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

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11
Justice

Index Number : 101498/2006
BENARESH, BAHRAM
VS
NOCENTI, ANN
Sequence Number : 001
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 and cross-motion are determined in accordance with the annexed decision and order.

FILED
MAR 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: March 10, 2008

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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BAHRAM BENARESH,

Plaintiff,

Index No.: 101498/06

-against-

ANN NOCENTI and THOMAS GORAI,

Defendants.

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JOAN A. MADDEN, J.:

In this action for a declaratory judgment, a possessory judgment and a money judgment regarding loft premises, plaintiff landlord moves for an order pursuant CPLR 3025(b) granting leave to amend the complaint, and an order directing defendant tenant to pay use and occupancy during the pendency of this action, and to provide copies of her tax returns for 2000 through 2005. Defendant tenant Ann Nocenti opposes the motion and cross-moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint in its entirety. For the reasons stated below, the motion is denied and the cross-motion is granted.

I. Background

The following facts are not disputed unless otherwise noted. Since July 26, 2003, plaintiff Bahram Benaresh has been the owner of the building located at 175 Franklin Street in Manhattan. The building was formerly used for commercial purposes, and each of its six floors now contains one loft unit. Defendant Ann Nocenti is the tenant of the fifth floor pursuant to a "Loft Lease" lease dated April 1, 1984 . Nocenti is the only tenant remaining in the building and co-defendant Thomas Gorai is her roommate.

In January 1983, the previous owner filed an Interim Multiple Dwelling ("IMD") Registration Application with the New York City Loft Board ("Loft Board"). On March 2, 1983, the Loft Board issued IMD registration number A10217 for the building. In December 1983, the owner filed a "Rider" to the initial IMD registration application. As an IMD, the building lacks a residential certificate of occupancy. It does not appear that the prior owner took any steps to legalize the building and secure a residential certificate of occupancy in accordance with the procedures set out in the Loft Law and its regulations. After Benaresh purchased the building, he began to take such steps, by serving Nocenti with a "narrative statement" on June 13, 2005, and filing an alteration application with the Department of Buildings ("DOB") on August 31, 2005. On September 15, 2005, the Loft Board held a conference on the narrative statement and Nocenti appeared, expressing concern over Benaresh's plans to remove the freight elevator, to remove her bedroom wall, and to route vent stacks through her living room. When those issues could not be resolved, Nocenti retained an architect and submitted an alternate alteration plan to the Loft Board on November 17, 2005. The Loft Board ruled in favor of Nocenti's alternate alteration plan and forwarded it to the DOB, which approved the alternate plan on March 28, 2006. It is appears that Benaresh's alteration application is still listed as disapproved by the DOB and no work has commenced.

Meanwhile, on February 2, 2006, Benaresh commenced the instant action against Nocenti and her roommate, Gorai. The complaint asserts four causes of action: 1) for a declaratory judgment that Benaresh is not required to install a passenger elevator since Nocenti cannot pay her share of the cost to obtain a residential certificate of occupancy; and a declaratory judgment that Nocenti's objection to the narrative statement as to the installation of a passenger elevator

was made in bad faith; and a declaratory judgment that Nocenti's bad faith precludes her from defending against a summary nonpayment proceeding or any action on the ground that Benaresh has timely failed to obtain certificate of occupancy; 2) for a judgment of possession against Nocenti based on non-payment of rent, and a money judgment in the amount of $9,064.00; 3) for a declaratory judgment as to the amount Nocenti owes for gas; and 4) an award of reasonable attorney's fees.

Nocenti filed an answer on April 18, 2006, asserting four affirmation defenses and one counterclaim, including failure to state a cause of action, the absence of a justiciable controversy, the relief sought by plaintiff can be obtained in Housing Court or from the Loft Board, and attorney's fees. Co-defendant Gorai neither answered nor appeared.

On or about July 12, 2006, Benaresh served Nocenti with a 30-day notice terminating her tenancy as of August 31, 2006. As the grounds for the termination, the notice stated that the "referenced Premises are not subject to Article 7-C of Multiple Dwelling Law [the Loft Law] because you first occupied it for residential occupancy on or about April 1, 1984 and you do not have a current lease."

The parties have completed discovery and Benaresh is now moving to amend the complaint based on purported "new facts" and information obtained in discovery. In the proposed amended complaint, the original first, third and fourth causes of action essentially are unchanged. The original second cause of action is amended to assert a claim for a money judgment alone in the amount of $44,972 for unpaid rent and additional rent, escalations, or use and occupancy, and no longer seeks a possessory judgment. The proposed amended complaint adds new fifth, sixth and seventh causes of action. The proposed fifth cause of action seeks a

possessory judgment on the ground that Nocenti's loft does not qualify as an IMD unit, and she is a month-to-month tenant who is "not entitled to the benefits of continued occupancy" and is "not entitled to the benefits of rent regulations provided by the Loft Law and the Loft Board's regulations." The proposed sixth cause of action asserts a claim for ejectment and a judgment of possession on the ground that Nocenti is engaged in rent profiteering from her roommate, co-defendant Gorai, in violation of Rent Stabilization Code §2525.7(b), and also seeks a money judgment in an amount not less than $14,700. The proposed seventh cause of action seeks money judgment in the "amount of market rent from August 31, 2006 until defendant vacates the Loft, in an amount not less than $6,000 per month." In addition to the foregoing amendments, plaintiff moves for an order directing Nocenti to pay use and occupancy during the pendency of this action, and an order directing her to provide copies of her tax returns for 2000 through 2005. Defendant Nocenti opposes plaintiff's motion, and cross-moves for summary judgment dismissing the complaint in its entirety.

II. Loft Law Coverage

At the outset, the court will determine whether Nocenti is entitled to the protections of the Loft Law, since the resolution of that issue affects the determination of other issues raised in this action.[1]

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[1]While neither the original or amended complaint, or the answer directly asserts a claim for a declaratory judgment as to Loft Law coverage, the proposed fifth cause of action in the amended complaint seeks a judgment of possession against Nocenti, alleging that her loft "does not qualify as an IMD unit" and that she is a month-to-month tenant who is "not entitled to the benefits of rent regulation provided by the Loft Law and the Loft Board's regulations." The proposed fifth cause of action further alleges that "Defendant is not entitled to require plaintiff to perform alterations the Building and obtain a C of O for residential use." The determination of this claim necessarily requires a determination as to whether Nocenti is protected by the Loft Law. Also, plaintiff's motion papers acknowledge that the "new fifth cause of action seeks a

To establish that her unit is covered by the Loft Law, Nocenti must show that it was occupied for residential purposes during the statutory window period, from April 1, 1980 through December 1, 1981. See Wolinsky v. Kee Yip Realty Corp., 2 NY3d 487, 492-493 (2004); Laermer v. New York City Loft Board, 184 AD2d 339 (1st Dept), lv app den 81 NY2d 701 (1992). The documentary evidence in the record is sufficient to establish this fact as a matter of law.

Loft Board registration records show that the prior owner originally registered the building with the Loft Board as an IMD on January 28, 1983. That initial IMD registration application listed the units on floors 1, 2, 3, 4 and 6 as residentially occupied, and the unit on floor 5 as a residential unit that was "vacant." On December 1, 1983, the owner filed a "Rider" to the initial IMD registration application, stating that all six units in the building, including the fifth floor unit, "on December 1, 1981 were occupied for residential purposes since April 1, 1980." That rider is dated November 16, 1983, and is signed by the owner with a certification that "under penalties provided by law, including fine and/or imprisonment that all statements made herein are true and correct."

Where as here, the 1983 rider to the initial registration included a certified statement by the prior owner that the fifth floor unit was occupied for residential use during the statutory window period, i.e. from April 1, 1980 through December 1, 1981, Benaresh is foreclosed from contesting the applicability of the Loft Law to Nocenti. See Mongelli v. Sharp, 140 AD2d 273 (1st Dept 1988). While the January 1983 registration document listed the fifth floor as "vacant,"

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declaratory judgment that the Loft [Nocenti's unit] is not subject to the Loft Law." Thus, the issue of Loft Law coverage is before the court for determination.

that was status of the unit at a time concurrent with the document, i.e. January 1983. The December 1983 Rider provided specific information as to status of the apartment during a different and earlier period, i.e. the window period from April 1, 1980 through December 31, 1981, which is the only period relevant to the issue of Loft Law coverage. See Wolinsky v. Kee Yip Realty Corp., supra. Thus, since the Loft Board records conclusively establish that Nocenti's fifth floor unit was occupied as a residence during the statutory window period, the court finds that she is entitled to the protections of the Loft Law. Id.

III. First Cause of Action

As noted above, the first cause of action as pleaded in the original and the amended complaint seeks a declaration that Benaresh is not required to install a new elevator, and that Nocenti's objections to the narrative statement regarding the elevator were made in bad faith.

Assuming without deciding that the court has concurrent jurisdiction with the Loft Board over the issues presented by plaintiff pertaining to the elevator, see County Dollar Corp. v. Douglas, 160 AD2d 537 (1st Dept 1990), those issues were specifically raised before and determined by the Loft Board, at least to the extent of approving Nocenti's alternate plan to repair the existing freight elevator. It is not disputed that Benaresh submitted an alteration plan to the Loft Board and the DOB, which included the removal of the existing freight elevator. It is also not disputed that Nocenti appeared before the Loft Board, objected *inter alia* to that aspect of the plan, and submitted an alternate plan which called for the freight elevator to be repaired, which the Loft Board approved.

The issue as to whether Benaresh, in seeking to legalize the building, has a right to remove or is required to repair the existing freight elevator was presented to and should be

resolved by the Loft Board, as that is the entity responsible for monitoring an owner's compliance with the legalization process prescribed by the Loft Law. Benaresh may seek judicial review of the Loft Board's final determination by way of an Article 78 proceeding. It appears that Benaresh may have abandoned his efforts, at least temporarily, to legalize the building in accordance with Loft Law requirements, and instead commenced the instant action for relief, in part, as to the elevator issues, which could potentially conflict with the outcome in the administrative proceeding. Under these circumstances, the court accords the Loft Board primary jurisdiction with respect to the elevator issues, and defers to the Loft Board's discretion and expertise. See In the Matter of Jo-Fra Properties, Inc., 27 AD3d 298 (1st Dept 2006), lv app den 8 NY3d 801 (2007); EPDI Associates v. Conley, 7 AD3d 755 (2nd Dept 2004); Sheinberg v. 177 E.77th Inc., 248 AD2d 176 (1st Dept), lv app den 92 NY2d 844 (1998); El Haddad Corp. v. Cal Redmond Studio, 102 AD2d 730 (1st Dept 1984); Charles H. Greenthal & Co., Inc. v. 301 East 21st Street Tenants' Ass'n, 91 AD2d 934 (1st Dept 1983).

IV. Second Cause of Action

As to the second cause of action, the original complaint seeks a money judgment and a possessory judgment based on non-payment of rent and additional rent; the amended complaint asserts a claim for a money judgment only based on non-payment of rent and additional rent, or use and occupancy. In either form, the second cause of action is without merit.

Multiple Dwelling Law §302 provides that an owner may not collect rent in the absence of a valid certificate of occupancy. Multiple Dwelling Law §284(1)(i)(D) provides an exception to this rule in the case of an IMD, which by its terms lacks a valid certificate of occupancy. Under section 284(1)(i)(D), the owner of an IMD is entitled to collect rent if he "take[s] all

reasonable and necessary action to obtain a certificate of occupancy" in accordance with the Loft Law legalization requirements. See 640 Broadway Renaissance Co. v. Eisner, 212 AD2d 376 (1st Dept), lv app dism 86 NY2d 837 (1995), cert den 517 US 1155 (1996); Cromwell v. LeSannom Building Corp., 171 AD2d 458 (1st Dept 1991); County Dollar Corp. v. Douglas, supra.

Here, defendant has made a sufficient showing that Benaresh has failed to satisfied this standard. The most recent amendments to the Loft Law in 2007 require an owner to have filed an alteration application by September 1, 1999, to have taken "all reasonable and necessary action to obtain an approved alteration permit" by March 1, 2000, to have complied with residential safety and fire protection standards by May 1, 2008, and to have taken "all reasonable and necessary action" to obtain a residential certificate of occupancy by May 31, 2008. MDL §284(1)(v).

Benaresh acquired the building in July 2003, but did not take the first steps toward legalization until two years later when he served Nocenti with the narrative statement in June 2005 and filed his alteration application with the DOB in August 2005 While under the 2007 amendments, he still has until May 1, 2008 to comply with code standards and to obtain a certificate of occupancy, the record clearly establishes that he has failed to take all "reasonable and necessary action to obtain an approved alteration permit." MDL §284(1)(v). It is undisputed that the DOB designated his alteration plan "disapproved" as of April 25, 2005. This is significant in view of the fact that Nocenti, after retaining and an architect at her own expense to prepare an alternate alteration plan, obtained the DOB's approval of her plan on March 28, 2006.

Benaresh has not provided an adequate explanation for his inaction and he has not submitted an affidavit in opposition to Nocenti's cross-motion for summary judgment.[2] He relies solely on an affirmation from his attorney who states that in May 2007, she spoke with Benaresh's architect and "learned that she was no longer working on this job and plaintiff had retained a new architect. Plaintiff intends to submit his final plans as soon as possible and to become compliant with his legalization obligations." These vague and conclusory statements from counsel are insufficient to raise an issue of fact to the reasonableness of Benaresh's efforts. Notably, the record suggests that Benaresh may have intended to abandon or delay his efforts to legalize the building and Nocenti's unit, as in July 2006, he served Nocenti with a 30-day notice terminating her tenancy effective August 31, 2006, on the ground that she is a month-to-month tenant. That termination notice provides the basis for the new fifth cause of action Benaresh is now seeking to add to the complaint, which also asserts that Nocenti's unit is not covered by the Loft Law.

Finally, Benaresh's reliance on American Package Co., Inc. v Kocik, 12 Misc 3d 1166(A) (Sup Ct, Kings Cty 2006), is misplaced, as in that case the tenant's own architect provided an affidavit sufficient to support a finding that the building "as whole" and the tenant's units "in particular, substantially conform[ed] to building code standards." Here, however, Benaresh has not produced any competent proof showing substantial conformity to building code standards.

Based on the foregoing, the court finds as a matter of law that Benaresh is not entitled to collect rent or use and occupancy from Nocenti pursuant to §284(1)(i)(D), since he is not in

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[2]Although Benaresh submits an affidavit in support of his motion to amend, he has not submitted an affidavit opposing the cross-motion.

compliance with the legalization requirements of the Loft Law. Thus, the second cause as asserted in the original and the amended complaint, which is based on non-payment of rent or use and occupancy, is without merit.

V. Third Cause of Action

The third cause of action (essentially the same in the original and amended complaints) seeks a declaratory judgment as to the amount Nocenti is obligated to pay for her share of gas service. To support summary judgment dismissing this claim, Nocenti submits an affidavit which, in pertinent part, states as follows:

> [U]p until the present landlord, there was always a shared gas account for all of the tenants in the building, and until recently, I used that gas to heat my apartment. In the past, the tenants would divide the costs each month and pay the bill. After Mr. Benaresh took over, as he began emptying apartments, we asked him to pay his share of the gas bill, as the previous landlord had whenever there were empty units. While Mr. Benaresh initially acceded to that request, he changed his mind when I became the last person left in the building, at which point he refused to make further payments. As a result, I was forced, at considerable expense, to switch over to electric heat. For this reason, I believe that the issue of who should pay what for gas is essentially moot.

Benaresh opposes dismissal of this claim, but submits no affidavit. He relies solely on his attorney's sur-rely affirmation in opposition, which asserts that the third cause of action is not moot and the court should determine the rights of the parties, since Benaresh does not want to be responsible for the payment of gas service to Nocenti and does not want to be the subject a harassment application or an HP proceeding in Housing Court.

The court need not resolve this issue, at least now, in light of the determination above, that Benaresh is not entitled to collect rent from Nocenti. In any event, the court agrees that the issue is probably moot, based on Nocenti's sworn statement above that she no longer uses gas for

heating. Contrary to Benaresh's contention, nothing in the record suggests that Nocenti still uses gas for cooking or hot water.

VI. Fourth Cause of Action

The fourth cause of action (essentially the same in the original and amended complaints) seeks legal fees pursuant to the terms of Nocenti's lease. Since Benaresh is not the prevailing party in this action, he is not entitled to attorneys fees. See A.G. Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986); Monacelli v. Farrington, 240 AD2d 296 (1st Dept 1997)

VII. Proposed Fifth Cause of Action

The proposed fifth cause of action seeks a judgment of possession on the grounds that Nocenti's loft does not qualify as an IMD unit, and that Nocenti is a month-to-month tenant who is "not entitled to the benefits of continued occupancy" and is "not entitled to the benefits of rent regulations provided by the Loft Law and the Loft Board's regulations." In light of the determination above that Nocenti is entitled to the protections of the Loft Law, plaintiff's proposed fifth cause of action is without merit.

VIII. Proposed Sixth Cause of Action

In the proposed sixth cause of action, Benaresh seeks a judgment of ejectment on the ground that Nocenti is engaged in rent profiteering from her roommate, co-defendant Gorai, in violation of the rent stabilization code; Benaresh also seeks a money judgment in an amount not less than $14,700. Relying on Nocenti's deposition testimony that she currently collects rent from Gorai each month, Benaresh asserts that the collection of rent from Gorai when Nocenti asserts no rent is due constitutes rent profiteering in violation of Rent Stabilization Code §2525.7(b).

In challenging the rent profiteering claim, Nocenti admits that she has been collecting $525 per month from Gorai towards the rent (less than half her total monthly rent of $1,133), and an additional $175 per month toward Gorai's share of the utilities (total utilities range from $400 to $500 a month). Nocenti, however, testified and submits an affidavit that on counsel's advice, she has been depositing both Gorai's and her own rent payments into a savings account, so that funds will be available on short notice in the event the court directs her to pay Benaresh. In her affidavit, Nocenti also states that her "understanding with Mr. Gorai is that if the money does not get used to pay rent, I will return his portion to him."

The court finds that the proposed rent profiteering claim fails as a matter of fact, as Nocenti's collection of less than half the monthly rent from Gorai, and the maintenance of such funds in a bank account with the understanding that they would be paid to Benaresh or returned to Gorai, does not rise to the level of commercial exploitation – an incurable violation warranting forfeiture of the tenancy. See e.g. 54 Green Street Realty Corp. v. Shook, 8 AD3d 168 (1st Dept 2004), lv app den 4 NY3d 704 (2005)(where rent stabilized tenant charged roommate more than half the stabilized rent, court found that the amount of the overcharge was "small and there was no evidence of bad faith and an intent to profiteer"); 270 Riverside Drive, Inc. v. Braun, supra (24% overcharge did not constitute "profiteering" or "commercial exploitation"); Roxborough Apartments Corp. v. Becker, 11 Misc3d 99 (App Term, 1st Dept 2006)(where rent stabilized tenant charged roommates a disproportionate share of the legal rent, court found the overcharges did not rise to level of profiteering requiring eviction without providing an opportunity to cure, since the amounts did "not reflect commercial exploitation" and the financial arrangements between the tenant and his roommates was not "actuated by bad faith and an intent to profiteer");

compare BLF Realty Holding Corp. v Kasher, supra (rent profiteering where loft tenant charged subtenants more than triple the lawful rent over a four-year period); West 148 LLC v. Yonke, 11 Misc3d 40 (App Term, 1st Dept 2006)(rent stabilized tenant engaged in "commercial exploitation" by charging nearly double the legal rent); Continental. Towers Ltd. Partnership v. Freuman, 128 Misc2d 680 (App Term, 1st Dept 1985)(rent profiteering where tenant secured landlord's consent to sublet by falsely representing that the subtenant would pay the legal maximum of $724.56, but actually paid $1,500). However, it appears to this court that Nocenti is bound by her sworn statements to return the funds to Gorai if after appeals she is not required to pay rent.[3]

IX. Proposed Seventh Cause of Action

Finally, in the proposed seventh cause of action, Benaresh seeks a money judgment for the market value of the use and occupancy of Nocenti's apartment. In light of the determination above that Benaresh is not entitled to collect rent or use and occupancy from Nocenti, this claim is without merit.

X. Conclusion

Based upon the foregoing, Nocenti's cross-motion for summary judgment dismissing the

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[3]Furthermore, even if Nocenti was profiteering from her roommate, it appears that no legal basis exists for evicting a loft tenant who profiteers from a roommate. See Giachino Enterprises L.P. v. Inokuchi, 7 Misc3d 738 (Civ. Ct, N.Y. Co. 2005). While the First Department has held that rent controlled and loft tenants who profiteer from *subleasing* their apartments are subject to eviction, see BLF Realty Holding Corp. v Kasher, 299 AD2d 87 (1st Dept 2002), lv app dism 100 NY2d 535 (2003), Benaresh cites no appellate authority applying the reasoning of that decision to either a rent controlled or loft tenant who engages in profiteering from a *roommate*. See 220 West 93rd St., LLC v. Stavrolakes, 33 AD3d 491 (1st Dept 2006), lv app den 8 NY3d 813 (2007); Ishida v. Markowicz, 18 AD3d 502 (2nd Dept 2005); 270 Riverside Drive, Inc. v. Braun, 4 Misc3d 77 (App Term, 1st Dept 2004); Giachino Enterprises L.P. v. Inokuchi, supra; Scherer and Fisher, "Residential Landlord Tenant Law in New York," §8:169 (2007).

complaint is granted. Benaresh's motion for leave to amend the complaint is denied, as the proposed amendments are plainly lacking in merit. See Thomas Crimmons Contracting Co., Inc. v. City of New York, 74 NY2d 166 (1989); Katechis v. Our Lady of Mercy Medical Center, 36 AD3d 514 (1st Dept 2007). Those portions of Benaresh's motion for an order directing defendant tenant to pay use and occupancy, and to provide copies of her tax returns, are denied as moot. The court notes that the dismissal of the complaint is effective as against co-defendant Gorai, since neither the complaint nor the amended complaint sets forth a viable cause of action against him. Pursuant to CPLR 3212 (b), a court presented with a motion for summary judgment can search the record and grant summary judgment to any party, including a non-moving party, who is entitled to such relief. See Levin v 117 Limited Partnership, 291 AD2d 304 (1st Dept 2002).

Accordingly, it is hereby

ORDERED that the motion by plaintiff Bahram Benaresh is denied in its entirety; and it is further

ORDERED that defendant Ann Nocenti's cross-motion for summary judgment is granted, and the complaint is dismissed as against defendants Ann Nocenti and Thomas Gorai, and the Clerk is directed to enter judgment accordingly.

DATED: March 10, 2008

ENTER:

J.S.C.