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Ollie Associates LLC v. Santos

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[*1]

Ollie Assoc. LLC v Santos
2019 NY Slip Op 51085(U) [64 Misc 3d 1208(A)]
Decided on July 1, 2019
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected in part through July 8, 2019; it will not be published in the printed Official Reports.

Decided on July 1, 2019

Civil Court of the City of New York, Bronx County

Ollie Associates LLC, Petitioner,

against

Karina Santos, Respondent-Tenant.

859/2019

For Respondent
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Shorab Ibrahim, J.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion.

Papers/Numbered
Notice of Motion [With Affidavit & Exhibits] 1
Answering Affirmation [With Affidavit & Exhibits] 2
Reply Affirmation in Support 3

After oral argument held on June 17, 2019, and upon the foregoing cited papers, the decision and order on this motion is as follows:

FACTUAL AND PROCEDURAL HISTORY

Ollie Associates LLC, the petitioner herein, ("Petitioner"), commenced the instant non-payment proceeding alleging Karina Santos, the respondent in this proceeding, ("Respondent"), was $ 28,708.50 in arrears through December 2018.[FN1] The matter first appeared on the court's calendar on January 16, 2019 at which time Respondent obtained her attorney through the Universal Access to Counsel, ("UAC"), program. Respondent moves for (a) leave to file an amended answer pursuant to CPLR § 3025(b); (b) partial summary judgment pursuant to CPLR § 3212(e) on a laches defense; and (c) leave to conduct discovery pursuant to CPLR § 408 and CPLR § 3102. Petitioner argues that each branch of the motion must be denied.

DISCUSSION

The Amended Answer

As to the request to file an amended answer pursuant to CPLR § 3025(b), the motion must be granted. CPLR 3025(b) provides that leave to amend a pleading shall be freely given upon such terms as may be just. (*Norwood v City of New York*, 203 AD2d 147, 148-149, 610 NYS2d 249 [1st Dept 1994]). Amendment can be granted at any time, especially where there is not significant prejudice to the opposing party. (*National Union Fire Ins. Co. v Schwartz*, 209 AD2d 289, 290, 619 NYS2d 542 [1st Dept 1994]). Further, the proposed amended answer contains meritorious defenses (*Thomas Crimmins Contracting Co. v New York*, 74 NY2d 166, 170, 544 NYS2d 580 [1989]), including the equitable defense of laches, that the premises remain subject to rent stabilization, that Respondent has been overcharged, and a breach of the warranty of habitability counterclaim.[FN2]

Petitioner argues that the proposed defenses are meritless. While proposed defenses which "plainly lack merit" should be denied, (*Thomas Crimmins Contracting Co.*, 74 NY2d at 170), each of the proposed amendments are, in fact, potentially meritorious. (*See Goldman v City of New York*, 287 AD2d 482, 483, 731 NYS2d 212 [2nd Dept 2001]). Whether the doctrine of laches applies "depends on the facts of the case." (*Continental Cas Co v Employers Ins Co of Wausau, 60 AD3d 128*, 137, 871 NYS2d 48 [1st Dep't 2008]). Equitable considerations rather than inflexible times frames should guide the court in determining whether rent claims are stale. (*Mordland Assoc. v Coccaro*, NYLJ, August 25, 1987, at 5, col. 6 [App Term, 1st Dept]).

At best, Petitioner's submissions regarding the laches defense raises issues of fact and/or credibility to be resolved by a trial court. (*See Sanchez v Finke*, 288 AD2d 122, 123, 733 NYS2d 387 [1st Dept 2001]). Here, given that arrears sought date back to November 2016 and totaled over $28,000 when the case commenced, there is certainly the *potential* to prove laches. (*Sontag v Garcia, 31 Misc 3d 1223*(A), 2011 NY Slip Op 50811(U) [Civ Ct, Bronx County 2011] (internal citations omitted)).

Respondent's *claim* that the premises remains subject to Rent Stabilization potentially has merit. There is no dispute that the legal registered rent in 2011 was $1131.57. In 2012, the apartment is listed as "exempt—high rent vacancy." [FN3] The registration does not allege individual apartment improvements, ("IAI"). (See DHCR Operational Bulletin 2016-1—"Any increase based on an IAI is to be reflected in the next occurring annual registration filing for the subject apartment."). However, Petitioner alleges $ 71,484.60 in renovations, a vacancy increase, and a longevity increase justify the deregulation.[FN4] Petitioner attaches numerous checks and invoices purporting to legitimize the IAI. Assuming arguendo that these documents could *conclusively* establish the IAI, the documents are not authenticated. The May 21, 2019 Luis Delacruz affidavit does not establish any personal knowledge of the work performed, who did such work, how the [*2]records were made or how they were kept.[FN5] Since the DHCR registration is silent as to the alleged IAI, questions are raised whether the registration is "reliable" and/or whether the rent increase is "unexplained." (See Part F of the Housing Stability and Tenant Protection Act of 2019, ("2019 HSTPA")).[FN6]

Because the premises might arguably be subject to rent-stabilization with a lower rent, the rent overcharge claim is potentially meritorious. (See Part F of the 2019 HSTPA).[FN7]

Furthermore, it is inappropriate, at this juncture, to find that Respondent's counterclaim for an

order to correct is meritless. Respondent's January 16, 2019 *pro-se* Answer raises the issue of repairs and, as such, Petitioner is not prejudiced by the claim that repairs are needed.[FN8] Contrary to Petitioner's view, city issued violations are not a prerequisite for an order to correct. The New York City Civil Court Act vests the Housing Court with broad authority to "recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or *to protect and promote the public interest.*" (*CCA § 110 [c]* [emphasis added]; *see Prometheus Realty Corp. v City of New York,* 80 AD3d 206, 911 NYS2d 299 [1st Dept 2010] (Housing Court granted broad authority to enforce "housing standards")). Under *§110(c)* this court may even enter into orders *sua sponte* to enforce housing standards. (*Castillo v Banner Group LLC*, 2019 NY Slip Op 50897(U) [Civ Ct, New York County 2019]). The existence of violations may be proved by DHPD or inspection reports; DHPD or other governmental computerized records; photographs; or through testimony. (Scherer and Fisher, *Residential Landlord-Tenant Law in New York § 19:65* [2018 Update]; *See Mite v Pipedreams Realty*, 190 Misc 2d 543, 740 NYS2d 564 [Civ Ct, Bronx County 2002]).

Finally, as the Petition seeks legal fees,[FN9] Respondent counterclaiming for legal fees does not "plainly lack merit." As it is settled law that only the prevailing party may collect legal fees, [*3](*Nestor v McDowell*, 81 NY2d 410, 415 [1993]), Respondent's counterclaim is simply a reservation of a claim she may have under the parties' lease. Respondent has promptly moved for amendment; has alleged potentially meritorious defenses and counterclaims; and Petitioner does not show any, much less substantial, prejudice.[FN10] As such the Amended Answer is deemed served and filed.

Partial Summary Judgment on The Laches Defense

On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate entitlement to judgment as a matter of law and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. (*Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 492-493, 955 NYS2d 589 [1st Dept 2012], *citing Vega v Restani Constr. Corp.,* 18 NY3d 499, 503, 942 NYS2d 13 [2012]).

The laches doctrine bars the enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to an opposing party. (*Saratoga County Chamber of*

Commerce v Pataki, 100 NY2d 801, 816, 766 NYS2d 654 [2003]; *Dante v 310 Associates*, 121 AD2d 332, 333, 503 NYS2d 786 [1st Dep't 1986]). To establish laches, a party must show (1) conduct by an offending party giving rise to the situation complained of; (2) delay by the complainant in asserting his or her claim for relief, despite the opportunity to do so; (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief; and (4) injury or prejudice to the offending party in the event the requested relief is accorded to the complainant. With respect to the prejudice, this may be demonstrated "by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay." (*In re Linker*, 23 AD3d 186, 189, 803 NYS2d 534 [1st Dep't 2005]). All four elements must be shown. (*A & E Tiebout Realty v Johnson*, 23 Misc 3d 1112 [A], 885 NYS2d 710 [Civ Ct, Bronx County 2009], *aff'd,* 26 Misc 3d 131[A], 907 NYS2d 98 [App Term, 1st Dep't 2010]).

Once all four elements of laches are shown to exist, the burden of proof shifts to the opposing party, who "bears the burden of proving that there was a reasonable excuse for the delay", and who then "may also offer evidence tending to disprove the four conditions." (*2275 Washington, LLC v Gomez*, 57 Misc 3d 1216(A) at *4, 2017 NY Slip Op 51481(U) [Civ Ct, Bronx County 2017], *quoting Dedvukaj v Madonado*, 115 Misc 2d 211, 453 NYS2d 965 [Civ Ct, Bronx County 1982]).

Whether the doctrine applies "depends on the facts of the case." (*Continental Cas Co v Employers Ins Co of Wausau*, 60 AD3d 128, 137, 871 NYS2d 48 [1st Dep't 2008]). Equitable considerations rather than inflexible time frames should guide the court in determining whether rent claims are stale. (*Mordland Assoc. v Coccaro*, NYLJ, August 25, 1987, at 5, col. 6 [App Term, 1st Dept]).

As there are material facts in dispute, the motion for summary judgment must be denied. Though Respondent alleges unreasonable delay, there remains issues of fact. Petitioner's agent avers that between the last non-payment proceeding ending and this non-payment proceeding commencing Petitioner "actively cooperated" with Respondent in seeking assistance for the arrears. She further avers that rent statements and ledgers were provided every month. Petitioner also attaches proof that it faxed "HomeBase" breakdowns in January 2018 and October 2018. Importantly, Petitioner alleges it "advised" Respondent that it reserved its right to commence a nonpayment proceeding. While no further detail is given, Respondent does not deny this. The court also notes Respondent's inconsistent statement that she 'was surprised to receive the notice of petition and petition because I did not expect to be sued for the arrears, as I had never been informed they were due."**[FN11]** Compare that statement to the Reply Affirmation at par. 10, "Respondent requested Petitioner bring this

proceeding." It may be reasonable for a court to infer that Respondent knew that arrears were due, and that Petitioner wanted them paid. These are questions of fact to be resolved at trial. Here, there remains, at a minimum, an issue of fact as to whether the delay, to the extent there was one, was unreasonable.

Even if there was an unreasonable delay, mere delay without a showing of prejudice does not constitute laches. (*Premier Capital, LLC v Best Traders, Inc.*, 88 AD3d 677, 678, 930 NYS2d 249 [2nd Dept 2011]). Respondent's affidavit fails to conclusively establish prejudice. "If my landlord has sought arrears sooner, I would have been able to seek rental assistance for a smaller amount than what I currently owe" is an entirely conclusory statement insufficient to support summary judgment. (*See Iandoli v Lange*, 35 AD2d 793, 794, 315 NYS2d 752 [1st Dept 1970] (conclusory affidavits lack probative value); *Prakhin v Fulton Towers Realty Corp.*, 122 AD3d 602-603, 996 NYS2d 85 [2nd Dept 2014] (conclusory and unsupported assertions were insufficient to satisfy the plaintiff's prima facie burden, and accordingly, the Supreme Court properly denied the plaintiff's motion for summary judgment on the complaint *regardless of the sufficiency of the defendants' opposition papers* [internal citations omitted] [emphasis added]); *50 West 96th Realty LLC v Lysle*, 61 Misc 3d 134(A), 2018 NY Slip Op 51492(U) [App Term, 1st Dept 2018] (conclusory submissions fail to establish 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)).

As such the motion for partial summary judgment is denied without prejudice to asserting such claims at trial.

Discovery

Respondent demonstrates ample need sufficient for discovery in a summary proceeding. (*See New York University v Farkas,* 121 Misc 2d 643, 647, 468 NYS2d 808 [Civ Ct, New York County 1983]). Respondent's challenge to the regulatory status of the apartment can be made at any time. (*See Gersten v 56 7th Ave LLC*, 88 AD3d 189, 199, 928 NYS2d 515 [1st Dept 2011] (a tenant should be able to challenge the deregulated status of an apartment *at any time* during the tenancy. Indeed, courts have uniformly held that landlords must prove the change in an apartment's status from rent stabilized to unregulated even beyond the four-year statute of limitations for rent overcharge claims [emphasis added])). To the extent that overcharge is [*4]implicated, Petitioner urges the court to abide by the four-year statute of limitation, absent evidence of fraud. However, the 2019 HSTPA, while now limiting rent overcharge damages [including treble damages] to *six years*, does not have any temporal limitations when determining the legal regulated rent *or* in investigating overcharge

complaints, *or* in determining whether the premises is subject to Rent Stabilization. Indeed, Part F states,

> "(9) The division of housing and community renewal and the courts, in *investigating complaints of overcharge* and *in determining legal regulated rents*, shall consider all available rent history which is reasonably necessary to make such determinations, including but not limited to (a) any rent registration or other records filed with the state division of housing and community renewal, or any other state, municipal or federal agency, regardless of the date to which the information on such registration refers; (b) any order issued by any state, municipal or federal agency; (c) any records maintained by the owner or tenants; and (d) any public record kept in the regular course of business by any state, municipal or federal agency. *Nothing contained in this paragraph shall limit the examination of rent history relevant to a determination as to*:
>
> (i) *whether the legality of a rental amount charged or registered is reliable in light of all available evidence including, but not limited to, whether an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the housing accommodation, rendered such rent or registration unreliable;*
>
> (ii) *whether an accommodation is subject to the emergency tenant protection act*;
>
> (iii) whether an order issued by the division of housing and community renewal or a court of competent jurisdiction, including, but not limited to an order issued pursuant to section 26-514 of the administrative code of the city of New York, or any regulatory agreement or other contract with any governmental agency, and remaining in effect within six years of the filing of a complaint pursuant to this section, affects or limits the amount of rent that may be charged or collected;
>
> (iv) whether an overcharge was or was not willful;
>
> (v) whether a rent adjustment that requires information regarding the length of occupancy by a present or prior tenant was lawful;
>
> (vi) the existence or terms and conditions of a preferential rent, or the propriety of a legal registered rent during a period when the tenants were charged a preferential rent;
>
> (vii) the legality of a rent charged or registered immediately prior to the registration of a preferential rent; or
>
> (viii) the amount of the legal regulated rent where the apartment was vacant or temporarily exempt on the date six years prior to a tenant's complaint." [emphasis added].

This significant change to the law means that a mere "unexplained" increase in rent gives rise to

an overcharge claim and may justify the granting of discovery.[FN12]

Part F, § 7 further states, "[t]his act shall take effect immediately and shall apply to any [*5]claims pending or filed on the after such date." As such, the act applies to these proceedings. Consequently, Respondent is entitled to discovery on her overcharge claim *and* on her challenge to deregulation.

Petitioner, however, is correct that discovery dating back to 1997 is overbroad and unwarranted. Respondent inaccurately asserts, "The Petition states that the subject premises became vacant *in* 1997 and the rent *at that time* was in excess of $2,000" [emphasis added].[FN13] The petition [par. 7], actually states the premises is "not subject to City Rent control nor Rent Stabilization Laws as the subject premises became vacant *after* June 19, 1997 and the legal rent was in excess of $2,000 per month" [emphasis added]. Petitioner is directed to produce all relevant documents to support the deregulation of the subject premises in 2011. (*See Farkas,* 121 Misc 2d at 647, for the proposition that the court may issue an order limiting any prejudice). The court notes that Petitioner does not claim any prejudice and, in fact, alleges to have the documents supporting the $71,484.60 in "gut-renovation" costs.[FN14] All documents are to be forwarded to Respondent's counsel by August 2, 2019, unless the parties agree to separate time frames.

CONCLUSION

Based on the foregoing, it is So Ordered that the branches of Respondent's motion seeking leave to file an Amended Answer and for leave to conduct discovery are granted. Petitioner is directed to comply with the with the Discovery Demand [FN15] as ordered herein. Summary judgment on the laches defense is denied without prejudice to raising it at trial. The matter is adjourned to August 15, 2019, Part F, Room 320, at 9:30 a.m., for all purposes. This constitutes the Decision and Order of the court.

SO ORDERED,

Dated: July 1, 2019
Bronx, NY

____

SHORAB IBRAHIM, JHC

Footnotes

Footnote 1: The petition also states the monthly rent is $28,705.50 [Par. 2 of petition].

Footnote 2: See Amended Answer attached to motion as exhibit 'A.'

Footnote 3: See motion exhibit 'F.'

Footnote 4: Specifically, Petitioner alleges a longevity increase of $60.90, a vacancy increase of $186.71, and IAI increase of $1191.41 (one-sixtieth of $71,484.60). See opposing affirmation at par. 29.

Footnote 5:DHCR Operational Bulletin 2016-1 states that acceptable proof of improvements *should* include: "signed contract agreement; and Contractor's affidavit indicating that the installation was completed and paid in full." Those items are not included in Petitioner's submissions.

Footnote 6: Part F, dealing with overcharges, takes effect immediately and applies to "any claims *pending*" [emphasis added].

Footnote 7: The statute of limitations overcharge was amended after the instant motion was made and before it was heard for argument. CPLR 213-a, as amended by the 2019 HSTPA, states, "No overcharge penalties or damages may be awarded for a period more than six years before the action is commenced or complaint is filed, however, an overcharge claim may be filed at any time, and the calculations and determination of the legal rent and the amount of the overcharge shall be made in accordance with the provision of law governing the determination and calculation of overcharges."

Footnote 8: The court notes that Petitioner takes no issue with the breach of the warranty of habitability counterclaim.

Footnote 9: See Petition "wherefore" clause.

Footnote 10: Given that the UAC program grants Respondent the right to litigate this matter with the benefit of counsel, this court must ensure it is not an empty right whenever possible. (*See generally, 2247 Webster Ave. HDFC v Galarce*, 62 Misc 3d 1036, 90 NYS3d 872 [Civ Ct, Bronx County 2019]).

Footnote 11: Respondent's affidavit, par. 9.

Footnote 12: Compare, *Grimm v State Div. of Hous. & Community Renewal*, 15 NY3d 358, 367 [2010] ("a mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further"); *Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d

999 [2014] (significant rent increase alone was insufficient indicia of a fraudulent scheme).

Footnote 13: Affirmation in support at par. 44.

Footnote 14: See Petitioner's exhibit "D."

Footnote 15: See Respondent's exhibit "B."

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