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

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TOWNHOUSE COMPANY II, LLC,

Petitioner,

-against-

L&T Index No. 68318/16

FRANCES PETERS,

DECISION / ORDER

Respondent.

PREMISES: Apartment 16E
265 East 66th Street
New York, New York 10065

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HON. TIMMIE ERIN ELSNER, J.H.C.

Recitation, as required by CPLR §2219(A), of the papers considered in the review of petitioner's motion: (1) to strike defenses pursuant to CPLR §3211(b); (2) for summary judgment pursuant to CPLR § 3212; (3) for use and occupancy; (3) and legal fees; and respondent's cross-motion for summary judgment pursuant to CPLR § 3212:

Papers	**Numbered**
Petitioner's Notice of Motion; Affidavit and Affirmation in Support; and Annexed Exhibits	1
Respondent's Cross-Motion; Affidavit and Affirmation in Opposition to Petitioner's Motion and in Support of its Cross-Motion; and Annexed Exhibits	2
Petitioner's Affirmation in Opposition and in Reply	3
Respondent's Reply Affirmation	4

Upon the foregoing papers, the Decision/Order of this Court is as follows:

Townhouse Company II, LLC ("petitioner") commenced this holdover against Frances Peters ("respondent") by Notice of Petition and Petition, dated July 1, 2016, at 265 East 66th Street, Apartment 16E, New York, New York ("premises") alleging that respondent, the rent-stabilized tenant of record, failed to execute a renewal lease. Respondent appeared by counsel and interposed an answer, dated July 20, 2016. Respondent alleges that the "lease renewal offered did not comply with the Rent Stabilization Law and Code including, without limitation, improper surcharges."

By motion, dated March 10, 2016, petitioner moved: to strike defenses; for summary judgment; use and occupancy; and legal fees. Respondent cross-moved for summary judgment pursuant to CPLR Section 3212.

FACTS

The facts in this proceeding are largely undisputed. Petitioner is the owner and landlord of the subject building which received tax benefits pursuant to Real Property Tax Law ("RPTL") section 421-a. Respondent is the rent-stabilized tenant of record after succeeding to the tenancy of her ex-husband who initially occupied the premises on April 1, 1979 at the monthly rent of $1,690.00. Respondent's ex-husband vacated the premises on or about April 2, 1997. In April 1989 both respondent and her husband executed a two-year renewal lease for the period May 1, 1989 through April 30, 1991. The April 1989 lease renewal listed "421-a (2.2%)" surcharge of $185.90 and "window cleaning" at $21.92 for one year or $22.54 for two years. Respondent continued to execute eleven lease renewals through April 2013. At that time, the parties executed a renewal lease for the period May1, 2013 through April 30, 2015 at a monthly rate of $5,532.28. This renewal lease also listed a separate charge for "421-a (2.2%)" surcharge of $185.90 and "window cleaning" at

$42.67 for one year or $43.51 for two years.

On or about January 26, 2016, petitioner offered respondent a renewal lease with "421-a" charges in the amount of $185.90 and "window cleaning" in the amount of $43.51. Respondent refused to execute the offered renewal lease and alleged that the renewal lease: contained an unlawful 2.2% surcharge; did not contain a 421-a rider; and contained an improper charge for window cleaning.

STATUTES and ADMINISTRATIVE POLICY STATEMENT

Rent Stabilization Code 2522.5(e)(2) provides, in pertinent part:

For buildings receiving benefits pursuant to section 421-a of the Real Property Tax Law and the regulations promulgated pursuant thereto, such clauses may provide for an annual or other periodic rent at an average rate of not more than 2.2 percent of the amount of such initial rent per annum not to exceed the maximum cumulative amount, if any, permitted under the 421-a program rules and regulations. After the tax benefits end, such additional 2.2 percent charges shall no longer be added but the owner may continue to collect the cumulative 2.2 per cent increases charged prior to the termination of said tax benefits. Any lease containing the aforementioned provision shall also include a rider with an endorsement signed by the tenant acknowledging the owner's right to include such provision and to collect such rent increase for the tax benefit period. Such rider shall state the approximate date of the expiration of such tax benefits.

Rules of the City of New York, Title 28, Section 6-04(b) provides:

The initial 2.2 percent escalation and all subsequent escalations shall be based solely on the initial adjusted monthly rent and shall not be compounded from year to year but rather shall remain constant based on said initial adjusted monthly rent. . . .The maximum increase permitted by this Section is 19.8 percent over the initial adjusted monthly rental. The maximum increase permitted by this section may be charged in each year following the expiration of the tax benefits period, but shall not exceed 19.8 percent, or that amount charged in the last year of the exemption period, and shall not become part of the base rent."

DHCR Policy Statement 92-2, dated May 21, 1992 provides, in pertinent part:

An owner may charge the 421-a rent increase commencing with the anniversary date of the first lease of the first tenant to take occupancy of the unit after the building was constructed, and once each year thereafter on such anniversary date, for a total period of nine years. Each annual rent increase is equal to 2.2% of the rent of the unit's first tenant. The total maximum increase thus permitted 19.8% above the unit's initial monthly rental

* * *

Section 2522.5(e)(4) of the Rent Stabilization Code provides that any 2.2 % increase which became effective on or after November 19, 1982 shall not become part of the

legal regulated rent but is to be charged the tenant as a separate charge, not included in the "base rent" when calculating Rent Guidelines Board increases.

The maximum increase [19.8%] may continue to be charged in each year following the expiration of the tax benefit period, but no additional 2.2% increases may be added after the tax benefit ends.

* * *

Rent charged in excess of nine 2.2 per cent per annum charges, limited to nine years, or a maximum of 19.8%, or which is otherwise not in compliance shall constitute overcharges.

ANALYSIS

Pursuant to CPLR §3212, summary judgment is a drastic remedy that deprives litigants of their day in court, and it "should only be employed when there is no doubt as to the absence of triable issues." *See Andre v Pomeroy,* 35 NY2d 361 [1974]; *see also, Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2d Dept 2004]. The court's function is not to determine credibility, but to determine if there exists a triable issue, or if arguably there is a genuine issue of fact. *See S.J. Capelin Assocs., Inc. v Global Mfg. Corp.*, 34 NY2d 338 [1974]. The movant has the initial burden of proving entitlement to summary judgment and upon such proof, the opposing party must show facts sufficient to require a trial of any issue of fact. *See Winegrad v New York Univ. Med. Center*, 64 NY2d 851 [1985](*citing, Zuckerman v City of New York*, 49 NY2d 557 [1980].)

Rent Stabilization Code Section 2522.5(e)(2) provides that "after the tax benefits end, such additional 2.2 percent charges shall no longer be added *but the owner may continue to collect the cumulative 2.2 percent increases charged prior to the termination of said tax benefits [emphasis added].*" Pursuant to 28 RCNY Section 6-02(d), "eligible buildings may receive a ten, fifteen, twenty or twenty-five year tax exemption." Since the benefits period may be as long as a twenty-five years, the regulations limit the number of increases in the "421-a" surcharge to nine annual increases of 2.2 percent above the initial monthly rent or 19.8 percent. Pursuant to 28 RCNY Section 6-04(b), "[t]he initial 2.2 percent escalation and all subsequent escalations shall be based solely on the initial adjusted monthly rent and shall not be compounded from year to year but rather shall remain constant based upon said initial adjusted monthly rent.

New York State Home and Community Renewal ("HCR"), in a policy statement, dated May 21, 1992, explained:

It appears that petitioner has utilized five "421-a" increases for a total of $185.90 less than the amount it was entitled to collect. It is undisputed that petitioner no longer receives 421-a benefits. Based upon the foregoing, the "421-a" surcharge is frozen at $185.90 and petitioner may not collect more than this amount.

Respondent alleges that the most recent renewal lease was improper because petitioner failed to include a proper lease rider. Respondent's contention is misguided for several reasons. The initial lease agreement includes a "rent adjustment rider" that provides:

> "the building is or will be receiving the benefit of the Partial tax exemption Program in effect in the City of New York. Under that program . . .Landlord is entitled to receive from Tenant pursuant to Sections 20-D and 42-C of the Rent Stabilization Code, an increase in the amount of rent reserved in Article 1 (the "base Rent") at the rate of 2,.2% of the Base Rent per year, cumulatively but not compounded, to offset the gradual decrease in partial tax exemption granted for the building by said Section 42 for each year of the term of this lease."

Petitioner attached DHCR Policy Statement 92-2 which fully explains the 421-a surcharge to the most recent lease renewal. As the premises are already subject to rent regulation, there is no penalty for any impropriety in the rider. *See Giannattasio v Cialini*, 165 Misc2d 249 [iv Court, Kings Co 1995](holding that "the apartment only could be deregulated if respondents vacated the apartment or if petitioners provided respondents with notice . . .that the building was receiving the 421-a exemption, due to expire . . . and thereafter the building and the apartment no longer would be subject to the protections of the Rent Stabilization Code").

Finally, respondent claims that the renewal lease was improper due to the collection of "window cleaning" charge. Since 1979, renewal leases listed a separate charge for window cleaning. The increases were based upon Rent Guidelines Board Order which respondent does not dispute. Based upon the foregoing, the window charges are appropriate.

CONCLUSION

Based upon the foregoing, petitioner's motion for summary judgment is granted and respondent's cross-motion for summary judgment id denied. Petitioner is awarded a final judgment of possession however issuance of the warrant is stayed ten days from service of a copy of this Order for respondent to execute the renewal lease. On default, petitioner may move for issuance of the warrant on notice to respondent. This proceeding is restored to the court's calendar to October 30, 2017, 9:30 a.m. for a conference relating to petitioner's claim for use and occupancy and legal fees.

Dated: New York, New York
October 6, 2017

TIMMIE ERIN ELSNER, J.H.C.