SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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TABITHA ORTIZ, ARILEE ORTIZ, TABITHA ORTIZ, TAMARA ORTIZ, EDWIN ORTIZ,

Plaintiff,

- v -

NERVES LOS TRES PRESERVATION, LLC,LOS TRES UNIDOS MANAGEMENT, NUEVO EL BARRIO PARA LA REHABILITACION DE VIVIENDA Y ECONOMIA, BELVERON PARTNERS, NCV CAPITAL PARTNERS, HUDSON VALLEY PROPERTY GROUP

Defendant.

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INDEX NO. 153469/2022

MOTION DATE 03/15/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for STRIKE AFFIRMATIVE DEFENSE.

In this wrongful death action, plaintiffs Tabitha Ortiz, as Personal Representative of the Estate of Edwin Rosa Ortiz, and Arilee Ortiz, Tabitha Ortiz, Tamara Ortiz, and Edwin Ortiz Jr. individually (collectively "Plaintiffs") move for an order striking defendants' affirmative defenses pursuant to CPLR §§ 3012(a) and 3211(b). Defendants oppose the motion.

This action arises out of the October 13, 2020 death of Edwin Rosa Ortiz ("Ortiz") following an asthma attack in his home. At the time, Ortiz resided in a building owned by Defendants located at 1680 Madison Avenue in Manhattan. On October 11, 2020, he suffered an asthma attack. Plaintiffs allege that the emergency medical teams dispatched to aid Ortiz were initially unable to reach his apartment in time due to "multiple obstructions and lack of directions, signals, and instructions" in Defendants' building; the emergency teams had to contact the New York City Fire Department for assistance in reaching Ortiz. Although Ortiz

eventually was taken to the hospital, he fell into a coma and passed away on October 13. Plaintiffs assert that the delay in reaching Ortiz contributed to his death and that the delay was caused by the obstacles in the building.

Plaintiffs commenced this action on April 22, 2022. In their Complaint, they set forth causes of action for negligence, negligence per se, and wrongful death. In their March 3, 2023 Answer, Defendants assert twelve affirmative defenses. Plaintiffs now move to dismiss these defenses.

Plaintiffs argue that the following affirmative defenses must be stricken for not being stated with the particularity required by CPLR 3013: the first (Plaintiffs' culpable conduct), second (apportionment of damages), third (damages caused by others), fourth (Defendants' damages not to exceed their respective equitable share), eighth (superseding or intervening negligence), ninth (joint and several liability), tenth (sole proximate cause), and twelfth (Complaint seeks recovery not permitted under the current state of the law). They claim that the relevant portions of the Verified Answer fail to give notice of the "transactions, occurrences, or series of transactions or occurrences" underlying these defenses. Plaintiffs further contend that other defenses must be stricken as they are not affirmative defenses, namely the second (apportionment of damages), fourth (Defendants' damages not to exceed their respective equitable share), fifth (collateral estoppel), ninth (joint and several liability), and twelfth (recovery sought not permitted under the current state of the law). Plaintiffs cite to Florida and New Jersey, but not New York, case law to support this position. Finally, they contend that the seventh affirmative defense – that the Complaint fails to state a cause of action – should be stricken as the Complaint does state a cause of action for wrongful death. Plaintiffs' memorandum of law does not address the sixth defense for reduction of any recovery under

CPLR 4545. In opposition, Defendants contend that the motion must be denied as Plaintiffs fail to meet their burden under CPLR 3211(b), as Plaintiffs purportedly offer no substantive arguments or admissible facts in support of their position.

CPLR 3211(b) allows a party to "move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." A "plaintiff bears the heavy burden of showing that [a] defense is without merit as a matter of law" (*Emigrant Bank v Rosabianca*, 210 AD3d 527 [1st Dept 2022] [internal citations and quotation marks omitted]). "The allegations in the answer must be viewed in the light most favorable to the defendant . . . and the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*id*., citing *Pugh v New York City Hous. Auth.*, 159 AD3d 643 [1st Dept 2018]). "Further, the court should not dismiss a defense where there remain questions of fact requiring a trial" (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015], citing *534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011]).

Here, Plaintiffs do not meet their heavy burden of demonstrating the purported lack of merit of Defendants' first, second, third, fourth, eighth, ninth, tenth, and twelfth affirmative defenses, respectively: Plaintiffs' culpable conduct, apportionment of damages, damages caused by others not within Defendants' control, Defendants' damages not to exceed their respective equitable share, superseding or intervening negligence, joint and several liability, sole proximate cause, and the recovery sought is unavailable under current law. Plaintiffs annex no exhibits to their moving papers apart from their unverified Complaint and the Verified Answer that would demonstrate how these defenses are without merit as a matter of law (*see Granite State Ins. Co.*, 13 AD3d at 481; *534 E. 11th St. Hous. Dev. Fund Corp.*, 90 AD3d at 542). Furthermore, each of

these defenses as pled are sufficient to put Plaintiffs on notice as to the nature of the defenses that Defendants intend to raise and are therefore complaint with the requirements of CPLR 3013.

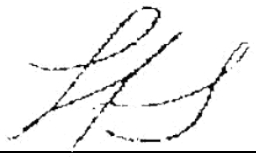
Plaintiffs' argument that the second, fourth, fifth, ninth, and twelfth defenses in the Verified Answer are not actually affirmative defenses is without merit. The second defense, apportionment of damages, is specifically classified as an affirmative defense by CPLR 1412: "[c]ulpable conduct claimed in diminution of damages . . . shall be an affirmative defense to be pleaded and proved by the party asserting the defense." The fourth and ninth defenses for apportionment and joint and several liability under CPLR 1601 and CPLR Article 16, respectively, may be affirmatively pled even though the CPLR does not mandate their inclusion in the answer (*see, e.g., Miller v Staples the Off. Superstore E., Inc.*, 52 AD3d 309, 310 [1st Dept 2008]). As to the fifth defense, it is well-established that collateral estoppel is among the defenses that a "party shall plead . . . which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading" (CPLR 3018[b]). Finally, although the twelfth affirmative defense asserting that Plaintiffs seek recovery not available under current law is not specifically enumerated in CPLR 3018(b), the rule specifically states that "[t]he application of this subdivision shall not be confined to the instances enumerated."

Finally, Plaintiffs do not demonstrate that the seventh affirmative defense lacks merit. Although the affirmative defense that the complaint fails to state a cause of action may be regarded as "surplusage" (*Riland v Frederick S. Todman & Co.*, 56 AD2d 350, 352 [1st Dept 1977]), in general "assertion of [this] defense in an answer should not be subject to a motion to strike or provide a basis to test the sufficiency of the complaint" (*id.* at 353). This affirmative defense "may be dismissed only if all the other affirmative defenses are found to be legally

insufficient" (*Tribbs v 326-338 E 100th LLC*, 215 AD3d 480, 482 [1st Dept 2023], quoting *Raine v Allied Artists Prods.*, 63 AD2d 914, 915 [1st Dept 1978]). As the Court has not dismissed the other affirmative defenses, it may not dismiss the seventh affirmative defense.

Accordingly, it is hereby:

ORDERED that the motion is denied.



9/11/2023
DATE

LORI S. SATTLER, J.S.C.

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