

Russo v South 2nd Residence LLC

2025 NY Slip Op 30539(U)

February 10, 2025

Supreme Court, Kings County

Docket Number: Index No. 521051/2023

Judge: Anne J. Swern

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At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 10th day of February 2025

PRESENT: HON. ANNE J. SWERN, J.S.C.

MICHAEL RUSSO,

Plaintiff(s),

-against-

SOUTH 2nd RESIDENCE LLC,

Defendant(s).

ORDER

Index No.: 521051/2023

Calendar No.: 43&44

Motion Seq.: 001&002

Recitation of the following papers as required by CPLR 2219(a):

	Papers Numbered
MS001 Plaintiff's Notice of Motion, Affirmation, Affidavits and Exhibits (NYSCEF 8-18).....	1, 2
Affirmation in Opposition (NYSCEF 69).....	3
Reply Affirmation and Opposition to Cross-Motion (NYSCEF 70).....	4
MS002 Defendant's Notice of Cross-Motion, Affirmation Affidavits and Exhibits (NYSCEF 22-67).....	5, 6
Affirmation in Opposition (NYSCEF 70).....	7
Reply Affirmation and Exhibits (NYSCEF 71-74).....	8

Upon the foregoing papers and after oral argument, the decision and order of the Court is as follows:

Introduction

Plaintiff commenced this action asserting four causes of action: seeking a judgment as follows: (1) a declaration that his apartment is Rent Stabilized and he is entitled to a Rent Stabilized lease; (2) enjoining defendant from evicting plaintiff as a "free market tenant" until plaintiff's tenancy rights are adjudicated; (3) awarding treble damages for rent overcharge; and

(4) awarding plaintiff attorneys' fees pursuant to Real Property Law § 234 (NYSCEF 20, p.7). In its answer, defendant has asserted a counterclaim for an award of legal fees, costs and expenses associated with the defense of this action in amount no less than \$3,000.00 (NYSCEF 57, p.3, ¶16). Both parties have moved for summary judgment in their favor.

Factual Allegations

Plaintiff is a tenant in defendant's building known as 199 Lee Avenue, Brooklyn, New York (Building) pursuant to a lease agreement since October 2015. In 2008, defendant undertook a substantial rehabilitation of the building located in an Anti-Harassment Zone (Zone) in Greenpoint-Williamsburg (ZR §23-013).

Plaintiff alleges that defendant's predecessor in title (the predecessor) did not obtain a Certificate of No Harassment from the New York City Department of Housing Preservation and Development (DHPD) that is required before substantially renovating a building within the Zone. Instead, defendant filed a false certification with the New York City Department of Buildings claiming an exemption from the need for the Certificate of No Harassment because it was a multiple dwelling *after* 1974 and not covered by the Loft Law. However, the building was in fact occupied as a multiple dwelling *before* 1974, registered with the New York City Department of Housing and Community Renewal (DHCR) and subject to Rent Stabilization. Based on the predecessor's illegal and fraudulent acts, the building was improperly removed from the protections of Rent Stabilization. Notably, the last registered rent with DHCR in 1989 was \$202.99; the predecessor did not register any rents from 1990 through 2008 when the building was renovated. In 2009, the predecessor filed a registration with DHCR that the building was permanently exempt from Rent Stabilization. Defendant cannot insulate itself from

liability by claiming it was unaware of its predecessor's acts.¹ Therefore, plaintiff seeks actual damages of \$274,720.48 for rent overcharge from 8/2017 through 5/2024² and treble damages of \$549,440.96, for a total of \$824,161.44.³

Defendant alleges that the substantial renovation is irrelevant even if it was reason for building being deregulated (NYCEF 66, ¶¶58 and 59). The apartment became "automatically" deregulated when the rent-controlled tenant "Mary," who resided in the apartment since 1971, allegedly vacated it in 2008.⁴ However, when she died in August 2015, her death certificate lists the apartment as her residence.⁵ It is further alleged that the apartment remained vacant during the renovations⁶ until the next tenant took occupancy in 8/2009 with an initial rent of \$3,200.00.⁷ Defendant alleges that the filing by the prior owner's architect that the building was deregulated due to the substantial rehabilitation was a "clerical error." The architect "did not purposely check the wrong box on the Department of Building's form; the architect mistakenly "check[ed] the wrong box."⁸ "This mistake was rectified by [the] Prior Owner and DOB through the various inspections, certifications and finally the issuance of the Letter of Completion by DOB."⁹

Standard for Summary Judgment

When deciding a summary judgment motion, the Court's role is solely to identify the existence of triable issues, and not to determine the merits of any such issues (*Vega v Restani*

¹ *see* Complaint, NYSCEF 20 and plaintiff's affidavit, NYSCEF 9

² Plaintiff's damages are calculated from 2017 based on the six year statute of limitations (NYSCEF 18, p.9).

³ NYSCEF 9, ¶8 (Plaintiff has calculated the damages based on the Orders issued by the New York City Rent Guidelines Board [NY10-14sSCEF 16]). Based on these rent guidelines, plaintiff's rent as of 10/2016 should have been \$764.44 (NYSCEF 18, p.9), instead of \$4,050.00 [8/2017 to 6/2020], \$4,000.00 [7/1/2020 to 11/2022], and \$4,600.00 [from 12/2022 to 5/2024] (NYSCEF 12 and NYSCEF 18, pp.9 and 10).

⁴ NYSCEF 66, ¶¶10-14, 19

⁵ NYSCEF 35

⁶ NYSCEF 66, ¶¶27, 34, 37, 50

⁷ NYSCEF 66, p.6, ¶38.

⁸ NYSCEF 66, ¶¶42, 63

⁹ NYSCEF 66, ¶63

Construction Corp., 18 NY3d 499, 505 [2012]) or the credibility of the movant's version of events (see *Xiang Fu He v Troon Management, Inc.*, 34 NY3d 167, 175 [2019] [internal citations omitted]). The Court views the evidence in the light most favorable to the nonmoving party, affording them the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Shop & Stop, Inc.*, 65 NY2d 625, 626 [1985]). The motion should be denied where the facts are in dispute, different inferences may be drawn from the evidence, or the credibility of the witnesses is in question (see *Cameron v City of Long Beach*, 297 AD2d 773, 774 [2d Dept. 2002]). The motion must also be denied if the movant fails to establish a *prima facie* entitlement to summary judgment by eliminating any material issue of fact from the case (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 861, 853 [1985]). The failure to do so "requires a denial of the motion, regardless of the sufficiency of the opposing papers (*id.*).

Based on the record, both motions for summary judgment are denied with leave to renew after the completion of discovery.

Discussion

Defendant has failed to establish a *prima facie* entitlement to summary judgment (*id.*). The statements in movant's affidavit are inconsistent with the evidence and, therefore, do not remove all material issues of fact (*id.*). Defendant's statements that Mary vacated the apartment in 2008 are without foundation. The death certificate in evidence establishes that her residence at the time of her death in 2015 was the apartment at issue. Additionally, defendant does not provide the lease for the tenant who allegedly took occupancy in 2009. Defendant only provided a print-out of its internal records (NYSCEF 48-49). Plaintiff must have the right to explore these records in a deposition. Without this lease, there is a question of fact whether Mary vacated the apartment 2008.

Defendant's motion also fails because the affidavit summarily opines that because the Department of Buildings issued a Letter of Completion (NYSCEF 45) this remedied the failure to obtain the necessary Certificate of No-Harassment from a separate agency, the DHPD. Defendant provides no legal authority for this argument. Further, the bulletins from DHCR (NYSCEF 53 and 54) do not establish that the previous owner was exempt from filing a certificate of No Harassment because either (1) 75% of the building-wide and individual accommodation systems were replaced or (2) the rehabilitation was necessary because the building was in a substandard or seriously deteriorated condition (NYSCEF 54). The affidavit does not establish either criterion.

Accordingly, plaintiff's motion for summary judgment must also be denied since there are questions of fact of whether defendant meets either criterion in the DHCR bulletins for an exemption from the Certificate of No-Harassment to permit the deregulation of the building.

The Court has considered the parties' remaining contentions and finds that any determination must await the outcome of discovery.

Accordingly, it is hereby

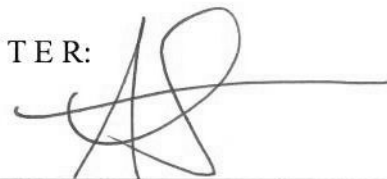
ORDERED that plaintiff's motion and defendant's cross-motion for summary judgment are denied in their entirety, and it is further

ORDERED that plaintiff shall file a Request for a Preliminary Conference within 30 days of entry of this Order in NYSCEF.

This constitutes the decision and order of the Court.

For Clerks use only: MG _____ MD _____ Motion seq. # _____

ENTER:



Hon. Anne J. Swern, J.S.C.

Dated: 2/10/2025