Chan Juan Zheng v Mak
2015 NY Slip Op 32956(U)
July 28, 2015
Supreme Court, New York County
Docket Number: 112693-2009
Judge: George J. Silver
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10
---X
CHAN JUAN ZHENG,

Plaintiff,

-against-

NANCY MAK, CHINATOWN PRESERVATION HDFC, ASIAN AMERICAN HOUSING DEVELOPMENT FUND COMPANY, INC., and ASIAN AMERICANS FOR EQUALITY,

Defendants.
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Index No. 112693-2009

DECISION/ORDER

Motion Sequence 002

FILED

JUL 29 2015

COUNTY CLERK'S OFFICE
NEW YORK

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion, Affirmation & Collective Exhibits Annexed............................	1, 2, 3
Answering Affirmation & Collective Exhibits..	4, 5
Reply Affirmation..	6

Defendants Chinatown Preservation HDFC (Chinatown preservation) and Asian American Housing Fund Company, Inc. (Asian American) (collectively defendants) move pursuant to CPLR § 2221 for an order granting them leave to renew their prior motion for summary judgment and, upon renewal, dismissing plaintiff Chan Juan Zheng's (plaintiff) second and fifth causes of action. By order dated March 14, 2012, Justice Gische dismissed plaintiff's 4th, 5th and 6th causes of action against both defendants as well as the first, third and eighth causes of action against Asian American. The second cause of action, sounding in rent overcharge, and the fifth cause of action, sounding in fraud, were not dismissed. With respect to these causes of action, the March 14, 2012 order states:

> The issue of whether plaintiff's overcharge claim should be restricted to the 4 year limitation period is closely intertwined with her fraud claim because, if there is a substantial indicia of fraud, then the rent history for Apartment 2 is unreliable. To state a cause of action for fraud, plaintiff must show: (1) that defendants intentionally made a misrepresentation or material omission of fact; (2) that the misrepresentation

> or material omission of fact was false or known to be false to defendants; (3) plaintiff's reliance; and (4) that the misrepresentation resulted in some injury to plaintiff (citation omitted).
> The fraud alleged by plaintiff is two-fold: she claims that the jump in rent for apartment 2 from $150.01 in 1998 to $1,100 in 200 is 'inconsistent with applicable law.' To further illustrate her point, plaintiff provides the rent history for two other unrelated apartments. The rent for apartment 6, for example, increased from $427.29 to $1,200.00 upon becoming vacant and the rent for apartment 19 increased rent [sic] from $369.73 to $1,050 upon vacancy. Plaintiff contends that this not only shows Mak defrauded her tenants, but that moving defendants could and should have discovered this fraud through due diligence. Her second fraud allegation involves the size of her apartment. She contends she rented apartment 2 as a three (3) bedroom apartment when, in fact, it is only a legal one (1) bedroom apartment.

The March 14, 2012 order further states:

> They [defendants] have not met their burden and, in any event, plaintiff has pleaded and raised triable issues of fact supporting a tenable claim for fraud, requiring denial of Asian America and Chinatown Preservation's motion for summary judgment dismissing (or limiting) the overcharge (2nd COA) claim based on the applicable statute of limitations and fraud claim (5th cause of action).

In opposition to defendants' summary judgment motion, plaintiff submitted an affidavit in which she averred that her apartment had three bedrooms at the time she first saw it and prior to when she agreed to rent it. In moving for leave to renew, defendants argue that plaintiff admitted at her deposition, held after the time of their motion, that she was aware that the apartment was a one bedroom apartment. Defendants contend that plaintiff's admission establishes that plaintiff's averment regarding the size of the apartment were false, created with the intent to deceive defendants and the court and improperly submitted to avoid dismissal of the second and fifth causes of action. Defendants also contend that Yu Hua Chen (Chen), a plaintiff in a separate action against defendants, also submitted an affidavit in opposition to defendants' motion that she later contradicted during her deposition when she testified that her apartment had only one bedroom when she first went to see it.

In opposition to the motion to renew, plaintiff submits yet another affidavit, this time claiming that the subject apartment had two bedrooms when she saw it and agreed to rent it in October 2003. Plaintiff claims that when she first saw the apartment, she observed a bedroom to the left of the entrance door, a bathroom in front of the entrance door and to the left, and a combined kitchen and living area to the right of the entrance door. Plaintiff claims she also observed wall with a slanted door beyond the kitchen wherein there was a bedroom. Plaintiff states that she inquired of the landlord whether plaintiff could install additional sleeping areas in the kitchen and the landlord agreed. Plaintiff also inquired whether she could separate the

bedroom to the right of the entrance door into two sleeping areas[1]. The landlord again agreed. Plaintiff claims that her affidavit referencing a three bedroom apartment was prepared by her attorney and executed by her but at the time it was executed she misunderstood her attorney's questions regarding the number of bedrooms existing in the apartment at the inception of her tenancy. Plaintiff claims that because the landlord rented her a two bedroom apartment and consented to the creation of a third bedroom, plaintiff stated that she rented a three bedroom apartment. Regarding her deposition testimony, plaintiff claims that in preparation for that testimony, her attorney spent several hours with her and a translator during which time the distinction between what the apartment looked like when she first saw it and the three bedroom apartment she occupied and the prior landlord consented to became apparent to plaintiff.

An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court (*Elson v Defren*, 283 AD2d 109 [1st Dept 2001]). This requirement, however, is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made (*Liberty Mut. Ins. Co. v Allstate Ins. Co.*, 237 AD2d 260 [2d Dept 1997]; *Vayser v Waldbaum*, 225 AD2d 760 [2d Dept 1996]). The Appellate Division, First Department has held that even if the vigorous requirements for renewal are not met, such relief may be properly granted so as not to "'defeat substantive fairness'" (*Metcalfe v City of New York*, 223 AD2d 410, 411 [1st Dept 1996] *quoting Lambert v Williams*, 218 AD2d 618, 621 [1st Dept 1995]). Deposition testimony which had not been elicited at the time a motion for summary judgment was made constitutes new evidence for the purpose of a motion for leave to renew (*Morales v Coram Materials Corp.*, 64 AD3d 756 [2d Dept 2009]). Accordingly, defendants' motion for leave to renew is granted. However, upon renewal, the court adheres to Justice Gische's March 14, 2012 order. The inconsistencies in plaintiff's affidavit and her subsequent deposition testimony, as well as the excuses she has proffered for those inconsistencies, raise questions of credibility that cannot be resolved on a motion for summary judgment (*see Johnson v Ann-Gur Realty Corp.*, 117 AD3d 522 [1st Dept 2014]; *Hagensen v Ferro, Kuba, Mangano, Skylar, Gacovino & Lake, P.C.*, 108 AD3d 410 [1st Dept 2013]) and the issue regarding the number of bedrooms in the subject apartment should be resolved on cross-examine before a fact finder. The inconsistencies and contradictions in plaintiff's testimony go to the weight of the evidence, not its competence, and the value to be accorded to the evidence is a matter for resolution by the trier of fact (*Alvarez v N.Y. City Hous. Auth.*, 295 AD2d 225 [1st Dept 2002]). Moreover, it is apparent from a reading of the March 14, 2012 order that Justice Gische's finding that plaintiff raised triable issues of fact supporting a fraud claim was based not only upon the number of bedrooms allegedly in the apartment but also upon increases in rent for the subject apartment as well as other apartments in the building.

Accordingly, it is hereby

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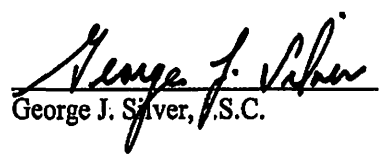
[1] The court notes that while plaintiff claims that she inquired whether the bedroom to the right of the entrance door could be separated into two sleeping areas, plaintiff first stated that she observed a combined kitchen/living are to the right of the entrance door, not a bedroom.

ORDERED that defendants' motion to renew is granted and, upon renewal, the court adheres to the decision and order dated March 14, 2012; and it is further

ORDERED that the parties are to appear for a status conference on September 29, 2015 at 9:30 a.m in Part 10, room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; and it is further

ORDERED that defendant movants are to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry.



George J. Silver, J.S.C.

GEORGE J. SILVER

Dated: 7/28/15
New York County

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