

**Stone v W7879 LLC**

2011 NY Slip Op 33936(U)

November 16, 2011

Sup Ct, NY County

Docket Number: 109621/10

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY  
J.S.C. Justice

PART 8

Index Number : 109621/2010  
STONE, JAMES W.  
vs.  
W7879 LLC  
SEQUENCE NUMBER : 002  
DISMISS

INDEX NO. 109621/10  
MOTION DATE 10/7/11  
MOTION SEQ. NO. 002

The following papers, numbered 1 to \_\_\_\_\_, 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) 12-22

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

**FILED**

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: 11/16/11

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

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 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

-----X  
JAMES W. STONE and LISA J. KIELL,

Plaintiffs,

- 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.  
-----X

**DECISION AND ORDER**

Index Number: 109621/10

Cal.: 10/7/2011

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.

Plaintiffs James W. Stone and Lisa J. Kiell (plaintiffs) cross-move for injunctive relief, pursuant to CPLR 6301, staying defendants from offering a renewal lease, collecting rent increases to plaintiffs, and reducing the plaintiffs' rent/use and occupancy.

Briefly, plaintiffs are the current tenants of a unit in defendants' building. In their amended complaint, plaintiffs allege three causes of action: 1) a declaration that defendants unlawfully

deregulated plaintiffs' unit; 2) a money judgment and treble damages on the grounds that defendants fraudulently overcharged plaintiffs on their 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 plaintiffs' unit was mistakenly deregulated, they argue that the action should be dismissed because defendants have already re-regulated the apartment and reimbursed plaintiffs for overcharges.

Plaintiffs do 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 plaintiffs' assertions of fraudulent conduct in the amended complaint.

On a motion to dismiss under CPLR 3211 (1) based on documentary evidence, defendants' documentary evidence must refute plaintiffs' 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), plaintiffs' 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.*), plaintiffs' cross-motion for injunctive relief is denied. Here, and in the absence of plaintiffs' showing that they are likely to succeed on the merits of their claims (*i.e.* a declaration and additional rent overcharges over and against the reimbursement sent by defendants), plaintiffs have failed to demonstrate in their cross-motion an entitlement to a stay of *inter alia* renewing plaintiffs' lease and collecting rent increases. Although plaintiffs claim that immediate and irreparable harm will occur if the within injunctive relief is not granted, they have failed to specify the irreparable injury or extraordinary circumstances, if any, that would warrant granting such a drastic remedy.

Plaintiffs' 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 plaintiffs' 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

E N T E R  
  
Hon. John M. Kenney, J.S.C.

**FILED**

NOV 22 2011