SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46V**

Justice

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STEVEN LANDESS, KATHERINE LLEWELLYN

Plaintiff,

- v -

BR 31, LLC,

Defendant.

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INDEX NO. 153809/2015

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that plaintiffs' motion pursuant to CPLR 3212 for summary judgment on their claims seeking a determination of the legal regulated rent, overcharge, treble damages, and attorneys' fees, and defendant's cross motion pursuant to CPLR 3212 for summary judgment on its counterclaims for unpaid rent and/or use and occupancy and attorneys' fees are determined as follows:

Plaintiffs commenced this action seeking, inter alia, a declaration that their loft apartment is rent stabilized and that they must be issued a rent stabilized renewal lease. Additionally, they are seeking, among other things, a determination and calculation of what the legal rent-stabilized rent is for the premises and the amount of the rent overcharge. The crux of plaintiffs' argument is

that defendant and/or its predecessor-in-interest engaged in a fraudulent scheme to deregulate their apartment and that they are entitled a new, lower rent, an overcharge finding, and treble damages. Defendant argues that the deregulation, if improper, was mere error.

Background

As a general matter, Article 7-C of the New York State Multiple Dwelling Law ("MDL"), also known as the Loft Law, was promulgated in 1982 to provide for the legal conversion of commercial spaces, improperly used as residences into rent-stabilized units (MDL § 280). It authorized the creation of the Loft Board, which oversees the conversion process (MDL § 282). Once an application under the Loft Law is made, and the Loft Board determines that the premises is an interim multiple dwelling, the owner of the building must follow established procedures and timelines to legalize the covered units (MDL § 284). Once the apartment has been legalized, the covered units exit Loft Board oversight and enter rent stabilization.

In this matter, the Loft Board found in 1986 that the building located at 15 E. 31st Street, New York, New York was an interim multiple dwelling covered under the Loft Law. Plaintiff's unit, which consists of the entire fourth floor, was considered an interim multiple dwelling. In 1997 a certificate of occupancy was issued for the building stating that there were three residential apartments that were legalized pursuant to Article 7-B of the MD. Between 1986 and 2000, the defendant's predecessor-in-interest complied with the Loft Board's regulations, which culminated in an order issued by the Loft Board on January 25, 2000, finding that the subject building was in compliance with the MDL. The Loft Board further determined the legal rents for three, newly recognized units including the subject unit. Defendant's predecessor-in-interest was directed in that order to register the three units with the New York State Division of Housing and Community

Renewal ("DHCR") and provide the occupants with rent stabilized leases. Nevertheless, they failed to register the units for nearly seven years, until November of 2006.

Prior to and at all times during the conversion, the subject unit was occupied by non-party Robert Nartowicz. Nartowicz eventually vacated the subject unit pursuant to a surrender and buy-out agreement dated August 9, 2008. His last rent was $1,888.04. Defendant alleges that its predecessor-in-interest then gut renovated the unit, spending in excess of $50,000.00[1]. Thereafter, on May 18, 2009, defendant's predecessor-in-interest registered the unit with DHCR as exempt from rent stabilization due to high rent vacant decontrol. Defendant's predecessor-in-interest then rented the unit to plaintiff Steven Landess on or about December 1, 2009. The lease provided to Landess states that it was for an apartment not subject to the Rent Stabilization Law ("RSL"). His initial rent was $3,750.00. Defendant then purchased the building from its predecessor-in-interest on or about October 23, 2013.

The Housing Court Action

On or about December 15, 2014, defendant served plaintiffs with a termination notice and on or about March 27, 2015, commenced an eviction holdover proceeding in the Housing Part of the Civil Court of the City of New York, New York County. In the petition, the defendant alleged that the subject unit was not subject to the RSL on the grounds that the premises was deregulated due to high rent vacancy deregulation. Plaintiffs submitted a verified answer on April 8, 2015, and simultaneously moved for summary judgment, claiming that the subject unit was a former interim

[1] In support of this proposition, defendant submits an affidavit from the managing member of defendant's predecessor-in-interest, based on his review of the work involved, recollection of the project, and experience in construction renovation projects, maintaining that the work done was "easily in excess of $50,000." However, the only documentary evidence submitted was an architect's drawing for the fourth floor and a job filing with the Department of Buildings that estimated the total cost at $19,000.00.

multiple dwelling unit and was exempt from high rent vacancy decontrol. Defendant then cross-moved to amend the petition to change the basis for deregulation to a sale of improvements and a sale of rights pursuant to MDL §§ 286(6) and 286(12), respectively. Defendant argued that it was previously unaware that the building was ever an interim multiple dwelling regulated by the Loft Board. Its new theory of deregulation was that the Nartowicz' surrender and buy-out agreement constituted a sale of rights and/or improvements.

In opposition to the cross motion to amend, the plaintiffs submitted an affidavit from Nartowicz dated May 11, 2015. The affidavit stated, inter alia, that it was his understanding that he "was merely relinquishing possession of the Subject Premises in exchange for consideration . . . At no point did Petitioner's predecessor-in-interest ever indicate to me that by entering into such an agreement, I was selling my rights and/or improvements." He added that there were no discussions concerning selling any rights or improvements under the Loft Law, nor did he understand that he could do that. Along with his affidavit Nartowicz attached his 2008 surrender affidavit from the date he surrendered the unit, two Loft Board orders, and a copy of the cashed check from defendant's predecessor-in-interest.

In defendant's reply papers in further support of their cross motion to amend, it now too submitted an affidavit from Nartowicz sworn to on May 21, 2015. He now stated that he paid $20,000.00 to the prior tenant in 1983 for improvements and fixtures, including the kitchen. He added that he lived there for 25 years, and during his tenure he made his own improvements including installing a ceramic shower and creating individual rooms. Nartowicz further alleged that because he wanted to recoup his investment in the property, he accepted $20,000.00 to fully compensate him for the value of his improvements and fixtures. He also claims that he understood

the language in the surrender and buy-out agreement[2], which states that "[a]nything left behind will be deemed abandoned," to be transferring all of his personal property and a sale of improvements.

Defendant also submitted an affidavit from Ken Sato, managing member of defendant's predecessor-in-interest, wherein he states that he expected the $20,000.00 payment to give the owner all right, title, and interest to the unit, including any and all improvements. Further, he alleged its purpose was to destabilize the unit.

On July 30, 2015, without conceding the credibility of the amendment, the plaintiffs ultimately consented to it and then moved for summary judgment on the new petition. In support of their motion, they again submitted the surrender affidavit and surrender payment, which were initially attached to the original Nartowicz affidavit. Defendant then cross-moved for summary judgment and now submitted, for the first time, the underlying surrender and buy-out agreement dated August 9, 2008.

The surrender and buy-out agreement stated in pertinent part:

> 2. The tenant shall remove all personalty from and vacate the Premises on or before October 31, 2008 at 3:00 p.m., leave same vacant and broom clean . . . Anything left behind will be deemed abandoned[3] . . .
>
> 11. This agreement constitutes the entire understanding of the parties hereto, and all discussions and all prior agreements or understandings between the parties are hereby merged in this agreement . . .

[2] At this stage in the housing court action, the surrender agreement had not yet been provided to the plaintiffs or the court.

[3] Notably absent is any reference to the Loft Law, fixtures, or improvements. Additionally, this is standard language used in any residential lease buy-out and surrender agreement, even those that have nothing to do with the Loft Law.

Then, the day before the motion and cross motion were made returnable, defendant served a new notice of cross motion, where it sought to amend its prior cross motion to add a new exhibit. That new exhibit was entitled "Clarification and Amendment Agreement" and was entered into between Nartowicz and the predecessor-in-interest[4], which was fully executed the same day it was submitted in 2015 for the purposes of the litigation. It sought to demonstrate that both parties intended a sale of rights and improvements under MDL §§ 286(12) and (6).

By order dated June 29, 2016, the housing court judge denied all of the summary judgment motions, finding triable issues of fact based on the conflicting Nartowicz affidavits. That court further found the "Clarification and Amendment Agreement" was "inherently unreliable" and "drafted solely in an effort to win [owner's] motion for summary judgment."

This decision was ultimately appealed to the Appellate Term, 1st Department. They determined that the holdover proceeding should have been dismissed based on Landess' motion for summary judgment. They ruled that proof submitted "conclusively establishe[d] that the 2008 transaction . . . did not constitute a sale of improvements that removed the unit from rent regulation." Further, they opined that the "remove all personalty" language failed to mention anything about improvements. Moreover, defendant's predecessor-in-interest failed to file a record of any sale of improvements as required by 29 RCNY 2-10. Additionally, they pointed out that the surrender and buy-out agreement contained a merger clause, and, thus, "the landlord's attempt to introduce extrinsic evidence . . . should have been rejected." They also stated that the extrinsic evidence, consisting of the second Nartowicz affidavit "was obviously calculated to create a feigned issue of fact." Defendant then sought leave to appeal the Appellate Term decision, which was denied (*see BR 31, LLC v Landess*, 2018 NY Slip Op 85545[U] [1st Dept 2018]).

[4] The predecessor-in-interest, 15 East 31st Street Co. LLC, was defunct at the time of this agreement.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating that absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.,* 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez,* 68 NY2d at 324; *see also Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Chance v Felder,* 33 AD3d 645, 645-646 [2d Dept 2006]).

At the outset, that portion of plaintiffs' summary judgment motion, seeking a declaration stating that the subject unit is rent stabilized is granted pursuant to the Appellate Term decision dated December 4, 2017 (*see BR 31, LLC v Landess*, 57 Misc3d 156 [A] [App Term, 1st Dept, 1st Jud Dist 2017]; *Raffelo v Thompson Assets, LLC*, 132 NYS3d 612 [1st Dept 2020][Housing court determination of rent stabilization status had res judicata effect in subsequent Supreme Court case]).

At the heart of the remainder of plaintiffs' motion and defendant's cross motion is whether defendant participated in a fraudulent scheme to deregulate, and whether the default formula should be used to calculate the legal rent.

In June 2019, New York State enacted the Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36, §1, Part F) (HSTPA), which overhauled the method for determining overcharge claims, dramatically expanding owner liability. However, the Court of Appeals held that the overcharge provisions of the HSTPA cannot be applied retroactively to overcharges alleged to have occurred before the law's enactment (*see Matter of Regina Metro. Co. LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 [2020]). Instead, Regina Metro explains the pre-HSTPA law that applies to such claims:

> The rule that emerges from our precedent is that, under the prior law, review of rental history outside the four-year lookback period was permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate and, even then, solely to ascertain whether fraud occurred—not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations (*Grimm*, 15 NY3d at 367). In fraud cases, this Court sanctioned use of the default formula to set the base date rent. Otherwise, for overcharge calculation purposes, the base date rent was the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges were to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period (35 NY3d at 355-56).

Pre-HSTPA rent overcharges are subject to a four-year statute of limitation (former CPLR 213-a as added by L 1983, ch. 403, § 35, as amended by L 1997, ch. 116, § 34; *see also Thornton v Baron*, 5 NY3d 175, 180 [2005]). The base date for calculating an overcharge is "four years prior to the date of the filing of [a] complaint" (Rent Stabilization Code [9 NYCRR] §2520.6 [f] [1]; see also Rent Stabilization Code [9 NYCRR] § 2526.1 [a][2]). Where there is substantial indicia of a landlord's fraudulent scheme to deregulate rent stabilized apartments, the rental history may be examined beyond the four-year lookback period to determine whether a fraudulent scheme to destabilize the apartment tainted the reliability of the base date rent (*see Matter of Grimm v New York State Div. of Hous. & Community Renewal*, 15 NY3d 358 [2010]; *Conason v Megan Holding*, LLC, 25 NY3d 1 [2015]).

Here, defendant incorrectly contend that *Regina's* citation to *Conason* and *Thornton* disavows any cases outside of those alleging wholly fictitious tenants or rents in finding a fraudulent scheme to deregulate. Actually, there are numerous and varied indicia that can be considered to form the basis of a fraudulent scheme to deregulate. Some of the factors that are considered are

whether there was a substantially large increase in rent, missing or incorrect rent registrations, a paucity of evidence supporting claimed improvements, and non-stabilized leases (*see Dignam v 305 Riverside Corp.*, 2013 NY Slip Op 30805 [Sup Ct, New York County, J. Ling-Cohan]; *Similis Mgmt. LLC v Dzganiya*, 71 Misc3d 129[A][App Term, 1st Dept 2021]). Additionally, in the aftermath of *Regina*, courts have found that "[a]ssumptions regarding the regulatory status of an apartment may amount to 'willful ignorance, which constitutes willful conduct[5], particularly since defendants are sophisticated property managers and owners'" (*Montera v KMR Amsterdam LLC*, 193 AD3d 103 [1st Dept 2021] citing *Grady v Hessert Realty LP*, 178 AD3d 401 [1st Dept 2019]).

Here and in the housing court action, it has already been decided that Landess should have been provided with a lease under the RSL since defendant did not take the necessary actions to consummate a sale of rights and/or improvements (compare with *Aurora Associates LLC v Locatelli*, 2022 NY Slip Op 00958 [2002][Unit legalized under the Loft Law not subject to rent stabilization after properly recorded sale of rights and/or improvements]). It also apparent that if defendant did properly effectuate a sale of rights and/or improvements that there would likely be no controversy concerning the deregulation of the unit (*id.*). As a result, defendant's narrative may be true that this was merely a mistake of its predecessor-in-interest. Nevertheless, in viewing the predecessor-in-interest's failure to comply with the Loft Board's order to register the unit for nearly seven years, failure to file the mandatory forms memorializing a sale of rights and/or improvements, and defendant's failure to address the questionable, conclusory affidavits of Ken Sato that contradict other exhibits and the prior basis for deregulation, the defendant does not eliminate all triable issues of fact that it, or its predecessor-in-interest, did not participate in a

[5] *Regina* stated in a footnote that "[f]raud consists of evidence [of] a a representation of material fact, falsity, scienter, reliance and injury . . . In this context, willfulness means "consciously and knowingly charg[ing] . . . improper rent" (*Regina*, 35 NY3d at 356 n. 7)

fraudulent scheme to deregulate. This Court is also hard pressed to believe a sophisticated landlord like defendant did not know that the property was formerly an interim multiple dwelling, particularly in light of the uncontroverted evidence in the certificate of occupancy (*see Montera*, 193 AD3d 102; *Grady*, 178 AD3d 401). Moreover, the totality of the housing court record, containing changing bases for deregulation, feigned affidavits meant to create issues of fact, and a highly irregular attempt to modify a contract years later through the "Clarification and Amendment Agreement," do little to help its argument that it did not participate in a fraudulent scheme. Nevertheless, at this juncture, it is not the Court's job on a motion for summary judgment to weigh credibility. Thus, at minimum, the Court finds that there are competing contentions and discrepancies raising triable issues of fact as to whether defendant participated in a fraudulent scheme to deregulate (*see Austin v 25 Grove Street LLC*, 202 AD3d 429 [1st Dept 2022]).

Accordingly, plaintiffs' motion for summary judgment, seeking, inter alia, a declaration that their unit was rent stabilized is granted solely to that extent; and it is further

ORDERED and ADJUDGED that 15 E. 31st, 4th Floor Unit, New York, York is a rent stabilized unit; and it is further

ORDERED that the remaining aspects of plaintiffs' and defendant's motions, including and dependent on a finding or non-finding of fraud, are all denied; and it is further

ORDERED that those remaining issues consisting of reasonable attorneys' fees, treble damages, rent setting, overcharge, and/or money due to defendant based on the non-payment of rent or use and occupancy (less any abatements) shall be set down for a hearing, either at or after the bench trial of this matter, which will determine if defendant, or its predecessor-in-interest, participated in a fraudulent scheme to deregulate; and it is further

ORDERED that the parties shall appear for a settlement conference on June 6, 2022 at 2:00PM via Microsoft Teams.

This constitutes the decision and judgment of this Court.

5/16/2022
DATE

RICHARD LATIN, J.S.C.

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