

**Feingold v River Place I Holdings, LLC**

2016 NY Slip Op 32397(U)

December 6, 2016

Supreme Court, New York County

Docket Number: 150084/12

Judge: Ellen M. Coin

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

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LEON FEINGOLD,

Plaintiff,

-against-

Index No. 150084/12

RIVER PLACE I HOLDINGS, LLC,

Defendant.

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**ELLEN M. COIN, J.:**

Defendant River Place I Holdings, LLC (Holdings), the owner of the building in which plaintiff Leon Feingold is a rent stabilized tenant, moves, pursuant to CPLR 3001 and 3212 (a), for an order: (a) granting it summary judgment on its first counterclaim, for a declaration that plaintiff has profited on his apartment (Apartment); (b) granting an injunction barring him from charging his co-occupants rent in excess of the proportionate space occupied by them; and © dismissing the second and third causes of action in plaintiff’s amended verified complaint (complaint). Those causes of action allege, respectively, actual eviction and damages resulting from defendant’s refusal to permit a prospective co-occupant of the Apartment to move into it.

This case arises from the undisputed fact that plaintiff has had a sequence of co-occupants in the Apartment since he first leased it. By order dated January 10, 2013, this court granted plaintiff’s motion for partial summary judgment, declaring that pursuant to his lease, he is entitled to have three roommates in the Apartment. Plaintiff’s lease provides, in relevant part:

“The only persons who may reside in the Apartment are: (i) the Tenant named in the preamble of the Lease, (ii) members of Tenant’s immediate family as listed in this Article, and (iii) any other person who is authorized by Tenant to reside in the

Apartment and is entitled to be so authorized under Section 235-(f) of the New York Real Property Law.”

Thus, plaintiff’s co-occupants reside in the Apartment pursuant to Real Property Law § 235-f.

Rent Stabilization Code (RSC) § 2525.7 provides, in relevant part,

“(b) The rental amount that a tenant may charge a person in occupancy pursuant to section 235-f of the Real Property Law shall not exceed such occupant’s proportionate share of the legal regulated rent charged to and paid by the tenant for the subject housing accommodation. For the purposes of this subdivision, an occupant’s proportionate share shall be determined by dividing the legal regulated rent by the total number of tenants named on the lease and the total number of occupants residing in the subject housing accommodation.”

Plaintiff indisputably charged his co-occupants rental amounts far exceeding their proportionate share of the legal regulated rent for the Apartment, while often paying no rent himself. Plaintiff correctly points out that the cases upon which defendant relies involve tenants who charged their subtenants, or roommates, more than the legal regulated rent for their respective apartments. Plaintiff did just that from September 2010 through September 2011. *See* Axelrod affidavit, exhibit K (chart prepared by plaintiff at his deposition), 1-2. But RSC § 2525.7 is violated by conduct well short of such egregious profiteering. From at least September 2010 through September 2011, from October 2012 through at least September 2013, and again, from at least October 2014 through December 2014, plaintiff charged each of his roommates more rent than he paid. *See id.* Moreover, plaintiff, who is a real estate broker, exacted a brokerage fee from a number of his roommates, in addition to the rent that he charged them. *See* Axelrod affidavit, exhibit N.

Nonetheless, defendant’s motion for summary judgment must be denied, because defendant seeks summary judgment “on its First Counterclaim for a declaration that Plaintiff has

profiteered on his Rent Stabilized apartment” (notice of motion, 1), while defendant’s first counterclaim “seeks a declaratory judgment that the individuals authorized by Plaintiff to occupy the subject premises are sublessees of the Plaintiff.” Axelrod affidavit, exhibit B, ¶ 33. While summary judgment should not be granted against a party that has made out a sufficient evidentiary case, despite a deficiency in its pleading (*Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276, 280-281 [1978]), it may not be granted to a movant whose pleading does not support its request. See *Encarnacion v Manhattan Powell*, 258 AD2d 339, 340 (1st Dept 1999); see also *Dorsey v Yantambwe*, 276 AD2d 108, 112 (4th Dept 2000).

Nor is defendant entitled to injunctive relief. It is elementary that a party seeking either a temporary, or a permanent, injunction must show that, absent the grant of such relief, it will likely suffer irreparable harm. *Ovitz v Bloomberg L.P.*, 18 NY3d 753,760 (2012); see also *Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 431 (1st Dept 2016). Defendant merely speculates that “[a]llowing Mr. Feingold to continue overcharging his subtenants/roommates . . . may ultimately render Defendant . . . complicit in his illegal scheme and may result in liability to Defendant.” Axelrod, reply aff, ¶ 15. Citing *Primrose Mgt. Co. v Donahoe* (253 AD2d 404 [1<sup>st</sup> Dept 1998]), defendant argues in support of this speculation, that a landlord may be liable for damages to a subtenant, when it has colluded with the prime tenant to create an illusory tenancy. The hallmark of an illusory tenancy, however, is “a ‘residential leasehold created in a person who does not occupy the premises for his or her own residential use and subleases it for profit’ . . . .” *Matter of Partnership 92 LP v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 (1st Dept 2007), *affd* 11 NY3d 859 (2008) (quoting *Matter of Badem Bldgs. v Abrams*, 70 NY2d 45, 52-53 [1987]); see also *Primrose Mgt.Co. v*

*Donahoe*, 253 AD2d at 405. Here, in contrast, it is undisputed that plaintiff has resided in the Apartment throughout the duration of his lease.

The second and third causes of action alleged in the complaint arise out of an "Apartment Share Agreement" between plaintiff and nonparty Judy Truong, dated October 15, 2011, pursuant to which Ms. Truong would move into the Apartment and pay a monthly rent of \$1,400. At that time, the legal regulated rent for the Apartment was \$4,000 per month, and Ms. Truong would have been one of four persons living there. Accordingly, pursuant to RSC § 2525.7, plaintiff could not lawfully charge her rent in excess of \$1,000 per month. It is established that a court will not enforce an unlawful contract (*Georgia Props., Inc. v Dalsimer*, 39 AD3d 332, 334 (1st Dept 2007); *Abright v Shapiro*, 214 AD2d 496, 496 (1st Dept 1995)). It follows that a court will not award damages where the purpose of such a contract is frustrated. *Stone v Freeman*, 298 NY 268, 271 (1948); *Braunstein v Jason Tarantella, Inc.*, 87 AD2d 203, 207 (2d Dept 1982). Accordingly the second and third causes of action must be dismissed.

Accordingly, it is hereby

ORDERED that the motion of defendant River Place I Holdings, LLC for summary judgment is granted to the extent that the second and third causes of action alleged in the complaint of plaintiff Leon Feingold are dismissed, and the motion is otherwise denied.

Dated: December 6, 2016

ENTER:

  
 A.J.S.C. **HON. ELLEN M. COIN**