

**Conason v Megan Holding, LLC**

2012 NY Slip Op 32625(U)

October 10, 2012

Supreme Court, New York County

Docket Number: 106560/11

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 : 106560/2011  
CONASON, JULIE  
vs.  
MEGAN HOLDING LLC  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. 106560/11  
MOTION DATE 7/20/12  
MOTION SEQ. NO. 005

The following papers, numbered 1 to 32, were read on this motion to/for Sj motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	No(s) <u>1-23</u>
Answering Affidavits — Exhibits <u>+ Memo of Law</u>	No(s) <u>24-31</u>
Replying Affidavits	No(s) <u>32</u>

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

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

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

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Dated: 10/10/12

  
\_\_\_\_\_  
JOAN M. KENNEY, J.S.C.

- 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: PART 8

-----x  
JULIE CONASON and GEOFFREY BRYANT,  
Plaintiffs,

DECISION & ORDER  
Index No.: 106560/11

-against-

MEGAN HOLDING, LLC and EMMANUEL KU,  
Defendants.

-----x  
JOAN M. KENNEY, J.:

Motion sequence numbers 005 and 006 are  
disposition.

In motion sequence number 005, plaintiffs move, pursuant to CPLR 3212, for summary judgment: (1) on their first cause of action in the amount of \$172,743.21; (2) holding that plaintiffs may pierce the corporate veil and impose liability on defendant Emmanuel Ku (Ku); and (3) awarding plaintiffs' reasonable attorney's fees.

In motion sequence number 006, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

**FACTUAL BACKGROUND**

This action is predicated upon the factual findings of the Civil Court of the City of New York, New York County, in the matter entitled *Megan Holding, LLC v Julie Conason and Geoffrey Bryant*, index number L&T 64737/09, dated April 8, 2011, a summary nonpayment proceeding in which the court held, after trial, that defendant Megan Holding, LLC (Megan), plaintiffs' landlord, had committed fraud by creating and registering a fictitious tenant in order to inflate the legal regulated rent for plaintiffs' rent-

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stabilized apartment. Motion (sequence number 005), Ex. A. Defendant Ku is the principal of Megan.

At the trial in the Civil Court, plaintiffs herein were awarded an abatement but no other damages because they failed to present evidence as to what the legal rent for their apartment should be, based on the Division of Housing and Community Renewal (DHCR) guidelines. *Id.* In rendering its decision, the Civil Court stated:

"The parties first appeared before me on December 9, 2009, and testimony was taken on January 20, March 3, April 19 and 29, June 10 and 11, and September 15, 2010. Completion of the trial was delayed by the withdrawal of [Megan]'s counsel based upon ethical concerns, and by [Megan]'s failure to retain new counsel. While [Megan]'s principal [Ku] testified as [plaintiff]'s witness, [Megan] rested without presenting any evidence on its own behalf. [Megan] retained counsel to submit a post-trial memorandum on its behalf."

*Id.* at 1.

In the instant motion, plaintiff submit, as evidence of the legal regulated rent for their unit, a certified DHCR rent roll, allegedly establishing the legal regulated rent for the apartment as \$180.92. Motion, Ex. B. The court notes that this exhibit indicates the rent roll for the building by apartment, including plaintiffs' apartment (apartment 3), and that the lowest rent stated is for apartment 6 at 180.92; however, there is no information in this exhibit that apartment 3 and apartment 6 are in any way similar.

Plaintiffs first leased the subject apartment on November 1,

2003, at an initial rent of \$1800.00 per month. Motion, Ex. C. With subsequent lease renewals, by November 1, 2007, the rent had increased to \$1955.97 per month. Motion, Exs. D and E.

In its decision, the Civil Court stated:

"Ordinarily, a claim of rent overcharge is governed by a four year statute of limitations. CPLR Section 213-a, NYC Admin. Code Section 26-516 (a) (2). The legal regulated rent is defined as the rent actually charged and paid on the base date, four years prior to the interposition of the overcharge claim, plus any legal increases taken thereafter. 9 NYCRR Sections 2520 (e), (f) (10, and 2566 (a) (3) (1)."

Motion, Ex. A, at 3.

However, the Civil Court also found that plaintiffs' "rent on the base date was obviously affected by [Megan]'s fraud." *Id.*

The Civil Court determined that the base dated for plaintiffs' rent overcharge is April 9, 2005, their rent overcharge claim having been interposed on April 9, 2009. *Id.*<sup>1</sup>

Plaintiff asserts that, pursuant to the DHCR default formula, the base rent for their apartment is the lowest rent paid in the subject building with the same number of rooms as their apartment, which, they assert, is apartment 6.

Plaintiffs argue that they are entitled to pierce the corporate veil because, in the Civil Court action, Ku conceded that he intermingled his personal finances with Megan's finances in

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<sup>1</sup>The court is not recapitulating the evidence upon which the Civil Court based its determination, such findings appearing in Exhibit A of this motion (motion sequence 005).

making various alleged improvements to plaintiffs' apartment.<sup>2</sup>

To substantiate plaintiffs' claim regarding the co-mingling of Megan and Ku's finances, they point to Ku's testimony that he used cash to pay for some of the alleged improvements to plaintiffs' apartment, which he characterized as either a loan or capital contribution to Megan, and to a check drawn on Megan's account, on which Ku wrote "Dakko Property" (Dakko), made payable to City Waste Services of NY. Motion, Exs. O and P. Dakko is the management company for Megan, which is also wholly owned by Ku.

