SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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310 EAST 74 LLC,

Plaintiff,

- v -

CONSTANTIN MIREA, GABRIELA MIREA

Defendants.

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INDEX NO. 657182/2021

MOTION DATE 06/28/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

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

Plaintiff's motion for summary judgment dismissing defendant's first, second, and fifth counterclaims is granted.

Background

Plaintiff (landlord) brings this action to recover unpaid rent allegedly owed by defendants. It observes that defendants initially entered into a lease back in February 2001 and entered into a series of renewals, including one that began on February 1, 2020 and ended on January 31, 2022. Plaintiff contends that defendants began to stop paying rent in March 2020 and (although a few sporadic payments were made), more than $59,000 is now owed.

In this motion, plaintiff moves to dismiss defendants' first, second and fifth counterclaims, all of which relate to defendants' overcharge claim. Defendants insist that the apartment is subject to the Rent Stabilization Code and that plaintiff unlawfully increased the rent. The first counterclaim for rent overcharge alleges that defendants moved into the unit in 1993 under a lease issued to defendant Gabriela Mirea's siblings. Defendants contend that there

was no vacancy when defendants officially took over the lease in 2001 and therefore the vacancy increase was improper. Defendants also contend that plaintiff improperly revoked the preferential rent offered to defendants in 2008 (defendants were paying a preferential rent, as opposed to the legal regulated rent, prior to 2008). The second counterclaim seeks a declaratory judgment based on the rent overcharge and the fifth counterclaim alleges a breach of contract based upon the rent overcharge.

Plaintiff asserts that these counterclaims should be severed and dismissed. It claims that defendants' arguments that they were the actual illusory tenants of the unit starting in 1993 and that the 2008 revocation of the preferential rent are not bases to avoid the applicable lookback period. It argues that under the applicable caselaw, these claims should be dismissed as time barred. It observes that the six-year lookback period would extend to January 21, 2016 (six years prior to defendants' answer) and nothing on this record compels the Court to go beyond that period.

In opposition, defendants assert that plaintiff has left out material facts that support their claims. They point out that the lease plaintiff provided to defendants required that any increases in rent be based on the preferential rent amount of $1,750.00. Defendants insist that the Rent Stabilization Law and Code prohibits the waiver of any benefits of these laws and so plaintiff's assertion that defendants waived their rights is without merit.

Defendants insist that plaintiff is trying to circumvent the Rent Stabilization Law by increasing the rent for rent stabilized tenants in excess of the limits set by the Rent Guidelines Board. They contend that their overcharge claims are not time-barred because plaintiff engaged in a fraudulent scheme to deregulate the apartment. Defendants argue that plaintiff should not benefit from its fraudulent actions.

In reply, plaintiff maintains that it disclosed the rent increases directly to defendant and to the DHCR each year, thereby demonstrating that there was no fraudulent scheme. With respect to the revocation of the preferential rent in 2008, plaintiff observes that it is not claiming that defendants waived their rights to contest this action. It argues instead that the alleged actions do not state a cognizable claim for fraud. Plaintiff points out that the revocation of the preferential rent was explicitly made clear in the 2008 lease renewal and in the DHCR rent registration filed that year. Plaintiff emphasizes that defendants failed to include any affidavits from defendants in their opposition papers and so the Court should grant the instant motion.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably

conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The question on this motion is whether defendants raised a material issue of fact to permit the Court to go beyond the applicable lookback period. In other words, the Court must consider whether there is a material issue of fact regarding whether plaintiff engaged in a "fraudulent scheme to deregulate" the apartment (*see Burrows v 75-25 153rd St., LLC,* 215 AD3d 105, 109, 189 NYS3d 1 [1st Dept 2023]). Neither party disputes that defendants must raise an issue of fact about plaintiff's alleged fraudulent scheme to deregulate as the alleged overcharges (according to the answer) stem from 2001 (when defendants entered into the lease) and 2008 (when the preferential rent was revoked and plaintiff charged the legal rent).

The Court dismisses the rent overcharge counterclaims because defendants failed to raise an issue of fact that plaintiff engaged in any fraudulent actions. As the First Department observed in *Burrows*, "the inflation of the legal regulated rents set forth on the publicly filed registration statements was evident from the registration statements themselves, negating the element of reliance as a matter of law" (*id.*). Here, plaintiff accurately reflected the rent increases in both the leases it provided to defendants and in the DHCR rent registrations, which shows that preferential rent was revoked in 2008 (NYSCEF Doc. No. 15). "It is undisputed that this rental history has been available for public inspection at all relevant times. Thus, the inflation of the legal regulated rents was evident from the face of the registration statements on which [tenants'] claims are based" (*Burrows*, 215 AD3d at 112). Accordingly, this Court finds that defendants did not establish the reasonable reliance element of a fraud claim.

The other basis for the alleged fraudulent scheme—the rent increase in 2001—is also accurately documented in the rental history filed with DHCR (NYSCEF Doc. No. 15). That means that defendants cannot now claim, twenty years later, that their initial rent was improper and part of a fraudulent scheme because publicly filed information put defendants on notice about their potential claims long ago.

And, as plaintiff points out, defendants failed to submit an affidavit from either defendant (only an attorney's affirmation is included). Without such an affidavit, defendants failed to raise a material issue of fact about plaintiff's alleged fraud, including their reasonable reliance on an alleged misrepresentation by plaintiff (*see Tribbs v 326-338 E 100th LLC*, 215 AD3d 480, 188 NYS3d 18 [1st Dept 2023] [noting that tenants failed to meet their prima facie burden on a summary judgment motion in an overcharge case because they did not submit affidavits in support]).

Summary

There is no dispute in this case that the actions that form the basis of defendants' overcharge counterclaims all took place well beyond the applicable statute of limitations (the lookback period). Here, the Court simply finds that defendants failed to raise a material issue of fact to show that plaintiff engaged in a fraudulent scheme to deregulate and cannot go farther back than the lookback period.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment to dismiss the first, second and fifth counterclaims is granted and these counterclaims are severed and dismissed.

The Court observes that this action was filed in December 2021 (although an RJI was not filed until recently) and so the Court orders that a note of issue be filed on or before August 2, 2023. The parties have had more than enough time to complete discovery.

6/29/2023
DATE

ARLENE P. BLUTH, J.S.C.

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