

Tong v Granat

2022 NY Slip Op 31159(U)

April 4, 2022

Supreme Court, New York County

Docket Number: Index No. 650264/2021

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

DICKON TONG,

Plaintiff,

- v -

JEFFREY GRANAT, KATHRYN MCCLAIN, and RONALD
MCCLAIN,

Defendants.

-----X

INDEX NO. 650264/2021

MOTION DATE 04/21/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, and 47 were read on this motion to DISMISS

Upon the foregoing documents, it is hereby ordered that defendants' motion to dismiss the complaint pursuant to CPLR 3211 is denied, and plaintiff's cross motion to compel disclosure pursuant to CPLR 3124 and 3126 is denied, based upon the following memorandum decision.

In this action for breach of an apartment lease, the parties dispute whether the lease was renewed prior to the expiration of the lease term on June 30, 2020, and, consequently, whether defendants Jeffrey Granat and Kathryn McClain, residents of the apartment, and defendant Ronald McClain, the guarantor of the lease, are liable for an additional year of rent payments to the landlord, plaintiff Dickon Tong. Plaintiff commenced this action by filing the summons and complaint on January 13, 2021 (NYSCEF Doc. No. 1). Defendants appeared and answered the complaint and asserted several counterclaims on February 18, 2021 (NYSCEF Doc. No. 2). Plaintiff replied to the counterclaims, and issue was completely joined between the parties, on March 10, 2021 (NYSCEF Doc. No. 15).

Defendants, despite having already answered the complaint, now make the instant motion to dismiss pursuant to CPLR 3211 “as the Defendants deny all charges alleged in the complaint and can prove that the Plaintiff’s lawsuit is frivolous and sanctionable” (NYSCEF Doc. No. 17). A motion under CPLR 3211 is made “at any time *before* service of the responsive pleading is required,” unless the motion is based on failure to state a cause of action, lack of subject matter jurisdiction, or failure to join a necessary party (CPLR 3211[e]). Here, defendants’ notice of motion fails to identify any statutory ground in support of the motion. To the extent one is set forth anywhere in the papers, it is documentary evidence pursuant to CPLR 3211(a)(1). The statute provides that such a defense is waived if not raised in a motion prior to answering the complaint, or in the answer itself (CPLR 3211[e]). Defendants did not assert a defense based on documentary evidence as an affirmative defense in their answer. Accordingly, to the extent this motion is based on a documentary evidence defense, it must be denied as defendants have waived this defense (*Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 257 [2d Dept 2012]). Defendants’ claimed denial of liability is also insufficient; defendants’ argument challenges the facts alleged in the complaint, implicating matters that cannot be resolved on a motion to dismiss (*Genger v Genger*, 87 AD3d 871, 873 [1st Dept 2011]).

In their reply papers, defendants ask for leave to amend their answer pursuant CPLR 3025(b) to add the affirmative defenses of documentary evidence and waiver, estoppel, and laches, asserting that these defenses were inadvertently omitted from the answer due to law office failure. While leave to amend is typically freely given (CPLR 3025[b]), leave should not be given where the proposed amendment would be futile (*Silverstein v Pillersdorf*, 199 AD3d 539 [1st Dept 2021]). As with documentary evidence, the defenses of waiver, laches, and estoppel are also waived if not raised in a pre-answer motion or in a responsive pleading

(*Hanover Ins. Co. v Finnerty*, 225 AD2d 1054, 1054 [4th Dept 1996] [“defendant's post-answer motion to dismiss based upon the defenses of waiver, release and Statute of Limitations was untimely”]; *Peoples Commercial Bank v Jerry Greene Distrib., Inc.*, 149 AD2d 774, 775 [3d Dept 1989] [holding that laches must be raised by pre-answer motion or in the responsive pleading]). Waived defenses may only be asserted in an amended answer where there will be no prejudice or surprise resulting from the delay in asserting them, and they are not “palpably insufficient or patently devoid of merit” (*Deutsche Bank Trust Co. Ams. v Cox*, 110 AD3d 760 [2d Dept 2013]). Here, defendants’ affirmative defenses are both pled in an entirely conclusory manner without any supporting facts. “[B]are legal conclusions are insufficient to raise an affirmative defense” (*Robbins v Growney*, 229 AD2d 356, 358 [1st Dept 1996]). Additionally, as this is an action at law for damages, equitable defenses such as laches are unavailable (*Cadlerock, L.L.C. v Renner*, 72 AD3d 454 [1st Dept 2010]).

Finally, plaintiff’s cross-move to compel production of outstanding interrogatory responses pursuant to CPLR 3124 and 3216. In opposition to the cross motion, defendants attached their response to the interrogatories. Plaintiff now claims that the responses are insufficient but does not dispute that defendants have responded. Sanctions or other relief as provided in CPLR 3126 are not appropriate herein as defendants have not behaved contumaciously and have responded to plaintiff’s demand, even if potentially incompletely (*Double Fortune Prop. Inv'rs Corp. v Gordon*, 55 AD3d 406, 407 [1st Dept 2008]). The parties will appear for a conference to determine whether further compliance with plaintiff’s interrogatories need be ordered.

Accordingly, it is hereby

ORDERED that the motion and cross-motion are denied; and it is further

ORDERED that the parties shall appear for a virtual status conference via Microsoft Teams on April 27, 2022 at 2:00 PM.

This constitutes the Decision and Order of the court.

Louis L. Nock

<u>4/4/2022</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
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 checked="" type="checkbox"/> DENIED	<input 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