Supreme Court, Appellate Division, Second Department, New York.
ROCKAWAY ONE COMPANY, LLC, Petitioner-Respondent,
v.
Deborah WIGGINS, Respondent-Appellant.
No. 2004-08794.
March 2, 2005.

Appellant's Reply

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***1** *ARGUMENT*

POINT I

THE STATE LEGISLATURE HAS NOT PROSCRIBED THE COURT'S JURISDICTION OVER A RENT OVERCHARGE COMPLAINT ARISING OUT OF AN INDIVIDUAL APARTMENT INCREASE CHALLENGE.

Article VI, § 7 of the N.Y. Constitution designates the Supreme Court as "one of general jurisdiction in law and equity." Article VI, § 7 also declares that:

> If the legislature shall create new classes of actions and proceedings, the Supreme court shall have jurisdiction over such classes of actions and proceedings, but the legislature may provide that another court or other courts shall also have jurisdiction and that actions and proceedings of such classes may be originated in such other court or courts.

McKinney's Const. Art. 6, § 7(b).

That the New York State Constitution grants the courts broad authority is indicative of several things. Where the legislature intends to subordinate the Court's jurisdiction, it must do so unequivocally. Further, absent any definitive legislative action, the Court's jurisdiction is assumed. Thus, the millstone is to demonstrate, not that jurisdiction is vested with the Court but, that the Court's already existing jurisdiction has been proscribed.

In this instance, the legislature has not taken any action, expressed or implied, approaching what is required to supplant the Court's constitutionally derived ***2** jurisdiction over a rent overcharge claim arising out of an individual apartment increase (IAI) challenge. The legislature's implicit intentions regarding the Court's jurisdiction can be determined by considering the statutory directives governing a landlord's actions.

Sohn v. Calderon, 78 N.Y.2d 755, 587 N.E.2d 807 (Ct. of Appeals, 1991), which examined what the rent stabilization code requires of an owner seeking to demolish a building, is illustrative of this tenet. The owner of a building damaged by fire commenced an action seeking a declaration that, under the applicable rent control and rent stabilization regulations, he could either demolish the building or remove it from the market. *Id.* at 762. In addition, the landlord sought issuance of a certificate of eviction and permanent injunctive relief. *Id.* In opposition, the tenants and the New York State Division of Housing and Community Renewal (DHCR) asserted that the Court lacked jurisdiction over the controversy and that original jurisdiction rested with DHCR. *Id.*

The Court found that the relevant rent control and rent stabilization law provisions revealed the legislature's intent to have DHCR and HPD be the exclusive arbiters of whether an owner has satisfied the requisites for obtaining a certificate of eviction based on demolition ***3** of a building. *Id.* at 766. It did so because these proceedings cannot be commenced without prior administrative approval and succinctly concluded that a prior approval and other restraining measures are the tools of demarcating the Court's jurisdiction. *Id.* at 767.

The Court in *Sohn* recognized that there are matters that are appropriate for the Court's jurisdiction. However, the case before it allow for the Court's jurisdiction. The Court's rationale in *Sohn* makes plain that the issue of rent overcharge is not one where the legislature has specifically proscribed the Court's jurisdiction.

Petitioner incorrectly interprets *Sohn* as generally declaring that the Court is incompetent to entertain any matters involving rent regulation. The Court's consideration of an IAI rent challenge is precisely the type of issue that is within the Court's jurisdiction. Owners are not required to submit any application for pre-approval where they seek to increase the legal regulated rent based on an IAI increase in any one apartment. RSC § 2522.4(a) (1) entitles an owner, without qualification, to increase the monthly stabilized rent where the subject apartment has been improved by installation of new equipment or an increase in services. There is no prior ***4** restraint on imposing an IAI rent increase. An owner is never required to seek DHCR authorization before imposing an IAI rent increase. *Global Management v. Richards,* 152 Misc. 2d 759, 761 (App. Term, 2d & 11th Jud. Dists. 1992); *Trio Realty Co. v. Cofield,* 151 Misc.2d 244, N.Y.S.2d 228(N.Y. Civ. Ct. 1991) (there is no question but that under the Rent Stabilization Code itself the increase would be authorized without a DHCR order.); *Wadsworth Assocs. V. Poole,* 20 HCR 128, N.Y.L.J. March 11, 1992, p. 22, col. 3 (N.Y. Civ. Ct.).

Authority for the Court's jurisdiction over a tenant's overcharge claim is also found in the Emergency Tenant Protection Act of 1974 (hereinafter "ETPA"), as amended in 1983, which provides the authority by which the DHCR enforces the provisions of the New York City Rent Stabilization Law.

