West 140 LLC v Zeigler

2023 NY Slip Op 33663(U)

September 11, 2023

Civil Court of the City of New York, New York County

Docket Number: Index No. 308925/22

Judge: Alberto M. Gonzalez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART A
---X
WEST 140 LLC,

LT Index No.: 308925/22

PETITIONER-LANDLORD

-against-

DECISION/ORDER

YVETTE C. ZEIGLER, "JOHN DOE"

RESPONDENT-TENANT

---X

Hon. Alberto Gonzalez:

Recitation as required by CPLR Rule 2219(A), of the papers considered in the review of Respondent's motion seeking leave for disclosure.

Papers	NYSCEF DOC #
[Respondent's] Notice of Motion;	11
[Respondent's] Affidavit or Affirmation in Support of Motion;	12
[Respondent's] Affidavit or Affirmation in Support of Motion;	13

Exhibit A-F;	14-19
[Petitioner's] Affidavit or Affirmation in opposition;	22
[Petitioner's] A-B;	23,25
[Respondent's] Affidavit or Affirmation in Reply.	26

Procedural History and Factual Background

The instant nonpayment proceedings was initiated by service of a notice of petition and petition, dated May 22, 2022, seeking unpaid rent, at a monthly rent of $2,500, for the period of November 2021 to May 2022, for a total of $17,500. *See* NYSCEF #1 and #2.

On December 19, 2022, Ms. Deana J. McGirt filed a Pro Se Answer with the court, and the proceeding was made returnable on January 3, 2023. *See* NYSCEF # 6.

Thereafter, the Respondent Yvette C. Zeigler appeared by counsel (Manhattan Legal Services), who filed a notice of appearance with the court dated February 24, 2023. *See* NYSCEF #7.

Manhattan Legal Services then filed an "Amended Answer, Defenses, and Counterclaims,"on behalf of Ms. Yvette Zeigler. The Amended Answer stated among its affirmative defenses/counterclaims, "Overcharge[,]" "Overcharge and Fraud." *See* NYSCEF #9.

After filing her Amended Answer, Respondent filed a motion, dated May 1, 2023, seeking "limited discovery." *See* NYSCEF #11.

The motion, in the attorney affirmation, expands upon the allegations made in the amended answer, stating, "38. The DHCR rent history for the subject premises shows a history of preferential rents and actual rents significantly lower than the legal regulated rents from 2000 to 2009, then again in 2020, right after a significant increase in the legal regulated rent listed. 39. The subject premises were not registered until 1999, though [DOB] permits for the building were issued before any registration." *See* NYSCEF #12.

The Respondent's motion then offers specific instances, including that

- "40. There are unexplained increases in the apartment's legal rent. The first occurs in 2000 when the legally-registered rent increased from $771.00 to $975.00.
- 41. Then in 2003, the legally-registered rent increased from $975.00 to $1193.40, an increase of 22.4%, though the same tenant (Viula Abreau) remains listed[…] In order to have charged this amount legally in 2003, Petitioner must have made $7,956.00 worth of Individual Apartment Improvements (IAIs). Yet no IAIs is claimed on the [DHCR rent registration], and no permit for this period or purpose is filed with DOB[….]
- 42. Then in 2008, the registered legal rent increase was from $964.70 in 2007 to $1,352.99, supposedly due to a vacancy increase. However, the allowable vacancy increase of 20% plus the 3% RGB increase for that year's one-year lease would have made the registered rent in 2008 $1,186.58. No tenant is listed for 2008, yet the preferential rent was listed at $964.78.

- 43. Even stranger is that the registered rent listed in 2009, also listed as due to a vacancy increase, is $1,131.21.
- 44. Then from 2017 to 2018, when Petitioner represented to DHCR that a new set of tenants moved in, the rent was increased from $1,370 to $2,500 per month. This is an increase of more than 82.4% or $1,129.42 per month – even considering the allowable increases this is an exceptionally large increase that raised the rent way beyond the legal limit. Furthermore, this increase and subsequent increases were not explained in any rent rider provided to Ms. Zeigler at the inception of her tenancy.
- 45. Additionally, Petitioner registered the apartment on June 12, 2019 as Vacant, but then registered the next tenant's lease as commencing May 1, 2019." *See* NYSCEF #12.

Respondent also alleges that there is "ample reason to doubt" that Petitioner made significant improvements to the apartment to justify increasing the rent, stating that the DHCR rent history does not indicate IAIs or MCIs by Petitioner, and there are no permits with DOB indicating substantial work as a basis for the increases. *See* NYSCEF #12.

Respondent then offers, as part of her common law fraud claim, that "Petitioner has misrepresented numerous facts as to the legality of the rent registered of the subject apartment. These include entirely-missing registrations, overlapping vacant registrations with lease registrations, inconsistently listing legal regulated, preferential, and actual rents, large increases that exceed even the allowable vacancy percentages and no accompanying explanation in the form of claimed IAIs, DOB permits, or explanations in rent riders. Ms. Zeigler had no way of knowing what the rental history of the unit was previous to her tenancy in subject premises, that

only commenced in June 2020 [...] [t]herefore, she had no choice but to rely on the Landlord's willful misrepresentation to what the lawful rent was, and was materially injured as a result." *See* NYSCEF # 12 ⁋ 53-55.

Respondent then concludes by stating that that increase of $2,500, took place in 2018, which does not make it subject to the 4-year look back period because the case commenced in June 2022, as per CPLR 213-a. *See* NYSCEF # 12 ⁋ 98.

Petitioner opposes Respondent's motion, citing to *Casey v. Whitehouse Estates, Inc.* and *Regina Metro Co. LLC vs. New York State Div. of Housing and Community Renewal*, to say that the one exception to the four-year lookback period is the "limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate and even then solely to ascertain whether fraud occurred – not to furnish evidence for calculation of the base date or permit discovery for years of overcharges barred by the statute of limitations." *See* NYSCEF # 22 ⁋ 4.

Petitioner defines fraud, by the common law standard: "evidence of a representation of material fact, falsity, scienter, reliance and injury[,]" and further states that the Court in *Regina* carefully distinguishes between actions that present a challenge to the deregulated status of an apartment and an overcharge claim. *See* NYSCEF # 22 ⁋ 5, 6. Petitioner's opposition also states, citing to *Burrows v. 75-25 153rd Street LLC*, that reliance on a DHCR rent history – a public record – "negates the element of reliance as a matter of law." *See* NYSCEF # 22 ⁋ 13..

The opposition then goes through each of Respondent's individual allegations:

- "17. The Tenant Protection Unit ("TPU") of the New York State Homes and Community Renewal determined that the registered rent in 2018, $2,500 for the subject apartment was sufficiently substantiated [Petitioner attaches documents, including work orders and checks in support of the TPU finding] .

- 20. That there were no rents registered between 1984 through 1998 is inconsequential and the lack of registration is not evidence of fraud.
- 21. Respondent's reference that in 1999 the premises were registered as rent stabilized – vacant with a legal regulated rent of $771 per month while overlapping with another tenant's lease is inaccurate as the lease for tenant Mandis Scade commenced April 1, 2000.
- 22. Respondent's claim that there are inconsistent rent registrations between 2000-2003 is likewise not accurate as the legal regulated rent remained at $975 throughout this period with lower amounts for actual rent paid.
- 23. Respondent's claim that the rent increase from $975 to $1,193.40 is evidence of a fraudulent scheme to deregulate the apartment is likewise meritless. Tenant Viula Abreu from 2002 through 2007, last registered legal regulated rent in 2007 was $964.70, an amount less than $975 registered in 2001 when said tenant first moved into the premises. The actual rent paid was lower than the aforementioned initial $975 legal regulated rent through out the tenancy.
- 24. In 2008, the registered rent for the vacant apartment was $1,352.99 but was then reduced to $1,131.21 in 2009 when the next tenant Alhousseynon Damba moved into the apartment.
- 25. An increase from $964.70 per month in 2007 to $1,131.21 registered in 2009 to this tenant is less than the 21% vacancy plus renewal increase permitted in 2009 ($1,167.29).
- 26. From 2009 through 2017 the rent increases were consistent with the allowable RGB Increases then in effect.

- 27. Certainly, the amount of rent charged between $1,131.21 and $1,370.58 from 2009 through 2017 were nowhere near the deregulation threshold necessary to deregulate the premises."*See* NYSCEF # 22.

Finally, Petitioner states that Petitioner purchased the building in March 2015, that there have been six different owners from 1988-2015, and the tenant was provided a rent stabilized lease with all the appropriate riders[1], and attaches a copy of Respondent's lease with the relevant riders.

Respondent's reply states that Petitioner's reliance on Burrows and Casey is misplaced as the decisions do not "abrogate" the decision in Thornton and Grim, and that both cases are still good law and that Petitioner's conduct is replete with "indicia of fraud," as recognized in Thornton and Grimm. *See* NYSCEF # 26 ⁋ 10. Concerning the TPU finding, and the documents attached, Respondent's counsel writes, "TPU's audit is not conclusive nor dispositive. The letter provided by DHCR's TPU itself says that it "it is not an order of HCR and is done without prejudice to a tenant to file an overcharge complaint or other legal claim(s) that he/she may have." *See* NYSCEF # 26 ⁋ 18..

Discussion

Section 408 of the CPLR authorized the use of discovery in summary proceeding with permission of the court if ample need is shown. Disclosure, "may assist the speedy disposition of a case when it has served the purpose of clarifying the issues for trial." *New York University v. Farkas*, 121 Misc.2d 643, 468 N.Y.S.2d 808 (Civ. Ct. N.Y. Cty. 1983)

In *New York University v. Farkas*, the court set forth six factors to consider when determining whether discovery is appropriate to CPLR § 408:

[1] The riders attached indicate that the apartment is subject to 421-a.

1) whether the party seeking discovery has asserted facts to establish a cause of action or defense;
2) whether there is a need to determine information directly related to the cause of action;
3) whether the requested discovery is carefully tailored and likely to clarify the disputed facts;
4) whether prejudice will result;
5) Whether prejudice can be diminished or alleviated, for example by prescribing a short time period to conduct discovery; and
6) Whether the court, in its supervisory role, can structure discovery so that the party against whom discovery is sought, particularly pro se tenant, will be protected and not adversely affected by the discovery requests.

In nonpayment proceedings, such as the instant one, tenants are allowed to assert rent overcharge defenses and counterclaims to defend against nonpayment proceedings, and in pursuit of the rent overcharge claims tenants can seek disclosure from the landlord.

As a result of the Housing Stability and Tenant Protection Act (HSTPA) of 2019, overcharge complaints were to be investigated by, "consider[ing] all available rent history which is reasonably necessary to make such determinations." 2019 McKinney's Session Law News of NY, Ch. 36, § 1 at Part F, § 6. The HSTPA, changed the analysis of rent overcharges, in that prior to 2019, rent overcharge claims were generally subject to a four-year statute of limitation, but events dating beyond the four-year statute of limitations could be considered – most notably to determine if the apt is rent regulated or to determine "whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date." *See Gersten v. 56 7th Ave LLC*, 88 AD3d 189, 928 NYS2d 515 (App. Div. 1st. Dept); *Matter of Grimm v. State of New York Div of Hous and Community Renewal Office of Rent Admin*, 15 N.Y.3d 358, 912 N.Y.S.2d 491 (2010).

The Court of Appeals, a year after the passage of the HSTPA, held in *Matter of Regina Metro Co., LLC* that, "the overcharge calculation amendments (of the HSTPA) cannot be applied retroactively to overcharges that occurred prior to their enactment." *See Austin v. 25 Grove St.*

LLC, 202 A.D.3d 429, 162 N.Y.S.3d 342 (App. Div. 1st. Dep't. 2022). As such, any overcharge claims, which were alleged to have occurred prior to the passage of the HSTPA, were to have the prior law applied. *Id.*

The Court in Regina specifically states, "The rule that emerges from our precedent in that, under prior law, review of rental history outside the four-year lookback period was permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate, and even then, solely to ascertain whether fraud occurred - not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations." *Regina Metropolitan Co., LLC v. New York State Division of Housing and Community Renewal*, 154 N.E.3d 972, 130 N.Y.S.3d 759 (2020).

In addition, Appellate Courts have held that when pleading an overcharge claim, it must be pled as common law fraud: "evidence of representation of material fact, falsity, scienter, reliance and injury." *Burrows v. 75-25 153rd Street, LLC*. 215 A.D.3d 105, 189 N.Y.S.3d 1 (App. Div. 1st Dep't. 2023).

But "at this juncture respondent need not prove fraud [...] ["[A"]lthough under CPLR 3016 (b) the complaint must sufficient detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud." *3612 Broadway Partners LLC vs. Mejia*, 79 Misc.3d 230, 189 N.Y.S.3d 406 (Civ. Ct. N.Y. Cty. 2023).

Here, Petitioner is incorrect that the exception to the four year rule only applies to fraudulent schemes to deregulate the apartment, as it also applies to fraudulent schemes to overcharge an already rent stabilized apartment. *See 435 Cent. Park W. Tenant Assn. v. Park Front Apts., LLC*, 183 A.D.3d 509, 125 N.Y.S.3d 85 (App. Div. 1st. Dept. 2020) ("We reject defendant's landlord's argument that the fraudulent exception applies only to a

fraudulent-scheme-to-deregulate case. In the event it is proven that defendant engaged in a fraudulent overcharge scheme to raise the pre-stabilization rent of each apartment, tainting the reliability of the rent on the base date, then the lawful rent on the base date for each apartment must be determined by using the default formula devised by DHCR…) *See also Montera v. KMR Amsterdam LLC*, 193 A.D.3d 102, 142 N.Y.S.3d 24 (App. Div. 1st. Dep't. 2021) ("The dissent ignores our recent decision in 435 Cent. W. Tent. Assn. v. Park Front Apts., LLC, 183 A.D.3d 509, 125 N.Y.S.3d 85 (1st Dept 2020). Citing to Regina, we stated that the fraud exception to the four-year lookback period applied both to a fraudulent scheme to deregulate and to a fraudulent overcharge scheme."

And though the public availability of a DHCR Rent Registration History may negate the reliance element in a fraud claim, as per the Appellate Division in *Burrows vs. 75-25 153rd Street, LLC*, the facts in the instant proceeding differ. In *Burrows*, the fraudulent act (the inflated legal rent) – which the landlord in Burrows claimed the tenants never paid – was explained and at all times made available on the rent registration history as well on the lease riders, which meant the tenant had notice from the outset. Here, Respondent alleges a collection of inaccuracies, including missing registrations (from 1984-1999), that are not explained on either the lease riders or rent registration history (the DHCR registration does not indicate why the registrations are missing), and which would not have put Respondent on notice.

Here Respondent has made out a colorable overcharge claim and pleads the elements of common law fraud, in its answer and motion, thereby asserting facts to establish a cause of action of a fraudulent scheme to overcharge. Respondent has pointed to numerous suspicious registration with unexplained increases exceeding the vacancy increase, missing registrations (1984-1999), lack of explanation concerning IAIs, and overlapping tenancies. Though Petitioner

offers a letter from TPU and checks and other documents alleging work in the apartment, the letter from TPU states that the letter is without prejudice to an overcharge claim and itself states that it is not dispositive or conclusive. *See also Tribbs vs. 326-338 E.100 LLC*, 215 A.D.3d 480, 188 N.Y.S.3d 18 (App. Div. 1st. Dept. 2023) ("The eight defense of res judicata and/or collateral estoppel, based on the TPU decision, was properly dismissed. "[R]es Judicata and collateral estoppel are applicable to give conclusive effect to the quasi-judical determinations of administrative agencies" (Ryan v. New York Tel. Co., 62 N.Y.2d 494, 499, 478 N.Y.S.2d 823, 467 N.E.2d 487 [1984]). The TPU process was not a quasi-judicial determination. TPU merely asked landlord to send it information; it did not give plaintiff an opportunity to be heard."

There is a need for the requested information, as the information sought goes directly to the overcharge claims alleged by Respondent, and which are in the exclusive control of Petitioner. The information sought is carefully tailored, and seeks leases, rent records and proof of MCIs and IAIs. Little to no prejudice is expected against Petitioner – Petitioner sued for the rent alleged and itself claims that the rent is properly registered. Finally, both parties are represented by counsel, which should minimize any potential prejudice.

As such, Respondent's motion is granted to the extent of Petitioner's counsel providing Respondent's counsel with a response to Respondent's document demand within forty-five days of service of this decision and a Notice of Entry. However, Petitioner's counsel shall not be required to comply/respond with item 12 of the Document Demand ("[a]ll rent records, including ledger books or computer records, showing rents charged and/or paid for units in the subject building for the Period…", as the demand is overbroad and does not apply to the subject apartment. To the extent that Petitioner does not have custody or control of the documents, it shall produce an affidavit from its agent stating such.

This matter is then adjourned to November 16, 2023 at 9:30am, Part A for all purposes.

CONCLUSION

For the reasons stated above, it is hereby ORDERED that Respondent's motion for disclosure is granted.

Hon. Alberto M. Gonzalez, HCJ

ALBERTO GONZALEZ
JUDGE, HOUSING COURT

Dated: New York, New York

September 11, 2023