# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. PAUL A. GOETZ **PART** 47

*Justice*

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TESSA GOURIN

Plaintiff,

- v -

72A REALTY ASSOCIATES, L.P.,

Defendant.

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**INDEX NO.** 152698/2022

**MOTION DATE** 05/06/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for DISMISSAL.

In this residential landlord/tenant action, defendant 72A Realty Associates, L.P. (the landlord) moves to dismiss the verified complaint of plaintiff Tessa Gourin (Gourin) pursuant to CPLR § 3211 (a) (1), (5) and (7) (motion sequence number 001) and Gourin opposes the motion. For the following reasons, the landlord's motion is granted, and the instant complaint is dismissed.

## BACKGROUND

Gourin is the tenant of record of apartment 4A in a residential apartment building located at 504 East 5th Street in the County, City and State of New York (the building) and the landlord is the building's owner (*see* Verified Complaint, ¶¶ 3-4, NYSCEF Doc No 1). This action involves a dispute over the rent regulated status of apartment 4A.

Gourin initially took possession of apartment 4A pursuant to a non-rent-stabilized market rate lease running from July 15, 2020 to June 30, 2021 with a monthly rent of $4,195.00 (*see* Exh A, NYSCEF Doc No 5). She subsequently executed a lease extension agreement running from July 1, 2021 to June 30, 2022 with a monthly rent of $4,250.00 (*id.*; Exh B, NYSCEF Doc No 6).

Shortly thereafter, Gourin evidently came to believe that apartment 4A was actually a rent stabilized unit that the landlord had improperly deregulated in 2001 by raising its monthly rent from $1,099.38 to $2,026.72 without explanation or justification (NYSCEF Doc No 1, ¶¶ 13-22). As a result, Gourin filed an administrative rent overcharge complaint with the New York State Division of Homes and Community Renewal (DHCR) on March 25, 2021 (Exh C, NYSCEF Doc No 7). Gourin later withdrew that DHCR complaint on November 25, 2021 (*id.*).

The landlord's counsel states that Gourin began withholding rent payments shortly thereafter (*see* Zinberg Affirm, NYSCEF Doc No 3, ¶¶ 16-18; Exh D, NYSCEF Doc No 8). He does not state what amount of arrears Gourin may currently owe or whether she continued to occupy apartment 4A after her lease extension agreement expired on June 30, 2022. However, counsel has presented documentary evidence (discussed *infra*) which, he asserts, establishes that the landlord properly deregulated apartment 4A long before Gourin took occupancy of it and completely refutes her claims that the unit is rent stabilized and that the landlord has overcharged her (NYSCEF Doc No 3, ¶¶ 19-55; Exhs D-M, NYSCEF Doc Nos 8-17).

Gourin commenced this action by serving and filing a summons and complaint that sets forth causes of action for: 1) a declaratory judgment that apartment 4A is a rent stabilized unit; 2) rent overcharge; and 3) legal fees and court costs (*see* NYSCEF Doc No 1). Rather than file an answer, the landlord submitted the instant motion to dismiss on May 6, 2022 (*id.*; NYSCEF Doc Nos 2-17).

**DISCUSSION**

When evaluating a defendant's motion to dismiss pursuant to CPLR § 3211 (a), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference" (*see Chanko v Am. Broadcasting Cos. Inc.*, 27

NY3d 46, 52 [2016], citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). However, a "CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, * * * may be appropriately granted [] where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen*, 98 NY2d at 326, quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Here, Gourin's complaint alleges claims for declaratory relief, rent overcharge and legal fees/court costs, and the landlord argues that all of those claims are barred by documentary evidence (*see* NYSCEF Doc 1, 3). Each will be addressed in turn.

Gourin's first cause of action seeks a declaratory judgment that "[apartment 4A is] rent stabilized, [and] directing [landlord] to provide her with a proper rent stabilized lease" (*see* NYSCEF Doc No 1, ¶¶ 27-34). Pursuant to CPLR § 3001, a declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (*see e.g.*, *Jenkins v State of N.Y., Div. of Hous. & Community Renewa*l, 264 AD2d 681 [1st Dept 1999]). As the landlord does not raise any "justiciability" arguments in its moving papers, that issue is not before the court. A trial court's proper function in a declaratory judgment action is to determine the respective rights of all of the affected parties under a lease (*see e.g.*, *615 Co. v Mikeska*, 75 NY2d 987, 988 [1990], citing *Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 [1926]). Here, Gourin's claim specifically requests a declaration "that the premises are rent stabilized (and an order/injunction) directing the Defendant to provide her with a proper rent stabilized Lease" (*see* NYSCEF Doc No 1, ¶ 34). "[A] tenant should be able to challenge the deregulated status of an apartment at any time during the tenancy" (*Matter of 150 E. Third St. LLC v Ryan*, 201 AD3d 582, 583 [1st Dept 2022], quoting *Gersten v 56 7th Ave. LLC*, 88 AD3d

189, 199 [1st Dept 2011]). Here, as noted, Gourin alleges that apartment 4A was originally rent stabilized but was improperly deregulated, and thus seeks a determination regarding its current rent-regulated status (*see* NYSCEF Doc No 1, ¶¶ 27-34). Gourin's complaint, which alleges that (a) her apartment was once rent stabilized and (b) her landlord improperly deregulated it, has satisfied the law's lenient pleading requirements for a declaratory judgment regarding the nature of her leasehold. Normally, this would be sufficient to defeat a CPLR § 3211 motion to dismiss.

However, the landlord argues that Gourin's claim fails as a matter of law under CPLR § 3211 (a) (1) and (7) because documentary evidence establishes that she is not entitled to the declaration that she seeks. The landlord has specifically presented copies of: 1) a DHCR order dated Feb 24, 1997 which found that apartment 4A's monthly legal regulated rent was $1,016.44 through January 31, 1998; 2) two subsequent two-year rent-stabilized renewal leases for apartment 4A which respectively ran from February 1, 1998-January 31, 2000 at $1,057.10 per month, and February 1, 2000-January 31, 2002 at $1,099.38 per month; 3) bills, receipts and cancelled checks for a total of $25,922.36 in "individual apartment improvement" (IAI) renovation work performed in apartment 4A between November 2000 and January 2001; 5) a November 7, 2000 letter from apartment 4A's subsequent tenant, Jane Barrett (Barrett), acknowledging that ongoing renovation work in the unit had to be completed before she could take possession of it; 6) Barrett's subsequent market rate lease which ran from December 15, 2000 through December 31, 2002 with a monthly rent of $2,010.00; and 7) the DHCR exit registration the landlord filed in December 2000 notifying the agency that apartment 4A would no longer be registered as rent stabilized because the criteria for "high rent vacancy deregulation" had been met (*see* NYSCEF Doc Nos 9, 11, 12, 14, 15). The landlord states that it calculated the rent for Barrett's vacancy lease by increasing apartment 4A's 2000 legal regulated

monthly rent of $1,099.38 to include a: 1) 20% "vacancy increase" of $219.88; 2) "longevity increase" of $59.40; and 3) fortieth of the $25,922.36 in IAI costs ($648.06) (NYSCEF Doc No 3, ¶¶ 21-27; Zinberg Affirm, NYSCEF Doc No 4, ¶¶ 12-22). The landlord asserts that its documents establish that, in December 2000, it correctly and lawfully raised apartment 4A's legal regulated rent above the $2,000.00 per month "deregulation threshold" that was provided for in the Rent Stabilization Law and Code (RSL and RSC) at that time (NYSCEF Doc No 3, ¶¶ 28-33).[1] The landlord then concludes that Gourin's first cause of action must fail, as a matter of law, because the documentary evidence establishes that apartment 4A was deregulated in 2000 and is no longer rent stabilized (*id.*). The landlord is correct, the documentary evidence adequately records a proper apartment deregulation in December 2000.

Gourin nevertheless argues that the 2000 deregulation was improper because the landlord was not entitled to the $648.06 rent increase for IAI work which raised apartment 4A's legal regulated rent above the deregulation threshold (*see* Plaintiff's Memorandum of Law, NYSCEF Doc No 30 at pp 11-14). Gourin specifically contends that the landlord "neglects to offer paid receipts, signed contract agreements, and/or contractor affidavits, and the cancelled checks offered do not all state that they were for improvements made to apartment 4A or that they were issued contemporaneously with the completion of the work," and that "much of the work outlined is for repairs" (*id.* at p 12). She concludes that more discovery is needed to determine whether or not the landlord's IAI records are fraudulent (*id.* at p 15). However, having reviewed all of those records, Gourin's argument is unpersuasive for four reasons.

First, the landlord's documentary submissions clearly *do* include a "signed contractor affidavit" and a quantity of "paid receipts and cancelled checks" (*see* Exh H, NYSCEF Doc No

[1] RSL § 26-504.2 ("Exclusion of high rent accommodations"), enacted L.1997, c. 116, § 15, eff. June 19, 1997, repealed L.2019, c. 36, pt. D, § 4, eff. June 14, 2019; NYC Admin Code §§ 26–504.2, 26–511 (c) (14); NYC Admin Code § 2520.11 (r) (4).

12). Gourin's assertion to the contrary is thus incorrect. Second, all of the records submitted by the landlord are dated between November 2000 and January 2001, so they were "contemporaneous" with the work allegedly performed during that period (*id.*). Third, all of the records state that that they were issued for services and/or materials provided in apartment 4A. (*id.*). Finally, the work memorialized on the records indicates that landlord paid for a comprehensive "gut rehabilitation" of the entire apartment and its fixtures, including demolition and replacement of floors, cabinetry and windowsills and installation of new appliances and fixtures (*id.*). The records do not support Gourin's assertion that the landlord merely performed discrete repair jobs instead. Therefore, Gourin's characterization of the documentary evidence is rejected.

Further, more discovery is not needed. Gourin contends that the landlord's documents do not comport with the IAI evidenciary submission standards contained in "DHCR Policy Statement 90-10," a regulatory guideline issued by the DHCR (*i.e.*, New York State Division of Homes and Community Renewal) on June 26, 1990 (*see* NYSCEF Doc No 30 at p 11). However, DHCR's guideline is not controlling. Appellate precedent instead holds that "the determination of whether work constitutes an IAI supporting a rent increase 'is one to be resolved by the factfinder in the same manner as other issues, based on the persuasive force of the evidence submitted by the parties'" (*Ampim v 160 E. 48th St. Owner II LLC*, 208 AD3d 1085, 1086-87 [1st Dept 2022], quoting *Jemrock Realty Co., LLC v Krugman*, 13 NY3d 924, 926 [2010]). In applying that standard, the landlord's documentation of the 2000 IAI work is sufficient to establish that it performed the work in apartment 4A, and Gourin has not articulated any grounds to find that the work was either not performed or not qualifying IAI work. Therefore, Gourin's contention that more discovery is needed is rejected. Accordingly, that part

of the landlord's motion that requests dismissal of Gourin's first cause of action pursuant to CPLR § 3211 (a) (1) will be granted.[2]

Gourin's second cause of action seeks a judgment for money damages and treble damages for rent overcharges that the landlord allegedly imposed (*see* NYSCEF Doc No 1, ¶¶ 35-44). "Rent overcharge" is a statutorily created cause of action governed by RSL § 26-516 and has no common law analogue (*see e.g.*, *134-38 Maple St. Realty Corp. v Medina*, 3 Misc 3d 134(A), 2004 NY Slip Op 50469[U], *2 [App Div 2004]). RSL § 26-516 (a) clearly provides that the statute's remedies are only available to tenants of "housing accommodation[s] subject to this chapter;" *i.e.*, rent stabilized apartment dwellings. However, it has already been determined that the documentary evidence demonstrates that apartment 4A was not a rent stabilized unit. As a result, Gourin's claim must fail as a matter of law. Accordingly, that part of the landlord's motion that requests dismissal of Gourin's second cause of action pursuant to CPLR § 3211 (a) (7) will be granted.

Gourin's final cause of action seeks an award of legal fees and court costs (*see* NYSCEF Doc No 1, ¶¶ 45-48). "Under the general rule, attorney's fees are incidents of litigation and a *prevailing party* may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989] [emphasis added]); *see also Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279 [1st Dept 2007]). CPLR § 8101 further provides that "[*t]he party in whose favor a judgment is entered* is entitled to costs in the action, unless otherwise provided by statute or unless the court determines that to so allow costs would not be equitable, under all of the circumstances

[2] A portion of Gourin's argument strays onto the issue of "fraudulent rent registrations" (*see* NYSCEF Doc No 30 at pp 13-14). However, that argument is only germane in the context of a rent overcharge claim and, as will be discussed *infra*, Gourin's rent overcharge claim fails as a matter of law. Therefore, this argument need not be addressed.

(emphasis added)." Neither type of damages may be awarded unless the party seeking them has prevailed on his/her claim. However, it has already been determined that Gourin's two claims should be dismissed. Accordingly, that part of the landlord's motion that requests dismissal of Gourin's third cause of action pursuant to CPLR § 3211 (a) (7) will be granted and Gourin's verified complaint will be dismissed.

**CONCLUSION**

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR § 3211 (a) of defendant 72A Realty Associates, L.P. (motion sequence number 001) is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly with costs and disbursements to defendant.

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7/27/2023
DATE

PAUL A. GOETZ, J.S.C.

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