

Tovar v Adam's Tower L.P.

2023 NY Slip Op 33594(U)

September 28, 2023

Supreme Court, New York County

Docket Number: Index No. 150776/2017

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 41

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LEON TOVAR and MARIA TOVAR,

Plaintiffs

Index No. 150776/2017

-against-

DECISION AND ORDER

ADAM'S TOWER LIMITED PARTNERSHIP,
KIBEL COMPANIES, LLC, PETER LEVENSON,
HENRY KIBEL, and LEE ROSEN,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

From November 1, 2011, through October 31, 2016, plaintiffs were the tenants of record of apartment 2D in a residential apartment building at 351 East 84th Street, New York County, under successive leases. Defendant Adam's Tower Limited Partnership is the building's owner, of which defendant Levenson is a partner. Defendant Kibel Companies, LLC, is the building's managing agent, of which defendant Kibel was an officer. Defendant Rosen is the building's leasing representative employed by the other defendants.

The current complaint claims (1) damages for defendants' breach of the warranty of habitability implied and expressed in plaintiffs' lease and for plaintiffs' constructive eviction or partial actual eviction, (2) a declaratory judgment that

plaintiffs' apartment was rent stabilized and damages for rent overcharges, and (3) attorneys' fees and expenses. Defendants move for summary judgment dismissing plaintiffs' second and third claims. C.P.L.R. § 3212(b) and (e). Plaintiffs cross-move for summary judgment (1) on defendants' liability for breach of the warranty of habitability and for plaintiffs' constructive eviction or partial actual eviction, (2) granting a declaratory judgment that their apartment was rent stabilized and treble damages for rent overcharges, and (3) on defendants' liability for attorneys' fees and expenses. C.P.L.R. §§ 3001, 3212(b) and (e).

II. BREACH OF THE WARRANTY OF HABITABILITY

Plaintiffs' first claim seeks damages for breach of the warranty of habitability caused by defendants' demolition and construction work on apartment 2D's wrap-around terrace. Plaintiffs claim that defendants performed this work for over six months, forcing plaintiffs to relocate to a more expensive apartment in another building in December 2016. They cross-move for summary judgment on defendants' liability for breach of the warranty of habitability, in violation of New York Real Property Law (RPL) § 235-b, causing their partial actual eviction from their terrace and constructive eviction from their apartment. The warranty of habitability guaranteed by RPL § 235-b encompasses three covenants: "(1) that the premises are 'fit for

human habitation,' (2) that the premises are fit for 'the uses reasonably intended by the parties,' and (3) that the occupants will not be subjected to conditions that are 'dangerous, hazardous or detrimental to their life, health or safety.'" Solow v. Wellner, 86 N.Y.2d 582, 587-88 (1995) (quoting RPL § 235-b). Although a building or housing code violation is prima facie evidence of a violation of RPL § 235-b, such evidence is "not the exclusive determinant of whether there has been a breach. Housing codes do not provide a complete delineation of the landlord's obligation, but rather serve as a starting point in that determination by establishing minimal standards that all housing must meet" Park W. Mgt. Corp. v. Mitchell, 47 N.Y.2d 316, 328 (1979). See Fiondella v. 345 W. 70th Tenants Corp., 217 A.D.3d 495, 496 (1st Dep't 2023). Instead, "the implied warranty protects . . . against conditions that materially affect the health and safety of tenants or deficiencies that 'in the eyes of a reasonable person . . . deprive the tenant of those essential functions which a residence is expected to provide.'" Solow v. Wellner, 86 N.Y.2d at 588 (quoting Park W. Mgt. Corp. v. Mitchell, 47 N.Y.2d at 328). See O'Hara v. Board of Directors of the Park Ave. & Seventy-Seventh St. Corp., 206 A.D.3d 476, 478 (1st Dep't 2022).

Determination of a breach ordinarily requires a fact finding at trial, e.g., Armstrong v. Archives L.L.C., 46 A.D.3d 465, 466

(1st Dep't 2007); Solow Mgt. Corp. v. Tanger, 1 A.D.3d 165, 166 (1st Dep't 2003); McCrossin v. Benson Ave. Owners Corp., 35 Misc. 3d 143(A), 2012 N.Y. Slip Op. 50937(U), at *1 (App. Term 2d Dep't 2012), but a claim for breach of the warranty of habitability is viable as long as the complained of conditions are within the scope of the warranty. E.g., Shultz v. Cambridge Dev., L.L.C., 200 A.D.3d 624, 625 (1st Dep't 2021); Shackman v. 400 E. 85th St. Realty Corp., 161 A.D.3d 438, 439 (1st Dep't 2018); Brown v. Blennerhasset Corp., 113 A.D.3d 454, 455 (1st Dep't 2014). Plaintiff Maria Tovar attests that a damaged parapet that defendants neglected to repair rendered apartment 2D's terrace unsafe, and defendants' eventual repair work was unduly protracted, used substances dangerous to their health, and was so unsafe and noisome that the work forced plaintiffs to leave the apartment. These allegations indicate safety hazards that support a breach of the warranty of habitability. E.g., O'Hara v. Board of Directors of the Park Ave. & Seventy-Seventh St. Corp., 206 A.D.3d at 478.

Defendants make three points in rebuttal to plaintiffs' prima facie claim. First, defendants insist that ¶ 7 of plaintiffs' lease ("WARRANTY OF HABITABILITY") bars their claim. NYSCEF Doc. 87. Yet defendants rely on terms that do not appear in the lease defendants present. Paragraph 7 of that lease actually provides:

- A. All of the sections of this Lease are subject to the provisions of the Warranty of Habitability Law in the form it may have from time to time during this Lease. Nothing in this Lease can be interpreted to mean that You have given up any of Your rights under that law. Under that law, Owner agrees that the Apartment and the Building are fit for human habitation and that there will be no conditions which will be detrimental to life, health or safety.

Id. The lease does not include any of the limiting terms that defendants suggest. Even if it did, such terms would be unenforceable since defendants' obligation to maintain residential premises in a habitable condition is a non-waivable duty imposed by statute. RPL § 235-b(2); Solow v. Wellner, 86 N.Y.2d at 589; Andreas v. 186 Tenants Corp., 208 A.D.3d 406, 408 (1st Dep't 2022). Therefore defendants' defense based on a limitation or waiver in plaintiffs' lease is unsustainable.

Defendants also maintain that a stipulation dated February 20, 2019, discontinuing plaintiffs' claims of personal injury, bars plaintiffs' claim for breach of the warranty of habitability. This defense misreads the stipulation. Plaintiffs allege toxic or other dangerous substances on the terrace not to support personal injury claims, which they discontinued, but to support their claim for breach of the warranty of habitability, which they did not discontinue in its entirety. NYSCEF Doc. 76.

Finally, in addition to relying on the absence of building or housing code violations associated with the terrace, which, as discussed above, is not a prerequisite to plaintiffs' claim for

breach of the warranty of habitability, defendants maintain that plaintiffs fail to show defendants' negligence, which is also not a prerequisite to plaintiffs' breach of warranty claim. Even were negligence required, plaintiffs make such a showing by alleging defendants' failure to meet the statutory standard of habitability in violation of RPL § 235-b. Elliott v. City of New York, 95 N.Y.2d 730, 734 (2001).

Defendants do not otherwise rebut plaintiffs' evidence. Although plaintiffs allege conditions such as toxic substances and noise that require expert evidence of danger or objective testing of unreasonable levels to sustain those claims, plaintiffs also attest to dirt, dust, and noxious odors and fumes throughout plaintiffs' apartment and their exclusion from the terrace. Plaintiffs describe the lack of privacy due to the workers on the terrace, requiring plaintiffs to install shades and keep them closed, thus depriving them of sunlight in the apartment. Their lay description establishes defendants' liability for at least these conditions. Plaintiffs also attest that defendants' superintendent admitted to asbestos on the terrace and, due to this condition, advised plaintiffs not to use their air conditioners or open their windows during the summer of 2016. The trier of fact will determine the extent to which the conditions deprived plaintiffs of the use of their apartment, whether the deprivation extended to the interior as well as the

terrace, whether the conditions forced plaintiffs to leave the apartment, any rent abatement commensurate with the deprivation of use, and reasonable expenses for any necessary alternative housing.

III. CONSTRUCTIVE AND PARTIAL ACTUAL EVICTION

Plaintiffs fail to show that their constructive eviction claim does not simply duplicate their claim for breach of the warranty of habitability. Elkman v. Southgate Owners Corp., 233 A.D.2d 104, 105 (1st Dep't 1996). See Shackman v. 400 E. 85th St. Realty Corp., 161 A.D.3d at 439. Whether a landlord has constructively evicted tenants ordinarily is determined when they claim a breach of the covenant of quiet enjoyment or as a defense to a landlord's claim for rent. River Park Assoc. (1972) L.P. v. Richman Plaza Garage Corp., 178 A.D.3d 422, 424 (1st Dep't 2019); Jackson v. Westminster House Owners Inc., 24 A.D.3d 249, 250 (1st Dep't 2005); Elkman v. Southgate Owners Corp., 233 A.D.2d at 105, although the defense is not limited to offsetting unpaid rent and allows recovery of paid rent. Heights 170 LLC v. York, 29 Misc. 3d 138(a), 2010 N.Y. Slip Op. 52045(U), at *1 (App. Term 1st Dep't 2010); Paskov v. Kreshitchki, 35 Misc. 3d 148(A), 2012 N.Y. Slip Op. 51072(U), at *3 (App. Term 2d Dep't 2012). Defendants do counterclaim for rent for September through December 2016, but do not seek it through their current motion.

More significantly, constructive eviction requires a showing that plaintiffs actually abandoned their apartment. River Park Assoc. (1972) L.P. v. Richman Plaza Garage Corp., 178 A.D.3d at 424; Jackson v. Westminster House Owners Inc., 24 A.D.3d at 250. Plaintiffs admit that they did not leave their apartment until the middle of December 2016 and did not pay any rent for September-December 2016, the months to which defendants' counterclaim for rent is limited. Moreover, although plaintiffs may have been entitled to a renewal lease beginning November 1, 2016, they did not enter one and nowhere attest that they would have entered one but for the apartment's conditions. Therefore they fail to support any claim to the apartment after October 2016, any rent abatement for September-December 2016 when they paid no rent, or how a constructive eviction claim affords them any affirmative relief not afforded by their claim for breach of the warranty of habitability and a rent abatement before September 2016. They may claim constructive eviction as a defense to defendants' counterclaim for rent.

Plaintiffs also concede that their claim of a partial actual eviction from the terrace may be claimed only as a defense to defendants' counterclaim for rent. Unless defendants' exclusion of plaintiffs from the terrace was de minimis, the exclusion would constitute a partial actual eviction discharging plaintiff from all liability for rent as long as the eviction continued.

Eastside Exhibition Corp. v. 210 E. 86th St. Corp., 18 N.Y.3d 617, 622-23 (2012); Paskov v. Kreshitchki, 35 Misc. 3d 148(A), 2012 N.Y. Slip Op. 51072(U), at *2. On the other hand, regarding both the partial actual eviction and the constructive eviction claims, if the conditions that plaintiffs allege excluded them from the terrace and forced them to leave the apartment were the necessary product of necessary repairs to which plaintiffs consented, these defenses will fail. Jackson v. Westminster House Owners Inc., 24 A.D.3d at 250.

IV. APARTMENT 2D'S RENT REGULATORY STATUS

C.P.L.R. § 3001 authorizes the court to grant a declaratory judgment "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," specifically to determine the respective rights of parties to a residential lease. E.g., 615 Co. v. Mikeska, 75 N.Y.2d 987, 988 (1990). The complaint requests a declaratory judgment that (1) apartment 2D was a rent stabilized apartment subject to the New York Rent Stabilization Law (RSL) and Rent Stabilization Code (RSC), and (2) plaintiffs are entitled to compensation for rent overcharges in violation of New York City Administrative Code (RSL) § 26-516 because defendants unlawfully deregulated the apartment.

Since plaintiffs commenced this action before the effective date of the Housing Stability and Tenant Protection Act of 2019

(HSTPA) June 14, 2019, they are subject to the limitations period of four years set by the prior version of RSL § 26-516. Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal, 35 N.Y.3d 332, 357 (2020); Fuentes v. Quik Realty LLC, 186 A.D.3d 435, 437 (1st Dep't 2020). Review of apartment 2D's rent history before the limitations period of four years predating plaintiffs' complaint filed January 24, 2017, is permissible, however, to determine apartment 2D's rent regulatory status, which is not subject to a statute of limitations and may be determined at any time during a tenancy. E.g., 150 E. Third St. LLC v. Ryan, 201 A.D.3d 582, 583 (1st Dep't 2022); Kostic v. New York State Div. of Hous. & Community Renewal, 188 A.D.3d 569, 569 (1st Dep't 2020); Fuentes v. Quik Realty LLC, 186 A.D.3d at 437; Gersten v. 56 7th Ave. LLC, 88 A.D.3d 189, 199 (1st Dep't 2011).

Apartment 2D's New York State Division of Housing and Community Renewal (DHCR) rent registration history lists the apartment as rent stabilized in 1984 and temporarily exempt from rent stabilization from 1992 through 1996 because it was occupied by an employee of the owner. The history lists the apartment as permanently exempt from rent stabilization in 1997 because the apartment was rented at a rent above the deregulation threshold and shows that defendants filed no further registrations from 1998 through at least 2015. A former Kibel Companies manager

attests that a succession of building superintendents occupied apartment 2D from 1970 through 1996 and that in 1996 nonparty tenants Harold Jensen and Rachel Gordon leased it at \$4,500/month.

Plaintiffs claim that apartment 2D's 1996 deregulation was unlawful, and the apartment remained rent stabilized as a matter of law. 9 N.Y.C.R.R. § 2526.1(a)(3)(iii) in effect in 1996 provided:

Where a housing accommodation is vacant or temporarily exempt from regulation pursuant to section 2520.11 of this Title on the base date, the legal regulated rent shall be the rent agreed to by the owner and the first rent stabilized tenant taking occupancy after such vacancy or temporary exemption, and reserved in a lease or rental agreement

This "first rent" regulation "necessarily presumes that the first tenant after a vacancy is offered a rent-stabilized lease," and a landlord's attempt to deregulate a superintendent's apartment by issuing the incoming tenants a lease with a monthly rent above the RSC's deregulation threshold is unlawful. Gordon v. 305 Riverside Corp., 93 A.D.3d 590, 592 (1st Dep't 2012). See Thompson Assets LLC v. Raffelo, 61 Misc. 3d 130(A), 2018 N.Y. Slip Op. 51411(U), at *1 (App. Term 1st Dep't 2018); M & E Christopher LLC v. Godfrey, 50 Misc. 3d 143(A), 2016 N.Y. Slip Op. 50229(U), at *1 (App. Term 1st Dep't 2016); Goldman v. Malagic, 45 Misc. 3d 37, 39 (App. Term 1st Dep't 2014); 656 Realty, LLC v. Cabrera, 27 Misc. 3d 138(A), 2010 N.Y. Slip Op.

50899(U), at *1 (App. Term 1st Dep't 2010). Superintendents' apartments that were temporarily exempt from rent stabilization revert to their prior rent stabilized status when leased to new tenants. Goldman v. Malagic, 45 Misc. 3d at 39; 656 Realty, LLC v. Cabrera, 27 Misc. 3d 138(A), 2010 N.Y. Slip Op. 50899(U), at *1. Under this rule, apartment 2D resumed its rent stabilized status when defendants leased it to Jensen and Gordon in 1996, so that the deregulation and unregulated market rent charged in the 1996 lease was plainly unlawful.

Consequently, defendants' insistence that apartment 2D was deregulated since the prior tenants' rent exceeded the deregulation threshold is untenable. Defendants were not entitled to exempt an apartment from rent regulation simply by leasing it above the deregulation threshold and offer no persuasive reason for such a belief, given the "first rent" precedent cited above. Instead, if the rent regulations permitted a rent above the deregulation threshold, only then would defendants be permitted to exempt the apartment from rent regulation. Based on that abundant precedent, plaintiffs are entitled to a declaratory judgment that apartment 2D is rent stabilized. C.P.L.R. § 3001.

Because plaintiffs commenced this action January 24, 2017, their overcharge claim is limited to the preceding four years, beginning January 24, 2013. Regina Metro. Co., LLC v. New York

State Div. of Hous. & Community Renewal, 35 N.Y.3d at 355-56.

Under pre-HSTPA law, "the four-year lookback rule and standard method of calculating legal regulated rent govern" overcharge claims, absent fraud, which plaintiffs do not establish here.

Id. at 361. See Najera-Ordonez v. 260 Partners, L.P., 217 A.D.3d 580, 581 (1st Dep't 2023).

Plaintiffs do claim that defendants' unlawful deregulation of apartment 2D, by misapplying the RSC's "first rent" regulation, 9 N.Y.C.R.R. § 2526.1(a)(3)(iii), was willful. Defendants' deregulation was not due to inadvertent reliance on an erroneous DHCR advisory opinion or guidance, see Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal, 35 N.Y.3d at 356, regarding whether the RSC's "first rent" regulation might effect deregulation of vacated apartments previously occupied by a landlord's employee. Instead, copious appellate precedent, cited above, held that such a practice was unlawful. Landlords are responsible to know the law governing their practices. Therefore the court may presume that defendants chose to disregard that law. Nor do defendants present any basis to find their deregulation of apartment 2D via misapplication of the RSC's "first rent" regulation inadvertent rather than willful. Instead, defendants' disregard of their obligations under the RSC and RSL by their 1996 deregulation of apartment 2D was willful. E.g. Montera v. KMR Amsterdam LLC, 193 A.D.3d 102,

106 (1st Dep't 2021); Nolte v. Bridgestone Assoc. LLC, 167 A.D.3d 498, 498-99 (1st Dep't 2018).

V. CALCULATION OF THE RENT OVERCHARGE

Plaintiffs' rent as of January 24, 2013, was \$7,700/month.

See Najera-Ordonez v. 260 Partners, L.P., 217 A.D.3d at 581. The RSL, N.Y.C. Admin. Code § 26-517(e), provided that:

The failure to file a proper and timely initial or annual rent registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement or if no such statements have been filed, the legal regulated rent in effect on the date that the housing accommodation became subject to the registration requirements of this section.

Apartment 2D's DHCR rent registration history shows that defendants did not file any registration statements between 1998 and 2015. RSL § 26-517(e) thus barred defendants from increasing apartment 2D's rent above its last "legal regulated" amount of \$7,700/month through 2015. 9 N.Y.C.R.R. § 2522.8(a); Altschuler v. Jobman 478/480, LLC., 135 A.D.3d 439, 441 (1st Dep't 2016).

From November 2013 through October 2015, however, defendants charged and plaintiffs paid at least \$8,000/month, an overcharge of at least \$300/month for 24 months, totaling \$7,200. NYSCEF Doc. 86, at 2; NYSCEF Doc. 87, Renewal Lease Form. From November 2015 through July 2016, defendants charged and plaintiffs paid \$8,750/month, an overcharge of \$1,050/month for nine months,

totaling \$9,450. Thus the total overcharge for the four years from January 24, 2013, to January 24, 2017, is at least \$16,650.

The RSL, N.Y.C. Admin. Code § 26-516(a)(2) (2016), provided that: "No penalty of three times the overcharge may be based upon an overcharge having occurred more than two years before the complaint is filed" upon overcharges willfully collected by the landlord. Therefore plaintiffs' treble damages are based on the overcharges collected only from February 2015 through July 2016. From February through October 2015, the overcharges totaled at least \$2,700. From November 2015 through July 2016, the overcharges totaled \$9,450. Thus the total overcharge for the two years from January 24, 2015, to January 24, 2017, is at least \$12,150. Adding twice this amount, \$24,300, to \$16,650, plaintiffs are entitled to compensation for overcharges and treble damages of at least \$40,150.

Contrary to plaintiffs' Renewal Lease Form and defendants' ledger, plaintiffs claim they paid \$8,050/month from November 2013 through October 2015, rather than \$8,000/month. Whether plaintiffs incurred this additional overcharge is an issue for trial.

VI. ATTORNEYS' FEES AND EXPENSES

Plaintiffs' third claim seeks attorneys' fees and expenses. RSL § 26-516(a)(4) authorizes an award of attorneys' fees and expenses upon a finding that a landlord has collected an

overcharge from a tenant. Because plaintiffs establish that they are entitled to relief on their rent overcharge claim, they are entitled to attorneys' fees and expenses. Therefore the court grants plaintiffs' cross-motion for summary judgment on their third claim to the extent of holding defendant Adam's Tower Limited Partnership and Kibel Companies liable for plaintiffs' attorneys' fees and expenses incurred in prosecuting their second claim. RSL § 26-516(a)(4); 9 N.Y.C.R.R. § 2520.6(i); Najera-Ordonez v. 260 Partners, L.P., 217 A.D.3d at 581-82. The amount of fees and expenses and defendant Levenson's liability for this claim will be determined at trial. N.Y. Partnership Law § 26. Plaintiffs' entitlement to attorneys' fees and expenses for prosecuting their first claim will depend on whether they recover damages based on this claim at trial. RPL § 234.

VII. CONCLUSION

For the foregoing reasons, the court denies defendants' motion for partial summary judgment and grants plaintiffs' cross-motion for partial summary judgment to the following extent. C.P.L.R. § 3212(b) and (e).

1. Defendants are liable to plaintiffs for a breach of the warranty of habitability during June through December 2016 in an amount, if any, to be determined at trial. RPL § 235-b.

2. The court declares and adjudges that apartment 2D in the building owned and operated by defendants Adam's Tower

Limited Partnership, Kibel Companies, LLC, Levenson, Kibel, and Rosen at 351 East 84th Street, New York, New York 19026, has been rent stabilized since at least 1996. C.P.L.R. § 3001.

3. The court awards a judgment in favor of plaintiffs and against defendants Adam's Tower Limited Partnership and Kibel Companies, jointly and individually, 9 N.Y.C.R.R. § 2520.6(i); Najera-Ordonez v. 260 Partners, L.P., 217 A.D.3d at 581-82, for \$40,950 in rent overcharges, with interest at 9%/year on \$16,650 from March 16, 2015, the approximate midpoint of the overcharges. C.P.L.R. §§ 5001, 5004; Trumbull Equities LLC v. Mt. Hawley Ins. Co., 191 A.D.3d 587, 587 (1st Dep't 2021). Defendant Levenson's liability for this claim will be determined at trial. N.Y. Partnership Law § 26.

4. Defendants Adam's Tower Limited Partnership and Kibel Companies, LLC, jointly and individually, are liable for plaintiffs' attorneys' fees and expenses incurred in prosecuting their second claim, RSL § 26-516(a)(4); 9 N.Y.C.R.R. § 2520.6(i); Najera-Ordonez v. 260 Partners, L.P., 217 A.D.3d at 581-82, in an amount to be determined at trial. Defendant Levenson's liability for this claim also will be determined at trial. N.Y. Partnership Law § 26.

The court denies the balance of plaintiffs' cross-motion.

Dated: September 28, 2023

Lucy Billings, J.S.C.