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1641 Park Ave. Assoc. v Parker
2022 NY Slip Op 30519(U)
February 17, 2022
Supreme Court, New York County
Docket Number: Index No. 159106/2020
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN KELLEY **PART** 56M

Justice

----------X

1641 PARK AVENUE ASSOCIATES

Plaintiff,

- v -

JUSTIN PARKER,

Defendant.

----------X

INDEX NO. 159106/2020

MOTION DATE 01/27/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63, 76, 77

were read on this motion to/for JUDGMENT - SUMMARY.

I. INTRODUCTION

In this action for ejectment, and for declaratory and injunctive relief, the plaintiff landlord moves pursuant to CPLR 3211(b) to strike the defendant's affirmative defenses, and pursuant to CPLR 3212 for summary judgment (1) on its cause of action seeking ejectment, a judgment of possession referable to the subject premises, and the issuance of a writ of assistance (second cause of action), (2) on its cause of action to recover a money judgment for use and occupancy (third cause of action), (3) on the issue of liability on its cause of action for an award of attorneys' fees (fourth cause of action), and (4) dismissing the defendant's counterclaims. The defendant opposes the motion. The motion is granted only to the extent that all of the plaintiff's affirmative defenses are stricken, with the exception of the affirmative defenses of failure to state a cause of action and waiver, and the plaintiff is awarded summary judgment dismissing all of the defendant's counterclaims. The motion is otherwise denied. Upon searching the record (*see* CPLR 3212[b]), summary judgment is awarded to the defendant dismissing the plaintiff's second, third, and fourth causes of action, without prejudice to the plaintiff's

commencement of a holdover proceeding or proceeding to obtain possession in the Housing Division of the Civil Court, after providing the defendant with a 90-day notice of nonrenewal pursuant to Real Property Law § 226-c (L 2019, ch 36, Part M, § 3).

II. DISCUSSION

The plaintiff asserts that it leased an apartment to the defendant, that the apartment was not subject to rent regulation and that, as such, it was not obligated to tender a renewal lease to the defendant upon the expiration of the lease. It thus seeks to eject the defendant from the apartment, along with an award of use and occupancy for the time that he occupied the leasehold after expiration. The defendant counters that the lease should have been subject to rent regulation because the plaintiff fraudulently deregulated it in 2013, and that he should not be ejected from the apartment. He also counterclaims to recover for rent overcharges, fraud, harassment, and defamation.

A. Summary Judgment

1. Standard Applicable to Summary Judgment Motions

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]).

Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). "The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in its opponent's case. He or she must affirmatively demonstrate the merit of his or her claim (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism,* 135 AD3d 458, 462 [1st Dept 2016]).

In support of its motion, the plaintiff submits the affidavits of its asset manager, Jessica Hakim, its building superintendent, Victor Torres, and its officer, Kayvan Hakim, the pleadings, the registrations that it filed with the New York State Division of Housing and Community Renewal (DHCR), the renovation permits issued to it by the New York City Department of Buildings (DOB), the approved plans that it filed with the DOB, a third-party construction service agreement, the previous rent stabilized tenant's renewal lease and surrender agreement, a notice of deregulation, the Rent Guidelines Board Apartment orders chart, and a resident ledger of the rent charges and payments applicable to the defendant's apartment.

2. Second Cause of Action-Ejectment and Possession

The plaintiff has not established that it is entitled to relief on its second cause of action, which seeks ejectment, a judgment of possession referable to the subject premises, and the issuance of a writ of assistance. The 2019 Housing Security and Tenant Protection Act (HSTPA) provides, in pertinent part, that

> "*[w]henever a . . . landlord does not intend to renew the tenancy, the landlord shall provide written notice as required in subdivision two of this section. If the landlord fails to provide timely notice, the occupant's lawful tenancy shall*

> *continue under the existing terms of the tenancy* from the date on which the landlord gave actual written notice until the notice period has expired, notwithstanding any provision of a lease or other tenancy agreement to the contrary"

(L 2019, ch 36, Part M, § 3; RPL 226-c[1] [emphasis added]). Where, as here, "the tenant has occupied the unit for more than two years . . . the landlord shall provide at least ninety days' notice" (RPL 226-c[2][c]).

This court concludes that RPL 226-c applies to all tenancies, and is applicable to both common-law ejectment actions and RPAPL holdover proceedings. There is nothing in this mandatory directive, or in any part of the HSTPA, that suggests that its application is somehow limited only to landlords who elect to commence special proceedings pursuant to RPAPL (*cf. Armstrong Realty, Inc. v Roche,* 2021 NY Slip Op 30640[U], 2021 NY Misc LEXIS 867 [Sup Ct, Kings County, Mar. 3, 2021] [holding that the recently enacted RPL 226-c did not apply to common-law ejectment actions]; *Paz Rentals, LLC v Bryer*, 2021 NY Slip Op 30916[U], 2021 NY Misc LEXIS 1276 [Sup Ct, Kings County, Mar. 22, 2021] [same]). In any event, although "[t]he common law does not require a notice to terminate a tenancy of a definite term, . . . it does require a notice to quit to remove a tenant of an indefinite term by an ejectment action" (*id.*, 2021 NY Slip Op 30916[U], *3, 2021 NY Misc LEXIS 1276, *4]; *see Gerolemou v Soliz*, 184 Misc 2d 579 [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2000]; *Hsiu v Trujillo*, 192 Misc 2d 147 [Sup Ct, Bronx County 2002]).

Initially, the statutory notice required here was not a notice of termination, but a notice of nonrenewal. Consequently, the above rule dispensing with the requirement for notices of termination in common-law actions is inapplicable. Moreover, the plaintiff here not only failed to give the defendant notice that it intended not to renew his one-year lease, but failed to give him notice, even after the expiration of his lease, when his alleged "tenancy" became indefinite, that his tenancy was being terminated. In fact, the first formal notice that the defendant received that his tenancy was being terminated was on November 13, 2020, when the plaintiff served him

with the summons and complaint in this action, along with papers in support of its motion for a preliminary injunction. That date was more than three months after the term of the defendant's lease had expired.

Hence, the plaintiff has not established, through its moving papers, that it provided the defendant with the required statutory notice, or any notice whatsoever. As such, the branch of the plaintiff's motion which is for summary judgment on its second cause of action, seeking ejectment, a judgment of possession, and the issuance of a writ of assistance, must be denied, regardless of the sufficiency of any opposition papers. Moreover, "it is well settled that the Supreme Court has the authority to search the record and grant summary judgment to a nonmoving party with respect to an issue that was the subject of a motion before the court" (*Schwartz v Town of Ramapo*, 197 AD3d 753, 756 [2d Dept 2021], quoting *Zhigue v Lexington Landmark Props.*, LLC, 183 AD3d 854, 856 [2d Dept 2020]). Inasmuch as the court concludes that the provision and service of that 90-day notice of nonrenewal was a condition precedent to the commencement of a holdover proceeding pursuant to RPAPL or a common-law action for ejectment, that the plaintiff was required to submit such notice a condition to obtaining relief, and that the parties' submissions do not suggest that notice was actually provided, the court further concludes that no notice was, in fact, provided. The court thus searches the record and awards summary judgment to the defendant dismissing the second cause of action.

The dismissal of the second cause of action is, however, without prejudice to the plaintiff's commencement, in the Civil Court, of a proper holdover proceeding or proceeding to recover possession pursuant to the RPAPL after providing the defendant with the proper 90-day notice of nonrenewal pursuant to RPL 226-c. "Civil Court has jurisdiction of landlord tenant disputes . . . and when it can decide the dispute, as in this case, it is desirable that it do so" (*Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 28 [1984]; *Lexington Ave. Assocs. v Kandell*, 283 AD2d 379, 379 [1st Dept 2001]).

3. Third Cause of Action---Use and Occupancy

Where, as here, the "main object" of an action is the equitable remedy of ejectment, and concomitant possession, any claim for use and occupancy would be "incidental to a final judgment of possession" (*Katzman v City of New York*, 183 Misc 2d 501, 502 [App Term 1st Dept 1999]; *see Sez Holdings LLC v Jerome Ave. Car Wash & Lube Inc.*, 2017 NY Slip Op 50906[U], 56 Misc 3d 1208[A], 2017 NY Misc LEXIS 2670, *6 [Sup Ct, Bronx County, Jul. 17, 2017]; *see also Lexington Ave. Assocs. v Kandell*, 283 AD2d at 379; *cf. Barzack Realty Co. v Joseph Legatti & Son, Inc.*, 114 Misc 2d 245, 246 [Civ Ct, N.Y. County 1982] ["A landlord is entitled to seek use and occupancy when it is attendant to a demand for possession."]). Hence, upon dismissal of the cause of action for a judgment of ejectment and possession, the cause of action to recover use and occupancy must be dismissed as well.

In any event, summary judgment on the plaintiff's third cause of action, seeking an award of use and occupancy, also would have to be denied based on the doctrine of waiver. In opposition to the plaintiff's motion, the defendant submitted proof of "cash assistance rent/housing payment[s]" made between September 2020 and September 2021. The defendant claims that some of the payments were cancelled for not being cashed by the plaintiff for more than one year and that, in 2019, the Housing Part of the Civil Court, New York County (Nembhard, J.), instructed the plaintiff to cash all rent checks. Even if the plaintiff established its prima facie entitlement to judgment as a matter of law on its cause of action to recover use and occupancy, the defendant raised a triable issue of fact as to whether the plaintiff waived the right of recovery by refusing to accept payment when tendered (*see generally Cosmopolitan Assoc., LLC v Fuentes*, 11 Misc 3d 37, 39 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2006]). In fact, the plaintiff's refusal to accept payment when tendered was admittedly a tactic to avoid creating a month-to-month tenancy by operation of RPL 232-c, which provides that "if the landlord shall accept rent for any period subsequent to the expiration" of the term of a lease,

"the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term."

Upon searching the record, the court, as it did with the second cause of action, awards summary judgment to the defendant dismissing the third cause of action, again without prejudice to the commencement of holdover or possession proceeding in the Civil Court, in which use and occupancy may be sought as relief incidental to possession.

4. Fourth Cause of Action---Attorneys' Fees

Summary judgment on the plaintiff's fourth cause of action must also be denied. Although the subject lease contains a clause providing for the reimbursement of legal fees to the plaintiff, that branch of the plaintiff's motion seeking an award of attorneys' fees must be denied, as the plaintiff is not yet a prevailing party (*see Board of Mgrs. of 55 Walker St. Condo. v Walker St., LLC*, 6 AD3d 279, 280 [1st Dept 2004]). The party seeking attorneys' fees must "be the prevailing party on the central claims advanced, and receive substantial relief in consequence thereof" (*325 E. 14th St. Corp. v. Marie Fr. Realty*, 2018 NYLJ LEXIS 1964, *3 [Sup Ct, N.Y. County, Jun 7, 2018]; *see 501 E. 87th St. Realty Co., LLC v Ole Pa Enters.*, 304 AD2d 310, 311 [1st Dept 2003]; *Peachy v Rosenzweig*, 215 AD2d 301, 302 [1st Dept 1995]). Inasmuch as the plaintiff has yet to prevail on its central claims or receive substantial relief, attorneys' fees cannot be awarded at this juncture. As with the second and third causes of action, upon searching the record, the fourth cause of action is summarily dismissed, without prejudice to the assertion of the claim for attorneys' fees in a Civil Court proceeding after the plaintiff provides the defendant with the requisite 90-day notice of nonrenewal.

5. First Counterclaim---Rent Overcharge

The plaintiff established, prima facie, that the defendant's counterclaim alleging a rent overcharge is without merit, as the defendant's apartment was substantially renovated and properly deregulated prior to the start date of the defendant's initial lease and his move-in date. The plaintiff submits a DOB work permit and approved plans, a construction services agreement

with Barrington Construction Corp., with a project start date of January 19, 2012, and DHCR registration information for the apartment at issue showing when the regulated rent changed and why. The plaintiff also provides a notice of deregulation that it sent to the defendant on January 9, 2013, explaining the basis for the deregulation of the apartment and providing detailed calculations as to the new rent amount. As such, the plaintiff avers that the defendant is a deregulated occupant not entitled to a lease renewal and, therefore, may be removed from the premises and ordered to pay the holdover rate as per the expired lease. The defendant failed to raise a triable issue in opposition to the plaintiff's showing in this regard, but made only conclusory and unsupported allegations that the plaintiff failed to qualify for an individual apartment increase in the rent, and fraudulently secured such a rent increase by virtue of its filings with the DHCR.

Rent overcharge claims are governed by Admin. Code of City of N.Y. (Admin. Code) § 26-516(a), pursuant to which any landlord found "to have collected an overcharge above the rent authorized for a housing accommodation . . . shall be liable to the tenant for a penalty equal to three times the amount of such overcharge" (*see Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382 [2014]). In considering an overcharge complaint, the rental history of the apartment prior to the four-year time-period preceding the filing of a tenant's complaint generally cannot be examined (*see Grimm v State Div. of Housing and Community Renewal Office of Rent Admin.*, **15** NY3d 358, 364-365 [2010]; *Thornton v. Baron*, 5 NY3d 175 [2005]). Examination of the rental history beyond the look-back period of four years requires a showing of a colorable claim of fraud (*Grimm*, **15** NY3d at 366-367; *see also Altschuler v Jobman 478/480, LLC*, 135 AD3d 439 [1st Dept 2016]; RSC 2526.1[a][2][iv]). Moreover, the newly-enacted overcharge provisions of HSTPA (L 2019, ch 36, **Part F**), allowing a look-back period of six years even where there is no fraud, cannot be applied retroactively (*see Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 [2020]). In the present case, the plaintiff commenced this action on October 27, 2020 and, thus, any

counterclaim asserted here is not barred to the extent that it was not barred as of that date (see CPLR 203[d]). Therefore, examination of the defendant's rental history can only go back to October 27, 2016, or four years prior to that date. Although the defendant claims that he has been overcharged since 2012, examination of his rental history cannot go back that far, as he has not made a proper showing of fraud. Furthermore, the plaintiff has made a prima facie showing that, in fact, it did not overcharge the defendant, as any change in the rent was proper due to the renovations made to the apartment and the subsequent deregulation of the unit. Hence, the plaintiff is entitled to dismissal of the counterclaim for rent overcharge.

6. Second Counterclaim---Fraud

To assert a claim sounding in fraud, a claimant must allege an intentional misrepresentation of facts, made to induce him or her to rely on it, reasonable reliance of the on those facts, and damages (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). The defendant in this case alleges fraud, and claims that the plaintiff misrepresented the regulation status of the apartment in question. The defendant claims that the renovations made to the apartment were overstated and the deregulated rent amount was improper. The defendant also contends that he has been "dutifully trying to figure out the Legal Regulated Status," and that the notice of deregulation sent to him by the plaintiff was "merely a poor attempt at legitimizing fraud." The plaintiff established a proper basis for the deregulation and rent increase through affidavits and evidence of renovations. The defendant, however, has not shown that the plaintiff made a misrepresentation in that regard, that what he believes to be a misrepresentation was intentional, or that he was induced to rely on those misrepresentations, resulting in damages. He simply proclaims that fraud has been committed, but does not go beyond that in opposing the plaintiff's motion. Thus, the plaintiff is entitled to the summary dismissal of the counterclaim for fraud.

7. Third Counterclaim---Harassment

New York does not recognize a common-law cause of action for harassment (*see Edelstein v Farber*, 27 AD3d 202 [1st Dept 2006]). Hence, the harassment counterclaim must summarily be dismissed for failure to state a cause of action. To the extent that the defendant intended to assert a statutory cause of action pursuant to Admin. Code § 27-2005(d) to recover for the plaintiff landlord's alleged harassment, as defined in Admin. Code § 27-2004(a)(48), such a claim may be maintained as a counterclaim (*see ABJ Milano LLC v Howell*, 63 Misc.3d 1037 [Civ Ct, N.Y. County 2018]), but allegations of harassment under this local law must specify the facts constituting harassment. It is not enough to make conclusory allegations that merely track the language of the statute (*see Acosta v 202 South 2nd Street, LLC*, 2019 NY Slip Op 50040[U], 62 Misc 3d 1209[A], 2019 WL 255586 [Civ Ct, Kings County, Jan. 9, 2019]). Here, in opposition to the plaintiff's prima facie showing that it did not engage in any of the acts proscribed by Admin. Code § 27-2004(a)(48), the defendant failed to raise a triable issue of fact with proof in admissible form that the plaintiff did, in fact, engage in such conduct. Hence, the plaintiff is entitled to summary judgment dismissing the harassment counterclaim, even if it were premised upon violations of the Administrative Code.

8. Fourth Counterclaim---Defamation

"The elements of a cause of action [to recover] for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Gaccione v Scarpinato*, 137 AD3d 857, 859 [2d Dept 2016], quoting *Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009]; *see Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014]). "To establish actionable defamation, it must be shown that the facts are false and," depending on whether the plaintiff is or is not a public figure, "that their publication was generated by actual malice, i.e. with a purpose to inflict injury upon the party defamed, or in a

grossly irresponsible manner" (*Kuan Sing Enterprises, Inc. v T.W. Wang, Inc.*, 86 AD2d 549, 550 [1st Dept 1982], *affd* 58 NY2d 708 [1982] [internal quotation marks and citations omitted]).

To impose liability in a defamation action commenced by a person who is not a public figure, "the party defamed must establish by preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" (*Chapadeau v Utica Observer-Dispatch, Inc.* 38 NY2d 196, 199 [1975]; *see Huggins v Moore*, 94 NY2d 296 [1999]; *Farber v Jefferys*, 103 AD3d 514 [1st Dept 2013]). A person is grossly irresponsible in this regard when he or she fails to verify the accuracy or veracity of information before disseminating it (*see Matovcik v Times Beacon Record Newspapers*, 108 AD3d 511 [2d Dept 2013]), or evinces an inability or unwillingness to take any steps to obtain such a verification (*see Fraser v Park Newspapers of St. Lawrence, Inc.*, 246 AD2d 894 [3d Dept 1998]). The plaintiff must allege "the precise words allegedly giving rise to defamation [as well as the] time, place and manner of publication" (*Khan v Duane Reade*, 7 AD3d 311, 312 [1st Dept 2004]). In the First Department, a claim based upon an allegedly libelous statement that does not constitute libel per se must plead special damages (*see Rall v Hellman*, 284 AD2d 113 [1st Dept 2001]; *cf. Matherson v Marchello*, 100 AD2d 233, 236 [2d Dept 1984] [cause of action asserting slander must plead special damages, but cause of action asserting libel need not]).

Only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue (*see Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]; *Martin v Daily News L.P.*, 121 AD3d 90, 100 [1st Dept 2014]). Thus, for example, "a general accusation of 'unprofessional conduct' [is] a protected statement of opinion [and] not sufficiently factual to be actionable" (*Chiavarelli v Williams*, 256 AD2d 111, 114 [1st Dept 1998]).

The defendant averred that, on September 19, 2019, Steven B. Sperber, counsel for the plaintiff, called him "a loser who could not hold down a job." He further asserted that Mr. Sperber intended to cause him duress by describing him as an "annoyance" and a "pain." The

court concludes that the plaintiff established that Mr. Sperber's comments are statements of opinion and, thus, cannot be defamatory or actionable. In any event, the defendant has cited, and research has revealed, not authority for the proposition that an nonparty attorney's statement can be imputed to his or her client for purposes of asserting a defamation claim. Hence, the plaintiff is entitled to summary judgment dismissing the counterclaim seeking to recover for defamation.

B. Striking of Affirmative Defenses

Inasmuch as the court is dismissing the second, third, and fourth causes of action, it need not address the validity of the defendant's affirmative defenses as they apply to those causes of action. The court nonetheless does so, and concludes that the plaintiff established its entitlement to dismissal of all of the affirmative defenses, save the affirmative defenses of failure to state a cause of action and waiver, by showing that those affirmative defenses lack merit. Specifically, it demonstrated that there is no merit to the defendant's affirmative defenses asserting that the action is barred by estoppel, consent, or ratification (part of the second affirmative defense), the plaintiff's culpable conduct (third affirmative defense), the doctrine of unclean hands (fourth affirmative defense), the impropriety of the initial lease (fifth affirmative defense), the defendant's alleged protection from ejectment by virtue of rent stabilization (sixth affirmative defense), the plaintiff's alleged harassment of the defendant (seventh affirmative defense), or the doctrine of constructive ejectment (eighth affirmative defense).

CPLR 3211(b) provides that "a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." To be appropriately pleaded, the defense "must afford *notice*, not just a label" (*Huntington Utilities Fuel Corp. v McLoughlin*, 45 Misc 2d 79, 81 [Sup Ct, Suffolk County 1965]; *see* CPLR 3013).

The plaintiff established that the apartment was properly deregulated, without even a hint of fraud and, as such, it was not obligated to offer the defendant a renewal lease after his July 13, 2019 lease expired in August 2020 (*see D'Ambrosio v Rivera*, 2006 NY Misc LEXIS

3916, *2 [Civ Ct, Kings County, Dec. 27, 2006]). The defendant failed to raise a triable issue of fact in opposition. Hence, the fifth, sixth, and eighth affirmative defenses, all of which are premised upon the plaintiff's failure to tender a renewal lease or treat the apartment as subject to rent regulation, must be stricken. Moreover, the plaintiff has shown that it did not engage in conduct that could be a basis for invoking the defense of unclean hands, which bars a claimant from obtaining equitable relief where it has engaged in wrongful or inequitable conduct. The defendant failed to raise an issue of fact in opposition to that showing as well. Hence, the third, fourth, and seventh affirmative defenses, all of which are premised upon such alleged behavior by the plaintiff, must be stricken. The eighth affirmative defense must also be stricken for that reason as well, as it is based, in part, upon the plaintiff's alleged misconduct.

There is no basis, however, upon which to strike the first affirmative defense, alleging failure to state a cause of action. A motion to strike the affirmative defense of failure to state a cause of action does not lie, since assertion of that affirmative defense is "harmless" and "mere surplusage," and is only effective where defendant makes a motion to dismiss on that ground (*see San-Dar Assoc. v Fried,* 151 AD3d 545, 545-546 [1st Dept 2017]; *Riland v Frederick S. Todman & Co.*, 56 AD2d 350, 352-353 [1st Dept 1977]; *see also Butler v Catinella,* 58 AD3d 145 [2d Dept 2008]), which did not occur here. In any event, since the defendant failed to plead compliance with the statutory nonrenewal notice requirement in connection with its cause of action for ejectment, and the causes of action for use and occupancy and attorneys' fees were consequently dismissed, this affirmative defense has proven to be meritorious.

A waiver is "the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it" (*Werking v Amity Estates, Inc.*, 2 NY2d 43, 52 [1956]; *see Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442 [1984]; *Russo v Rozenholc*, 130 AD3d 492 [1st Dept 2015]; *see also Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 968 [1988]). With respect to the portion of the defendant's second affirmative defense that alleges that the action is barred by the doctrine of waiver, the plaintiff, as explained

above, submitted evidence that the plaintiff rejected use and occupancy payments that he tendered. Thus, the defendant has established the existence of material issues of fact as to whether the plaintiff waived the right to recover use and occupancy payments (*see generally Cosmopolitan Assoc., LLC v Fuentes*, 11 Misc 3d at 39).

There is, however, no merit to the affirmative defenses of estoppel, consent, or ratification. Hence, the branch of the plaintiff's motion seeking to strike the defendant's affirmative defenses is granted to extent that the third, fourth, fifth, sixth, seventh, and eighth affirmative defenses, and so much of the second affirmative defense as asserted estoppel, consent, and ratification, are stricken.

III. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion is granted to the extent that the third, fourth, fifth, sixth, seventh, and eight affirmative defenses, and so much of the second affirmative defense as asserted estoppel, consent, and ratification, are dismissed, the defendant's first, second, third, and fourth counterclaims are dismissed, and the motion is otherwise denied; and it is further,

ORDERED that, upon searching the record, the court awards summary judgment to the defendant dismissing the plaintiff's second, third, and fourth causes of action, without prejudice to the plaintiff's assertion of those claims in the Civil Court after providing the defendant with a 90-day notice pursuant to Real Property Law § 226-c; and it is further,

ORDERED that the parties shall complete document discovery, limited to the first cause of action, on or before March 17, 2022, and shall complete all depositions, limited to the first cause of action, on or before April 14, 2022; and it is further,

ORDERED that the plaintiff shall file the note of issue on or before April 29, 2022; and it is further,

ORDERED that the discovery schedule set forth above shall be strictly adhered to, and the failure to comply with the schedule may result in the imposition of sanctions.

This constitutes the decision and order of the court.

2/17/2022
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE