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### Crotona Ave. Assoc. L.P. v. Lynch

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[\*1]

<b>Crotona Ave. Assoc. L.P. v Lynch</b>
2023 NY Slip Op 50159(U) [78 Misc 3d 1205(A)]
Decided on January 25, 2023
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on January 25, 2023

Civil Court of the City of New York, Bronx County

<p style="text-align: center;"><b>Crotona Avenue Associates L.P., Petitioner,</b></p> <p style="text-align: center;"><b>against</b></p> <p style="text-align: center;"><b>Lawrence Lynch, Respondent, JOHN DOE &amp; JANE DOE,</b> <b>Respondents-Occupants.</b></p>
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L&T Index No. 319191-2022

For Petitioner: Sontag & Hyman, P.C.

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Shorab Ibrahim, J.

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED  
IN THE REVIEW OF THIS MOTION BY THE RESPONDENT FOR LEAVE TO SERVE

AN AMENDED ANSWER AND FOR SUMMARY JUDGMENT: NYSCEF Documents # 11 & 14 through 17.

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

### RELEVANT FACTS AND PROCEDURAL POSTURE

This is a non-payment proceeding. Respondent Lynch filed a *pro-se* answer on September 15, 2022. (*see* NYSCEF Doc. 8). Prior to assignment to this part (Part I), respondent retained counsel and promptly moved for leave to file an amended answer and for partial summary judgment. (*see* NYSCEF Doc. 11). Petitioner opposes the motion.

### DISCUSSION

#### Amended Answer

Leave to amend an answer should be freely given. (*see Norwood v City of New York*, 203 AD2d 147, 148 [1st Dept 1994]). Amendment can be at any time, especially where there is not significant prejudice to the opposing party. (*see National Union Fire Ins. Co. v Schwartz*, 209 AD2d 289, 290 [1st Dept 1994]). Here, petitioner alleges prejudice based on respondent's purported delay in moving for relief. However, the instant motion was made prior to the first appearance in this resolution part, shortly after counsel was retained. (*see* Notice of Appearance [\*2] at NYSCEF Doc. 9). Nor does the court credit petitioner's conclusory assertions that it is hindered in preparing its case. (*see* NYSCEF Doc. 14, par. 14). A party is not prejudiced simply because it is exposed to greater liability or because it may spend additional time preparing its case. (*see Jacobson v McNeil Consumer & Specialty Pharmaceuticals*, 68 AD3d 652, 654-655 [1st Dept 2009]).

The court notes that the original answer was filed when respondent was *pro-se*. Counsel was retained, identified possible defenses and quickly moved to amend. These types of motions ought to be granted, provided the proposed defenses are not devoid of merit. (*see Thomas Crimmins Contracting Co. v New York*, 74 NY2d 166, 170 [1989]). Doing so affords respondents the full benefit of counsel. (*see 3225 Holdings LLC v Imeraj*, 65 Misc 3d 1219(A), n. 5 [Civ Ct, Bronx County 2019] *citing Harlem Restoration Project v Alexander*, 1995 NY LEXIS 783 [Civ Ct, New York County 1995]). Consequently, the proposed Verified Amended Answer is deemed served and filed. (*see* NYSCEF Doc. 11, pg. 15).

## Summary Judgment

The proponent of a motion for summary judgment "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]; *see also Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). Furthermore, CPLR 3212(b) provides that a summary judgment motion "shall be supported by affidavit" of a person "having knowledge of the facts" as well as other admissible evidence. (*see GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's *prima facie* burden. (*see e.g. Vermette v Kenworth Truck Co.*, 68 NY2d 714 [1986]).

Respondent seeks partial summary judgment based on laches. Respondent argues that rents accruing either more than 3 months or more than a year prior to commencement should be barred.

Whether the doctrine of laches applies "depends on the facts of the case." ([\*see Continental Cas Co v Employers Ins Co of Wausau\*, 60 AD3d 128](#), 137 [1st Dept 2008]). Equitable considerations, rather than inflexible times frames, should guide the court in determining whether rent claims are stale. (*see Mordland Assoc. v Coccaro*, NYLJ, August 25, 1987, at 5, col. 6 [App Term, 1st Dept]). 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. (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 816 [2003]; *Dante v 310 Associates*, 121 AD2d 332, 333 [1st Dept 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. Prejudice 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 [1st Dept 2005]). All four elements must be shown. ([\*see A & E Tiebout Realty v Johnson\*, 23 Misc 3d 1112\(A\) \[\\*3\]](#)[Civ Ct, Bronx County 2009] *aff'd*, 26 Misc 3d 131(A) [App Term, 1st Dept 2010]).

