SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO **PART** 33M

Justice

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INDEX NO. 155944/2020

COD, LLC,

MOTION DATE 02/17/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

L. P., GIULIANA PICININ TEDESCO

DECISION + ORDER ON MOTION

Defendants.

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Upon the foregoing documents, and oral argument, which took place on October 7, 2021[1] where Hal Weiner, Esq. appeared for Plaintiff Cod, LLC ("Cod" or "Plaintiff") and Ellery Ireland, Esq. appeared for Defendants L.P. by his Guardian Giulianna Picinin Tedesco ("L.P.") and Giuliana Picinin Tedesco in her individual capacity ("Tedesco") (collectively "Defendants"), Plaintiff's motion seeking to strike Defendants' answer for failure to provide discovery is denied, and the branch of Plaintiff's motion seeking partial summary judgment on its declaratory relief cause of action is denied without prejudice. Defendants' cross-motion seeking summary judgment dismissing Plaintiff's Complaint is denied as moot, and the branch of Defendants' cross-motion seeking leave to amend their Answer is granted.

I. Factual and Procedural Background

COD commenced this action on August 18, 2020, by serving a summons and complaint seeking a declaratory judgment, ejectment, and alleging trespass (NYSCEF Doc. 1). Defendants filed an answer with affirmative defenses and a counterclaim for harassment on August 25, 2020.

[1] While this motion was submitted and heard in another part, the case has been transferred to Part 33. The motion was not transferred to Part 33 but given the age of the motion and in the interest of judicial economy and expediency, this Court issues a decision on the instant motion.

(NYSCEF Doc. 2) On February 16, 2021, COD submitted the instant motion for an order dismissing defendants' answer or for partial summary judgment on the declaratory judgment claim. (NYSCEF Docs. 7-22). On March 29, 2021, Defendants submitted their cross-motion for leave to file an amended answer and for summary judgment dismissing the Complaint. (NYSCEF Docs. 25-43).

COD is the corporate owner of a residential, rent stabilized apartment building located at 151 East 80th Street, New York, New York (the building) (NYSCEF Doc. 1 at ¶ 1). Defendants currently reside in the Apartment (the "Apartment") in the building (*id.* at ¶ 11). This action arises out of a dispute over Defendants' succession rights to the unit.

The prior tenants of record of the Apartment were non-party decedents Jay Hoffman and Eva Hoffman (the Hoffmans), both of whom passed away on April 15, 2020. (NYSCEF Doc. 1 at ¶¶ 4 and 9; *see also* NYSCEF Docs. 7-8, and 14). The most recent rent stabilized renewal lease for the unit that the Hoffmans had executed with COD runs from March 1, 2020 through February 28, 2022 with a monthly rent of $2,245.29. (NYSCEF Doc. 13).

Defendants aver that L.P. is the minor child of the Hoffmans' son, non-party Per Hoffman ("Per"), and his former wife Tedesco (NYSCEF Doc. 27 at ¶¶ 2-3). Further, Defendants assert Per, Tedesco, and L.P. moved into the Apartment on December 27, 2018 to care for Jay Hoffman ("Jay"), who was suffering from Alzheimer's disease (*id.* at ¶ 3). Jay's wife, Eva, had relocated to a long-term assisted-living facility at that time as a result of her own health problems (*id.* at ¶ 3). Defendants produced email correspondence dated June 2019 in which Per notified building management that he and his family moved into the Apartment on December 27, 2018 (NYSCEF Doc. 31). Defendants assert that Per permanently vacated the unit in March 2019 (NYSCEF Doc. 26 at ¶ 7 n. 1).

Defendants have produced copies of rent receipts showing that COD accepted rent payments directly from Tedesco in the months of May, June and July, 2020 (NYSCEF Doc. 30). Defendants also produced 2020 emails that indicate Tedesco made monthly rent payments prior to May 2020 (NYSCEF Doc. 35). However, those emails also set forth COD's demands, under threat of litigation, (1) that Per apply to Surrogates Court to be designated as the executor of his parents' estates, and (2) that, for the duration of the lease term, all rent payments be made only by the estate and not by Tedesco *(id.)* Defendants assert that there was no legal requirement for Per to submit his parents wills to probate since the assets in their estates totaled less than $15,000.00 in value at the time of their deaths (NYSCEF Doc. 27 at ¶ 17). Further, Defendants argue that, despite having forced Per to bear the cost and inconvenience of the probate process, COD improperly failed to name the Hoffmans' estate as a party (NYSCEF Doc. 26 at ¶ 3). Per submitted an affidavit that advances this same argument and states as executor, he granted L.P. and Tedesco permission to reside in the Apartment through the end of the lease. (NYSCEF Doc. 28). Tedesco further notes that she and Per were obliged to transfer L.P. into an elementary school close to the Apartment in 2018 as due to their move (NYSCEF Doc. 40). Correspondence indicates that Defendants attempts to resolve their dispute with COD in 2020 were unsuccessful. (NYSCEF Doc. 42).

II. Discussion

A. Plaintiff's Motion to Strike Defendants' Answer

As previously mentioned, the first portion of COD's motion seeks an order, pursuant to CPLR 3126, to strike defendants' answer. The statute provides that the granting of such orders is a matter committed to the court's discretion. The Appellate Division, First Department, repeatedly holds that:

> "'[I]t is well settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith' (*McGilvery v New York City Tr. Auth.*, 213 AD2d 322, 324 [1st Dept 1995]). Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses (*see Johnson v City of New York*, 188 AD2d 302 [1st Dept 1992]; *Nunez v City of New York*, 37 AD3d 434 [2d Dept 2007])."

Henderson–Jones v City of New York, 87 AD3d 498, 504 (1st Dept 2011); *see also Lane v City of New York*, 210 AD3d 502, 503 (1st Dept 2022).

Here, COD notes that it served a document discovery demand on September 16, 2020 and sent follow up emails to Tedesco on October 13, 2020 and October 28, 2020 (NYSCEF Docs. 9; 16-17). COD seeks to infer that "[t]he only available conclusion is that the failure to provide the discovery is willful and contumacious and therefore the court should impose its harshest available sanction and order striking the answer." (NYSCEF Doc. 9). Defendants respond that "[p]laintiff's counsel's two emails over a two-week period of time, to a pro se litigant, in the middle of a pandemic, do not constitute a good-faith effort to resolve a discovery dispute for the purposes of 22 NYCRR § 202.7 (a) (2)." (NYSCEF Doc. 26). Defendants fail to mention that Plaintiff's counsel also sent emails seeking compliance with the document discovery request to Defendants' own counsel on December 2, 2020 and December 22, 2020 after counsel was retained in November 2020 (NYSCEF Doc. 9 and 19). Plaintiff's counsel subsequently filed an affirmation of good faith on February 16, 2021 (NYSCEF Doc. 10). It therefore appears that Plaintiff has complied with the Uniform Court Rule set forth in 22 NYCRR § 202.7. However, the court does not deem this to be a sufficient basis to invoke its discretion to strike defendants' answer.

Defendants also argue that Plaintiff's request should be denied note because "there has not been a discovery conference and there is no court order directing Defendants to comply with the discovery demands." (NYSCEF Doc. 26). As a result, this court cannot find that defendants have

"failed to comply with a discovery order" in violation of CPLR 3126. Indeed, it does not appear that the parties ever commenced the discovery process herein. The court also notes that Plaintiff's reply papers do not reassert the request for an order to strike in response to Defendants' above-noted opposition arguments. It thus appears that Plaintiff has abandoned that request. Because of this, and because there is no basis for finding that defendants have violated CPLR 3126, the court denies this branch of Plaintiff's motion.

B. Plaintiff's Motion for Partial Summary Judgment on its Declaratory Judgment Cause of Action

Plaintiff also seeks partial summary judgment on its first cause of action for a declaration that defendants are not entitled to succession rights to the Apartment (NYSCEF Doc. 7).

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.,* 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.,* 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.,* 1 NY3d 381 [2004]).

Declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *see e.g. Jenkins v State of N.Y., Div. of Hous. & Community*

Renewal, 264 AD2d 681 (1st Dept 1999). It has long been the rule that, in an action for declaratory judgment, the court may properly determine respective rights of all of the affected parties under a lease (*see Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 [1926]).

As a rent stabilized unit, the Apartment is governed by the RSC. The pertinent regulations are found in 9 NYCRR § 2520.6 ("Definitions") and 9 NYCRR § 2523.5 ("Notice for renewal of lease and renewal procedure"), and provide as follows:

> "(n) Immediate family. A spouse, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, *grandson*, granddaughter, father-in-law, mother-in-law, son-in-law *or daughter-in-law of the owner*.
>
> "(o) Family member.
>
> "(1) A spouse, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, *grandson*, granddaughter, father-in-law, mother-in-law, son-in-law or *daughter-in-law of the tenant or permanent tenant*.
>
> "(2) Any other person residing with the tenant or permanent tenant in the housing accommodation as a primary or principal residence, respectively, who can prove emotional and financial commitment, and interdependence between such person and the tenant or permanent tenant. Although no single factor shall be solely determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence existed, may include, without limitation, such factors as listed below. In no event would evidence of a sexual relationship between such persons be required or considered:
>
> "(i) longevity of the relationship;
>
> "(ii) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;
>
> "(iii) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.;
>
> "(iv) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;
>
> "(v) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions each for the other, entering into a personal relationship contract, making a

domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;

"(vi) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their words or actions;

"(vii) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services;

"(viii) engaging in any other pattern of behavior, agreement, or other action which evidences the intention of creating a long-term, emotionally committed relationship."

9 NYCRR § 2520.6 (n) & (o) (emphasis added).

"(b)

"(1) Unless otherwise prohibited by occupancy restrictions based upon income limitations pursuant to federal, state or local law, regulations or other requirements of governmental agencies, if an offer is made to the tenant pursuant to the provisions of subdivision (a) of this section and such tenant has permanently vacated the housing accommodation, any member of such tenant's family, as defined in section 2520.6(o) of this Title, who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years, *or where such person is a* "senior citizen," or a *"disabled person" as defined in paragraph (4) of this subdivision, for a period of no less than one year, immediately prior to the permanent vacating of the housing accommodation by the tenant*, or from the inception of the tenancy or commencement of the relationship, if for less than such periods, shall be entitled to be named as a tenant on the renewal lease.

* * *

"(4) For the purposes of this subdivision (b), disabled person is defined as a person who has an impairment which results from *anatomical, physiological or psychological conditions*, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and *which are expected to be permanent and which substantially limit one or more of such person's major life activities*."

9 NYCRR § 2523.5 (b) (1) & (4) (emphasis added).

Plaintiff raises two arguments regarding why Defendants are not entitled to succession rights to the Apartment. First, it argues that, although "LP is allegedly the deceased tenants' grandson and assuming arguendo this can be established..." Tedesco "does not allege any recognized family relationship to the deceased as defined in . . . [9 NYCRR § 2520.6 (n)]." (NYSCEF Doc. 9).

This argument is unavailing. RSC § 2520.6 (n) is inapposite since it pertains to the "immediate family" of a rent stabilized unit's "owner." The situation at bar is instead governed by RSC § 2520.6 (o), which pertains to "family members" of a rent stabilized unit's "tenant or permanent tenant," which is what the decedents were. That regulation recognizes both grandsons and daughters in law as "family members" of such tenants. RSC § 2520.6 (o) (1). Defendants allege that L.P. falls into the former category, and such evidence as is currently before the court is inconclusive as to whether Tedesco may fall into the latter category.[2] Tedesco relies on the definition of "other family member" that is set forth in RSC § 2520.6 (o) (2). (NYSCEF Doc. 26). Should she be able to establish that she falls within either definition she will have satisfied the RSC's first requirement for succession rights claimants. The Court therefore rejects Plaintiff's contention that she has failed to "allege any recognized family relationship" to the Hoffmans.

Plaintiff next argues that "neither Defendant meets the length of residency requirement" set forth in 9 NYCRR § 2523.5 (b) (1) because Per's email indicates that they moved into the Apartment on December 27, 2018 and the Hoffmans both died on April 15, 2020 - "approximately 6 months less than the 2-year requirement to succeed to the lease . . . under [the RSC]." (NYSCEF document 9). This allegation is borne out by documentary evidence that COD submitted with its motion. (NYSCEF Docs. 14-15). Defendants nevertheless assert that Tedesco is a "disabled person" as defined in 9 NYCRR § 2523.5 (b) (4), and that her succession rights claim is therefore only subject to the one-year residency requirement set forth in 9 NYCRR § 2523.5 (b) (1). (NYSCEF Doc. 26). Since the Hoffmans were still alive on the one-year anniversary of her first occupying the Apartment, Defendants argue she has satisfied the RSC's requirements for a succession rights claim to the unit. Id., ¶ 22. COD replies that Defendants' proof of Tedesco's

status as an "other family member" and a "disabled person" are inadequate. (NYSCEF Doc. 45). After careful consideration, the Court denies this branch of Plaintiff's motion.

Appellate authority has long recognized that the succession rights regulation set forth in RSC § 2523.5 (b) are remedial in nature and should be liberally construed to carry out the reform intended, which is "to prevent displacement of family members." (*BPP ST Owner LLC v Nichols*, 63 Misc 3d 18, 21 [App Term 1st Dept 2019], citing *Festa v Leshen*, 145 AD2d 49, 55 [1989]). Here, it is undisputed that Defendants did not satisfy the two-year residency rule set forth in RSC § 2523.5 (b). However, no formal discovery has been had, and the evidentiary record is limited to the exhibits which the parties submitted in connection with their motions. With respect to Defendants' assertion Tedesco is a "disabled person", this is limited to a now-expired certification of a diagnosis of "severe or chronic pain resulting in substantial limitation of function." (NYSCEF Doc. 34). However, in view of the regulation's remedial nature and the directive that it be liberally applied, the Court does not believe that it would be provident to make such a finding at this juncture based on an undeveloped evidentiary record. Instead, the Court finds that the RSC's purposes would be better served by denying COD's request for partial summary judgment with leave to renew after Defendants have interposed their Amended Answer and the parties have completed the discovery process. Accordingly, the Court denies this branch of Plaintiff's motion without prejudice.

C. Defendant's Cross-Motion Seeking Leave to Amend the Answer

Defendants cross-motion seeks the leave to serve and file an amended answer. Pursuant to CPLR 3025 (b), "[a] party may amend his or her pleading . . . at any time by leave of court," such "[l]eave shall be freely given upon such terms as may be just including the granting of costs and continuances," and "[a]ny motion to amend . . . pleadings shall be accompanied by the proposed

amended . . . pleading clearly showing the changes or additions to be made to the pleading." The First Department has long held that "leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay," unless "the proposed pleading fails to state a cause of action ... or is palpably insufficient as a matter of law." *Davis & Davis v Morson*, 286 AD2d 584, 585 (1st Dept 2001).

The proposed amended answer asserts a new affirmative defense ("succession rights") that was mentioned in the original answer, but not explicitly pled as an affirmative defense. (NYSCEF Docs. 26 and 29). Defendants assert that this fact precludes Plaintiff from claiming surprise or prejudice at having to respond to their proposed succession rights defense. They also assert that the defense is meritorious since L.P. and Tedesco meet the criteria for "family member" and/or "non-traditional family member" succession rights set forth in RCS (9 NYCRR) § 2520.6 et seq.[1] *Id.* Defendants' relationship with the Hoffmans is certainly not in question, as evinced by Plaintiff's emails acknowledging that L.P is their grandson and that Tedesco is his mother (NYSCEF Docs. 31-32 and 35-37). Nevertheless, Plaintiff does not respond to any of these assertions, but instead argues that Defendants have not submitted sufficient evidence to support a succession rights claim (NYSCEF Doc. 44). This argument is directed to the proof, rather than the pleadings, and thus misconceives the standard of review that governs motions pursuant to CPLR 3025 (b).

An evidentiary challenge is not appropriate at this stage of the litigation, and a court will not entertain an evidentiary argument unless it conclusively establishes that a proposed pleading fails to state a cause of action as a matter of law. As a result, the court finds that Defendants' proposed affirmative defense is adequate and satisfies the requirements of CPLR 3015 (b). Indeed, Defendants have presented sufficient evidence to support their allegations regarding: (1) their

familial and/or quasi-familial relationship with the Hoffmans, (2) the length of time they have resided in the Apartment with plaintiff's knowledge and consent, (3) plaintiff's acceptance of direct rent payments from Tedesco; and (4) disability. (NYSCEF documents 30, 37, 40, 42). Accordingly, because Defendants have satisfied the criteria set forth in CPLR 3025 (b), the court grants Defendants' cross-motion to amend their Answer.

D. Defendants' Cross-Motion to Dismiss for Failure to Name a Necessary Party

Defendants' cross motion asserts that Plaintiffs' Complaint must be dismissed for failure to name a necessary party; i.e., the Hoffmans' estate, of which Per Hoffman has been appointed executor. (NYSCEF Doc. 26). Defendants cite the First Department's decision in *Extell Belnord LLC v Uppman* (113 AD3d 1 [1st Dept 2013]) to support their assertion that the instant complaint must be dismissed as a matter of law. Plaintiff responds that "[p]rior to the commencement of this action there had been no Estate designated," and that it "could not bring an action against the Estate since no executor or administrator had been appointed." (NYSCEF Doc. 45). Plaintiff also argues that "joinder of the estate . . . is only relevant if an immediate judgment granting ejectment were to be granted," and therefore concedes that Per's appointment has rendered Plaintiff's cause of action for ejectment "moot." *Id.* Finally, plaintiff asserts that it "reserves the right to move this Court to amend the complaint to name the Estate" as a defendant. *Id.* Defendants' reply papers reassert their initial reliance on the *Extell Belnord LLC v Uppman* holding and note the circular and self-contradictory nature of plaintiff's opposition. (NYSCEF Doc. 48). The Court finds that Defendants' argument is now moot.

Extell Belnord LLC v Uppman did not involve a succession rights claim, but rather an allegation of non-primary residence. However, it did feature a tenant who was (a) the licensee of the deceased tenant of record, and (b) occupying the subject apartment during the period of time

between the decedent's death and the expiration of the decedent's lease term. The First Department determined that the decedent's estate was a necessary party in this set of circumstances. *Extell Belnord LLC v Uppman*, 113 AD3d at 12. The Court did not order that the complaint be dismissed. However, in making its determination, the First Department cited its earlier decision in *Westway Plaza Assoc. v Doe* (179 AD2d 408 [1st Dept 1992]) which had held that a landlord's failure to name the estate of a deceased prime tenant in an eviction case against the decedent's licensee was a jurisdictional defect *requiring* dismissal of the complaint. However, the Hoffmans' final renewal lease term expired on February 28, 2022 (NYSCEF Doc. 13). Because that lease term has ended, the Hoffmans' estate is no longer a necessary party to this action, as it was in 2020. Accordingly, Defendants' argument is now moot, and this branch of Defendants' motion is denied as such.

Accordingly, it is hereby,

ORDERED that Plaintiff's motion to strike Defendants' Answer for failure to provide discovery is denied; and it is further

ORDERED that Plaintiff's motion seeking partial summary judgment on its declaratory judgment cause of action is denied without prejudice; and it is further

ORDERED that Defendants' motion seeking dismissal of Plaintiff's Complaint is denied as moot; and it is further

ORDERED that the Defendants' motion for leave to amend the Answer herein is granted, and the amended complaint 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 shall submit a proposed preliminary conference order to the Court via NYSCEF and e-mail to SFC-Part33-Clerk@nycourts.gov on or before March 1, 2023. If the

parties are unable to agree to a proposed preliminary conference order, the parties are directed to appear for an in-person preliminary conference on March 8, 2023 at 9:30 a.m at 60 Centre Street, Room 442, New York, New York; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order on all parties and the Clerk of the Court, with notice of entry; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

2/8/2023
DATE

HON. MARY V. ROSADO, J.S.C.

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