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3612 Broadway Partners LLC v. Mejia

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2023 NY Slip Op 23078 [79 Misc 3d 230]

March 27, 2023

Bacdayan, J.

Civil Court of the City of New York, New York County

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[*1]

3612 Broadway Partners LLC, Petitioner,
v
Crispin Mejia, Respondent.

Civil Court of the City of New York, New York County, March 27, 2023

APPEARANCES OF COUNSEL

Manhattan Legal Services (*Hallelujah Lewis-Flannory* of counsel) for respondent.

SDK Heiberger LLP (*Eric Kahan* of counsel) for petitioner.

{**79 Misc 3d at 231} OPINION OF THE COURT

Karen May Bacdayan, J. {**79 Misc 3d at 232}

Procedural Posture and Background

This is a summary nonpayment proceeding commenced against the rent-stabilized tenant of record, Crispin Mejia (respondent), by 3612 Broadway Partners LLC (petitioner). (NY St Cts Elec Filing [NYSCEF] Doc No. 1, petition ¶¶ 1-2.) Petitioner seeks rent arrears accruing at the monthly rental amount of $2,447.00. (*Id.* ¶ 6.) Respondent filed an answer without the assistance of counsel alleging a general denial and a breach of the warranty of habitability.[FN1] Thereafter, respondent retained counsel who moved to file an amended answer. With leave of court, respondent has moved a second time to amend his answer. (NYSCEF Doc No. 32, notice of mot [seq 3].) Respondent seeks to include a second affirmative defense and a first counterclaim of fraudulent rent overcharge and an award of treble damages. Respondent also seeks to interpose defenses related to the alleged fraudulent overcharge, to wit: defective rent demand and defective petition. Lastly, respondent seeks to raise the Tenant Safe Harbor Act (TSHA) (L 2020, ch 127), a violation of Real Property Law

§ 235-e (d), a warranty of habitability counterclaim pursuant to Real Property Law § 235-b, and a claim for attorney's fees. (NYSCEF Doc No. 35, proposed amended answer.)[FN2]

Petitioner opposes respondent's motion to interpose an overcharge defense and counterclaim on the basis that, due to both lawful vacancy and longevity increases, and a lawful [*2]Individual Apartment Improvement (IAI) increase, respondent was charged $5.28 *less* than he could have been charged at the inception of his tenancy. (NYSCEF Doc No. 41, petitioner's attorney's affirmation ¶¶ 11-14.) Thereafter, petitioner avers that "all increases to the rent in nearly two (2) decades that the [r]espondent has been residing in the [p]remises have been in compliance with lawful RGBO [Rent Guidelines Board Order] increases upon renewal." (NYSCEF Doc No. 42, Middleton aff ¶ 12.) Petitioner opposes respondent's motion for discovery related to his alleged overcharge on the basis that respondent "fails [in his answer] to meet the colorable claim requirement{**79 Misc 3d at 233} to establish 'fraud,' which has been specifically elaborated by the Court of Appeals in [*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*]." (NYSCEF Doc No. 41, petitioner's attorney's affirmation ¶ 23.)

Petitioner also objects to the interposition of each of the proposed defenses and counterclaims which are unrelated to the alleged fraudulent overcharge. Petitioner states that respondent's proposed TSHA defense is "moot and wholly irrelevant as the COVID-19 covered period under S8192B ended on June 24, 2021 and the eviction moratorium expired on January 15, 2022, over a year ago." (NYSCEF Doc No. 41, petitioner's attorney's affirmation ¶ 41.) Regarding respondent's breach of the warranty of habitability claim, petitioner's attorney states, unsupported by an affidavit from petitioner's agent, that respondent never provided notice of the alleged conditions in need of repair. (*Id.* ¶ 48.) Finally, petitioner states that the Housing Stability and Tenant Protection Act of 2019 (HSTPA) (L 2019, ch 36, § 1) disallows a claim for attorneys' fees in a summary proceeding despite language in a lease to the contrary. (*Id.* ¶ 56; RPAPL 702 [1].)

In reply, respondent points to the numerous inconsistencies in the Division of Housing and Community Renewal (DHCR) registrations and petitioner's own statements. These irregularities include a discrepancy between petitioner's rent breakdown which indicates respondent took occupancy of the subject apartment in May 2004, and the DHCR registration history which indicates respondent's first lease started May 1, 2005; failure to register the apartment at all in 2007 and 2008; registration of a tenant whose identity is unknown for a lease term between June 1, 2009, and May 31, 2011; and failure to properly register respondent as the tenant of record until 2019. (NYSCEF Doc No. 46, respondent's attorney's

affirmation ¶¶ 8-10.) Respondent further argues that petitioner's attempt to rehabilitate the $869.94, 111.5% increase in May 2005, one year after petitioner's records indicate respondent took occupancy, is suspect as the submitted documents to support an IAI increase "raise more questions than they answer." (*Id.* ¶ 13.)

The court will first address respondent's proposed second affirmative defense and first counterclaim of an alleged willful and fraudulent overcharge and treble damages. The court will then address whether respondent has demonstrated ample need to warrant leave to conduct discovery related to this {**79 Misc 3d at 234} defense and counterclaim. Lastly, the court will address respondent's remaining proposed defenses and counterclaims and petitioner's objections thereto.

Discussion

Respondent's Motion to File an Amended Answer

[1] It is well-settled that leave to amend a pleading is freely granted under CPLR 3025 absent a showing of prejudice or surprise. (*Mezzacappa Bros., Inc. v City of New York*, 29 AD3d 494 [1st Dept 2006]; *Valdes v Marbrose Realty*, 289 AD2d 28, 29 [1st Dept 2001]; *Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 104 AD2d 258 [1st Dept 1984].) Whether to grant a motion to amend a pleading is a matter "committed 'almost entirely to the [*3]court's discretion to be determined on a sui generis basis,' [with] 'the widest possible latitude' being extended to the courts." (*Murray v City of New York*, 43 NY2d 400, 404-405 [1977] [citation omitted].) However, a defense cannot be devoid of merit as a matter of law. (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541 [1st Dept 2011].) Petitioner principally argues that the proposed defenses and counterclaims lack merit; the court disagrees, as explained below. Respondent's motion to amend the answer is granted to the extent permitted by this decision and order.

What is fraud as elaborated by *Regina Metro.*?

Under the standard enunciated by *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332 [2020]), a cause of action for an overcharge calculated using the default formula requires a demonstration of facts supporting a "fraudulent scheme to *deregulate* the apartment." (*Id.* at 354 [emphasis added].) Fraud comprises "evidence [of] a representation of material fact, falsity, scienter, reliance and injury." (*Id.* at 356 n 7 [internal quotation marks and citations omitted].) Since *Regina* was decided, courts have clarified that the fraud exception to the four-year look-back restriction

applies to unlawful deregulation claims, as well as claims of *unlawful overcharge* as in the case at bar. (*435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC*, 183 AD3d 509, 510 [1st Dept 2020]; *Montera v KMR Amsterdam LLC*, 193 AD3d 102 [1st Dept 2021].)

Subsequent decisions have opined that the type of fraud contemplated by *Regina* is "common-law fraud." Most recently, in *435 Cent. Park W Tenant Assn. v Park Front Apts., LLC* (2023 NY Slip Op 30799[U] [Sup Ct, NY County 2023, Mary V. {**79 Misc 3d at 235}Rosado, J.]), on remittitur from the Appellate Division, First Department, the court observed that "the First Department, Second Department, and trial courts have all frequently analyzed a showing of fraud according to the common law elements laid out by the Court of Appeals in *Regina*. . . . The Court of Appeals, and multiple Appellate and Trial Courts have held that to successfully prove fraud, [t]enants must prove misrepresentation of material fact, falsity, scienter, reliance, and injury." (*Id.* at *9, *16 [citations omitted].) The *Park Front* court expounded that in analyzing a fraud claim in the context of a rent overcharge, "reliance on the false representation must result in injury, and if the fraud causes no loss, then the plaintiff has suffered no damages." (*Id.* at *16.) Notably, the court had previously granted *leave* to conduct post-note of issue discovery "as the information sought was *critical to [p]laintiffs' burden of proof* in showing they were harmed or injured by [d]efendant's *alleged* fraud." (*Id.* at *4 [emphasis added].) This determination by Justice Carol R. Edmead in the nearly seven-year-long history of *Park Front*, involving multiple trial and appellate level decisions, "was the only decision on the docket not appealed." (*Id.*)

Also recently, in *Casey v Whitehouse Estates, Inc.* (39 NY3d 1104 [2023]) the Court of Appeals reversed the Appellate Division, First Department which upheld the lower court's finding that fraud had been pleaded. In its brief to the Court of Appeals, the landlord appellant argued "Supreme Court's *sua sponte* finding of fraud resulted from its mistaken belief that fraud in a rent overcharge case fundamentally differs from a claim of common law fraud." (Brief for defendants-appellants & third-party plaintiffs-appellants in *Casey v Whitehouse Estates, Inc.*, 39 NY3d 1104 [2023], at 31.) In reversing the Appellate Division, the Court implicitly rejected a distinction between common-law fraud, and fraud in the context of overcharge and unlawful deregulation claims.

Indeed, *Regina* did not change the pre-HSTPA law regarding fraudulent overcharge claims; as such, the decision should not provoke so much consternation among advocates seeking discovery in Housing Court. In *Quinatoa v Hewlett Assoc., LP* (205 AD3d 654, 654 [1st [*4]Dept 2022]) the landlord moved to renew its motion to dismiss the tenant's cause of action sounding in fraud, arguing that the intervening decision in *Regina* constituted a

"change in the law" that heightened the standard for pleading fraud which had not been met as the tenant{**79 Misc 3d at 236} nowhere used the word "fraud" in her complaint. Supreme Court denied the motion to renew. On appeal, the Appellate Division agreed with the court below and declined to reach the pleading issue on the grounds that *Regina* "merely reaffirmed the existing law." (*Id.* at 655 [internal quotation marks and citation omitted].) In dicta, the *Quinatoa* Court stated that, had they reached the issue, they would have found that "the complaint sufficiently sets forth the elements of 'representation of material fact, falsity, scienter, reliance and injury' (*Regina*, 35 NY3d at 356 n 7) . . . ." (*Id.*)[FN3]

Respondent's Motion for Discovery Reaching Back to 2003

Neither party disputes that common-law fraud must be pleaded to pierce the look-back period. Petitioner, however, disputes that common-law fraud has been sufficiently pleaded as elaborated in *Regina*. The court disagrees and finds that respondent has adequately and properly alleged the elements of fraud in order to warrant discovery regarding a cause of action for a fraudulent overcharge in this summary nonpayment proceeding.[FN4]

At this juncture, respondent need not *prove* fraud. (*See Sargiss v Magarelli*, 12 NY3d 527, 530-531 [2009] ["(A)lthough under CPLR 3016 (b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud" (internal quotation marks and citation omitted)].) To determine whether a party has established "ample need" to conduct discovery in a summary proceeding, the court must find, "in the first instance, [that] the [movant] has asserted facts to establish a cause of action [or defense]." (*New York Univ. v Farkas*, 121 Misc 2d 643, 647 [Civ Ct, NY County 1983].)[FN5] This stands in contrast to actions in other forums where parties proceed to discovery{**79 Misc 3d at 237} without leave of court. In Housing Court, because a litigant must be able to demonstrate ample need for discovery related to a cause of action or defense, *discovery regarding fraudulent overcharge claims is inextricably entwined with proper pleading.*

Regarding proper pleading, "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or [*5]occurrences, intended to be proved and the material elements of each cause of action or defense." (CPLR 3013.) For discovery related to a fraudulent scheme to overcharge a tenant, the answer must sufficiently detail the alleged fraud, and plead the elements thereof. (CPLR 3016; *Sargiss*, 12 NY3d at 530-531.) As to the difficulty of pleading fraud without discovery, this court's position has always been that it is possible "even without discovery [to]

adequately allege[ ] [fraud]." (*Kaufman v Cohen*, 307 AD2d 113, 121 [1st Dept 2003].) Indeed, respondent's attorney has capably demonstrated that this hurdle is not insurmountable if sufficient indicia of fraud exist.

Respondent states that petitioner has "willfully" overcharged him and engaged in a "pattern of fraud" and a "fraudulent scheme to avert rent stabilization laws." (NYSCEF Doc No. 35, proposed amended answer ¶ 18.) Respondent further alleges that the rent charged is unlawful "based upon [p]etitioner's material misrepresentations that [p]etitioner knew was [sic] false." (*Id.* ¶ 28.) Respondent claims that he "relied upon [p]etitioner's representations about the legality of the rent to [r]espondent's detriment because [r]espondent paid this amount, or part of it." (*Id.* ¶ 29.) Finally, respondent pleads that "[a]s a result, [he] has been injured in an amount to be determined at trial plus treble damages and interest." (*Id.* ¶ 30.)

To further bolster his properly pleaded claim of fraud, respondent notes in his proposed amended answer two unexplained increases in the legal regulated rent: (1) an increase in 2003 from $725.64 to $780.06 for a two-year lease renewal starting December 1, 2003, in excess of the permissible RGBO {**79 Misc 3d at 238} increase for leases starting on that date, and (2) an 111.5% rent increase between 2005 and 2006 (which neither side disputes is *after* respondent moved to the subject apartment).

Additional indicia of fraud are identified by respondent, including: a discrepancy between petitioner's rent breakdown for respondent which indicates respondent took occupancy in May 2004, and the DHCR registration history which does not properly name respondent as the tenant of record until 2019; petitioner's 2006 registration statement that lists "Roberto Passon" as the tenant of record for a lease term starting May 1, 2005, and ending April 30, 2007, contradicting petitioner's rent breakdown which notes respondent took occupancy in May 2004, along with petitioner's opposition papers which claim respondent's tenancy commenced in May 2004 (NYSCEF Doc No. 41, petitioner's attorney's affirmation ¶ 13); petitioner's failure to register the apartment in 2007 and 2008;[FN6] a 2010 registration naming an unknown or fictitious tenant, "Rigoberto Garcia," as the tenant for a lease term starting June 1, 2009, and ending May 31, 2011; and a 2011 registration that lists "Passon Crispin" and "Roberto Meja" as the registered tenants for a lease term starting May 1, 2009, and ending April 30, 2011, a term which conflicts with the prior year's registration of a lease term of June 1, 2009, through May 31, 2011, [*6]for "Rigoberto Garcia."[FN7]

Petitioner points to no prejudice within the meaning of *Farkas* that would befall it were discovery to be granted. The court can "alleviate" any such prejudice by fashioning a

discovery timeline that will not significantly delay the disposition of critical issues in this proceeding, and by ordering use and occupancy.[FN8] {**79 Misc 3d at 239}(*Farkas*, 121 Misc 2d at 647.) Petitioner's statement that "[i]t is wholly prejudicial if this Court were to grant [r]espondent's motion for limited discovery for documents that are from approximately twenty (20) years ago" does not resonate with the court. (NYSCEF Doc No. 42, Middleton aff ¶¶ 4-5.) A "bare allegation of prejudice based upon the passing of time is insufficient" to demonstrate actual prejudice. (*Appleby v Suggs*, 135 AD3d 623, 623 [1st Dept 2016].) Nor does prejudice inure merely from exposure to greater liability. (*St. Nicholas W. 126 L.P. v Republic Inv. Co., LLC*, 193 AD3d 488, 489 [1st Dept 2021] ["additional discovery, extended litigation, and increased liability exposure does not result in prejudice"].) Finally, petitioner has not averred that it is unable to locate any of the requested documents. Indeed, petitioner has already been able to locate an estimate for renovations to the subject apartment with a notation that the "[p]roject will finish at 4/15/05," a Department of Buildings work permit issued March 1, 2005, and an estimate from a contractor dated January 28, 2004. (NYSCEF Doc No. 27; NYSCEF Doc No. 28; NYSCEF Doc No. 29.)

Accordingly, respondent's motion for disclosure dating back to May 2003, the year prior to respondent's initial occupancy, is granted.

Respondent's Other Proposed Defenses and Counterclaims

Respondent's motion to interpose defenses that seek dismissal of the petition based on a rent demand and petition that allege a purportedly unlawful legal regulated rent is also granted. Accordingly, respondent's first, third, and fourth defenses are deemed interposed nunc pro tunc.

Respondent's proposed fifth defense and second counterclaim allege petitioner has failed to state a cause of action because it has not provided a "proper, valid rent stabilized lease at the correct legal regulated rent" to respondent. (NYSCEF Doc No. 35, proposed amended answer ¶ 39.) This allegation is redundant, as respondent asserts the same factual allegations made under its second defense and first counterclaim. Moreover, this court is without jurisdiction to order petitioner to give respondent a lease renewal. The motion to add the proposed fifth defense and second counterclaim is therefore denied. {**79 Misc 3d at 240}

[2] Respondent's sixth defense asserts respondent is protected by TSHA because he suffered financial hardship during the statutorily defined time period due to loss of

employment. (*Id.* ¶ 44.) Petitioner argues in opposition that the defense is "moot" because "the COVID-19 covered period under [TSHA] ended on June 24, 2021," that the eviction moratorium ended January 15, 2022, and that TSHA does not preclude the court from entering a monetary judgment for rent owed during the TSHA covered period. (NYSCEF Doc No. 41, petitioner's attorney's affirmation ¶¶ 41-42.) However, petitioner is incorrect that the TSHA covered period which began on March [*7]7, 2020, concluded on June 24, 2021, when Governor Cuomo announced he would not renew the state of emergency. (Executive Order [A. Cuomo] No. 210 [9 NYCRR 8.210].) The Legislature answered swiftly by extending the TSHA covered period to January 15, 2022. (L 2020, ch 127, § 2 [1], as amended by L 2021, ch 417, § 2, part D, § 1.) The statute was never repealed; thus respondent can still assert a defense under the statute that, if proved, would preclude the court from entering a possessory judgment based on arrears owed between March 7, 2020, and January 15, 2022. The motion to add the proposed sixth defense is therefore granted.

Respondent's seventh defense alleges petitioner failed to provide respondent with the notice required under Real Property Law § 235-e (d) which requires a landlord to send a written notice by certified mail to a tenant that states the landlord failed to receive the tenant's rent payment within five days of the date specified in the tenant's lease. While the statute is opaque as to a tenant's remedy, it explicitly permits a tenant to raise the failure to send the notice as an affirmative defense in a nonpayment proceeding. (Real Property Law § 235-e [d].) Petitioner does not raise any objections to the defense in its opposition papers. Accordingly, the motion to add the proposed seventh defense is granted.

Respondent's third counterclaim asserts petitioner breached the warranty of habitability, due to conditions that exist or previously existed in the subject apartment, and that petitioner had actual or constructive notice of each condition but failed to correct those conditions. (NYSCEF Doc No. 35, proposed amended answer ¶¶ 49-51.) The pleading sufficiently states a counterclaim for breach of the warranty of habitability. Petitioner's affidavit does not address the proposed counterclaim, nor does petitioner's attorney state a basis for any{**79 Misc 3d at 241} personal knowledge that respondent never notified petitioner about the alleged conditions. (NYSCEF Doc No. 42, Middleton aff.) Respondent's motion to amend the answer to include the third counterclaim is therefore granted.

Finally, respondent's fourth counterclaim seeks attorneys' fees. Petitioner contends that HSTPA's amendment to RPAPL 702 precludes any party from seeking fees in a housing court proceeding. Respondent does not address this argument on reply. Thus, without deciding whether attorneys' fees may be sought in a summary proceeding, under the facts and

circumstances, respondent's claim for attorneys' fees is severed without prejudice to a plenary proceeding.

Conclusion

Accordingly, it is ordered that respondent's motion to interpose a late answer is granted to the extent provided by this decision-order; and it is further ordered that respondent shall serve the proposed answer, *verified by respondent*, on petitioner's attorney via NYSCEF within seven business days; and it is further ordered that respondent's motion to conduct discovery is granted; and it is further ordered that respondent shall serve petitioner with the document demands filed as respondent's exhibit B, NYSCEF Doc No. 36, within seven business days; and it is further ordered that the proceeding is marked off the court's calendar for petitioner to produce documents pursuant to the document demands within 45 days of receipt of same from respondent as set forth above; and it is further ordered that the parties shall make good-faith efforts to resolve all discovery disputes outside of court and be able to demonstrate same to the court; and it is further ordered that either party may restore this proceeding to the court's calendar by eight days' [*8]notice of motion for appropriate relief including motion practice pursuant to CPLR article 31 or trial.

Footnotes

Footnote 1: The pro se answer was not filed on NYSCEF, but was filed with the clerk on August 17, 2022.

Footnote 2: Petitioner opposes respondent's motion on the basis that respondent's first motion to interpose an amended pleading remains pending before the court. (NYSCEF Doc No. 14, notice of mot [seq 2]; NYSCEF Doc No. 41, petitioner's attorney's affirmation ¶ 2.) Based on recorded conferences with the court, and in the interests of judicial expediency and economy, the court deems respondent's first motion to amend his answer (seq 2) withdrawn.

Footnote 3:*See also* Andrew Darcy & Brian Sullivan, *Regina Metro One Year On: Residential Tenants in New York City Can Still Conduct Robust Discovery in Rent Overcharge Cases*, Practical Guidance, LexisNexis (2021), available at https://mobilizationforjustice.org/wp-content/uploads/Regina-Metro-One-Year-On-Residential-Tenants-in-New-York-City-Can-Still-Conduct-Robust-Discovery.pdf (last accessed Mar. 24, 2023) ("[T]enant advocates must be sure to point out that *Regina* is not a 'new' law, but rather an elaboration on precedent").

Footnote 4: This determination should not be construed as concluding that fraud exists.

Respondent must prove this at trial. (*Park Front Apts., LLC*, 2023 NY Slip Op 30799[U].)

Footnote 5: In determining whether a party has established ample need for discovery, courts consider a number of factors, not all of which need be present in every case, including: (1) whether the movant has asserted facts to establish a claim or defense; (2) whether there is a need to determine information directly related to the claim or defense; (3) whether the requested disclosure is carefully tailored and likely to clarify the disputed facts; (4) whether prejudice will result from granting leave to conduct discovery; and (5) whether any prejudice caused by granting a discovery request can be diminished by an order fashioned by the court for that purpose. (*Farkas*, 121 Misc 2d 643, 647.)

Footnote 6: The court notes that the 2009 registration of a one-year lease starting May 1, 2008, increased the prior registered rent by 7.21% (from $1,650.00 to $1,769.03), when the applicable RGBO only permitted a 3% increase for a one-year lease renewal commencing between October 1, 2007, and September 30, 2008. (New York City Rent Guidelines Board, Rent Guidelines Board Apartment Orders #1 through #54, available at https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2022/06/2022-Apartment-Chart.pdf [last accessed Mar. 24, 2023].) This unlawful increase belies petitioner's sworn statement that "all increases" in the 20-year history of respondent's tenancy "have been in compliance with lawful RGBO increases upon renewal." (NYSCEF Doc No. 42, Middleton aff ¶ 12.)

Footnote 7: Petitioner's argument that the DHCR rent history "is not binding" fails to acknowledge that the rent history is a summary of petitioner's own annual representations to DHCR as to who the leaseholder is for the subject apartment, the amount of rent said person(s) pays, the lease terms for vacancy and renewal leases, and explanations for increases in the registered rents.

Footnote 8: The parties have already stipulated that use and occupancy will be paid pendente lite. (NYSCEF Doc No. 47.)