Plaintiffs have also provided a loan application from Ku in which he lists various properties as being solely owned by him, but which, in fact, are owned by limited liability companies for which Ku is the sole or controlling member. Motion, Ex. R. The court notes that plaintiffs allege that Ku uses his personal funds to pay for expenditures for his limited liability companies; however, the documents submitted relate to other entities owned by Ku, not Megan.

Plaintiffs argue that there are no facts in dispute, since Megan is collaterally estopped from challenging a finding that plaintiffs were illegally overcharged and that the base rent, based on the DHCR default formula, is \$180.92. As a consequence, plaintiffs claim that the total amount of their rent overcharge is

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<sup>2</sup>It is noted that plaintiffs also allege various bad acts on the part of Ku not related to this action, which, therefore, the court will disregard.

\$172,743.21, including treble damages.

Plaintiffs also argue that they should be entitled to pierce the corporate veil based on Ku's dealings with his various limited liability companies.

In opposition to the instant motion, defendants assert that plaintiff's action is time-barred, because the present action was not filed until June 2011 and the alleged overcharge accrued in November 2003, when plaintiffs' initial lease commenced. Defendants say that this action would still be time-barred even if it could relate back to their answer interposed in the Civil Court action in April 2009.

Even if the claim were not time-barred, defendants maintain that plaintiffs have failed to meet their burden of proof that there was any rent overcharge. Further, the proceeding in the Civil Court was closed when Megan failed to appear by counsel (previous counsel having been allowed to withdraw) and, hence, the Civil Court determination was made without Megan having an opportunity to litigate the issue. In addition, defendants argue that plaintiffs have failed to provide any proof sufficient to warrant piercing the corporate veil.

In reply, plaintiffs aver that defendants have failed to refute any of the facts presented in the motion. According to plaintiffs, defendants' sole argument is that plaintiffs cannot rely on the Civil Court determination; however, plaintiffs state

that, even if that were true, they have still met their burden herein of demonstrating a rent overcharge.

Plaintiffs also point out that defendants were represented throughout nearly the entirety of the trial, but only lacked representation when their prior counsel withdrew, for ethical reasons, and the court granted a seven-week adjournment for defendants to find new counsel, which they failed to do. In addition, plaintiffs state that defendants have failed to appeal the Civil Court determination, even though more than a year has elapsed from that judgment.

Finally, plaintiffs claim that defendants have submitted no evidence to refute their request to pierce the corporate veil.

In their motion, motion sequence number 006, defendants reiterate the arguments that they posited in opposition to plaintiffs' motion.

The opposition and reply to defendants' motion are, in sum and substance, the same arguments proffered by each side in motion sequence number 005, and need not be restated at this point.

#### 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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 v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiffs' motion seeking summary judgment is granted on the issue of liability only.

The court is unpersuaded by defendants' argument that the claim for a rent overcharge is time-barred because the overcharge started in 2003 and the overcharge claim was first asserted in 2009, more than four years after the start of plaintiffs' lease.

For the purpose of calculating the correct rent, a tenant's "rent overcharge claim is subject to a four-year statute of limitations (see Rent Stabilization Law of 1969 ...). The Rent Regulation Reform Act of 1997 'clarified and reinforced the four-year statute of limitations applicable to rent overcharge claims ... by limiting examination of the rental history of housing accommodations prior to the four-year period preceding the filing of an overcharge complaint' [internal citations omitted]."

*Matter of Cintron v Calogero*, 15 NY3d 347, 353-354 (2010).

Therefore, rather than calculating the statutory period from the commencement of the overcharge, such claims are determined backwards, from the date of the first claim of an overcharge. As a consequence, the court finds that plaintiffs' cause of action for

a rent overcharge is not time-barred.

Although plaintiffs have indicated that the Civil Court found that their base rent was fraudulently established, which would permit the court to look back beyond the four-year period (*Matter of Grimm v State of New York Division of Housing and Community Renewal Office of Rent Administration*, 15 NY3d 358 [2010]; *Zheng v Mak*, 2012 WL 97859, 2012 NY Misc LEXIS 1195 2012, NY Slip Op 30634(U) [Sup Ct, NY County 2012]), they have only sought, and provided calculations (Motion sequence number 005, Appendix) for, the four years preceding the interposition of their rent overcharge claim in the Civil Court. Hence, there is no reason why the court should go outside the four-year look-back period. Since plaintiffs are willing to limit the inquiry into their damages for an alleged rent overcharge to the four years preceding the interposition of this claim in the Civil Court action, the court concludes that a determination of the lawful rent and any overcharge is limited to the four years prior to that time: April 9, 2005. *78/79 York Associates v Rand*, 180 Misc 2d 316 (App Term, 1<sup>st</sup> Dept 1999). In calculating the base rent for the purposes of establishing the amount of the alleged rent overcharge, the court must use the lowest rent charged for a rent stabilized apartment with the same number of rooms in the same building as the subject apartment. *Thorton v Baron*, 5 NY3d 175 (2005). In the case at bar, plaintiffs have averred that apartment 6 in the subject

building has the same number of rooms as their unit, and defendants have not contradicted this assertion. Therefore, the court concludes that the rent charged to apartment 6 in the subject building on April 9, 2005 is the appropriate base rent for the determination of any rent overcharge to plaintiffs. However, the court finds that the calculations provided by plaintiffs appear to neglect any mention as to whether they actually received any portion of the rent abatement that was awarded to them by the Civil Court, nor do they take into consideration any lawful increases to the base rent over the period in question. Therefore, the court must set down the issue of the amount of plaintiffs' overcharge for a hearing.

In order for plaintiffs to be entitled to both treble damages and attorney's fees, there must be evidence that the rent overcharge was occasioned by Megan's fraud or wilful misconduct. See generally *Matter of Obiora v New York State Division of Housing and Community Renewal*, 77 AD3d 755 (2d Dept 2010); See *Matter of Graham Court Owners Corp. v Division of Housing and Community Renewal*, 71 AD3d 515 (1<sup>st</sup> Dept 2010).

Plaintiffs base their allegations of fraud on the findings of the Civil Court quoted above. Defendants, in their opposition, argue that the doctrine of collateral estoppel is inapplicable with respect to the Civil Court's findings, because they did not litigate this issue. The court finds such argument specious.

"It is well established that the doctrine of collateral estoppel bars a litigant from disputing an issue in another proceeding in which he had a 'full and fair opportunity' to contest the matter."

*Feinberg v Boros*, 2012 WL 390558, 2012 NY App Div LEXIS 6053, \*12, 2012 NY Slip Op 06114, (1<sup>st</sup> Dept 2012).

In deciding whether or not a litigant had a full and fair opportunity to be heard in the prior proceeding, the court must evaluate several factors, including but not limited to, the forum of the prior litigation, the extent of the litigation, and the competence of counsel. *Schwartz v Public Administrator of County of Bronx*, 24 NY2d 65 (1969). However, the courts have held that collateral estoppel will apply "where the party against whom collateral estoppel is sought to be invoked has appeared in the prior action or proceeding and has, by deliberate action, refused to defend or litigate the charge or allegation that is the subject of the preclusion request." *Matter of Abady*, 22 AD3d 71, 83-84 (1<sup>st</sup> Dept 2005). Such is the circumstance in the case at bar.

In the earlier litigation, Megan was represented by counsel during most of the trial, was afforded the opportunity to acquire new counsel when its lawyer withdrew for ethical reasons, failed to obtain successor counsel, declined to present a defense, submitted a post-trial brief, and failed to appeal the determination. These facts compel the court to find that Megan did have a full and fair opportunity to be heard in the prior proceeding and, therefore, it is now collaterally estopped from challenging the Civil Court's

determination that the base date for determining the rent overcharge is April 9, 2005 and that the rent charged to plaintiffs was fraudulently established.

Based on the foregoing, the court concludes that plaintiffs are entitled to treble damages for the rent overcharge and to reasonable attorney's fees.

The court also finds that plaintiffs have met their burden to enable them to pierce the corporate veil to find individual liability on the part of Ku.

"[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete dominion of the corporation in respect to the transaction attacked; and (2) the such dominion was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury."

*Morris v New York State Department of Taxation & Finance*, 82 NY2d 135, 141 (1993).

A court will pierce the corporate veil or disregard the corporate form whenever necessary to achieve equity, and that determination is based on the facts and circumstances of each individual case. *Hyland Meat Company v Tsagarakis*, 202 AD2d 552 (2d Dept 1994).

In the case at bar, it has been established that Ku is the owner of 99% of Megan, that Megan fraudulently set a rent for plaintiffs apartment, and that plaintiffs were financially injured thereby. The court can pierce the corporate veil when it is established that "[t]he individual defendant[s] exercised complete

dominion and control of the corporation, which domination was used to commit a fraud or wrong against the plaintiff[s].” *NPR, LLC v Met Fin Management, Inc.*, 63 AD3d 1128, 1130 (2d Dept 2009).

Therefore, based on the foregoing, the court grants that portion of plaintiffs’ motion seeking to hold Ku individually liable.

As a consequence of the preceding, the court denies defendants’ motion.

The court has considered all of the other arguments posited by the parties and has found them to be unpersuasive.

Accordingly, it is hereby

ORDERED that plaintiffs’ motion (motion sequence number 005) is granted to the extent of granting plaintiffs summary judgment against both defendants on the issue of liability; and it is further

ORDERED that an assessment of damages against defendants is directed; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the Trial Support Office (room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place the action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that the issue of reasonable attorney’s fees is held

in abeyance pending the resolution of the assessment of plaintiffs' damages; and it is further

ORDERED that defendants' motion (motion sequence number 006) is denied.

Dated: October 10, 2012

ENTER:



Joan M. Kenney, J.S.C.

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