

**H & L Thompson St. Assoc. v 177 Thompson
Owners Corp.**

2014 NY Slip Op 33591(U)

January 6, 2014

Supreme Court, New York County

Docket Number: 114285/09

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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H&L THOMPSON STREET ASSOCIATES,

Plaintiff,

Index No.: 114285/09

-against-

**ORDER WITH
NOTICE OF ENTRY**

177 THOMPSON OWNERS CORP., AND
HOWARD ROSENTHAL,

Defendants.

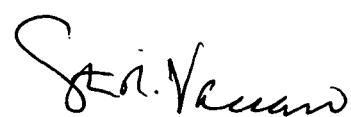
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PLEASE TAKE NOTICE, that the within is a true copy of the Decision and
Order dated January 6, 2014, duly entered in the office of the Clerk of the within
named Court on January 8, 2014.

Dated: Forest Hills, New York
January 13, 2014

Yours, etc.

GOLDSTEIN & GREENLAW, LLP



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FILED

JAN 22 2014

COUNTY CLERK'S OFFICE
NEW YORK

177 Thompson Owners Corp. ("177") to resolve litigation concerning the shares of four cooperative apartments ("the apartments").

H & L alleges that the stipulation of settlement granted it the sole and exclusive right to: (a) receive rents from the apartments; (b) receive any sale proceeds from the apartments; and (c) procure tenants for the apartments. H & L further alleges that the stipulation requires the rents from the apartments to be paid to 177's managing agent, and then remitted to H & L.

On October 13, 2009, H & L commenced this action alleging that the defendants breached the stipulation of settlement. H & L asserts six causes of action sounding in breach of contract, tortious interference, breach of fiduciary duty, and unjust enrichment.

On February 27, 2013, I heard oral argument on the motion to dismiss, and I issued an order on the record dismissing the first, second, and third causes of action to the extent that those actions allege breaches of contract beyond the six-year statute of limitations. I further dismissed the fourth and fifth causes of action, and I dismissed the sixth cause of action except for the unjust enrichment claim within the three-year statute of limitations.

The remaining issue is whether the defendants are entitled to dismissal of the first, second, and third causes of action based on the affirmative defenses of waiver and estoppel. In the first, second, and third causes of action, respectively, H & L alleges that the defendants breached the stipulation by: (1) deducting repair costs from the rents of the apartments; (2) failing to advise H & L of any vacancies and failing to allow H & L to

procure tenants and negotiate market rate rents; and (3) failing to maximize the value of the apartments.

In the current motion, the defendants argue that the first, second, and third causes of action should be dismissed because H & L waived its contractual rights under the stipulation. The defendants claim that H & L never objected when the defendants rented out the apartments, or to the rent amounts charged by the defendants or the repair costs deducted from the rents. In addition, the defendants argue that they justifiably relied on H & L's failure to enforce its rights, and therefore H & L should be estopped from asserting its claims against the defendants.

At his deposition, 177's treasurer, Howard Rosenthal, testified that he had a conversation with H & L's managing partner, Nathan Halegua, shortly after the stipulation of settlement was signed. According to Rosenthal, Halegua agreed during the conversation that 177 should rent out the apartments instead of H & L.

Rosenthal testified, "I must have said to Nathan [Halegua] that it would be easier to have us rent it and if you're not in agreement tell me. Nothing was ever said, so we rented the units in all 12 or 14 years." Rosenthal stated that 177 rented out the apartments "because it was more expedient" for H & L. Rosenthal also testified that 177 gave H & L the opportunity to procure tenants, but that H & L never submitted any tenants.

Rosenthal further explained that 177's managing agent collected the rents from the apartments. After the rents were collected, Rosenthal deducted co-op maintenance

charges and repair costs from the rents, and remitted the remainder to H & L, with a statement itemizing the deductions. Rosenthal testified that H & L never objected to the deduction of repair costs from the rents.

In opposition, H & L argues that the first, second, and third causes of action should not be dismissed based on the defenses of waiver and estoppel. H & L claims that it did not waive its rights because it regularly complained to the defendants about renting out the apartments and the repair costs deducted from the rents.

H & L submits the deposition testimony of its managing agent, Joe Mohan (“Mohan”). Mohan testified that he managed the apartments on H & L’s behalf for five years, and that he is responsible for reviewing the rent amounts that H & L received from the apartments.

Mohan testified that he spoke with Rosenthal approximately ten times during the five years that he managed the apartments for H & L.¹ Mohan stated that he spoke to Rosenthal concerning issues such as whether “there was a vacancy, if he re-rented it, who did he re-rent it to . . . what kind of repairs were done” and whether any invoices existed for the repair costs that were deducted from the rents.

According to Mohan, the defendants never informed H & L when the apartments were vacant and they never provided any leases to H & L. In addition, H & L did not

¹ Mohan’s deposition took place on November 15, 2010. Based on the date of his deposition, I infer that Mohan’s testimony refers to the period between 2005 and 2010.

have access to the apartments even though it requested access twice. Mohan explained that H & L could not determine the market rate rents for the apartments without access to the unit. He also testified that Rosenthal never provided documentation for repair costs deducted from the rents, except for one occasion.

H & L's managing partner, Nathan Halegua, testified that his office frequently contacted Rosenthal about repair costs and maintenance increases, but that Rosenthal never acknowledged H & L's objections. Halegua further testified that the defendants sent him copies of new leases for the apartments, but that it was "always after the fact that we found out what he [Rosenthal] was renting these apartments for and what kind of deal he had made and we were never entitled to rent these apartments ourselves."

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

To establish the defense of waiver, the defendant must show that the plaintiff knowingly, voluntarily, and intentionally abandoned his or her contractual right.

Echostar Satellite L.L.C. v. ESPN, Inc., 79 A.D.3d 614, 618 (1st Dep't 2010). The

abandonment may be established by an affirmative act, or a failure to act so as to evince an intent not to claim a purported advantage under the contract. *Fundamental Portfolio Advisers, Inc. v. Tocqueville Asset Mgt., L.P.*, 7 N.Y.3d 96, 104 (2006).

Based on the deposition testimony submitted, I find that the defendants made a *prima facie* showing of their affirmative defense of waiver. Rosenthal testified that H & L never objected when the defendants rented out the apartments, and they never objected to the rent amounts or the deduction of repair costs from the rent. H & L's failure to object evinces an intent not to claim its rights under the stipulation.

The burden now shifts to H & L to raise a triable issue of fact. Here, I find that H & L raises a triable issue of fact as to whether it waived its rights under the stipulation dating back to 2005. Mohan testified that he repeatedly contacted Rosenthal between 2005 and 2010 to discuss issues such as the repair costs deducted from the rents, and whether there were any vacancies in the apartments.

Although H & L raises an issue of fact as to the whether it waived its rights beginning in 2005, I find that H & L failed to submit any evidence that it objected to the defendants' actions prior to 2005. I therefore grant the defendants' motion for summary judgment dismissing the first, second, and third causes of action to the extent that any alleged breaches of contract prior to January 1, 2005 are dismissed based on the affirmative defense of waiver, and I otherwise deny the motion.

The defendants also argue that the first, second, and third causes of action should be dismissed based on the affirmative defense of estoppel. Estoppel "prevents the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that enforcement would not be sought." *Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 N.Y.2d 175, 184 (1982); *Echostar Satellite L.L.C. v. ESPN, Inc.*, 79 A.D.3d 614, 619 (1st Dep't 2010). Because issues of fact exist as to H & L's conduct with respect to the apartments, I do not address the defendants' estoppel argument at this time.


In accordance with the foregoing, it is hereby

ORDERED that defendants 177 Thompson Owners Corp. and Howard Rosenthal's motion for summary judgment dismissing the first, second, and third causes of action pursuant to CPLR § 3212 is granted to the extent that any alleged breaches of contract prior to January 1, 2005 are dismissed, and otherwise denied.

This constitutes the decision and order of the court.

Dated: New York, New York
January 10, 2014

ENTER:



Saliann Scarpulla, J.S.C.

Steven R. Vaccaro, an attorney duly admitted to practice law in the State of New York affirms the truth of the following under penalty of perjury:

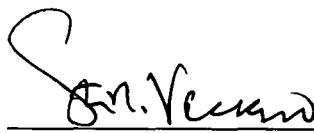
I am not a party to the action, am over the age of eighteen (18) years and reside in New York. On January 14, 2014, I served the within

ORDER WITH NOTICE OF ENTRY

By depositing a true copy thereof in a post-paid envelope, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to the following persons at the last known address set forth after each name:

TO: Daniel F. Spitalnic, Esq.
Attorney for Plaintiff
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Six Grace Avenue, Suite 202
Great Neck, N.Y. 11021

Dated: Forest Hills, New York
January 14, 2014



Steven R. Vaccaro, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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