SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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ANNAMARIA NUCCI,

Plaintiff,

- v -

MASOOD NABI,

Defendant.

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INDEX NO. 101217/2013

MOTION DATE 03/18/2020

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, 95, and 97

were read on this motion to VACATE - DECISION/ORDER/JUDGMENT/AWARD.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is determined that the motion by the defendant to set aside the post-trial judgment in this matter is denied, per the following memorandum.

This Supreme Court action, seeking rent arrears, was authorized by, and contemplated by, prior orders emanating from Housing Court proceedings between the parties commenced as far back as, at least, 2010. Once the Housing Court adjudicated issues involving possession of the leased premises that underlie both this action and the precursor Housing Court proceedings, the Housing Court recognized the parties' rights to continue to litigate with regard to rent arrears. Plaintiff did precisely that by commencing this rent arrears case on September 3, 2013. This case proceeded to a non-jury trial over the course of multiple days which concluded in a final judgment for the plaintiff in the principal sum of $79,760 plus interest. The judgment is recorded in the transcript of proceedings dated February 11, 2020 (NYSCEF Doc. No. 80) (the "Transcript").

As said February 2020 record reflects, counsel for the defendant, on summation, made what was (and currently is, in theory) a motion to dismiss the 2013 complaint on the ground that plaintiff had sold the leased premises in February 2013 – some six months or so prior to her commencement of this Supreme Court action in September of that year. Said counsel argued that because plaintiff no longer owned the premises at the time she commenced this action, she was lacking in standing to commence this action by virtue of Real Property Law § 223, which states that:

> The grantee of leased real property or of a reversion thereof or of any rent, the devisee or assignee of the lessor of such a lease or the heir or personal representative of either of them has the same remedy by entry, action or otherwise for the non-performance of any agreement contained in the assigned lease for the recovery of rent.

Based on that statutory language, defendant's counsel argued that the only person with standing to sue for the rent arrears at the time of the commencement date of this action would be the person who purchased the leased premises from the plaintiff, as that person would constitute "[t]he grantee of [the] leased real property" (RPL 223) – not the plaintiff, who had divested herself of ownership of the leased premises prior to her commencement of this action (*see*, Transcript at 21-22). No such defense, though – of lack of standing to sue (CPLR 3211 [a] [3]) – had ever been preserved in the answer, or in any interlocutory motion to dismiss, or in any amended answer on motion or otherwise.

As the record reflects, this court disposed of defendant's counsel's summation argument by referencing CPLR 1018, which states: "Upon any transfer of interest, the action may be continued by or against the original parties unless the Court directs the person to whom the interest is transferred to be substituted or joined in the action." (*See*, Transcript at 22.) But defendant's counsel now moves to set aside that conclusion based, essentially, on his

understanding that CPLR 1018 speaks in terms of "continu[ance]" of an action by a person with standing, and not in terms of *commencement* of an action by a person *without* standing.[1]

Defendant's counsel's argument is fundamentally flawed as applied to the particular procedural history of this controversy. Even assuming counsel's thesis to be correct – to wit, that CPLR 1018 only applies to a plaintiff who possessed standing at commencement – his argument deliberately avoids the fact that these parties had been litigating the merits of this controversy since, at least, 2010, beginning with the Housing Court proceedings serving as the precursor to this Supreme Court action. Indeed, after adjudicating the possessory aspects of the controversy, the Housing Court expressly recognized the parties' rights to continue the controversy in Supreme Court with regard to the monetary aspects. To ignore that patent reality, and dismiss this action out of hand due to the technicality of a September 2013 Supreme Court action commencement date – an action specifically contemplated by the Housing Court – would be worse than elevating form over substance; it would be a mockery of plaintiff's rights as a landlord vis-à-vis the defendant since as far back as, at least, 2010, which rights were undeniably vested in the plaintiff at that time (and for years afterward). To put it in other terms, this action is, in sum and substance, an extension of the litigation commenced long ago by plaintiff in the Housing Court.

Distinct of the foregoing, defendant's failure to preserve the defense of lack of standing either in his answer or in a pre-answer motion to dismiss constitutes a waiver of the defense (*see*, *Fossella v Dinkins*, 66 NY2d 162, 167 [1985] ["challenge to standing was waived because it was

[1] More specifically, defendant's counsel stated that this court "mistakenly believed that Plaintiff sold the Apartment in 2017" (i.e., after commencement) when, in fact, she did so in February 2013 (i.e., before commencement) (*see*, Affirmation in Support of Order to Show Cause [NYSCEF Doc. No. 79] ¶¶ 18, 21). From thence springs forth said counsel's argument that CPLR 1018 cannot save the plaintiff from a finding of lack of standing, leaving us with the implication that RPL 223 only vests her grantee with standing in this case – again, a defense that was never preserved in the answer or promoted in any CPLR article 32 motion to dismiss or attempted in any amended answer on motion or otherwise.

not raised as an affirmative defense, or by way of motion to dismiss . . . ."]). Nor did defendant seek to amend his answer at any time prior to trial to assert an affirmative defense of lack of standing.

Defendant's counsel's suggestion that plaintiff's Trial Exhibit 1 is a forgery (*see*, NYSCEF Doc. No. 79 ¶¶ 38-56) places too much reliance on the court's benign conclusion "that Exhibit 1 is not a viable contract controlling the case" (Transcript at 7). This court made no finding that forgery was engaged in; nor did it have to. It assessed the evidence and made conclusions as to credibility and weight.[2]

Thus, for these reasons, defendant's motion to set aside the post-trial judgment of the court is denied.

Accordingly, it is ORDERED that defendant's motion to set aside the post-trial judgment of the court (NYSCEF Doc. Nos. 77, 80) is denied.

This will constitute the decision and order of the court.

ENTER:

4/27/2022
DATE

LOUIS L. NOCK, J.S.C.

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

[2] Without adopting plaintiff's counsel's conjecture as authoritative, the court appreciates the point he tries to make in suggesting that "[i]f [Defendant] did not sign Exhibit 1 or authorize is signature, then a far more likely explanation is that a non-party such as his now ex-wife did so and that Plaintiff operated on the good faith belief that it was signed by Defendant" (Affirmation in Opposition to Order to Show Cause [NYSCEF Doc. No. 94] ¶ 26). The point being, that the court's discounting of the exhibit as non-controlling is a far cry from defendant's counsel's accusation of a forgery by the plaintiff.