Eter Inc v Nowik
2021 NY Slip Op 31527(U)
April 29, 2020
Civil Court of the City of New York, Queens County
Docket Number: L&T 58527/19
Judge: Clinton J. Guthrie
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART A

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ETER INC,

Petitioner,

-against-

KAZIMIERZ NOWIK,

Respondent.

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Index No. L&T 58527/19

DECISION/ORDER

Present:

Hon. CLINTON J. GUTHRIE
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Respondent's motion for leave to amend the answer pursuant to CPLR § 3025(b) and for discovery pursuant to CPLR § 408:

Papers	**Numbered**
Notice of Appearance & Motion & Affirmation/Affidavit/Exhibits Annexed.........	1
Affirmation in Opposition & Affidavit/Exhibits Annexed..............................	2
Reply Affirmation & Exhibits Annexed..	3
Sur-Reply Affirmation & Exhibits Annexed...	4

Upon the foregoing cited papers, the decision and order on Respondent's motion for leave to amend the answer and for discovery is as follows.

PROCEDURAL HISTORY

This nonpayment proceeding was commenced in April 2019. Petitioner seeks rent from December 2018 through April 2019 at an amount of $2,004.00 per month from Respondent, the rent-stabilized tenant of record. Respondent filed a *pro se* answer on April 25, 2019. Thereafter,

Queens Legal Services appeared for Respondent through the Universal Access program and made the instant motion to amend Respondent's answer and for discovery on June 10, 2019. Following extensive briefing and settlement negotiations by counsel, the Court heard argument on Respondent's motion on January 22, 2020 and reserved decision.

ANALYSIS

Respondent's Motion to Amend

Pursuant to CPLR § 3025(b), "[a] party may amend his or her pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including granting of costs and continuances." *See e.g. Faiella v. Tysens Park Apts., LLC*, 110 A.D.3d 1028, 1029 (2d Dep't 2013) ("Leave to amend a pleading should be freely given absent prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit.") (Internal citations omitted). Annexed as Exhibit A to Respondent's motion is a "Proposed Amended Answer and Counterclaims" (hereinafter "proposed amended answer"). Respondent states in his affidavit in support of the motion that he learned that he had meritorious defenses after meeting with his attorneys and seeks to amend his answer as a result.

The proposed amended answer includes a general denial, four affirmative defenses (including a personal jurisdiction defense), and four counterclaims. Petitioner opposes Respondent's motion to amend the answer in its entirety, arguing that the proposed defenses "have already been asserted, could have been asserted, are devoid of merit, and/or have been waived" (Gonzalez-Abreu Affirmation, ¶ 9). Before reaching the merits of the proposed defenses and counterclaims, the Court notes that only three defenses were raised in the *pro se* answer: general denial, the rent/part of the rent has been paid to Petitioner, and conditions in need of repair.

As for the general denial in the proposed amended answer, it is consistent with the *pro se* answer and simply provides an exception that Respondent actually is the tenant in possession of the subject premises. Therefore, the general denial amendment is appropriate and Petitioner will not suffer any prejudice from the amendment.

Personal Jurisdiction

With regard to the proposed personal jurisdiction defense (labeled as Respondent's first affirmative defense), Respondent states that he was not personally served with the Notice of Petition and Petition as alleged in the affidavit of service. He states that he only received those pleadings by mail. He also states "upon information and belief" that he was not present at his home on April 18, 4:38 PM, when service is alleged to have occurred, because he was at a doctor's appointment and at his sister's home between 2 PM and 8 PM on that date. A process server's affidavit of service constitutes prima facie evidence of proper service. *See e.g. Rox Riv 83 Partners v. Ettinger*, 276 A.D.2d 782, 783 (2d Dep't 2000). However, an affidavit may be rebutted by a "sworn, nonconclusory denial of service." *Endlich v. Sweet*, 34 Misc.3d 155(A), 950 N.Y.S.2d 608 (App. Term 2d, 11th & 13th Jud. Dists. 2012). Nonetheless, allegations made exclusively "upon information and belief" are insufficient to raise a meritorious defense. *See e.g. Fekete v. Camp Skwere*, 16 A.D.3d 544, 454 (2d Dep't 2005). Since Respondent's denial of service is predicated on allegations made "upon information and belief" regarding his whereabouts on the date of service, it is insufficient to constitute a "nonconclusory" denial of service and is thus "patently

devoid of merit" for amendment purposes.[1] *See Faiella*, 110 A.D.3d at 1029.

Defective Rent Demand

Respondent's second proposed affirmative defense alleges that the rent demand is defective. The only factual allegation within the proposed defense is that "Petitioner's rent demand claims overcharges on the Respondent's rent." It appears that Respondent intends to connect the rent demand defense with the following defense and counterclaim, based on rent overcharge, without explicitly doing so. As pled, however, the second affirmative defense is "palpably insufficient." Nonetheless, the Court notes that a proper rent demand remains a statutory prerequisite in this nonpayment proceeding and must be established by Petitioner as part of its prima facie case. *See 125 Ct. St., LLC v. Sher*, 58 Misc.3d 150(A), 94 N.Y.S.3d 539 (App. Term 2d, 11th & 13th Jud. Dists. 2018).

Rent Overcharge

Respondent's third affirmative defense and first counterclaim allege rent overcharge. The crux of the overcharge claim is that the initial legal regulated rent of $1,950.00 (charged in 2017)[2] did not comport with the Rent Stabilization Law and Rent Stabilization Code, and as such, the amounts charged and collected thereafter are unlawful. Respondent also alleges that the overcharge was willful. In opposition and especially in its sur-reply, Petitioner asserts that the subject premises was subject to rent control in 1984 and at all times thereafter until the execution of Respondent's

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[1] The proposed amended answer uses the language "upon information and belief," while the affidavit in support of the motion refers to "usual" activities undertaken on the date of service. Neither is sufficiently specific to challenge service.

[2] Although not alleged in the proposed amended answer, Respondent states in his affidavit in support of the motion that this was the initial rent charged to his mother and stepfather, the former tenants of record, who are now both deceased. Respondent states in his affidavit that he became the leaseholder in December 2018 and that his one-year lease (a copy of which is annexed to the motion) includes a monthly rent of $2,004.00.

parents' initial lease in 2017 and, as result, Petitioner was entitled to deem the initial legal regulated rent to be the agreed-upon amount in that lease pursuant to 9 NYCRR § 2521.1(a)(1). Moreover, Petitioner argues that Respondent's sole recourse for challenging the initial legal regulated rent was by filing a fair market rent appeal with the Division of Housing and Community Renewal (DHCR) pursuant to 9 NYCRR §2522.3, which has not been done.

Respondent argues that, contrary to Petitioner's position, the subject premises were not subject to rent control in 1984 and thereafter but instead were subject to rent stabilization at those times. In support, Respondent annexes the certified DHCR Rent Registration history for the subject premises, which goes back to 1984. The registration history states that the premises were registered as rent stabilized in 1984 and that the tenant was Aloisia Schemitsch (although the amount is missing). Thereafter, until 1988, the apartment was registered as rent stabilized with Ms. Schemitsch listed as the tenant. Then, from 1989 through 1993, the apartment was registered as exempt from rent stabilization, either as owner occupied or as a "coop/condo." In 1994, the apartment was again registered as rent stabilized with Ms. Schemitsch listed as the tenant, and in 1995, it was listed as exempt due to owner occupancy. From 1996-1998, the apartment was listed as vacant, with a legal regulated rent of $580.00. Then the apartment was listed as temporarily exempt from 1999-2013. Subsequently, from 2014-2016, the apartment was again listed as vacant, but with a legal regulated rent of $0. In 2017, the apartment was registered at a rent of $1,950.00 with Mariana Karwowski and Josef Karwowski (Respondent's mother and stepfather) listed as tenants.

Petitioner's principal, Ernest Schemitsch, states in the affidavit in opposition that his mother, Aliose Schemitsch, was the prior owner and resided in the premises until she died in 1996

(the deed transferring the subject building to Ms. Schemitsch in 1973 is annexed to the sur-reply); that the premises was vacant in 1997 and 1998; that the current owner purchased the building in 1999 (the deed transferring the subject building from Ernest Schemitsch, as executor for Ms. Schemitsch, to Petitioner is annexed to the opposition papers); that his brother, Reinhard Schemitsch, occupied the premises from 1999 to 2014 without paying any rent; and that the premises was then vacant from Reinhard's vacatur in 2014 until December 1, 2016, when Karwowskis' initial lease commenced. Petitioner's attorney states in the sur-reply that any registration of the premises as rent stabilized prior to 2017 was a "clerical error" and that all occupancy until the Karwowskis' tenancy was by the owners within the confines of rent control.

In assessing the merits of Respondent's overcharge claim for amendment purposes, it must be noted that the law governing rent overcharges has now changed substantially twice in the course of this proceeding. First, on June 14, 2019, the Housing Stability and Tenant Protection Act (HSTPA) of 2019 became law. Part F of the HSTPA includes a host of amendments affecting rent overcharges, including the repeal of the 4-year statute of limitations for rent overcharge claims, expansion of the damages recovery period to 6 years, and a direction for courts to consider "all available rent history which is reasonable necessary" (NYC Admin. Code § 26-516(h)) to determine overcharges and legal regulated rents. However, on April 2, 2020, the Court of Appeals, in *Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 2020 NY Slip Op. 02127 (2020), held that retroactive application of the Part F overcharge provisions is unconstitutional (under the Due Process clauses of the US and New York constitutions).[3]

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[3] For a more thorough analysis of the holding in *Matter of Regina Metro. Co., LLC* by this Court, *see 57 Elmhurst, LLC v. Williams*, 2020 NY Slip Op. 20093 (Civ. Ct. Queens County 2020).

Therefore, since the overcharge asserted by Respondent is alleged to have occurred before June 14, 2019, it must be assessed according to the law in effect prior to the enactment of the HSTPA. *See Matter of Regina Metro. Co., LLC.*, 2020 NY Slip Op. 02127, at *18 ("[T]he overcharge calculation and treble damages provisions in Part F may not be applied retroactively, and these appeals must be resolved under the law in effect at the time the overcharges occurred."); *see also Shalom Aleichem LLC v. Soto*, 2020 NY Slip Op. 20091 (Civ. Ct. Bronx County 2020).

Under the former law, "the legal regulated rent for purposes of determining an overcharge[] shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement" plus subsequent lawful increases and adjustments. *See* former NYC Admin. Code § 26-516(a)(i); *see also* 9 NYCRR § 2526.1(a)(3)(i). As to challenges to the initial registration, "the legal regulated rent shall be deemed to be the rent charged on the date four years prior to the date of the initial registration of the housing accommodation" or the initial legal regulated rent if the accommodation was subject to rent stabilization for less than four years, plus subsequent lawful increases and adjustments. *See* former NYC Admin. Code § 26-516(a)(ii). Here, Respondent's overcharge claim was interposed in June 2019. The "most recent registration statement" at that time was on May 29, 2019, when the premises was registered at a rent of $2,004.00 under Respondent's name. Four year prior thereto, in 2015, the apartment was registered as vacant with a legal regulated rent of $0. Petitioner effectively argues that the 2015 registration is a nullity and that only the initial registration of $1,950.00 is relevant for the purposes of determining an overcharge.

If, as Petitioner maintains, the subject premises was owner-occupied as a rent controlled apartment for one year continuously after April 1, 1953, it would have been potentially *exempted*

from rent control pursuant to 9 NYCRR 2200.2(f)(11). *See Delillo v. New York State Div. of Housing and Community Renewal*, 45 A.D.3d 682, 684 (2d Dep't 2007). However, as the subject building was constructed prior to 1974 and contains 8 housing accommodations (as reflected in Petitioner's exhibits), the subject premises would have then potentially become subject to rent stabilization pursuant to the Emergency Tenant Protection Act of 1974 (ETPA). *See West 88A LLC v. Doe*, 64 Misc.3d 73, 74-75, 105 N.Y.S.3d 780, 781 (App. Term 1st Dep't 2019).[4] The facts in *West 88A LLC* are particularly relevant here. There, as detailed in the Appellate Term, First Department's opinion, the building was subject to rent control, became decontrolled due to owner occupancy in the late 1950s, and then became subject to rent stabilization via the ETPA but remained temporarily exempt for decades due to continued owner occupancy pursuant to 9 NYCRR § 2520.11(i) until the respondent executed a one-year lease in 2014. *See West 88A LLC*, 64 Misc.3d at 74-75, 105 N.Y.S.3d at 781-782. In those unique circumstances, the Appellate Term held that the lower court erred in directing the respondent to file a fair market rent appeal to challenge the initial rent and instead held that the rent charged and collected from the respondent in the 2014 lease became the initial legal regulated rent (and dismissed the respondent's overcharge counterclaims). 64 Misc.3d at 76, 105 N.Y.S.3d at 782 (citing, *inter alia*, *Muller v. New York State Div. of Hous. and Community Renewal*, 263 A.D.2d 296, 303 (1st Dep't 2000), *lv denied* 95 N.Y.2d 763 (2000)).

One significant difference between the facts here and the facts in *West 88A LLC* is the period of "owner occupancy" within the time that the premises were potentially subject to rent

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[4] The Court stresses that it is not making any final determinations regarding rent control and/or rent stabilization status at this juncture, as the instant motion only seeks amendment, not summary disposition. To the extent that CPLR § 409(b) permits a court to make a summary disposition on its own initiative, it is unwarranted on the motion record.

stabilization. In *West 88A LLC*, there was uninterrupted owner occupancy for decades prior to the sale to the petitioner therein in 2013 (which was less than a year before the lease with the respondent was executed). Here, however, Petitioner, a corporate entity, became owner in 1999. Although Petitioner claims that the apartment was owner occupied since the principal's family member, Reinhard Schemitsch, occupied the premises without paying rent from the time of the transfer until 2014, there is no provision for owner occupancy by a corporate entity in the Rent Stabilization Code. *See 1077 Manhattan Associates, LLC v. Mendez*, 5 Misc.3d 130(A), 798 N.Y.S.2d 714 (App. Term 2d & 11th Jud. Dists. 2004) (citing 9 NYCRR § 2524.4(a)(1)). Therefore, any owner occupancy would have ceased upon Ms. Schemitsch's death in 1996 (since Ernest Schemitsch states in his affidavit that the apartment was vacant after her death until Reinhard took occupancy).

Nonetheless, Respondent's proposed overcharge defense/counterclaim does not allege any *actual* agreed-upon rent that preceded his parents' initial lease amount. To the extent that a $0 rent was registered in 2015, there is no indication that this reflected the terms of any lease or other rental agreement. Although the Court of Appeals has recognized the propriety of DHCR and courts using the "default formula" to calculate the base date rent when it is tainted by fraud, Respondent makes no allegation of fraud by Petitioner here. *See Matter of Grimm v. State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 N.Y.3d 358, 366 (2010); *Thornton v. Baron*, 5 N.Y.3d 175, 181 (2005).[5] Consequently, the Court holds that Respondent's overcharge defense/counterclaim is "patently devoid of merit" for amendment purposes insofar as it fails to

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[5] In *Thornton*, the default formula is defined as using "the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date." 5 N.Y.3d 175, at FN 1.

plead a sufficient basis under pre-HSTPA law for challenging the setting of the base date rent at $1,950.00, which is the initial (rent-stabilized) rent "charged and collected" that can be discerned for the subject premises on this record. *See West 88A LLC*, 64 Misc.3d at 76, 105 N.Y.S.3d at 782; *Muller*, 263 A.D.2d at 303. However, this determination does not address or preclude any right that Respondent may have to file a fair market rent appeal at DHCR.[6]

Breach of Warranty of Habitability and Order to Correct

Respondent's fourth proposed affirmative defense and second proposed counterclaim allege a breach of the warranty of habitability (citing Real Property Law (RPL) § 235-b), resulting from conditions "dangerous or detrimental to life, health and safety," including a leak in the kitchen ceiling and a cockroach infestation. Respondent alleges that Petitioner knew about the conditions and failed to correct them, thus entitling Respondent to an abatement of rent. Petitioner disputes that there are conditions in need of repair, asserts that there are no violations recorded by the Department of Housing Preservation and Development (HPD), and denies being made aware of any conditions in need of repair.

The statutory warranty of habitability codified in RPL § 235-b provides that "[i]n every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health

[6] Unlike in *West 88A LLC*, where the Appellate Term held that the lower court's direction to the tenant to file a fair market rent appeal was in error since the subject apartment "was not subject to the City Rent Law on December 31, 1973" (citing 9 NYCRR §2522.3(a)), there is no definitive evidence before the Court to determine whether that was the case here. 64 Misc.3d at 76, 105 N.Y.S.3d at 782.

or safety." In reviewing Respondent's proposed warranty of habitability defense and counterclaim, the Court does not find that they are palpably insufficient or patently devoid of merit. Respondent has alleged conditions, including a cockroach infestation, that would impair the habitability of the apartment, and that Petitioner was aware of them but failed to repair them. *See Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 328 (1979) ([N]o one will dispute that health and safety are adversely affected by insect or rodent infestation, insufficient heat and plumbing facilities, significantly dangerous electrical outlets or wiring, inadequate sanitation facilities or similar services which constitute the essence of the modern dwelling unit."). To extent that Petitioner disputes the validity of Respondent's allegations, the dispute should be resolved on the merits at trial.

Respondent's third proposed counterclaim seeks an order to correct the conditions alleged in the warranty of habitability defense/counterclaim. Civil Court Act § 110(c) provides that "[r]egardless of the relief originally sought by a party the court may recommend or any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest..." Since this Court is specifically tasked with the enforcement of housing standards and may make any order that is appropriate to enforce them, Respondent's third proposed counterclaim is sufficiently meritorious for amendment purposes.

Attorneys' Fees

Respondent's fourth (and final) proposed counterclaim seeks attorneys' fees pursuant to the reciprocal right contained in RPL § 234. The parties' lease (Respondent's Exhibit B) specifically provides that "[t]he successful party in a legal action or proceeding between Landlord and Tenant

for non-payment of rent or recovery of possession of the Apartment may recover reasonable legal fees and costs from the other party." Therefore, even without the reciprocal right to fees in RPL § 234, Respondent has a contractual right to seek attorneys' fees under the lease if he is the prevailing party. As a result, Respondent is entitled to interpose the third proposed counterclaim.

Conclusion

As Petitioner has not demonstrated any surprise or prejudice that will result from the amendment of Respondent's answer to the extent permitted herein, Respondent's motion to amend the answer is granted. *See Faiella*, 110 A.D.3d at 1029. Respondent's amended answer and counterclaims are deemed served and filed, however Respondent's first, second, and third affirmative defenses and first counterclaim are deemed stricken pursuant to the foregoing determinations.

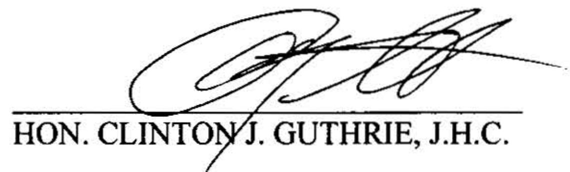
Motion for Discovery

Respondent seeks discovery pursuant to CPLR § 408 on his proposed rent overcharge affirmative defense and counterclaim. Since the Court has determined that the overcharge defense and counterclaim are insufficiently meritorious to be interposed in Respondent's amended answer and counterclaims, there is no cause of action upon which discovery may be granted in this summary proceeding. *See New York University v. Farkas*, 121 Misc.2d 643, 647, 468 N.Y.S.2d 808, 811 (Civ. Ct. N.Y. County 1983) ("Ample need" for discovery in a summary proceeding requires assertion of facts that establish a cause of action); *Georgetown Unsold Shares, LLC v. Ledet*, 130 A.D.3d 99, 106 (2d Dep't 2015). Accordingly, Respondent's motion for discovery is denied.

CONCLUSION

Respondent's motion to amend his answer is granted to the extent stated herein. Respondent's motion for discovery is denied. This proceeding shall be restored to Part A, Room 401, for trial on June 24, 2020 at 9:30 AM. This date, however, remains subject to administrative adjournment in the event that the current COVID-19 public health crisis continues to impact court operations.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.



Dated: Queens, New York
April 29, 2020

HON. CLINTON J. GUTHRIE, J.H.C.

SO ORDERED - HON. CLINTON J. GUTHRIE

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