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

PRESENT: JANE S. SOLOMON *Justice* PART 55

Index Number : 103966/2007

GREEN 333 CORP.

VS.

KWINTER, SANFORD

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 103966-07

MOTION DATE 9/24/08

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	5-6
Replying Affidavits	7-8

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision, order and declaratory judgment.

N.B. -- Preliminary conference scheduled for 11/24/08 at 12 noon.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 11/07/08

JANE S. SOLOMON 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: I.A.S. PART 55

----------X

GREEN 333 CORP.,

Plaintiff,

-against-

SANFORD KWINTER,

Defendant.

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DECISION, ORDER and
DECLARATORY JUDGMENT

Index No.: 103966/07

HON. JANE S. SOLOMON:

In this dispute over a Manhattan loft apartment, the plaintiff building owner seeks a declaratory judgment that a Stipulation of Settlement that the plaintiff's predecessor entered into with the defendant-tenant in 2004 is null and void and contrary to public policy on the ground that it circumvents and waives several important statutory protections afforded to landlords under the Rent Stabilization Law. Plaintiff now moves, pursuant to CPLR 3212, for a partial summary judgment on its first and second causes of action, and to sever its third and fourth causes of action as well as defendant's counterclaims for resolution at trial. For the following reasons, the motion is granted in part.

In January of 2001, a company by the name of Blue 123 Corp. (Blue Corp.) leased the building at 422 West Broadway, New York, New York from the then fee owner pursuant to a net lease for a term of 11 years commencing January 1, 2001. Bruno Condi was the president of Blue Corp. In March of 2005, plaintiff herein, Green 333 Corp. (Green Corp.), purchased the building from the fee owner. It should be noted that Mr. Condi is also the president of Green Corp., and his new company commenced a summary non-payment proceeding against his old company, Blue Corp., which resulted in the eviction of Blue Corp. as net lessee of the building in

or about December of 2005. Therefore, Mr. Condi's new company -- Green Corp. -- is now the owner and lessor of the apartments in the building, and defendant's landlord.

The building is a loft building with four residential units above a commercial space on the ground floor. By order dated March 26, 1992, it was determined by the Loft Board to be subject to Article 7-C of the Multiple Dwelling Law (MDL). Defendant Sanford Kwinter is the occupant of a duplex apartment on the third and fourth floors. He has resided in the building since 1982.. In or about January of 2001, defendant began withholding his monthly rental payments on the ground that Blue Corp. was not in compliance with its legalization obligations pursuant to MDL Article 7-C.

Sometime in 2001, Blue Corp. commenced a non-primary occupancy holdover proceeding against the defendant in Civil Court under L&T Index No. 74166/01, contending that defendant had relocated his primary residence to Houston, Texas, where he was employed as a professor at Rice University. Defendant counterclaimed, raising issues concerning the maintenance of the building and the delivery of essential services. After extensive discovery, the holdover proceeding was marked off calendar on December 19, 2001.

Although the parties never restored the holdover proceeding to the Civil Court's calendar, sometime in June and/or November of 2004,[1] Mr. Condi and defendant, but not their attorneys, executed a "Stipulation of Settlement" (Stipulation) that is now the subject of this action. The parties agreed to withdraw all of their claims, with prejudice; agreed that defendant

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[1] It is entirely unclear when the Stipulation was executed. The printed version contains a date of "November __, 2003," and a handwritten change to "May 22, 2004." Mr. Condi avers that he signed it in November 2004 at defendant's apartment. Defendant avers that Mr. Condi signed two versions in May of 2004, but that defendant did not sign it until November of 2004.

was the residential occupant of his duplex apartment and qualified for protection under MDL Article 7-C; agreed that defendant would resume his monthly rent payments the month following execution of the Stipulation; and agreed that the "legal rent" for defendant's duplex was $1,350 per month, but that the rent would increase by 10% upon issuance of a certificate of occupancy for the building, which Blue Corp. promised to do within 12 months. In addition, Blue Corp. waived all claims for rent arrears through the date of the Stipulation, and defendant agreed to give Blue Corp. access to the duplex apartment for repairs and legalization work.

Specifically at issue in this action are paragraphs 15 and 18 of the Stipulation, which provide as follows:

> 15. Petitioner [Blue Corp.] shall waive any claim of non-primary residence with respect to respondent [Sanford Kwinter] during the remainder of the term of petitioner's net lease; petitioner shall forever further waive any future claim to refuse to renew respondent's lease based on any of the grounds set forth in Rent Stabilization Code §§2524.4, 5. In the event that the Rent Stabilization Law expires, petitioner and respondent agree that respondent shall be entitled to renewal leases. The rent increase shall be equal to the increase in the Consumer Price Index for the New York region in the year in which the lease expires. Petitioner shall not seek to evict respondent except for non-payment of rent or other wrongful acts of respondent, as set forth in Rent Stabilization Code §2524.3. In the event of renewal lease tenders under the Rent Stabilization Law, the parties agree that the rent increases shall be the lower of the Rent Guidelines Board increase or 4% per renewal term.
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> * * *
>
> 18. This agreement is binding upon and shall inure to the benefit of the parties hereto, their successors, assigns, representatives, heirs and executors and all other persons or entities who derive their interest through or from the parties hereto, whether by agreement or operation of law.

Condi Aff., Exh. A.

Green Corp. commenced this action on May 25, 2007. The amended complaint asserts four causes of action. The first and second causes of action seek a declaratory judgment that the Stipulation is void as against public policy, because it contravenes important provisions of the Rent Stabilization Law and violates the rule against perpetuities, or, in the alternative, that only paragraph 15 of the Stipulation is void as against public policy. In the third and fourth causes of action, it is alleged that Blue Corp. was fraudulently induced to enter into an unconscionable agreement by defendant's misrepresentations, fraud, scheming and overreaching, without the benefit of counsel, and that the Stipulation should be vacated, cancelled and set aside as the product of fraud in the factum, fraud in the inducement, overreaching by defendant, and because it was never fully executed by the attorneys for the parties.

Defendant served an amended answer on or about June 27, 2007 that includes the following three counterclaims: (1) a refund of all rent paid by defendant that exceeds the maximum amount permissible by law; (2) damages as a result of Green Corp.'s violation of the warranty of habitability; and (3) damages resulting from Green Corp.'s conversion of defendant's property.

In support of Green Corp.'s motion, Mr. Condi submits an affidavit in which he avers that he was induced by the defendant to sign the Stipulation because Blue Corp. was desperately in need of funds in 2004; that defendant had not paid rent on his duplex apartment since January 2001; that defendant was not cooperating with Blue Corp.'s efforts to perform legalization work on the building so as to obtain a certificate of occupancy; that the Stipulation was drafted by defendant's attorney; that Mr. Condi could not contact the attorney who

represented him in the non-payment proceeding and that the new attorney he asked to review the Stipulation refused to render a legal opinion without further legal research into the history of the parties' dispute; and that he relied on defendant's representations that any differences between the Stipulation and a stipulation settling two other summary proceedings against other tenants in the building were minor. Unlike the typical landlord-tenant dispute, here it is the landlord claiming that he was taken advantage of by a clever tenant and his attorney.

In opposition, defendant Kwinter contends that nothing could be further from the truth, and that the Stipulation was executed at Mr. Condi's insistence; that Mr. Condi had the draft stipulation for months before he signed it and had every opportunity to have it reviewed by an attorney. Throughout this time, while Mr. Condi was initiating proceedings against him and other tenants in the building, he was failing to comply with the legalization requirements of the Loft Law, failing to provide the most basic services, such as heat and lighting, and refusing to complete required lead abatement work. Defendant maintains that paragraphs 15 and 18 were necessary to prevent harassing litigation by the landlord, and that all of the provisions of the bargained-for Stipulation are supported by mutual consideration, were reviewed by counsel for the parties beforehand, and, thus, the Stipulation should be upheld in its entirety.

As an initial matter, defendant argues that Green Corp.'s claims for declaratory relief are premature and that there is no justiciable controversy, because his apartment is not yet subject to rent stabilization and the building continues to be an Interim Multiple Dwelling (IMD) subject to the jurisdiction of the Loft Board. However, on reply, Green Corp. presents documentary evidence, namely, a Loft Board order and the initial apartment registration with the Division of Housing and Community Renewal (DHCR), demonstrating that a final certificate of

occupancy was issued on May 30, 2006; on September 28, 2007, the building ceased to be an IMD; and defendant's apartment became a rent-stabilized unit under the jurisdiction of the DHCR with an initial legal regulated rent of $1,540.69. Accordingly, there is a justiciable controversy as to the parties' respective rights under the Rent Stabilization Law (Administrative Code of the City of New York §§ 26-501, *et seq.*) and the regulations promulgated thereunder as the Rent Stabilization Code (RSC).

Green Corp. argues that the phrase "Rent Stabilization Code §§2524.4,5" in paragraph 15 of the Stipulation refers to two major sections of the RSC that protect both landlords and tenants to assure the availability of housing in New York City. RSC § 2524.4 provides a method by which an owner may recover possession of a housing accommodation: (a) for his own use or that of a family member; (b) for charitable or educational purposes on a not-for-profit basis; and (c) if the current occupant is not using it as his primary residence. Section 2524.5 allows an owner to apply to DHCR for permission to refrain from offering a renewal lease to tenants in the event that the owner wishes to remove the housing accommodation from the rental market, for the owner's own use or because it is hazardous and the costs of removing the hazard are more than the value of the structure; or the building is to be demolished; or the building is rehabilitated in accordance with certain state and federal housing laws. Green Corp. argues further that by virtue of the language of paragraph 18 of the Stipulation, all of these statutory rights of the building's owner are not just waived for defendant's lifetime, but could arguably inure to his "successors, assigns, representatives, heirs and executors," and thus serve to displace the rules of the Rent Stabilization Law, including the rule of succession, and also violate the rule against perpetuities' prohibition against remote vesting. In addition, Green Corp. argues

that the Stipulation places a cap of 4% on lease renewal increases, essentially overruling the Rent Guidelines Board.

"It is well settled that the parties to a lease governing a rent-stabilized apartment cannot, by agreement, incorporate terms that compromise the integrity and enforcement of the Rent Stabilization Law. Any lease provision that subverts a protection afforded by the rent stabilization scheme is not merely voidable, but void." *Drucker v Mauro*, 30 AD3d 37, 39 (1st Dept), *appeal dismissed* 7 NY3d 844 (2006).

RSC § 2520.12 provides that: "[t]he provisions of any lease or other rental agreement . . . [that] are inconsistent with the ETPA, the RSL or this Code . . . shall be void and unenforceable." In addition, section 2520.13 of the RSC provides that "[a]n agreement by the tenant to waive the benefits of the RSL or this Code is void." While the language of this latter code section may appear to address only a tenant's waiver, the underlying policy considerations of the Rent Stabilization Law or Code require that neither a landlord nor a tenant can enforce a lease or settlement agreement that is not in compliance with the provisions of the RSC or that circumvents or waives statutory protections, even if the stipulation is favorable to the tenant. *Drucker v Mauro,* 30 AD3d at 38 ("an agreement in purported or actual settlement of a landlord-tenant dispute which waives the benefit of a statutory protection is unenforceable as a matter of public policy, even if it benefits the tenant"). A tenant cannot avoid the public policy and protections of the RSC by entering into private agreements purporting to take a lease out of the rent regulation schema, even if by a stipulated settlement. *390 West End Assoc. v Harel*, 298 AD2d 11, 16 (1st Dept 2002); *Cvetichanin v Trapezoid Land Co.*, 180 AD2d 503, 504 (1st Dept), *lv dismissed* 79 NY2d 933 (1992).

The Court of Appeals has recently dispelled any doubts that a landlord's agreement not to enforce its right under RSC § 2524.4(c) to recover possession of an apartment not occupied by the tenant as his or her primary residence is not enforceable by the tenant. *Riverside Syndicate, Inc. v Munroe*, 10 NY3d 18 (2008), citing *Park Towers S. Co., L.L.C. v Universal Attractions*, 274 AD2d 312 (1st Dept 2000), and *Rima 106, L.P. v Alvarez*, 257 AD2d 201 (1st Dept 1999). In *Rima 106, L.P. v Alvarez*, *supra*, a lease that contained a clause permitting the tenant "unrestricted rights" to occupy the subject apartment as an occasional residence, "with complete immunity from any default claim by the landlord arising by reason of nonprimary occupancy" constituted a waiver of RSC § 2524.4, was "null and void as violative of public policy and the rent control and stabilization statutes and code." 257 AD2d at 203, 204. The First Department, citing its earlier holding in *Cier Indus. Co. v Hessen* (136 AD2d 145, 150 [1st Dept 1988]), noted that:

> "one of the basic and most significant components of the Rent Stabilization Law is its application only to premises used as the primary residence of the tenant [citations omitted]. A tenant of a stabilized apartment who maintains a primary residence elsewhere, and also seeks to retain the stabilized apartment for convenience or for considerations of personal gain, is not one who is a victim of the housing crisis but may rather be said to be a contributing and exacerbating factor in the continuation of the critical shortage of affordable apartments. The aims of the Rent Stabilization Law are better served when such occupancy is discouraged."

257 AD2d at 205-06. Likewise, a provision of a stipulation settling a holdover proceeding that the landlord would never again seek possession of the apartment on the ground that it was not the tenants' primary residence was held to be against public policy and unenforceable in *Park Towers S. Co., L.L.C. v Universal Attractions*, *supra*.

The papers submitted on this motion raise an issue of fact concerning whether Mr. Condi was adequately represented by counsel at the time he executed the Stipulation on behalf of Green Corp. and understood the meaning of paragraphs 15 and 18. Nevertheless, the law is clear that the waiver in paragraph 15 of the Stipulation of Green Corp.'s statutory rights under RSC § 2524.4(c) to seek an eviction of the defendant on the grounds of non-primary residency is void and unenforceable. The waiver of Green Corp.'s rights under the remaining provisions of RSC § 2524.4 as well as RSC § 2524.5, and corresponding limitation of its right to evict defendant only pursuant to RSC § 2524.3 in paragraph 15 of the Stipulation, are also void as against public policy. Green Corp., however, cites no legal precedent that a landlord and tenant may not legally agree that rent increases shall be *lower* than the increases set by the Rent Guidelines Board, and thus, there is no basis to set aside that provision of paragraph 15.

Defendant argues that there are exceptions to the rule that waivers of statutory rights are void and contrary to public policy. Citing *Merwest Realty Corp. v Prager* (264 AD2d 313 [1st Dept 1999]) and *437 Palisade Ave. Realty Corp. v Boyd*, 124 Misc 2d 759 [App Term, 2d Dept 1984]), he argues that where there is an absence of fraud and overreaching, agreements forfeiting regulatory protections have been upheld, particularly when made with the advice of counsel. He avers that it was Mr. Condi who pushed for the Stipulation to be executed, that the agreement was reviewed by Mr. Condi's attorney before he signed it, and that it should be upheld in its entirety.

Neither of these cases assists the defendant, as they both involve a tenant's negotiated surrender of possession of rent-regulated apartments in exchange for some type of forbearance by the landlord, neither of which was deemed an affront to public policy. In

Merwest Realty, *supra*, the tenant was six months behind in paying rent on her rent-controlled apartment and was considering relocating when she, with benefit of counsel, agreed to a payment of $10,000 in exchange for vacating the apartment by a date certain. Likewise, in *437 Palisade Ave. Realty Corp.*, *supra*, the tenant made a timely, but incomplete attempt to renew her lease, and the settlement of her landlord's subsequent holdover proceeding, pursuant to which the tenant signed a three-year lease at a stipulated rent, with no further right of renewal, was deemed a valid settlement of a bona fide dispute made with the advice of counsel and approval of the court. Thus, these cases merely stand for the proposition that a rent-regulated tenant may agree to terminate the tenancy. What is not allowed is an agreement to modify a rent-regulated tenancy in such a way that involves selective invalidation of provisions of the Rent Stabilization Law.

Finally, defendant argues that if the court should find that paragraph 15 of the Stipulation is void and unenforceable, then the court should find the entire agreement void and unenforceable, since that paragraph embodies a necessary and central part of the Stipulation. He contends that paragraph 15 of the Stipulation was not added by him as an attempt to illegally subvert the law or to get Blue Corp. to waive its statutory rights, but only to prevent additional harassment by Mr. Condi through meritless and costly lawsuits. In response, Mr. Condi denies that he has ever harassed the defendant, through litigation or otherwise, and maintains that Blue Corp.'s main objective in entering into the Stipulation was to collect money from a tenant who had not paid rent in over three years, in order to upgrade and legalize the loft building.

When the "main objective of an agreement is illegal, courts will not sever and enforce incidental legal clauses." *Georgia Props, Inc. v Dalsimer*, 39 AD3d 332, 334 (1st Dept 2007), citing *Abright v Shapiro*, 214 AD2d 496, 496-97 (1st Dept 1995) (parties to an illegal

transaction who are in pari delicto may not invoke judicial aid to undo the consequences of their illegal acts). Thus, for example, in *Riverside Syndicate, Inc v Munroe* (10 NY3d at 24), the Court invalidated an entire consent agreement whereby the tenant agreed to pay rent far in excess of the maximum rent allowed by the rent stabilization laws in exchange for the landlord's agreement that the tenant could remain in the apartment as rent-stabilized tenants regardless of their primary residence. Because the primary purpose of the agreement, on both sides, was illegal and the parties were in pari delicto, the entire agreement was deemed void. However, in *Drucker v Mauro* (30 AD3d 37, *supra*), the Court merely invalidated only one article of a lease rider incorporating the terms of a stipulated settlement on the ground that it attempted to permanently remove a rent-stabilized apartment from the Rent Stabilization Law's luxury decontrol provisions. *See also Rima 106, L.P. v Alvarez*, 257 AD2d 201, *supra* (three "sweetheart" provisions of leases declared void, rather than the entire lease).

Here, defendant has failed to raise a triable issue of fact regarding his claim that the waivers in paragraph 15 were the main objective of the Stipulation. The documentary evidence establishes that, in 2004, when the Stipulation was signed, only the one lawsuit seeking defendant's eviction on non-primary residence grounds had been commenced against defendant and that lawsuit was brought in good faith based on defendant's status as a tenured professor at Rice University, his rental of an apartment in Houston, and his admitted subletting of a portion of the duplex apartment in 1999 and 2000. The e-mails between defendant and Mr. Condi between October 2003 and June 2004, in which they discuss the Stipulation reflect that a cordial relationship existed between the two men, rather than a tenant being harassed by his landlord. *See* Kwinter Aff., Exhs. E and F thereto. Most importantly, the e-mails make only one mention

of paragraph 15, and only in connection with the sale of the building to a new landlord.

In addition, key provisions of the Stipulation have already been effectuated -- the building has been legalized and the initial legal regulated rent established by the Loft Board is based on formulas agreed to in the Stipulation. And there is no doubt that defendant benefitted from the Stipulation by Blue Corp.'s: (1) acknowledgment of defendant's status as a protected loft occupant under the MDL; (2) waiver of its right to seek a 20% rent increase upon issuance of the certificate of occupancy, waiver of other rent increases available to it by law, and agreement to a 4% cap on yearly lease renewals; and (3) agreement to legalize the building within 12 months. If, as defendant contends, he continues to reside in the duplex with his wife and children as their primary residence, then he cannot be evicted based on the grounds set forth in RSC § 2524.4(c), and sanctions are available in the event that a frivolous lawsuit is brought. Accordingly, the court finds that the entire Stipulation need not be invalidated, and that Green Corp. has established its right to partial summary judgment on the second cause of action to the extent of declaring the waivers of Green Corp.'s statutory eviction rights in paragraph 15 are void and unenforceable.

For the foregoing reasons, it is:

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Green 333 Corp. for partial summary judgment on the first and second cause of action for declaratory relief is granted to the extent set forth below, and otherwise is denied; and it is

ADJUDGED and DECLARED that the provisions of paragraphs 15 and 18 of the Stipulation of Settlement dated May 22, 2004, that was executed by plaintiff's predecessor in interest and defendant Sanford Kwinter, is void and unenforceable pursuant to sections 2520.12

and 2520.13 of the Rent Stabilization Code and is against public policy, to the extent that paragraphs 15 and 18 purport to waive the rights of plaintiff and its successors, etc., under sections 2524.4 and 2524.5 of the Rent Stabilization Code, and the motion is denied in all other respects; and it is further

ORDERED that plaintiff's third and fourth causes of action, together with defendant's counterclaims, hereby are severed and continued; and it further is

ORDERED that the parties appear for a preliminary conference in Part 55 on November 24, 2008 at 12 noon.

Dated: November 7, 2008

ENTER:

J.S.C.

JANE S. SOLOMON