

Tomic v 92 E. LLC
2016 NY Slip Op 30911(U)
May 17, 2016
Supreme Court, New York County
Docket Number: 151152/2015
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: Part 55

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 LISA TOMIC and GORAN TOMIC,

Plaintiffs,

Index No. 151152/2015

-against-

DECISION/ORDER

92 EAST LLC,

Defendant.

-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiffs commenced the instant action seeking, *inter alia*, reimbursement for alleged rent overcharges. Plaintiffs then moved for an Order pursuant to CPLR § 2221 granting them leave to renew a decision issued by this court which denied both plaintiffs and defendant summary judgment and upon renewal, granting plaintiffs’ motion for summary judgment. Thereafter, this court issued a decision on plaintiffs’ renewal motion. However, the court now recalls that decision and upon further consideration, decides plaintiffs’ motion as set forth below.

The relevant facts are as follows. Defendant is the current landlord and owner of a residential apartment building located at 92 East Broadway, New York, NY 10002 (the “Building”) having purchased the building on or about February 20, 2014. Plaintiffs are the current tenants of Apartment 4 (the “Apartment”) in the Building. Plaintiffs first entered into possession of the Apartment in May 2007 pursuant to a fair market residential lease agreement

with defendant's predecessor-in-interest, The Third Dynasty Realty Corp. ("Dynasty"), commencing May 1, 2007 and ending April 30, 2008 with a rent in the amount of \$1,700.00 per month. Over the next three years, plaintiffs' rent remained stagnant at \$1,700.00 per month. Plaintiffs then entered into a one-year lease commencing May 1, 2011 and ending April 30, 2012 with a rent in the amount of \$1,800.00 per month. Over the next two years, plaintiffs' rent remained stagnant at \$1,800.00 per month. Plaintiffs then entered into another one-year lease with defendant commencing May 1, 2014 and ending April 30, 2015 with a rent in the amount of \$1,872.00 per month.

Prior to plaintiffs' tenancy, the Apartment was registered as rent stabilized with a monthly rent of \$267.23. According to defendant, after a former tenant vacated the Apartment in 2007, Dynasty, the former owner of the Building, retained the services of two construction companies at the cost of over \$70,000 to renovate the Apartment. Defendant further contends that these renovations coupled with two statutory rent increases increased the legal regulated rent for the Apartment beyond \$2,000.00. Thus, the Apartment was deregulated in 2007 due to a high rent vacancy.

On or about February 3, 2015, plaintiffs commenced the instant action alleging that the Apartment is still subject to the Rent Stabilization Law ("RSL"), that no rent registrations were filed since 2007, in violation of the RSL, and seeking to recover a rent overcharge calculated from May 1, 2007, the beginning of their tenancy in the Apartment, treble damages and attorney's fees. Thereafter, both the plaintiffs and defendant moved for summary judgment. Defendant argued that it was entitled to summary judgment on the ground that the Apartment is permanently exempt from rent stabilization as a result of the high rent vacancy decontrol that

occurred prior to May 1, 2007. Further, defendant argued that it was entitled to summary judgment dismissing this action as the rent increases at issue are beyond the four-year statute of limitations for such claims. Plaintiffs disputed the deregulation of the Apartment in 2007. Specifically, plaintiffs challenged defendant's contention that approximately \$70,000 worth of renovation work was done to the Apartment in 2007 to increase the legally allowable rent to over \$2,000 per month.

In a decision dated July 23, 2015, this court denied both motions for summary judgment (the "Decision"). This court found that the action was not time-barred because the RSL's four-year statute of limitations is limited to calculating a rent overcharge claim and does not apply when the court is determining whether an apartment is regulated in the first instance and that there were triable issues of fact, including whether the Apartment is exempt from rent stabilization based on the high rent vacancy decontrol said to have occurred in 2007. Plaintiffs then moved for an Order pursuant to CPLR § 2221(e) granting them leave to renew this court's Decision and upon renewal, granting plaintiffs' motion for summary judgment. In a decision dated April 13, 2016, this court granted plaintiffs' motion insofar as it granted plaintiff leave to renew this court's Decision and upon renewal, granted plaintiffs summary judgment on their first cause of action to collect rent overcharges from May 1, 2007, the beginning of plaintiffs' tenancy in the Apartment; granted plaintiffs summary judgment on their third cause of action for attorney's fees and interest; and denied plaintiffs summary judgment on their cause of action for treble damages. However, the court now recalls its decision and upon further consideration, decides plaintiffs' motion as set forth below.

A motion for leave to renew "shall be based upon new facts not offered on the prior

motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and...shall contain reasonable justification for the failure to present such facts on the prior motion.” CPLR § 2221(e) (2)-(3).

Plaintiffs assert that since the Decision was issued, there has been a change in the factual circumstances of the case. Specifically, plaintiffs have provided a letter dated December 29, 2015 (the “December 2015 Letter”) from defendant’s counsel to plaintiffs’ counsel pursuant to which defendant offered to reimburse plaintiffs for rent overcharges in the amount of \$741.00 for the years 2011 through 2015 based on the fact that “to date [they] have not received documentation from the prior owner to substantiate [the alleged apartment improvements that occurred prior to defendant’s purchase of the property and prior to plaintiffs’ occupancy of the subject premises], as the improvements occurred nearly a decade ago.” Thus, the December 2015 Letter informed plaintiffs that “[w]ithout prejudice to any of Defendant’s defenses in the referenced action, the Defendant has retroactively registered the rents charged to Plaintiffs for the years 2011 to 2015 at the Division of Housing and Community Renewal (“DHCR”),” thereby conceding that the Apartment is regulated under the RSL.

As an initial matter, as the court finds that plaintiffs have established new facts which were not offered on their prior motion for summary judgment and have provided a reasonable justification for the failure to present such facts on the prior motion, plaintiffs’ motion for leave to renew the Decision is granted. The court next turns to that portion of plaintiffs’ motion for an Order, upon renewal, granting plaintiffs summary judgment on their first cause of action seeking to recover a rent overcharge. It is well-settled that “[r]ent overcharge claims are generally subject to a four-year statute of limitations.” *Matter of Grimm v. State of N.Y. Div. of Hous. &*

Community Renewal Off. of Rent Admin., 15 N.Y.3d 358, 364 (2010). Pursuant to RSL § 26-516(a)(2),

[A] complaint under this subdivision shall be filed...within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed...This paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this subdivision.

This limitations period was codified in CPLR § 213-a, which similarly provides that:

An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action.

“To effectuate the purpose of the four-year limitations period, in rent overcharge cases DHCR regulations, as relevant here, set the ‘legal regulated rent’ as the rent charged on the ‘base date,’ which is the ‘date four years prior to the date of the filing of [the overcharge] complaint’ plus any subsequent lawful increases.” *Matter of Grimm*, 15 N.Y.3d at 365, citing 9 NYCRR 2520.6(e), (f)(1) and 2526.1(a)(3)(i). However, the Court of Appeals has carved out an exception to the rule that a court may not review the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action in order to calculate the amount of an overcharge. Specifically, the Court of Appeals held that “where the overcharge complaint alleges fraud...[there is] an obligation to ascertain whether the rent on the base date is a lawful rent.” *Id.* at 366. The Court of Appeals explained

that

Generally, an increase in the rent alone will not be sufficient to establish a “colorable claim of fraud,” and a mere allegation of fraud alone, without more, will not be sufficient to require [further inquiry]. What is required is evidence of a landlord’s fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization. [Thus], the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date.

Id. at 367. Indeed, the Court of Appeals has explained more recently in a case involving alleged rent overcharges based on certain alleged improvements to the property that the fraud exception will not be applied where the “tenant fail[s] to set forth sufficient indicia of fraud to warrant consideration of the rental history beyond the four-year statutory period.” *Matter of Boyd v. New York State Div. of Hous. & Community Renewal*, 23 N.Y.3d 999, 1000-01 (2014).

In the instant action, this court finds that upon renewal, plaintiffs are entitled to summary judgment on their first cause of action for reimbursement of a rent overcharge, which shall be calculated from the base date of February 3, 2011, four years prior to the commencement of the instant action. As an initial matter, it is undisputed that plaintiffs commenced the instant action seeking to recover a rent overcharge with the filing of the complaint on February 3, 2015. Thus, pursuant to the four-year statute of limitations set forth in the CPLR and the RSL, plaintiffs are only entitled to collect any overcharges which occurred within four years prior to the commencement of the overcharge proceeding, which would be the base date of February 3, 2011. Further, defendant has conceded in the December 2015 Letter and in opposition to plaintiffs’ motion that it did overcharge plaintiffs during the four-year period at issue in this case. Thus, at it is undisputed that plaintiffs were at least overcharged during the four years prior to

commencing the instant action, plaintiffs are entitled to summary judgment on their first cause of action.

However, the court declines to review the rental history of the Apartment prior to the base date of February 3, 2011 in order to determine whether the amount of the rent on the base date was lawful on the ground that plaintiffs have failed to sufficiently establish a colorable claim of fraud. Initially, plaintiffs have failed to plead fraud in the complaint as required by the Court of Appeals in *Matter of Grimm*. Indeed, the complaint merely asserts a rent overcharge claim based on defendant's failure to file rent registration statements for the years 2007 to the present and fails to include any allegations of fraud whatsoever. Even if the court were to consider any allegations of fraud made in plaintiffs' motion to renew, the court would still find that plaintiffs have failed to establish a colorable claim of fraud as they have failed to provide any "evidence of [defendant's] fraudulent deregulation scheme to remove [the] [A]partment from the protections of rent stabilization." *Matter of Grimm*, 15 N.Y.3d at 367. In their moving papers, plaintiffs allege that Dynasty, the prior owner and not defendant, wrongfully deregulated the Apartment in 2007 and failed to register the Apartment since 2006, which deprived the plaintiffs of any knowledge of the proper rent; that defendant perpetuated the same scam by claiming that the Apartment was permanently exempt from rent stabilization; and that Dynasty and defendant claimed bogus renovations performed to the Apartment in 2007. However, plaintiffs fail to provide any evidence, nor do they allege, that defendant knew that the Apartment was unlawfully deregulated when defendant purchased the Building and still continued to charge plaintiffs improper rent or that defendant knew, prior to December 2015, that it could never prove that improvements to the Apartment were actually made. It is undisputed

that defendant bought the Building in 2014 after plaintiffs had already been residing in the Apartment for almost seven years. Defendant has affirmed that at that time, it understood that certain improvements totaling \$70,000 had been made to the Apartment by Dynasty and thus believed, in good faith, that the Apartment was no longer regulated under the RSL. Further, defendant has affirmed that it was only when it attempted to obtain the records of the alleged improvements from Dynasty for purposes of the instant litigation that it realized that Dynasty had no such records. Plaintiffs have failed to provide any evidence to the contrary. Thus, as plaintiffs have failed to establish a colorable claim of fraud, the court declines to review the rental history of the Apartment prior to the base date of February 3, 2011 in order to determine whether the amount of the rent on the base date was lawful.

Additionally, the court finds that upon renewal of this court's Decision, plaintiffs are entitled to summary judgment on their third cause of action for attorney's fees and interest pursuant to RSL § 26-516. Pursuant to RSL § 26-516(a)(4), "[a]n owner found to have overcharged may be assessed the reasonable costs and attorney's fees of the proceeding and interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five thousand four of the civil practice law and rules." As this court has found that plaintiffs have been overcharged by defendant, plaintiffs are entitled to costs and attorney's fees incurred in the instant proceeding as well as interest at the statutory rate from February 3, 2011 until December 29, 2015, the date of the December 2015 Letter pursuant to which defendant attempted to resolve the action by providing plaintiffs a check for the alleged overcharge amount.

However, the court finds that upon renewal of this court's Decision, plaintiffs are not

entitled to summary judgment on their cause of action for treble damages against defendant. Pursuant to RSL § 26-516(a), treble damages shall be imposed against an owner upon a finding of a rent overcharge unless the owner establishes by a preponderance of the evidence that the rent overcharge was not willful. Treble damages amount to a substantial penalty, the purpose of which is to punish owners who deliberately and systematically charge tenants unlawful rents. *See H.O. Realty Corp.*, 46 A.D.3d at 103. The burden is on the owner to rebut the presumption of willfulness. *See Yorkroad Associations v. DHCR*, 19 A.D.3d 217 (1st Dept 2005).

In the instant action, the court finds that plaintiffs are not entitled to summary judgment on their cause of action for treble damages as there is an issue of fact as to whether the rent overcharge was “willful” under the law. Although it is now undisputed that the Apartment is regulated under the RSL and the court has found, and defendant has not disputed, that plaintiffs were overcharged during a portion of their tenancy which occurred in the four years prior to the commencement of the instant action, it is not clear from the record before the court that defendant willfully overcharged plaintiffs. As this court has already explained, there is no evidence in the record before the court that defendant knew, at the time it purchased the building, that improvements to the Apartment were not actually made or that the Apartment was unlawfully deregulated. Indeed, defendant has affirmed that it was only when it attempted to obtain the records of the alleged improvements from the prior owner for purposes of the instant litigation that it realized that the prior owner had no such records. Thus, it has not been established, as a matter of law, that defendant “willfully” overcharged the plaintiffs. At such time when plaintiffs’ claim for treble damages is resolved, this court will send the action to an inquest to determine the exact amount of the rent overcharge, attorney’s fees and interest to

which plaintiffs are entitled.

Accordingly, plaintiffs' motion is resolved to the extent set forth herein. This constitutes the decision and order of the court.

Dated: 5/17/16

Enter: _____

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J.S.C.
CYNTHIA S. KERN
J.S.C.