

Damassia v Bedford Stuyvesant S. One LLC

2023 NY Slip Op 34269(U)

December 8, 2023

Supreme Court, New York County

Docket Number: Index No. 160827/2022

Judge: Lyle E. Frank

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

MICKELLE DAMASSIA, MICAELLA DUNCAN, DIANA
AYOUB

Plaintiff,

- v -

BEDFORD STUYVESANT SOUTH ONE LLC,

Defendant.

-----X

INDEX NO. 160827/2022

MOTION DATE 07/21/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95

were read on this motion to/for DISMISSAL.

For the foregoing reasons, the defendant’s motion to dismiss is denied.

Background and Facts

Plaintiffs are residents of the apartment building 27 Albany Avenue in Brooklyn, New York. Defendant is the owner and operator of 27 Albany Avenue. This action arises out of allegations that the defendant overcharged plaintiffs for rent and conducted a scheme to evade rent stabilization laws by utilizing rent concessions to register higher rents with Division of Housing and Community Renewal, (“DHCR”) than were charged to initial tenants. Defendant moves to dismiss pursuant to CPLR 3211(a)(1) and (7).

i. 421-a program

Under New York City’s 421-a program, in exchange for tax credits, landlords are required to register their units with DHCR, and provide its tenants with the protections of the rent stabilization laws. Here, it is undisputed that the apartments at issue are subject to rent

stabilization protections pursuant to the 421-a program. As such, pursuant to regulations, the defendant was required to register the units' initial rents with DHCR and provide rent stabilization benefits for each subject unit. Then, as rent stabilized units, the landlord can only raise the rent from that initial amount based on the legal stabilized rate. As such, the higher the initial rent, the more the landlord can charge subsequently, even when stabilized.

ii. Construction Riders

In support of its motion to dismiss, defendant offers the construction riders attached to plaintiffs' leases and the leases of the first tenants in each apartment. For instance, one rider in relevant part states,

“Tenant further acknowledges being advised that during the Tenant’s Lease there will be continued work in the Building in order to complete various public areas including, but not limited to, the lobby, hallways, health club, laundry facilities, etc... In order to accommodate Tenant for any inconvenience caused by the ongoing construction, Owner agrees to give Tenant two one-time ren credits for this vacancy Lease totaling \$5,300.00 (the “Construction Concession”). This Construction Concession is solely to compensate Tenant for the inconvenience Tenant may encounter during the ongoing construction and in commencing building services, but in no way constitutes a preference or reduction in the Apartment’s legal regulated rent. These one-time Construction Concessions will apply to May 2018 and March, 2019. Tenant is responsible to pay rent in full for the remaining months of the Lease...”

NYSCEF Doc. No. 50

Based on this provision which is repeated without significant distinction in each rider offered, defendant asserts it did not offer tenants a reduced rent at the beginning of their tenancy, but rather specific concessions to compensate for the building’s ongoing construction. The defendant contends the rider conclusively shows each tenant acknowledged the concession was specific to one or two months and would not change the total monthly rent of their apartment. In opposition, plaintiffs contend that while on its face the rider appears to offer rent concessions due

to ongoing construction in the building, there was actually no construction happening in the building when these concessions were offered, thus evidencing defendant's aim to offer preferential rents under another name. Plaintiffs assert defendant utilized this method because under DHCR regulations, one-time rent concessions that apply to a specific month do not affect the legal regulated rent, whereas prorated discounts are considered preferential rents, which must be the rent registered with DHCR.

In support of its claim that there was no construction ongoing at the time the construction concessions were offered plaintiffs offer google images of the outside of the subject building from the time the concessions were provided. Plaintiffs contend such images show the building was fully constructed and complete when the defendant offered what it asserted were construction concessions. Plaintiffs also submit personal affidavits which attest they did not witness any "significant ongoing construction" at the commencement of their lease or thereafter. NYSCEF Doc. No. 61, NYSCEF Doc. No. 63, NYSCEF Doc. No. 65. Moreover, plaintiffs rely on the affidavit of David J. Spector, its purported industry expert, who attests that within construction projects a lack of a Permanent Certificate of Occupancy ("PCO") does not conclusively establish ongoing construction. NYSCEF Doc. No. 58. Based on said evidence, plaintiff opposes defendant's motion to dismiss, arguing that plaintiff has sufficiently plead a cause of action alleging defendant overcharged plaintiffs for rent and concocted a scheme to evade rent stabilization requirements.

Standard of Review

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *Leon v.*

Martinez, 84 NY2d 83 [1994]. On a motion to dismiss the court “merely examines the adequacy of the pleadings”, the court “accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff’s claim.” *Davis v Boenheim*, 24 NY3d 262, 268

Under CPLR Rule 3211(a)(1) documentary evidence provides a basis for dismissing a cause of action “where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goseh v. Mutual Life Ins. Co. of NY*, 98 N.Y.2d 314, 326 [2002].

Discussion

In support of dismissal, defendant directs the Court to *Flynn v Red Apple 670 Pac. St., LLC* (200 AD3d 607 [1st Dept 2021]). In *Flynn*, the First Department held that one-time month-specific “rent concessions” do not create a new net effective rent for which the landlord is required to register with DHCR. *Id.* The plaintiffs in *Flynn* brought suit alleging the landlord illegally increased their rent by initially registering a higher rent with DHCR than what the tenants initially paid, through the use of initial rent concessions. The Court explained, “the parties plainly agreed that the one month rent concession was a one-time event that had no impact on the remainder of plaintiff’s rent payments. There is also no dispute that at the time the plaintiff received the one month rent concession, the building had not yet received a permanent certificate of occupancy. Under these circumstances, plaintiff failed to assert allegations sufficient to withstand a motion to dismiss...” *Id.* The defendant therefore contends pursuant to *Flynn*, dismissal is warranted under the plain language of each construction rider.

In opposition, plaintiff contends that the present case is distinguishable from *Flynn* because there was no substantial construction when the construction riders were used, an issue that was not a factor in *Flynn*. Plaintiffs direct the Court to *Chernett v. Spruce 1209, LLC*, where

the First Department affirmed the denial of defendant's motion to dismiss under a similar set of facts. The Court held, "we agree with the motion court that the allegations in the complaint warrant discovery to determine whether the concessions were functionally equivalent to a preferential rent; "[s]imply calling it a concession does not transform it into a permissible activity under the applicable statutory scheme." *Chernett v. Spruce 1209, LLC*, 200 A.D.3d 596. Thus, under *Chernett*, where a tenant can introduce evidence that there was a "false justification" for the concession, such as providing "construction concessions well after construction was complete," the complaint should survive dismissal. *Id.*

The Court finds there is a question of fact as to whether there was construction ongoing at the time the initial leases were signed, and thus dismissal is not appropriate, based on the affidavits provided by the plaintiffs that there was no "substantial construction" ongoing while they lived there, as well as the self-authenticating photographs provided by plaintiffs. While the defendant argues the documentary evidence conclusively shows the concessions were to compensate for interruptions to tenants as a result of ongoing construction, the Court does not agree that has been so conclusively established that dismissal is warranted at this early stage. Moreover, these construction riders were prepared by defendant, and their truthfulness has been raised as an issue by plaintiffs. The Court finds discovery is needed to determine whether the "free" months of rent offered to tenants were in fact construction concessions, or disguised preferential rents mislabeled to enable the landlord to raise future rents beyond what would be permissible under rent stabilization rates.

Finally, the defendant has argued that plaintiff's reliance on an expert affidavit is inappropriate on this motion to dismiss. The Court need not reach that issue, as the other factors

discussed above are enough for this Court to find that dismissal is not warranted at this time.

Accordingly, it is hereby,

ADJUDGED that defendant's motion to dismiss is denied.

20231208161912LFRANKDB815783334A343C0B7AB15A630A3A1B5

12/8/2023

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE