Garcia v D. Camilleri, LLC

2011 NY Slip Op 30053(U)

January 6, 2011

Supreme Court, New York County

Docket Number: 116368/09

Judge: Louis B. York

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[* 1]
SCANNED ON 1/11/2011

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

PRESENT: Hon. Louis B York Justice

PART 2

Garcia

- v -

Camilleri

INDEX NO. 116368/09

MOTION DATE 11/17/10

MOTION SEQ. NO. 002

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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)

Dated: 1/6/11

LOUIS B. YORK J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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JOSHUA GARCIA,

Plaintiff,

Index No.: 116368/09

-against-

DECISION

D. CAMILLERI, LLC,

Defendant.

----------x

UNFILED JUDGMENT
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LOUIS B. YORK, J.S.C.:

BACKGROUND

Plaintiff moves, pursuant to CPLR 3212, for summary judgment: (1) declaring that the apartment located at 40 Morton Street, Apartment 1A, New York, New York, is subject to rent stabilization and that plaintiff is the rent stabilized tenant; (2) directing defendant to provide plaintiff with a rent stabilized lease for the subject apartment at a lawful rent of $885.52 per month and to register the apartment as a rent stabilized unit with the New York State Division of Housing and Community Renewal (DHCR); (3) awarding plaintiff a rent overcharge in the amount of $36,296.16 for the period commencing in January, 2009, and ending in May, 2010; (4) determining that said overcharge was wilful and awarding plaintiff treble damages in the amount of $108,888.48; (5) dismissing with prejudice the

non-payment proceeding that has been consolidated with this action, pursuant to an order of this court dated January 27, 2010; (6) directing defendant to legalize all portions of said apartment so that it conforms to the certificate of occupancy; and (7) awarding plaintiff his reasonable attorney's fees incurred in this action and the aforementioned non-payment proceeding.

Defendant landlord[1] cross-moves, pursuant to CPLR 3126, to strike plaintiff's complaint based on plaintiff's failure to respond to defendant's document demands or, in the alternative, to compel plaintiff to produce the documents demanded, and for leave to serve an amended answer asserting the affirmative defense of statute of limitations and setting forth counterclaims.

Plaintiff asserts that his tenancy and occupancy of the apartment that is the subject of this action (the apartment) commenced on or about January 1, 2009, pursuant to the terms of a November 24, 2008 lease. Motion, Ex. F. Plaintiff says that, except for the November 24, 2008 lease and its subsequent rider, he has never been given any written lease, lease riders, lease renewals or lease extensions for the apartment.

According to the November 24, 2008 lease, the apartment is

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[1] Defendant's predecessor in interest was David Camilleri, who acquired the property on April 21, 1992, and transferred his interest to defendant on April 29, 2004. Cross Motion, Ex. E. For the sake of simplicity, the term"landlord" is used in this decision to indicate both parties.

not subject to rent stabilization, and sets a full market rent of $4,700.00 per month. *Id.* Plaintiff contends that, despite the landlord's assertion that the apartment was removed from the provisions of rent stabilization based upon high-rent vacancy decontrol, the apartment is actually subject to rent stabilization due to the building's receipt of J-51 property tax benefits from the City of New York. Plaintiff further states that the November 24, 2008 lease does not contain any notice of such tax benefits.

Plaintiff has provided copies of cancelled checks that he paid to the landlord, totaling $51,350.00, representing rent from the period of February, 2009 through May, 2010. In addition, plaintiff paid $4,400.00 to "Quality Living" as a broker's fee.

According to plaintiff, landlord, or its predecessor, ceased filing rent registration statements for the apartment after 1995. However, again according to plaintiff, the building in which the apartment is located is the recipient of benefits under New York City's J-51 tax abatement program for the ten-year period commencing in tax year 2004-2005, and set to expire in tax year 2014-2015. Motion, Ex. H. In addition, the building was the recipient of the same tax benefit for the period commencing with tax year 1995-1996, and expiring in tax year 2005-2006. Motion, Ex. I. A Department of Finance J-51 printout for tax year 2005-2006 indicates that both J-51 tax abatements were effect at that

time. Motion, Ex. J.

Plaintiff also asserts that the apartment, which is rented as a duplex, is, as presently configured, in violation of the building's certificate of occupancy (CO), for which it has received several violations (Motion Ex. M), and plaintiff further requests that landlord be compelled to take all steps to make the apartment conform to the CO. Presently, the apartment has four rooms and a bathroom on the first floor, plus a basement that is partitioned into three rooms and a bathroom.

