

Cone v Roxborough Apts. Corp.
2019 NY Slip Op 32479(U)
August 16, 2019
Supreme Court, New York County
Docket Number: 154704/2017
Judge: Alexander M. Tisch
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER M. TISCH PART IAS MOTION 18EFM

Justice

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INDEX NO. 154704/2017

MICHAEL CONE and REBECCA HELEN STEINER f/k/a
REBECCA CONE,

MOTION DATE 06/19/2019

Plaintiffs,

MOTION SEQ. NO. 002

- v -

ROXBOROUGH APARTMENTS CORP. a/k/a
ROXBOROUGH APTS CORP., and PAUL BOGONI,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 72, 73, 74, 76, 77, 78, 79, 80, 81, 82, 83, 111, 112, 120, 121, 122, 123, 124, 125, 127

were read on this motion to/for DISMISS

Upon the foregoing papers, defendant Paul Bogoni (Bogoni) moves to dismiss plaintiffs' causes of actions as against him in his individual capacity, pursuant to CPLR 3211. Defendant Roxborough Apartments Corp. (Roxborough) moves to dismiss so much of plaintiffs' first and second causes of action seeking declaratory judgment that the apartment is subject to rent regulation. Roxborough also moves for an award of use and occupancy for all post-commencement rent arrears in the sum of \$160,680.00 and for an order declaring that the monthly legal rent during the pendency of this action shall be \$6,695.00. Plaintiff Michael Cone cross-moves to strike defendants' second affirmative defense pursuant to CPLR 3211 (b) and in the event the Court finds the complaint insufficient, for leave to replead pursuant to CPLR 3211 (e).

BACKGROUND

Plaintiff Michael Cone is the current occupant of apartment 12D in a building (the building) located at 251 W. 92nd Street in the County, City, and State of New York. Plaintiff

Rebecca Steiner (formerly Rebecca Cone) was an occupant of the apartment from July 1, 2014 until June 30, 2016. Defendant Roxborough Apartments Corporation (Roxborough) is the building's owner, and co-defendant Paul Bogoni is the principal, managing agent, and sole shareholder of Roxborough. Plaintiffs state that they initially took possession of apartment 12D on July 1, 2014 pursuant to a two-year lease with rent reserved for the first year at \$6,695.00 and rent for the second year at \$6,835.00, a 2% increase.

Roxborough started receiving J-51 benefits in the 2005/2006 tax year. Roxborough maintains that they stopped receiving the benefits in July 2017. Because plaintiffs entered into their lease while defendants were receiving J-51 tax benefits, the apartment was subject to rent stabilization. The lease provided to plaintiffs was not on a form indicating that the unit was rent stabilized. Even though the building was receiving J-51 tax abatements, Roxborough and Bogoni maintain that they were unaware that it was subject to rent regulation. As a result, Roxborough did not file registration statements for the building's apartments with the New York State Division of Housing and Community Renewal (DHCR), as required by law, from 2005 to 2013. Roxborough claims they only became aware of the mistake in 2014, prior to plaintiff's tenancy in apartment 12D. Thereafter, they promptly registered 12D as rent stabilized, and retroactively registered the apartment for prior years dating back to 2006.

Plaintiffs initiated the instant action¹ alleging that both the building and apartment are subject to the Rent Stabilization Laws (RSL) and Rent Stabilization Codes (RSC), but that defendants improperly removed the apartment from rent stabilized status, and as a result, have overcharged them illegally for their entire tenancy.

¹ A motion to consolidate the instant action with Rebecca Cone v Roxborough Apartments Corp. and Paul Bogoni, Index No. 158379/17, was granted upon a so-ordered stipulation dated May 5, 2019 (NYSCEF Doc. No. 107). For the purposes of the instant motion, their pleadings shall be treated as one insofar as they are consistent with one another.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a) (7), a court must accept each and every allegation in the complaint as true, and liberally construe those allegations in the light most favorable to the pleading party (Leon v Martinez, 84 NY2d 83, 87 [1994]). The court must simply determine “whether the facts as alleged fit within any cognizable legal theory” (id. at 87-88). However, “allegations consisting of bare legal conclusions...are not entitled to such consideration” (Roberts v Pollack, 92 AD2d 440, 444 [1st Dept 1983]). Moreover, a dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted “utterly refutes plaintiff’s factual allegations” (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]), and “conclusively establishe[s] a defense to the asserted claims as a matter of law” (Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 270-271 [1st Dept 2004]).

I. Declaratory Judgment

Plaintiffs’ first and second causes of action seek, in part, a declaration: i) that the apartment and tenancy are subject to the RSL and the RSC; and ii) establishing the past and current legal rent. Defendants seek to dismiss the first part of those claims on the ground that there is no justiciable controversy. Defendants claim that the matter is moot because they have recognized the apartment’s rent-stabilized status since plaintiffs’ tenancy began and have admitted it in their answers. The Court agrees. However, the causes of action also seek declaratory judgment with respect to the past and current legal rent amount, both of which are heavily disputed. Accordingly, defendants’ motion to dismiss as to the first and second causes of action is granted only to the extent that they seek a declaration that the apartment has been, and still is, subject to the RSL and RSC.

II. Piercing the Corporate Veil

Individually named defendant Bogoni seeks to dismiss all of plaintiffs' claims as asserted against him personally. Bogoni argues that he cannot be held personally responsible as he is merely a "disclosed agent" of Roxborough. Bogoni maintains that he never offered plaintiffs a lease, or charged them rent in his personal capacity. Additionally, Bogoni directs the Court to the NYC Multiple Dwellings Registration in which he is the named managing agent and officer for the building; the owner listed is Roxborough (NYSCEF Doc. No. 26). Bogoni also submits the affidavit of Robert Joyce, the accountant for Roxborough and Bogoni, which states that Bogoni does not control Roxborough, does not personally profit from the rent collected, or treat the corporation's assets as his own. Further, Bogoni submits his own affidavit in which he denies all of plaintiffs' allegations pertaining to his control of Roxborough.

Plaintiffs oppose and aver that Roxborough was merely a dummy entity that Bogoni used to transact business with. They maintain that the complaint more than sufficiently pleads a claim for piercing the corporate veil, and in the event that the Court disagrees, plaintiff Cone cross-moves for leave to replead.

A primary purpose of incorporating is to eliminate the personal liability of corporate principals (see Bartle v Home Owners Coop., 309 NY 103 [1955]). "Nevertheless, equity will intervene to 'pierce the corporate veil' and permit the assertion of claims against the individuals who control the corporation in order to avoid fraud or injustice" (Flushing Plaza Assoc. No. 2 v Albert, 102 AD3d 737, 738 [2d Dept 2013]). Generally, a plaintiff seeking to pierce the corporate veil must demonstrate "the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form,

thereby perpetrating a wrong that resulted in injury to the plaintiff” (Queens West Development Corp., v Nixbot Realty Assoc., 121 AD3d 903, 905-906 [2d Dept 2014]; see TNS Holdings, Inc. v MKI Sec. Corp., 92 NY2d 335, 339 [1998]).

“Officers, directors or employees of a corporation do not become liable to one who has contracted with the corporation for inducing the corporation to breach its contract merely because they have made decisions and taken actions that resulted in the corporation's breaching its contract” (Citicorp Retail Services, Inc. v Wellington Mercantile Services, Inc., 90 AD2d 532 [2d Dept 1982]). Moreover, an agent who acts on behalf of a disclosed principal will generally not be liable for a breach of contract (see Savoy Record Co. v Cardinal Export Corp., 15 NY2d 1 [1964]; John Holzer Assoc. v Orta, 250 AD2d 737, 672 [2d Dept 1998]). A principal is considered to be “disclosed” if, at the time of a transaction conducted by an agent, the other party to the contract had notice that the agent was acting for the principal and of the principal's identity (see Restatement [Third] of Agency § 6.01; Anderson v Pods, Inc., 70 AD3d 820, 821 [2d Dept 2010]).

Here, plaintiffs certainly plead a fraudulent scheme endeavored by Roxborough. However, fatal to their claim is that the complaint does not sufficiently plead Bogoni's domination over Roxborough or his abuse of the corporate form. Plaintiffs' argument to pierce the veil is largely predicated on its allegation that Bogoni offered and signed plaintiffs' lease in his personal capacity. Plaintiffs argue that doing so demonstrates that Roxborough is Bogoni's “alter-ego.” In support of their argument, plaintiffs rely on a decision in Kreisler v B-U Realty Corp., Index No. 161021/2014, April 27, 2017 (James, J.), finding that Bogoni intended to be personally bound because he executed the lease in his personal capacity. However, in that case the leases in question listed Bogoni as the landlord, and Bogoni signed the lease individually as the landlord rather than on behalf of a corporation. Here, in moving to dismiss, defendants submit the lease for apartment

12D which utterly refutes plaintiffs' allegations. The lease clearly lists Roxborough as the landlord and is signed by Bogoni *for* Roxborough. The Court rejects plaintiffs' argument that because his corporate title is missing, Bogoni signed the lease in his personal capacity. The signature line explicitly lists Roxborough as the landlord.

Plaintiffs further allege, without indicating any such basis, that Roxborough has little or no capital, no appreciable assets, and that Bogoni co-mingled Roxborough's assets with his own. While a court must accept plaintiffs' allegations as true, "bare legal conclusions...are not entitled to such consideration" (Roberts, 92 AD2d at 444). Roxborough is the present owner of the building, which, as pointed out by defendants, is an appreciable asset. No other single actions taken by Bogoni are alleged that are separate and apart from Roxborough. Thus, the complaint does not suggest that Bogoni acted as anything other than an officer of Roxborough, or failed to respect the separate legal existence of Roxborough, that Roxborough was undercapitalized, or that Bogoni treated Roxborough's assets as his own (see E. Hampton Union Free School Dist. v Sandpebble Builders, Inc., 66 AD3d 122, 127 [2d Dept 2009], affd 16 NY3d 775 [2011]). The undisputed fact that Bogoni and his wife are the sole shareholders is insufficient to successfully plead domination over the entity, or abuse of the corporate form (see id.).

With respect to plaintiff Cone's request for leave to replead, plaintiff submits an amended complaint. However, the amended complaint does not allege any additional or new facts that were not already in plaintiff Steiner's complaint. Accordingly, defendant Bogoni's motion to dismiss all claims against him in his individual capacity is granted.

III. Use and Occupancy

Defendants cross move for an award of use and occupancy for all post-commencement rent arrears in the sum of \$160,680.00 and an order directing the monthly payment during the pendency

of this action at \$6,695.00. Plaintiffs allege that here, defendants engaged in a fraudulent scheme by, *inter alia*, failing to register the apartment as required by the RSL, failing to use proper rent-stabilized leases and a rider, and fraudulently attempting to deregulate the apartment. Plaintiffs also challenge the validity of the improvements that Roxborough allegedly made to 12D which provided the basis for Roxborough's original claim that the apartment was not subject to rent regulation. Therefore, they argue that an award for use and occupancy and rent arrears must be denied because the current rent for the apartment is illegal. The Court finds that questions still remain regarding the legal rent amount.

New York City's J-51 tax abatement program provides incentives for owners to rehabilitate and improve their buildings. "One of the caveats of the program was that the rent deregulation of residential units in buildings receiving J-51 benefits was prohibited" (Roberts v Tischman Speyer Properties, L.P., 62 AD3d 71, 74 [1st Dept 2009], affd 13 NY3d 270 [2009]). Additionally, a building receiving J-51 benefits will be subject to rent stabilization for the duration of the period in which such benefits are received (id.) and this principle may be applied retroactively (Gersten v 56 7th Ave. LLC, 88 AD3d 189, 195 [1st Dept 2011]). Even after the abatements have ended, an apartment may not be removed from rent stabilization unless a rent stabilization rider is provided to the tenant with his or lease informing them of the date of the change (RSC, 9 NYCRR § 2520.11 [o]). As noted above, because the building began receiving J-51 benefits in the 2005/2006 tax year, apartment 12D became subject to rent stabilization in at least that same year.

Defendants correctly note that a rent overcharge claim is subject to a four-year statute of limitations and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed (RSL of 1969 [Administrative Code] § 26-516 [a][2]). Further, examination of the rental history of the

apartment prior to the four-year filing is prohibited. However, the Court of Appeals has carved out an exception for cases where there is evidence that a landlord engaged in a fraudulent scheme to destabilize an apartment (Grimm v State Div. of Hous. and Community Renewal Off. of Rent Admin., 15 NY3d 358 [2010]). As the Court of Appeals states in Thornton v Baron, 5 NY3d 176 (2005), where the lease reflects

“an attempt to circumvent the Rent Stabilization Law in violation of the public policy of New York, [that] lease was void at its inception. Further, because the rent it purported to establish was illegal, the...rent registration statement listing this illegal rent was also a nullity. Under those circumstances,...the default formula used by the DHCR to set the rent where no reliable rent records are available was the appropriate vehicle for fixing the base date rent here” (id. at 181).

At this stage in the litigation, the rental history for apartment 12D is far from clear; the information in the apartment registration statements filed by Roxborough with the DHCR contain some discrepancies that are inconsistent with the leases. It appears that the apartment was treated as rent stabilized in 1984, however the tenant listed at that time, Stephen Wald (Wald), had a lease for the years 1995-1996. Additionally, the rent increase was based on alleged improvements to the apartment; whether such renovations took place is unclear. Defendants fail to explain or clarify why Wald was listed as the tenant for the year 1984. The apartment was not registered again until 1996 for the same tenant as listed in 1984, however the rent conspicuously changed from \$2,750 to \$3,000 for the same lease term. From 1985 until 1996, the apartment was not registered at all. In 1997 the apartment was listed as a high rent vacancy and was thereafter not registered until 2014, when plaintiffs commenced their tenancy. Notably, defendants only filed registrations for the years from 2006 until 2013 after which plaintiffs commenced this suit.

The circumstances by which the apartment became deregulated are also murky. Defendants claim that the receipt of J-51 benefits re-regulated the apartment whereas plaintiffs maintain that it was improperly deregulated in the first instance. What is clear is that the lease provided to

plaintiffs for apartment 12D did not designate the apartment as rent stabilized, nor include any of the riders required by the RSL, RSC, and NYC Administrative Code § 26-504(c).

Defendants argue that their failure to register the apartment was the result of a mistake; it was unaware that receipt of J-51 benefits subject the building to rent stabilization as they relied upon a 1996 DHCR advisory opinion. The Roberts Court rejected that opinion and in any event, defendants' ignorance of the law is no excuse.

Defendants also unequivocally deny plaintiffs' allegations of a scheme to defraud and state that beyond the improper leases, plaintiffs have not alleged sufficient indicia of fraud.

For their part, plaintiffs state that Wald never resided in the apartment, but rather, was an illusory tenant who worked with Bogoni to illegally deregulate the apartment. Plaintiffs' assertion stems from the lease with Wald, which erroneously listed the building's previous owner as the landlord. The lease also had a typewritten paragraph added to it which explicitly granted Wald the right to sublet the apartment. Plaintiffs argue that this provision strongly suggests that the intent of the parties was for Wald to sublet the apartment. Moreover, plaintiffs maintain that it is "generally known" that Wald never lived in that apartment and point out that Wald and Bogoni had previously worked together on real estate transactions. Plaintiff Cone states in his affidavit that he spoke to the building staff who confirmed that Wald always lived in apartment 12B, and never in 12D. Roxborough and Bogoni deny this allegation and maintain that Wald was a bona fide tenant.

Plaintiffs further direct the Court to a separate action taken by a tenant in the building, and several actions taken by tenants in another building owned by a corporation that lists Bogoni and his wife as the sole shareholders. Plaintiffs also present the DHCR registration history for the apartment, as of 2017, that shows that defendants did not file any registration statements while receiving J-51 benefits. It also contains errors and inconsistencies. Under these circumstances,

plaintiffs' allegations are sufficient indicia of Roxborough's fraud (see Altschuler v Jobman 478/480, LLC., 135 AD3d 439 [1st Dept 2016]). In light of this indicia of fraud, at this time the Court need not consider the arguments put forth in the supplemental papers. Accordingly, defendants' motion seeking use and occupancy and post-commencement arrears is denied as there are issues of fact regarding the legal rent amount.

Finally, plaintiffs' cross-motion to strike defendants' second affirmative defense is granted without opposition.

Accordingly, it is hereby

ORDERED that the branch of the motion to dismiss plaintiffs' first and second causes of action is granted to the extent that they seek a declaratory judgment that the apartment is subject to the RSL and RSC, and is otherwise denied; and it is further

ORDERED that the branch of the motion of defendant Paul Bogoni to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/suptctmanh); and it is further

ORDERED that the branch of the motion for an award of use and occupancy for all post-commencement rent arrears and for an order directing the monthly payment during the pendency of this action at \$6,695.00 is denied; and it is further

ORDERED that the branch of plaintiff Cone's cross-motion for leave to amend the complaint herein is denied; and it is further

ORDERED that the branch of plaintiff Cone's cross-motion to dismiss defendants' second affirmative defense is granted without opposition.

This constitutes the decision and order of the Court.



8/16/2019
DATE

ALEXANDER M. TISCH, J.S.C.

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