SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2

Justice

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JOCELYN NOLTE

Plaintiff,

- v -

BRIDGESTONE ASSOCIATES LLC,

Defendant.

INDEX NO. 160321/2014

MOTION DATE

MOTION SEQ. NO. 001

DECISION, ORDER and JUDGMENT

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The following e-filed documents, listed by NYSCEF document number 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62,

were read on this application to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is **granted in part** as follows.

Plaintiff Jocelyn Nolte a/k/a Jocelyn Socias commenced this action on October 22, 2014 against her landlord, defendant Bridgestone Associates LLC, seeking a declaratory judgment that her apartment is subject to rent stabilization and seeking monetary damages in the form of rent overcharges, treble damages, and attorneys' fees. Plaintiff now moves for summary judgment, pursuant to CPLR 3212, dismissing defendant's affirmative defenses and counterclaims and granting summary judgment in her favor on the first, second and fourth causes of action in the complaint. Although defendant admits that plaintiff's apartment is presently subject to rent stabilization, defendant denies that there has been any rent overcharge and opposes the motion in all other respects.

FACTUAL ALLEGATIONS AND CLAIMS

The subject apartment, number 5B at 640 Fort Washington Avenue, New York, New York, was initially registered with the New York State Division of Housing and Community Renewal (DHCR) as rent-stabilized in 1984. The initial rent-stabilized rent was $417.11. Between 1999 and 2000, when the long-term tenant of record moved out, the rent was raised from $623.67 to $1,400. Plaintiff moved into apartment 5B in March 2005 as the roommate of the then tenant of record, Marisa Scirocco. At that time, the monthly rent was $1,862.34. On September 1, 2006, Scirocco renewed the lease for two years at a monthly rental of $1,964.77. On September 1, 2008, plaintiff and Scirocco, as co-tenants, signed a one-year rent-stabilized lease for the apartment at a monthly rent of $2,200.[1] In the meantime, defendant purchased the building, built prior to 1947 and consisting of 66 rental apartments, sometime in 2007.

In 2009, the apartment was registered with DHCR as permanently exempt from rent stabilization based on "high rent vacancy," effective retroactively to September 1, 2008. On September 1, 2009, defendant signed a new, non-rent-stabilized lease, with plaintiff only, at the same monthly rent of $2,200. Over the next five years, plaintiff's rent increased as follows:

[1] The lease states that the monthly legal regulated rent was $2,303.69.

October 2010 to August 2011	$2,300 per month
September 2011 to August 2012	$2,400 per month
September 2012 to August 2013	$2,475 per month
September 2013 to August 2014	$2,575 per month
September 2014 to August 2015	$2,650 per month

Plaintiff also paid $1,764.95 per month for the months of September and October 2015. She stopped paying rent in November 2015 because the New York City Department of Housing and Preservation (HPD) issued 13 violations on her apartment, including two "C" (immediately hazardous) violations for lead paint and a "C" violation for a defective window guard. However, plaintiff admits that the lead paint condition was corrected by HPD in January 2016.

On October 22, 2009, the Court of Appeals ruled in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270) (*Roberts*) that a landlord who receives J-51 tax abatements cannot take advantage of the high rent decontrol provisions of the Rent Stabilization Law. By order dated November 23, 2009, defendant was specifically advised by DHCR, in connection with a rent overcharge complaint by another tenant in the same building, of the *Roberts* decision. On August 18, 2011, the First Department held that *Roberts* applied retroactively (*Gerstein v 56 7th Ave. LLC*, 88 AD3d 189, 207 [1st Dept 2011]). It is undisputed that the defendant, and the prior owner of the building, were receiving benefits under New York City's J-51 tax abatement and exemption program from 2003 through June 2013.

Plaintiff commenced this action on October 22, 2014. The complaint alleges four causes of action. The first cause of action seeks a declaratory judgment that plaintiff's apartment is covered by the provisions of the Rent Stabilization Law and the Rent Stabilization Code. The second cause of action alleges that plaintiff has been overcharged in her rent and security deposit in violation of the Rent Stabilization Law and Code and seeks a judgment for the amount of the overcharge since October 22, 2010 to the present, plus treble damages, interest, costs and reasonable attorneys' fees. The third cause of action alleges that defendant has engaged in deceptive acts and/or practices in violation of General Business Law § 349. In the fourth cause of action, plaintiff seeks to recover her costs, expenses and reasonable attorneys' fees.

Defendant's answer asserts the following affirmative defenses: (1) failure to state a cause of action; (2) plaintiff has not been overcharged; (3) defendant has not violated the Rent Stabilization Law or Code; (4) waiver; (5) estoppel and laches; and (6) statute of limitations. Defendant also counterclaims for an order directing plaintiff to pay fair market use and occupancy on a monthly basis and for an award of attorneys' fees pursuant to the parties' lease.

On January 5, 2017, the same day that defendant filed its papers in opposition to this motion, late registration statements for the apartment were filed with DHCR covering the years 2010-2016.

DISCUSSION

Rent Stabilization

Defendant admits that the apartment is subject to rent stabilization because the building received J-51 tax abatements between 2003 and June 30, 2013. Thus, plaintiff is entitled to summary judgment on her first cause of action. The apartment was illegally deregulated on September 1, 2008, and plaintiff was entitled to a rent-stabilized lease when she rented the apartment solo on September 1, 2009. As a tenant in occupancy at the time an apartment was improperly deregulated by a landlord receiving J-51 benefits, plaintiff retains her rent-regulated status for the duration of her tenancy (*see 72A Realty Assoc. v Lucas*, 101 AD3d 401, 401-402 [1st Dept 2012]).

Base Date Rent

Plaintiff contends that the base date for the calculation of rent is October 22, 2010, four years prior to October 22, 2014, when this action was commenced by the filing of a summons with notice. Defendant does not challenge this date (*see* Rent Stabilization Law, Administrative Code of the City of NY § 26-516 [a]; CPLR 213-a). The amount of the base date rent is, however, the subject of much dispute.

In plaintiff's view, because the rent charged on the base date of October 22, 2010 [$2,300] was an illegal market rent, that amount cannot be used for the purposes of determining the base date rent. Plaintiff argues that, due to defendant's repeated acts of fraud, the entire rental history of plaintiff's apartment is not reliable, and this Court must calculate the legal rent pursuant to DHCR's default formula. DHCR's rent rolls show that

the lowest stabilized rent for a comparable apartment in the building, as of September 1, 2008 (the date plaintiff became a tenant of record), was $963.27 per month, and, thus, plaintiff contends that the base date rent should be set and frozen at that amount.

Defendant contends that the base date rent is $2,200, and filed registration statements with DHCR in January 2017 utilizing that rental amount. Defendant argues that, under the circumstances presented herein, it is appropriate to examine the last-stabilized lease before the apartment was deregulated. The apartment's two-year renewal lease immediately preceding plaintiff's initial lease was executed by Marisa Scirocco on September 1, 2006 at a registered rent-stabilized rent of $1,964.77. The then building owner subsequently charged a vacancy increase to plaintiff and her co-tenant Marisa Scirocco on September 1, 2008 in the amount of $2,303.69, but collected a lower preferential rent of $2,200. Since, in the next lease to plaintiff as the sole tenant of the apartment, her rent was $2,200, defendant argues that this amount should be considered the legal regulated rent for purposes of calculating the base date rent and future rent increases. Defendant denies that it committed any fraud, and challenges plaintiff's argument that the base date must be frozen up until the present time.

CPLR § 213-a and Rent Stabilization Law § 26-516 provide that a rent overcharge claim is subject to a four-year statute of limitations. Thus, a rent overcharge claim is calculated using the legal regulated rent in effect on the "base date," i.e., the date four years prior to the filing of the complaint, plus any lawful increases and adjustments (Rent Stabilization Code, 9 NYCRR § 2520.6 [f]; Rent Stabilization Law, Administrative Code of the City of NY § 26-516 [a] [2]). Pursuant to CPLR § 213-a, this Court is precluded

from examining any rental history of the unit prior to the four-year period immediately preceding the commencement of the action.

However, where a rent overcharge complaint alleges fraud, the court must look beyond the four-year base date and examine the entire rental history to "ascertain whether the rent on the base date is a lawful rent" (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366 [2010]). Where a court finds that no reliable rent records exist and that fraud has tainted the base rent, it must employ the default formula to set the proper base rent (*Thorton v Baron*, 5 NY3d 175, 181 [2005]; *Matter of Grimm*, 15 NY3d at 367).

In *72A Realty Associates v Lucas* (101 AD3d at 403), the First Department held that, where an owner improperly deregulated a unit in a building that was receiving J-51 tax benefits, and the record failed to establish the validity of the rent increase that brought the rent-stabilized amount above the regulated threshold amount, the court had to disregard the free market lease amount in effect on the four-year base date and must instead review "any available record of rental history necessary to set the proper base date rate."

In the case at bar, plaintiff contends that DHCR's registration history for the apartment shows a large and unexplained jump in the rent from $623.67 per month back in 1999 to $1,400 per month in 2000, nearly a 125% increase (*see* Languedoc affirmation, Ex. G). Plaintiff contends that this increase has never been explained by defendant and that defendant ignored her requests for documentation to substantiate any individual apartment improvements (IAIs). Plaintiff submits and relies on an affidavit from an independent renovation contractor who inspected the apartment in November 2014.

Plaintiff's expert avers that he did not find any evidence of any renovation work at all that might have been performed in the apartment to justify such an increase in rent, such as new windows, appliances, and flooring, or electrical work (Leahy aff, ¶¶ 5, 18). Indeed, defendant offers no evidence to challenge plaintiff's claim of a fraudulent increase in rent by the prior owner in 2000.

As the Court of Appeals noted in *Matter of Grimm*, the mere fact that a bump in an apartment's rent occurred in the past from alleged IAIs to the apartment authorized by Rent Stabilization Law § 26-511 (c) (13) is not enough to establish a colorable claim of fraud to avoid the application of the four-year statute of limitations (15 NY3d at 367; *see also Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014], *reversing* 110 AD3d 594 [1st Dept 2013]). However, the evidence in *Matter of Boyd* consisted solely of a letter by the tenant containing her own personal observations of the lack of improvements to the apartment (110 AD3d at 611). Here, in contrast, the plaintiff has offered the detailed and unrefuted affidavit of a contractor familiar with the cost of renovation projects in New York City.

In addition, defendant offers no excuse or explanation for its failure to correct the 2009 registration statement listing plaintiff's apartment as permanently exempt due to high-rent vacancy, or for its failure to file registrations for the years 2010-2016 until January 2017, almost two years and three months after plaintiff instituted this overcharge action, and many years after the decision of the Court of Appeals in *Roberts*. The undisputed evidence is that defendant was specifically notified of the *Roberts* decision by DHCR in an order dated November 23, 2009 (*see* Languedoc affirmation, Ex. K). Defendant also

fails to contradict plaintiff's evidence that, between 2007 and 2013, it deregulated 30 other apartments in the same building pursuant to luxury deregulation and continues to treat those apartments as unregulated. Thus, the evidence establishes a blatant attempt to circumvent the Rent Stabilization Law. Under these circumstances, it is appropriate for the court to examine the entire rent history of the apartment to determine the legality of the base date rent (*Altschuler v Jobman 478/480, LLC*, 135 AD3d 439, 440-441 [1st Dept 2016]). Given the unreliability of the rental history since 1999, this Court finds that it is appropriate to apply DHCR's default formula, as plaintiff urges this court.

Plaintiff contends, pursuant to Rent Stabilization Code § 2526.1 (g), that the base date rent should be established as the lowest stabilized rent for a comparable apartment in the building *on the date plaintiff moved into the apartment*. However, the Court of Appeals has repeatedly ruled that "[t]he default formula 'uses the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building *on the relevant base date*'" (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d at 366 n 1, quoting *Thorton v Baron*, 5 NY3d at 180, n 1; *see also Conason v Megan Holding, LLC*, 25 NY3d 1, 9-10 [2015]).

The base date rent is, therefore, the lowest stabilized rent for a comparable apartment in the building on October 22, 2010. The rent records submitted to the court show that the lowest rent for any apartment in the "B" line on that date was $1,023.27 per month (*see* Languedoc affirmation, Ex. L at 53). Plaintiff's rent must also be frozen in that amount due until defendant files corrected registration statements with DHCR (*see* Rent Stabilization Law, Administrative Code of the City of NY § 26-517 [e]; *Altschuler v*

Jobman 478/480, LLC, 135 AD3d at 441, citing *Matter of Hargrove v Division of Hous. & Community Renewal*, 244 AD2d 241 [1st Dept 1997]).

An award of treble damages pursuant to Rent Stabilization Law § 26-516 (a) and Rent Stabilization Code § 2526.1 (a) is also warranted. Once an overcharge has been established, the burden shifts to the landlord to prove, by a fair preponderance of the evidence, that the overcharge was not willful (*see Matter of H.O. Realty Corp. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 103, 107 [1st Dept 2007]). Defendant, having admittedly been on notice of *Roberts* since November 2009, has failed to prove that its continued failure to deny plaintiff her rent-stabilized status, its failure to register the apartment with DHCR as rent-stabilized until January of this year, and its continuing deregulation of other apartments in the building, were not willful or were actions taken in good faith.

Offset for Unpaid Rent

Plaintiff admits that she stopped paying rent in November 2015, and paid only $1,764.95 for the months of September and October 2015 (Nolte aff, ¶ 11). Defendant's first counterclaim asserts a claim for payment of use and occupancy, and defendant argues that any judgment for rent overcharges must be offset by the rent unpaid since October 2015. In her reply memorandum of law, plaintiff contends that this is a frivolous argument because, pursuant to section 235-b of the Real Property Law, she is entitled to a rent abatement due to defendant's breach of the warranty of habitability based on the numerous HPD violations on her apartment.

However, plaintiff did not raise the habitability defense in response to the defendant's counterclaim or as an affirmative claim in her complaint (*see Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 329 [1979] [rent reduction due to landlord's breach of the warranty of habitability "may take the form of a sum of money awarded the tenant in a plenary action or a percentage reduction of the contracted-for rent as a setoff in summary nonpayment proceeding in which the tenant counterclaims or pleads as a defense breach by the landlord of his duty to maintain the premises in habitable condition"). In her reply to the defendant's counterclaim, plaintiff's only defense was that she was not obligated to pay fair market use and occupancy since her apartment was rent-stabilized. The issue of a rent abatement as a result of the HPD violations was raised, for the first time, in plaintiff's reply papers. While plaintiff contends that her non-payment of rent is justified by the HPD violations, there is no evidence before this Court as to whether these violations still exist and whether they might justify a full or partial rent abatement and to what point in time. Thus, not only is this an unpleaded defense, but plaintiff has failed to establish the defense as a matter of law. Therefore, any judgment for rent overcharges must be offset by the rent unpaid since October 2015.

Attorneys' Fees

As the prevailing party in this action to establish her rights under the Rent Stabilization Law and Code and recover damages for rent overcharges, plaintiff is entitled to recover her costs and reasonable attorneys' fees pursuant to Rent Stabilization Law § 26-516 (a) and Rent Stabilization Code § 2526.1 (d). This factual issue will be referred to

a Special Referee to hear and determine (CPLR 4317 [b]), together with the issue of calculating the total amount of rent overcharges that are due to plaintiff.

CONCLUSION, ORDER AND DECLARATORY JUDGMENT

In conclusion, this Court has determined that: (1) plaintiff is entitled to summary judgment on her first cause of action and a declaration that her apartment is subject to the provisions of the Rent Stabilization Law and Rent Stabilization Code; (2) plaintiff is entitled to summary judgment on her second cause of action seeking monetary damages for residential overcharge; (3) the base date is October 22, 2010; (4) the base date rent is $1,023.27 per month; (4) plaintiff's rent is frozen at that amount until corrected registration statements are filed with DHCR; (5) plaintiff has established her entitlement to treble damages and reasonable costs and attorneys' fees pursuant to Rent Stabilization Law § 26-516 (a) and Rent Stabilization Code § 2526.1 (d); (6) plaintiff has not established her right to a rent abatement, and any judgment for rent overcharges must be offset by the rent unpaid since October 2015; and (7) the issue of an award of reasonable attorneys' fees and costs to plaintiff is referred to a Special Referee to hear and determine who shall also compute the total amount of the overcharge, together with treble damages.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff's motion for partial summary judgment on her first, second and fourth causes of action is granted to the extent that plaintiff is entitled to a declaration that her apartment is subject to the provisions of the Rent Stabilization Law

and Rent Stabilization Code and an award of monetary damages for residential overcharge in violation of the Rent Stabilization Law and Rent Stabilization Code, together with treble damages until January 5, 2017, and an award of reasonable costs and attorneys' fees; and it is further

ORDERED, ADJUDGED and DECLARED that apartment 5B located at 640 Fort Washington Avenue, New York, New York was improperly deregistered from rent regulation on September 1, 2008 based on high rent vacancy, and that plaintiff Jocelyn Nolte a/k/a Jocelyn Socias is the rent-stabilized tenant of this apartment and retains such rent-regulated status for the duration of her tenancy; and it is further

ORDERED that the plaintiff's claim for monetary damages is severed and continued pursuant to CPLR 5012; and it is further

ORDERED that the issue of an award of reasonable attorneys' fees and costs to plaintiff is referred to a Special Referee to hear and determine in accordance with the rulings of this Court regarding the base date and base date rent and the Special Referee is directed to also compute the total amount of the rent overcharge, together with treble damages; and it is

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date

upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including all witnesses and evidence they seek to present, and shall be ready to proceed, on the date fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury, CPLR 4320 (a) — in that the proceeding will be recorded by a court reporter, the rules of evidence apply, etc. — and, except as otherwise directed by the

assigned Special Referee for good cause shown, the trial of the issues specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that this constitutes the decision, judgment and order of the court.

10/4/2017
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	DO NOT POST		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE