

<b>Gelinas v 35 W. 26th St. Realty LLC</b>
2022 NY Slip Op 33236(U)
September 26, 2022
Supreme Court, New York County
Docket Number: Index No. 157476/2021
Judge: Mary V. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 33

CHRISTOPHER R GELINAS

Plaintiff,

- v -

35 WEST 26TH STREET REALTY LLC,

Defendant.

INDEX NO. 157476/2021

MOTION DATE 11/08/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON  
MOTION

HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for

JUDGMENT - DECLARATORY

Upon the foregoing documents, and the motion being unopposed, the motion for summary judgment is granted.

**I. Factual and Procedural Background**

Plaintiff Christopher R. Gelinas ("Plaintiff") brings this action seeking declaratory judgment that the Apartment is rent stabilized and seeking a money judgment for the overcharging of rent and security deposit (NYSCEF Doc. 1). Plaintiff filed a motion for summary judgment on October 19, 2021 (NYSCEF Doc. 8). Plaintiff seeks declaratory judgment stating that the 2nd floor apartment is subject to, and plaintiff is protected by rent stabilization. He also seeks a money judgment on his second and third cause of action; and dismissal of defendant's affirmative defenses pursuant to CPLR 3211(b) and counterclaims pursuant to CPLR 3212(a). Defendant has not filed any opposition to Plaintiff's motion.

On October 20, 2020, Plaintiff signed a lease to rent the second-floor apartment 35 West 26th Street, New York, New York (the "Apartment") (NYSCEF Docs. 9, 13). Plaintiff rented the

Apartment from his landlord, Defendant 25 West 26th Street Realty LLC (“Defendant”) (NYSCEF Doc. 13).

The Apartment is in an “interim multiple dwelling” (“IMD”) under Multiple Dwelling Law (“MDL”) Article 7-C (also known as the “Loft Law”). The Loft Law requires owners to legalize an IMD with a residential certificate of occupancy. Upon obtaining a certificate of occupancy, unless exempt, the units in an IMD became subject to rent stabilization. Some IMD units are exempt from rent regulation if they have been subject to a “sale of rights” pursuant to MDL 286(1). But a unit that is subject to an outstanding finding of harassment may not be deregulated despite the unit being subject to a “sale of rights” (NYSCEF Doc. 17).

On December 18, 1985, the Loft Board issued a finding of harassment against the owner of the Apartment who preceded Defendant (the “Harassment Order”) (NYSCEF Doc. 16). The Harassment Order was never terminated. In March 2019, Defendant filed an application with the Loft Board seeking to establish rent, to remove the building from loft board jurisdiction, and remove the Apartment from rent stabilized status (NYSCEF Doc. 17). The Loft Board denied Defendant’s application to remove the apartment from rent stabilization on October 17, 2019, on the basis that the Harassment Order was never revoked, established the initial legal rent of the second-floor apartment at \$363.75 per month, and directed Defendant to register the Apartment with the New York State Division of Housing and Community Renewal (DHCR) (*id.*).

Plaintiff’s lease was not subject to rent stabilization. After Plaintiff researched and discovered he had been allegedly overcharged, he filed this action seeking declaratory judgment that the Apartment is subject to rent stabilization, and to collect on rent overcharge (NYSCEF Docs. 1, 9). Allegedly, Plaintiff has paid Defendant \$4,300 per month in rent through August 2021 despite the Apartment’s rent stabilized status (NYSCEF Doc. 9, 15). Plaintiff also seeks treble

damages for the amount he has been overcharged. Finally, Plaintiff seeks to collect damages related to an illegally collected excess security deposit. Defendant filed an Answer with various affirmative defenses and counterclaims (NYSCEF Doc. 4). Plaintiff filed a reply to counterclaims on October 5, 2021 (NYSCEF Doc. 7).

## Discussion

### A. Standard

“Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party’s “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1<sup>st</sup> Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

Pursuant to Uniform Court Rule 202.8-g(c), where a movant submits an affidavit of material facts, and the non-movant does not assert any facts that are contrary or in opposition, the facts contained in the movant’s affidavit will be deemed admitted. Since Defendant has not submitted any opposition, the statement of material facts is deemed admitted for purposes of this summary judgment motion (NYSCEF Doc. 19).

### B. Declaration that the Apartment is Rent Stabilized

It is undisputed that pursuant to a ruling from the Loft Board dated October 17, 2019, the Apartment was rent stabilized (the “Loft Board Order”). It is also undisputed that Defendant has not challenged the Loft Board Order. Although Defendant has stated affirmative defenses challenging the validity of the Loft Board Order, it is well established that it is not appropriate to collaterally attack an administrative order regarding an apartment’s rent stabilized status (*Gersten v 56 7th Avenue LLC*, 88 AD3d 189, 201-202 [1st Dept 2011]; *New York City Campaign Finance Board v Mahadeo*, 88 AD3d 536, 536 [1st Dept 2011]). Given the undisputed facts and Defendant’s preclusion from attacking the Loft Board’s order in this litigation, the Court finds that Plaintiff is entitled to declaratory relief stating that the Apartment is rent stabilized at a legal regulated rent of \$363.75.

### C. Rent Overcharge and Security Deposit

Plaintiff satisfied its prima facie burden of showing entitlement to summary judgment on his rent overcharge claim. It is undisputed that the Apartment is rent stabilized and the legal regulated rent for the second floor was set at \$363.75. Plaintiff has shown that he signed a lease starting on October 24, 2020, where he was charged a monthly rent of \$4,300 (NYSCEF Doc. 13). Plaintiff has also shown that from October 2020 through October 2021 he paid \$52,700.00 (NYSCEF Doc. 15). Since Plaintiff was being charged and paying thousands more in rent than was legally allowed pursuant to the Loft Board Order, Plaintiff has met its prima facie burden for summary judgment on its rent overcharge claim (*Altschuler v Jobman 478/480, LLC*, 135 AD3d 439, 440 [1st Dept 2016]); *see also* New York City Admin. Code §26-512(a) [“No owner of property subject to this law shall charge or collect any rent in excess of the initial legal regulated rent”]). Plaintiff has also shown that the overcharge was willful entitling Plaintiff to treble

damages, as the lease which overcharged plaintiff was entered after the Loft Board issued its order informing Defendant that the legal regulated rent was \$363.75 and there is no proof that the Apartment was ever deregulated after the Loft Board Order.

As Defendant has not submitted any opposition to Plaintiff's motion for summary judgment, Defendant has failed to show the existence of a material issue of fact that would necessitate a trial. Defendant has also failed to rebut the presumption of willfulness in overcharging Plaintiff; therefore, Plaintiff is entitled to treble damages (New York City Admin Code §26-516(a); *see also Delaj v Bronx Park East Housing, Inc.*, 117 AD3d 546 [1st Dept 2014]).

Moreover, Plaintiff is entitled to recoup the excess security deposit unlawfully collected by Defendant. A landlord may only request a security deposit of one month's rent (New York Rent Stabilization Code § 2525.4). As the legal regulated rent is \$363.75, and it is undisputed that the Defendant collected \$4,300, Plaintiff is entitled to recoup \$3,936.25. Plaintiff is also entitled to attorneys' fees (NYC Admin. Code §26-516(a)(4)).

#### **D. Dismissing Affirmative Defenses and Counterclaims**

Plaintiff has also moved to dismiss Defendant's affirmative defenses pursuant to CPLR 3211(b). Defendant has also failed to oppose this branch of Plaintiff's motion. Defendant's first affirmative defense that the unit is subject to deregulation is barred by the doctrine of collateral estoppel (*D'Alessandro v DHCR*, 92 AD3d 421, 422 [1st Dept 2012] ("the doctrine of collateral estoppel precludes petitioners from relitigating the issue of the legal rent for the apartment").

The doctrine of collateral estoppel also precludes Defendant from raising its second affirmative defense attacking the validity of the Order of Harassment. Defendant should have raised this issue in the Loft Board proceedings or in a challenge to those proceedings. In any event, the Loft Board provided Defendant with an opportunity to clear the Order of Harassment, but

Defendant failed to do so. It cannot now attack the validity of the order of harassment that it has ostensibly done nothing to remove.

The Third Affirmative Defense is also without merit. Although Defendant asserts MDL §286(3) only applies to qualified Loft Law tenants who may receive rent stabilized leases, the plain language of the statute contains no such limiting language. Moreover, since Defendant failed to remove the Apartment from rent stabilization, logic and the statutory language provide that Plaintiff took possession of the Apartment subject to a rent stabilization order promulgated by the Loft Board's Order. The same reasoning applies to the Fourth Affirmative Defense, which is also a mere sentence long and not pleaded with any particularity.

The Fifth Affirmative Defense is totally without merit as the statute of limitations for rent overcharge is six years and there is no limitation on challenging rent regulatory status (*Regina Metropolitan Co., LLC v New York State Division of Housing and Community Renewal*, 35 NY3d 332 [2020]; *East West Renovating Co. v New York State Division of Housing and Community Renewal*, 16 AD3d 166, 167 [1st Dept 2005]).

The Sixth Affirmative Defense, which asserts the overcharge was not willful, is also without merit as Defendant was certainly aware of the rent stabilized status of the Apartment well before Defendant rented the Apartment to Plaintiff.

The Seventh Affirmative Defense, which argues that the Order of Harassment should have been automatically purged, is also barred by collateral estoppel pursuant to the Loft Board Order which found that the Order of Harassment prevented the Apartment from being taken out of rent stabilized status (*D'Alessandro v DHCR*, 92 AD3d 421, 422 [1st Dept 2012]).

The Eighth Affirmative Defense, which purports to be a counterclaim, alleges unclean hands as Plaintiff knew the Apartment was rent stabilized but leased it anyway with the intent to

bring this lawsuit and reap a windfall. As previously stated, Defendant has not opposed this motion and has not provided any evidence to substantiate these conclusory claims. Conclusory and unsubstantiated affirmative defenses are not sufficient to defeat a motion for summary judgment (*US 7 Inc. v Transamerica Ins. Co.* 173 AD2d 311 [1st Dept 1991]). Therefore, this affirmative defense/counterclaim is dismissed.

Finally, the last counterclaim seeks attorneys' fees. As attorneys' fees may only be awarded to a prevailing party, and Plaintiff has shown its prima facie entitlement to summary judgment given Defendant's complete lack of any opposition, this counterclaim should be dismissed. As this case is disposed by Plaintiff's motion, and Plaintiff has shown that it is entitled to prevail on its claims, Defendant is not entitled to any attorneys' fees.

Accordingly, it is hereby

ORDERED, ADJUDGED, AND DECLARED that the second-floor apartment of 35 West 26th Street, New York, New York is rent stabilized pursuant to the decision and order of the Loft Board dated October 17, 2019; and it is further

ORDERED that the Clerk of the Court enter judgment in favor of Plaintiff and against Defendant on Plaintiff's second cause of action for rent overcharge in the amount of \$144,758.58, plus statutory interest as calculated by the Clerk of the Court; and it is further

ORDERED that the Clerk of the Court enter judgment in favor of Plaintiff and against Defendant on Plaintiff's third cause of action seeking to recoup his security deposit in the amount of \$3,936.25, plus statutory interest as calculated by the Clerk of the Court; and it is further

ORDERED that Plaintiff is entitled to reasonable attorneys' fees and Plaintiff's counsel is directed to provide a supplemental affirmation of counsel for attorneys' fees, requesting a specific sum, and detailing the justifications for the sum, attaching proof (invoices or billing statements,

etc.) as necessary, by e-filing such supplemental documentation on or before October 24, 2022. Defendant shall submit an opposition to the reasonableness of said attorneys' fees on or before October 31, 2022. Plaintiff may file a reply to any opposition by November 4, 2022. Plaintiff's failure to timely comply with this Order will be deemed a waiver of its entitlement to attorneys' fees; and it is further

ORDERED that Plaintiff is to serve a copy of this order with notice of entry on the Clerk of the Court and Defendant within twenty-one (21) days of this decision and order; and it is further

ORDERED that such service upon the Clerk of the Court 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](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.

9/26/2022  
DATE

*Mary V Rosado*  
HON. MARY V. ROSADO, J.S.C.

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