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[2] JEFFREY JOHNSON, Plaintiff, -against- S.W. MANAGEMENT, LLC, 78/79 YORK ASSOCIATES, LLC, and VARIOUS JOHN AND JANE DOES, Defendants.**
INDEX NO. 102034/12

102034/12

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2013 N.Y. Misc. LEXIS 4810; 2013 NY Slip Op 32593(U)

October 7, 2013, Decided
October 23, 2013, Filed

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

JUDGES: [*1] JOAN A. MADDEN, J.S.C.

OPINION BY: JOAN A. MADDEN

OPINION

JOAN A. MADDEN, J.:

Plaintiff Jeffrey Johnson ("Johnson" or "Plaintiff") moves for an order granting reargument of this court's Decision and Order dated January 29, 2013 (the "Original Decision") to the extent that it denied his motion for summary judgment on his cause of action for rent overcharge and treble damages. Defendants 78/79 York Associates, LLC ("York") and S.W. Management, LLC ("S.W. Management") (together, "Defendants") oppose the motion.

Background

This action arises out of a landlord-tenant dispute concerning Apartment 3F (the "Apartment") in a building located at 511 East 78th Street, New York, New York. Johnson initially executed a lease (the "Lease") with York for a two-year period commencing on March 1, 2008, at a monthly rent of $1,695.00. Johnson and York subsequently executed an annual renewal of the Lease at a monthly rate of $1,495.00, an annual renewal of the Lease at a monthly rate of $1,528.64, and one or more renewals of the Lease at a monthly rate of $1,625.00.

Paragraph 59 of the rider to the Lease states that:

> "Tenant acknowledges and agrees that he or she has rented an apartment which is not subject to the Rent Stabilization [*2] Law and Code or any governmental controls regulating [**3] rent.... [and that] [t]his understanding is an integral part of this lease, and is an inducement to the Landlord to enter into this agreement."

However, it is undisputed that these statements are inaccurate and that the Apartment is actually a rent stabilized unit.

Johnson commenced the instant action on February 27, 2012, claiming that Defendants knew or should have known that the Apartment was rent stabilized, that the rent charged was "fictitious and illegal," and that other

terms and conditions of the Lease violated the Rent Stabilization Law ("RSL"). The complaint asserts 15 causes of action, including fraud, rent overcharge, noise nuisance, second-hand smoke nuisance, constructive eviction, breach of lease, unjust enrichment, and intentional infliction of emotional distress.

The complaint charges that Defendants engaged in a fraudulent scheme to have the Apartment registered with New York City's Division of Housing and Community Renewal ("DHCR") as not subject to rent stabilization. Thus, Johnson was allegedly charged "a fictitious and illegal" rent of $1,695 per month. Complaint, ¶8. The scheme allegedly began at or about the [*3] time in 1996 when Defendants acquired a 14-building residential complex containing the Apartment. Each rental unit therein was allegedly subject to the Rent Stabilization Law. Defendants imposed and attempted to impose permanent rent increases on the Apartment for major capital improvements ("MCIs"), an ordinarily allowable procedure. According to the complaint, however, Defendants made false representations as they "inflate[d], fabricate[d], or multiple-bill[ed] costs and/or include[d] non-qualifying costs in MCI applications." Id., ¶102. Johnson maintains that "tenants: a.) lack the ability and means to challenge MCI rent increases; and b.) would therefore not be inclined to file a complaint that would expose Defendants' [**4] fraudulent destabilization scheme." Id., ¶105. As a result, Defendants "imposed MCI rent increases on tenants even though such increases were contrary to lease provisions." Id., ¶104.

Additionally, the complaint states that Defendants made false vacancy claims to DHCR, and created false rent histories in order to justify rent deregulation. Once rent deregulation has been achieved by fraud, according to Johnson, "fraudulent rent increases are forever concealed... [*4] [and] defrauded tenants are forever denied relief." Id., ¶119. A copy of a DHCR Registration Apartment Information (the "Registration History") for the Apartment, which was submitted with Plaintiff's original summary judgment motion, shows the Apartment was occupied by a prior rent stabilized tenant, Rose Clossick ("Clossick") from 1984 through late 2007, whose last regulated rent was $586.37 monthly.

Plaintiff succeeded Clossick at $1,695 monthly in March 2008, although the Registration History shows that the Apartment's status is still listed as rent stabilized. The Registration History shows that the rent decreased to $1,495 monthly for Plaintiff's second term, increased to $1,528.64 for his third term, and now is $1,625 monthly. Plaintiff calculates his overcharges through the tenancy as amounting to $50,895.18, on the basis of the $586.37 monthly paid by the prior tenant, Clossick. Plaintiff argues that Defendants' "overcharge was willful within the meaning of RSC 2526.1, thereby entitling Plaintiff to judgment for rent overcharges, treble damages, plus interest thereon.[1]" Johnson Aff, ¶37. Plaintiff alleges that he is entitled to a total [**5] of $95,316.78 without interest (Id., ¶31), [*5] as only a portion of the purported overcharge is subject to treble damages, due to time limits.

> 1 Rent Stabilization Code 2526.1(a)(1) provides that "[a]ny owner who is found by the DHCR, after a reasonable opportunity to be heard, to have collected any rent or other consideration in excess of the legal regulated rent shall be ordered to pay to the tenant a penalty equal to three times the amount of such excess, [unless] the owner establishes by a preponderance of the evidence that the overcharge was not willful, the DHCR shall establish the penalty as the amount of the overcharge plus interest....".

Defendants filed an answer to the complaint denying its allegations. Before discovery was completed, Johnson moved for summary judgment (i) granting his claim for rent overcharge and treble damages and (ii) declaring that the Apartment is subject to the RSL and that York must provide Johnson with a rent stabilized lease for the Apartment, subject to the same terms and conditions as the Lease, but with a monthly rent of $586.37.

Johnson asserted that he was entitled to summary judgment as York charged an illegal rent, since it draft a non-regulated lease and charged a market-rate rent for a [*6] rent stabilized apartment in intentional disregard for the Rent Stabilization Law. Johnson further argued that case law establishes that where, as here, a landlord charges an illegal rent, the tenant is entitled to a reformed lease setting the monthly rent at the "legal regulated rent in effect as of the date of the last preceding [valid DHCR] rent registration statement" (Bradbury v. 342 W. 30th St. Corp., 84 A.D.3d 681, 683, 924 N.Y.S.2d 349 (1st Dep't 2011)), which Johnson maintains was $586.37 per month. Johnson asserted that Defendants are not entitled to common law reformation of the Lease after engaging in wrongdoing.

In opposition, Defendants maintained that Johnson was not overcharged for rent since RSC §2522.4(a) allows a landlord to increase the rent when "new equipment, new furniture or furnishings; [and/or] major capital improvements" are provided, and that when an apartment is vacant, tenant consent to the changes is not required. RSC §2522.4(a)(1). Defendants claimed that they made significant improvements to the Apartment after it was vacated by Clossick, including, among others, replacing the walls and ceilings, putting in a new stone kitchen floor, [**6] and wood parquet flooring in the [*7] rest of the Apartment, and installing new tiles and fixtures in the bathroom. Defendants asserted that these improvements cost $38,500, and in support of this assertion, Defendants provided an estimate from a contractor and a copy of a check in that amount. Additionally, they provided an invoice and a copy of a check in the amount of $867 for new kitchen appliances. This total investment of $39,367 arguably would permit Defendants to increase the rent by $984.18 monthly, 1/40th of the total, pursuant to RSC §2522.4(a)(4).

Defendants also claimed that they were permitted a 20% increase over the previous legal regulated rent of $586.37, totaling $117.27, due to the vacancy of the Apartment, pursuant to RSC §2522.8(a). Additionally, Defendants contended that a monthly increase of $105.55 is warranted since "the legal regulated rent was not increased...by a permanent vacancy allowance within eight years prior to a vacancy lease" (RSC §2522.8(a)(2)(ii)), and they are entitled to an increase in proportion to "the number of years since the imposition of the last permanent vacancy allowance" (RSC §2522.8(a)(2)(ii)(a)).[2] In aggregate, Defendants asserted that the total monthly increase could [*8] amount to $1,207, setting the new rent at $1,793.37. Defendants therefore argued that Johnson was not subjected to an illegal overcharge as the complaint alleges, since he was only charged $1,695 under the Lease. Defendants also pointed out that the Registration History shows that they continued to list the Apartment as rent stabilized after Johnson took occupancy.

2 The regulation specifies a formula based on the legal regulated rent and the number of years since the last permanent vacancy allowance.

In the Original Decision, this court granted Johnson's motion for summary judgment, on consent of Defendants, insofar as Johnson sought a declaration that the Apartment was rent [**7] stabilized and subject to the Rent Stabilization Law, but denied Johnson's request for summary judgment on his claim for rent overcharge and treble damages. The court found that Defendants' evidence as to how the rent was calculated based on MCI increases and other increases permitted by Rent Stabilization Law raised triable issues of fact. The court further found that this instant action was distinguishable from Bradbury, based on the evidence provided by Defendants to the effect that they were not engaged in a [*9] wrongful rent destabilization scheme and that Johnson allegations of fraud were too conclusory to provide a basis for granting him summary judgment..

Johnson now moves for reargument, asserting that the court failed to consider that, even assuming *arguendo* that Defendants were otherwise entitled to increase the rent for the Apartment, that he is entitled to summary judgment on his rent overcharge claim based on Defendants' admitted failure to provide him with an initial rent stabilized lease, *citing* Jazilek v. Abart Holdings, LLC, 72 A.D.3d 529, 899 N.Y.S.2d 198 (1st Dep't 2010). Johnson argues that RSC §2522.5(c)(1)(i) and Sheridan Props., L.L.C. v. Liefshitz, 17 Misc.3d 1137[A], 851 N.Y.S.2d 74, 2007 NY Slip Op 52316[U] (Sup. Ct. Bronx County 2007), mandate that any rent adjustments be made in the statutorily mandated manner, which is in a rider to an initial rent stabilized lease. Additionally, Johnson asserts that the court overlooked Gordon v. 305 Riverside Corp., 2011 N.Y. Misc. LEXIS 3362, 2011 N.Y. Slip Op. 31860[U] (Sup. Ct. N.Y. County 2011)(Madden, J.) aff'd 93 A.D.3d 590, 941 N.Y.S.2d 93 (1st Dep't 2012) and Sullivan v. Brevard Assoc., 66 N.Y.2d 489, 488 N.E.2d 1208, 498 N.Y.S.2d 96 (1985), which, he argues, establishes that the stated rent in a lease that is not a rent stabilized lease cannot constitute the [*10] legal regulated rent within the meaning of the Rent Stabilization Law.

Johnson additionally argues that the court should not have considered Defendants' arguments that the language in ¶59 of the rider was included in error, since extrinsic evidence or [**8] a claim of unilateral mistake cannot contradict the express terms of the Lease, and the statements relating to this alleged error were not made by individuals with personal knowledge of the relevant facts. Johnson further disputes the court's finding that Bradbury is distinguishable from the present case and argues that the allegations of fraud, which the court found to be conclusory in the Original Decision, do not relate to the

rent overcharge claim.

In opposition, Defendants argue that Johnson's motion should be rejected to the extent it relies on case law which was not cited by Johnson in his initial motion papers. Defendants further argue that, in any event, the newly cited case authorities are not controlling here. Discussion

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied [*11] a controlling principle of law. See Foley v. Roche, 68 A.D.2d 558, 567, 418 N.Y.S.2d 588 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22, 588 N.Y.S.2d 8, appeal denied in part dismissed in part 80 N.Y.2d 1005, 607 N.E.2d 812, 592 N.Y.S.2d 665 (1992).

Here, Johnson is not entitled to reargument as he has not shown that the court overlooked or misapprehended any legal or factual issues. Specifically, the court correctly denied Johnson's motion for summary judgment on his rent overcharged claim based on evidence submitted by Defendants supporting their argument that the rent charged to Johnson was legal. Furthermore, the court correctly found that Bradbury does not warrant a contrary finding. In Bradbury, the Appellate Division, First Department found that the defendant landlord was barred from [**9] collecting rent in excess of the last properly registered rent.[3] Significantly, the finding of rent overcharge was made after trial and was based on evidence that the landlord had fabricated bills and invoices to forge a document to justify rent increases. In contrast, in this action discovery has not [*12] been completed and as the court found in the Original Decision, it cannot be concluded from the record that Johnson is entitled to summary judgment on his overcharge claim, particularly as Defendants have submitted evidence supporting the rent increases registered with the DHCR.

> 3 On appeal, the First Department modified the trial court to prohibit the landlord from collecting any rent increases.

Furthermore, under the circumstances here where the landlord registered the apartment as rent stabilized and offers certain proof that rent increases were based on MCI's, that the Lease incorrectly stated that the apartment was not rent stabilized does not entitle Johnson to summary judgment on his rent overcharge claim, and the case law cited by Johnson in support of his argument is distinguishable. In Jazilek v. Abart Holdings, LLC, 72 A.D.3d 529, 899 N.Y.S.2d 198, the court froze the rent at the amount of the last registration only after the court found that previous rent registrations filed by the landlord with DHCR were false. In Gordon v. 305 Riverside Corp., 2011 N.Y. Misc. LEXIS 3362, 2011 N.Y. Slip Op. 31860[U], the court denied the defendant landlord's motion for summary judgment, finding that issues of fact existed as to the base [*13] rent and legally regulated rent for the subject apartment. As for Sheridan Props., L.L.C. v. Liefshitz, 17 Misc.3d 1137[A], 851 N.Y.S.2d 74, 2007 NY Slip Op 52316[U], a finding of rent overcharge was made only after trial, when in considering the evidence, the court determined that the landlord had not met its burden of proving its entitlement to a rent increase [**10] based on improvements to the subject apartment.[4] In addition, while the court in Sheridan noted that the landlord failed to provide the tenant with a rider in her initial lease reflecting how the rent was calculated in violation of RSC 2522.5[c][1], the rent overcharge determination was not made based on this deficiency.

> 4 Johnson also cites Sullivan v. Brevard Assoc., 66 N.Y.2d 489, 488 N.E.2d 1208, 498 N.Y.S.2d 96, which is not controlling here since the issue in that case was whether the plaintiff, who was not a party to a rent stabilized lease for an apartment that she came to occupy with her sister, was the tenant of record.

Finally, contrary to Johnson's position, the parole evidence rule does not bar Defendants from introducing evidence that the inclusion of ¶ 59 of the Rider was an error.

Conclusion

In view of the above, it is

ORDERED that the motion for reargument is denied; and it is further

ORDERED [*14] that within 30 days of the date of this decision and order, the defendants are to provide proof of all documents filed with the DHCR in

connection with any application for MCI increase in which defendants claim that rent increases at issue in this action are based and any determination of DHCR with respect to such application(s); and it is further

ORDERED that a status conference shall be held on December 5, 2013, at 3:00 pm

Dated: October 7, 2013

/s/ Joan A. Madden

J.S.C.