2024-05-29

Montera v. KMR Amsterdam LLC

Montera v KMR Amsterdam LLC
2024 NY Slip Op 31883(U)
May 29, 2024
Supreme Court, New York County
Docket Number: Index No. 160550/2017
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHLOMO S. HAGLER** **PART** **17**

Justice

----------X

KEN MONTERA, on behalf of himself and all others similarly situated

Plaintiff,

- v -

KMR AMSTERDAM LLC,

Defendant.

----------X

INDEX NO. 160550/2017

MOTION DATE 07/16/2020

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

HON. SHLOMO S. HAGLER, J.S.C.:

Plaintiff Ken Montera (Montera) is the current tenant of apartment 4E (the Apartment) in a building located at 2201 Amsterdam Avenue in Manhattan (the Premises), owned and operated by defendant KMR Amsterdam LLC (KMR). Montera commenced this action against KMR, seeking a judgment declaring that he and all others similarly situated are entitled to rent stabilized leases, damages for willful rent overcharge, class certification, and attorneys' fees.

In motion sequence 007, Montera moves pursuant to CPLR 3212 for summary judgment in his favor and to dismiss KMR's remaining affirmative defenses and counterclaims. KMR opposes the motion and cross-moves pursuant to CPLR 3212 to dismiss Montera's claim for fraud and for a determination that the default formula under 9 NYCRR 2522.6[b][2] does not apply in this action.

For the following reasons, the motion is granted in part, dismissing KMR's remaining affirmative defenses and counterclaims, and the motion is otherwise denied, and the cross-motion is denied in its entirety.

BACKGROUND

Rent overcharge claims often consist of complex statutory and factual frameworks. Such claims can be particularly complex when they center around a building deregulated while receiving J-51 benefits, pursuant to the New York City J-51 incentive program, like the subject building at issue here. Historically, building owners of rent stabilized apartments in buildings receiving J-51 benefits followed the New York State Division of Housing and Community Renewal's (DHCR) long-standing policy of permitting luxury deregulation while J-51 benefits remained in effect. However, in 2009, the Court of Appeals issued its guidance in *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009] which clarified the process and procedures of the law and held that apartments in buildings receiving J-51 benefits were to remain subject to rent stabilization, for at least as long as those buildings continued to receive J-51 benefits. The First Department later held that *Roberts* was to be applied retroactively (*see Gersten v 56 7th Ave. LLC*, 88 AD3d 189 [1st Dept 2011]).[1]

Adding difficulty to the analysis of a rent overcharge claim is the ever-changing statutory framework of such claims, most recently, by the Housing Stability and Tenant Protection Act of 2019 ("HSTPA"). With the enactment of the HSTPA, and specifically the changes introduced in Part F of the legislation, a six-year statute of limitations on the calculation of overcharge claims with no limitation on the lookback period to determine the legal rent, was introduced (*see* RSL sec. 26-516(a)(2) and CPLR 213-a). This substantially expanded the nature and scope of an owner's liability in rent overcharge cases. However, in 2020 the Court of Appeals found that the retroactive application of Part F of the HSTPA was unconstitutional on due process grounds and

[1] Owners of rent stabilized apartments were put on notice that luxury deregulation while in receipt of J-51 benefits were no longer permitted under any circumstance, and any apartment that was previously improperly deregulated should have been re-registered with DHCR and those tenants subject to regulation were to be provided rent stabilized leases.

determined that rent overcharge claims filed prior to the enactment of the HSTPA would be analyzed pursuant to the former applicable laws (*see Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 [2020]). As the complaint in the instant case was filed on November 29, 2017, prior to the enactment of the HSTPA, the instant motions will be analyzed utilizing pre-HSTPA law.

Prior to the HSTPA, rent overcharge claims were generally limited to a four-year lookback period for purposes of determining both the existence of an overcharge claim and the amount of rent that the landlord is allowed to charge for an apartment as established by the RSL and RSC (also called the legal regulated rent)[2] (*see* former RSL sec 26-516(a)(2) and former CPLR 213-a; *see also Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144 [2002]). The former versions of the above statutes required, absent a finding of fraud, a rent overcharge be calculated by considering the rent charged on the date four years before the filing of the overcharge complaint (the base date)[3], the lookback period as the base date rent, and computing the difference between that rent and the rent actually charged to determine if the tenant was overcharged. However, the rental history of a housing accommodation may be examined beyond the four-year lookback period for the limited purpose of determining whether a fraudulent scheme to deregulate the housing accommodation rendered the rent on the base date unreliable (*see* RSC sec 2526.1(a)(2)(iv)). In the event the rent being charged to the tenant is determined to be the product of a fraudulent scheme to deregulate the apartment, the default

[2] The legal regulated rent is the rent charged on the base date, plus any subsequent lawful increases and adjustments (*see* RSC sec 2520.6(e)).
[3] For claims filed before June 14, 2019, the base date is the date four years prior to the filing date of such claim except where a special provision of the RSC, the RSL or other law required maintenance of records or review for a longer period (*see* RSC sec 2520.6(f)).

formula[4] is then employed to calculate the rent on the base date (*see* RSC sec 2522.6 (b)(2) and 2526.1(g)). Therefore, on this record the issue of fraud must be determined before the issue of overcharge can be addressed, as a finding of fraud will necessitate the application of the default method.

When Montera began his tenancy and moved into the Apartment on March 10, 2010, it was pursuant to a non-regulated lease for a monthly rent of $1,150 (*see* NYSCEF doc. no. 134, 2nd Amended Complaint ¶¶ 17, 19, 28 and 138). Following Montera's initial lease expiration, KMR and Montera executed several one-year free-market lease extensions between 2010-2017 at increasing rental rates.[5]

Prior to Montera's tenancy, in 2003, KMR's predecessor applied for J-51 tax benefits for the subject building. KMR acquired the subject building in approximately 2004. Claiming ignorance of the laws regarding New York City's J-51 incentive program, KMR began improperly deregulating apartments while receiving J-51 benefits, and continued to do so, even though the J-51 tax benefits for the building did not expire until in or around June 2013 (*see* NYSCEF doc. no. 188, Yaghoubzadeh Aff, ¶¶ 7-12). On July 28, 2010, KMR improperly filed a high-rent destabilization exemption for Montera's apartment with DHCR, based on a 17% vacancy increase from the previous registered legal rent, that pushed it above the then-applicable $2,000 threshold for luxury deregulation (*see* NYSCEF doc. no. 140).

Montera commenced this action by summons and complaint dated November 29, 2017 (*see* NYSCEF doc. nos. 1-2), asserting claims for, *inter alia*, rent overcharge and seeking class

---

[4] The default formula generally provides that if the base date rent is the product of a fraudulent scheme to deregulate the apartment, the rent shall be established at the lowest rent registered for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment (*see* RSC sec 2522.6(b)(2)(iii) and (b)(3)(iii)).
[5] There were seven additional one-year free-market lease extensions between 2010-2017 that set Montera's monthly rent at the following rates: $1,195, $1,250, $1,350, $1,425, $1,475, $1,525, and $1,595 (*see* NYSCEF doc. No. 214).

certification. KMR denied the material allegations in the complaint and asserted affirmative defenses and counterclaims. Before discovery was completed and a note of issue was filed, the parties proceeded to engage in motion practice. During the pendency of this case, in 2018, KMR finally re-registered Montera's apartment and issued Montera a rent-stabilized lease dated May 1, 2018, covering August 1, 2018 through July 31, 2020, at a monthly rent of $1,595 (*see* NYSCEF doc. nos. 141, 214). Shortly thereafter, KMR moved for partial summary judgment seeking dismissal of Montera's complaint (Motion Sequence no. 2 "MS2") and Montera moved for class certification (Motion Sequence no. 3 "MS3"). KMR's motion was denied and Montera's motion was granted in this court's prior decision and order, dated June 11, 2019 (*see* NYSCEF Doc. No. 78). KMR appealed that decision (*see* NYSCEF doc. no 83).

Montera then filed a second amended complaint dated June 24, 2020 (*see* NYSCEF doc. no. 130). Consistent with the claims asserted in the initial complaint, the new complaint asserted claims for, *inter alia*, rent overcharge. Specifically, Montera alleges that the subject building was enrolled in the J-51 real estate tax abatement program "until approximately June of 2013," and notes that the program required landlords to register the apartments of enrolled buildings as rent stabilized units, and to provide the tenants of such units with rent stabilized leases and J-51 Riders. Montera further alleges that he was entitled to receive a rent-stabilized lease, and any rent increases that were taken in excess of those allowed by the rent stabilization law were and are improper. As such, Montera alleges he is entitled to a rent stabilized lease in the correct amount as well as damages (*see* NYSCEF doc. no. 134 ¶¶ 1-11)[6]. KMR denies the material

[6] Montera alleged in his initial complaint as well as his second amended complaint that he was entitled to reformation of his lease to provide for the correct legal regulated rent, and to reflect accurately his rent stabilized status (*see* NYSCEF doc. nos. 2 ¶26, 134 ¶ 26). The court notes that since the instant case was filed, KMR has recognized Montera as a rent stabilized tenant (*see* NYSCEF doc. no. 74, transcript oral argument dated 11/27/2018 pg 11 lines 24-26, pg 12 lines 2-3), and in 2018, as noted above, KMR issued Montera a rent stabilized lease and

allegations in the second amended complaint and again asserts several affirmative defenses and counterclaims (*see* NYSCEF doc. no. 131).

Montera now moves for summary judgment and for dismissal of KMR's affirmative defenses and counterclaims, arguing that KMR's failure to register Montera's apartment and the apartments of the members of the Class as required by the Rent Stabilization Law (RSL) and Rent Stabilization Code (RSC) constitutes fraud, requiring imposition of the default formula pursuant to 9 NYCRR 2522.6[b][2] to calculate his proper rent. Montera argues that KMR's numerous affirmative defenses and counterclaims are meritless and therefore should be dismissed. Specifically, Montera argues that KMR's improper deregulation of Montera's apartment while receiving J-51 benefits, coupled with KMR's failure to promptly re-register Montera's apartment, conclusively establishes fraud (*see* NYSCEF doc. no. 142, pg 41, Memo of Law). Montera further argues that KMR's indicia of fraud also establishes the fraudulent scheme itself, as KMR provided multiple free-market leases to every class member, over a multi-year period, and failed to re-register, after *Gersten*. KMR's conduct, Montera asserts, established fraud (*see* NYSCEF doc. no. 142, pg 42).

KMR opposes Montera's motion in its entirety and cross-moves for summary judgment seeking dismissal of Montera's claim for fraud and a determination that the default formula under 9 NYCRR 2522.6[b][2] does not apply in this action. KMR argues that Montera's proof is lacking in that Montera does not show that KMR established a pattern, practice, or policy of overcharging the class members in rent, nor does Montera show how KMR misrepresented legal rents to the class. KMR argues that Montera demonstrates neither what his or any class

---

registered with DHCR. However, Montera still disputes the amount of rent being charged and maintains the fraud and overcharge allegations.

members' legal rent should have been nor how he or any of the class members were overcharged (*see* NYSCEF doc. no. 189, pg 14, Memo of Law in Opp.). KMR further asserts that Montera does not have a claim for rent overcharge as he was never charged more than the last legal registered rent for the entirety of his tenancy (*see* NYSCEF doc. no. 188, Yaghoubzadeh Aff, ¶¶ 78-81, 101-112).

KMR further argues that Montera moves for summary judgment without the necessary support of an affidavit of an individual with personal knowledge, as Montera has failed to "submit an affidavit from the lead plaintiff or any of the class members, nor does he submit deposition testimony or written admissions from the [d]efendant" (*see* NYSCEF doc no. 189, pg 14, Memo of Law in Opp.). KMR further cites the lack of such an affidavit a deficiency in Montera's motion. While KMR cites to CPLR 3212(b) in support of its argument, it fails to cite any case law in support of its position (*Id.*).

Montera opposes KMR's cross-motion for summary judgment in its entirety. Montera argues KMR's motion should be denied as it is KMR's second motion for such relief, and KMR fails to proffer any new evidence or good cause in support of its motion (*see* NYSCEF doc. no. 230, pg 7, Plaintiff's Memo of Law in Reply). Montera further argues that KMR engaged in a fraudulent scheme by deregulating its apartments after the Court of Appeals decision in *Roberts*, and not re-registering them after the decision in *Gersten*, and therefore the default formula applies. Montera further asserts that KMR's reliance on the argument that KMR did not engage in a fraudulent scheme to evade the rent regulations, because for the majority of the class, the last registered rent was higher than the rent collected on the base date, is without merit. Montera asserts that KMR's position has no legal basis or support (*see* NYSCEF doc. no. 230, pg 27). Montera argues KMR's position is tantamount to asking the court "to hold that a landlord is free

to deceive its tenants about their rent-stabilized status, so long as it does not charge them more than the last rent listed in the DHCR history" (*Id.* at 29).

While KMR indicates that it previously moved for partial summary judgment to dismiss Montera's complaint (MS2), the court denied its motion and the appeal was pending when KMR filed this instant cross-motion. KMR asserts the previous summary judgment motion was "basically a motion to dismiss and this motion is substantive" (*see* NYSCEF doc. no. 188, Yaghoubzadeh Aff, fn 1). As such, KMR requests the court consider its second summary judgment motion (Cross-mtn. seq. no. 7). However, KMR fails to offer an argument or any case law in support of its position.[7]

DISCUSSION

Summary Judgment

On a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). The movant must show its prima facie entitlement to judgment as a matter of law by producing sufficient admissible evidence demonstrating the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of any opposition (*see Vega*, 18 NY3d at 503). The opposing party overcomes the movant's showing only by introducing "evidentiary proof in admissible form sufficient to require a trial of material questions" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

[7] During the pendency of this motion, the First Department affirmed this court's prior decision and order, dated June 11, 2019, that denied KMR's pre-discovery motion for summary judgment (MS2) and granted Montera's motion for class certification (MS3) (*see* NYSCEF Doc. No. 78, *Montera v KMR Amsterdam LLC*, 193 AD3d 102 [1st Dept 2021]).

Generally, successive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification, such as an intervening appellate decision in the same case that clarifies or changes the controlling law (*see Amill v Lawrence Ruben Co., Inc.*, 117 AD3d 433, 433-34 [1st Dept 2014] [internal quotation marks and citations omitted]). However, a court may exercise its discretion in reviewing such a motion where it clearly enhances judicial efficiency (*see MTGLQ Invs., LP v Collado*, 183 AD3d 414, 414 [1st Dept 2020]). Therefore, the court may use its discretion to overcome KMR's submission of successive summary judgment motions, especially when applying such discretion not only serves judicial efficiency, but also furthers the court's strong interest in deciding cases on the merits (*see Henneberry v Borstein*, 91 AD3d 493, 497 [1st Dept 2012]).

To support his demand for summary judgment and the subsequent application of the default method in this overcharge claim, Montera has the burden to prove prima facie the elements of fraud in establishing KMR engaged in fraudulent scheme to deregulate its building. This showing requires evidence of a misrepresentation of material fact, falsity, scienter, reliance and injury, akin to the elements of common law fraud (*see Regina*, 35 NY3d at 356 n 7 [2020]). Therefore, mere speculation that fraud occurred will not suffice to invoke the default formula, as all elements of fraud must be established (*see Aras v B-U Realty Corp.*, 221 AD3d 5, 11-12 [1st Dept 2023]). Here, the First Department previously determined that KMR's post-*Roberts* deregulation coupled with KMR's late filing of amended registrations was enough to support an indicia of fraud to deregulate, such that discovery of the rental history outside the four-year lookback period was appropriate[8] (*see Montera v KMR Amsterdam LLC*, 193 AD3d 102, 103-104 [1st Dept 2021]). Therefore, in accordance with the prior holding of the First Department

[8] On that record, the facts were insufficient to establish fraud as a matter of law (*see Montera v KMR Amsterdam LLC*, 193 AD3d 102).

and the controlling law, the rental history on this record shall be examined beyond the four-year lookback period for the purpose of determining whether fraud occurred.

Montera maintains that KMR knowingly engaged in a multi-year scheme to deregulate the subject building after the decisions in *Roberts* and *Gersten*. It is undisputed that KMR made a misrepresentation of fact to Montera that the apartment was a free market rental at the time Montera leased it, and undisputedly, the representation was false. However, on this record, Montera did not provide any testimony, an affidavit, or a verified pleading[9] from an individual with personal knowledge regarding how Montera relied on KMR's misrepresentation of the apartment's regulatory status to his detriment or injury. As such, Montera's motion lacks the necessary support of a sworn statement of an individual with personal knowledge to speak to the remaining elements of reliance, injury, and scienter to establish fraud as a matter of law. As Montera has failed to meet his prima facie burden and establish that KMR engaged in a fraudulent scheme to deregulate its building, that part of Montera's motion that seeks summary judgment is hereby denied.

Again, as the movant on a summary judgment motion, even a cross-motion, KMR has the burden to establish prima facie that it is entitled to judgment as a matter of law. Here, it is undisputed that KMR failed to re-register its apartments as rent stabilized as required by law. It is also undisputed that KMR did not change its behavior until after it was sued (and this instant case was filed). While the First Department has held that a delay of re-registering "for years after *Roberts*" could support a finding of fraud (*see Hess v EDR Assets LLC*, 217 AD3d 542, 543 [1st Dept 2023]), KMR claims it was ignorant of the requirements concerning its obligations to

[9] A verified pleading is the equivalent of a responsive affidavit for purposes of a motion for summary judgment (*see Travis v Allstate Ins. Co.*, 280 AD2d 394, 394-395 [1st Dept 2001] [internal quotations and citations omitted; *see also* CPLR 105[u]). Here, Montera's second amended complaint is not verified.

re-register their apartments. However, "[i]t is axiomatic that ignorance of the law is not a defense for the failure to comply with unambiguous legal obligations" (*Montera v KMR Amsterdam LLC*, 193 AD3d at 107).

Further, the court notes an unexplained anomaly in this record. KMR asserts that Montera's apartment was deregulated subject to KMR taking a 17% vacancy increase on the last legal regulated registered rent amount of $1,779.71, and that increased the legal rent of the apartment above the $2,000 threshold for luxury deregulation (*see* NYSCEF doc. no. 188 ¶¶ 101-106; *see also* NYSCEF doc. no. 140). While that series of events may have been accurate, the math does not appear to be. When 17% is applied to $1,779.71, it equals an increase of $302.55. When $302.55 is added to $1,779.71, it equals $2,082.26. However, on Montera's lease history, proffered in support of KMR's cross-motion, the form entitled "Notice to First Tenant of Apartment Deregulated After Vacancy Due to a Rent of $2,000 or More," lists the regulated rent for Montera's apartment prior to vacancy as $1,853.70. The same form lists the vacancy increase as $315.13 (which is 17% of $1,853.70) and lists the total rent after vacancy as $2,168.83 ($1,853.70 + $315.13). The form entitled, "Certified Notice to First Tenant of Apartment Deregulated After Vacancy Due to a Rent of $2000 or More," also states the last regulated rent prior to vacancy is $1,853.70 (see NYSCEF doc. no. 214, pgs 74-75). These submissions are not only inconsistent with KMR's own assertions and admissions, but this anomaly amounts to an unexplained excessive rent increase. As such, this also raises an issue of fact as to scienter. Therefore, KMR has failed to establish its prima facie burden and its cross-motion must be denied.

In this instance, only when the issue of fraud has been determined can there be a further determination as to Montera's overcharge claim. Whether KMR engaged in a fraudulent scheme

to deregulate its subject building will determine if the default method applies. If KMR did not engage in a fraudulent scheme to deregulate its subject building, then a determination must be made regarding whether a rent overcharge occurred, and if so, what rent calculation should apply. Here, as robust as the record is, both Montera's motion and KMR's cross-motion regarding the issues of fraud and the application of the default method are hereby denied as there remain issues of fact to be determined at trial regarding whether the necessary elements of scienter, reliance and injury can be established to prove whether fraud occurred and KMR engaged in a fraudulent scheme to deregulate its subject building.

KMR's Affirmative Defenses and Counterclaims

On that portion of Montera's motion that seeks dismissal of KMR's affirmative defenses and counterclaims, pursuant to CPLR 3212, the court notes that only KMR's affirmative defenses numbers one, thirteen, fourteen, and counterclaims numbers two through five will be considered, as all other affirmative defenses and the first counterclaim have either been previously decided, dismissed without prejudice or voluntarily withdrawn (*see* NYSCEF doc. nos. 333, 346, 351).

Montera argues that KMR's remaining affirmative defenses and counterclaims should be dismissed as they are without merit. KMR opposes this portion of Montera's motion in its entirety and argues that it is procedurally defective, in that it lacks an affidavit of an individual with personal knowledge. While Montera has failed to satisfy the requirements of CPLR 3212(b) by omitting an affidavit of an individual with personal knowledge, this omission does not prove fatal to the motion as KMR's remaining affirmative defenses and counterclaims are questions of law and shall be analyzed accordingly.

KMR's thirteenth affirmative defense states, "[a]ny and all actions by defendant were taken in good faith." KMR's fourteenth affirmative defense states, "[d]efendant is not liable because it was entitled to, and did, reasonably and in good faith rely on the then-existing statutory, administrative and regulatory law…in determining whether apartments could be deregulated" (*see* NYSCEF doc. no. 131 ¶¶ 20-21). In support, KMR argues that "it is unfair to penalize a party because it had relied upon a previous statement of law simply because the law has changed" (see NYSCEF doc. no. 189, pg 38). However, after the decisions in *Roberts* and *Gersten*, KMR was effectively put on notice that luxury deregulation while in receipt of J-51 benefits was no longer permitted, and any apartment that was previously deregulated should have been re-registered with DHCR, and those tenants subject to regulation were to be provided rent stabilized leases. As such, KMR's thirteenth and fourteenth affirmative defenses are insufficient as a matter of law and are hereby dismissed.

KMR's second counterclaim seeks an offset in the amount of unpaid rent, if any, in an amount to be determined by the court, in the event a claim for damages is established by plaintiffs (*see* NYSCEF doc. no. 191 ¶ 52). KMR's third counterclaim seeks a money judgment and/or a judgment of possession against any tenant class member who may owe rent in excess of an award of damages that may be awarded to plaintiffs (*Id.* at ¶ 54). Here, KMR merely asserts it is entitled to this relief. However, KMR fails to plead with the necessary particularity required to sustain either counterclaim. KMR's allegations are conclusory at best and fail to assert that any rent amounts are due and owing for any tenant member of the class or that any tenant has breached their lease or an obligation to pay rent thereunder. When seeking an offset, the facts in support of such a counterclaim must be pled (*see Kivort Steel, Inc. v Liberty Leather Corp.*, 110 AD2d 950, 952 [3d Dept 1985]). Furthermore, as KMR is seeking an offset for alleged rental

arrears as a reduction of any damages for alleged rental overcharges that may be awarded to Montera, it does not state a cause of action against Montera for monetary damages. Instead, it sets forth an affirmative defense, and is therefore improperly pled as a matter of law. As such, KMR's second and third counterclaims are hereby dismissed.

KMR's fourth counterclaim seeks a declaratory judgment that it was not required to maintain or produce records relating to the plaintiff's rental for more than four years prior to the most recent registration or annual statement for such accommodation (*see* NYSCEF doc. no. 191 ¶ 63). KMR's fifth counterclaim seeks a declaratory judgment that a four-year statute of limitations applies to the plaintiff and the Members' rent overcharge claims in this action (*Id.* at ¶ 74). The Court of Appeals previously held that the portion of the HSTPA which contained the newly amended version of RSL sec 26-516 would not be accorded retroactive effect (*see Matter of Regina Metro. Co., LLC v NY State Div. of Hous. & Community Renewal*, 35 NY3d 332). Therefore, the relief KMR seeks here is moot. Furthermore, in the event a finding of fraud is determined and an examination of KMR's records is deemed necessary beyond the four-year lookback period, that is an operation of law (*see Id.*). As this court cannot grant KMR relief that it is not empowered to give, KMR's fourth and fifth counterclaims that seek declaratory judgment are hereby dismissed.

Finally, KMR's first affirmative defense asserts that the complaint fails to state a cause of action (*see* NYSCEF doc. no. 131 ¶ 8). KMR asserts that Montera failed to state a claim for fraud and states, "since the court's decision on this issue is currently on appeal…, we have asserted this affirmative defense just in case the… court's decision [is reversed on MS2]" (*see* NYSCEF doc. no. 189, pg 36). Here, the First Department affirmed this court's prior decision on MS2, finding an indicia of fraud. While a failure to state a cause of action may be considered

harmless surplusage when pled as an affirmative defense, as it may be asserted at any time, even if not pleaded (*see* CPLR 3211[e]; *San-Dar Assoc. v Fried*, 151 AD3d 545, 546 [1st Dept 2017]), such an affirmative defense may be ripe for dismissal, when as here, KMR's other affirmative defenses have all been found to be legally insufficient (*see Tribbs v 326-338 E 100th LLC*, 215 AD3d 480, 482 [1st Dept 2023]). Therefore, KMR's first affirmative defense for failure to state a cause of action is also dismissed.

Joinder of Issue

For the first time during oral argument KMR argues that issue was not joined prior to Montera filing his motion for summary judgment because Montera never replied to KMR's second amended answer with counterclaims[10] (*see* NYSCEF doc. no. 351, pgs 18-20, Transcript Oral Argument 11/23/21). As KMR failed to brief this issue in its submitted opposition to Montera's motion (*see* NYSCEF doc. nos. 188, 189), Montera was not provided adequate opportunity to prepare and submit a response to this new issue presented. To the extent that KMR first articulated this issue at oral argument, it is not properly before the court (*see Rinzler v Rinzler*, 97 AD3d 215, 219 n 2 [3d Dept 2012]). Therefore, it will not be considered.

Legal Fees

As that portion of Montera's motion that seeks summary judgment on the second amended complaint is denied, the issue of legal fees is reserved for trial, to be determined with the resolution of the rent overcharge claim.

[10] NYSCEF doc. no. 131

Sanctions

Montera asks this court to sanction KMR pursuant to 22 NYCRR 130-1.1. Montera argues that KMR engaged in frivolous conduct when it proffered numerous meritless affirmative defenses and counterclaims within its pleadings, allegedly for the purposes of slowing down this litigation or deterring its prosecution. As the majority of KMR's affirmative defenses and counterclaims were previously decided, dismissed or voluntarily withdrawn, Montera has failed to show that KMR's conduct and pleadings were "so egregious as to constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1" (*Nugent v City of New York*, 189 AD3d 631, 632 [1st Dept 2020] [internal citations and quotation marks omitted]). As such, Montera's request is denied.

CONCLUSION

Accordingly, it is

ORDERED, that plaintiff's motion for summary judgment pursuant to CPLR 3212 is granted in part as defendant's affirmative defenses and counterclaims are dismissed, and the motion is otherwise denied, and it is further;

ORDERED, that defendant's cross-motion for summary judgment pursuant to CPLR 3212 is denied in its entirety.

This constitutes the decision and order of the court.

5/29/2024
DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE:		CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
		GRANTED		DENIED	[X]	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE