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| Roberts v W7879 LLC |
| 2011 NY Slip Op 33925(U) |
| November 16, 2011 |
| Sup Ct, NY County |
| Docket Number: 110213/10 |
| Judge: Joan M. Kenney |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JOAN M. KENNEY
J.S.C.

PRESENT: _____
Justice

PART 8

Index Number : 110213/2010
ROBERTS, JUDITH COHEN
vs.
W7879 LLC
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. 110213/10
MOTION DATE 002 ↗
MOTION SEQ. NO. 10/7/11 ↘

The following papers, numbered 1 to 22, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1-10

Answering Affidavits — Exhibits _____ No(s). 11-17

Replying Affidavits _____ No(s). 18-22

FILED

Upon the foregoing papers, it is ordered that this motion is

NOV 22 2011

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

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

Dated: 11/17/11

Joan M. Kenney J.S.C.
JOAN M. KENNEY

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

JUDITH COHEN ROBERTS,

Plaintiff,

- against -

W7879 LLC, N, K AND S LLC, WEST 79TH LLC, MN
BROADWAY, LLC, LISA W. NAGEL IRREVOCABLE T,
LLC, DESCENDENTS SINGLE TRUST U/W MICHAEL
NAGEL, EVELYN NAGEL AND ALAN NAGEL
TRUSTEES, DESCENDENTS SINGLE TRUST U/W
MICHAEL NAGEL FBO STEVEN NAGEL, ET AL.,
STEVEN NAGEL AND EVELYN NAGEL TRUSTEES,
DESCENDENTS SINGLE TRUST U/W MIACHEL
NAGEL FBO EVELYN NAGEL, ET AL., EVELYN
NAGEL AND ALAN NAGEL TRUSTEES,
DESCENDENTS SINGLE TRUST U/W MICHAEL
NAGEL FBO CLAIR NAGEL, ET AL., CLAIR NAGEL
JERNICK AND ALAN NAGEL TRUSTEES, AND
DESCENDENTS SEPARATE TRUST U/W MIACHEL
NAGEL FBO ALAN NAGEL, ET AL., ALAN NAGEL and
STEVEN TRUSTEE,

Defendants.

DECISION AND ORDER
Index Number:110213/10
Cal.: 10/07/2011
Motion Seq. No.: 002

FILED

NOV 22 2011

NEW YORK
COUNTY CLERK'S OFFICE

KENNEY, JOAN M., J.

Appearances

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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss and cross-motion for injunctive relief:

Papers

Notice of Motion, Affirmation, Affidavit, Exhibits, & Memorandum
Notice of Cross-Motion, Affidavit, Affirmation, & Exhibits
Reply Affirmation, Exhibits, & Memorandum

Numbered

1-10
11-17
18-22

In this action, defendants seek an Order, pursuant to CPLR 3211 (1) and (7), dismissing the amended complaint.

Plaintiff Judith Cohen Roberts (plaintiff) cross-move for injunctive relief, pursuant to CPLR 6301, staying defendants from offering a renewal lease, collecting rent increases to plaintiff, and reducing the plaintiff's rent/use and occupancy.

Briefly, plaintiff is the current tenants of a unit in defendants' building. In her amended complaint, plaintiff alleges three causes of action: 1) a declaration that defendants unlawfully

deregulated plaintiff unit; 2) a money judgment and treble damages on the grounds that defendants fraudulently overcharged plaintiff on her rent by *inter alia* falsely misrepresenting the rent regulated status of their unit despite accepting J-51 tax benefits; and 3) attorneys fees.

Although defendants do not dispute that plaintiff's unit was mistakenly deregulated, they argue that the action should be dismissed because defendants have already re-regulated the apartment and reimbursed plaintiff for overcharges.

Plaintiff does not dispute that defendants sent them a reimbursement check, but allege in their cross-motion that defendants improperly calculated the overcharges since defendants' attorney calculated the amount of overcharges based on a four-year statute of limitations period in accordance with CPLR 213-a, which states that "no award or calculation of any award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced."

At the outset, this Court notes that discovery is yet to begin and defendants have not interposed an answer to deny plaintiff's assertions of fraudulent conduct in her amended complaint.

On a motion to dismiss under CPLR 3211 (1) based on documentary evidence, defendants' documentary evidence must refute plaintiff's factual allegations (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). Under CPLR 3211 (7) for failure to state a claim, the facts as alleged in the complaint must be accepted as true, and plaintiff is given the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270 [1st Dept 2004]). Here, defendants failed to meet its entitlement to dismissal of the amended complaint under either provision. Within the meaning of CPLR 3211 (a) (1), defendants sole assertion that his reimbursement calculation is accurate does not constitute "documentary evidence." Unlike other forms of acceptable "documentary evidence" (*see e.g. 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 4 [1st Dept 2004] [lease]; *Bronxville Knolls, Inc. v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995] [integrated mortgage and note]; *Casamassima v Casamassima*, 30 AD3d 596, 596 [2d Dept 2006] [irrevocable trust]), an affidavit by its very nature, cannot conclusively establish a defense as a matter of law (*see Weil*,

Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 271 [1st Dept 2004]). Alternatively, pursuant to CPLR 3211 (a) (7), plaintiff's three causes of action asserted in its amended complaint are sufficient to survive a motion to dismiss at this juncture of the litigation (*Seymour Winick, Inc., v Ariana Realty Comp.*, 171 AD2d 785, 786 [1991]).

It is well settled that in order to be entitled to a preliminary injunction, a movant must clearly demonstrate: (1) a likelihood of success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*St. Paul Fire and Marine Ins. Co. v York Claims Serv., Inc.*, 308 AD2d 347, 348 [1st Dept 2003]). Since a mandatory injunction should not be granted, absent extraordinary circumstances (*see id.*), plaintiff's cross-motion for injunctive relief is denied. Here, and in the absence of plaintiff's showing that they are likely to succeed on the merits of her claims (*i.e.* a declaration and additional rent overcharges over and against the reimbursement sent by defendants), plaintiff has failed to demonstrate in her cross-motion an entitlement to a stay of *inter alia* renewing plaintiff's lease and collecting rent increases. Although plaintiff claims that immediate and irreparable harm will occur if the within injunctive relief is not granted, she has failed to specify the irreparable injury or extraordinary circumstances, if any, that would warrant granting such a drastic remedy.

Plaintiff's reliance on *In re Berry Estates, Inc.*, 812 F2d 67, 68 [2d Cir 1987], which stands for the proposition that city and State housing laws are to be obeyed and none shall benefit from their violation, is inapposite because a violation of any city or State housing laws, if any, has not been affirmatively proven at this procedural juncture. Accordingly, it is:

ORDERED that defendants' pre-answer motion to dismiss is denied, in its entirety; and it is further

ORDERED that plaintiff's cross-motion is denied; and it is further

ORDERED that the aforementioned defendants are directed to serve an amended answer, if any, to the amended complaint within 20 days from the date of this decision; and it is further

ORDERED that the parties are to appear for a compliance conference in Room 304 at 71 Thomas Street, New York, New York on January 12, 2012, 10:00 A.M.

Dated: November 16, 2011

FILED

E N T E R

Hon. Joan M. Kenney, J.S.C.

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