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

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AURORA ASSOCIATES LLC,

Petitioner,

Index No. 63292/2016

- against -

DECISION/ORDER

RAFFAELOLO LOCATELLI,

Respondents/Tenants.

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Present:

Hon. Jack Stoller
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion.

Papers	Numbered
Notice of Motion and Supplemental Affidavit Annexed.....	1, 2
Notice of Cross-Motion and Supplemental Affidavit and Affirrmation Annexed	3, 4, 5
Reply Affirmation	6

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

Aurora Associates LLC, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Raffaello Locatelli, the respondent in this proceeding ("Respondent"), seeking possession of 78 Reade Street, Loft 3B on the 3rd Floor, New York, New York ("the subject premises") on the ground of termination of Respondent's tenancy pursuant to RPL §232-a. Respondent interposed an answer ("the Answer"), which includes, *inter alia*, a claim that the subject premises is subject to rent regulation and includes, *inter alia*, a counterclaim for rent overcharge. Petitioner now moves for summary judgment in its favor and to dismiss Respondent's defenses. Respondent moves for summary judgment in his favor. The

Court consolidates both motions for resolution herein.

The core of the parties' dispute is the rent regulatory status of the subject premises. If the subject premises is unregulated, termination of a tenancy pursuant to RPL §232-a is a remedy available to Petitioner. If the subject premises is rent-stabilized, RPL §232-a is not a remedy available to Petitioner. N.Y.C. Admin. Code §26-511(c)(4). Neither party disputes that, at least at one point in time, the subject premises was an Interim Multiple Dwelling pursuant to Article 7-C of the Multiple Dwelling Law ("the Loft Law"). Petitioner annexes to its motion papers an agreement entered into between Petitioner's predecessor-in-interest and former Loft Law tenants of the subject premises ("the agreement"). The agreement, dated March 26, 1998, purports to effectuate a sale of both improvements and rights of the prior tenants to Petitioner's predecessor-in-interest pursuant to MDL §286(6) and MDL §286(12). A vacancy lease for the subject premises ensued, commencing on December 18, 1998 with a monthly rent of $2,001.00.

Respondent disputes the admissibility of the agreement and that disputes that the agreement effectuated a fixture purchase due to infirmities with the sale.[1] Be that as it may, Respondent argues, even assuming *arguendo* that the agreement is admissible and was legitimate, that the agreement does not deregulate the subject premises.

Exhibit D of Petitioner's motion shows that there are six residential units in the building

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[1] Specifically, the sale purportedly occurred on March 26, 1998 but documentation thereof was not filed with the Loft Board until 2004. An owner must file such a record with the Loft Board within thirty days of a sale of improvements. 29 R.C.N.Y. §2-07(j)(1). Part of the reason for this requirement is to afford an incoming tenant the opportunity to challenge the sale. 29 R.C.N.Y. §2-07(g)(1)(iv). Obviously, the incoming tenant of the subject premises who signed a lease commencing in 1998 had no meaningful opportunity to challenge the sale if it was not filed with the Loft Board until six years after the fact.

in which the subject premises is located, including the subject premises. Where, as here, the building contains six or more residential units, it is subject to rent stabilization by virtue of Emergency Tenant Protection Act ("ETPA") notwithstanding the sale of Loft Law rights by a prior tenant, in part because MDL §286(12) only applies to the actual occupant who sold her or his rights, not subsequent tenants. Acevedo v. Piano Bldg. LLC, 70 A.D.3d 124, 127 (1st Dept. 2009), *appeal withdrawn*, 14 N.Y.3d 884 (2010), VVV Partnership v. Moran, 10 Misc.3d 130(A) (App. Term 1st Dept. 2005), 29 R.C.N.Y. §2-10(d)(2).

Petitioner attempts to distinguish Acevedo, supra, from this case. Petitioner argues that even if the subject premises would otherwise be subject to the Rent Stabilization Law, the first rent in 1998 being above $2,000.00 effectuated a deregulation of the subject premises by the provisions of the very Rent Stabilization Law Respondent claims coverage under. However, the apartment at issue in Acevedo, supra, had a vacancy lease of $2,781.00 in June of 1999, after the vacancy lease for the subject premises. Acevedo, supra, 70 A.D.3d at 126. If the rule that Petitioner urges the Court to apply here were applied in Acevedo, supra, the result would be the same, because rent-stabilized apartments which become vacant on or after June 19, 1997 but before June 24, 2011 with a legal regulated rent of $2,000.00 or more per month are subject to deregulation. 9 N.Y.C.R.R. §2520.11(r)(4). The ruling in Acevedo, supra, that is contrary to Petitioner's argument compels the conclusion that the provisions of the Loft Law and the ETPA preclude such an application of the law as Petitioner urges. See 91 Fifth Ave. Corp. v. New York City Loft Bd., 249 A.D.2d 248, 249 (1st Dept. 1998) (special Loft Law provisions respecting leases take precedence over contrary provisions of the ETPA).

Petitioner cites other authority that stands for a different proposition than Acevedo, supra, and also argues that Acevedo, supra, is not good law. However, the authority that Petitioner cites is not binding on this Court in the same manner that the First Department of the Appellate Division is on this Court. It is axiomatic that a lower Court, like this one, is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department. D'Alessandro v. Carro, 123 A.D.3d 1, 6 (1st Dept. 2014). Accordingly, on the basis of the authority of Acevedo, supra, the Court grants Respondent's motion to dismiss Petitioner's cause of action, denies Petitioner's motion for summary judgment, and denies Petitioner's motion to dismiss Respondent's first affirmative defense to the petition as moot. What remains for the Court to decide is Petitioner's motion to dismiss Respondent's counterclaims sounding in rent overcharge and in attorneys' fees.

"The purpose of the Loft Law was to integrate unregulated loft dwelling units into the coverage of the rent stabilization system, and to harmonize with — rather than displace — existing forms of regulation." Acevedo, supra, 70 A.D.3d at 128-129. Accordingly, the Court evaluates Respondent's rent overcharge counterclaim according to the standards set by the Rent Stabilization Code. The legal regulated rent for the purposes of determining an overcharge shall be deemed to be the rent charged on the base date, plus in each case any subsequent lawful increases or adjustments. 9 N.Y.C.R.R. §2526.1(a)(3)(I). The base date is four years prior to the filing of a rent overcharge claim. 9 N.Y.C.R.R. §2520.6(f)(1). Respondent does not prove that an objectionable rent increase occurred during this time frame. As Petitioner moved to dismiss Respondent's defense and counterclaim by summary judgment, Respondent was required to "lay

bare" his proof of an objectionable rent increase as such. Alfred E. Mann Living Trust v. ETIRC Aviation S.a.r.l., 78 A.D.3d 137, 142 (1st Dept. 2010), Johnson v. Phillips, 261 A.D.2d 269, 270 (1st Dept. 1999); Fileccia v. Massapequa General Hospital, 99 A.D.2d 796 (2nd Dept.), *aff'd*, 63 N.Y.2d 639 (1984); Hasbrouck v. Gloversville, 102 A.D.2d 905 (3rd Dept.), *aff'd*, 63 N.Y.2d 916 (1984). As Respondent has not done so, the Court grants Petitioner's motion to dismiss Respondent's first counterclaim sounding in rent overcharge.

Petitioner also moves to dismiss Respondent's counterclaim sounding in attorneys' fees. Given that Petitioner has not prevailed on its cause of action for possession herein and that Respondent has not prevailed on its counterclaim for rent overcharge, the Court finds that the outcome of this proceeding is mixed to the point that neither party is the prevailing party for purposes of determining which party may be entitled to attorneys' fees. 12-14 E. 64th Owners Corp. v. Hixon, 38 Misc.3d 135(A)(App. Term 1st Dept. 2013), 339-347 E. 12th St. LLC v. Ling, 31 Misc.3d 48, 49 (App. Term 1st Dept. 2011). Accordingly, the Court grants Petitioner's motion to dismiss Respondent's second counterclaim sounding in attorneys' fees.

This constitutes the decision and order of this Court.

Dated: New York, New York
November 28, 2016

HON. JACK STOLLER
J.H.C.