Here, laches is discussed *only* by respondent's counsel. The court affords her statements no probative value. ([see 3630 Holland v Davis, 66 Misc 3d 1221\(A\)](#), \* 5 [Civ Ct, Bronx County 2019] *citing Arriaga v Michal Laub Co.*, 233 AD2d 244 [1st Dept 1996]). Critically, respondent's affidavit does not mention "laches" much less that he lacked knowledge that petitioner would assert the rent arrears claim, or that he is prejudiced by the alleged delay in commencing this case.

Consequently, the motion for partial summary judgment is denied.

### Striking Defenses

Petitioner requests that certain defenses be stricken because they are without merit or have been waived. (*see* NYSCEF Doc. 14 at pg. 4). Although petitioner does not label its request as a cross-motion, the arguments are responded to in respondent's reply and this court is empowered to strike those defenses which "plainly lack merit." (*see Thomas Crimmins Contracting Co.*, 74 NY2d at 170).

Respondent's personal jurisdiction defense is dismissed. Respondent's original answer does not indicate any service of process defense(s). Personal jurisdiction defenses not raised in the first responsive pleading are waived and cannot be revived by subsequent amendment, unless the amendment is as "of right." (*see* CPLR 3211(e); [see also Iacovangelo v Shepherd, 5 NY3d 184](#), 187 [2005] (CPLR 3025(a) gives a party 20 days after serving a pleading to correct it or improve upon it, and the addition of a jurisdictional defense is no less proper a correction or improvement than any other. We hold that a party who adds such a defense by an amendment as of right "raise[s] such objection in the responsive pleading" within the meaning of CPLR 3211(e)); *GMAC Mortgage, LLC v Winsome Coombs*, 191 AD3d 37, 41 [2nd Dept 2020] ("[w]hile permission to amend an answer is to be freely given pursuant to CPLR 3025(b), the waiver of a jurisdictional defense [listed in CPLR 3211(a)(8) or (9)] cannot be nullified by a subsequent amendment to a pleading adding the missing affirmative defense") [citations omitted]; [McGowan v Hoffmeister, 15 AD3d 297](#) [1st Dept 2005] ("While permission to amend an answer is to be freely given pursuant to CPLR 3025 (b), the waiver of a jurisdictional defense cannot be nullified by a subsequent amendment to a pleading adding the missing affirmative defense.")).

There are, of course, contrary holdings. ([see e.g. Crosby v Crosby, 177 AD3d 1143](#), 1144 [3rd Dept 2019]; *see also 1163 Washington LLC v Cruz*, 75 Misc 3d 1237(A) [Civ Ct, Bronx County 2022]). In *Cruz*, the court was faced with similar facts as the case at bar and

allowed the amendment by motion, noting the unique circumstances faced by pro-se litigants in the Housing Court. This court agrees with the *Cruz* court's compelling reasoning but holds it must follow the established binding appellate precedent from the First Department and the Court of Appeals. ([see e.g. Bronx 2120 Crotona Ave. L.P. v Gonzalez, 75 Misc 3d 753](#), 755-756 [Civ Ct, Bronx County 2022] (discussing binding authority and *stare decisis*)). Binding precedent does not contemplate a Housing Court exception to the general waiver rules encapsulated in CPLR 3211(e). [\[FN1\]](#) While [\[\\*4\]](#) this may be harsh result, it is one to be addressed by the Legislature.

Petitioner's request to strike the Second Counterclaim is denied. The counterclaim essentially seeks an order to correct conditions. It is settled law that this court may issue such orders regardless of the relief originally sought. ([see Jeffers v River Park Residences LP, 71 Misc 3d 1222\(A\)](#), \*5 [Civ Ct, Bronx County 2021], *citing* Civil Court Act § 110(c)).

Based on the above, respondent's motion is granted to the extent of deeming the amended answer served and filed. However, the personal jurisdiction defense, which relates only to the service of the petition and notice of petition, is dismissed. ([see Marmon Realty Group LLC v Khalil, 72 Misc 3d 136\(A\)](#) [App Term, 2nd Dept 2021] (failure to serve a predicate notice does not implicate personal jurisdiction)). Summary judgment is denied.

This constitutes the Decision and Order of the court. It will be posted to NYSCEF.

The matter is adjourned to February 10, 2023, at 9:30 AM for in-person pre-trial conference.

Dated: January 25, 2023  
SO ORDERED,  
Bronx, New York  
/S/

---

HON. SHORAB IBRAHIM  
JUDGE, HOUSING PART I

### Footnotes

**Footnote 1:** The court recognizes the inconsistency of holding both that formerly pro-se respondents should have the full benefit of counsel, and that a defense inadvertently waived without the benefit of counsel cannot be resuscitated by amendment.

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