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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Index Number : 106701/2010

GLYNN, JONATHAN

VS

177 WEST 26TH STREET

Sequence Number : 003

SUMMARY JUDGMENT

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 ...	1
Answering Affidavits — Exhibits _____	2
Replying Affidavits _____	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 8/8/11

HON. EILEEN A. RAKOWER 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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

JONATHAN GLYNN,

Plaintiff,

- against -

177 WEST 26TH STREET REALTY CORP., and ELIAS BOCHNER,

Defendants.

----------X

Index No. 106701/10

DECISION and ORDER

Mot. Seq. 003

HON. EILEEN A. RAKOWER

Jonathan Glynn ("Plaintiff") states in his complaint that he is the tenant of a rent regulated loft unit located at 177 West 26th Street in New York County ("the Building"). Defendant Elias Bochner is the managing member of defendant 177 West 26th Realty LLC (incorrectly sued herein as 117 West 26th Street Realty Corp.) ("Owner"), owner of the building. Plaintiff alleges that he and Bochner "formed a business relationship," whereby Plaintiff agreed to manage and maintain certain units in the Building. Pursuant to this relationship, "Defendants agreed to grant Plaintiff a tenancy for nine units ("the subject units") in the premises in exchange for the management of the said designated units ...."

Plaintiff states that, despite the Building being subject to Article 7-C of the Multiple Dwelling Law ("MDL"), or "Loft Law," "defendants have steadfastly refused to comply with the legalization requirements of the Loft Law ...." Plaintiff further alleges that he has "expended time, money and resources in an effort to legalize the premises on defendants' behalf," and that defendants have collected rent from Plaintiff covering the subject units for over twenty years, "with full knowledge of Plaintiff['s] expenditure of time, money and resources to maintain, manage and improve the premises." Plaintiff also alleges that defendants have wrongfully collected rent from the designated units despite their failure to bring the Building into full compliance with the Loft Law. Lastly, Plaintiff alleges that defendants have permitted the existence of, and failed to correct conditions in the Building which violate the warranty of habitability.

Plaintiff seeks an injunction staying all eviction proceedings against him. Plaintiff also seeks restitution, alleging that the designated units were "provided and granted to Plaintiff as consideration in exchange for the substantial monetary and other resources provided by Plaintiff to maintain, manage and improve the premises."

On or around August 3, 2010, defendants joined issue and asserted two counterclaims. The first counterclaim alleges that Plaintiff is "illegally interfering with Landlord's direct landlord-tenant relationship with the occupants-sub-tenants of the Units," and seeks an injunction enjoining Plaintiff from interfering with collecting rent with the subtenants of the designated units. Defendants' second counterclaim sought attorney's fees.

On December 17, 2010, defendants served an amended answer with fourteen counterclaims upon Plaintiff. These counterclaims seek ejectment of Plaintiff from the subject units, and alleged unpaid rent from April 1, 2010 forward.

Presently before the court is a motion by defendants for an order pursuant to CPLR §3212 dismissing the complaint and granting defendants judgment on their counterclaims; and referring the issue of use and occupancy and/or rent, as well as the issue of attorney's fees, to a referee to hear and report. Defendants state that Plaintiff originally leased the subject units (Units 200, 201, 204, 301, 304, 501, 504, 600, and 604) from the years 1988 through 1994. Defendants annexed the respective lease agreements. All of these leases expired between 1991 and 1998 (all but three of them expired in 1997). In July of 2010, defendants served nine thirty-day notices to terminate Plaintiff's possession of the designated units effective August 31, 2010. Defendants claim that Plaintiff have subleased each of the designated units to others for more than ten years, and does not use any of the units as his primary residence.

During proceedings held on the record on August 31, 2010, Plaintiff's counsel acknowledged that Plaintiff rented eight of the nine units to others as a business, but maintained that Plaintiff uses Unit 501 as his primary residence. In the instant motion, defendants assert that Plaintiff does not use Unit 501 as his primary residence, and in fact rents this unit like the others. Defendants submit the affidavit of Merisa Ferrarin, resident of Unit 604. Ferrarin states that she originally sublet 604 from Plaintiff, and for approximately ten years, until August 2010, worked for Plaintiff as a manager of eight of the nine units (including her own). She states that she would make leases with Plaintiff's subtenants, collect rent, and resolve any other

landlord/tenant issues in the eight units. Ferrarin states that Plaintiff

> ran and runs a real estate business, including unit 501 which he himself rented over the years and now rents out to different customers that he had and has for short term stays, much like a hotel. Between these short term stays with different people, occasionally, [Plaintiff] would use unit 501, but I know that unit 501 is not now and has not been, in many years, used by [Plaintiff] as his primary residence. Over the years I have continuously seen different people use Unit 501.

Ferrarin further states that she knows Plaintiff to maintain his primary residence at 11 William Street in Sag Harbor, New York. She states that she knows this because she would contact him at the Sag Harbor address and previously visited him there.

Defendants also submit the affidavit of Stanislaw Wasyk. Wasyk states that he has been the Building Superintendent for the last six years, and in that time, has been in the building every day, aside from weekends and holidays. Wasyk further states that "unit 501 was continuously rented to different people for short term stays of a day, a week or a month, much like a hotel .... Rarely, if ever in the last 6 years did [Plaintiff] himself stay in the Building much less in Unit 501."

Defendants further supply the affidavit of Isaac Mandelbaum, Building Manager. Mandelbaum states that he has been in the building on a daily basis for the last six years. In that time, Mandelbaum states that he has rarely seen Plaintiff in the Building. Moreover, he "know[s] that he runs a real estate business of renting out all of the 9 units in the Building, including Unit 501 ...." Mandelbaum states that Plaintiff does not use Unit 501 as his residence but, "on a rare occasion, he may be at the building occupying Unit 501 between rentals."

Defendants annex a printout from Plaintiff's website www.jngproperties.net which lists "Chelsea 3 Bedroom Loft unit 501" as "Available for long or short term rental." Defendants also annexes a printout from the website rentalo.com advertising Unit 501 as available to rent. The printout sets forth rates for the unit, and shows a year-round "Availability Calendar" for booking the unit. In addition, defendants annex a copy of the deed evidencing Plaintiff's ownership of the house at 11 William

Street in Sag Harbor. Defendants also annex records from the New York City Board of Elections which demonstrate that, since September 23, 2004, Plaintiff listed his address as 332 Bleecker Street. In addition, records from the Suffolk County Board of Elections show that Plaintiff registered to vote there in 2000, indicating that he resided at 11 William Street in Sag Harbor.

With respect to Plaintiff's restitution claim, defendants state that there was never any agreement made with Plaintiff to compensate him for any improvements made to the nine units, and that what Plaintiff did "was for his own benefit" in subletting the units out.

Plaintiff submits his own affidavit in opposition, as well as an attorney's affirmation. Plaintiff states that "[t]he written leases which all expired in or about 1997 did not reflect the nature of our contractual relationship ...." He claims that, from the time he initially took possession of the units, "the Owner delegated to [him] the authority to manage, maintain and improve various [units]" in the Building. They agreed that Plaintiff would convert uninhabitable units into residential units "in order to assist the Owner in the process of creating legal space under the Loft Law. The Owner agreed that upon termination of our relationship there would be consideration paid for the transfer of the units to the Owner." Plaintiff states that he expended his own funds to put in floors, electrical wiring, plumbing, bathroom fixtures, partition walls, appliances, and furniture. In addition, Plaintiff managed and maintained the nine units, and paid insurance, water and sewage charges. The owner, on the other hand, was to maintain the common areas, elevators, and the heating system.

Plaintiff alleges that while he has properly maintained all of the nine units in his possession, defendants have failed to maintain the common areas, have been cited for numerous code violations, and have failed to obtain a certificate of occupancy. Plaintiff claims that, due to the owner's failure to properly maintain the Building and bring it into conformity with applicable laws and codes, he has expended his own funds to put the Building "on a path toward compliance."

Plaintiff asserts that he does in fact occupy Unit 501 as his primary residence, and has lived there since 1997. He annexes copies of tax returns and bank records which he claims establish that he resides in Unit 501. He states that he would occasionally sublet Unit 501, but did so with the owner's permission and continued to maintain 501 as his primary residence. He further states that he uses the Bleecker

Street address as a "post office box," and that "[t]here is no residence at that location."

Plaintiff further states that previously, in or around 2004, defendants indicated that they wished to terminate the business relationship with Plaintiff and would compensate Plaintiff for the improvements made to the designated units. Now, Plaintiff states that defendants seek to retake the units without compensating Plaintiff, contrary to their initial agreement at the outset of their relationship.

With respect to alleged unpaid rent, Plaintiff alleges that Owner is and has been collecting rent directly from the subtenants, and claims that there are no rent arrears at this time.

In reply, defendants note that Plaintiff's tax records are undated. Indeed, cover sheets from Plaintiff's accountant accompanying the returns are dated June 20, 2010, after this litigation was commenced. They further provide a printout from Plaintiff's website jngproperties.net showing that Plaintiff continues to advertise Unit 501 as "[a]vailable for short or long term lease."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]). "[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, 'the facts must be viewed in the light most favorable to the nonmoving party'" (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

Here, the court finds that defendants are entitled to an order of ejectment with respect to all of the subject units except Unit 501. It is undisputed that Plaintiff has

been using eight of these units as rental units to rent to subtenants as a source of income. Moreover, the record is equally undisputed that Plaintiff's leases with respect to these units expired in the 1990s, and that, accordingly, Plaintiff held the units as a month-to-month tenant. Inasmuch as defendants served Plaintiff with written 30-day termination notices for each of the respective units, defendants are entitled to possession of those units (*see Lower Manhattan Loft Tenants v. New York City Loft Board*, 104 A.D.2d 223[1st Dept. 1984]).

As for Unit 501, the court finds that issues of fact preclude the court from finding, as a matter of law, that 501 is not Plaintiff's primary residence. In his affidavit, Plaintiff explains that he uses the Bleecker Street address as a post office box, and that, although he is "present in the building an overwhelming majority of [the] time," he is occasionally absent due to his overseeing his real estate investments elsewhere, and due to his charitable work in Haiti in the aftermath of the 2010 earthquake. Plaintiff states that, during those occasions in which he is traveling, he will sublet Unit 501, but he maintains that unit as his "principal domicile and primary residence." While the documents and affidavits proffered by defendants all constitute evidence supporting their position that 501 is not Plaintiff's primary residence, they are not determinative for purposes of summary judgment (*see* 9 NYCRR §2520.6(u)(1), (3), and (4)) (use of different address on document filed with public agency, use of different address on voter registration, and subletting of subject premises all constitute non-dispositive "evidence which may be considered").

Nor have defendants demonstrated their entitlement to summary judgment on the issue of rent arrears on the record before the court. The conflicting affidavits of Bochner (who asserts that Plaintiff has failed to pay rent) on the one hand, and Plaintiff (who asserts that all rent has been paid) on the other, constitute an issue of fact to be resolved at trial.

Turning now to Plaintiff's causes of action which remain after this court's August 31, 2010 order, Plaintiff's first cause of action (which seeks an order enjoining defendants from evicting Plaintiff) is dismissed as to all units except Unit 501, in light of the foregoing.

As for Plaintiff's second cause of action,

> The essential inquiry in any action for unjust enrichment or

> restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Grombach Prods v. Waring, 293 N. Y. 609, 615*; *American Sur. Co. v. Conner, 251 N. Y. 1, 8-11*; *Miller v. Schloss, 218 N. Y. 400, 407*; *Schank v. Schuchman, 212 N. Y. 352*; *Restatement, Restitution, § 1*; 50 N. Y. Jur., Restitution, *§§ 1, 3*). Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice (50 N. Y. Jur., Restitution, § 7). Generally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent (*Restatement, Restitution, §§ 1, 142*, esp. Comment *b*; *id.*, § 155, including Comment *b*).

(*Paramount Film Distrib. Corp. v. State*, 30 N.Y.2d 415, 421 [1972]).

Here, the court finds that issues of fact preclude summary judgment on Plaintiff's second cause of action. First, there is a factual dispute as to whether defendants promised to compensate Plaintiff when he took possession of the subject units. Plaintiff claims that, from the outset, it was understood that Plaintiff would undertake substantial improvements to the leased premises at his own expense, and that, at the end of their business relationship, defendants would compensate him for the fair value of improvements made. Secondly, assuming the existence of this understanding between Plaintiff and defendants, it is unclear in the record whether, throughout the course of Plaintiff's subleasing the subject units, he was able to recoup the expenditures he made vis-a-vis the nine units.

With respect to defendants' request for reasonable attorneys fees, such fees shall be assessed at the time of trial, as several causes of action remain unresolved in favor of either party.

Nor at this stage have defendants demonstrated that they are entitled to dismissal of Plaintiff's warranty of habitability claims concerning Unit 501.

Based upon the foregoing, defendant's motion for summary judgment is granted in part and denied in part. Settle order.

DATED: August 8, 2011

EILEEN A. RAKOWER, J.S.C.