Plaintiff also seeks to have the court determine his correct rent-stabilized rent by using the Division of Housing and Community Renewal (DHCR) default formula because, plaintiff alleges, no accurate rent history records are available, since landlord removed the apartment from rent stabilization in 1995. In support of his contention as to what the correct rent-stabilized rent should be, plaintiff has provided the rent history of a tenant who has an apartment in the same building, with the same number of rooms, with the lowest rent. Motion, Ex. O.

Lastly, plaintiff seeks treble damages plus his attorney's fees.

In opposition to the instant motion, landlord has provided the affidavit of Brian Billings (Billings), a licensed architect, who states that renovation work was performed on the apartment in

1993, so as to add the basement recreational room to the first-floor unit, for which work the Department of Buildings (DOB) issued a work permit. The DOB issued a letter of completion, which indicates that the partitioning of the basement, which plaintiff asserts is illegal, was approved by the DOB. Opp., Ex. 1. Further, according to Billings, the violations attached to the motion papers do not pertain to the subject apartment, but refer to a different apartment on the same floor.

After the renovations were completed on the apartment, landlord asserts that it was able to charge a new rent of no less than $2,005.00 per month, by reason of the immediately preceding vacancy of the unit prior to the renovations. On November 1, 1993, landlord entered into a lease for the apartment with a new tenant for a monthly rent of $2,005.00, which rent was not challenged, as the fair market rent for the unit. Opp., Ex. N.

In June, 1994, landlord filed the lease indicating a monthly rent of $2,005.00 for the apartment with DHCR. Opp., Ex. K, Sub-Ex. 1. Therefore, according to landlord, as of November 1, 1993, the apartment was no longer subject to rent stabilization, which pre-dates the building receiving J-51 tax abatements. This contention, that the apartment's luxury decontrol prior to the building receiving J-51 tax abatements, is the thrust of landlord's opposition to plaintiff's argument that the apartment is rent stabilized because of the tax benefits conferred on the

building.

Landlord states that it mistakenly neglected to indicate the deregulated status of the apartment in its 1994 annual registration statement, which it corrected in December, 2009, by filing an amended 1994 annual registration statement. Opp., Ex. K, Sub-Ex. 2. Additionally, landlord points out that the DHCR rent roll for the apartment states that the apartment was filed as exempt from rent stabilization at least as of April 1, 1995 by reason of high-rent vacancy. Opp., Ex. N.

Landlord asserts that, prior to granting plaintiff a lease, plaintiff was interviewed but mislead landlord as to his intended use of the apartment. Landlord states that plaintiff was told that the basement portion of the unit was to be used for recreational purposes only, to which plaintiff assented. However, according to landlord, plaintiff actually used the basement portion of the apartment as an illegal bed-and-breakfast.

Landlord also states that, based on the recent decision in *Roberts v Tishman Speyer Properties, L.P.*, 13 NY3d 270 (2009) (*Roberts*), it has filed and served registration statements for the years 1994 through 2009 for the apartment, under protest, asserting that the apartment was properly deregulated prior to the grant of J-51 benefits. In this context, landlord is seeking to amend its answer to interpose a request for a declaratory

judgment that the apartment is not subject to rent stabilization.

Landlord also maintains that the use of the DHCR default formula to determine the lawful rent is only available in instances of egregious fraud, which, it avers, does not appear in the present action. Further, landlord asserts that there are no other apartments in the building with the same number of rooms as the subject apartment, so there is no automatic way to calculate such alleged lawful rent. It is noted that plaintiff states that the apartment has four rooms, whereas landlord states that the apartment has five rooms. Moreover, landlord insists that, even if the apartment were deemed to be rent-stabilized, the figures used by plaintiff to calculate the alleged lawful rent are inaccurate, and that the legal monthly rent would be significantly higher than the amount that plaintiff claims.

Finally, landlord argues that plaintiff's use of the apartment for an illegal bed-and-breakfast would automatically entitle landlord to eject him and would also deprive plaintiff of any status as a lawful rent stabilized tenant. Cross Motion, Ex. L.

In addition to its opposition, landlord also cross-moves to strike plaintiff's complaint for his failure to comply with landlord's document production demands, or, in the alternative, to compel plaintiff to produce those documents. Further, landlord seeks leave to file an amended answer to add the

affirmative defense of the statute of limitations and five counterclaims.

The replies provided by both parties basically mimic their initial arguments.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

That part of plaintiff's motion seeking to have the apartment declared to be subject to rent stabilization is granted.

In *Roberts*, the Court of Appeals affirmed the Appellate Division's finding that:

"building owners who receive J-51 benefits forfeit

> their rights under the luxury decontrol provisions even if their buildings were already subject to the RSL."

Roberts, 13 NY3d at 283.

Further,

> "dwelling units in J51 buildings 'shall be subject' to continued protection under rent stabilization 'until the occurrence of the first vacancy of such unit after such benefits are no longer being received,' except where 'each lease and renewal thereof for such unit for the tenant in residence at the time of the expiration of the tax benefit period' has included a proper notice informing the tenant, *inter alia*, that the unit will become deregulated upon the expiration of the tax benefit period."

Spaeda v Bakirtjy, 189 Misc 2d 222, 223 (App Term, 1st Dept 2001).

In *Roberts*, the Court specifically states that the statute concerning rent stabilization and J-51 abatements was never intended to create two categories of buildings, one category for buildings that were rent stabilized prior to receiving J-51 benefits, for which luxury decontrol was available in 1993, and another category for those buildings that became rent stabilized as a result of receiving J-51 tax abatements. *Roberts*, 13 NY3d at 286. One of the impacts of *Roberts* is to treat all units in buildings receiving J-51 tax abatement equally, meaning, in the instant case, that landlord may not receive J-51 abatements and have luxury decontrolled apartments in the same building. Hence, the court finds that plaintiff's apartment is subject to rent stabilization because the building in which it is situated is receiving J-51 tax benefits.

That portion of plaintiff's motion seeking to have the court declare that the lawful rent for his apartment is $885.52 per month and that he be given a rent stabilized lease to that effect is denied.

Plaintiff contends that the court should use the DHCR default formula to determine the lawful rent for his apartment because there are no valid rent registration statements for the four years preceding the institution of the instant action.

> "[A] default formula 'should be used to determine the base rent in an overcharge case where ... no valid rent registration statement was on file as of the base date.' That is, while the applicable four-year statute of limitations reflects a legislative policy to 'alleviate the burden on honest landlords to retain rent records indefinitely', and thus precludes us from using any rental history prior to the base date, where there is fraud or an unlawful rent, the lease is rendered void. The legal rent should be established by using the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the base date [internal citations omitted]."

Matter of Grimm v State of New York Division of Housing and Community Renewal, Office of Rent Administration, 68 AD3d 29, 31-32 (1st Dept 2009) aff'd 15 NY3d 917 (2010); *Matter of Partnership 92 LP v State of New York Division of Housing and Community Renewal,* 11 NY3d 859 (2008)(the default formula should be used where no reliable rent records are available).

The court notes that plaintiff relies heavily on *Grimm, supra,* for the argument that landlord's fraud allows the court to use the default formula. However, in *Grimm*, the landlord totally

disregarded the registered rent and knowingly entered into an agreement with the previous tenant to lease the unit at an unlawful rent. When that plaintiff tenant took possession, the lease did not indicate that the apartment was rent stabilized, based on the landlord's fraudulent lease with the previous tenant. Such obvious and blatant fraud is absent from the case at bar.

However, in the instant matter, too many questions of fact exist to permit the court to calculate the lawful rent for the apartment at this time.

There is conflicting evidence as to the actual number of rooms in the apartment and whether there are any other apartments in the building with a similar number of rooms, which would preclude the court from using any one apartment as the similar apartment for rent calculation without more evidence as to the unit's actual similarity.

Moreover, despite plaintiff's assertion that landlord's renting the apartment at a decontrolled rent while receiving J-51 tax abatements represents fraud, in and of itself, thereby allowing the court to use the default formula, the court disagrees with plaintiff's conclusion. Until the decision in *Roberts*, landlords were relying on prior DHCR determinations that permitted luxury decontrol in buildings that were receiving J-51 tax benefits. Therefore, if this landlord was merely following

DHCR precedent, acting under the color of law, it would be difficult to see its actions as fraudulent. Conversely, if this landlord knowingly falsified his rent records in order to circumvent the rent stabilization law, plaintiff's assertions would have weight. However, at this juncture, too little evidence has been provided for the court to make any determination as to the apartment's lawful rent with respect to using the four-year statute of limitations or the default formula.

Since landlord has stated that it has filed the apartment as rent stabilized with DHCR, even though such filing was allegedly done under protest, that portion of plaintiff's motion seeking to have the apartment so registered is denied as moot.

That portion of plaintiff's motion seeking to be awarded a rent overcharge in the amount of $36,296.16 is denied for the reasons previously stated; i.e., the court cannot, at this time, calculate the lawful rent for the apartment and, therefore, it cannot calculate any alleged overcharge.

That portion of plaintiff's motion seeking to have the court determine that landlord's overcharge was wilful, thereby entitling plaintiff to treble damages, is denied because questions of fact exist that preclude the court from making such a finding at this time, as stated above.

That portion of plaintiff's motion seeking to have the court

dismiss with prejudice the non-payment summary proceeding instituted against him by landlord based on landlord's failure to indicate the apartment's rent stabilized status is denied.

Although the petition in a summary proceeding must meet all statutory requirements, only

> "deliberate misrepresentation of the rent-stabilized status of a leasehold subjects a petition to strict construction as a matter of equity, subjecting the summary proceeding to dismissal. Here, any misstatement concerning whether the premises were subject to the Rent Stabilization Law resulted from [possible] uncertainty surrounding the status of [plaintiff]'s tenancy and cannot be ascribed to a venal motive [, at least at this time][internal citations omitted]."

546 West 156th Street HDFC v *Smalls,* 43 AD3d 7, 11 (1st Dept 2007).

That portion of plaintiff's motion seeking an order compelling landlord to legalize all portions of the apartment is denied.

Conflicting evidence has been presented in this matter that precludes the court from determining, at this point in time, whether the partitions in the basement portion of the apartment violate the building's CO. *See generally 625 West End, Inc.* v *Howard,* 2001 NY Misc Lexis 729, 2001 NY Slip Op 40496(U) (App Term, 1st Dept 2001).

Lastly, the court denies that portion of plaintiff's motion seeking attorney's fees as premature.

That portion of landlord's cross motion seeking leave to

serve an amended answer is granted in part and denied in part.

Pursuant to CPLR 3025, a motion to amend an answer should be freely given, unless there is undue delay in seeking leave to amend, the amendment causes prejudice to the plaintiff, or the amendment lacks merit. *Ozen v Yilmaz,* 181 AD2d 666 (2d Dept 1992). In the instant matter, the motion for leave to amend was made within six months of serving the initial answer, which does not constitute undue delay. *Id.* Further, plaintiff has not argued, nor is there any evidence to suggest, that the proposed amendments would prejudice plaintiff at this relatively early stage in the proceedings. However, the court must still evaluate whether the proposed changes lack merit.

Landlord first seeks to add a defense of the statute of limitations.

> "Leave to amend pleadings is to be freely given absent prejudice or surprise directly resulting from the delay. Further, this court has held that the late assertion of a Statute of Limitations defense is no barrier to amendment; [l]ateness must be coupled with significant prejudice to plaintiff [internal quotation marks and citations omitted]."

Cseh v New York Transit Authority, 240 AD2d 270, 271 (1st Dept 1997).

Plaintiff opposes this portion of the proposed amendment by asserting that a four-year look-back period is inapplicable to the case at bar, and that the default period for determining the legal rent is appropriate. However, as discussed above,

questions of fact remain regarding the calculation of the legal rent and, consequently, it cannot be said, as a legal certainty, at this time, that the four-year statutory period may not be applicable.

Landlord also seeks to amend its answer by asserting five counterclaims: (1) ejectment; (2) breach of lease; (3) quantum meruit; (4) use and occupancy, pursuant to Real Property Law (RPL) § 220; and (5) declaratory judgment that the apartment is not subject to the Rent Stabilization Law (RSL).

Plaintiff opposes the inclusion of the first counterclaim based on an argument that the basis of the claim is plaintiff's alleged holding over of the apartment after the termination of the lease, which cause of action does not lie for rent stabilized apartments. However, landlord asserts that this counterclaim is based on plaintiff's illegal use of the apartment as a bed-and-breakfast.

A tenant in a rent stabilized apartment has a perpetual right to renewal of the lease (*Rima 106, L.P. v Alvarez,* 257 AD2d 201 [1st Dept 1999]), but is prohibited from profiteering from the use of such unit. *Id.* If a rent-stabilized tenant violates the law or the provisions of the RSL, he or she may be subject to an action for ejectment. *Id.; Katz Park Avenue Corp. v Jagger,* 46 AD3d 186 (1st Dept 2007) aff'd 11 NY3db 314 (2008). However, "when there is a valid landlord-tenant relationship, a predicate

notice must be served on the [tenant] before commencement of an ejectment action. ... In the absence of the giving of such notice, an ejectment action will not lie [internal quotation marks and citation omitted]." *Prana Growth Fund I, L.P. v Lazala*, 8 Misc 3d 667, 668 (Sup Ct, NY County 2005).

There is no evidence that plaintiff was ever served with a notice of termination based on his alleged illegal use of the apartment. Hence, this counterclaim cannot be maintained.

The answer may be amended to assert the second counterclaim alleging a breach of the lease. As stated above, if, as alleged, plaintiff was using all or part of the apartment as a bed-and-breakfast, thereby profiteering from the lease of a rent stabilized apartment, he would have breached the lease.

The amended answer may not include a counterclaim for quantum meruit. Where, as here, there is a contract that governs the issue in dispute, a cause of action based on quantum meruit does not lie. *Melissakis v Proto Construction and Development Corp.*, 294 AD2d 342 (2d Dept 2002).

Landlord may not amend his answer to assert a counterclaim for use and occupancy. Since landlord failed to serve plaintiff with a predicate notice of termination based on an illegal use of the apartment, plaintiff is still in possession as a rent stabilized tenant, and landlord is entitled to the lawful rent. Use and occupancy is only permitted when a tenant holds over

after the termination of a leasehold, which has yet to happen in the instant matter, based on the court's conclusion that the apartment is subject to the RSL.

The answer may not be amended to assert a counterclaim to declare that the apartment is not subject to the RSL, based on the court's earlier determination on plaintiff's motion.

Lastly, the court denies that portion of landlord's cross motion seeking to strike plaintiff's complaint for failing to respond to landlord's discovery demands, and also denies landlord's alternative request to compel plaintiff to respond to those demands.

Where a party disobeys a court order and, by his or her conduct, frustrates discovery as permitted by the CPLR, dismissal of the party's pleadings is within the sound discretion of the court. *Zletz v Wetanson,* 67 NY2d 711 (1986). Although striking the pleadings is a drastic measure, it may be appropriate in instances in which a party's failure to comply has been deliberate or contumacious. *Henry Rosenfeld, Inc. v Bower & Gardner,* 161 AD2d 374 (1st Dept 1990). In the instant matter, such a remedy would be inappropriate.

The court notes that the cross motion lacks copies of plaintiff's allegedly deficient responses and, more importantly, lacks any explanation or analysis as to why the responses are improper. Moreover, there is no evidence of a prior order of

this court compelling discovery which was disobeyed by plaintiff. *Double Fortune Property Investors Corp. v Gordon,* 55 AD3d 406 (1st Dept 2008). As a consequence, it cannot be concluded that plaintiff has acted wilfully or deliberately so as to warrant striking the complaint.

Similarly, since the cross motion lacks plaintiff's responses or any analysis as to why they are deficient, the cross motion offers the court no basis for determining the propriety of landlord's demands and plaintiff's responses so as to compel plaintiff to supplement his responses.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of plaintiff's motion seeking to have the apartment declared to be subject to rent stabilization is granted; and it is further

ADJUDGED and DECLARED that the premises known as Apartment 1A, 40 Morton Street, New York, New York, is subject to the Rent Stabilization Law and that plaintiff is the rent stabilized tenant thereof; and it is further

ORDERED that the remainder of plaintiff's motion is denied; and it is further

ORDERED that the portion of defendant's cross motion seeking leave to amend his answer is granted, in part, as follows: leave is granted to amend the answer by adding a defense based on the

statute of limitations and adding a counterclaim for a breach of the lease, and to this extent the amended answer in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that the remainder of defendant's cross motion for leave to amend the answer is denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 205, 71 Thomas Street, on Feb. 2, 2011, at ~~9:30~~ 2:00 A.M./P.M.

Dated: 1/6/11

ENTER:

Louis B. York, J.S.C.

LOUIS B. YORK

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 118)