Feltman v 106th Realty LLC

2023 NY Slip Op 31592(U)

May 11, 2023

Supreme Court, New York County

Docket Number: Index No. 162549/2019

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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ROBERT FELTMAN,

Plaintiff,

- v -

106TH REALTY LLC,ATLAS PROPERTIES LLC,FIRST METRO REALTY LLC,DREYFUS REALTY MANAGEMENT

Defendant.

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INDEX NO. 162549/2019

MOTION DATE 08/05/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

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

Upon the foregoing documents, and after oral argument, which was held on February 14, 2023, where David Hershey-Webb, Esq. appeared for Plaintiff Robert Feltman ("Plaintiff") and Brett Gossett, Esq. appeared for Defendants 106th Realty LLC ("106th Realty"), Atlas Properties LLC ("Atlas"), First Metro Realty LLC, and Dreyfus Realty Management LLC (collectively "Defendants"), Defendants' motion for summary judgment is denied and Plaintiff's cross-motion for summary judgment is granted.

I. Background

Plaintiff filed his Complaint in this declaratory judgment and rent overcharge action on June 23, 2021 (NYSCEF Doc. 6). Plaintiff is the tenant of apartment B1 located at 62 West 106th Street (the "Apartment") (*id.* at ¶ 7). Defendants 106th Realty and Atlas are the co-owners of the building located at 62 West 106th Street (the "Building") (*id.* at ¶ 8). Plaintiff first took occupancy of the Apartment on December 1, 2006, pursuant to a written lease, for a rent of $2,300.00 per month (*id.* at ¶ 12). He has occupied the Apartment ever since (*id.*). At some point between

November 2007 and July 2015, Plaintiff alleges he was charged $2,250.00 as his monthly rent, it has remained the same ever since (*id.* at ¶ 14). Plaintiff was served a notice of termination of his month-to-month tenancy on January 1, 2020 (*id.* at ¶ 16). However, Plaintiff alleges the Apartment is subject to rent stabilization (*id.* at ¶¶ 18-26). Plaintiff alleges that Defendants engaged in a fraudulent scheme to deregulate the Apartment by failing to do the following: register plaintiff's tenancy with DHCR; to offer a rent stabilized inception lease, and to register a legal regulated rent (*id.* at ¶ 34). Plaintiff seeks declaratory judgment that the Apartment is subject to rent stabilization, as well as seeking rent overcharge damages (*id.* at ¶¶ 38-48).

Defendants served their Answer on July 2, 2021 (NYSCEF Doc. 7). On July 20, 2022, Defendants filed the instant motion for summary judgment (NYSCEF Doc. 24). Defendants argue they are entitled to 'first rent' because the apartment was extensively altered to the point that the previous apartment ceased to exist (NYSCEF Doc. 27). Defendants also argue they are entitled to a 'first rent' because when the Apartment was first rented, the Apartment had been temporarily exempt from rent stabilization because it was occupied by a building employee for at least four years (*id.*).

Defendants submitted the affidavit of David Moore ("Moore") in support of their motion for summary judgment (NYSCEF Doc. 26). Moore provided a work permit for the Department of Buildings issued on March 22, 2002, which reflected construction done on the Apartment (NYSCEF Doc. 29). Moore also provided the architectural plans reflecting the renovations done to the Apartment (NYSCEF Doc. 30). The plans are described as "renovation of existing apartment space" (*id.*). The plans show that certain interior walls were demolished. Moore also describes that the exterior walls were expanded slightly, so that a former common area storage unit was incorporated into the Apartment (NYSCEF Doc. 26 at ¶ 7). Defendants argue that these

renovations are substantial enough to constitute a "new apartment" allowing them to charge a free market rent.

Following the renovations, the Apartment was leased to Jonathan H. Rappe ("Rappe") on August 1, 2004, for a monthly rent of $2,000.00 (*id.* at ¶ 8; *see also* NYSCEF Doc. 31). The next lease was entered with Charles Carwin & Wiliam Carwin commencing on December 1, 2005 (*id.* at ¶ 9; *see also* NYSCEF Doc. 32). The monthly rent on the Carwin lease was for $1,895.00 (*id.*). On December 1, 2006, Plaintiff took possession of the Apartment. While Defendants make the argument that prior to renovation, the Apartment was occupied by an employee and therefore exempt from rent stabilization, they have submitted no evidence in support of this assertion.

On October 28, 2022 Plaintiff cross-moved for summary judgment (NYSCEF Doc. 42). Plaintiff seeks summary judgment on his first cause of action declaring the premises subject to rent stabilization (NYSCEF Doc. 45). Plaintiff argues that because the perimeter walls of the apartment remained almost completely untouched, Defendants are not entitled to a first rent. Plaintiff also argues that Defendants are not entitled to a first rent as a result of the Apartment being occupied by an employee, because the provision of the rent stabilization code Defendants rely upon requires that the first tenant after a vacancy be offered a rent-stabilized lease. Plaintiff argues that because the following tenants were never offered a rent-stabilized lease, Defendants are not entitled to the protection of the RSC.

On November 17, 2022, Defendants filed their opposition to Plaintiff's cross-motion (NYSCEF Doc. 48). In opposition, Defendants repeat many of the same arguments made on their own motion for summary judgment, including that the Apartment was taken out of rent stabilization because the Apartment was renovated beyond recognition.

II. 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 [1st 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]).

B. Defendants' Motion for Summary Judgment

Defendants also correctly points out that where an apartment is "reconfigured" and "obliterated" so as to erase that apartment's particular identity, DHCR allows a landlord to seek a "first rent" (*Dixon v 105 West 75th Street LLC*, 148 AD3d 623 [1st Dept 2017]; *Devlin v New York State Div. of Hous. & Community Renewal*, 309 AD2d 191 [1st Dept 2003]). The subdivision of a single, multiple bedroom apartment into two smaller apartments has explicitly been held to constitute the kind of reconfiguration and obliteration which allows for a "first rent" (*see Devlin, supra* at 194 ["The illustrations we offered…were the conversion of a single two-bedroom apartment into two studio apartments, or, conversely, the consolidation of two smaller units into a

single larger unit, so that the prior abodes were essentially unidentifiable within the new configurations."]).

Defendants have failed to meet their prima facie burden that the alterations made to the apartment were so substantial so as to render the Apartment unrecognizable. The First Department has succinctly laid the parameters of when reconfiguration of an apartment qualifies it for first rent where it stated

> "In *Matter of 300 W. 49th St. Assoc.* this Court offered examples of the types of alterations contemplated by the policy – namely a two-bedroom apartment being split into two studio apartments, or two units being combined into one larger apartment (212 AD3d at 253-254). In that case, where the landlord substantially remodeled the apartment but it remained "essentially intact" (*id.* at 254), and *Devlin*, where the landlord relocated a wall so as to remove 86 square feet of space and add it to the neighboring apartment (309 AD2d at 192), this Court found that the landlord was not entitled to charge first rent. In contrast, the landlord was found to be entitled to charge first rent where it made "significant dimensional changes to a single-floor apartment to create a new (duplex) apartment prior to tenant's occupancy" (*446-450 Realty Co., L.P. v Higbie,* 30 Misc.3d 71, 73 [App. Term, 1st Dept 2010])" (*Dixon v 105 West 75th Street LLC*, 148 AD3d 623, 627 [1st Dept 2017]).

The facts presented by Defendants in support of their motion for summary judgment are akin to *Devlin*, where just one wall of an apartment was relocated, and the apartment was only altered by about 86 square feet (309 AD2d 191, 192 [1st Dept 2003]). As the First Department held in *Devlin*, "in view of the relatively modest alteration of one perimeter wall in the present case, it cannot be said that former apartment 5D no longer exists" (*id.* at 194).

The First Department went on to state "to allow a landlord to significantly increase the legal rent on a unit merely by the expedient of modifying the unit's dimensions in a minor manner would encourage subterfuges as a means of improperly manipulating rent stabilization." (*id.*). So too here only one exterior perimeter wall was slightly expanded. The Apartment basically maintained all the same rooms, although the interior walls shifted slightly. Moreover, the

Apartment was far from being obliterated, as required by First Department precedent (*Dixon v 105 West 75th Street LLC*, 148 AD3d 623 [1st Dept 2017] ["the test for whether alterations qualify for first rent [is] 'reconfiguration plus obliteration of the prior apartment's particular identity'"] quoting *Devlin v New York State Div. of Hous. & Community Renewal*, 309 AD2d 191, 194 [1st Dept 2003] *lv. denied* 2 NY3d 705 [2004]).

By contrast, a first rent is allowed when an existing apartment is connected to a penthouse apartment (*Dixon, supra*), or changing a single floor apartment into a new duplex apartment (*446-450 Realty Co., L.P. v Higbie*, 30 Misc.3d 71 [App. Term., 1st Dept 2010]). Such substantial alterations are a far cry from the facts presented on this motion for summary judgment.

Similarly, Defendants have not met their prima facie burden of showing the Apartment was exempt from the RSC for at least four years prior to issuing a lease to Rappe. Indeed, aside from a conclusory affidavit, there is no evidence at all submitted in support that an employee occupied the Apartment. Defendants do not even provide the name of the employee who occupied the Apartment. This falls far short from meeting their heavy burden of showing, by admissible evidence, that an employee occupied the Apartment. Moreover, as Plaintiff argues, the statutory text upon which Defendants rely, along with binding precedent, required Defendants to offer a rent-stabilized lease to the first tenant who occupied the Apartment after the employee vacated (*Gordon v 305 Riverside Corp.*, 93 AD3d 590, 592-594 [1st Dept 2012]). However, Rappe's lease expressly states that the Apartment is not subject to rent stabilization (NYSCEF Doc. 31). Therefore, even if Defendants had met their prima facie burden, RSC (9 NYCRR) §2526.1(a)(3)(iii) [former] could not apply to take the Apartment out of rent stabilization. Thus, Defendants' motion for summary judgment is denied.

C. **Plaintiff's Cross-Motion for Summary Judgment**

Plaintiff has cross-moved for summary judgment on its first cause of action seeking declaratory judgment that the Apartment is rent stabilized. It is undisputed that the Building is a pre-war building built before January 1974 which contains at least eleven residential units, thereby automatically qualifying those units for rent stabilization pursuant to the Emergency Tenant Protection Act of 1974 (ETPA) § 5(4)(a) and the Rent Stabilization Law of 1969 (Administrative Code of City of NY) § 26-504(a) (*see* NYSCEF Doc. 6 at ¶¶ 18-22 and 25-26; *see also* NYSCEF Docs. 17-18). Therefore, Plaintiff has made a prima facie showing that the Apartment is subject to rent-stabilization and should be granted summary judgment unless Defendants can show a material issue of fact regarding the regulatory status of the apartment.

However, in opposition, Defendants rely only on their two flawed theories of why the Apartment was deregulated. As explained, these arguments are without merit and contrary to binding precedent. It has long been held that a party opposing a motion for summary judgment is bound to lay bare his proofs and make an evidentiary showing that there exist genuine, triable issues of fact (*Oates v Marino*, 106 AD2d 289 [1st Dept 1984]). Defendants have failed to meet this burden by reiterating their reliance on the "apartment obliteration" and "exempt from regulation for over four years" theories. Defendants have failed to show any material issues of fact or raise any other reason or theory as to why the Apartment is not subject to rent stabilization. Thus, Plaintiff's cross-motion for summary judgment is granted.

Accordingly, it is hereby,

ORDERED that Defendants' motion for summary judgment is denied, and Plaintiff's cross-motion for summary judgment on his first cause of action is granted; and it is further

ORDERED, ADJUDGED, AND DECLARED that Apartment B1 located at 62 West 106th Street New York, New York (the "Apartment") is subject to New York's rent stabilization laws, and pursuant to those laws, the Plaintiff Robert Feltman is entitled to a rent stabilized lease; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: (1) the amount at which the legal regulated rent shall be set for the apartment which is the subject of this litigation; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special

Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on Defendants; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

5/11/2023
DATE

Mary V Rosado J S C
HON. MARY V. ROSADO, 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	x REFERENCE