlooked and/or misapprehended the facts and/or law in denying Defendant's prior motion in two aspects; first by not ruling on the Defendant's statute of limitations defense as to Plaintiff's 421-a claims, and second, that the Court incorrectly determined that the concession offered to Waller was preferential rent in contrast to reasoning

which has been affirmed by the First Department in *Flynn v Red Apple 670 Pacific Street, LLC*, 2021 NY SlipOp 07510 (1st Dept Dec. 28, 2021).[1]

Pursuant to CPLR §2221(d), "a motion for leave to reargue: … (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." A motion to reargue is addressed to the court's discretion, and permission to reargue will only be granted if the court believes some error has been made (*see* CPLR § 2221 [d][2]). In order to succeed on a motion for reargument, the movant must demonstrate that the court overlooked or misapprehended the law or facts when it decided the original motion (*Foley v Roche*, 68 AD2d 558 [1st Dept 1979]). A motion to reargue is not designed to provide an unsuccessful party with another opportunity to re-litigate the same issues previously decided against him (*Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]). Nor does a motion to reargue permit a litigant to present new arguments not previously advanced on the prior motion (*Amato v Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]; *see also DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715 [1st Dept 2005]).

Reargument is denied as Defendant has not demonstrated that the Court misconstrued the facts or misapplied any controlling principles of law. Nonetheless, the Court will address Defendant's contentions below.

Analysis

On a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank*

[1] The Court notes that the First Department decision in *Flynn v Red Apple 670 Pacific Street, LLC*, 2021 NY SlipOp 07510 (1st Dept Dec. 28, 2021), was issued after the November 18, 2021 decision Defendant is now seeking to reargue.

National Association, 159 AD3d 618, 621-22 [2018]). In addition, "on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Id.* at 622). However, vague and conclusory allegations cannot survive a motion to dismiss (*see, Kaplan v Conway and Conway*, 173 AD3d 452, 452-53 [2019]; *D. Penguin Brothers Ltd. v City National Bank*, 270 NYS3d 192, 192 [2018] [noting that "conclusory allegations fail"]; *R & R Capital LLC, et al., v Linda Merritt*, 68 AD3d 436, 437 [2010]).

The criterion for establishing whether a Complaint should be dismissed pursuant to §3211(a)(7) is "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; s*ee also Foley v D'Agostino,* 21 AD2d 60, 64-65 [1964]). Whether the pleader will ultimately be able to establish the allegations in the pleading is irrelevant to the determination of a motion to dismiss pursuant to CPLR §3211(a)(7) (*see EBC I, Inc., v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001][motion must be denied if "from [the] four corners [of the pleadings] factual allegations are discerned which taken together manifest any cause of action cognizable at law"]).

Dismissal of a cause of action under CPLR § 3211(a)(5) is appropriate if the cause of action may not be maintained because of "arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds." Further, dismissal under CPLR § 3211(a)(1) is warranted where the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Fortis Financial Services, LLC v Fimat Futures*

USA, 290 AD2d 383, 383 [1st Dept 2002]; *see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431 [1st Dept. 2014]).

Rent Overcharge Claims

Defendant contends that the Court never ruled on "Defendant's meritorious statute of limitations defense or found that Plaintiffs established an exception thereto." However, the Court directly addressed Defendant's allegedly meritorious statute of limitations defense and found that Plaintiffs had provided a "sufficient indicia of fraud" to allow the court to look back past the four-year look back limit dictated in *Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 35 N.Y.3d 332 [130 N.Y.S.3d 759, 154 N.E.3d 972] (2020) (herein "*Regina*") (*see Butterworth v 281 St. Nicholas Partners, LLC*, 160 AD3d 434, 434 [1st Dept 2018] ["sufficient indicia of fraud" allows court to look back beyond four years]).

Despite Defendant's contentions on reargument, Plaintiffs do not need to demonstrate fraud conclusively to survive a motion to dismiss, and further, have sufficiently pled their rent overage claims (*see Chang v Bronstein Props.*, 2019 NY Slip Op 30744[U] at * 18 [Sup Ct, NY County 2019] [tenant need only show indicia of fraud to survive dismissal]; *435 Cent. Park W. Tenant Assn. v Park Front Apartments, LLC*, 183 AD3d 509, 510-11 [1st Dept 2020] [dispositive judgment in landlord's favor inappropriate, where tenant demonstrated landlord registered initial rents at false rates.]).

Waller's Individual Claim

Defendant argues that the Court misconstrued Waller's narrowly argued contention that the rent increase from his 2017 initial lease to his 2019 renewal lease constituted an overcharge under RSL §26-511(c)(14), as Defendant did not average Waller's "two-months' free" rent concession over the term of his 2017 lease to calculate a "net effective rent," and then base any

rental increase off the purported "net effective rent," rather than the monthly rent that Waller was actually charged and paid prior to the renewal. Further, Defendant claims that the Court improperly relied upon the StreetEasy advertisements, which Defendant claims was specifically rejected in *Flynn,* 2021 NY SlipOp 07510.

As the Court stated in its prior opinion, in enacting the HSTPA the Legislature amended RSL §26-511(c)(14) to prohibit a landlord from revoking a tenant's preferential rent upon a lease renewal and instead required a landlord, upon renewing a tenant's lease, to base any rental increase off of the preferential rent that was actually charged to and paid by the tenant prior to the renewal. Defendant contends that a concession for a specific number of months is not considered a preferential rent.

However, unlike the defendants in *Flynn* and *Chernett*, Defendant has not presented any reason for the two-month rent concession that was offered to Waller (see *Flynn,* 2021 NY SlipOp 07510; *see Chernett v Spruce 1209, LLC*, 2021 NY Slip Op. 31064[U], 8 [Sup Ct, NY County 2021]). Discovery may reveal that Defendant used this concession the same way a landlord may use preferential rent, or it may not. At this juncture in the litigation, Plaintiff has stated a viable cause of action as to Waller's cause of action and Defendant has not produced any evidence that utterly refutes Plaintiffs' claims.

Accordingly, it is hereby,

ORDERED Defendant's motion to reargue is denied.

4/ 8/2021
DATE

SHAWN KELLY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

160082/2020 BURROWS, BRIAN vs. 75-25 153RD STREET, LLC
Motion No. 001