

L&L Realty Equities, LLC v Healy
2019 NY Slip Op 30081(U)
January 10, 2019
Supreme Court, New York County
Docket Number: 152704/2018
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: <u>HON. BARBARA JAFFE</u> <i>Justice</i> -----X L&L REALTY EQUITIES, LLC, Plaintiff, - v -	PART IAS MOTION 12EFM INDEX NO. <u>152704/2018</u> MOTION DATE _____ MOTION SEQ. NO. <u>001</u>
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GREGORY HEALY and ANDREW HEALY,
 Defendants.

**AMENDED
DECISION AND ORDER**

-----X
 The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26
 were read on this motion to _____ dismiss _____.

Plaintiff moves pursuant to CPLR 3211 for an order dismissing defendants’ second, fourth, fifth, seventh, eighth, and ninth affirmative defenses, and dismissing defendants’ second counterclaim. Defendants oppose.

I. VERIFIED COMPLAINT (NYSCEF 9)

Plaintiff owns an apartment building in Manhattan, and employed defendant Gregory Healy, a real estate broker, to rent apartments in the building. In 2015, Gregory took advantage of the incapacity of the building’s manager and engaged in self-dealing by executing a rent-stabilized lease with defendant Andrew Healy, with whom he shares a familial relationship. Andrew had a rent stabilized lease from May 2015 to May 2017, and still resides in the building.

On March 27, 2018, plaintiff initiated this action alleging fraud, breach of fiduciary duty, conversion, ejectment, unjust enrichment, and seeking an order nullifying the lease and requiring that Andrew pay use and occupancy.

II. VERIFIED ANSWER AND COUNTERCLAIMS (NYSCEF 10)

On May 31, 2018, defendants filed their answer and asserted counterclaims. At issue are the following affirmative defenses:

- 2) the action is brought without requisite authority;
- 4) unjust enrichment;
- 5) laches, waiver, ratification, estoppel and/or unclean hands;
- 7) accord and satisfaction;
- 8) statute of limitations; and
- 9) failure to mitigate damages.

In their second counterclaim, defendants allege that they acted in good faith in renting the apartment to Andrew, that during the two-year lease term Andrew paid the monthly rent, and that after the lease ended, plaintiff failed to offer him a renewal lease, as required by rent stabilization laws and guidelines, thereby attempting to unlawfully evict him in violation of 9 NYCRR § 2525.5 and maliciously commencing this meritless action. They also seek an award of punitive damages based on plaintiff's commencement of similarly unwarranted actions against other building residents, and damages to compensate them for their attorney fees and other expenses.

III. CONTENTIONS

A. Plaintiff (NYSCEF 7-12)

Plaintiff alleges that defendants' second, fourth, fifth, seventh, eighth, and ninth affirmative defenses must be dismissed as boilerplate devoid of supporting facts, and that in any event, they lack merit as a matter of law. It asserts that defendants fail to state a cause of action in their second counterclaim, absent any private right of action that may be derived from 9 NYCRR § 2525.5. Rather, defendants' sole remedy is the filing of a complaint with the Division

of Housing and Community Renewal (DHCR). Consequently, the request for punitive damages has no basis.

B. Defendants (NYSCEF 17-25)

Defendants assert that they state their defenses and counterclaims with the requisite specificity, and they deny bringing a claim pursuant to 9 NYCRR § 2525.5. Rather, they accuse plaintiff solely of “unlawful harassment” and “fraud and deceit.” They maintain that plaintiff remains subject to Administrative Code § 27-2004 (Local Law 7), which provides for a private right of action.

Defendants argue that they will be substantially prejudiced and deprived of due process, by the loss of their defenses and counterclaim, whereas plaintiff is not prejudiced by their retention in this action. Absent discovery, they claim to be incapable of alleging more specific facts.

C. Reply (NYSCEF 26)

Plaintiff denies that defendants pleaded Local Law 7 as the basis for their harassment claim.

IV. ANALYSIS

A. Affirmative defenses

To dismiss a defense pursuant to CPLR 3211(b), the movant bears the burden of demonstrating that the defense is not stated or is without merit as a matter of law. (*S. Point, Inc. v Redman*, 94 AD3d 1086, 1087 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Gordon*, 84 AD3d 443, 443-444 [1st Dept 2011]). In deciding the motion, the court must give the defendant the benefit of every reasonable intendment of the pleading, which is to be liberally construed. (*Id.*; *Warwick v Cruz*, 270 AD2d 255, 255 [2d Dept 2000]). Dismissal is warranted where the

affirmative defenses only plead conclusions of law without any supporting facts. (*Robbins v Growney*, 229 AD2d 356, 358 [1st Dept 1996]; *Bank of Am., NA v 414 Midland Av. Assoc., LLC*, 78 AD3d 746, 750 [2d Dept 2010]; *Firemans' Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008]).

Here, defendants' defenses of lack of requisite authority and laches are insufficiently pleaded (*Noble v Ambrosio*, 173 AD2d 801 [2d Dept 1991] [standing or capacity defense must be supported by facts]; *Robbins*, 229 AD2d at 358 [defense of laches based on bare legal conclusion did not state valid defense]), and although unjust enrichment may be pleaded as an affirmative defense, defendants do not show that plaintiff will obtain a benefit to which it is not entitled. Rather, a finding in plaintiff's favor in this action constitutes an adjudication that plaintiff is entitled to damages, which cannot be a basis for claiming an unjust enrichment.

As an exception to the rule that a defense must be pleaded with sufficient particularity, a defendant relying on a statute of limitations need not specify the applicable statute or its limitation period. (*Immediate v St. John's Queens Hosp.*, 48 NY2d 671, 673 [1979]). Nevertheless, as the parties entered into the lease less than three years before the initiation of the action, and as none of the claims asserted has a limitation period of less than three years, defendants cannot sustain its statute of limitations defense.

A party may not be estopped from denying the rent regulatory status of an apartment, nor may such status be waived (*546 W. 156th St. HDFC v Smalls*, 43 AD3d 7, 11 [1st Dept 2007] [rent stabilization treatment of premises not subject to waiver or estoppel]), and a rent stabilized lease may not be ratified for a non-rent stabilized apartment.

An issue may be subject to an accord and satisfaction where there is a dispute regarding the amount of money owed, and the creditor accepts payment with the effect of settling or

discharging its claim. (*Complete Messenger & Trucking Corp. v Merrill Lynch Money Markets, Inc.*, 169 AD2d 609, 610 [1st Dept 1991]). Defendants fail to allege that the amount of rent paid to plaintiff was in dispute at the time it was paid. (*Echostar Satellite L.L.C. v ESPN, Inc.*, 79 AD3d 614, 619 [1st Dept 2010] [amount owed must be in dispute before accord and satisfaction may extinguish debt]).

Generally, a landlord owes no duty to mitigate damages upon the tenant's abandonment of premises. (*Holy Properties Ltd., LP v Kenneth Cole Prods., Inc.*, 87 NY2d 130, 133 [1995]; *Rios v Carrillo*, 53 AD3d 111, 113 [2d Dept 2008]). Even if such a duty exists, the apartment remains occupied by Andrew and thus could not be rented out. Consequently, plaintiff is unable to mitigate its damages.

B. Counterclaim

In the second counterclaim, defendants assert violations of 9 NYCRR § 2525.5, which must be adjudicated by DHCR. (9 NYCRR 2526.2; *Mago, LLC v Singh*, 47 AD3d 772, 773 [2d Dept 2008]). To the extent they argue that they state a claim pursuant to Administrative Code § 27-2004, it appears nowhere in their counterclaim.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to dismiss defendants' second, fourth, fifth, seventh, eighth, and ninth defenses is granted; it is further

ORDERED, that plaintiff's motion to dismiss defendants' second counterclaim is granted; and it is further

ORDERED, given that the issue of the rent stabilized status of the apartment will be dispositive of the claims and counterclaims asserted here, and as DHCR has primary jurisdiction

over that issue (*Olsen v Stellar W. 110, LLC*, 96 AD3d 440, 441 [1st Dept 2012]), the parties are directed, within 30 days of the date of this order, to submit letter memoranda addressing why this action should not be stayed and/or dismissed pending the commencement and outcome of a proceeding before DHCR.

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1/10/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE