2024-04-30

DELEON v. 560-568 AUDUBON REALTY, LLC

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. EMILY MORALES-MINERVA** **PART** **42M**

Justice

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INMACULADA DELEON, RUFINO DISLA, GRISAIDA FERNANDEZ, IDALMI MERCADO,

Plaintiffs,

- v -

560-568 AUDUBON REALTY, LLC, HAYCO CORPORATION, FRED HAY, ALEX HAY, ALFONSO DEJESUS, RUBY ECHEVARRIA

Defendants.

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INDEX NO. 154546/2022

MOTION DATE 01/23/2024, 01/26/2024

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 63, 64, 65, 66, 67, 68, 69, 70, 105, 107, 111, 112, 113, 114

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 106, 108, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127

were read on this motion to/for DISCOVERY.

APPEARANCES:

Schulte Roth & Zabel, LLP, New York, New York, (by counsel, John P. Mixon, Esq.), for plaintiffs

Rosenberg & Estis, P.C., New York, New York, (by counsel, Howard W. Kingsley, Esq.), for defendants

HON. EMILY MORALES-MINERVA:

In this action for rent overcharge, plaintiffs INMACULADA DELEON, RUFINO DISLA, GRISAIDA FERNANDEZ, and IDALMI MERCADO, move (motion sequence 003), pursuant to CPLR 3211(a)(7)[1] and CPLR

[1] CPLR 3211(a)(7) provides: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: . . . the pleading fails to state a cause of action"

3013[2], to dismiss defendants 560-568 AUDUBON REALTY, LLC, HAYCO CORPORATION, FRED HAY, ALEX HAY, ALFONSO DEJESUS, and RUBY ECHEVARRIA's counterclaim for attorney's fees. Defendants submit opposition to the motion. The motion was marked submitted on February 21, 2024.

Further, Plaintiffs INMACULADA DELEON, RUFINO DISLA, GRISAIDA FERNANDEZ, and IDALMI MERCADO, move (motion sequence 004), pursuant to CPLR 3124[3], for an order compelling defendants to produce discovery, or in the alternative, to provide an affidavit that comports with *Jackson v. New York*[4] confirming the non-existence of the requested discovery. Defendants submit opposition to the motion. The motion was marked submitted on March 20, 2024.

For the reasons set forth below, plaintiffs' INMACULADA DELEON, RUFINO DISLA, GRISAIDA FERNANDEZ, and IDALMI MERCADO motion to dismiss defendants' counterclaim is denied in its entirety. Further, plaintiffs' INMACULADA DELEON, RUFINO DISLA,

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[2] CPLR 3013 provides: "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

[3] CPLR 3214 provides: "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response."

[4] See Jackson v New York, 185 AD2d 768, 770 [1st Dept 1992])(holding that when documents are not produced during discovery an affidavit must be provided which makes a "showing as to where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found.")

GRISAIDA FERNANDEZ, and IDALMI MERCADO motion to compel is granted to that extent that Defendants must provide (1) rent ledgers for plaintiffs' predecessors and co-tenants dating back to 2016 and (2) a sufficient *Jackson* affidavit relating to plaintiffs' discovery requests and plaintiffs' motion is otherwise denied.

BACKGROUND

Plaintiffs commenced this action by filing a summons and complaint, on May 26, 2022, against defendants 560-568 AUDUBON REALTY, LLC, HAYCO CORPORATION, FRED HAY, ALEX HAY, ALFONSO DEJESUS, RUBY ECHEVARRIA (defendants). Plaintiffs INMACULADA DELEON, RUFINO DISLA, GRISAIDA FERNANDEZ and IDALMI MERCADO (plaintiffs) are tenants in the building located at "650-568 Audubon Avenue, New York, New York 10040" (building). Defendants are the owners and managers of the building. Plaintiffs asserted eleven causes of action in their original summons and complaint. On December 1, 2023, the Court [N. Bannon, J.S.C.], issued an order, granting in part, defendants' pre-answer motion to dismiss certain causes of action and ordered defendants to file an answer as to the remaining causes of action within 30 days of the date of the order. The causes of action remaining after the Court's order were plaintiff's first cause of action for fraud, fifth cause of action for rent overcharge, sixth cause of action

for willful rent overcharge, seventh cause of action for breach of warranty of habitability, eighth cause of action for order to correct, and ninth cause of action for breach of lease.

Thereafter, on January 3, 2024, defendants filed an Answer with Counterclaim. Defendants assert one counterclaim for attorneys' fees pursuant to "the terms and conditions of each Lease" and request a money judgment for those fees, costs, and expenses together with interest (see Answer with Counterclaim, filed January 3, 2024).

On January 23, 2024, plaintiffs filed the subject motion to dismiss defendants' counterclaim pursuant to CPLR 3211(a)(7), or in the alternative, pursuant to CPLR 3013. Plaintiffs assert that defendants' counterclaim is not supported by a lease provision and does not refer to which lease provision the counterclaim is premised upon. Plaintiffs contend that defendants fail to adequately particularize their counterclaim and fail to state a cause of action for attorneys' fees.

In opposition, defendants argue that their counterclaim is based upon lease provisions for each of the plaintiffs' leases. Defendants specifically point to paragraph 28 of plaintiff Deleon's lease, paragraph 30 of plaintiff Disla's lease, paragraph 19(A)(5) of plaintiff Fernandez's lease and paragraph33 of the rider thereto, and paragraph 19(A)(5) of plaintiff Mercado's lease and paragraph 33 of the rider thereto

(see Affirmation in Opposition, paragraph 3, and exhibit A). Further, defendants assert that an award of attorneys' fees can only be made after a finding that one party is the prevailing party therefore plaintiffs' motion is premature. In the alternative, defendants request that if there is a finding that its counterclaim is insufficient, they be permitted to amend the pleading.

A few days after plaintiffs filed its motion to dismiss defendants' counterclaim, on January 26, 2024, plaintiffs filed a motion to compel, pursuant to CPLR 3124. Plaintiffs' motion seeks an order directing defendants to produce (1) financial records evidencing purported improvements to plaintiffs' apartments; (2) non-privileged electronic communication addressing concerning or relating to plaintiffs' claims, or, if none exist, shall produce a *Jackson* affidavit; (3) copies of leases for the apartments currently occupied by Plaintiffs dating back to 2009, or provide proof the documents have been destroyed; (4) building-wide rent rolls and ledgers dating back to 2009.

In opposition, defendants state that they have provided the documents requested by plaintiffs and that this motion is moot and a form of harassment. Defendants contend that, in an effort to resolve this motion, they produced certain categories of documents that span approximately fifteen years in response to

plaintiffs demands. Defendants asserts that plaintiffs are on a fishing expedition and defendants have produced what they have, subject to their objections, and have provided a *Jackson* affidavit stating that they have no additional responsive documents. Defendants cite a newly enacted amendment passed in New York State Assembly Bill 2023-A8506[5] and the Housing Stability and Tenant Protection Act of 2019 in support of its contention that plaintiffs are not entitled to any documents relating to other apartments in the building or relating to prior tenants of the four subject apartments prior to plaintiffs entering into their respective lease agreements to prove their claim for fraud. Defendants argue that these documents are not material and necessary to plaintiffs' case and are irrelevant.

In reply, while acknowledging that defendants have provided many responsive documents, plaintiffs contend that defendants

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[5] "When a colorable claim that an owner has engaged in a fraudulent scheme to deregulate a unit is properly raised as part of a proceeding before a court of competent jurisdiction . . . shall issue a determination as to whether the owner knowingly engaged in such fraudulent scheme after a consideration of the totality of the circumstances. In making such determination, the court or the division shall consider all of the relevant facts and all applicable statutory and regulatory law and controlling authorities, provided that there need not be a finding that all of the elements of common law fraud, including evidence of a misrepresentation of material fact, falsity, scienter, reliance and injury, were satisfied in order to make a determination that a fraudulent scheme to deregulate a unit was committed if the totality of the circumstances nonetheless indicate that such fraudulent scheme to deregulate a unit was committed. § 5. Section 3 of part B of a chapter of the laws of 2023 relating to defining clearly the scope of the fraud exception to the pre-HSTPA four-year rule for calculating rents, as proposed in legislative bills numbers S. 2980-C and A. 6216-B, is amended to read as follows: § 3. This act shall take effect immediately and shall apply to any action or proceeding in any court or any application, complaint or proceeding before an administrative agency on the effective date of this act."

have not sufficiently or completely complied with their request for discovery. Plaintiffs point to the following deficiencies in defendants' responses, (1) defendants must produce rent ledgers for plaintiffs' predecessors and co-tenants as they are relevant to defendants' scienter in relation to plaintiffs' fraud claim, and (2) defendants' *Jackson* affidavit is not sufficient. Plaintiffs argue they are entitled to this discovery and therefore defendants should be compelled to provide it.

For the reasons set forth below, plaintiffs' INMACULADA DELEON, RUFINO DISLA, GRISAIDA FERNANDEZ, and IDALMI MERCADO motion to dismiss the counterclaim is denied in its entirety. Further, plaintiffs' INMACULADA DELEON, RUFINO DISLA, GRISAIDA FERNANDEZ, and IDALMI MERCADO motion to compel is granted to that extent that Defendants must provide (1) rent ledgers for plaintiffs' predecessors and co-tenants dating back to 2016 and (2) a sufficient *Jackson* affidavit relating to plaintiffs' discovery request and is otherwise denied.

ANALYSIS

Motion to Dismiss Counterclaim

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (Leon v Martinez, 84

NY2d 83, 87 [1994]). The Court must "'accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (Kolchins v Evolution Mkts., Inc., 31 NY3d 100, 105-106 [2018], quoting Leon, 84 NY2d at 87-88). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration" (Connaughton v Chipotle Mexican Grill, Inc., 29 NY3d 137, 141-142 [2017], quoting Simkin v Blank, 19 NY3d 46, 52 [2012] [internal quotation marks omitted]).

"[T]he motion should not be granted unless the movant can show that a material fact as claimed by the plaintiff is not a fact at all and unless it can be said that no significant dispute exists regarding it" (Kollatz v KOS Bldg. Group, LLC, 188 AD3d 1175, 1177 [2d Dept 2020] citing Pac. W., Inc. v E & A Restoration, Inc., 178 AD3d 834, 835 [2d Dept 2019]).

In support of its motion, Plaintiffs assert that Defendants' counterclaim is not supported by a lease provision and does not refer to which lease provision the counterclaim is premised upon. Plaintiffs contend that defendants fail to adequately particularize their counterclaim and fail to state a cause of action for attorneys' fees.

In opposition to Plaintiffs' motion to dismiss, Defendants

argue that their counterclaim is based upon lease provisions for each of the plaintiffs' leases. Defendants specifically point to paragraph 28 of plaintiff Deleon's lease, paragraph 30 of plaintiff Disla's lease, and paragraph 19(A)(5) of plaintiff Fernandez's lease and paragraph33 of the rider thereto, and paragraph 19(A)(5) of plaintiff Mercado's lease and paragraph 33 of the rider thereto (see Affirmation in Opposition, paragraph 3, and exhibit A). Further, defendants assert that an award of attorneys' fees can only be made after a finding that one party is the prevailing party therefore plaintiffs' motion is premature. In the alternative, defendants request that if there is a finding that its counterclaim is insufficient, they be permitted to amend the pleading.

Defendant's counterclaim states in paragraph 24 "pursuant to the terms and conditions of each Lease, the respective plaintiffs are liable for attorneys' fees, costs and expenses that have been or will be incurred by Landlord in connection with this action". (Answer with Counterclaim, filed January 3, 2024).

CPLR 3013 provides that "statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

"[O]nly a prevailing party is entitled to attorney's fees"

(Nestor v McDowell, 81 NY2d 410, 415-416 [1993]. "Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (Hooper Assoc., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]).

Here, defendants sufficiently state a cause of action of attorneys' fees as they state that their claim for attorneys' fees is premised upon language contained in the plaintiffs' leases. This is sufficient to state a cause of action. The issue of whether defendants will ultimately be the prevailing party and prove entitlement to attorneys' fees is not before the Court. Therefore, plaintiffs' motion to dismiss defendants' counterclaim, pursuant to CPLR 3211(a)(7) and CPLR 3013, is denied.

Motion to Compel

CPLR 3124 provides: "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." When a party moves pursuant to CPLR 3124, "[t]here is no requirement upon the movant other than to show that no response had been received" (All Boro Psychological

Servs., P.C. v Allstate Ins. Co., 39 Misc 3d 9, 11 [2nd Dept, App Term 2013]).

Parties are entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR § 3101(a)). It is well-settled that what constitutes "'material and necessary' is left to the sound discretion of the . . . courts and includes 'any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason'" (Andon v 302-304 Mott St. Assoc., 94 NY2d 740, 746 [2000] [citing Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]).

Here, it is undisputed that defendants have complied with a significant number of the outstanding discovery requests from plaintiff during the pendency of this motion. The only remaining discovery requests appear to be, (1) plaintiffs' request that defendants produce rent ledgers for plaintiffs' predecessors and co-tenants dating back to 2009, as they are relevant to defendants' scienter and plaintiffs' claim for fraud, and (2) plaintiffs' request, and the Court's [N. Bannon, J.S.C] Status Conference Order, dated February 8, 2024, that defendants file a sufficient *Jackson* affidavit if responsive records do not exist.

As to plaintiffs first request for rent ledgers for

plaintiffs' predecessors and co-tenants, dating back to 2009, plaintiffs have established their entitlement to a limited category of such records as case precedent and legislative history provides that the Court consider the "totality of the circumstances"[6] and "all available evidence"[7]. Therefore, the Court finds that defendants must produce the requested rent ledgers for plaintiffs' predecessors and co-tenants, for a period of six years before this action is commenced.

A claim for rent overcharge of a subject apartment, if successful, pursuant to CPLR § 213-a[8], can only receive an award of damages for six years before the action is commenced. Further, the Courts have upheld that a "review of rental history, outside the four-year lookback period is only permitted where the tenant produced evidence of a fraudulent scheme to deregulate" (Burrows v 75-25 153rd St., LLC, 215 AD3d 105, 109 [1st Dept 2023] [quoting Casey v Whitehouse Estates, Inc., 39 NY3d 1104, 1106 [2023]).

NYC Administrative Code 26-516(h) provides "courts, in investigating complaints of overcharge and in determining legal regulated rents, shall consider all available rent history which

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[6] See New York State Assembly Bill 2023-A8506
[7] See NYC Administrative Code 26-516[h]
[8] "No overcharge penalties or damages may be awarded for a period more than six years before the action is commenced or complaint is filed, . . ., and the calculation and determination of the legal rent and the amount of the overcharge shall be made in accordance with the provisions of law governing the determination and calculation of overcharges"

is reasonably necessary to make such determinations." It provides the Court may review "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; . . . (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; . . ." (NYC Administrative Code 26-516[h]).

Here, it appears that defendants have turned over records for the subject apartments. In applying the above principles, to the extent records exist, defendants must provide rent ledgers for plaintiffs' predecessors and co-tenants dating back to 2016.

As to the second outstanding discovery issue regarding the *Jackson* affidavit, the Court finds that the affidavit submitted by defendants does not comport with the guidelines provided in *Jackson*. Defendants' proffered affidavit is vague and conclusory. Defendants' proffered affidavit merely states, "defendants have made a diligent and good faith effort search of our records, which are kept at our office located at 377 Fifth Avenue in Manhattan, to locate all responsive documents sought by plaintiff". (Affirmation in Opposition, Exhibit 1).

The proffered affidavit fails to show "where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found." (Jackson v New York, 185 AD2d 768, 770 [1st Dept 1992]). Defendants fail to provide an affidavit which provides that the "the search had been a thorough one or that it had been conducted in a good faith effort to provide these necessary records to plaintiff." (Id.).

The Court finds that Defendants shall produce an affidavit in response to plaintiffs' requested discovery, which comports with *Jackson* within 30 days of the date herein.

Note of Issue

Although not requested in the pending motions, while these motions were *sub judice*, the note of issue deadline has passed. Plaintiffs uploaded a letter, dated April 15, 2024, requesting an extension to file note of issue until 45 days after the Court's decision on Plaintiffs' motion.[9] Pursuant to the latest Status Conference Order, dated February 9, 2024, the Court [N. Bannon, J.S.C.] set note of issue deadline for April 15, 2024.

[9] NYSCEF Doc. No. 140

Given the determinations in this Decision and Order, and the fact that discovery has not been completed, the Court finds good cause to extend the note of issue deadline. (see CPLR § 2004). Note of issue deadline will be extended to June 14, 2024, to allow compliance with this Decision and Order.

Accordingly, it is

ORDERED, plaintiffs' INMACULADA DELEON, RUFINO DISLA, GRISAIDA FERNANDEZ, and IDALMI MERCADO motion to dismiss Defendants' counterclaim is denied in its entirety; it is further

ORDERED, plaintiffs' INMACULADA DELEON, RUFINO DISLA, GRISAIDA FERNANDEZ, and IDALMI MERCADO motion to compel is granted to that extent that Defendants must provide (1) rent ledgers for plaintiffs' predecessors and co-tenants dating back to 2016 and (2) a sufficient *Jackson* affidavit relating to plaintiffs' discovery request, and is otherwise denied; it is further

ORDERED that the deadline to file note of issue shall be extended to June 14, 2024.

This constitutes the Decision and Order of the Court.

DATE: 04/30/2024

EMILY MORALES-MINERVA, JSC

Check One: ☐ **Case Disposed** ☒ **Non-Final Disposition**

Check if Appropriate: ☐ **Other (Specify _____)**