SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LORI SATTLER** **PART** **02TR**

Justice

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RENATE VON BOYENS,

Plaintiff,

- v -

12 EAST 86TH STREET LLC,URBAN ASSOCIATES LLC,RICHARD MASON, WILCE ROBLES

Defendant.

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INDEX NO. 161448/2019

MOTION DATE 07/06/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 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, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Plaintiff commenced this residential rent overcharge action against 12 East 86th Street LLC ("Owner"), the owner of a residential building located in Manhattan, as well as management company Urban Associates LLC ("Urban") and two individual managing agents ("Mason" and "Robles") (collectively "Defendants"). Defendants have appeared and answered the Complaint. Prior to the holding of a Preliminary Conference and conducting of discovery, Plaintiff moves for summary judgment and/or partial summary judgment and for an order dismissing or striking Defendants' defenses or in the alternative directing Defendants to offer a more definite statement. Defendants oppose the motion and cross-move for an order dismissing the Complaint pursuant Civil Practice Law and Rules ("CPLR") 3211(a)(2), (4), and (5), or in the alternative dismissing as to Urban, Mason, and Robles pursuant to CPLR 3211(1) and (7) and permitting Defendant Owner to amend its answer. Plaintiff opposes the cross-motion.

On January 26, 2004, Plaintiff executed a lease agreement for apartment number 1622 at 12 East 86th Street, New York, New York ("Apartment"). The lease agreement provided for a two-year term commencing March 1, 2004 and for a monthly rent of $2,200 with payment of a $2,200 security deposit. Plaintiff also signed a Deregulation Rider acknowledging that she was the first unregulated tenant, that the last regulated rent for the Apartment was $1,482.61, and that, "adding the statutory vacancy allowance and / or applying 1/40th of the cost of new equipment and improvements, the new rent becomes $2,200 and the apartment was deregulated." She subsequently agreed to nine lease renewals as of the date of the Complaint. Each renewal was for a two-year term which increased her monthly rent.

In 2017, Plaintiff commenced an action seeking the same relief sought in the instant matter. That action was dismissed in 2018 because Plaintiff had failed to first seek relief from the New York State Division of Housing and Community Renewal ("DHCR"). Plaintiff commenced a proceeding with the DHCR thereafter. In 2019, the Housing Stability and Tenant Protection Act became effective, which provides *inter alia* that courts and the DHCR have concurrent jurisdiction. Plaintiff then withdrew her DHCR complaint and commenced the instant action.

Plaintiff alleges Defendants improperly deregulated the Apartment by fabricating renovations that were not in fact done. Plaintiff concedes that the prior tenant had lived in the Apartment for twenty years and that in advance of her taking possession, some work was performed. She further acknowledges paying for upgrades to that work, for instance her choice of kitchen cabinets, relocation of the electrical box, and wall-to-wall carpeting. However, she contends Defendant Owner inflated its renovation costs in order to calculate a rent increase sufficient to deregulate the Apartment.

In opposition, Defendants contend that, before applying any increases stemming from the cost of improvements, the Owner was entitled to increase the Apartment's rent to $1,957.06 based on the statutory vacancy allowance and long-term vacancy adjustment set forth in the Rent Stabilization Code ("RSC"). Defendants further annex an invoice from Alcko Contracting Corp. ("Alcko") dated March 31, 2004 itemizing work costing $16,900 and an after-tax total of $18,357.62; a check register indicating that payment was made; and an affidavit of Alcko's president stating the company was hired to perform work in Plaintiff's apartment, that the March 31, 2004 invoice was the total amount billed, and that Defendant Owner paid the invoice.

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], *citing Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980], *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d, at 853). In deciding a summary judgment motion, the court "should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). A court's function is issue finding rather than issue determination (*Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013], *citing Sillman*, 3 NY2d 395; *Garcia*, 180 AD2d, at 580).

The Rent Stabilization Code as it applies to this matter permits a landlord to increase the rent of a regulated unit upon a tenant's vacating the unit (§ 2522.8) and upon making improvements to the unit (§ 2522.4[a][1]). Specifically, an owner is entitled to increase the legal rent by 1/40th of the cost of qualifying improvements (RSC § 2522.4[a][4]). Expenses for

normal maintenance and repair, such as painting, plastering, and repairing floors, are not considered improvements for the purposes of increasing rent (*125 St. James Place LLC v N.Y. State Div. of Hous. & Cmty. Renewal*, 158 AD3d 417 [1st Dept 2018]). If after these increases the legal regulated rent is more than $2,000 per month, the apartment becomes deregulated (RSC § 2520.11; Rent Stabilization Law § 26-504.2(a); *Altman v 285 W. Fourth LLC*, 31 NY3d 178 [2018]).

In support of her motion, Plaintiff states: "[t]here were absolutely no renovations done in the apartment at all at the time I signed [the Deregulation Rider] and no renovations were done before I moved in" (Plaintiff's affidavit, at ¶ 22). Nevertheless, she goes on to acknowledge that some improvements were indeed made. Plaintiff concedes that walls were plastered and painted, radiator covers were replaced, and the bathroom was tiled. She likewise acknowledges additional "upgrades" for which she paid, such as the purchase of new kitchen cabinets, but she fails to demonstrate that the Owner did not also incur costs for that work, for instance for the demolition of the old cabinets and installation of the ones she chose. Accordingly, Plaintiff's own papers raise a material issue of fact as to the extent and nature of improvements made to the Apartment.

Defendants corroborate that improvements were made to the Apartment. Per the March 31, 2004 invoice, Alcko's work included removing and installing new kitchen cabinets and bathroom tile, installing bathroom fixtures, removing wall moldings, rewiring the entire Apartment, bringing electrical outlets to code height, hanging new drywall, plastering and painting, and replacing windows. The Court notes that Defendant need only demonstrate it paid a fraction of those improvements to exceed the $2,000 deregulation threshold. Nevertheless, Plaintiff's contentions that this work was either not performed, was paid for by her rather than by

the Owner, or constituted normal maintenance and repair are issues of fact or cannot be determined at this pre-discovery stage.

Plaintiff's other grievances, for instance that she was promised a new dining area which was not built, or that the renovations included "cheap white tile" in the bathroom and Formica countertops in the kitchen rather than marble and granite, do nothing to support a finding of summary judgment in her favor. Material issues of fact clearly exist which preclude a summary judgment finding. Accordingly, Plaintiff's motion is denied.

Defendants' motion to dismiss pursuant to CPLR 3211(2), (4), and (5) is denied. That motion, premised on the fact that the DHCR had not yet dismissed its proceeding, was rendered moot upon the Order Terminating Proceeding issued by the DHCR on November 1, 2021.

However, the motion to dismiss the claims against Defendants Urban, Mason, and Robles is granted. As Defendants argue, Plaintiff's claims stem from obligations of owners as defined by RSC § 2520.6(i). Defendants Urban, Mason, and Robles are not fee owners, lessors, sublessors, assignees, net lessees, or proprietary lessees as set forth in that section, and managing agents are not liable in rent overcharge actions absent clear and explicit evidence of an agent's intent to substitute personal liability for the principal (*Crimmins v Handler & Co.*, 249 AD2d 89, 91-92 [1st Dept 1998]). Such evidence has not been shown.

Finally, Plaintiff moves to strike portions of Defendants' Answer contending the Answer lacks particularity as required by CPLR § 3013, or in the alternative for a more definite statement pursuant to CPLR 3024, while Defendants cross-move to amend the Answer. Leave to amend pleadings shall be freely given so long as there is no surprise or prejudice to the opposing party (CPLR 3025; *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). As

Plaintiff will not be prejudiced by the filing of the proposed amended pleading, the motions are granted to the extent of permitting Defendant to file an amended answer.

Accordingly, for the reasons set forth herein it is hereby,

ORDERED that Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that Defendants' motion to dismiss pursuant to CPLR 3211(2), (4), and (5) is denied; and it is further

ORDERED that Defendants' motion to dismiss the Complaint as to Defendants Urban Associates, LLC, Richard Mason, and Wilce Robles is granted and the complaint is dismissed in its entirety as against said Defendants, with costs and disbursements to said Defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said Defendants; and it is further

ORDERED that the action is severed and continued against the remaining Defendant 12 East 86th Street LLC; 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/supctmanh)]; and it is further

ORDERED that Defendants' motion for leave to amend the Answer herein is granted, and the Amended Answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with Notice of Entry thereof; and it is further

ORDERED that counsel are directed to appear for a Preliminary Conference in Room 212, 60 Centre Street, on May 10, 2022, at 9:30 AM.

All other relief sought is denied. This constitutes the Decision and Order of the Court.

4/1/2022
DATE

LORI SATTLER, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[X]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**