

<b>Fleetwood v Haberman</b>
2007 NY Slip Op 30826(U)
April 12, 2007
Supreme Court, New York County
Docket Number: 0105186/2006
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. JOAN A. MADDEN**

PART 11

Index Number : 105186/2006 J.S.C.

FLEETWOOD, BLAKE

vs

HABERMAN, SIMON

Sequence Number : 002

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION-SEQ. NO. \_\_\_\_\_

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

*is determined in accordance with the annexed decision and order.*

**FILED**  
APR 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: April 12, 2007

*[Signature]*  
\_\_\_\_\_  
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: PART 11

-----X

BLAKE FLEETWOOD and JANE FLEETWOOD,

Plaintiffs,

INDEX NO. 405186/06

-against-

SIMON HABERMAN and 251 CPW HOUSING LLC,

Defendants.

-----X

JOAN A. MADDEN, J.:

**FILED**  
APR 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

In this action to recover excess rent awarded in a fair market rent appeal ("FMRA") before the New York State Division of Housing and Community Renewal ("DHCR"), defendants move for an order pursuant to CPLR 3211(a)(5) and (7) dismissing the complaint, or alternatively, for an order pursuant to CPLR 3212 granting them summary judgment. Defendants also seek an order canceling the lis pendens filed with the complaint. Plaintiffs oppose the motion and cross-move for an order pursuant to CPLR 3212 granting them summary judgment, or in the alternative, an order pursuant to CPLR 3126(3) granting various relief based on defendants' failure to comply with discovery demands.

The following facts are not disputed. By a lease dated March 31, 1992, plaintiffs became the tenants of a rent stabilized apartment located at 1 West 85<sup>th</sup> Street, Apartment 4B, in Manhattan. The lease listed the owner of the building as "251 CPW Housing Ltd. DBA Orwell Management," and provided for a term of one year and 15 days commencing on April 15, 1992,

and ending on April 30, 1993, at a monthly rent of \$3,000. Plaintiffs vacated the apartment on or about November 30, 1994. Meanwhile, plaintiffs filed a FMRA with DHCR, alleging that the initial rent stabilized rent exceeded the apartment's fair market rent.<sup>1</sup> The owner named in the FMRA is "251 CPW Housing Ltd, c/o Orwell Management," which is the owner listed on the lease. On July 29, 1997, DHCR issued an order establishing the fair market rent for plaintiffs' apartment at \$1,382.86, and adjusting the initial legal regulated rent from \$3,000 to \$1,382.86 effective April 15, 1992, the commencement date of the initial rent stabilized lease. The owner, 251 CPW Housing Ltd. c/o Orwell Management, thereafter filed a Petition for Administrative Review ("PAR"). On May 20, 1999, DHCR Deputy Commissioner Roldan issued an order granting the PAR in part by increasing the fair market rent to \$2,191.43. The Commissioner determined that the total amount of excess rent was \$25,801.14 and directed the owner to refund that amount to the tenants.

In or about July 1999, the owner commenced an Article 78 proceeding seeking to vacate DHCR's determination in the FMRA. The owner/petitioner in that proceeding was named as "Simon Haberman d/b/a 251 CPW Housing," which differed from the owner named in FMRA, the PAR, and the lease, i.e. 251 CPW Housing Ltd. c/o Orwell Management. The sworn and verified petition stated that Haberman "is a natural person, and all times relevant hereto has been *owner and landlord* of real property in New York County known as and located at One West 85<sup>th</sup> Street, New York, New York" (emphasis added). Haberman's personal verification of the petition states that "Simon Haberman, being duly sworn, deposes and says . . . Deponent is

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<sup>1</sup>The complaint alleges that the FMRA was filed "on or about 1996." DHCR's records, however, indicate that the FMRA was first brought in August 1992.

*Landlord* of the premises which are the subject of this proceeding” (emphasis added). The tenants, Blake and Jane Fleetwood, responded to the petition, by “cross-petitioning” to modify DHCR’s order. In a decision and judgment entered on July 24, 2000, the Hon. Paula Omansky upheld DHCR’s determination, and dismissed the petition and cross-petition.

On or about July 31, 2000, the tenants commenced a plenary action in Civil Court, seeking a money judgment enforcing DHCR’s FMRA order as to the \$25,801.14 in excess rent to which they were entitled, as well as an award of costs and attorney’s fees. The Civil Court complaint named the defendant as “Simon Haberman dba 251 CPW Housing,” who was the petitioner in the Article 78 proceeding challenging the FMRA award. The tenants moved for summary judgment against “both defendants” and on October 24, 2003, the Hon. Lucy Billings granted the motion to the extent of awarding a judgment in the amount of the Civil Court’s jurisdictional limit of \$25,000, against “251 CPW Housing Ltd.” Judge Billings found that since the DHCR order was against only 251 CPW Housing Ltd, the tenants were entitled to a judgment only against that entity, and Haberman was entitled to summary judgment dismissing the complaint against him. Judge Billings also awarded the tenants prejudgment interest, and reasonable attorney’s fees and expenses incurred in the Civil Court action to enforce DHCR’s order, but not in the DHCR and Article 78 proceedings.<sup>2</sup>

Thereafter, the defendants in the Civil Court action appealed the portion of order granting the tenants’ motion for summary judgment. The tenants cross-appealed the portion of the order dismissing the complaint as against Simon Haberman. On October 17, 2005, the Appellate

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<sup>2</sup>Plaintiffs state that they were subsequently awarded \$15,000 in legal fees, by an order of the Civil Court dated March 13, 2006, which is under appeal.

Term, First Department issued an order modifying the Civil Court's order "by deeming the dismissal of plaintiffs' claim of 'alter ego' liability against Simon Haberman to be without prejudice." Fleetwood v. Haberman, 9 Misc3d 133(A), 808 NYS2d 917, 2005 WL 2648486 (App Term, 1<sup>st</sup> Dept 2005). The Appellate Term determined as follows:

Plaintiffs-tenants commenced this plenary action against the corporate defendant to recover excess rent awarded them in a fair market rent appeal. They also sought recovery against defendant Haberman, principal of the defendant corporation, who allegedly misused the corporate form for purposes of evading liability for excess rent charges.

The defense attack on the order to refund excess rent collected is without merit, and is in any event barred by the doctrine of collateral estoppel based on prior judicial review of the underlying fair market rent appeal. . . . Plaintiffs were properly awarded attorney's fees incurred in prosecuting this plenary action. . . . as well as prejudgment interest on their rent overpayments from the midpoint of each overcharge period. . . . While it is true that Haberman was not named a party to the fair market rent appeal, he did file a petition in his individual capacity for administrative review, which was denied. He has also been the record owner of the building since 1972, rendering summary judgment dismissal of the claim against him inappropriate (*see generally Sciarra v. 531 E. 83<sup>rd</sup> St. Owners Corp.*, 8 AD3d 159 [2004]). Civil Court does not have jurisdiction to grant a piercing of the corporate veil. . . . Accordingly, we modify Civil Court's order to deem the dismissal as against Haberman to be without prejudice to plaintiff's equitable remedies in a proper forum.

On April 14, 2006, the tenants commenced the instant action to enforce the FMRA order against Simon Haberman individually, and 251 CPW Housing LLC. The complaint asserts seven causes of action seeking to hold Haberman individually responsible as the owner of the premises, seeking to pierce the corporate veil and hold Haberman individually responsible, and for fraudulent conveyance. Plaintiffs also request costs and attorney's fees. The complaint alleges that the owner named in the 1992 lease, 251 CPW Housing Ltd, is listed as an inactive corporation by the New York State Division of Corporations, and that the owner "at that time

[\* 6 ]

was in fact defendant Simon Haberman pursuant to a deed dated October 12, 1972.” The complaint further alleges that Haberman later transferred the premises “for less than fair market value” to defendant 251 CPW Housing LLC, by a deed dated January 1, 1997, which is an “LLC owned and controlled by him,” and that 251 CPW Housing LLC is still the owner of the premises. The complaint asserts that Haberman is individually responsible to plaintiffs because “at all relevant times he was the owner of the subject premises,” because the landlord listed on the lease “never existed,” because Haberman “exercised such a dominion and control over the landlord and,” and because the landlord used 251 CPW Housing Ltd and 251 CPW Housing LLC to perpetuate a fraud or a wrong.

Specifically, plaintiffs seek to pierce the corporate shields of both corporations, alleging that the operations of the two corporations and Haberman “were and are so intermingled as to given them no independent identities,” that Haberman exercised control over both corporations “as if there was a single integrated operation,” and that the two corporations lacked a corporate formality, were under-capitalized, filed no tax returns, elected no directors and had no stockholders. Plaintiffs further seek to set aside as fraudulent, the conveyance of title to 251 CPW Housing LLC, alleging that at the time of the transfer, plaintiffs’ FMRA was pending, that Haberman and 251 CPW Housing Ltd. knew of the indebtedness to plaintiffs, that such transfer with made for no or insufficient consideration, and that such transfer was “made with actual intent to hinder, delay or defraud” plaintiffs.

Defendants now move to dismiss the complaint on the grounds of statute of limitations, collateral estoppel, res judicata, and failure to state a cause of action. Plaintiffs oppose the

motion and cross-move for summary judgment, and alternatively, move for sanctions for non-compliance with discovery.

Defendants' motion to dismiss is denied in its entirety. First, as to the statute of limitations issue, defendants assert the action is barred by the four-year statute of limitations applicable to a FMRA proceeding. Specifically, defendants argue that since neither of them was a party to the DHCR proceedings, the instant "action constitutes a de novo Fair Market Rent Appeal against said defendants and not merely enforcement of an existing DHCR award," which is subject to the four-year statute of limitations for commencing a FMRA before the DHCR. This argument is without merit, as defendants mischaracterize the nature of plaintiffs' action, which is not a FMRA. Plaintiffs' FMRA was finally adjudicated in their favor, and in this action they are simply continuing their efforts to enforce the FMRA order. While plaintiffs have already secured a judgment against 251 CPW Housing Ltd. as a result of the plenary action in Civil Court, they commenced the instant plenary action against Haberman and 251 CPW Housing LLC, non-parties to the FMRA, to hold them liable for the excess rent awarded in the FMRA, on the equitable grounds of piercing the corporate veil and fraudulent conveyance. A plenary action to enforce a FMRA order is governed by the six-year statute of limitations period in CPLR 213(1). See Sciarra v. 531 East 83<sup>rd</sup> Street Owners Corp., 8 AD3d 159 (1<sup>st</sup> Dept 2004).

Second, defendants rely on Judge Billings' dismissal of the Civil Court complaint against Haberman in arguing that the instant action against him is barred under the doctrines of res judicata and collateral estoppel. Defendants, however, conveniently neglect to mention that on appeal, the Appellate Term, First Department modified the Civil Court's order "to deem the

dismissal as against Haberman to be *without prejudice* to plaintiffs' equitable remedies in a proper forum" (emphasis added). The Appellate Term concluded that summary dismissal of the claim against Haberman was inappropriate, in view of his having filed the Article 78 petition in his individual capacity and his record ownership of the building since 1972. Thus, as a result of the Appellate Term's order, plaintiffs are permitted to maintain this action against Haberman to hold him individually responsible for the judgment awarded against 251 CPW Housing Ltd, based upon equitable claims of piercing the corporate veil and fraudulent conveyance.

Third, defendants argue that the complaint fails to state a cause of action against defendant 251 CPW Housing LLC, since that entity was not party to the FMRA proceeding and did not obtain title to the building until many years after plaintiffs paid excessive rent to its predecessor. To support this argument, defendants cite Fullan v. 142 East 27<sup>th</sup> Street Assocs, 1 NY3d 211 (2003) and Sciarra v. 531 East 83<sup>rd</sup> Street Owners Corp., *supra*, which hold that a successor landlord is generally not liable for excess rent collected by a predecessor landlord, as determined in a FMRA order. Although that is the general rule, those cases also make clear that where, as here, a fraud cause of action has been pleaded, and the evidence shows or at least suggests that the transfer of the property was not at arms' length or was entered into for the purpose of evading liability for excess rent charges, a tenant may be able to recover against a successor owner in a plenary action. See Fullan v. 142 East 27<sup>th</sup> Street Assocs v. 27 Realty, LLC, *supra*; Sciarra v. 531 East 83<sup>rd</sup> Street Owners Corp., *supra*.

Finally, defendants argue that plaintiffs fail to state a cause action for fraudulent conveyance. Specifically, defendants assert that no basis exists for setting aside as fraudulent,

the January 1, 1997 conveyance of the building to 251 CPW Housing LLC, since at the time of the conveyance, the parties to the conveyance, Haberman and 251 CPW Housing LLC, were not parties to any judgment, administrative award or pending litigation involving plaintiffs. Once again, this argument is premised on a mischaracterization of the claims as pleaded in the complaint, as plaintiffs are seeking to set aside, as fraudulent, the conveyance of the building from Haberman to 251 CPW Housing LLC, by alleging that Haberman and 251 CPW Housing LLC participated in the fraud in an effort to prevent plaintiffs from collecting the FMRA award directly from the landlord named in the lease and in the FMRA proceeding, 251 CPW Housing Ltd. As Haberman's conveyance occurred in January 1997, while the FMRA was pending before DHCR, plaintiffs have sufficiently stated a cause of action for fraudulent conveyance.

Based on the foregoing, defendants' motion to dismiss the complaint is denied. In light of this determination, defendants' motion to cancel the lis pendens is likewise denied.

Turning to the cross-motion, plaintiffs are seeking an order awarding them summary judgment. To obtain summary judgment, plaintiffs must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidentiary proof to demonstrate the absence of any material issues of fact as to their cause of action. See Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Id.

Here, plaintiffs have failed to meet this burden. In support of the motion, they submit an affidavit of plaintiff Blake Fleetwood and annex various documents, consisting of their interrogatories, records from the Division of Corporations of the New York State Department of State, a certified copy of an October 12, 1972 deed conveying the property from CPW 251

Housing, Ltd to Simon Haberman, the verified petition in the landlord's Article 78 proceeding, Justice Omansky's order denying that Article 78 proceeding, and the Appellate Term's decision modifying Judge Billing's order. Fleetwood's affidavit, however, is insufficient to support plaintiffs' motion. While he swears that he is "fully familiar with the facts herein set forth," the affidavit contains numerous factual statements and legal conclusions of which he cannot possibly have any personal knowledge, since he restates verbatim every factual allegation and legal assertion contained in the complaint. For example, Fleetwood states that "251 CPW Housing Ltd lacked a corporate formality, was undercapitalized and Simon Haberman personally used the funds of 251 CPW Housing Ltd," and that "[t]he landlord's minutes, books, stock certificate books, and stock ledgers are blank, [and the landlord] elected no directors, held no stockholders' or directors' meetings, adopted no bylaws and issued no stock."

While plaintiffs arguably may be relying on the documents annexed to Fleetwood's affidavit, they present no identifiable legal arguments or factual contentions as to why such documents demonstrate their entitlement to judgment as a matter of law on their claims against defendants. Significantly, plaintiffs' motion papers point to no specific documents and argue that such proof establishes a prima facie case for piercing the corporate veil or for fraudulent conveyance. Moreover, plaintiffs' arguments submitted for the first time in their reply papers are not properly considered. See Morris v. Solow Management Corp., 8 AD3d 126 (1<sup>st</sup> Dept 2004); Dannasch v. Bilfulco, 184 AD2d 415 (1<sup>st</sup> Dept 1992); Ritt v. Lenox Hill Hospital, 182 AD2d 560 (1<sup>st</sup> Dept 1992). However, even if those arguments could be considered, counsel's bare and conclusory assertions as to the significance of certain documents, are insufficient to support summary judgment. Under these circumstances, plaintiffs have failed to establish prima

facie entitlement to judgment as a matter of law.

Alternatively, plaintiffs seek sanctions against defendants for noncompliance with discovery. This portion of the cross-motion is granted only to the extent of directing the parties to appear for the compliance conference previously scheduled for May 13, 2007.

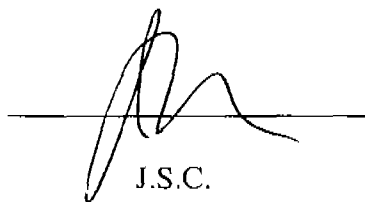
Accordingly, it hereby

ORDERED that defendants' motion is denied in its entirety; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment is denied and plaintiffs' cross-motion for discovery sanctions is granted only to the extent of directing the parties to appear for the compliance conference previously scheduled for May 13, 2007 at 9:30 am, in Part 11, Room 351 at 60 Centre Street.

DATED: April 12 2007

ENTER:

  
I.S.C.

**FILED**  
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