| **Greenberg v Blake** |
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| 2011 NY Slip Op 34127(U) |
| September 9, 2011 |
| Sup Ct, Kings County |
| Docket Number: 21880/10 |
| Judge: Richard Velasquez |
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At an IAS Term, Part 22 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of September, 2011.

P R E S E N T:

HON. RICHARD VELASQUEZ,

Justice.

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HARVEY L. GREENBERG, ESQ., AS GUARDIAN OF THE PROPERTY OF ADRIENNE SEALY A/K/A ADRIAN SEALEY A/K/A ADRIENNE SEALY HARDESTY A/K/A ADRIAN SEALY,

Plaintiff.

- against -

Index No. 21880/10

JOEL BLAKE; JEFFREY SPENCER; HASSAN SULE; JUDE DESIR; KAMAL P. SONI; GUARANTEE HOMES, LLC; NORTHEAST NY, LLC; YOSEF ABERJEL; GURSIM HOLDING, INC.; MANJEET BAWA; SONIA BAWA; BANK OF AMERICA, NA; RAMAPO REALTY, LLC; LEAF FUNDING, INC.; SKC CORP.; NASTEC; EAM LAND SERVICES, INC., REGISTER ABSTRACT INC.; THE NEW YORK CITY BUILDINGS DEPARTMENT; JANE AND JOHN DOES WHOSE NAMES ARE PRESENTLY UNKONOWN; AND XYZ CORPORATION, WHOSE NAME IS PRESENTLY UNKNOWN,

Defendants.

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The following papers numbered 1 to 13 read herein:

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1-2, 3-4, 5-6, 7-8 |
| Opposing Affidavits (Affirmations) | 9, 10, 11 |
| Reply Affidavits (Affirmations) | 12, 13 |
| ________ Affidavit (Affirmation) | |
| Other Papers | |

Upon the foregoing papers, defendant EAM Land Services, Inc., (EAM) moves for an order: (1) pursuant to CPLR 3211(a)(7) and 3013, dismissing with prejudice plaintiff's complaint and any and all cross-claims against it based on plaintiff's failure to state a cause of action; and (2) pursuant to CPLR 3211(f), extending EAM's time to serve an answer to the complaint in the event the instant motion is denied. Defendant Ramapo Realty, LLC, (Ramapo) moves for an order, pursuant to CPLR 3211(a)(10), 1001(a), and 1003, dismissing the complaint with respect to the 387 Classon Avenue property on the ground that plaintiff has failed to name an indispensable party. By way of separate motions, plaintiff Harvey L. Greenberg, Esq., as Guardian of the Property of Adriene Sealy, (Sealy) moves for an order dismissing the affirmative defenses and second counterclaim of defendant Sonia Bawa and for an order dismissing the first, second, third, fourth, fifth, sixth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and twentieth affirmative defenses of defendant Guarantee Homes, LLC (Guarantee).[1]

EAM's motion is granted to the extent that the complaint is dismissed as against it. Ramapo's motion is denied. Plaintiff's motions are granted to the extent that Guarantee's third, fourth, twelfth and thirteenth affirmative defenses, and Bawa's third, fourth, eleventh and twelfth affirmative defense are dismissed. Plaintiff's motions are otherwise denied.

In this action, plaintiff seeks monetary damages as well as equitable rescission and

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[1] It is noted that plaintiff's request that Guarantee's counterclaims be dismissed was crossed-out by plaintiff's counsel on the copy of the notice of motion submitted to court. In any event, Guarantee has not asserted any counterclaims.

cancellation of all deeds of transfer of, and encumbrances on, properties located at 987 Bedford Avenue, 385 Classon Avenue, and 387 Classon Avenue in Brooklyn, New York. As alleged in the complaint, prior to the alleged fraudulent transfers described below, 987 Bedford Avenue was owned by Sealy, Thomas Sealy (Sealy's father)[2] and Ruby Sealy (Sealy's mother), as joint tenants with rights of survivorship, 387 Classon Avenue was owned by Sealy and Ruby Sealy as tenants in common, and 385 Classon Avenue was owned by Sealy and Ruby Sealy as joint tenants with rights of survivorship. In 2002, defendant Joel Blake allegedly forged Sealy and Ruby Sealy's names on deeds purporting to transfer their interest in these properties to him.[3] Plaintiff alleges that these deeds from the Sealys to Blake were not recorded until December 2006 (with respect to 987 Bedford Avenue and 387 Classon Avenue) and September 2007 (with respect to 385 Classon Avenue). Blake, in July 2007, conveyed his interest in the three properties to defendant Jeffrey Spencer without any consideration.

As is relevant here, Spencer, in October 2007, allegedly conveyed the 387 Classon Avenue property to defendant Gursim Holdings, Inc., (Gursim) for $990,000. Defendant EAM procured title insurance for the benefit of Gursim with respect to this transaction and defendant SKC Corp. (SKC) loaned Gursim $800,000 for the purchase that was secured by a mortgage on 387 Classon Avenue. SKC assigned this note and mortgage to defendant

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[2] A copy of a death certificate attached to the complaint shows that Thomas Sealy died in November 29, 2000.

[3] Plaintiff also alleges that Sealy suffers from psychological issues that rendered her incompetent to convey her interest in the properties.

Ramapo in October 2007, and Ramapo thereafter loaned Gursim additional money that was also secured by a mortgage on 387 Classon Avenue. Gursim conveyed its interest in 387 Classon Avenue to defendant Sonja Bawa by way of a quitclaim deed in February 2008.

With respect to the 385 Classon Avenue property, Spencer conveyed it in January 2008 to defendant Guarantee Homes, LLC, (Guarantee) for $400,000. Ramapo loaned Guarantee $538,000 at the time of purchase and later loaned Guarantee $960,000 as a construction loan. Ramapo secured both loans by a mortgage on 385 Classson Avenue. Guarantee thereafter transferred its interest in the property to defendant Northeast NY, LLC.

In October 2009, plaintiff apparently commenced an action relating to the above noted transactions against the present defendants in the United States District Court for the Eastern District of New York. The copy of the civil docket for this federal action that is attached to plaintiff's papers states that the federal action was dismissed in June 2010 for failure to state a claim upon which relief may be granted, that the court declined to exercise its supplemental jurisdiction over plaintiff's state law claims, and that the state law claims were dismissed without prejudice. Plaintiff commenced the action in this court in September 2010.

**EAM'S MOTION**

Turning first to EAM's motion, it contends that it is entitled to dismissal of the complaint because plaintiff's allegations fail to show that EAM owed Sealy any duty. As noted above, according to the complaint, EAM's only involvement in any of the transactions was its issuance of an owner's title insurance policy to Gursim relating to Spencer's

conveyance of 387 Classon Avenue to Gursim. Based on this involvement, plaintiff asserts that EAM was negligent and grossly negligent in failing to discover that the deed from Sealy and Ruby Sealy to Blake was forged and that no valuable consideration was given for the deed.[4] Generally, in the absence of fraud or collusion, the liability of a title insurer or a title agent extends solely to the entity that contracts for its services (*see Sabo v Alan B. Brill, P.C.*, 25 AD3d 420, 421 [2006]; *Calamari v Grace*, 98 AD2d 74 [1983]; *Goodman v Title Guar. & Trust Co.*, 11 AD2d 1003 [1960]; 1 NY Jur 2d, Abstracts § 8; *see also Goldner v Kemper Ins. Co.*, 125 AD2d 954, 954-955 [1986]; *Henry v Guastella & Assoc.*, 113 AD2d 435, 437-439 [1985], *lv denied* 67 NY2d 605 [1986]; *cf. Velazquez v Decaudin*, 49 AD3d 712, 716 [2008][complaint contained allegations that the title insurers agent aided and abetted and/or participated in the scheme to defraud]). Given that plaintiff has not alleged that Sealy had any contractual connection with EAM, and has made no allegations that EAM committed any acts of fraud or other intentional wrongdoing, EAM is entitled to dismissal of the complaint as against it.[5] Since none of the answers in the record contain any cross-claims against EAM,

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[4] Although the complaint describes EAM as the issuer of the title insurance policy, in its motion papers, EAM describes itself as a title agent whose business involved procuring title insurance policies from various insurance companies. This distinction has no effect on EAM's entitlement to dismissal of the complaint (*see Sabo v Alan B. Brill, P.C.*, 25 AD3d 420, 421 [2006]).

[5] Even if EAM could be found to owe a duty to other non-contracting parties, such a duty would not extend to Sealy, as EAM could not have expected her to rely on its services (*see Securities Inv. Protection Corp. v BDO Seidman*, 95 NY2d 702, 710-712 [2001]; *Goldner*, 125 AD2d at 955).

the portion of EAM's motion requesting that the court dismiss any cross-claims against it is denied as academic.

**RAMAPO'S MOTION**

With respect to Ramapo's motion, its claim that plaintiff has failed to join an indispensable party with respect to the 387 Classon Avenue property presents a somewhat closer legal issue. Here, it is undisputed that Sealy's mother, Ruby Sealy, who owned 387 Classon Avenue with Sealy as a tenant in common, died in March 2005. Ramapo, in essence, asserts that all tenants in common holding or claiming an interest in 387 Classon Avenue are indispensable parties, and, in light of Ruby Sealy's death, the administrator of her estate has in interest in the property in common with plaintiff, and is thus an indispensable party. The caselaw, however, although not entirely consistent, does not support Ramapo's assertions.

Initially, it is not at all clear that all persons owning or claiming to own a property as a tenants common are necessary or indispensable parties to an action such as this. While some courts have held, under apparently similar circumstances, that all co-owners are necessary parties (*see e.g. Loree v Barnes*, 59 AD3d 965 [2009]; *Williams v Somers*, 91 AD2d 545, 545-546 [1982]; *Vicario v Raymon*, 44 AD2d 863 [1974]; *Eckerson v Villege of Haverstraw*, 6 App Div 102 [1896], *affd* 162 NY 952 [1900]; *Franz v Franz*, 15 F2d 797, 800 [8th Cir 1926]), other courts have held that one co-owner may maintain an action and the non-party co-owners are not indispensable parties (*see Deering v Reilly*, 167 NY 184, 189-191 [1901]; *Weichert v O'Neil*, 245 AD2d 1121, 1122 [1997]; *O'Donnell v McIntyre*, 37 Hun

615, 623 [1885], *affd* 116 NY 663 [1889]; *Beyers v Grande*, 58 Misc 398, 399-401 [Sup Ct, New York County 1908]; *McCulloch v Glasgow*, 620 F2d 47, 51 [5th Cir 1980]; *Skelly Oil Co. v Wickham*, 202 F2d 442, 446 [10th Cir 1953]). This court need not reconcile these holdings, however, as Ramapo has failed its burden of demonstrating that the administrator of Ruby Seale's estate is a necessary party.

In this respect, upon a person's death, title to his or her real property is deemed to vest with his or her heirs or distributees (*see Waxson Realty Corp. v Rothschild*, 255 NY 332, 336-337 [1931][addressing heirs under a will]; *DiSanto v Wellcraft Moving Corp.*, 149 AD2d 560, 562-563 [1989][addressing heirs under a will], *lv denied* 75 NY2d 703 [1990]; *Kraker v Roll*, 100 AD2d 424, 429 [1984][distributee in case of intestate succession]; *Matter of Jemzura*, 65 AD2d 656, 657 [1978][distributee in case of intestate succession], *affd for the reasons stated below* 52 NY2d 1067 [1981]). This vesting occurs as an operation of law, regardless of any failure to appoint an administrator or file new deeds (*see Matter of Jemzura*, 65 AD2d at 657). Accordingly, executors or administrators of a decedent's estate generally do not have an interest in the decedent's property following his or her death, and, as such, executors or administrators are not necessary parties to an action addressing the title to, or interest in, the property (*see Palmer v Morrison*, 104 NY 132, 138 [1887][administratrix had no interest in property and no right to sell it]; *Financial Freedom Senior Funding Corp. v Rose*, 64 AD3d 539 [2009][no need to join estate in mortgage foreclosure action]; *Countrywide Home Loans, Inc. v Keys*, 27 AD3d 247 [2006][mortgage

foreclosure], *lv denied* 7 NY3d 702 [2006]; *Matter of Jemzura*, 65 AD2d at 657; *Winter v Kram*, 3 AD2d 175, 176 [1957]; *Evenga v Herrick*, 3 AD2d 110, 112 [1956][distributees proper parties to bring action for specific performance of contract to purchase real property entered into by deceased person]; *Beesley v Ebert*, 431 So2d 1190, 1192-1193 [Ala 1983][action to quiet title]; *Matter of Baca's Estate*, 95 NM 294, 296, 621 P2d 511, 513 [1980][action to quiet title]).[6]

In view of this applicable law, Ramapo's assertion that the action must be dismissed because the administrator of Ruby Seale's estate has not been named is simply insufficient to establish its initial burden of demonstrating that plaintiff has failed to name a necessary party to this action (*see Bennett v King of Technology, NY, Inc.*, 8 Misc 3d 1005 [A], 2005 NY Slip Op 50935 [U][Sup Ct, Kings County 2005]; *Stanford Realty Assoc. v Rolling*, 161 Misc 2d 754, 756-757 [Civ Ct, New York County 1994]). In addition, Ramapo has not submitted any evidence showing that Ruby Sealy had a will or that she had any distributees other than Sealy. Of note, in this respect, if, as her counsel represents, Sealy is an only child, she would inherent the entirety of Ruby Sealy's property under the rules of intestate succession (EPTL 4-1.1[3]). Even if the estate were a necessary party (*see McLaughlin v McLaughlin*, 155 AD2d 418, 419 [1989]; *see also Schoeps v Andrew Lloyd Webber Art*

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[6] *Schoeps v Andrew Lloyd Webber Art Found.* (66 AD3d 137 [2009]), which is relied upon by Ramapo, is readily distinguishable in that the plaintiff there inherited only a percentage of the estate, and was not devised any specific property (*id.* at 141). Moreover, dismissal was required because, unlike here, the plaintiff in *Schoeps* had no direct interest in the property (*id.* at 141-144).

*Found.*, 66 AD3d 137, 140-144 [2009]), dismissal of the complaint would not be required, as the proper remedy for non-joinder would be for the court to direct plaintiff to obtain the appointment of a fiduciary in order to allow the estate to be joined as a party plaintiff (*see Hartford/North Bailey Homeowners Assn. v Zoning Bd. of Appeals of Town of Amherst*, 63 AD3d 1721, 1723 [2009], *lv denied* 66 AD3d 1504 [2009], *lv dismissed* 13 NY3d 901 [2009]; *Woodhouse v McCarthy*, 198 AD2d 909 [1993]; *McLaughlin*, 155 AD2d at 419; *see also Windy Ridge Farm v Assessor of the Town of Shandaken*, 11 NY3d 725, 727 [2008]; CPLR 1001[b]).[7]

**PLAINTIFF'S MOTIONS**

With respect to plaintiff's motions, plaintiff seeks an order dismissing the affirmative defenses and second counterclaim of Bawa and an order dismissing the first, second, third, fourth, fifth, sixth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and twentieth affirmative defenses of Guarantee. Bawa's first and ninth affirmative defenses and

[7] Although this court has held that Ramapo has failed to demonstrate that the estate is a necessary party, given that the case law on this issue is not clear-cut, it may be in plaintiff's best interest to seek the appointment and joinder of an administrator and joinder of any other party that may have succeeded to Ruby Sealy's rights under the deed. Moreover, although Ruby Sealy's estate may not be a necessary party with respect to plaintiff's claims against Ramapo, it would appear to be a necessary party to the extent that plaintiff seeks monetary damages from other parties based on the fraud/forgery causes of action relating to Ruby Sealy. Of note, any statute of limitations challenge to the timeliness of the claims of any new plaintiff joined to action would only be addressed after the joinder (*see Friedland v Hickox*, 60 AD3d 426 [2009]). Nevertheless, it would appear that the estates' claims would relate back to the original complaint filed by plaintiff (*see Highland Hall Apts., LLC v New York State Div. of Hous. & Community Renewal*, 66 AD3d 678, 682 [2009]; *Fulgum v Town of Cortland Manor*, 19 AD3d 444, 445 [2005]).

Guarantee's first affirmative defense, all to the effect that plaintiff's complaint fails to state a cause of action, are not subject to dismissal in the context of a CPLR 3211(b) motion (*see Butler v Catinella*, 58 AD3d 145, 150-151 [2008]).

Guarantee and Bawa both plead as second affirmative defenses that plaintiff's claims against them are barred by the statute of limitations. Plaintiff concedes that the relevant statute of limitations is the six year period of of CPLR 213(8), or two years from the discovery or imputed discovery of the fraud under CPLR 203(g) (*see Piedra v Vanover*, 174 AD2d 191, 194-196 [1992]; *see also Coombs v Jervier*, 74 AD3d 724, 725 [2010], *lv denied* 16 NY3d 709 [2011]). Since plaintiff has pled that the forgery of the deeds occurred, at the latest, in September 2002, the action was commenced more than six years after the fraudulent acts, even if the action is deemed to have been commenced when the complaint in the federal action was filed in October 2009 (*see Stylianou v Incorporated Vil. of Old Field*, 23 AD3d 454, 457 [2005]; CPLR 205[a]). As such, the timeliness of the action turns on when the plaintiff is deemed to have discovered the fraud with reasonable diligence (*see Coombs*, 74 AD3d at 725; *Piedra*, 174 AD2d at 194). The affirmation of plaintiff's attorney fails to demonstrate, as a matter of law, that plaintiff discovered the fraud less then two years prior to the commencement of the action, and plaintiff's motions must thus be denied with respect to their statute of limitations defenses (*see Town of Hempstead v Lizza Indus.*, 293 AD2d 739, 740 [2002][plaintiff moving under CPLR 3211(b) bears burden of showing action timely]).

Bawa's fifth, thirteenth, fourteenth fifteenth, seventeenth and twenty-first affirmative defenses, and Guarantee's fifth, fourteenth, and fifteenth affirmative defenses allege, or turn on whether Bawa and Guarantee may be deemed bona fide purchasers/encumbrancers for value. When these defenses are considered in the context of the complaint (*Krantz v Garmise*, 13 AD2d 426, 429 [1961]), which indicates that Bawa and Guarantee paid valuable consideration and contains no allegations that they participated in any fraud of Blake or Spencer or were otherwise connected to them, there is a basis to infer that Bawa and Guarantee were bona fide purchasers for value (*see Maiorano v Garson*, 65 AD3d 1300, 1302 [2009]; *Karan v Hoskins*, 22 AD3d 638 [2005]).[8] While plaintiff is correct that one cannot be a bona fide purchaser for value through a forged deed because such a deed is void and conveys no title (*see First Natl. Bank of Nev. v Williams*, 74 AD3d 740, 741 [2010]; *Karan*, 22 AD3d at 639; *Yin Wu v Wu*, 288 AD2d 104, 105 [2001]), plaintiff may be unable to demonstrate that the deed was forged (*see Banco Popular North America v Victory Taxi Mgt., Inc.*, 1 NY3d 381, 384 [2004]). In the absence of forgery, the allegations of other forms of fraud or that Sealy was incompetent are insufficient to defeat the defense of bona fide purchaser for value if Bawa and Guarantee purchased without notice of the incompetence of Sealy or the alleged fraud (*see Goldberg v McCord*, 251 NY 28, 32 [1929] [incompetency]; *Buckley v Ritchie Knop, Inc.*, 40 AD3d 794, [2007]; *Kraker*; 100 AD2d at

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[8] This court assumes that defendants intended to refer to Real Property Law § 266 (which protects bona fide purchasers for value from prior fraud), rather than to Real Property Law § 291 (which protects a bona fide purchaser for value from prior unrecorded conveyances) (*see* CPLR 2001).

431-432 [claim of bona fide purchaser for value viable for certain forms of fraud not involving forgery]). Similarly, while Bawa's sixteenth affirmative defense that plaintiff failed to offer return of consideration with respect to the rescission claim would be irrelevant if plaintiff can demonstrate that the deeds were forged (*see Filowick v Long*, 201 AD2d 893 [1994]), the defense may be relevant if plaintiff cannot demonstrate that the deeds were forged.

As a sixth affirmative defense both Bawa and Guarantee have pled that the deeds were signed and acknowledged before a notary public and duly recorded, and, as such, are presumptively valid. The copies of the deeds purportedly conveying 385 and 387 Classon Avenue from Sealy and Ruby Sealy to Blake show that they were purportedly acknowledged in front of a notary.[9] Sealy and Ruby Sealy's signatures would thus be presumptively valid (*see John Deere Ins. Co. v GBE/Alasia Corp.*, 57 AD3d 620, 621-622 [2008]). Although the presumption of validity could likely have been advanced through a general denial, the affirmative defense need not be stricken because it tends to clarify the issues (*see Schwartz v Compania Azucarera Vertientes-Camaquey De Cuba*, 14 AD2d 582, 583 [1961]).

In Guarantee's eleventh affirmative defense and Bawa's tenth affirmative defense, they both assert that plaintiff will bear the burden of proving his claims by clear and convincing evidence. This legal standard need not be pled. However, its inclusion likewise tends to clarify issues and causes plaintiff no prejudice (*see Schwartz*, 14 AD2d at 583).

Plaintiff has also failed to demonstrate that Bawa's eighteenth affirmative defense,

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[9] The copy of the deed relating to 385 Classon Avenue is contained in Guarantee's opposition papers. The copy of the deed relating to 387 Classon Avenue is attached as an exhibit to Ramapo's motion and as an exhibit to plaintiff's opposition to that motion.

alleging the absence of personal jurisdiction, must be dismissed. Plaintiff has failed to submit either the affidavit of service relating to service upon Bawa or the stipulation in which Bawa purportedly waived the issue of personal jurisdiction. In addition, as plaintiff moved to strike the defense prior to sixty days after the service of Bawa's answer, Bawa is not deemed to have waived the defense under CPLR 3211(e). Similarly, plaintiff has failed to demonstrate entitlement to dismissal of Bawa's nineteenth affirmative defense because the motion papers fail to demonstrate his authority to act as Sealy's guardian as a matter of law. While, as discussed above, Ramapo has failed to demonstrate its entitlement to dismissal of the action against it with respect to 387 Classon Avenue based on plaintiff's failure to join an indispensable party, the conclusory allegations of plaintiff's counsel fail to demonstrate entitlement to dismissal of Bawa's twenty-first affirmative defense premised on that same ground since they fail to show, as a matter of law, that Ruby Sealy had no heirs or distributees other than Sealy.

On the other hand, Guarantee's third, fourth, twelfth and thirteenth affirmative defenses, and Bawa's third, fourth, eleventh and twelfth, affirmative defenses alleging laches, estoppel, a defense founded on documentary evidence, unjust enrichment, equitable liens, and ownership in fee simple merely plead conclusions of law and are unsupported by factual allegations (*see Bank of Am., N.A. v Midland Ave. Assoc., LLC*, 78 AD3d 746, 750 [2010]; *Plemmenou v Arvanitakis*, 39 AD3d 612, 614 [2007]; *Bentivegna v Meenan Oil Co.*, 126 AD2d 506, 508 [1987]), even when considered in the context of plaintiff's factual

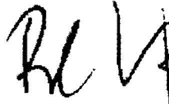
allegations (*see Krantz*, 13 AD2d at 429). Notably, with respect to the laches and estoppel arguments, there are no allegations that plaintiff (or Sealy) knew of the alleged forged conveyance and did nothing despite knowledge that Bawa and Guarantee had changed their positions to their detriment (*see Bank of Am., N.A.*, 78 AD3d at 750). In the seventh affirmative defense alleged by Bawa and Guarantee contend that any recovery against defendants must not exceed there proportionate share of liability under CPLR Articles 14 and 16. These provisions, however, have no application to Bawa and Guarantee given the nature of plaintiff's relief requested from them (*see Plemmenou*, 39 AD3d at 613-614). Since plaintiff does not seek to hold Bawa and Guarantee liable, and, in any event, Bawa and Guarantee's responsibility for any acts would appear to be covered by their general denials, Bawa's eighth affirmative defense and Guarantee's ninth affirmative defense that they cannot be held liable for the acts of others are gratuitous and dismissal of those defenses causes them no prejudice (*see Caiati v Kimel Funding Corp.*, 154 AD2d 639, 640 [1989]; *see also Pelmmenou*, 39 AD2d at 613).

Finally, Bawa, in her counterclaims, alleges that she or her predecessor's in title made improvements to the property and paid real estate taxes constituting liens against the premises and that she is thus entitled to an equitable lien against the premises to the extent to the improvements made and taxes paid. Whether or not such claims would constitute equitable liens, plaintiff, if successful in obtaining the equitable relief requested, could be required to reimburse Bawa for at least a portion of those expenses, except to the extent that

they are offset by the reasonable value of Bawa's use and occupancy of the premises (*see Grosch v Kessler*, 256 NY 477, 478-479 [1936]; *Genessee Conservation Found. v Oatka Fish & Game Club*, 63 AD2d 1115 [1978]). Bawa's counterclaims thus state a cause of action and plaintiff is not entitled to their dismissal.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

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SO ORDERED
Hon. Richard Velasquez