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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK Justice

PART 2

Silverski

- v -

Winters

INDEX NO. 600367/03

MOTION DATE

MOTION SEQ. NO. 008

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED

OCT 22 2004

COUNTY CLERK'S OFFICE NEW YORK

motion is decided in accordance with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/14/04

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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Alan and Anita Sibersky,

Plaintiffs,

Index No. 600367/03

-against-

Philip Winters,

Defendant.

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York, J:

In this motion - the eighth in this case, which is slightly over one year old[1] – plaintiffs seek to (1) vacate and modify - or, more accurately, to reargue - the court's order dated March 17, 2004; (2) allow plaintiffs leave to serve and file an amended complaint to include claims regarding subsequent actions by defendant; and, (3) compel defendant to pay use and occupancy into escrow pending the resolution of the action. The earlier motion also sought to extend a May 9, 2003 temporary restraining order and to obtain a court order stating that plaintiffs can remove defendant's name from the electrical account for apartment 4A. Defendant opposes all requests on numerous grounds.

I. Reargument

As to the first issue, the court grants reargument. The court denied the first motion without consideration because plaintiffs annexed their proposed amended complaint but not the original complaint. Now, plaintiffs rectify the problem. Accordingly, there is no bar to reconsideration.

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[1] The records for this case indicate that a ninth motion is pending in the submissions part.

II. Temporary Restraining Order

Next, the court turns to those aspects of the original motion not covered by the new motion. Plaintiffs attempt to "extend" a temporary retraining order which the court issued in May of 2003. It appears that plaintiffs actually seek to revive the temporary restraining order – which was in effect pending the hearing of an earlier motion. At any rate, that restraining order enjoined defendant "from any intimidation, interference, nuisance and harassment regarding Plaintiffs and their business vis-a-vis Tenants and NYS Licensed Professionals. . . ." Plaintiffs appear to base this current request on the alleged continued harassment against them and various of their tenants by defendant. They support these allegations by their own affidavits and by other documents including a letter written by a tenant in their building stating that defendant annoys her and her friends in the building and that she would like it to stop.

Defendant opposes the TRO on the ground that plaintiffs seek an equitable remedy here, and yet they lack the requisite "clean hands" entitling them to apply for this type of relief. This argument results in a series of accusations between defendant and plaintiffs; defendant accuses plaintiffs of building violations, and plaintiffs respond by accusing defendant of even more misconduct, including fraud and identity theft. In their reply, plaintiffs also annex some documents relating to the building, presumably refuting defendant's contentions.

The court notes that many of these issues are not pertinent to the case at hand. Plaintiffs do not need to reiterate their lawsuit and all of their contentions about defendant each time they request relief and/or submit papers to the court. Instead, they must focus on the issues relevant to the current application and/or motion. As for

defendant's argument, it has no merit because the unclean hands doctrine only applies "when the conduct relied on is directly related to the subject matter . . . ." Fade v. Pugliani/Fade, 8 A.D.3d 612, -, 779 N.Y.S.2d 568, 570 (2nd Dept. 2004); see Kopsidas v. Krokos, 294 A.D.2d 406, 407, 742 N.Y.S.2d 342, 344 (2nd Dept. 2002). Even then, the doctrine of unclean hands is used only when the conduct complained of is "immoral" and "unconscionable." Eric Vaughn Flam, P.C.v. FTF Crawlspace Specialists Inc., Index No. 116473/01 (Sup. Ct. N.Y. County Oct. 10, 2002)(avail at 2002 WL 31955398, *9).

The litigation contains allegations relating to the parties' rental dispute; and, thus, the doctrine of "unclean hands" might apply to any attempt by plaintiffs to evict defendant from the building. See Fazio v. Kelly, Index No. 35214/03(Civ.Ct. Richmond County Sept. 10, 2003)(avail. at 2003 WL 22227363, at *8). However, the registration – or lack thereof – of the building does not relate to the prong of the litigation alleging that defendant has harassed plaintiffs and adversely affected their business. Moreover, in his Answer, defendant denies that he is guilty of the alleged misconduct. Therefore, an injunction that prevents defendant from harassing plaintiffs would not limit his activities.

To some extent, the court finds that plaintiffs appear to seek an injunction which is overly broad. The language, as set forth by plaintiffs, arguably would preclude defendant from reporting building code violations and/or conversing with workers on the premises regarding work that affects his apartment. Plaintiffs has made no showing that justifies such a broad restraint. Moreover, plaintiffs seek to enjoin defendant from interfering with their business, but it is not clear what this entails. The court shall not prolong a restraint so vague in its wording that the parties are likely to disagree as to whether a violation has occurred. Instead, the court shall grant the relief to the extent of

issuing an order which, in a limited fashion, restrains defendant from harassing or threatening plaintiffs.

Finally on this issue, plaintiffs misunderstand the purpose of the temporary restraining order in the context of a civil litigation. "[T]he rule under New York state law is that a temporary restraining order expires with the hearing on the application for a preliminary injunction, which is to be conducted at the earliest possible time after entry of the TRO.." Carrabus v. Schneider, 11 F. Supp. 204, 209 (E.D.N.Y. 2000)(citation and internal quotation marks omitted). Because the TRO is, by its very nature, a "temporary" order which can remain in effect pending the speedy resolution of the preliminary injunction in a hearing, the court shall send the matter to a quick hearing on the preliminary injunction. "To hold otherwise would in effect transform a temporary restraining order into a permanent injunction." Sommerset Group, Inc. v. Town of Lewiston, 115 Misc.2d 398, 400, 454 N.Y.S.2d 220, 222 (Sup. Ct. Niagara County 1982). Therefore, it is especially appropriate for the court to limit both the scope and duration of this restraint on defendant. Moreover, the court exercises its discretion under CPLR 6313 and requires plaintiffs to post an undertaking of $____ pending the resolution of the matter at the hearing. When coupled with the existence of the TRO and the requirement that defendant pay use and occupancy, this should encourage both parties to try to resolve this lawsuit in a more timely fashion.

III. Leave to Amend Complaint

Plaintiffs seek to amend the complaint to allege continued wrongdoing against defendant. "Leave to amend a complaint is to be freely granted absent prejudice or surprise to the defendants, or unless the proposed amendment is patently devoid of

merit." Pirrotti & Pirrotti, LLP v. Estate of Warm, 8 A.D.3d 545, 545, 778 N.Y.S.2d 705, 705 (2nd Dept. 2004). Moreover, the motions "are addressed to the discretion of the trial court, whose decision remains undisturbed absent clear abuse." Rothberg v. Reichelt, 5 A.D.3d 848, -, 772 N.Y.S.2d 637, 638 (3rd Dept. 2004). Here, plaintiffs support their statements with their own affidavit and the letter of one of their tenants, also alleging harassment. Moreover, the motion to supplement the complaint is to include subsequently occurring factual allegations; and, in these circumstances, amendment is generally allowed. See Bastian v. State, 8 A.D.3d 764, -, 779 N.Y.S.2d 589, 590 (3rd Dept. 2004).

For the most part, the issues defendant raises in opposition are factual ones - that is, defendant's objections to the allegation raise questions of fact. The existence of factual disputes does not preclude amendment. Instead, for the court to deny amendment, the allegations must be patently bereft of any legal merit. See Sample v. Levada, 8 A.D.3d 3, -, 779 N.Y.S.2d 96, 99 (2nd Dept. 2004). To some extent, defendant is correct: Plaintiffs cannot assert a cause of action against defendant, their tenant, based solely on the allegation that defendant lied by stating that he taught at Columbia and had a law degree. However, to the extent that some of the contentions are not relevant to the causes of action, they do not and will not have any legal bearing in the action. Moreover, amendment is appropriate because defendant has not asserted that prejudice will ensue as a result. See Turner v. Caesar, 2 A.D.3d 1086, 1087, 768 N.Y.S.2d 679, 680 (3rd Dept. 2003).

The court notes that plaintiffs have made numerous motions to amend their complaint, and this appears to be the third amended complaint. Although, in light of

plaintiffs' pro se status and the liberal policy in favor of amendment, the court allows this latest amendment, it notes that plaintiffs cannot perpetually refine their complaint and/or add new claims against defendant. Therefore, absent extreme circumstances the court will not grant further applications to amend the complaint. See Schwartzman v. Weintraub, 56 A.D.2d 517, 517, 391 N.Y.S.2d 416, 418 (1st Dept. 1977).

IV. Use and Occupancy

Last, plaintiffs seek the payment of use and occupancy into escrow pending the resolution of this action. Defendant opposes the application based on Section 302(b)(1) of the Multiple Dwelling Law, which provides that a building owner can neither recover rent nor commence an action or special proceeding for nonpayment unless it has complied with Multiple Dwelling Law Section 301. Section 301 requires, inter alia, that the owner register the building with the DHCR. Plaintiffs apparently argue that the building need not be registered because there are not enough rental units to bring the building within the purview of the rent stabilization law. Defendant challenges this contention.

Defendant is correct that, if the building must be registered, plaintiffs cannot proceed by way of special proceeding for back rent. At the same time, however, a "rent withholding sanction [is] not available to a tenant who [is] merely using the violation to unjustly enrich himself." Chan v. Kormendi, 118 Misc.2d 1026, 1030, 462 N.Y.S.2d 943, 946 (Civ. Ct. Queens County 1983); Stanley Associates v. Marrero, 87 Misc.2d 1011, 1013-14, 386 N.Y.S.2d 953, 955 (Civ. Ct. Queens County 1976). Accordingly, the Court of Appeals recently held that tenants who claimed a breach of warranty of habitability under Real Property Law § 235-b (1) and sought a rent abatement under

Multiple Dwelling Law § 302-a still had to deposit with the court the amount of rent sought to be recovered. Notre Dame Leasing, LLC v. Rosario, 2 N.Y.3d 459, 467, 779 N.Y.S.2d 801, 804-05 (2004). Although the papers are unclear, it appears that defendant has not paid rent to plaintiffs in quite some time; and, possibly, he has not ever paid them rent. The court cannot permit defendant to "unjustly enrich himself" through this allegation. See Chan, 118 Misc.2d at 1030, 462 N.Y.S.2d at 946.

This is especially true in the case at hand, where there is a dispute over whether there is an improper failure to register. Based on the parties conflicting points of view and conflicting statements, the court cannot find that, as a matter of law, plaintiffs' failure to register the building is violative of Multiple Dwelling Law § 302-a. Moreover, although defendant filed violation charges against plaintiffs, plaintiffs have shown that they were found not to be in violation. Thus, the court orders defendant to pay use and occupancy of $1600 per month - the amount of rent set forth in the lease signed by the parties - into an escrow account. However, to protect defendant's rights under the Multiple Dwelling Law, the court directs plaintiffs to provide the court with proof of substantial conformity to Code standards within 90 days of this order. Moreover, at the hearing which the court shall schedule in this order, the referee will determine whether it appears that the building is subject to the registration requirement. If the referee determines that plaintiffs must register the building, then use and occupancy will be continued for 60 days, but will be discontinued at that time unless plaintiffs file the required notice with the DHCR. See Yuko Nii v. Quinn, 195 Misc.2d 821, 822, 759 N.Y.S.2d 841, 842 (Sup. Ct. App. T. N.Y. County 2003).

Finally, the court points out two issues. First, early in his opposition papers,

defendant sets forth his belief that plaintiff Anita Sibersky has no standing to bring the claims at hand on her own behalf. However, as defendant has made no motion with respect to this issue, the court does not consider his arguments at this time. Second, as stated above, this is the eighth motion in this lawsuit; and, plaintiffs apparently have already filed a ninth motion. Eight or nine of the motions have been filed by plaintiffs. Plaintiffs are admonished to be more parsimonious in their litigation tactics, so as not to waste their own resources or those of the court and of defendant.

Accordingly, it is

ORDERED that the portion of the motion seeking to vacate and/or reargue is granted; and it is further

ORDERED that the request to extend the injunction until the final resolution of this litigation is granted, but only to the extent that it seeks to enjoin defendant from interfering with plaintiffs' business, and not to the extent that it seeks to enjoin him from reporting alleged code violations and/or conversing with workers on the premises; and it is further

ORDERED that plaintiffs are required to post an undertaking of $_____ pending the resolution of this litigation, and if they fail to do so within 45 days of the date of this order, the injunction shall expire ; and it is further

ORDERED that leave to amend the complaint is granted, and plaintiffs shall serve an amended copy of the complaint within 45 days of the date of entry of this order; and it is further

ORDERED that defendant has 30 days from the date of service to answer the amended complaint; and it is further

ORDERED that defendant shall deposit for use and occupancy the sum of $1600 per month on the first of the month starting with November 1, 2004 with the Cashier in the County Clerk's Office and shall furnish plaintiff with a copy of his receipt by the 10th of the month.

ENTER:

Dated: October 14 , 2004

Hon. Louis B. York, J.S.C.

LOUIS B. YORK