CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART O

OREN APARTMENTS, LLC
Petitioner-Landlord

-against-

ESPERANZA R. TORRES
42-72 80th Street, Apt. 3-R
Elmhurst, New York 11380
Respondent-Tenant

Motion Seq # 1

L&T Index # 67038/16

DECISION/ ORDER

Hon. Clifton A. Nembhard

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent's motion for an order dismissing the petition pursuant to CPLR 3211 and summary judgment pursuant to CPLR 3212 and granting her counterclaim for damages.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	
Other	

Procedural History

Petitioner commenced the instant nonpayment proceeding by notice of petition and petition in July 2016. Prior to commencement petitioner served a Rent Demand seeking a balance of $1,181.67 for May and $1,825.00 for June. Respondent joined issue by way of a pro se answer on August 9, 2016. On August 19, 2016, after retaining counsel, respondent filed an amended answer which included a counterclaim for rent overcharge. Respondent now moves to dismiss the case on the grounds that the petition failed to state a cause of action because the predicate notice seeks rent in excess of that allowed under the Rent Stabilization Law and for damages resulting from the overcharge.

Background

The subject apartment was last registered as rent stabilized in 2002. At that time tenant's legal regulated rent was $1,594.83. Since 2003 the apartment has been registered as exempt due to high rent vacancy. Respondent moved into the apartment in 2011 and was initially charged $1,700.00 a month. The rent was raised to $1,775.00 in June 2015 and to $1,825.00 in June 2016.

Discussion

Upon a motion to dismiss pursuant to CPLR 3211(a)(7), the court accepts the complaint's allegations as true and draws all inferences in favor of the plaintiff. *Miglino v. Bally Total Fitness of Greater N.Y.*, 20 NY3d 342 [Ct App 2013]. Dismissal is warranted if the complaint fails to allege facts that fit within any cognizable legal theory. *Goldman v. Metropolitan Life Ins. Co.*, 5 NY 3d 561 [2005]. Summary judgment under CPLR 3212 should only be granted where there exists no triable issues of material fact. *Spearmon v. Times Square Corp.*, 96 AD2d 552 [2nd Dept 1983]. The proponent of the motion must therefore establish her defense by admissible evidence sufficient for the court to direct judgment in her favor as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 NY 2d 1065 [Ct App 1979]. The respondent has failed to meet this burden.

A proper demand is the statutory prerequisite to maintaining a nonpayment proceeding. RPAPL§ 711(2); *Community Housing Innovations, Inc. v. Franklin*, 14 Misc3d 131(A) [App Term 2nd Dept 2007]. The demand must be a good faith assertion of the rent due at the time of the demand to inform the tenant of the amount she must pay to avoid eviction. *Schwartz v. Weiss-Newell*, 87 Misc2d 558 [Civ Ct NY 1976]. Section 2525.1 of the Rent Stabilization Code and section 2205.1 of the New York City Rent and Eviction Regulations expressly forbid "any person to demand or receive" rent in excess of the legal regulated rent or maximum rent. A rent demand which seeks payment of charges whose collection is prohibited by rent stabilization does not state a good faith amount of rent claimed. *London Terrace Gardens v. Stevens*, 159 Misc2d 542 [Civ Ct NY 1993].

The petition here alleges that the subject apartment is luxury decontrolled under the 1993 Rent Regulation Reform Act as further amended in 1997 and 2011. Respondent, relying on the Appellate Division's decision in *Altman v. 285 W. Fourth, LLC,* 38 NYS3d 173 [1st Dept 2016] challenges this claim. The court in *Altman* opined that "[a]lthough the defendant was entitled to a vacancy increase of 20% following the departure of the tenant of record, the increase could not effectuate a deregulation of the apartment since the rent at the time of the tenants vacatur did not exceed $2,000". Respondent points out that prior to her apartment being registered as exempt, the previous tenant's legal regulated rent was $1,594.83. Since this was less that the $2,000.00 threshold for deregulation, the apartment is still subject to stabilization and petitioner's failure to register it as such prohibits it from collecting rent in excess of the $1,594.83.

Petitioner in opposition argues that respondent's theory of improper deregulation is mistaken

based on more recent appellate case law. Petitioner notes that the *Altman* decision is in inherent conflict with the Appellate Term's holdings in *233 E. 5th St. LLC v. Smith*, 2016 Slip Op 26404 [2016] and *Aimco 322 E. 61st St. LLC v. Brosius*, 50 Misc3d 10 [2015]. To support the position, petitioner cites the portion of the decision in *233 E. 5th St. LLC* in which the court stated that "we do not interpret the contents of a single sentence in the decision in *Altman v 285 W. Fourth, LLC*, (*citation omitted*) so broadly as to effectuate a sea change in nearly two decades of settled statutory and decisional law - that allow an owner to deregulate an apartment after a vacancy if the legal rent plus any lawful increases and adjustments to the rent, such as the vacancy allowance, exceeded $2,000".

Altman was the controlling authority at the time the motion was submitted. However, on April 20, 2017, the Appellate Division seemingly resolved the split of authority in *Matter of 18 St. Marks Palace Trident LLC v. State of New York Div. of Hous. & Community Renewal*, 2017 NY Slip Op 03042. There the court reversed the Supreme Court's denial of petitioner's Article 78 petition which sought to vacate respondent's determination that an apartment owned by petitioner was not eligible for deregulation. In reaching it decision, the court reasoned that based on the formula used by respondent, which included vacancy and improvement increases, the legal regulated rent was above the $2,000.00 threshold for deregulation. In light of this decision, the mere fact that respondent's predecessor's last registered rent was less than $2,000.00 does not prove that her apartment is subject to rent stabilization.

Respondent's rent overcharge claim is also unavailing. Regardless of the forum in which it is commenced, a rent overcharge claim is generally subject to a four-year statute of limitations. RSL § 26-516 (a) (2); CPLR 213-a; *In re Cintron v. Calogero*, 15 NY3d 347 [Ct App 2010]. The sole exception is where the tenant establishes a colorable claim of fraud. *Grimm v. State of New York Div. of Hous. & Community Renewal*, 15 NY3d 358 [Ct App 2010]. Here the apartment was registered as exempt well before the four year look back and respondent does not provide any evidence that petitioner engaged in a fraudulent scheme to remove it from rent stabilization. Instead, she merely asserts that the rent increases were improper based on the above contention that the apartment is stabilized.

Conclusion

Based on the foregoing, the motion is denied. The case is adjourned to May 30, 2017 at 9:30 am for settlement or trial.

This constitutes the decision and order of the Court.

SO ORDERED

HON. CLIFTON A. NEMBHARD

Date: April 24, 2017
Queens, New York

Hon. Clifton A. Nembhard, JHC