SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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GRAHAM SMITH,

Index No. 652178/2017
DECISION AND ORDER

Plaintiff,

V

BIG ALPHA REALTY, INC.,
118 & 120 HUDSON STREET LLC,
BANCO POPULAR NORTH AMERICA,
and RICHARD SQUIRES

MOT SEQ 002, 004, 005

Defendants.

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NANCY M. BANNON, J.

I. INTRODUCTION

Motion sequences No 002, 004, and 005 are consolidated for disposition.

This action arises from the allegedly improper deregulation of the plaintiff Graham Smith's loft apartment at 160 Franklin Street in Manhattan, a building owned by defendant Big Alpha Realty, Inc. (Big Alpha), pursuant to Article 7-C of the Multiple Dwelling Law (MDL).

In MOT SEQ 002, defendants Big Alpha Realty, Inc. (Big Alpha) and 118 & 120 Hudson Street, LLC (Hudson) move (i) to dismiss the plaintiff's complaint as against them pursuant to CPLR 3211(a)(1), (ii) to dismiss the complaint as against Hudson pursuant to CPLR 3211(a)(7) for failure to state a claim, and

(iii) for summary judgment pursuant to CPLR 3212 on their first counterclaim for the use and occupancy that accrued *pendente lite* while the plaintiff was in possession of the apartment during this litigation. The plaintiff opposes the motion.

In MOT SEQ 004, the plaintiff moves pursuant to CPLR 602(b) to consolidate this action with the defendants' underlying holdover proceeding in the Civil Court, Big Alpha Reality, Inc. v Graham Smith, et al., Index No. L&T 056074/2018 or, in the alternative, to stay the holdover proceeding pending a determination in this matter.

In MOT SEQ 005, the defendants move, pursuant to CPLR 2221(a), to modify this court's interim order of May 11, 2018, which granted a temporary stay of the holdover proceeding and ordered the plaintiff to pay defendants use and occupancy *pendente lite*, by either lifting the stay of the holdover proceeding, or, in the alternative, consolidating this action and the holdover proceeding for disposition. In MOT SEQ 005, the defendants also seek an order (i) directing the plaintiff to pay use and occupancy for the month of February 2019 and (ii) granting leave pursuant to CPLR 3025(b) to amend their answer to assert a counterclaim for attorneys' fees.

MOT SEQ 002 is granted in part. MOT SEQ 004 is denied. MOT SEQ 005 is granted.

II. BACKGROUND

On May 6, 2013, plaintiff entered into a one-year lease for the residential apartment with non-party Tribeca Landmarks LLC (Tribeca Landmarks) for a monthly rent of $11,500.00. Tribeca Landmarks was leasing the apartment and collecting rents pursuant to a net lease between Tribeca Landmarks and Big Alpha, the owner of 160 Franklin Street. The plaintiff renewed his residential lease for an additional one-year term from June 30, 2014 to May 31, 2015 for a monthly rent of $12,750.00. Shortly after this renewal, on July 21, 2014, Big Alpha (at the time Big Alpha Foods, Inc.) filed an application to remove the residential apartment building from the Loft Board's jurisdiction. The application was based upon all apartments in the building being deregulated, including the plaintiff's apartment through the sale of fixtures and improvements by the previous tenant of the plaintiff's apartment, Michael Wiener, to his landlord SoHo Tribeca Space Corp. for $9,525.00 on July 1, 1992.

The plaintiff renewed his lease for a third one-year term from June 1, 2015 to May 31, 2016 at a monthly rent of $13,500.00. He again renewed for an additional six-month term at a reduced monthly rent of $13,000.00 from June 1, 2016 through December 31, 2016. On December 31, 2016 the net lease under which Tribeca Landmarks collected the rents in the

building expired and Big Alpha regained possession of the building. On January 1, 2017, the plaintiff began paying $13,500.00 per month in rent as a month-to-month tenant to Big Alpha, as landlord, while both sides negotiated a two-year lease to commence on May 1, 2017. However, the plaintiff never signed the new lease and remained a month to month tenant.

The plaintiff alleges that in or about May 2017 he learned of information leading him to believe that his unit was improperly deregulated. Specifically, the plaintiff alleges that Big Alpha used a strawman to purchase tenants' fixtures and improvements for small consideration in an effort to deregulate the building, and as such his apartment was still subject to rent regulation pursuant to Article 7-C of the MDL and that he had been subject to rental overcharges for years. The plaintiff subsequently stopped paying rent to Big Alpha in June 2017.

On April 24, 2017, the plaintiff commenced the instant action seeking (i) a judgment declaring that he is a protected tenant under Article 7-C of the MDL, (ii) a determination of the maximum legal rent for the apartment, (iii) a judgment declaring that the rent previously paid from May 6, 2013 onward was erroneous or unlawful, and (iv) an order directing the defendants to register the premises as protected under the Loft Board's jurisdiction, provide him with a lease stating such, and repay any amounts overcharged plus applicable attorneys' fees.

On August 14, 2017, Big Alpha and Hudson answered and asserted a counterclaim for use and occupancy for the period of the plaintiff's holdover and an affirmative defense under CPLR 3211(a)(1) that the plaintiff's claim was barred by documentary evidence.

On or about January 22, 2018, Big Alpha served the plaintiff with a 30-Day Notice of Termination seeking to evict him from the apartment. On the same day, Big Alpha and Hudson filed MOT SEQ 002 seeking, *inter alia*, to dismiss the complaint.

On March 6, 2018 Big Alpha commenced a summary holdover proceeding against the plaintiff in the Civil Court, Kings County, Housing Part, entitled Big Alpha Realty, Inc. v Graham Smith, et al. (Index No. 056074/2018). On March 29, 2018 the plaintiff moved by order to show cause to consolidate the holdover action with the current action or stay the holdover proceeding pending the resolution of the instant case (SEQ 004). On March 29, 2018 the court granted a stay of the holdover proceeding, conditioned upon the plaintiff's payment of use and occupancy at a rate of $13,500.00 per month, including unpaid use and occupancy for the months that the plaintiff had not been paying rent. By order dated May 11, 2018, the court continued the stay on the holdover proceeding and directed the plaintiff to continue paying use and occupancy of $13,500.00 per month *pendente lite*.

On January 29, 2019, the plaintiff alerted Big Alpha that he did not intend to continue residing at the building and elected to vacate and surrender possession of the apartment at the end of the month. He vacated the apartment on January 31, 2019. However, the plaintiff failed to sign any surrender notice or relinquish his purported rights to the apartment.

On February 19, 2019, Big Alpha filed MOT SEQ 005 seeking various forms of relief as set forth above.

On June 20, 2019, the Loft Board issued an order granting Big Alpha's application to remove the building from the Loft Board's jurisdiction.

III. DISCUSSION

A. MOT SEQ 002

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). A motion to dismiss under CPLR 3211(a)(1) filed after an answer is usually treated as a summary judgment motion on the affirmative defense. As such, the court will treat the motion to dismiss

under CPLR 3211(a)(1) as the defendants' motion for summary judgment on that affirmative defense. See Hertz Corp. v Luken, 126 AD2d 446 (1st Dept. 1987).

Pursuant to Section 286(6) of the MDL, when a departing residential tenant in a building with fewer than six residential units as of June 21, 1982 (the effective date of Article 7-C) sells the fixtures and improvements made to the unit to his or her landlord, said unit is no longer subject to rent regulation and may be rented for fair market value. See Thorgeirsdottir v New York City Loft Bd., 77 NY2d 951 (1991). In support of its motion, Big Alpha submits, *inter alia*, the building's 1983 IMD Registration and 1988 Registration Statement, the 1992 Sixth Floor Purchase of Improvements, the affidavit of the tenant who had sold the improvements, Michael Wiener, and the cancelled check evidencing a payment of $9,525.00 to him. This documentary evidence demonstrates that the building was registered as an interim multiple dwelling that had fewer than six residential units as of June 21, 1982 subjecting it to Section 282(6). The documentary evidence further shows that the departing tenant, Michael Wiener, received payment for the fixtures and improvements made to the sixth-floor unit by his landlord at the time, SoHo Tribeca Space Corp. Therefore, the documentary evidence conclusively establishes that the unit is no longer subject to rent regulation.

The plaintiff, in opposition, does not dispute that the tenants sold their fixtures and improvements to the landlord. Instead, he maintains that the sale was done in a collusive manner or in bad faith and thus did not effectuate a deregulation. The complaint, although verified by the plaintiff, is insufficient as it makes only conclusory allegations of collusion or bad faith. Notably, the allegations of fraud are conclusory and not particularized enough to survive dismissal under CPLR 3016(b). The plaintiff also relies on an attorney's affirmation. In the affirmation, counsel argues that the defendants' evidence fails to utterly refute the allegations in the complaint, and alleges that Big Alpha had somehow used a straw-man to deregulate the building. However, the allegations in, inasmuch as the affirmation of an attorney who claims no personal knowledge of the underlying facts. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010).

Moreover, the Loft Board concluded that the subject building is not subject to the Loft Board's jurisdiction during the pendency of this action, and the court generally defers to the Loft Board's determinations under the MDL absent a showing of arbitrariness and capriciousness. See Lower Manhattan Loft Tenants v New York City Loft Bd., 157 AD2d 611 (1st Dept. 1990);

Perlrose Realty Corp. v New York City Loft Bd., 145 AD2d 159 (1st Dept. 1989).

The plaintiff's remaining causes of action seek damages that require a finding that the unit was improperly deregulated, and thus cannot survive the motion to dismiss in light of the court's determination to the contrary. Therefore, the defendants' motion to dismiss the plaintiffs' complaint as against them is granted.

As the motion is granted pursuant to CPLR 3211(a)(1) the court does not reach Hudson's claim pursuant to CPLR 3211(a)(7).

B. MOT SEQ 004

In MOT SEQ 004, the plaintiff seeks, pursuant to CPLR 602(b) to consolidate this action with the defendants' underlying holdover proceeding Big Alpha Reality, Inc. v Graham Smith, et al., Index No. L&T 056074/2018 or, in the alternative, to stay the holdover proceeding pending a determination in this action. The motion is denied as moot.

C. MOT SEQ 005

Big Alpha correctly argues that the court's May 11, 2018 interim order entitles it to use and occupancy from the plaintiff for the month of February 2019, which was the month after the plaintiff vacated the premises on two-days' notice. It

is undisputed that the plaintiff only provided the defendants with two-days' notice prior to vacating the premises. It is well-settled that where a tenant holds over, the law implies that the tenant does so on the same terms and conditions as under the previous tenancy. See Real Property Law § 232-c; City of New York v Pennsylvania R. Co., 37 NY2d 298 (1975). Big Alpha's prior lease with the plaintiff expressly required that the tenant give notice to terminate the lease 30 days in advance of any move-out date.

An occupant's duty to pay the landlord for its use and occupancy of the premises is predicated upon the theory of quantum meruit. See Carlyle, LLC v Beekman Garage LLC, 133 AD3d 510 (1st Dept. 2015). As the plaintiff vacated the premises on shorter notice than required, and failed to relinquish any of his rights in the apartment, the plaintiff effectively prevented the defendants from renting the apartment during February 2019. Thus, the branch of MOT SEQ 005 in which Big Alpha seeks summary judgment on the counterclaim for use and occupancy is granted and Big Alpha is entitled to $13,500.00, plus statutory interest running from February 1, 2019.

The branch of MOT SEQ 005 seeking leave for the defendants to amend the answer to add a counterclaim to recover attorneys' fees for is granted. Leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or

unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b); JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013); 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552 (1st Dept. 2011); Smith-Hoy v AMC prop. Evaluations, Inc., 52 AD3d 809 (1st Dept. 2008). The burden is on the party opposing the motion to establish substantial prejudice or surprise if leave to amend is granted. See Forty Cent. Park S., Inc. v Anza, 130 AD3d 491 (1st Dept. 2015). As the plaintiff did not oppose Big Alpha's motion to amend, the analysis turns to whether the proposed amendment is palpably insufficient or patently devoid of merit.

Attorneys' fees that are merely incidents of litigation are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976). However, in this instance, Big Alpha is granted leave to amend its answer to include a claim for contractual attorneys' fees pursuant to the same articles of the lease that the plaintiff relied upon when asserting his own claim for attorneys' fees. That section provides that "[i]f this Lease is ended by Owner because of [plaintiff's] default...[plaintiff] must pay to Owner as damages: (3) Owner's expenses for attorney's fees." Although

the plaintiff's lease expired, he can still be held liable for attorneys' fees under the applicable terms of the expired lease. See Real Property Law 232-c; City of New York v Pennsylvania R. Co., supra. As Big Alpha alleges that the lease was ended by the plaintiff's default and it is entitled to attorneys' fees on that basis, the proposed amendment is not palpably insufficient or patently devoid of merit. Therefore, that branch of the motion is granted.

The remaining branch of MOT SEQ 005, seeking to modify this court's May 11, 2018 order by either vacating the stay of the summary holdover proceeding or consolidating that holdover proceeding with this action, is granted to the extent of vacating the stay. To the extent that they seek consolidation, Big Alpha maintains that it is still litigating claims for attorneys' fees in the holdover proceeding. While this order grants leave to amend Big Alpha's answer to add a claim for attorney's fees, the two attorney fees claims can properly be litigated separately without consolidation under CPLR 602(b).

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of defendants Big Alpha Realty Inc. and 118 & 120 Hudson Street, LLC to dismiss the plaintiff's complaint pursuant to CPLR 3211(a)(1) and (7), and for summary

judgment on Big Alpha's counterclaim for unpaid use and occupancy for the period from June 2017 through March 2018 **(MOT SEQ 002)** is granted to the extent that the complaint is dismissed pursuant to CPLR 3211(a)(1), and is otherwise denied, and it is further,

ORDERED that the plaintiff's motion to consolidate this action with a holdover proceeding pending in the Civil Court, Kings County, Housing Part, Big Alpha Realty, Inc. v Graham Smith, et al. (L&T Index No. 056074/2018), or to stay that proceeding pending determination of this motion, **(MOT SEQ 004)** is denied; and it is further,

ORDERED that the defendants' motion for leave to amend their answer pursuant to CPLR 3025(b) to add a counterclaim for attorney's fees, lift the stay on the underlying holdover proceeding pending in the Civil Court, Kings County, Housing Part, Big Alpha Realty, Inc. v Graham Smith, et al. (L&T Index No. 056074/2018) imposed by this court's May 11, 2018 interim order, and for unpaid use and occupancy for Big Alpha for February 2019 **(MOT SEQ 005)** is granted; and it is further,

ORDERED that the amended answer, in the form annexed to the defendant's motion papers, shall be deemed served upon the plaintiff upon the defendant's service upon the plaintiff of a copy of this order with notice of entry, and it is further,

ORDERED that the defendant shall serve a copy of this order with notice of entry upon the plaintiff within 20 days of this order; and it is further,

ORDERED that the counterclaim for attorney's fees is severed and shall continue, and it is further

ORDERED that the stay imposed by this court's prior order dated May 11, 2018, of the proceeding pending in the Civil Court, Kings County, Housing Part, Big Alpha Realty, Inc. v Graham Smith, et al. (L&T Index No. 056074/2018) is vacated, and it is further

ORDERED that the plaintiff shall serve and file an answer to the new counterclaim within 30 days, and it is further,

ORDERED that the plaintiff shall pay the sum of $13,500.00 in use and occupancy to the defendants within 30 days, and it is further.

ORDERED that the parties shall contact chambers to schedule a status conference on or before July 31, 2020.

This constitutes the Decision and Order of the court.

Dated: May 15, 2020

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON