CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS : HOUSING PART J

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TZE-CHENG CHUN, AL CHENG GOH AND TZE-NGO CHUN

Petitioner-Landlord,

Index No.
L&T 102385/01

-against-

DECISION AND ORDER

KEITH RAYWOOD AND MELINDA RAYWOOD

Respondent-Tenant,

"JOHN DOE" and "JANE DOE"

Respondent-undertenants

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SHELDON HALPRIN, J.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of petitioner's motion to dismiss respondents' affirmative defenses and for summary judgment, and respondents' opposition to petitioner's motion, cross-motion for summary judgment, and counterclaim.

Papers	Numbered
Notice of Motion, annexed Affirmation and Affidavit and supporting exhibits.	1
Notice of Cross-Motion.	2
Affidavit in support of Cross-Motion and in opposition to Motion-in Chief, affirmation and supporting documents	3
Affirmation in Opposition to Respondent's Cross-Motion and in support of Petitioner's Motion	4
Affirmation in Reply as to the Cross-Motion.	5

Petitioners commenced this holdover proceeding seeking possession of the premises known as 59 Lefferts Place, apt 1(parlor and garden floors), Brooklyn , New York. Petitioners claim that the premises in question are not subject to rent regulation

and that, therefore, they are entitled to recover possession of the premises by virtue of the lease having expired, and the respondents having been served with a thirty day notice of termination.

While some aspects of the procedural history have not been briefed[1], it is undisputed that a 1959 Certificate of Occupancy("C of O") lists the building as containing seven units. Subsequently, in 1994, based on a type 1 alteration, a new C of O was issued listing the building as containing four residential units. The prior owners, David Conrad and Virginia Sikes, resided in the apartment in question from 1998 through approximately 2008. On February 6, 2008, petitioners took title to the building. Several days later, petitioners and respondents entered into a one year non rent stabilized lease commencing February 21, 2008, at a rental of $4000.00 per month. In 2009, the parties renewed the lease for a two year term for $4200.00 per month. After expiration of the renewal lease, and based on respondents' failure to sign a new renewal lease, petitioners commenced this proceeding seeking possession of the premises. Respondents, who are represented by counsel, filed an answer dated May 25, 2012, alleging, inter-alia, that the premises are subject to rent stabilization, and asserting counterclaims for rent overcharge and property damage.

By notice of motion dated July 9, 2012, petitioners seek, pursuant to CPLR §3211(b), to dismiss respondents' affirmative defenses; and pursuant to CPLR §3212(b)

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[1] Neither petitioners nor respondents provided any evidence as to the status or residents of the apartment prior to 1998.

summary judgment awarding them possession of the premises; and dismissing and /or severing respondents' property damage counterclaims. Respondents oppose petitioners' summary judgment claim, alleging that the premises are rent stabilized, and, as such, that respondents were entitled to a lease renewal at a correctly determined rent stabilized rent. In addition to opposing petitioners' motion, respondents cross-move for summary judgment dismissing the petition, and seek a determination of rent overcharge.

Petitioners have two arguments in support of their motion. First, petitioners rely on the provisions of RSC §2526.1(a)(2)(ii), which provide that:

> "Except in the case of decontrol pursuant to section 2520.11(r) or (s) of this title, nothing contained herein shall limit a determination as to whether a housing accommodation is subject to the RSL and this code...".

Petitioners argue that based on the decontrol exception in this statute the "four year rule" applies. Petitioners use the date of service of this proceeding, May 10, 2012, as the commencement date for the calculation of the four years. As respondents were in possession on May 10, 2008, and the monthly rent was in excess of $2000.00, petitioners argue that the apartment is not rent stabilized and that the court cannot look beyond that point. In further support, petitioners rely on the DHCR administrative ruling In the matter of Pace & Hersh Docket #WF410015RT.

While decontrol is stated as an exception in RSC §2625.1(a)(2)(ii), the court rejects petitioners' interpretation and the applicability of the statute in this instance. In

the absence of controlling authority in the Second Department, the court relies on the principle announced in *656 Realty, LLC v. Jimmy J. Cabrera* ,27 Misc.3d 1225A; 2009 NY Slip Op 52767U affirmed 27 Misc .3d 138A2010 N.Y.App Term May 20, 2010, where the Appellate Term, First Department, held that it was proper to go beyond the four year rule "since it was not for the purpose of calculating a rent overcharge but rather to determine whether the demised apartment premises is regulated." This principle is also supported by the holding in *Grimm v. DHCR*,2009 NY Slip Op 06653, citing *Thornton v. Baron,* 5NY3d 175,181[2005]. In Grimm, the Appellate Division, First Department, relying on the principle in Thornton supra, rejected the strict applicability of the "four year rule" stating that:

" [s]anctioning the owner's behavior on a statute of limitations ground 'can result in a future tenant having to pay more than the legal stabilized rent for a unit, a prospect which militates in favor of voiding agreements such as this in order to prevent abuse and promote enforcement of lawful regulated rents."

While Grimm relates to overcharge claims, it nevertheless establishes the principle that where there is fraud or an unlawful rent, the court can look beyond the four years.

Petitioners go further in their reply papers putting particular emphasis on the words "except in the case of decontrol pursuant to section 2520.11(r) or (s). " However, this provision in §2625.1(a)(2)(ii) of the RSC presumes that petitioner has complied with other provisions of the RSC. In essence, to de-regulate an apartment

premises, it is presumed that the accommodation was previously regulated, and that a clear path to deregulation can be shown. See, *656 Realty, LLC v. Jimmy J. Cabrera* (supra) To rely on this provision of the RSC, petitioners must establish that they complied with other prior applicable provisions of the RSC. Where there is a total disregard of the filing requirements, resulting in an unlawful rent, the principle in Thornton would apply. It is undisputed that no prior registrations exist relating to this premises through the commencement of this proceeding, including registration filings for this apartment at any stage. To accept petitioners' argument would leave a loophole in the RSC which would allow for abuse. In essence, an owner could fail to register an apartment subject to regulation, rent the apartment for over $2500(previously $2000), give a preferential rent for much less, and, as long as the tenant does not file an overcharge claim for the total rent claimed on the lease within four years, the apartment would be decontrolled, and would never be subject to DHCR's review

Petitioners' second premise in support of their motion for summary judgment is based on the provisions of §2526.1(a)(3)[iii] of the RSC. This section provides that:

> "Where a housing accommodation is vacant or temporarily exempt from regulation pursuant to section 2520.00 of this title, on the base date, the legal regulated rent shall be the rent agreed to by the owner and the first rent stabilized tenant taking occupancy after such vacancy or temporary exemption, and reserved in a

lease or rental argument..."

In their argument, petitioners contend that owner occupancy constitutes a temporary exemption pursuant to RSC §2520.11. They then argue that since the legal rent amount in the lease between the petitioners and the respondents, after the expiration of the temporary exemption, was in excess of $2000.00, the apartment was not subject to the Rent Stabilization Law. Petitioners support this position with the contention that the term "legal regulated rent" does not necessarily refer to a rent stabilized rental amount, but to the rental amount agreed to by the parties in an accommodation subject to rent stabilization. Petitioners go further to argue that the term "first rent stabilized tenant" does not refer to the status of the tenant as rent stabilized, but to a tenant who resides in a rent stabilized accommodation, which may or may not be exempt from rent stabilization coverage. The court rejects this argument based on the principle announced in *656 Realty, LLC v. Jimmy J. Cabrera*, supra. RSC §2526.1(a)(3)iii, clearly states that the exemption is "temporary". The intent of the statute is not to provide another avenue for deregulation but to provide a limited exemption from the requirements of the RSC based on the needs of the owner. It is well established that a statute must be read for its clear meaning. See Matter of *Tonis v: Bd of Rights*, 295 N.Y.286, 293(1946). The use of the term "temporary" in RSC §2526.1(a)(3)[iii] has the following implication: that the premises were rent stabilized, and that the exemption would be for a limited period, after which the premises would revert to rent stabilization status. To read it otherwise would

contradict the essence of the RSC. In this situation, not only was the premises not registered as rent stabilized prior to the exemption, but it was not registered as rent stabilized after the exemption, resulting, in effect, to a permanent exemption of the premises from rent stabilization.

Respondents, in support of their motion, also rely on the Appellate Division ruling in *Gordon v. 305 Riverside Corp*, 93 A.D 3d 59, 592-593[2]. Petitioners oppose, arguing that as in the case of *Roberts v. Tishman Speyer* ,13 NY3d 270,890, petitioners' actions prior to the Gordon case were not only proper, but were sanctioned by DHCR. This argument is also without merit. The Gordon case did not establish law which did not exist prior to the Gordon case, but clarified the presumption underlying the statute. As such, petitioners reliance on prior DHCR orders in no way justified their failure to comply with the provisions of the RSC.

Petitioners' reliance on the DHCR rulings in the matters of Pace & Hersh,(supra) and in *Baron v. Lawrence Towers Co.*, LLC, n.o.r. 2012 NY Slip Op 32177(u) is misguided. The facts in this proceeding are distinguishable from the above cases. In the above cases, the issue was limited to the lack of registration of a proper rent when the premises were decontrolled. The above cases placed particular emphasis on the fact that no registration had been filed with DHCR indicating that the rent had reached $2000.00,

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[2] In Gordon the Appellate Division ruling on §2526.7[a][iii] indicated that " the first rent stabilized tenant... presumes that the first tenant after a vacancy is offered a rent stabilized lease."

or more, when the apartment became vacant and was deregulated. In the instant case, not only was no registration filed when the premises became presumably deregulated and exempt, but no registration was ever filed with DHCR at any juncture. The owners of this premises simply disregarded the requirements of the RSC, and now seek to rely on its provisions. Such actions offend public policy, and would render the provisions of the RSC meaningless.

Further, even assuming *arguendo* that the term "temporary" was not utilized in the statute, petitioners' contention of entitlement to decontrol based on the lease between the parties would still fall short of the requirements of the RSC. RSC §2526.1(a)(3)[iii] provides that "the legal regulated rent shall be the rent agreed to by the owners and the first rent stabilized tenant." This clearly highlights the intent of the statute. The indication here is that the tenant would be rent stabilized. See Gordon supra. The statute was not intended to be another path to decontrol. To accept otherwise would indicate that after an exemption the petitioner could rent any premises for over $2500, and then decontrol the apartment, regardless of the rental amount prior to the exemption. This would be an erroneous reading of the statute. As such, petitioners argument is rejected.

In light of the above, and after careful consideration, that portion of the respondents' cross motion which seeks summary judgment pursuant to CPLR 3212(a) is granted, and the petition is dismissed. That portion of petitioners' motion which seeks summary judgment pursuant to CPLR 3212(b) and legal fees is denied. Petitioners'

motion is granted only to the extent of severing respondent's counterclaim for property damage. In relation to that portion of respondent's motion, pursuant to CPLR 3212(a), which asserts a counterclaim for rent overcharge, the court finds that the evidence provided is insufficient to warrant the granting of summary judgment and that issues of material fact exist. These facts include, but are not limited to, the calculation to be utilized in determining the correct rent for the premises. See *Park Holding Co v. Power*, 161 A.D.2d 143, 554 N.Y.S.2d 861(1st Dept 1990); *Belmont East Co v. Riedel*, 26, col 5 11/21/91 N.Y.L.J. (App Term 1st Dept). Accordingly, the proceeding is restored to the court's calendar on December 18,2012, to be sent to part X for a trial on respondents' overcharge claim.

This constitutes the decision and order of the Court.

Dated: Kings, New York

November 21, 2012

SHELDON HALPRIN
JHC