

DeLeon v 560-568 Audubon Realty, LLC

2024 NY Slip Op 33695(U)

October 15, 2024

Supreme Court, New York County

Docket Number: Index No. 154546/2022

Judge: Emily Morales-Minerva

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

PRESENT: HON. EMILY MORALES-MINERVA PART **42M**

Justice

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INDEX NO. 154546/2022

INMACULADA DELEON, RUFINO DISLA, GRISAIDA
FERNANDEZ, IDALMI MERCADO,

MOTION DATE 04/03/2024

Plaintiffs,

MOTION SEQ. NO. 005

- v -

560-568 AUDUBON REALTY, LLC, HAYCO
CORPORATION, FRED HAY, ALEX HAY, ALFONSO
DEJESUS, RUBY ECHEVARRIA

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 154, 155, 156, 157, 158

were read on this motion to/for SUBPOENA DUCES TECUM.

APPEARANCES:

Schulte Roth & Zabel, LLP, New York, New York, (Robert J. Ward, Esq. and Alexandra J. Carlton, Esq., of counsel), for plaintiffs.

Rosenberg & Estis, P.C., New York, New York, (Howard W. Kingsley, Esq., of counsel), for defendants.

HON. EMILY MORALES-MINERVA:

In this action seeking damages for residential rent overcharges, INMACULADA DELEON, RUFINO DISLA, GRISAIDA FERNANDEZ, and IDALMI MERCADO, move (motion sequence 005), pursuant to CPLR § 2307,¹ for the issuance of a judicial subpoena

¹ CPLR § 2307 provides: "A subpoena duces tecum to be served upon a library, or a department or bureau of a municipal corporation or of the state, or an officer thereof, requiring the production of any books, papers or other things, shall be issued by a justice of the supreme court in the district in which the book, paper or other thing is located or by a judge of the court in which an action for which it is

duces tecum upon nonparty New York State Department of Housing and Community Renewal (DHCR). Defendants, 560-568 AUDUBON REALTY, LLC, HAYCO CORPORATION, FRED HAY, ALEX HAY, ALFONSO DEJESUS, and RUBY ECHEVARRIA, submit opposition to the motion. For the reasons set forth below, the court grants the motion in its entirety.

BACKGROUND

Plaintiffs, INMACULADA DELEON, RUFINO DISLA, GRISAIDA FERNANDEZ, and IDALMI MERCADO (tenants), are tenants in a residential apartment building located at 560-568 Audubon Avenue, New York, New York 10040 (building) (see NY St Cts Elec Filing [NYSCEF] Doc. No. 001, Complaint, at ¶2). Defendants, 560-568 AUDUBON REALTY, LLC, HAYCO CORPORATION, FRED HAY, ALEX HAY, ALFONSO DEJESUS, and RUBY ECHEVARRIA (defendants), are the owners and/or managers of said building. Each of the tenant's moved into the building between 2012 and 2017 after executing

required is triable. Unless the court orders otherwise, a motion for such subpoena shall be made on at least one day's notice to the library, department, bureau or officer having custody of the book, document or other thing and the adverse party. Such subpoena must be served upon such library, or such department or bureau of such municipal corporation or of the state or an officer having custody of the book, document or other thing and the adverse party at least twenty-four hours before the time fixed for the production of such records unless in the case of an emergency the court shall by order dispense with such notice otherwise required. Compliance with a subpoena duces tecum may be made by producing a full-sized legible reproduction of the item or items required to be produced certified as complete and accurate by the person in charge of such library, department or bureau, or a designee of such person, and no personal appearance to certify such item or items shall be required of such person or designee."

leases with defendants (see id. at ¶ 78, 112, 160, 172). The apartments of each of the tenants are allegedly subject to the Rent Stabilization Law (RSL) and Rent Stabilization Code (RSC) (see id. at ¶38). However, none of the tenants' initial or renewal leases stated that the units were rent-stabilized, nor were they accompanied by rent-stabilization riders.

Tenants commenced this action against defendants on May 26, 2022, and asserted eleven causes of action for, among other things, fraud (first cause of action), rent overcharge (fifth cause of action), willful rent overcharge (sixth cause of action), breach of warranty of habitability (seventh cause of action), order to correct (eighth cause of action) and breach of lease (ninth cause of action).

Defendants filed a pre-answer motion to dismiss (seq. no. 001) on August 17, 2022. The court (N. Bannon, J.S.C.) granted the motion, in part, and dismissed the second, third, fourth, tenth and eleventh causes of action of the complaint (see Decision and Order, dated December 1, 2023). The court also ordered defendants to file an answer as to the remaining causes of action for fraud, rent overcharge, willful rent overcharge, breach of warranty of habitability, order to correct, and breach of lease (see id.).

Pending the court's decision on defendants' motion to dismiss (seq. no. 001), on August 15, 2023, tenants filed a

motion (seq. no. 002) for the issuance of judicial subpoenas duces tecum upon the New York City Department of Buildings (DOB), the New York City Department of Housing Preservation and Development (DHPD), and the New York State Department of Housing and Community Renewal (DHCR). The court (N. Bannon, J.S.C.) denied the motion "for the reasons set forth in the opposition papers submitted by defendants [] and the denial is without prejudice to address the propriety of and need for the proposed subpoenas at the next scheduled discovery conference on November 2, 2023" (Decision and Order, dated September 15, 2023).

Thereafter, on January 3, 2024, defendants filed an answer with one counterclaim for attorneys' fees (see NYSCEF Doc. No. 62, Answer). Tenants filed a motion to dismiss (seq. no. 003) defendants' counterclaim, as well as a motion to compel (seq. no. 004). The undersigned denied tenants' motion to dismiss defendants' counterclaim, and granted, in part, tenants' motion to compel (see Decision and Order, dated April 30, 2024).

Now, tenants move (seq. no. 005) for the issuance of a judicial subpoena duces tecum upon DHCR for

"all documents and communications concerning the building, apartments, and/or defendants, including but not limited to those concerning rent registrations; inspections; complaints; potential or actual violations of any federal, state, and/or city housing regulations; reports of any remedial measures; or fines issued and/or paid; and all documents and communications between you and defendants relating to or concerning rent registrations, the building, apartments, and/or [tenants]" from September 23, 2009 to

present"

(NYSCEF Doc. No. 137, Proposed Subpoena Duces Tecum).

Tenants served DHCR with the instant motion and exhibits attached thereto (see NYSCEF Doc. No. 156, Affidavit of Service). Nonparty DHCR did not submit opposition to being subpoenaed.

However, defendants submit opposition to the subject motion, arguing that the requested subpoena duces tecum is "patently improper . . . and [is] not narrowly tailored" to tenants' complaint (NYSCEF Doc. No. 147, Affirmation in Opposition, at ¶49). Further, defendants contend that the court's prior decision and order (N. Bannon, J.S.C.) bars tenants' from seeking subpoenas against DOB, DHPD, and DHCR.

ANALYSIS

CPLR § 2307 provides that a party wishing to serve a judicial subpoena duces tecum on any governmental agency must afford the agency at least one day's notice to the issuance of the subpoena on legitimate grounds (see generally CPLR § 2307). Where such a subpoena is directed to any nonparty department, bureau, or agency of the state, it may be issued on behalf of a party only upon order of a court (see id.).

The scope of discovery in New York is broad, and discovery

from a nonparty should be directed when the party seeking discovery demonstrates that the disclosure sought is material and necessary in resolving the issues presented by the case (see Forman v Henkin, 30 NY3d 656, 661 [2018]; see generally CPLR § 3101). A judicial subpoena duces tecum may be issued "to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding" (Matter of Terry D., 81 NY2d 1042, 1044 [1993]). "The words, 'material and necessary', are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]; Kapon v Koch, 23 NY3d 32 [2014]).

At the outset, tenants' proposed subpoena directed at DHCR satisfies the notice requirements pursuant to CPLR §§ 2307 and 3101 (see NYSCEF Doc. No. 156, Affidavit of Service; see also NYSCEF Doc. No. 137, Proposed Subpoena Duces Tecum).

Further, tenants have established that the documents and records maintained by DHCR are material and necessary to the facts at issue in the instant proceeding (see Matter of Terry D., 81 NY2d at 1044). Specifically, tenants allege that defendants engaged in a fraudulent scheme by intentionally overcharging tenants, illegally increasing the rent in tenants'

apartments and other apartments in the building with the goal of deregulating the apartments and filing rent registrations with DHCR reflecting higher Legally Regulated Rent (LRR) and/or higher Preferential Rents (PR) than indicated on tenants' leases (see NYSCEF Doc. No. 001, Complaint, at ¶219).

DHCR's documents and records from 2009 through 2024 "are relevant to determine whether defendant engaged in a [decades long] fraudulent scheme to deregulate [tenants'] apartment and other apartments in the building" (Ioannou v 1 BK Street Corp., 203 AD3d 627, 627 [1st Dept 2022] citing Cent. Park W. Tenant Assn. v Park Front Apts., LLC, 193 AD3d 509, 510 [1st Dept 2011]); see also 435 Cent. Park W. Tenant Ass'n v Park Front Apts., LLC, 183 AD3d 509 [1st Dept 2020] [finding that fraudulent exception to the four-year lookback period applies to fraudulent scheme-to-deregulate and rent overcharge scheme]).

Conversely, defendants have failed to satisfy their burden that the subpoenaed documents are "utterly irrelevant to any proper inquiry" (Velez v Hunts Point Multi-Serv. Ctr., Inc., 29 AD3d 104, 112 [1st Dept 2006]; see Brookes v 157th St. Assocs., LLC, 75 Misc.3d 1215(A) [Sup Ct, NY Cnty 2022] [finding that defendants did not satisfy their burden of establishing that the subpoenaed documents from DHCR were utterly irrelevant given the allegations of defendants' illegal and fraudulent deregulation of plaintiffs' apartment]). Further, DHCR -- the subpoenaed

party -- submits no objection to producing the requested documents.

Finally, defendants' argument that the court (N. Bannon, J.S.C.) issued a "quash order" precluding tenants from seeking a subpoena against DHCR is an unfortunate misrepresentation. The decision and order (N. Bannon, J.S.C.) explicitly denied tenants' previous motion for a subpoena duces tecum without prejudice (see NYSCEF Doc. No. 49, Decision and Order, dated September 15, 2023) (emphasis added). While said order provides that tenants could raise the question again at a subsequent conference with the court (N. Bannon, J.S.C.), the subsequent conference was off record and defendants' recollection of what occurred therein -- unsupported by a subsequent order of the court (N. Bannon, J.S.C.) -- is not dispositive on this motion.

Accordingly, it is

ORDERED that tenants INMACULADA DELEON, RUFINO DISLA, GRISAIDA FERNANDEZ, and IDALMI MERCADO's motion (seq. no. 005) to issue a judicial subpoena duces tecum upon DHCR is granted; and it is further

ORDERED that tenants' are directed to submit the judicial subpoena duces tecum to the Court to be so-ordered within 10 days of this decision and order; and it is further

ORDERED that Note of Issue shall be filed within 90 days of Notice of Entry of this decision and order; and it is further

ORDERED that the parties appear for a virtual status conference in Part 42, on January 13, 2025 at 11:30 A.M.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

10/15/2024
DATE

Emily Morales-Minerva
EMILY MORALES-MINERVA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE