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140 W. 238th St. LLC v. Jimenez

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: Housing Part L

140 WEST 238TH STREET LLC,

L & T Index No. 36317/19

Petitioner,

Present:

Hon. Norma J. Jennings

-against-

DECISION/ORDER

ANN JIMENEZ

Respondent.

HON. NORMA J. JENNINGS:

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this Motion by respondent for leave to interpose an amended answer and for discovery

PAPERS

NUMBERED

Notice of Motion and Affidavits Annexed	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing cited papers, the Decision/Order in this motion is as follows:

PROCEDURAL HISTORY:

This nonpayment proceeding was commenced in August 2019 seeking rental arrears totaling \$6,787.60 at a monthly rent of \$1600.00. The proceeding first appeared on the court's calendar on August 26, 2019 at which time it was adjourned to September 26, 2019 for respondent to obtain counsel. On September 26, 2019, respondent appeared by counsel, who filed the within motion, pursuant to CPLR §3025(b), for leave to interpose an amended answer and to deem the annexed amended answer filed and served. Respondent also moves, pursuant to CPLR §408 and CPLR §3102, for leave to conduct discovery.

Respondent received an initial lease agreement for the period March 1, 2014 through February 28, 2015, at a monthly rental of \$1,550.00. Respondent's renewal lease for the period March 1, 2015 through February 29, 2016, was at a preferential amount of \$1,565.50 with an alleged legal regulated rent of \$1,819.90 per month. Respondent also received a renewal lease for the period, March 1, 2016 through February 28, 2017, at a preferential rent of \$1570.00. per month. In 2018, there was a prior nonpayment proceeding involving the same parties, Index No. 43390/18, in

which respondent, represented by the same counsel, filed an answer raising the defenses of breach of the warranty of habitability and rent overcharge. In the prior proceeding, respondent moved for discovery to obtain documents related to her overcharge defense. The Honorable Brenda Spears dismissed the proceeding without ruling on respondent's motion for discovery. In this proceeding, respondent filed a *pro se* answer and the case was initially calendared for August 29, 2019. Respondent alleges that when she came to the court to file her answer she informed the clerk that she had defenses to the proceeding, including breach of the warranty of habitability and rent overcharge, but the clerk failed to note either on the answer form. Respondent, now represented by counsel, moves pursuant to CPLR section 3025(b) to amend her answer to assert these defenses as well as several counterclaims. Respondent also moves, pursuant to CPLR §408, for discovery.

DISCUSSION:

Respondent argues that her motion to amend her answer should be granted as pleadings may be amended, absent prejudice to the opposing party, who has the burden to prove prejudice beyond mere delay. Respondent further argues that it would be in contravention of public policy to preclude a tenant from raising an overcharge defense where, as in this case, she filed a *pro se* answer, is now represented by counsel and should be permitted to litigate the case on the merits. Respondent also argues that she should be granted leave to conduct discovery as her "ample need" is based upon her defense and counterclaim for rent overcharge and improper deregulation of the premises, as shown in the annexed Division of Housing and Community Renewal ("DHCR") rent registration history,¹ and the documents and information needed are in exclusive control of the petitioner. Respondent further argues that without discovery it is impossible to allege additional facts demonstrating that the calculation of her initial offered legal rent was unlawful. Respondent is only in possession of her DHCR rental history and her leases for the subject premises, which raise a basis for suspecting an overcharge, but does not have the documents pertaining to previous tenancies, which are in the exclusive control of the petitioner.

Specifically, respondent states the annexed DHCR rental history raises a basis for suspecting a rent overcharge as the initial 1984 registration for the subject apartment, which was not filed until 1998, indicates the legal regulated rent was \$1,355.64. The apartment was not registered from 1985 to 1998. In 2001 the apartment was registered at a monthly rent of \$1,887.48 and in 2002 the apartment had an increased legal regulated rent of \$1,962.28, per month, despite being vacant. Respondent argues, the increase in 2002, when the apartment was vacant, raises a question as to whether petitioner applied an improper rent increase. The DHCR registration in 2005 lists the subject apartment as a "high rent vacancy", which is also suspect, as petitioner provided respondent with a lease agreement over ten years later for the period, March 1, 2015 through February 29, 2016 at a rent of \$1,819.00 per month, which was lower than the alleged legal regulated monthly rent amount of \$2,362.65 in 2004. Finally, respondent argues, the DHCR registration lists the subject apartment as "exempt-reg not required" from 2006 to the present,

¹Exhibit J to respondent's motion

despite respondent having leases for this same time period.

Petitioner, in opposition, argues that respondent's motion to amend her answer should be denied because it would be prejudiced by allowing respondent to amend her answer when she had a full opportunity yet failed to raise these defenses in her *pro se answer*. Petitioner further argues that it would be surprised by granting respondent's motion, as respondent was previously represented by counsel who raised these defenses in the prior proceeding. Petitioner also argues that respondent's motion for discovery should be denied because she has failed to show "ample need," for the information, the request is overbroad, not narrowly tailored and respondent is engaging in a fishing expedition. Furthermore, petitioner argues, respondent seeks documents that are over thirty five (35) years old, not kept in the ordinary course of business and which were not required to be kept prior to the change in the law. Petitioner argues, it is unfair and unjust to require the production of such information, and the requests made by respondent, are outside the scope of this proceeding since the parties had an opportunity to address the issue of discovery in the previous case.

DECISION:

RESPONDENT'S MOTION TO AMEND:

Pleadings may be amended absent prejudice to the opposing party and "leave shall be freely given upon such terms as may be just." CPLR §3025(b). Leave to amend shall be granted provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, or is "patently" devoid of merit. The burden of establishing prejudice is on the party opposing the motion. *Kimso Apts., LLC v. Gandhi*, 24 NY3d 403 (2014). Petitioner has failed to establish that it would be prejudiced by the court granting respondent's motion to amend her answer, and only argues that allowing amendment would delay the proceeding. Court's have held delay alone does not establish prejudice. *Edenwald Contracting Co. v. City of New York*, 60 NY2d 957 (1983). Petitioner also argues the motion to amend should be denied as it is surprised by the respondent's defenses, who had the opportunity to raise these defenses in her *pro se answer*. The court finds petitioner's argument to be without merit, as less than one year ago there was a prior proceeding involving the same parties, in which respondent raised the defenses of warranty of habitability and rent overcharge. These defenses were not litigated as the case was dismissed, and therefore, petitioner cannot be surprised that respondent is raising the same defenses in her amended answer. The court favors litigating cases on the merits. Respondent should be afforded an opportunity to litigate her defenses, as her *pro se answer* did not include these defenses, and respondent is now represented by counsel. Accordingly, respondent's motion to file an amended answer is granted and the annexed amended answer is deemed filed and served.

RESPONDENT'S MOTION FOR DISCOVERY:

Respondent also moves, pursuant to CPLR §408 for discovery. Discovery is unavailable as a matter of right in summary proceedings, leave of the court must be obtained to conduct disclosure. However, no per se rule prohibits disclosure in summary proceedings, and "summary proceedings, despite its name, is nonetheless a judicial proceeding, and... the ends of justice ought not be sacrificed for speed." *Smilow v. Ulrich*, 11 Misc.3rd 179 (Civ. Ct. NY County 2005). Where a party demonstrates "ample need" for discovery, it should be granted. *Antillean Holding Co v. Lindley*, 76 Misc.2d 643 (Civ. Ct. NY County 1973); *New York University v. Farkas*, 121 Misc.2d 643 (Civ. Ct. NY City 1983). Discovery is not for the landlord's exclusive benefit as a tenant may also be granted similar relief to defend against the proceeding, if the disclosure reaches the "ample need" threshold. *Smilow v. Ulrich*, 179 Misc.2d 179, 182 (Civ. Ct. N.Y. Co. 2005). Discovery is granted where the opposing party is in exclusive possession of information critical to a claim or defense. *Hughes v. Lenox Hill Hospital*, 226 AD2d 4 (1st Dept. 1996). The factors considered in showing "ample need" are (1) the movant has asserted facts to establish a cause of action or meritorious defense; (2) the movant has demonstrated a need to determine information directly related to the cause of action; (3) the information requested is "carefully tailored and is likely to clarify the disputed facts;" (4) granting disclosure would lead to prejudice; (5) the court can alleviate the prejudice; (6) the court can structure discovery to protect pro se tenants against any adverse effects of a discovery request.

Respondent's motion for discovery is granted. Respondent is seeking information directly related to her defense of rent overcharge and has asserted specific facts to question the reliability of the rental history for the subject apartment. The Housing Stability And Tenant Protection Act of 2019 ("HSTPA") extended the statute of limitations for rent overcharge from four years to six years and expanded the ability of a tenant to question the legal rent for a subject apartment. RSL §26-516(a)(2). Previously, a tenant had to show fraud in order to go beyond the four year statute of limitations, however, under the HSTPA, a tenant no longer has to show a colorable claim of fraud. *Grimm v. State of NY Div. Of Hous. & Community Renewal*, 15 NY3d 358 (2010). Pursuant to CPLR §26-516(a)(h) provides that a court "shall consider all available rent history which is reasonably necessary" to investigate overcharges and determine the legal regulated rent. RSL §26-516(a) provides that the legal regulated rent for purposes of determining most overcharges 'shall be the rent indicted in the *most recent reliable* annual registration statement filed and *served upon the tenant six or more years* prior to the most recent registration statement... plus in each case any subsequent lawful increases and adjustments. *Dugan v. London Terrace Gardens, LP*, NY Slip Op 6578, NY: Appellate Div. 1st Dept. 2019.


Petitioner has not addressed respondent's claim of rent overcharge, the discrepancies in the registrations, the vacancy of the subject premises, or the amount charged to respondent. Petitioner argues that to require them to produce documents from 35 years ago is unfair as they were not required to be kept in the ordinary course of business, as well as being outside the scope of discovery, and respondent had an opportunity to litigate her claim of overcharge, but failed to pursue her defense. However, when respondent moved for discovery in the prior proceeding,

Judge Spears dismissed the proceeding without ruling on respondent's motion. In her amended answer, respondent has raised a defense of overcharge and questioned the reliability of the rental history for the subject apartment. Based upon the rental history annexed to respondent's motion, the last reliable registration for the subject apartment was in 1999. The initial 1984 registration was not filed until 1998, the apartment was not registered from 1985 through 1998. The legal regulated rent in 1999 was \$1355.64. In 2001, the registered monthly rent was \$1887.48 and in 2002, it was registered at \$1,962.28 despite being vacant, an over \$600 increase between 1999 and 2002. In addition, the apartment continued to be registered as "exempt" in 2002 with a high rent vacancy notation, and "exempt apartment-registration not required" from 2006 through 2015 without any notation as to why the apartment was exempt.

Accordingly, respondent's motion to amend her answer is granted and the annexed amended answer is deemed filed and served. Respondent's motion for discovery is also granted. Petitioner shall respond to the annexed Production of Documents for the period 1999 through the present, within thirty days (30) from the date of this decision with notice of entry. The parties are to appear in Part L, Room 450 on February 6, 2020 at 9:30 to be referred to the expeditor for trial.

This constitutes the decision and order of this court.

Dated: December 16, 2019
Bronx, New York



Hon. Norma J. Jennings
J.H.C.