

**Strout v CF 88 LLC**

2022 NY Slip Op 33264(U)

September 28, 2022

Supreme Court, New York County

Docket Number: Index No. 161439/2019

Judge: Sabrina Kraus

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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. SABRINA KRAUS PART 57TR

Justice

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BRIAN STROUT,

Plaintiff,

- v -

CF 88 LLC, and SM E 88 LLC,

Defendants.

-----X

INDEX NO. 161439/2019

MOTION DATE 09/09/2022

MOTION SEQ. NO. 014

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 014) 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 276, 277, 278, 279, 280, 281, 282

were read on this motion to/for SANCTIONS

BACKGROUND

Plaintiff, a tenant of apartment 12C at 160 East 88th Street, New York, New York 10128 (Subject Premises) commenced this action seeking a finding of rent overcharge and a declaration that the Subject Premises remains subject to rent regulation. Plaintiff's amended complaint asserts several causes of action including a declaratory judgment that the Subject Premises is Rent Stabilized and a request for a permanent injunction preventing defendants from commencing eviction actions against plaintiff except in accordance with the Rent Stabilization Law.

PENDING MOTION

On August 25, 2022, plaintiff moved for an order imposing sanctions pursuant to 22 NYCRR 130-1 on defendants and/or their counsel in the amount of \$30,000 for frivolous conduct by making misrepresentations to the court.

### ALLEGED FALSE STATEMENTS

Plaintiff alleges that defendants made a misrepresentation to this Court when they stated in their affirmation in support of the cross motion to plaintiff's motion to amend the complaint (Mot. Seq. 13) that "Defendants' predecessor (and thus Defendants who stand in their predecessor's shoes) is permitted to advise the Court that any/all records relative to the deregulation were lost or thrown away or destroyed in or after the year 2010." Plaintiff contends that the documents in question were subject to a litigation hold after April 15, 2018, and that defendants made representations to it after that date based on those records, and thus this statement must either be a misrepresentation, or defendants disposed of these records after they were placed under a litigation hold and they are grossly negligent.

Plaintiff additionally alleges that defendants made two misrepresentations to the Appellate Division, First Department, in its affirmation in support of a discovery stay, by claiming that a list of outstanding discovery issues submitted by plaintiff to the court was in fact his preliminary conference "submission" when it was in fact a different document, and by falsely claiming that it "produced certain responsive documents/information" when it had not done so.

### DISCUSSION

Pursuant to 22 NYCRR 130-1.1, the court, "in its discretion," may award costs, including attorney's fees, as well as impose financial sanctions against an attorney or firm that engages in "frivolous conduct," which includes conduct which "asserts material factual statements that are false." The court must consider the circumstances under which the conduct took place and whether the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent. 22 NYCRR 130-1.1(c). "Trial judges should be accorded wide latitude to determine the appropriate sanctions for dilatory and improper attorney conduct and we will defer

to a trial court regarding sanctions determinations unless there is a clear abuse of discretion.” *In re Kover*, 134 AD3d 64, 73-74 (1st Dept 2015); quoting *Pickens v. Castro*, 55 A.D.3d 443, 444 (1st Dept 2008).

Preliminarily, plaintiff, as a *pro se* litigant, improperly submits an affirmation in support of his motion instead of an affidavit, which cannot be considered by the Court pursuant to CPLR 2106. *See Household Finance Realty Corp. of New York v Della Cioppa*, 153 AD3d 908, 910 (2d Dept 2017) (*submission by defendant of affirmation rather than affidavit should have been disregarded as it was not in admissible form, even though he was an attorney*).<sup>1</sup>

Even if the affirmation were considered, the two alleged misrepresentations made in defendants’ affirmation in support to the Appellate Division are not properly before this Court and are thus disregarded. *See e.g. Industry LIC Condominium v Hudes*, 200 AD2d 761 (2d Dept 2021) (*22 NYCRR 130-1.1 is limited to frivolous conduct in the proceeding before the court*); *Ltown Ltd. Partnership v Sire Plan, Inc.*, 108 AD2d 435 (2d Dept 1985), *mod* 69 NY2d 840 (1986) (*question of whether appeal is frivolous should be determined by appellate courts from the record and any sanction should be fixed by that court*).

Defendants contend that the alleged misrepresentation to this court, when read in the context of the affirmation, was not a false statement, as they only contended that they were legally permitted to say that they had disposed of the documents at issue without penalty, not that they had done so. While the statement was ambiguous and inartfully worded, it does not constitute a materially false statement, and thus is not sanctionable pursuant to 22 NYCRR 130–1.1.

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<sup>1</sup> The court notes that plaintiff has improperly submitted affirmations on several prior motions before this court, although neither defendants nor the court have noticed or addressed the issue until now. Plaintiff is advised to avoid submitting affirmations on future motions.

Wherefore, it is hereby:

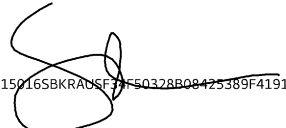
ORDERED that defendants' motion for sanctions is denied; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



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9/28/2022

DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE