CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART D

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W ASSOCIATES, LLC

Petitioner-Landlord,

Index No. L&T 73831/09

-against-

DECISION/ORDER

MAVERICK SCOTT

Respondent-tenant,

-and-

JOHN DOE and JANE DOE

Respondent-Undertenant.

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HON. BRUCE SCHECKOWITZ, J.H.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	
Other -	4, 5

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Petitioner commenced this nonpayment proceeding by service of a Notice of Petition and Petition alleging respondent owes $10,807.57 in rent and additional rent through April 2009. Respondent answered the petition by denying the allegations and interposing seven affirmative defenses and four counterclaims. Respondent now moves for an order dismissing the petition pursuant to RPAPL §721 and §741(4), and granting summary judgment on respondent's affirmative

defenses and counterclaims.[1] Respondent also seeks an order pursuant to Civil Court Act §110(c) directing petitioner to make repairs to the apartment.

In support of his motion, respondent argues that the petition fails to state the facts upon which this proceeding is based. In particular, respondent contends petitioner failed to accurately plead that the apartment is subject to the Rent Stabilization Law. According to respondent, petitioner applied for and received real estate tax exemptions and abatements pursuant to section 421-g of the Real Property Tax Law ("421-g program") which provides that all units in a multiple dwelling receiving such benefits are subject to the Rent Stabilization Law unless owned as a condominium or cooperative. Respondent argues that as a result of petitioner's participation in the 421-g program, his apartment is rent stabilized and petitioner's failure to allege the proper rent regulatory status warrants dismissal of the petition.

Respondent argues that summary judgment is appropriate on the sixth and seventh affirmative defenses alleging breach of warranty of habitability, and actual and/or constructive eviction, respectively. In a supporting affidavit, respondent attests that he moved into the apartment on August 4, 2007, and that during the winter months, the apartment was very drafty and cold. He claims he notified management about the improper heating and lack of insulation via email in November and December 2007, but petitioner failed to address the problem. Respondent states he and his son used portable heaters and wore extra clothing in the apartment, but tried to spend time away from the premises as much as possible. Respondent also states he hired professionals who

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[1]At oral argument, respondent withdrew the portion of the motion seeking dismissal of the petition on the basis that petitioner is not authorized to maintain this proceeding.

determined the insulation in the apartment was insufficient.[2]

Respondent also requests summary judgment on the first, second and fourth counterclaims. The first and second counterclaims seek a judgment for $5,000 based on petitioner's failure to correct the conditions in the apartment, and an abatement of the rent from May 2007 through August 4, 2007 because of rodent infestation, respectively. The fourth counterclaim seeks an award of attorneys' fees.

In opposing the motion, petitioner argues that respondent is precluded from raising the issue of the apartment's rent regulatory status because Judge Elsner already decided the issue in a prior nonpayment proceeding between the parties, *W Associates, LLC v Maverick Scott, Index No. 84936/2008.* Petitioner states Judge Elsner rejected respondent's claim because petitioner never increased the rent during the rental period. Petitioner further states that the lease acknowledges petitioner's participation in the 421-g program, but specifically states that respondent's apartment is not subject to the Rent Stabilization Law, or any other rent regulatory laws.

Petitioner disputes respondent's warranty of habitability and constructive eviction claims by asserting that the building is a brand new conversion with over 372 units and that no other tenant has complained about the insulation or drafty windows. Petitioner argues that respondent's claim for a sixteen (16) month rent abatement based on finding one mouse in the apartment in 2007 is completely baseless.

RPAPL §741(4) requires that the petition in a summary proceeding state the facts upon which

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[2]Annexed as Exhibit N to respondent's motion are reports from Sierra Designs Home Inspections dated January 6, 2009 stating the walls "appear to have opportunities for better insulation," and from JC Homecare dated August 20, 2009 concluding the rapid heat and cooling loss was due to "insufficient and poorly placed insulation."

the summary proceeding is based. Due process requires that a tenant be put on notice of the facts so that he or she will be able to plead a defense to the action. (*Valrose v Dewinger*, NYLJ 2/7/90, 23:3 [Civ Ct NY]). A petition that fails to accurately plead the rent regulatory status of the premises does not satisfy the requirements of RPAPL §741, and the proceeding must be dismissed. (*MSG Pomp Corp. v Doe*, 185 AD2d 798 [1st Dept.1992]).

The crux of the dispute between the parties is whether respondent's apartment is subject to the Rent Stabilization Law. Contrary to petitioner's claim, Judge Elsner did not rule on this issue in the prior nonpayment proceeding. This Court reviewed the transcript of the parties' appearance before Judge Elsner on December 30, 2008, and her decision/order dated April 22, 2009 and found nothing to indicate she made a final determination, written or otherwise, on the rent regulatory status of the apartment. Therefore, respondent is not precluded from raising the issue in this proceeding.

To support his argument that the apartment is rent stabilized, respondent relies on *Roberts v Tishman Speyer Properties, L.P.*, 2009 NY Slip Op 07470[U] [Ct App] ("*Tishman Speyer*"). In that proceeding, the landlord received tax incentives under New York City's J-51 program, which encouraged rehabilitation and improvements to residential properties. Several tenants in the building sued the landlord for charging rent in excess of the rent stabilization levels claiming the landlord was not entitled to take advantage of the luxury decontrol provisions of the Rent Stabilization Law while receiving tax incentives under the program. Upon examining the language of the statute and the legislative intent, the Court of Appeals agreed with the tenants. Respondent argues that *Tishman Speyer* is instructive because petitioner currently receives tax incentives under the 421-g program and should be precluded from alleging that the subject apartment is not rent stabilized. This Court agrees.

421-g provides in relevant part:

> "Notwithstanding the provisions of any local law for the stabilization of rents in multiple dwellings or the emergency tenant protection act of nineteen seventy-four, the rents of each dwelling unit in an eligible multiple dwelling shall be fully subject to control under such local law, unless exempt under such local law from control by reason of the cooperative or condominium status of the dwelling unit, for the entire period for which the eligible multiple dwelling is receiving benefits pursuant to this section..."

It is undisputed that petitioner is a current participant in the 421-g program and that the subject premises is neither a cooperative or a condominium. Based on the plain language of the statute, respondent's apartment is afforded rent stabilization protection because petitioner receives tax benefits under the 421-g program. As the Court of Appeals concluded in *Tishman Speyer,* petitioner cannot take advantage of the luxury deregulation exclusion of the Rent Stabilization Law while simultaneously receiving benefits under the program. This Court finds nothing in the statute, or in petitioner's opposition papers, to suggest the legislature intended a different interpretation. Furthermore, this Court rejects petitioner's claim that respondent is bound by the lease which states the apartment is not rent stabilized. Rent Stabilization Code §2520.13 specifically prohibits agreements waiving the benefits of the Rent Stabilization Law.

Petitioner's failure to properly allege the rent regulatory status of the subject apartment is an incurable defect warranting dismissal of the petition. Accordingly, the portion of respondent's motion seeking to dismiss the petition pursuant to RPAPL §741(4) is granted. The petition is dismissed without prejudice.

The portion of respondent's motion seeking summary judgment is denied. Summary judgment is a drastic remedy and should not be awarded if there are triable issues of fact or where the issues raised are arguable. *(Matter of Pollack*, 64 NY2d 1156 [Ct App 1985]). Based on the

papers submitted, this Court finds there are genuine issues of fact including but not limited to whether conditions exist in respondent's apartment that petitioner failed to correct, whether respondent is entitled to an abatement and/or a judgment against petitioner based on the alleged conditions, and whether respondent is entitled to an order to correct by the Court. These issues are better suited for resolution at trial.

The portion of respondent's motion seeking summary judgment on the fourth counterclaim requesting attorneys' fees is granted. Respondent obtained the central relief in defending this proceeding, namely that respondent's tenancy is subject to rent stabilization. As a result, respondent is the prevailing party in this proceeding and is entitled to reasonable attorneys' fees. The amount of such fees are reserved for determination after trial.

Accordingly, this proceeding is set down for trial solely on respondent's defenses and counterclaims. The parties are directed to appear on January 13, 2010 at 9:30am in Part D room 524 for referral to the court expediter for trial.

The foregoing constitutes the decision and order of the Court.

Dated: December 23, 2009
New York, New York

J. H. C.
HON. BRUCE E. SCHECKOWITZ