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

PRESENT: KAREN S. SMITH PART 62

Justice

ARLIN LLC,

Plaintiff,

- v -

GREGORY ARNOLD and CHRISTOPHER ARNOLD,

Defendant.

INDEX NO. 100819/06

MOTION DATE 9/11/06

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion and cross-motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Notice of Cross-Motion — Affidavits — Exhibits ...	2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ORDERED that the motion is decided in accordance with the attached memorandum decision and order.

Dated: March 22, 2007

KSS

Hon. Karen S. Smith, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44

----------X

ARLIN LLC,

Plaintiff,

-against-

GREGORY ARNOLD AND CHRISTOPHER ARNOLD,

Defendants.

----------X

Index No. 100819/06

Motion Date: 9/11/06

Motion Seq. No.: 001

DECISION AND ORDER

Karen S. Smith, J.:

Plaintiff's motion for summary judgment is denied, and defendants' cross-motion is granted in part, as discussed more fully below.

In this eviction action, plaintiff Arlin LLC seeks to regain possession of an apartment subject to the Rent Stabilization Code (RSC), which is currently occupied by defendant Christopher Arnold ("Christopher"). Defendant Gregory Arnold ("Gregory") is the tenant of record. Plaintiff also seeks monetary damages for fraud, arising, allegedly, from the defendants' attempt to hide the fact that Gregory is no longer the primary tenant of the apartment.

Plaintiff brings this summary judgment motion seeking an order (1) ejecting defendants from the apartment; (2) dismissing defendants' counterclaims seeking a renewal lease; and (3) an order setting the matter down for an inquest regarding plaintiff's fraud claims, and other monetary damages. Defendants cross-move for (1) summary judgment dismissing the complaint; (2) ordering plaintiff to offer defendant Gregory Arnold a rent-stabilized renewal lease; and (3) awarding defendants attorney's fees.

In support of its motion, plaintiff submits: 1) a decision and order issued by Hon. Gerald Lebovitz in the matter *Arlin LCC v Arnold*, Index No. 73801/04, dated September 23, 2005; 2) a copy of the transcript of the proceeding in Landlord/Tenant court before Judge Lebovits, dated October 1, 2004; 3) its summons and complaint; and 4) defendants' answer and counterclaims. In opposition to plaintiff's motion and in support of their cross-motion, defendants submit: 1) plaintiff's verified complaint; 2) defendants' answer and counterclaims; 3) the lease agreement for the subject apartment, dated March 1, 1992; and 4) a renewal lease form for the subject apartment, dated August 1, 1998 and terminating on July 31, 2000.

I. Background

The apartment in question, number 5F ("the apartment"), is located at 19 East 37th Street, New York, New York, and is rent-stabilized. The building was purchased by plaintiff in 2003. Gregory's tenancy commenced in the 1980s. It is undisputed that Gregory moved out of the building in February 1998, to go live in a cooperative owned by Gregory and his wife. It is also undisputed that, sometime prior to February 1998, Christopher, who is Gregory's brother, moved into the apartment.

In 2005, plaintiff commenced an illegal sublet proceeding against defendants in the New York County Civil Court, entitled *Arlin LCC v Arnold*, Index No. 73801/04 (the "Civil Court action"), which was heard by Judge Gerald Lebovits. Judge Lebovits discussed the history of the apartment vis-a-vis the defendants and the issue of Christopher's right to succession at some length. While defendants insisted that Christopher had occupied the apartment on a long-term basis prior to Gregory's leaving, Judge Lebovits, after a long discussion of the evidence, heartily disbelieved the defendants' testimony, and found that Christopher had not been a regular tenant

prior to the time Gregory left, but had only occupied the apartment sporadically. Thus, he found that Christopher could not succeed to the apartment, because, pursuant to the RSC, he did not live in the apartment as his primary residence for two years prior to Gregory's leaving. (9 NYCRR § 2204.6 (d) (1)).[1] Judge Lebovits's discussion of the law was both lengthy and detailed.

In his conclusion, Judge Lebovits stated that

> Christopher Arnold did not live in the apartment contemporaneously with Gregory Arnold for two years. He may not succeed Gregory Arnold to the subject apartment. Petitioner demonstrated that Gregory Arnold, the tenant of record, no longer occupies the subject apartment as his primary residence and that Christopher Arnold currently occupies the subject apartment. But petitioner brought an illegal-sublet proceeding, **not a non primary-residence proceeding**. An illegal-sublet proceeding may not be maintained if the illegal sublessee has a long-standing connection to the apartment, is the primary tenant's immediate family member, and is the primary tenant's licensee.[2] (Emphasis added).

As a result, Judge Lebovits dismissed the petition, and denied the instant plaintiff the right to terminate Christopher's occupancy. This action followed.

II. Arguments

Plaintiff's motion for summary judgment ejecting Christopher from the apartment is based directly on the findings of fact in the Civil Court action. It argues that defendants are collaterally estopped from claiming that Christopher occupied the apartment as his primary

---

[1]9 NYCRR 2204.6 (d) (1) states, in pertinent part that, "any member of the tenant's family ... shall not be evicted under this section where the tenant has permanently vacated the housing accommodation and such family member has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years ... ."

[2]Plaintiff incorrectly states in its moving papers that, by this decision, Christopher is a licensee of plaintiff. In fact, Christopher is a licensee of Gregory, the primary tenant, and as such, any attempt by plaintiff to "revoke" Christopher's license is ineffectual as a license may only be revoked by a licensor, here Gregory.

residence for two years prior to the date Gregory moved out, because Judge Lebovits included that finding in his decision. It also argues that, based on the decision, Christopher is a mere licensee, and that plaintiff has revoked his license to live in the apartment.

Defendants, on the other hand, argue that collateral estoppel does not apply, because the findings of fact made in the Civil Court action were mere dicta in a decision that decided the issue on grounds not pertinent to a discussion of primary residence. Further, they maintain that, by law, plaintiff has failed to follow the steps necessary to evoke the RSC to evict Gregory from the apartment, by failing to give notice of non-renewal within the proscribed period of time. Lastly, they claim that plaintiff's complaint is based entirely on a theory of fraud, which cannot be proven.

III. Discussion

A. Summary Judgment

"On this motion for summary judgment, [the movant] had the burden of making a *prima facie* showing of its entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *(Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 [1st Dept 2006]; *see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant has made such a showing, the burden then shifts to the non-movant to "come forward with evidence establishing a material issue of fact requiring a trial." (*Hanlan v Parkchester North Condominium*, 822 NYS2d 46 [1st Dept 2006]; *see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

B. Eviction

Plaintiff argues that collateral estoppel wholly blocks defendants from seeking a renewal

lease. "Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity." (*Buechel v Bain*, 97 NY2d 295, 303 [2001]; *see Ryan v New York Telephone Company*, 62 NY2d 494, 500 [1984]; *Hughes v Farey*, 30 AD3d 244, 247 [1st Dept 2006]). The issue to be decided must be identical to that in the prior proceeding, and there must have been a "full and fair opportunity" to litigate the issue. (*Buechel v Bain*, 97 NY2d 295, *supra; see also Stumpf AG v Dynegy, Inc.*, 32 AD3d 232, 233 [1st Dept 2006]). The issue "must have been material to the first action or proceeding and essential to the decision rendered therein." (*Ryan v New York Telephone Company*, 62 NY2d at 500).

The issue to which plaintiff refers is that of primary residence. Pursuant to the RSC, an owner is not required to offer a renewal lease to a tenant where

> The housing accommodation is not occupied by the tenant, not including subtenants or occupants, as his or her primary residence, **as determined by a court of competent jurisdiction**; provided, however, that no action or proceeding shall be commenced . . . unless the owner or lessor shall have given 30 days' notice to the tenant of his or her intention to commence such action or proceeding on such grounds. (9 NYCRR § 2524.4(c)). (Emphasis added).

An owner may, under this section, commence an action to recover possession of the property under these circumstances, but only after serving the tenant with notice pursuant to 9 NYCRR § 2524.2. That section details the procedural requirements for serving a tenant with termination notices:

> (a) Except for where the ground for removal or eviction of a tenant is nonpayment of rent, no tenant shall be removed or evicted from a housing accommodation by court process, and no action or proceeding shall be commenced for such purpose upon any of the grounds permitted in section 2524.3 or 2524.4 of this Part, **unless and until the owner shall have given written notice to such tenant as hereinafter provided.**

(b) Every notice to a tenant to vacate or surrender possession of a housing accommodation shall state the ground . . . upon which the owner relies for removal or eviction of the tenant, the facts necessary to establish the existence of such ground, and the date when the tenant is required to surrender possession.

. . .

(c) Every such notice shall be served upon the tenant:
(2) . . . in the case of a notice pursuant to subdivision (c) of section 2524.4 of this Part [primary residency], **at least 90 and not more than 150 days prior to the expiration of the lease term**. . . . (Emphasis added).

Plaintiffs contend that it is proper for this Court to issue an order of ejectment against defendants because Judge Lebovits determined that the subject apartment is not Gregory's primary residence. Defendants counter that this issue, while decided as a factual matter, was not essential to the final decision, in that it was merely dicta. With regard to collateral estoppel, it has been found that dicta "should not be accorded preclusive effect." (*Chiarini ex rel. Chiarini v County of Ulster*, 9 AD3d 769, 770 [3d Dept 2004] [internal quotations and citation omitted]; *Horne v New York State Department of Health*, 287 AD2d 940 [3d Dept 2001]).

In his concluding remarks, Judge Lebovits's decision makes clear that the kind of proceeding commenced by plaintiff was not one based on primary residence, but on the issue of illegal sublet. As such, the essential question in that proceeding was not whether Christopher used the premises as his "primary" residence, but whether he had "a long-standing connection to the apartment, is the primary tenant's immediate family member, and is the primary tenant's licensee." (Decision, at 11). The Judge need not have reached the issue of primary residence at all. In fact,

> [i]n analogous cases involving occupancies by family members with historical contacts to an apartment, it has been determined that the appropriate remedy is a

> nonprimary residence proceeding commenced upon the requisite statutory notice (*see*, Rent Stabilization Code 2524.2 [c] [3]), as opposed to a summary termination of the tenancy based upon a purported assignment or sublet between [family members].

(*235 West 71 Street LLC v Chechak*, 4 Misc 3d 114, 115 [App Term, 1st Dept 2004], *aff'd* 16 AD3d 242 [1st Dept 2005]).

Although Judge Lebovits devoted a substantial amount of his decision discussing whether Christopher used the apartment as his primary residence in the two years before Gregory left, the issue was not before him, as the proceeding was not one brought as a nonprimary residence proceeding "commenced upon the requisite statutory notice." (*Id.*). Therefore, any findings which Judge Lebovits made upon the issue were dicta, and do not estopp defendants from bringing their counter claim for a renewal lease.

A nonprimary residence proceeding cannot be brought unless and until a notice has been served upon the tenant pursuant to 9 NYCCR 2524.2 (c) (2). (*Golub v Frank*, 65 NY2d 900 [1985]; *PLWJ Realty, Inc. v Gonzalez*, 285 AD2d 370 [1st Dept 2001]). A failure to send this notice entitles the tenant to a renewal lease. (*Crow v 83rd Street Associates*, 68 NY2d 796 [1986]). Any proceeding professing to be one for nonprimary residence must be properly brought as such, or it will be dismissed. (*See 253 West 71 Street LLC v Chechak*, 16 AD3d 242 [1st Dept 2005]; *Hudson Associates v Benoit*, 226 AD2d 196 [1st Dept 1996]).

There is no dispute that plaintiff failed to serve a notice of non-renewal upon Gregory within the proscribed time, or at any time, before the termination of the 2000 lease. Indeed, plaintiff has yet to serve such a notice. Therefore, it cannot evict Gerald from the apartment, and has no right, as of this time, to commence a nonprimary resident proceeding against Gregory or

Christopher, much less an action for eviction. Plaintiff's failure to employ the correct procedures in the past does not allow it to avoid doing so in the present.[3] Consequently, plaintiff's motion must be denied, and defendants' granted.

Plaintiff has raised several other defenses to defendants' motion. First, it claims that defendants should be judicially estopped from now claiming that Gregory is the primary resident of the apartment, because it runs counter to his claims in the illegal sublet proceeding. "The doctrine of judicial estoppel holds that a party successfully taking a position in one proceeding may not thereafter assume an inconsistent position in a subsequent proceeding." (*Kalikow 78/79 Company v State of New York*, 174 AD2d 7, 11 [1st Dept 1992]; *see also UCP-Bayview Nursing Home v Novello*, 2 AD3d 643 [2d Dept 2003]).

Plaintiff is mistaken; Gregory did not prevail in the illegal sublet proceeding because he "admitted" he was not the primary resident; rather, he prevailed because the action was found to be an improper proceeding. Gregory's contention in this action is that he was entitled to statutorily mandated notice of non-renewal or an offer of renewal, which plaintiff failed to offer him. This was not the subject of the prior illegal sublet proceeding and, therefore, judicial estoppel does not apply.

The doctrine of equitable estoppel is also invoked in vain. Plaintiff's own failure to commence a proper proceeding and comply with the regulations of the RSC, and not defendants' conduct, makes this action inappropriate. For this reason, laches is also ineffectually raised.

---

[3]Plaintiff relies on 9 NYCRR 2520.11 (k) for the proposition that it is entitled to evict the defendants because the issue of their right to a renewal lease has been "determined by a court of competent jurisdiction." (*Id.*). However, as previously discussed, the matter was not determined in the Civil Court action.

Again, these defenses, along with the equitable defense of unclean hands, cannot be used to excuse plaintiff's failure to abide by the law as codified in the RSC. Plaintiff has simply failed to proceed in the fashion required by law.

C. Fraud

"To make a *prima facie* claim of fraud, the complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury." (*Dembeck v. 220 Central Park South, LLC*, ___AD3d___, 2006 WL 3007739 *1 [1st Dept 2006]). In order to state a cause of action based on fraudulent concealment, there must further be a fiduciary duty, or other duty to act on the part of the putative wrongdoer. (*Dembeck v. 220 Central Park South, id.*; *Shisgal v. Brown*, 21 Ad3d 845 [1st Dept 2005]).

Plaintiff argues that the defendants "misrepresented that Christopher lived in the subject apartment with Gregory for two years in order to deceive Arlin into giving Christopher a lease." Judge Lebovits found that both Christopher and Gregory engaged in "deception meant to secure for Christopher Arnold succession rights to a rent-stabilized apartment." (Decision, 4). The evidence is strong that the defendants were deceptive. But deception alone does not rise to the level of actionable fraud. That Christopher sent checks to plaintiff in his name is not a material misrepresentation as to Gregory or Christopher's relationship to the apartment. Moreover, the fact that plaintiff rejected the checks and never offered Christopher a lease demonstrates that plaintiff did not, in fact, rely on such misrepresentations. Absent proof of reliance, plaintiff has failed to produce evidence of fraud.

Nor has plaintiff pled a cause of action based on fraudulent concealment. Key to this

cause of action is a fiduciary relationship between the parties. There has never been a fiduciary duty between plaintiff and either defendant. Therefore, fraud cannot serve as a basis for plaintiff's causes of action, and plaintiff is not entitled to summary judgment based upon its fraud allegations.

III. Conclusion

Plaintiff's motion is denied, in that plaintiff has no basis for evicting Christopher from the premises until all procedural avenues have been exhausted, pursuant to *Golub v Frank* (65 NY2d 900, *supra*). Defendants have met their burden of demonstrating that Gregory, the tenant of record, is entitled to a renewal lease by law, extending in one or two year increments from the date of his last lease, to the present time, as if he had renewed his lease commencing July 31, 2000. Therefore, Gregory is entitled to a renewal lease commencing July 31, 2006, under the assumption that he would have renewed his lease in 2004 for two years. Under the RSC, should plaintiff send a notice of nonrenewal to Gregory within the proscribed time, pursuant to 9 NYCRR 2524.2 (c) (2), it may then proceed with a nonprimary residence proceeding against Gregory. As defendant Gregory Arnold is the prevailing party in this action, he is entitled to attorney's fees, under the terms of the lease. (Real Property Law § 234).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the part of defendants' motion seeking to dismiss plaintiff's complaint is granted, with costs and disbursement to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that plaintiff's complaint is dismissed; and it is further

ORDERED that the part of defendants' motion seeking summary judgment on their crossclaim is granted, and plaintiff is directed to offer defendant Gregory Arnold a renewal lease for apartment 5F, 19 East 37th Street, New York, New York, for the period commencing July 31, 2006; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the matter of defendants' attorney's fees is severed and referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the part of defendants' motion seeking legal fees is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference shall within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed

Information Sheet,[4] upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place the matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

This constitutes the decision and order of the Court.

Dated: March 22, 2007

ENTER:

Hon. Karen S. Smith, J.S.C.

[4]Copies are available in Rm 119 at 60 Centre Street, and on the Court's website.