

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

DAVID L. THORNTON and CYNTHIA L. THORNTON,

Plaintiffs,

-against-

SHLOMO BARON, ZIPORA WEBER, BERNARD
WEBER and 390 WEST END ASSOCIATES, L.P.,

Defendants.

INDEX NO. 119776/96

SCANNED
FEB 25 2002

MOTION SEQ. NO. 002

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: The plaintiffs reside in Apartment 10-F in a residential building located at 390 West End Avenue in Manhattan. The defendant 390 West End Associates, L.P. is the owner of the building. In December, 1992, 390 West End entered into a lease with defendant Shlomo Baron under which Baron, as tenant, would rent the apartment at an initial rent of \$2,400 per month, far in excess of the \$507.85 rent stabilized rent paid monthly by the previous tenant. In connection with this lease, 390 West End commenced an action in Supreme Court, New York County seeking a declaration that Baron's apartment was exempt from the application of the rent stabilization law because Baron, a resident of Germany, did not intend to use it as his primary residence but only as a pied-a-terre and that his right to sublet or assign the lease would be limited to a tenant who would not be using the apartment as his or her primary residence. Based upon a stipulation to this effect entered into by the parties, a consent judgment was granted on August 31, 1993 declaring that the apartment was exempt from the rent stabilization law.

This entire arrangement, however, was apparently intended to circumvent the rent stabilization law by taking advantage of the statutory exemption afforded to apartments which are not used as the tenant's primary residence. In fact, Baron never intended to use the apartment as a pied-a-terre. Indeed, at the time that the lawsuit was commenced, he had already sublet the apartment to the plaintiffs herein, David and Cynthia Thornton, at a rent of \$3,250 per month. From the inception of the sublease, on January 5, 1993, the plaintiffs have used the apartment as their primary residence. Their rent at the time that this lawsuit was commenced in December, 1996 was \$3,750 per month.

In April, 1999, 390 West End moved for an order vacating the consent judgment on the ground that its agreement with Baron to exempt the apartment from the rent stabilization law was illegal under a decision by the Appellate Division, First Department. *See 390 West End Avenue Associates v. Youngstein*, 221 AD2d 292 (1st Dept. 1995). The motion was ultimately granted, *see 390 West End Avenue Associates v. Baron*, 274 AD2d 330 (1st Dept 2000) and an order was entered on September 8, 2000 vacating the consent judgment and declaring that the lease between 390 West End and Baron was null and void.

In commencing the present lawsuit in 1996, the plaintiffs originally named only Baron and Baron's alleged agents, Zipora and Bernard Weber, as defendants. Alleging that Baron is a mere "illusory tenant" and that they are the real tenants of the apartment, the Thorntons sought damages reflecting the amount that they have been allegedly overcharged, plus treble damages and attorney's fees. They also sought an injunction restraining Baron from bringing any proceeding to evict them. In November, 2000, the complaint was amended to include 390 West End as a defendant and to add a cause of action compelling 390 West End to offer them a rent stabilized lease of \$507.85 per month. In their answer to the amended complaint, Baron and the Webers asserted a counterclaim for rental arrears, alleging that the Thorntons had not paid

Baron any rent since May, 1997. They also asserted a cross claim against 390 West End for rent overcharges and treble damages. In its answer, 390 West End alleges that the complaint as against it is barred by the applicable statute of limitations. It has also asserted three counterclaims against the plaintiffs, the first for an order directing that plaintiffs either sign a new lease or vacate the apartment, the second for rent due during the period from September 1, 2000 to February 28, 2001 and the third for any rent which thereafter accrues during the pendency of this litigation. They also asserted a cross claim against Baron and the Webers for indemnification or contribution.

390 West End has now moved for summary judgment dismissing the complaint as against it and granting it the relief it seeks under its three counterclaims. In turn, the plaintiffs have cross-moved for summary judgment in their favor on all of their claims against the defendants and dismissing all counterclaims which have been asserted against them.

Discussion

Although this court has jurisdiction to determine the legal rent which may be charged for a rent stabilized apartment and the amount of any overcharges, *see Wolfisch v. Mailman*, 182 AD2d 533 (1st Dept 1992), the plaintiffs nevertheless can obtain this relief against all of the defendants herein by filing an appropriate application with the New York State Division of Housing and Community Renewal ("DHCR"). *See, e.g., Matter of Pechock v. New York State Div. of Housing and Community Renewal*, 253 AD2d 554 (1st Dept. 1998). Indeed, overcharge claims are invariably filed with DHCR and it is rare for this court to entertain a plenary action seeking an order determining the legal rent for a rent stabilized apartment. However, because this case is over five years old and the plaintiffs have unquestionably been victimized by the defendants' fraudulent scheme to avoid the application of the rent stabilization law to their apartment, the court will retain jurisdiction.

As to the merits, 390 West End's defense is essentially predicated on two provisions of the Rent Regulation Reform Act ("RRA") of 1997 (L 1997, ch 116). These provisions have been codified under CPLR 213-a and RSL § 26-516(a). CPLR 213-a provides that an action on a residential rent overcharge must be commenced within four years of the first overcharge alleged, that an overcharge award may not be based upon an overcharge having occurred more than four years before the action is commenced and that an examination of the apartment's rental history cannot extend any farther back than the four-year period immediately preceding the commencement of the action. *See also* RSL § 26-516(a)(2). Under the RSL, the legal regulated rent for purposes of determining an overcharge "shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement plus in each case any subsequent lawful increases and adjustments." RSL § 26-516(a)(i).

In moving for summary judgment, 390 West End argues that since it was not made a party to this lawsuit until November, 2000, the base rent upon which to calculate the present legal rent for the apartment must be the rent indicated in the registration statement which it filed for the period covering November, 1996. That rent was \$2,496 per month. According to 390 West End, from November, 1996 to November, 2000, the rental increases which it took on the plaintiffs' apartment were consistent with the percentage increases authorized by the Rent Guidelines Board for two-year renewal leases. The landlord argues that since it filed an annual registration statement with DHCR during this period which accurately set forth the rents which were charged to Baron, the legal rent for the apartment as of November, 2000 is the rent, \$2,699.67 per month, which was reflected in the 2001 annual registration statement which it filed with DHCR.

Although this lawsuit was commenced in 1996, the court agrees with 390 West End that the RRA of 1997 precludes the court from looking any earlier than 1996 to determine the present legal rent for the plaintiffs' apartment. The Appellate Division, First Department has held that the time limitations imposed under the RRA of 1997 apply not just to overcharge claims, but to proceedings in which the tenant seeks an order determining the legal rent of his or her apartment. *See Matter of Muller v. DHCR*, 263 AD2d 296, 303-04 (1st Dept 2000). Thus, the four-year time limitations of the RRA of 1997 apply to the plaintiffs' first

cause of action for an order fixing the legal rent of their apartment. In this respect, since 390 West End and Baron are clearly not united in interest, *see Mondello v. New York Blood Center*, 80 NY2d 219, 225 (1992), the plaintiffs' claim against the landlord in their November, 2000 amended complaint cannot be said, under CPLR 203(b), to relate back to the commencement of the original action in 1996.

The court, however, disagrees with 390 West End's contention that the legal regulated rent of the plaintiffs' apartment should be calculated based upon the 1996 annual registration statement which it filed with DHCR. The time limitation on overcharge complaints imposed under the RSL was intended to relieve a landlord from having to produce rent records on rent stabilized apartments dating back more than four years prior to the most recent registration date. *See Zafra v. Pilkes*, 245 AD2d 218, 219 (1st Dept 1997). In directing that the legal regulated rent for purposes of determining an overcharge shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration, the Legislature surely did not intend to reward a landlord who, as here, four years earlier filed a registration for an illegally deregulated apartment which listed a rent far in excess of what should and would have otherwise been charged. Indeed, in a recent order granting a tenant's Petition for Administrative Review, DHCR ruled that "the amount of rent listed for an illusory prime tenant cannot be considered the lawful base date rent." *Matter of Conti and Shapiro*, Adm. Rev. Docket No. LB 410008, LB 410019 RT (June 8, 2000).

The RRA of 1997 supports this conclusion. Under RSL § 26-517(e), a landlord who has failed to file a proper registration statement in a particular year may not obtain a rent increase for that or any subsequent year unless and until a proper statement is filed. *See Myers v. Frankel*, 184 Misc2d 608, 616 (App T 2nd Dept 2000). Surely, a registration statement setting forth an unregulated rent based on an illegal illusory tenancy cannot be considered a proper statement and may not therefore be used as the basis on which to calculate the apartment's legal regulated rent.

In the absence of a proper 1996 registration statement and in view of the statutory prohibition against the court's examination of the apartment's rental history prior to 1996, the court agrees with the conclusion which DHCR reached in *Matter of Conti and Shapiro*, *supra*, that it is appropriate to utilize the well recognized DHCR default procedure to set the base date rent. *See In re Miller v. DHCR*, __ AD2d __, 733 NYS2d 860 (1st Dept 2001); *Matter of Spariosu v. DHCR*, 285 AD2d 649 (2nd Dept 2001); *Matter of Clear Holding Co. v. DHCR*, 268 AD2d 430 (2nd Dept 2000). Under this default formula, the base date rent is determined by using the lowest rent stabilized rent for an apartment in the same building with the same number of rooms as the subject apartment on the base rent date, which in this case is on or about November 3, 1996. *See Matter of Conti and Shapiro*, *supra*. *See also In re Miller v. DHCR*, 733 NYS2d at 860. Since, for the reasons previously stated, none of the registration statements which 390 West End thereafter filed can be considered to have been "proper," it is not entitled under RSL § 26-517(e) to any subsequent increases and adjustments. *See Myers v. Frankel*, 184 Misc2d at 616.

Accordingly, 390 West End's motion for summary judgment dismissing the plaintiffs' claims against it is hereby denied. The plaintiffs' cross-motion for summary judgment is granted to the extent that the legal rent for the apartment, which the court is unable to fix at this time, shall be determined by using the default formula described above. The parties' respective motions regarding 390 West End's counterclaims are denied since an order requiring the plaintiffs to sign a new lease or vacate the apartment and fixing the plaintiffs' rental arrears from the time that Baron's lease was declared null and void should not be issued until the legal rent for the apartment is determined.

Similarly, as to the plaintiffs' claim against Baron and the Webers for overcharges and treble damages and the counterclaim by these three defendants for rental arrears, the plaintiffs' cross-motion is denied since the court is unable to determine the amount of monies which the parties, respectively, owe each other until it determines the legal rent for the apartment since 1996. This determination must await further discovery between the parties. However, it is clear that the plaintiffs are entitled to treble damages from Baron and the Webers because the overcharges were patently willful. *See Matter of Hargrove v. DHCR*, 244 AD2d 241, 242 (1st Dept 1997); NYC Admin Code § 26-517(e). Moreover, the overcharges are to be calculated as follows: (1) for the period prior to the base rent date, the difference, if any, between the

amount of rent which Baron was paying 390 West End and the maximum rent which he was allowed by law to charge a sublessee; and (2) for the period after the base rent date, the difference between what will be determined as the legal regulated rent and the amount which Baron received from the plaintiffs. In turn, Baron's claim for rental arrears shall be calculated based upon the plaintiffs' failure to pay the legal regulated rent for any given month since November, 1996.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on March 12, 2002 at 10:00 a.m. for a conference to discuss the procedures which should be followed for determining the legal regulated rent and the amount which the parties owe each other.

The forgoing constitutes the decision and order of this court.

ENTER ORDER

Dated: 2-14-02



MARYLIN G. DIAMOND, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION