CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF ~~KINGS~~ New York

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INDEX NO. 70310/13

64 WEST 108TH ASSOCIATES,

Petitioner,

-against-

DECISION/ORDER

VANESSA BURDICK,

Respondent.

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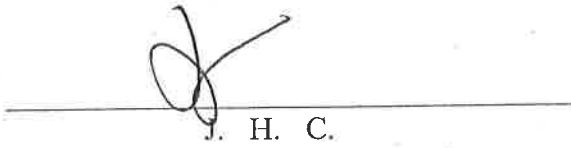
SCHNEIDER, J.

After a hearing, the court directs the entry of a judgment for money only in favor of the petitioner and against the respondent for $54,484.16 as petitioner's reasonable attorney's fees. The hourly rates charged by petitioner's counsel were entirely reasonable given counsels education, experience and expertise. The amounts of time expended by counsel on various tasks, as documented by counsel's detailed contemporaneous time records, were also entirely reasonable. This was an intensely litigated holdover proceeding in which the petitioner was compelled to respondent to numerous motions on respondent's behalf, none of them successful, and then to conduct a full trial on the merits. The overall total of the legal fees sought is reasonable in view of the history of the litigation and the results achieved.

Dated: 2/22/16



J. H. C.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART P

64 WEST 108TH ASSOCIATES,

Petitioner,

L & T Index #: 70310/13

-against-

DECISION/ORDER

VANESSA MARA BURDICK,

Respondent-Tenant,

and

SAMAM SAJMAMI, "JOHN DOE" and/or "JANE DOE,"

Respondent-Undertenants.

HON. ARLENE H. HAHN, J.H.C.

After several days of trial, based on the testimonial and documentary evidence adduced therein, the Court finds and decides as follows:

Petitioner commenced this summary holdover proceeding, after lease expiration, to recover possession of Apartment #6A at 64 West 108th Street, in New York county ("Apartment"), on the premise that it is not subject to rent stabilization, pursuant to the luxury decontrol law and the fact that the lease commenced on March 1, 2010 with a rent greater than $2,000.00. Respondent interposes affirmative defenses of, and counter-claims for, retaliatory eviction, rent overcharge and fraud, and that the apartment is subject to rent stabilization, and counterclaims additionally for attorneys fees.

Respondent took occupancy of the subject premises pursuant to a one-year, unregulated, residential lease dated February 23, 2010, commencing March 1, 2010 and ending February 28, 2011 at a monthly rental rate of $2300.00.[1] Thereafter, respondent refused to sign renewal leases in 2011, 2012, and 2013.[2]

Respondent alleges that petitioner brought this holdover proceeding in retaliation for her filing complaints with the New York City Department of Housing Preservation and Development ("HPD"), commencing with her first complaint on February 11, 2013, for "no heat."[3] Three other complaint numbers were registered with HPD as having been made by respondent in the months preceding petitioner's service

[1] Paragraph 23(D)(3) of the lease between the parties contains a legal fee provision.

[2] Respondent's Exhibits A - E.

[3] Although respondent's answer alleges that the February 11, 2013 complaint to HPD was for excessive heat, the HPD complaint history attached as Exhibit C to her Motion for Summary Judgment dated September 6, 2013, lists the complaint condition for that complaint date as "heat" and the condition detail as "no heat" in the entire apartment.

of the termination notice[4]: February 25, 2013, for broken radiator in the entire apartment, March 18, 2013, for radiator leak in kitchen/boiler inoperable in the entire apartment/kitchen, and April 6, 2013 for broken or defective cylinder/locks in the lobby. On March 21, 2013, HPD issued only one violation in respondent's apartment for a "broken or defective air valve at 2# steam line in the kitchen."

Respondent alleges that because petitioner commenced this proceeding within six months of her filing complaints with HPD, that this holdover proceeding should be presumed retaliatory and dismissed as a matter of law. RPL §223-B provides, in pertinent part:

> "1. No landlord of premises or units to which this section is applicable shall serve a notice to quit upon any tenant or commence any action to recover real property or summary proceeding to recover possession of real property in retaliation for:
> a. A good faith complaint, by or in behalf of the tenant, to a governmental authority of the landlord's alleged violation of any health or safety law, regulation, code, or ordinance . . . .
> 5. In an action or proceeding instituted against a tenant of premises or a unit to which this section is applicable, a rebuttable presumption that the landlord is acting in retaliation shall be created if the tenant establishes that the landlord served a notice to quit, or instituted an action or proceeding to recover possession, or attempted to substantially alter the terms of the tenancy, within six months after:
> a. A good faith complaint was made, by or in behalf of the tenant, to a governmental authority of the landlord's alleged violation of any health or safety law, regulation, code, or ordinance . . . .
> The effect of this presumption shall be to require the landlord to provide a credible explanation of a non-retaliatory motive for his acts. Such an explanation shall overcome and remove the presumption unless the tenant disproves it by a preponderance of the evidence."

Here, although petitioner's commencement of this holdover proceeding within six months of respondent's filing of complaints with HPD triggered the rebuttable presumption of RPL §223-B for retaliatory eviction, petitioner credibly explained several non-retaliatory motives for having done so.

Respondent repeatedly refused to sign renewal leases, despite many letters with warnings about the consequences of failing to do so. By letter dated February 21, 2012, petitioner requested that respondent sign and return the lease renewal forms sent to her in November, 2011, and included additional copies and advised that if it did not receive them by the expiration of her lease, she would be billed the new rate commencing March 1, 2012. The following year, by letter dated March 7, 2013, petitioner requested respondent sign a lease renewal for the period March 1, 2013 - February 28, 2014, sent to her January 4, 2013, but not returned, and warned that if she failed to return them, she would be a holdover tenant. On April 11, 2013, petitioner sent a third and final letter to respondent rescinding its lease renewal offer

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[4] The Termination Notice was dated April 23, 2013.

because she had failed to sign and return the renewal lease or even respond at all. The letter also sought access to respondent's apartment for the purpose of installing five window guards to clear up a violation which had been placed for them and stating that she had refused access to the super on April 1 and April 4, 2013, despite having previously notified him that she would provide him access. It concluded with a request for access and for respondent to inform petitioner when respondent would be moving.

Respondent rarely paid her rent on time and frequently carried a substantial rent arrears balance. Although respondent failed to sign any offered lease renewals, petitioner charged respondent $2350.00 in the second year, $2400.00 in the third year and $2500.00 in the fourth year of her tenancy, consistent with the offered, but unsigned renewal leases, and respondent paid rent at those higher rates at least once after having been charged them, indicating accession to the increased rental rate. A review of respondent's rent ledger indicates that from the inception of her tenancy through November, 2013, respondent carried a rent arrears balance in more months than not, with highs of $10,100.00 in July, 2012 and $12, 600.00 in August, 2012. And in the fifteen month period from December, 2013 through February, 2015, respondent carried a balance every month except for two[5] of anywhere between $2030.00/month and $7555.00. Further, one of respondent's checks was returned for insufficient funds.[6]

Additionally, respondent changed the lock to her apartment and refused to provide petitioner with a key, she failed to notify petitioner of heat complaints before notifying HPD, in violation of paragraph 4 of her lease, she failed to provide access on several occasions for petitioner to perform work to clear a violation and she failed even to respond to petitioner's many letters.

In light of the foregoing, the Court finds that petitioner did not commence this proceeding in retaliation pursuant to RPL §223-B and dismisses respondent's first counterclaim.

The court previously ruled on respondent's second affirmative defense of untimely service of the notice of termination in denying her motion to dismiss on this point.[7] For the reasons set forth therein, the Court denies respondent's second affirmative defense.

Respondent's third affirmative defense and second counterclaim allege that the apartment is subject to rent stabilization because petitioner failed to properly deregulate it and committed fraud by filing false, fraudulent or erroneous annual rent registration statements with the DHCR for the years 1999 and 2000.

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[5] September, 2014, and November, 2014, when she made a payment of $5600.00.

[6] Petitioner's Exhibits 8 and 12.

[7] J. Saxe, August 8, 2014.

Although respondent's answer alleges that petitioner failed to comply with Rent Stabilization Law [RSL] § 26-504.2[b], the "high rent vacancy" law, by failing to serve the required notice or "exit registration" upon the first deregulated tenant or herself, respondent provided no proof of this at trial. Further, this provision does not require such notification to be served on tenants subsequent to the first deregulated tenant.

Respondent's fourth affirmative defense and third counterclaim allege petitioner overcharged her in light of her claim that the apartment is rent stabilized. As these defenses and counterclaims are related, they shall be discussed together.

The Rent Stabilization Law limits consideration of events beyond a four-year period prior to an allegation of rent-overcharge for the purpose of calculating the amount of an overcharge.[8] However, where a tenant alleges fraud and challenges the rent regulatory status of an apartment, consideration of events beyond the statutory four-year period is permissible if done not for the purpose of calculating rent overcharge, but rather to determine whether an apartment is regulated.[9] In light of this, the Court reviewed and considered all evidence presented with regard to events related to petitioner's deregulation of the apartment from the end of the tenancy of the last registered rent stabilized tenant through the date of trial.

At trial, respondent called petitioner's agent, Gary Nave. Mr. Nave credibly testified that petitioner spent $60,000.00 gut-renovating respondent's apartment and submitted seven photographs of the renovation of respondent's apartment[10]which depict that it was gutted to the studs, and every wall as well as the ceiling in the entire apartment was replaced with new sheet-rock. It also appears from the photographs that the entire electrical system of the apartment was completely updated. Further, it appears that significant tile work was done in the bathroom. Respondent did not dispute that these photos were of her apartment, nor did she provide any other evidence whatsoever to rebut Mr. Nave's testimony. Respondent had no personal knowledge of the condition of her apartment at any time prior to her seeing it immediately before signing the lease, nor did anyone with such personal knowledge testify on her behalf. However, respondent asserts that petitioner's lack of additional documentation to prove that this renovation was actually done and to justify the rent increase to deregulate the apartment proves her argument that

[8] Administrative Code of the City of NY § 26-516(a)(2). For a summary of law and cases related to this issue through the date of publication, see "Deregulation Under Rent Stabilization: How Long Must Landlords Keep Records?," NYLJ 10/28/09, by Robert H. Gordon and Stuart F. Shaw.

[9] East West Renovating Co. v. New York State Div. Of Hous. And Community Renewal, 16 AD3d 166 [2005], 656 Realty, LLC v Cabrera, 27 Misc.3d 138(A), App. Tm., 1st Dept, 2010, etc.

[10] Petitioner's Exhibits 10 A-G.

petitioner committed fraud, and based on that fraud, improperly deregulated the apartment. Having called petitioner's witness as her own, and not having requested to treat him as a hostile witness, respondent vouched for his credibility and was unable to impeach his credibility, despite attempts to do so.[11]

Respondent's contention that petitioner failed to provide adequate proof of petitioner's expenditures for improvements necessary to bring the legal rent above the luxury decontrol threshold are unavailing, especially in light of petitioner's unrebutted testimony and evidence. This exact issue having been addressed by the Court of Appeals in Jemrock Realty Co., LLC. v. Krugman, 13 N.Y. 3d 924, 2010, the court ruled that

> "the resolution of that issue is not governed by any inflexible rule either that a landlord is always required, or that it is never required, to submit an item-by-item breakdown, showing an allocation between improvements and repairs, where the landlord has engaged in extensive renovation work. The question is one to be resolved by the factfinder in the same manner as other issues, based on the persuasive force of the evidence submitted by the parties."

The certified DHCR records show that Sam Barton was the last rent stabilized tenant of the apartment having lived there from at least 1984 until 1999. The records further show that the apartment was registered at a legal rent of $2000.00 in 1999, and as "permanently exempt" in 2000. These registrations were unrebutted by respondent and the eight intervening tenants between 2000 and 2010, when respondent took occupancy. Further, even if petitioner had not spent $60,000.00 and properly deregulated the apartment, if one were to complete the exercise of calculating what the current legal rent would have been pursuant to the regular rent stabilized guideline increases, beginning at Sam Barton's last regulated rent of $477.60, the rent would have reached $3019.80 by the time respondent took occupancy, rather than the $2300.00 of her initial lease. Her second lease would have been at a monthly rate of $3087.74, rather than $2350.00. Her third lease would have been at the rate of $3203.53, rather than $2400.00, and her fourth lease would have been at the rate of $3267.60, rather than $2500.00.

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[11] Velleman v. Sidney Blumenthal & Co., 172 A.D. 331, 158 N.Y.S. 393, N.Y.A.D. 1 Dept. 1916. "The plaintiff was, of course, at liberty to *contradict* the testimony given by the president of the defendant; but he failed to do so, and, having called him as a witness to give general testimony depending upon his veracity, he vouched for his credibility, and when his testimony was uncontroverted the plaintiff was not then in a position to ask to have the jury find contrary thereto."

Respondent's reliance on Altman v. 285 West Fourth, LLC, 127 A.D.3d 654, NY Slip Op 03485 [1st Dept, April 28, 2015] is misplaced, because that decision was based specifically upon removal of an apartment from rent stabilization based upon a vacancy increase alone. Here, the basis for the rent increase which deregulated the apartment was the amount of petitioner's expenditures for improvements which brought the legal rent above the luxury decontrol.

In light of the foregoing, and after careful review of all the documentary and testimonial evidence presented at trial, the Court finds that petitioner neither overcharged respondent nor committed any fraud as alleged by respondent, but rather did properly deregulate her apartment. Upon close inspection of all of the certified records of the DHCR, leases, rent ledgers, documentation in support of the IAI's in the apartment, and all other documents entered into evidence, and the unrebutted, credible testimony of petitioner's witness, Mr. Nave, the long-time property manager of this property, the Court finds that petitioner met its burden by the persuasive force of the evidence submitted that it did, in fact, substantiate an expenditure of $60,000.00 for the gut-renovation of respondent's apartment, and therefore respondent's apartment was properly deregulated in 2000, and that all subsequent leases were properly fair market leases, including respondent's, which expired on February 28, 2011. Further, respondent offered no relevant, credible documentary or testimonial evidence to contradict petitioner's evidence.

Accordingly, the Court denies respondent's third and fourth affirmative defenses, dismisses respondent's second through fifth counterclaims, and awards petitioner a final judgment of possession. Issuance of the warrant is stayed five days from service of a notice of entry of this decision upon respondent, and execution is stayed through August 31, 2015, for respondent to vacate, provided she pay any and all unpaid use and occupancy owed to date to petitioner by July 15, 2015, as well as use and occupancy for July, 2015 by July 15, 2015 and for August, 2015, by August 5, 2015. In case of default in payment, execution of the warrant may accelerate. Petitioner is directed to mail respondent and her attorney a copy of the rent ledger and amount of outstanding use and occupancy owed to date upon receipt of this order. The matter is adjourned to September 15, 2015 for a hearing to determine petitioner's reasonable attorney's fees as the prevailing party pursuant to the lease.

The foregoing constitutes the decision and order of this court.

Dated: New York, New York
June 26, 2015

HON. ARLENE H. HAHN, J.H.C