

<b>Gross v 420 East 72nd St. Tenants Corp.</b>
2008 NY Slip Op 30259(U)
January 22, 2008
Supreme Court, New York County
Docket Number: 0600642/2006
Judge: Doris Ling-Cohan
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SCANNED ON 1/30/2008  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DORIS LING-COHAN

PART 36

Justice

Gross

INDEX NO. 600642/06

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

MOTION SEQ. NO. 005

MOTION CAL. NO. \_\_\_\_\_

- v -

420 EAST 72<sup>nd</sup> ST Tenants

The following papers, numbered 1 to 4 were read on this motion to/for amend answer

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits memo of law

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2

3

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion by defendant to amend  
its answer is decided in accordance with the  
attached memorandum decision.

**FILED**

JAN 30 2008

NEW YORK  
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: 1/22/08

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

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 36

----- X  
MITCHELL GROSS and CHRISTINE DEBOUCK,

Plaintiffs,

- against -

420 EAST 72<sup>nd</sup> STREET TENANTS CORP.,

Defendant.  
----- X

**DORIS LING-COHAN, J.:**

Defendant 420 East 72<sup>nd</sup> Street Tenants Corp. moves for an order permitting it to amend its answer in the form of the proposed amended answer, to assert three additional affirmative defenses.

The complaint alleges as follows: plaintiff Mitchell Gross and Christine Debouck are the lessees of a co-op apartment in a building located at 420 East 72<sup>nd</sup> Street, New York, New York. Beginning in 2002, and at various times thereafter, excessive and unhealthy heat and humidity existed in the apartment during the summer months, caused by defendant's negligence or intentional failure to keep in good repair the building, and the building's equipment and apparatus, including conduits and pipes located within the walls and ceiling of the building and the apartment. Plaintiffs asked defendant to ascertain and remedy the cause of the problem, but to no avail.

In September 2004, moisture infiltrated the master bedroom, causing damage to the bedroom wall, and, in January 2005, and at various times thereafter, plaster on the apartment's ceiling began to crack and deteriorate. That same month, plaintiffs demanded that defendant take measures to remedy the situation. Defendant caused a licensed engineer to inspect the apartment,

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and issue a report relating to the findings. In March 2005, the engineer issued two reports, copies of which plaintiffs requested, but defendant refused to provide. As a result of defendant's failure to take measures to remedy the heat and humidity problems in the apartment, plaintiffs commenced this action.

The complaint contains six causes of action for (1) breach of contract; (2) breach of warranty of habitability; (3) breach of contract - partial constructive eviction; (4) legal fees; (5) breach of contract - injunction; and (6) negligence.

The second amended answer contains the following 10 affirmative defenses: (1) the business judgment rule precludes the court from looking behind the decision of the board of directors; (2) failure to state a cause of action; (3) lack of personal jurisdiction; (4) statute of limitations barring claims of intentional acts; (5) Business Corporation Law § 717; (6) failure to state a cause of action for construction eviction; (7) plaintiffs' own negligence; (8) contributory and comparative negligence; (9) acts beyond defendant's control; and (10) failure to mitigate.

Defendant now seeks to broaden the statute of limitations affirmative defense, so that it is not limited to a one-year limitations for intentional acts, and to add estoppel and waiver as affirmative defenses. Defendant asserts that, after a review of both sides' document production, it became apparent that defendant could assert the aforementioned three additional affirmative defenses. As for statute of limitations, defendant argues that the evidence establishes that plaintiffs purchased the premises in 2002, and knew at the time about the conditions existing therein, yet plaintiffs commenced this lawsuit in 2006, alleging, among other claims, negligence. As for estoppel and waiver, defendant argues that, having accepted the premises as is, with full knowledge of the conditions, plaintiffs cannot now be heard to complain.

Plaintiffs argue that leave to amend should be denied, because it would result in prejudice or surprise in that they spent 16 months pursuing defendant for discovery responses, and they would be prejudiced by having to propound additional discovery demands and pursue defendant's responses. Plaintiffs' counsel spent seven hours deposing defendant on the existing claims and defenses, and plaintiffs would require additional deposition testimony regarding the new defenses, after the deadline for filing the note of issue has passed. Plaintiffs also assert that defendant failed to provide a reason for not earlier moving to amend, and that the proposed amendment lacks merit.

Permission to amend pleadings should be freely given (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957 [1983]; *Lanpont v Savvas Cab Corp.*, 244 AD2d 208 [1<sup>st</sup> Dept 1997]). Mere lateness is not a barrier; it must be lateness coupled with significant prejudice to the other side (*Edenwald Contr. Co. v City of N.Y.*, 60 NY2d at 959). In determining whether to grant a motion to amend an answer, the court must consider the merits of the proposed amendment, and whether the plaintiff will be prejudiced by the delay in raising it (*Lanpont v Savvas Cab Corp.*, 244 AD2d at 210).

Applying these principles, the court grants the motion only to the extent of the statute of limitations affirmative defense. The motion papers indicate that the statute of limitations defense has merit, and permitting the amendment will not cause prejudice or surprise. Indeed, the second amended answer already contains the statute of limitations as an affirmative defense. The only change is to broaden it, so as make it applicable to all causes of action, rather than to claims only based on intentional wrongs. Plaintiffs' argument about "legal impossibility" (Opposition Memorandum, at 12) does not refute the merits of the defense. Moreover, broadening the

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applicability of this defense should not require any additional discovery, especially considering plaintiffs' argument that the defense lacks merit. Defendant itself states that it will not need any additional discovery, because, it asserts, the documents adduced in discovery permit it to assert this defense. Moreover, plaintiffs have not shown that permitting leave to amend the answer would cause them prejudice, as might otherwise be the case if, for example, plaintiffs alleged an inability to locate a potential witness required by the proposed amendment (*see Edenwald Contr. Co. v City of N.Y.*, 60 NY2d at 959).

As for the proposed estoppel and waiver defenses, the motion papers, including the annexed exhibits, do not establish that such defenses have merit. They do not support the assertion that plaintiffs voluntarily and intentionally abandoned a known right (waiver)(*see Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175 [1982]). In fact, Exhibit B to defendant's reply affirmation (memorandum from plaintiffs to the building's board of directors) contradicts the assertion of waiver.

As for estoppel, this defense involves a false or misleading statement, a lack of knowledge of the true facts, reliance upon the conduct of the party estopped, and a prejudicial change in position. The allegations in the proposed pleading do not support this defense, and defendant failed to submit an affidavit of merit or any evidence tending to provide support for it (*see Marinelli v Shifrin*, 260 AD2d 227 [1<sup>st</sup> Dept 1999]).

Accordingly, it is

ORDERED that defendant's motion for leave to amend the answer is granted, only to the extent that leave is granted to add the revised statute of limitations affirmative defense, and to this extent the amended complaint in the form proposed as annexed to the moving papers shall be

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deemed served upon service of a copy of this order with notice of entry; and its further

ORDERED that leave to amend the answer is denied with respect to the proposed ninth (waiver), and tenth (estoppel) affirmative defenses, and those affirmative defenses are stricken from the amended complaint in the form proposed as annexed to the moving papers; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve copy upon plaintiffs with notice of entry.

Dated: January 27 2008



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Hon. Doris Ling-Cohan, J.S.C.

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