Section 12(a) (1) (f) of the ETPA states as follows:

Unless a tenant shall have filed a complaint or overcharge with the division which complaint has not been withdrawn, nothing contained in this section shall be deemed to prevent a tenant or tenants, claiming to have been overcharged, from commencing an action or interposing a counterclaim in a court of competent jurisdiction for damages equal to the overcharge and the penalty provided for in this section, including interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five thousand four of ***5** the civil practice law and rules, plus the statutory costs and allowable disbursements in connection with the proceeding. Such action must be commenced or counterclaim interposed within four years of the date of the alleged overcharge but no recovery of three times the amount of the overcharge may be awarded with respect to any overcharge which had occurred more than two years before the action is commenced or counterclaim is interposed.

As a matter of statutory construction, this ETPA provision renders untenable the contention that ETPA § 12(b) divests the Court's jurisdiction over rent overcharge complaints in cities with a population of one million or more. A section is "either a subdivision of an article in a document, statutory title or code." A Dictionary of Modern Legal Usage (2nd ed. 1995) p. 786. Thus, the "this section" referred to in ETPA § 12(a) (1) (f) implicates the entire § 12 Enforcement and Procedures, including § 12(b). Therefore, the granting of power to the DHCR in § 12(b) to enforce the ETPA as provided in the RSL does not prevent a tenant from interposing an overcharge defense or counterclaim in a Housing Part proceeding. It does not prohibit the Court's exercise of jurisdiction. The Courts have recognized ETPA § 12 as a source of the Court's authority to entertain an action to recover a rent overcharge. *Wolfisch v. Mailman,* 182 A.D.2d 533, 582 N.Y.S.2d (1st Dep't 1992);

***6** Further, the related legislative history does not indicate any intention to divest the Court's jurisdiction over an IAI challenge. ETPA § 12(a)(1)(f) and what is now known as RSL § 26-426 were both adopted by L. 1983, c. 403, § 4 and 14 respectively. Simultaneously, ETPA § 12(b) was amended to provide that the DHCR rather than the Conciliation and Appeals Board (CAB) would now enforce the ETPA as shall be provided in the NYC RSL. L. 1983, c. 403, § 4. Previously, the CAB was charged with rent administration in the City of New York. With the expansion of the DHCR, the CAB was abolished. A single state agency, the DHCR, was to now regulate all of the systems of regulations of rents and evictions in New York State. The ETPA § 12(b) language speaking to cities with populations of one million or more is an act of inclusion. ETPA 12(b) purported to place DHCR in the stead of the CAB. The Sponsor memorandum of Senator John B. Daley does not mention jurisdiction. Sponsor's Mem, Bill Jacket L 1983, ch. 403.

CPLR § 213-a further indicates that there is no legislative intent to remove consideration of a rent overcharge from the Court's jurisdiction. Coincidentally, the legislature, during the same session, amended CPLR § 213 to include CPLR § 213-a. This statute governs the statute ***7** of limitations for which a tenant can commence an action on a residential rent overcharge. The legislature imposed a four year statute of limitations for such claims. Aside from the time limitation, the statute left the Court's jurisdiction over rent overcharge complaints intact. The legislature certainly did not act to subordinate the Court's

jurisdiction. Quite the opposite, the Court's jurisdiction was implicitly affirmed. In 1997, the legislature revisited CPLR § 213-a and again declined to limit or otherwise affect the Court's jurisdiction upon amending CPLR § 213-a to include applications, complaints and proceedings before an administrative body within the ambit of the statute of limitations.

If the Court's jurisdiction is to be abridged, the legislature must act to do so. It is correct that the legislature is empowered to confer exclusive original jurisdiction upon an agency. In this instance, as demonstrated above, the legislature has not done so. There has been no action to prevent the Court from considering a rent overcharge claim arising out of an individual apartment increase. Indeed, all legislative action since 1983 points to the opposite conclusion. Therefore, this Court should rule that the Civil Court properly exercised ***8** jurisdiction over Appellant's overcharge complaint and correctly rendered decision accordingly.

POINT II

A RENT OVERCHARGE DOES NOT INVOKE THE TECHNICAL EXPERTISE OF DHCR AND THUS ITS PRIMARY JURISDICTION AUTHORITY.

The Housing Court is of competent jurisdiction to determine the propriety of an IAI rent increase. The Courts that have considered the propriety of an IAI increase have expressed no disinclination or difficulty in doing so. *See generally, H&L Hotel Corp v. Ramos,* 18 HCR 516, N.Y.L.J. October 31, 1990(N.Y. Civ. Ct.); *Fifth Ave Assocs. V. Rodriguez,* 20 HCR 296, 297 N.Y.L.J. May 20, 1992 p. 25, col. 4 (N.Y. Civ. Ct.) ("*the instant case, however, involves only a single apartment* and this Court need only determine whether the work performed after a fire constituted a repair for which no increase would be allowed or a renovation for which a 1/40 increase is collectible." (emphasis added)); *See also,* 212 W. 22 Realty, LLC v. Fogarty, 1 Misc.3d 905, 781 N.Y.S.2d 629 (N.Y. Civ. Ct. 2003); *30 West 70th St. Corp. v. Sylvor,* 27 HCR 141A, N.Y.L.J. March 12, 1999 p. 26, col. 1(App. Term 1st Jud. Dist.); *E&W Rlty. Co. v. Fettner,* 25 HCR 443A, N.Y.L.J. August 22, 1997 p. 21, col. 2(App. Term 1st Jud. Dist.); *Mali Realty Corp. v. Rivera,* 23 HCR 498A, N.Y.L.J. August ***9** 9, 1995 p. 24, col. 4 (N.Y. Civ. Ct.); *Graham Court Owners Corp. v. Allen,* 22 HCR 488A, N.Y.L.J. August 17, 1994 p. 22, col. 6 (N.Y. Civ. Ct.).

The Court in *Rodriquez* commented that a determination of whether work performed in an apartment constituted a repair or a renovation appears to be much less complex than the adjudication of a rent overcharge complaint for which the Court also has concurrent jurisdiction. *Rodriguez,* 20 HCR at 997. As remarked in *Ramos,* it is not "beyond the capabilities of a Civil Court judge equipped with a calculator." *Ramos,* 18 HCR at 516. The determination of whether work performed in an apartment constituted a repair or a renovation is at least as simple as the adjudication of a rent overcharge complaint for which the Court also has concurrent jurisdiction and such a determination is limited in scope and does not require special expertise which is exclusively possessed by the agency. *Rodriguez* 20 HCR at 297.

The decisions above all recognize that there are matters that are within the specialized technical expertise of DHCR and that the Court should defer in these cases. But, courts in these cases concluded that the determination of the propriety of an IAI rent increase does not present such a situation. The Court below suggested that the Court ***10** withhold exercising jurisdiction but conduct a hearing to determine if the landlord can demonstrate a likelihood of success at DHCR. Implicit in this is that the Court is competent to make such a decision.

Therefore, it is appropriate for the Court to exercise jurisdiction over any rent overcharge claims arising out of an IAI rent increase challenge.

POINT III

THE CIVIL COURT CORRECTLY RULED THAT REPONDENT FAILED TO DEMONSTRATE ENTITLEMENT TO THE INDIVIDUAL APARTMENT INCREASE IMPOSED UPON THE TENANT.

The Civil Court correctly ruled that Respondent did not sufficiently demonstrate entitlement to the rent increase imposed upon Appellant. According to Policy Statement 90-10 "whenever it is found that a claimed cost warrants further inquiry, the processor may request that the owner provide additional documentation." This request is fully discretionary. *Waverly Assocs. V. N.Y. State Div. of Hous. & Cmty. Renewal,* 12 A.D.3d 272 (N.Y. App. Div., 2004) Additionally, further relevant evidence of any kind can be requested at any stage of the proceeding. 9 NYCRR § 2527.5(b); Policy Statement 90-10; see matter of 201 *81st St. Assocs. V. DHCR,* 288 A.D.2d 89, 90, 733 N.Y.S.2d 23 (2001) (Under the plain wording of the policy statement, ***11** submission of such proof does not necessarily end DHCR's inquiry, and DHCR may conduct such inquiry as it deems appropriate to determine compliance)

Respondent improperly relies on DHCR decisions where similar improvements have been approved as conclusive that further documentation should not have been requested in this case. However, even these decisions make clear that that a proper inquiry focuses on whether the documentation submitted is specific enough, which must be determined on a case by case basis. *Charles Birdoff & Co. v. New York State Div. of Hous & Community Renewal,* 204 A.D.2d 630, 631 (N.Y. App. Div., 1994). In this instance, the trier of fact found the submitted documentation did not pass muster. The Civil Court determined that the evidence presented was not sufficiently substantiated. The owner did not present evidence to demonstrate that the work completed was in the nature of a repair or an improvement for which an increase would be allowed. The trier of fact is entitled all due deference.

In sum, the Civil Court is an appropriate forum for a tenant to raise a rent overcharge defense or counterclaim arising out of an IAI. The Court's jurisdiction arises out of the New York State Constitution and remains intact. There has been no legislative action to limit the Court's ***12** jurisdiction over these claims. There has not been any indication of any legislative intent that these claims be removed from the jurisdiction of the Court. In contrast, the legislature has shown its inclination in many aspects of the state rent regulatory law to grant exclusive control to DHCR and limit the role of the Courts. No similar action has been taken with respect to IAI challenge based rent overcharge claims. No action has been taken to abate the Court's routine exercise of jurisdiction over IAI rent increase challenges. The practice has been allowed to continue, unchallenged for several decades. In accordance with all relevant statutory provisions, the breadth of supporting case law and the interest of justice, the Civil Court properly and lawfully entertained Respondent's counterclaim. Accordingly, the Appellate Term decision should be reversed and that of the Civil Court be affirmed.

***13** *CONCLUSION*

For the foregoing reasons, the order and judgment of the Appellate Term of the Second Eleventh Judicial Department should be reversed and the decision and order of the Civil Court should be affirmed.