

Feingold v River Place 1 Holding, LLC

2014 NY Slip Op 31237(U)

May 9, 2014

Supreme Court, New York County

Docket Number: 150084/2012

Judge: Ellen J. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 63

-----X
LEON FEINGOLD,

Plaintiff,

Index No. 150084/2012

DECISION AND ORDER

-against-

RIVER PLACE I HOLDINGS, LLC,

Defendant.
-----X

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Papers considered in review of motion sequences 002 and 003:

	Papers	Numbered
Seq. 002	Notice of Motion and Affidavits Annexed.....	<u>1</u>
	Notice of Cross-Motion and Affirm. in Opposition.....	<u>2</u>
	Memo. of Law in Opposition.....	<u>3</u>
	Affirm. in Reply.....	<u>4</u>
Seq. 003	Notice of Motion and Affidavits Annexed.....	<u>1</u>
	Memo. of Law in Support.....	<u>2</u>
	Notice of Cross-Motion and Affirm. in Opposition.....	<u>3</u>
	Affirm. in Reply and in Opposition	<u>4</u>

ELLEN COIN, J.:

In motion sequence 002, defendant River Place I Holdings, LLC (River Place or defendant) moves pursuant to CPLR 3124 to compel plaintiff Leon Feingold (Feingold) to comply with discovery demands 6, 7, 9, 10, 12 and 15 in defendant's first amended notice of discovery and inspection, or, in the alternative, for an order (1) pursuant to CPLR 3126 precluding Feingold from introducing any evidence at trial regarding these discovery demands

and/or (2) striking Feingold's pleading for his willful disobedience of the court's January 10, 2013 discovery order.

Feingold cross-moves pursuant to CPLR 3122 to strike that portion of defendant's discovery demands which seek production of Feingold's tax returns and W-2 forms and pursuant to CPLR 3103 for a protective order.

In motion sequence 003, Feingold moves pursuant to CPLR 3211 and 3212 to dismiss defendant's Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Affirmative Defenses and its First Counterclaim.¹ Defendant cross-moves pursuant to CPLR 3025 to amend its answer to assert a claim for an injunction enjoining Feingold from profiteering on his rent-stabilized apartment. Motion sequence numbers 002 and 003 are consolidated for disposition.

BACKGROUND

Feingold is a rent-stabilized tenant in a building owned by defendant. Feingold's original lease, dated July 16, 2003, provided that the apartment could be occupied by Feingold, his immediate family, and "by occupants as defined in, and only in accordance with, Real Property Law (RPL) §2354 [sic]" (Ginsburg aff [003], ex A, Art. 1). A supplement to Article 1 of that lease permitted Feingold to allow three additional occupants to reside in the apartment, each of whom was described as "friend" (*id.*)² Riders to subsequent leases contained the same occupancy provision, naming three different individuals as occupants, with the relationship to tenant described as "friend". It is undisputed that Feingold's 2011 renewal lease provided that

¹ Because issue has been joined in this matter and discovery is ongoing, the court will treat this motion as one for summary judgment.

² The supplement clarified that such persons were required to be authorized to reside in the apartment under Section 235-(f) of the New York Real Property Law.

the “renewal lease is based on the same terms and conditions as my (our) expiring lease.”

However, in August 2011, Feingold received a letter from defendant alleging that he illegally sublet the apartment and improperly collected rent from the subtenants. He alleges that thereafter defendant blocked a third roommate, Judy Truong, from moving into the apartment and denied one of the occupants rights to some of the building’s amenities.

Feingold commenced this action for a declaratory judgment, stating that he is entitled to maintain three roommates in the apartment. He seeks damages for defendant’s alleged actual eviction of Feingold’s roommates and for ongoing rent payments that Feingold has allegedly lost because of the eviction (Ginsburg aff, ex B).

Defendant answered, asserting affirmative defenses and a counterclaim which seeks a declaratory judgment that Feingold has sublet portions of his apartment in order to engage in profiteering, in violation of the Rent Stabilization Code (Ginsburg aff[003], ex C).

Previously, in 2013, Feingold moved for partial summary judgment on his First Cause of Action for a declaratory judgment that he is permitted to maintain three roommates in his apartment. In addition, he sought dismissal of defendant’s Second, Third, Tenth, Eleventh, Twelfth, and Thirteenth Affirmative Defenses and First Counterclaim. (*mot. seq. 001*).

By decision dated January 10, 2013, the Court held that Feingold was entitled to partial summary judgment on his First Cause of Action for a declaratory judgment that he is entitled to maintain three roommates in the apartment. The Court dismissed the Second Affirmative Defense which alleged that the Real Property Law barred Feingold from maintaining three additional occupants in the apartment. In addition, the Court granted the branch of plaintiff’s motion that sought dismissal of the Eleventh and Thirteenth Affirmative Defenses (Aslanova aff

[003], ex C).

However, the Court denied that branch of Feingold's motion that sought summary judgment dismissing the First Counterclaim and the Third, Tenth and Twelfth Affirmative Defenses because those affirmative defenses and the counterclaim raised questions of fact about whether Feingold's additional occupants were subtenants or roommates and whether he was illegally profiteering from their occupancy of the apartment in violation of the Rent Stabilization Law (RSL) (*id.*).

The Court granted defendant's cross-motion for an order compelling Feingold to comply with defendant's First Notice for Discovery and Inspection "to the extent that plaintiff has in his possession documents responsive thereto concerning the remaining causes of action, affirmative defenses and counterclaims . . ." (*id.* at 5).

Motion Sequence 002

Defendant now moves to compel plaintiff to comply with demands 6, 7, 9, 10, 12 and 15 of defendant's Amended First Notice for Discovery and Inspection.

A. Discovery demand number six seeks "copies of all move-in and move-out logs, requests for freight elevator use and movers' invoices and bills for Feingold and other individuals occupying or intending to occupy the premises from January 1, 2011 to the present, including a November 18, 2011 request to reserve the freight elevator and the movers' invoice for Judy Troung.

Plaintiff has responded that he did not keep these records and that defendant, not plaintiff, should have copies of move-in, move-out logs and reservations for the freight elevator for the relevant time period (Ginsburg aff, ex D). Accordingly, because Feingold denies having these

records he is precluded from introducing such evidence at trial.

B. Discovery demand number seven seeks copies of checks, money orders, wire transfers, receipts for cash payments and bank account statements showing payments Feingold received from individuals occupying or intending to occupy the premises from January 1, 2010 to the present.

Plaintiff claims that he does not have copies of his bank statements in his possession and that pursuant to the Court's prior order, he has no obligation to obtain those statements from the bank (Ginsburg aff, ex D). Here, the bank statements and other enumerated financial records for the relevant time period are material and necessary to establish whether or not Feingold is profiteering in violation of the RSL. The Court previously directed Feingold to produce records in his possession. His bank statements, although maintained electronically by the bank, are in his control, if not directly in his possession, and are available to him by simply requesting the statements from the bank. Feingold is directed to obtain the bank statements for the relevant time period within 30 days of service of a copy of this order with notice of entry or be precluded from offering any information contained in these bank statements or the other enumerated financial records as a defense to the profiteering claim or in support of the damages claim. Irrelevant material may be redacted prior to production of the records.

C. Discovery demand number nine seeks copies of all documents showing that Feingold incurred \$100,000 in damages. Feingold has responded that the leases provided in response to this discovery request set forth the monthly amounts that form the basis for plaintiff's damages claim. Accordingly, plaintiff is precluded from offering evidence, other than the leases already provided, as evidence in support of his damages claim.

D. Discovery demand number ten seeks copies of Feingold's federal and state income tax returns and W-2 forms for the years 2008 through 2012.

While the courts generally allow liberal discovery, there is an exception recognized regarding an individual's income tax returns, which are not discoverable absent a "strong showing of necessity" and a demonstrat[ion] "that the information contained in the returns is unavailable from other sources" (*Williams v New York City Hous. Auth.*, 22 AD3d 315, 316 [1st Dept 2005] [internal quotation marks and citations omitted]). "Because of their confidential and private nature, disclosure of income tax returns is disfavored" (*Gordon v Grossman*, 183 AD2d 669, 670 [1st Dept 1992] [citation omitted]).

Defendant has made an insufficient showing, at this time, of its inability to obtain the information sought from the tax returns from other sources. Accordingly, the branch of defendant's motion that seeks to compel disclosure of the tax returns and W-2 forms is denied, with leave to renew, if necessary, following receipt of Feingold's bank statements and other relevant financial data. Feingold's cross-motion to strike that portion of the discovery demands which seek production of his tax returns and W-2 forms is granted.

E. Discovery demand number 12 requests copies of all documents which demonstrate that Feingold reimbursed Judy Truong \$4,900 for her moving expenses as alleged in the complaint. Plaintiff states that the reimbursement to Ms. Truong is still outstanding (*Ginsburg aff, ex D*).

If plaintiff has a document evidencing his obligation to reimburse Ms. Truong for her moving expenses then the document must be produced within 30 days of service of a copy of this order with notice of entry. If no such document exists, Feingold shall so state. If Feingold does

not timely produce documents in response to this discovery demand, he is precluded from introducing such documents as evidence at trial.

F. Document demand number 15 seeks copies of all documents evidencing Feingold's "lost contribution" toward the payment of utility charges. In his response, Feingold stated that he has produced all documents within his custody and control and that other documents may currently be held by the utility company (Ginsburg aff, ex D). Because this information is material and necessary to the damages claim, Feingold is directed to produce, within 30 days of service of a copy of this order with notice of entry, any documents held by the utility company which evidence the "lost contribution" toward the payment of utilities or be precluded from introducing such evidence at trial.

Motion Sequence 003

In motion sequence 003, Feingold moves to dismiss defendant's Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Affirmative Defenses and defendant's First Counterclaim. River Place cross-moves to amend its answer to seek injunctive relief enjoining Feingold from profiteering on his rent-stabilized apartment.

So much of Feingold's motion as seeks dismissal of the First Counterclaim and the Third and Tenth Affirmative Defenses is barred by law of the case.³ The doctrine of "law of the case"

³ The First Counterclaim alleges that Feingold partitioned and reconfigured the apartment in order to sublet portions of the premises in order to engage in profiteering in violation of the RSL. The Third Affirmative Defense pleads that Feingold is the sole tenant of the premises and the sole signatory of the lease and that the original three roommates in the lease have vacated the premises and that the three individuals that Feingold is now trying to have declared lawful occupants were never in occupancy and have no right to be there. The Tenth Affirmative Defense pleads that the three individuals are not roommates, but rather month-to-month unauthorized subtenants.

precludes this court from re-examining an issue which has been raised and decided against a party on a prior motion where that party had a full and fair opportunity to address the issue (see, *People v Evans*, 94 NY2d 499, 502 [2000]).

Here, Feingold does not argue that he lacked a full and fair opportunity to litigate dismissal of the affirmative defenses and counterclaim on his previous motion for summary judgment. Rather, Feingold takes the position that he is not barred from relitigating the issue, and making a second motion for summary judgment, because defendant admitted, during the course of discovery, that it has no evidence to support the First Counterclaim and the Third and Tenth Affirmative Defenses.

However, it is well settled that, initially, the proponent of a motion for summary judgment has an obligation to come forward with evidence, in admissible form, to establish its prima facie case that it is entitled to judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). It is only after the proponent has met its burden, that the opponent must come forward with evidence to raise a question of fact, sufficient to overcome the proponent's prima facie case (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Here, plaintiff has not met his prima facie burden because he has not offered a scintilla of evidence, new or previously submitted, to support the proposition that he is entitled to judgment dismissing the First Counterclaim and Third and Tenth Affirmative Defenses. Moreover, he has not explained why he failed to seek dismissal of the Fourth, Fifth, Sixth, Seventh and Eighth Affirmative Defenses on his prior motion for summary judgment.

It is well settled that “[s]uccessive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification”

(*Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept 2010]; see also *Brown Harris Stevens Westhampton LLC v Gerber*, 107 AD3d 526, 527 [1st Dept 2013]). “[S]uccessive motions for summary judgment should not be made based upon facts or arguments which could have been submitted on the original motion for summary judgment” (*Vinar v Litman*, 110 AD3d 867, 869 [2d Dept 2013] [internal quotation marks and citation omitted]). Even deposition testimony obtained after a summary judgment motion has been decided is not necessarily newly discovered evidence to warrant successive motions for summary judgment (*id.*) Evidence is not newly discovered merely because it was not submitted on the prior motion, but, rather, it must be used to establish facts that were not available to the movant on the earlier motion and which could not have been established through alternative evidentiary means (see *Pavlovich v Zimmet*, 50 AD3d 1364, 1365 [3d Dept 2008]).

On this successive motion for summary judgment, it was plaintiff’s burden to come forward with evidence to establish that he did not partition and reconfigure the premises; that the occupants of the apartment are not subtenants and that he is not profiteering in violation of the RSL. This he has not done. Moreover, he has not produced evidence to resolve the issue of fact, raised by the Third Affirmative Defense, as to whether the new occupants are replacing prior occupants or are in addition thereto (*Aslanova aff, ex A at 4*).

Indeed, Feingold provides no justification for this successive motion except to state that the motion should be permitted because discovery has been concluded and the factual issues identified in the court’s January 10, 2013 decision have been resolved through disclosure. His assertion is belied by motion sequence 002, discussed *supra*, which clearly demonstrates that discovery is not concluded and that factual issues remain extant.

That portion of the summary judgment motion that seeks to dismiss the Fourth, Fifth, Sixth, Seventh and Eighth Affirmative Defenses⁴ is also denied. As stated above, New York has a “strong policy against allowing successive motions for summary judgment” (*Baron v Charles Azzue, Inc.*, 240 AD2d 447, 449 [2d Dept 1997]). This is particularly true where the second motion is based on legal grounds and factual assertions that could have been raised in an earlier motion (*Phoenix Four v Albertini*, 245 AD2d 166, 167 [1st Dept 1997]; *Levitz v Robbins Music Corp.*, 17 AD2d 801, 801 [1st Dept 1962]). Indeed, a second summary judgment motion should not be entertained without a demonstration of sufficient justification (*Jones v 636 Holding Corp.*, 73 AD3d at 409).

Despite Feingold’s assertions to the contrary, this branch of the motion, seeking dismissal of the affirmative defenses, is based on legal grounds and factual assertions that could have been raised in earlier motion practice.

However, even if the court were to consider the merits of plaintiff’s arguments in favor of dismissal of these affirmative defenses, there are questions of fact which cannot be resolved on the papers before the court. Plaintiff has not presented proof in admissible form sufficient to establish his prima facie case regarding the status of the occupants of the apartment and the circumstances surrounding Truong and Kledzik’s alleged “actual partial evictions.” Indeed,

⁴ The Fourth Affirmative Defense alleges that Feingold has no standing to seek damages for Truong’s alleged wrongful eviction. The Fifth Affirmative Defense alleges that Feingold has no standing to seek damages for any cause of action that is personal to Truong.

The Sixth and Seventh Affirmative Defenses allege that Feingold has no standing to seek damages for the denial of services to Kledzik, one of Feingold’s alleged roommates.

The Eighth Affirmative Defense pleads that as the sole signatory to the lease, Feingold is contractually obligated to pay the rent, whether or not he receives the financial contribution of the three roommates.

although Feingold has included affidavits from several of the former occupants, he has not submitted affidavits from Truong and Kledzik, nor has he presented evidence to establish damages, if any, resulting from defendant's allegedly wrongful acts.

Moreover, because discovery is still incomplete, "facts essential to justify opposition may exist, but cannot [now] be stated" (CPLR 3212 [f]; see *Watson v Work Wear Corp.*, 202 AD2d 231, 231 [1st Dept 1994] [the lower court's "denial of summary judgment at this juncture was appropriate in view of the still outstanding discovery"]).

River Place cross-moves to amend its First Counterclaim to specify that River Place is seeking not only a declaratory judgment that the occupants of the apartment are sublessees, but, in addition, injunctive relief enjoining Feingold from profiteering on his rent-stabilized apartment.

"Leave to amend a pleading is freely granted absent prejudice or surprise resulting directly from any delay in asserting the proffered claim" (*Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007]; see also CPLR 3025 [b]). The party opposing the motion to amend must overcome the presumption of validity in the moving party's favor, and demonstrate that the facts alleged and relied upon in the moving papers are unreliable or insufficient to support the amendment.

Here, the original answer with affirmative defenses and counterclaims put Feingold on notice of defendant's profiteering claim. The amendment simply clarifies that the relief defendant is seeking is to enjoin any profiteering occurring in violation of the RSL.

Moreover, in support of the request for injunctive relief, defendant cites *Leonori Assoc. v Sultan* (7 Misc 3d 238, 240 [Sup Ct, NY County 2005]), wherein the court expressly held that a

landlord could seek injunctive relief enjoining a tenant from profiteering. In addition, defendant cites *Breson Corp. v Halo* (3 Misc3d 1103 [A], 2004 NY Slip Op 50352 [U] *4 [Civ Ct, NY County 2004] for the proposition that it makes no difference whether this action is viewed as a sublet or a roommate situation; if the occupant was paying more than his/her proportional share of the rent, profiteering has occurred.

In opposition, Feingold merely repeats his bare assertion that the occupants of the apartment are not subtenants and that an injunction is not warranted.

Accordingly, because the amendment to the First Counterclaim appears to have merit and because it will not prejudice or surprise Feingold or unduly delay the resolution of this litigation, defendant's cross-motion to amend its answer and counterclaims in the form annexed to the moving papers is granted (*see Aurora Loan Servs., LLC v Dimura*, 104 AD3d 796, 796-797 [2d Dept 2013] [the decision of whether to grant leave to amend a pleading is within Supreme Court's broad discretion]).

Motion Sequence 002

Accordingly it is ORDERED that the motion of defendant River Place I Holdings, LLC to compel disclosure and prohibit plaintiff from introducing evidence is granted to the following extent: it is hereby

ORDERED that plaintiff Leon Feingold is precluded from introducing evidence of move-in, move-out logs or freight elevator records at trial; and it is further

ORDERED that plaintiff Leon Feingold is directed to produce copies of his monthly bank statements evidencing payments by the occupants of the apartment and payments of his monthly utilities (irrelevant material may be redacted) from January 2010 through the date of this decision

and order within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff León Feingold is precluded from offering evidence other than the leases already provided as evidence in support of his damages claim; and is it further

ORDERED that if plaintiff Leo Feingold has documents evidencing his obligation to reimburse Ms. Truong for her moving expenses, such documents must be produced within 30 days of service of a copy of this order with notice of entry. If Feingold does not timely produce documents in response to this discovery demand, it is ORDERED that he is precluded from introducing such documents as evidence at trial; and it is further;

ORDERED that within 30 days of service of a copy of this order with notice of entry, Feingold is directed to produce any and all documents held by a utility company evidencing his lost contributions toward payment of his utility charges; in the event that he fails to comply with this order, he shall be precluded from introducing such evidence at trial; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that plaintiff Leon Feingold's cross-motion for a protective order and an order striking so much of the defendant River Place I Holdings LLC's discovery demands as seek production of plaintiff's tax returns and W-2 forms is granted and such demands are hereby stricken.

Motion Sequence 003

It is ORDERED that plaintiff Leon Feingold's motion to dismiss defendant River Place I Holdings LLC's Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth affirmative defenses and the First Counterclaim is denied in its entirety; and it is further

ORDERED that defendant River Place I Holdings, LLC's cross-motion to amend its


answer to add a request to its First Counterclaim for injunctive relief enjoining plaintiff Leon Feingold from profiteering on his rent-stabilized apartment is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff shall serve a reply to the amended answer or otherwise respond thereto within 20 days from the date of service; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 311, 71 Thomas Street, on July 9, 2014, at 2:00 p.m.

Dated: May 9, 2014

ENTER:



Ellen M. Coin, A.J.S.C.