

Dixon v 1819 Weeks Ave. Realty Corp.

2023 NY Slip Op 33485(U)

October 4, 2023

Supreme Court, New York County

Docket Number: Index No. 161138/2019

Judge: Richard Latin

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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. RICHARD LATIN **PART** **46V**

Justice

-----X

BENJAMIN DIXON and CHRISTOPH J. MEINRENKEN,

Plaintiffs,

- v -

1819 WEEKS AVE. REALTY CORP., NANCY J. HABER,
and XYZ CORP.,

Defendants.

-----X

INDEX NO. 161138/2019

MOTION DATE 06/03/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 118, 119, 120

were read on these motions to/for SUMMARY JUDGMENT (AFTER JOINDER) & STAY .

In this residential landlord-tenant action, Benjamin Dixon (Dixon) and Christoph J. Meinrenken (Meinrenken, collectively plaintiffs) seek partial summary judgment granting a money judgment for rent overcharges and treble damages against 1819 Weeks Ave. Realty Corp. (1819 Weeks); reforming the leases between 1819 Weeks and Nancy J. Haber (Haber, collectively defendants) to reflect legal regulated rent (LRR) and rent-stabilization; and dismissing Haber's abuse of process and prima facie tort counterclaims with prejudice (NY St Cts Elec Filing [NYSCEF] Doc No. 66, notice of motion).¹ Defendants oppose the motion and cross-move for a stay of this action for a New York State Division of Housing and Community Renewal (DHCR) determination of their initial apartment registrations and tenants' possible Fair Market Rent Appeals (FMRAs) (NYSCEF Doc No. 101, notice of cross-motion). For the reasons below, plaintiffs' motion is granted solely to the extent of dismissing Haber's counterclaims and defendants' cross-motion is denied.

Background

Plaintiffs are tenants of 47 Perry Street, New York, New York (the building). Under a one-year lease headed "LEASE FOR AN UNREGULATED APARTMENT," Dixon entered

¹ Plaintiffs do not seek summary judgment on their claims for breach of warranty of habitability and attorney's fees.

possession of apartment 3A on May 1, 2016 (NYSCEF Doc No. 83, lease dated April 18, 2016 [bold type omitted]). 1819 Weeks is named as landlord; Haber's signature is on landlord's signature line. Dixon signed two one-year renewal leases (NYSCEF Doc Nos. 68, Dixon aff at ¶ 6, and 84, lease dated July 10, 2018).² Monthly rent was \$3,700 for the first year, \$3,800 for the second year, and \$3,650 for the third year.

Under a one-year lease headed "FOR APARTMENTS NOT SUBJECT TO THE RENT STABILIZATION LAW," Meinrenken entered possession of apartment 4C on June 14, 2019 (NYSCEF Doc No. 85, lease dated May 13, 2019 [bold type omitted]). Meinrenken signed a two-year renewal lease (NYSCEF Doc No. 86). Haber is named as owner; Haber's signature is on owner's signature line. Monthly rent was \$3,300 for the first year, \$3,375 for the second year, and \$3,450 for the third year.

Certified DHCR rent registration history records for the apartments cover 1984 to 2022, and note the records "merely report[] the statements made by the owner in the registration(s) filed by such owner...[,] do[] not reflect changes in rent occurring after April 1 of each year[,] and "do[] not attest to the truthfulness of the owner's statements or the legality of the rents reported" (NYSCEF Doc Nos. 87 and 90, both at 1-5 [block capitalization omitted]). Apartment 3A's record lists the unit as rent-controlled in 1984 with a LRR of \$230.27, as rent-controlled from 1985 to 1992 with no registration required, as rent-stabilized from 1993 to 1998 with a LRR that increased from \$685 to \$759.84, as rent-stabilized and vacant from 2000 to 2004 with a LRR of \$759.84, and as rent-stabilized and temporarily exempt from regulation due to owner or employee occupation in 2005. DHCR found no registrations for 1999 or from 2006 to 2022. Apartment 4C's record lists the unit as rent-controlled in 1984 with a LRR of \$258.24 and rent-controlled from 1985 to 2022 with no registration required.

Plaintiffs commenced this action challenging their leases' legality in November 2019 (NYSCEF Doc No. 71). On June 3, 2022, plaintiffs filed the current motion.

On June 27, 2022, defendants filed initial apartment registration (RR-1) forms for both apartments with DHCR. The forms state "Apartment Previously Rent Controlled" as the reason for both registrations (NYSCEF Doc Nos. 103 and 104). Haber signed these forms in her capacity as managing agent.

² Dixon's first renewal lease is not an exhibit.

For Dixon's apartment, 3A, Haber recorded October 19, 1992 as the date a rent-controlled tenant vacated and the unit became rent-stabilized with a LRR of \$230.27. Haber alleged that the May 1, 2016 to April 30, 2017 lease was in effect on the date the unit became rent-stabilized. For initial apartment registration status, she checked the permanently exempt box. The form instructs: "if exempt box is checked, one reason MUST be selected" (NYSCEF Doc No. 104, box 16b). Haber did not select a reason.

For Meinrenken's apartment, 4C, Haber recorded August 1, 2015 as the date a rent-controlled tenant vacated and the unit became rent-stabilized with a LRR of \$722.23. Haber wrote that the June 14, 2019 to June 13, 2020 lease was in effect on the date the unit became subject to rent stabilization. For initial apartment registration status, Haber checked the permanently exempt box and selected high rent vacancy deregulation as the reason.

After he received the RR-1 form, Meinrenken filed a letter and several documents with DHCR including a DHCR RA-89 form entitled "Tenant's Complaint of Rent and/or Other Specific Overcharges in a Rent Stabilized Apartment" (NYSCEF Doc No. 119, DHCR filing date-stamped October 3, 2022). The letter's last paragraph reads, in pertinent part:

"[M]y claim of willful rent overcharges has been pending in the Supreme Court since November 14, 2019 and I wish to proceed with that claim. It is my understanding that I cannot legally file an FMRA with DHCR in circumstances such as these. The sole purpose of this submission is to avoid a 'Catch 22' in the extremely unlikely event that the...Court should find that an FMRA is an appropriate proceeding for resolving this dispute and that I am required to demonstrate that I submitted an FMRA within the 90 day limit of receiving the RR-1....I am effectively asking for a stay of any processing of the attached FMRA, without prejudice, pending a final determination of the...Court action" (*id.* at 13).

Defendants' Cross-Motion for a Stay of this Action

Logic dictates that the court consider defendants' cross-motion first. According to defendants, a stay is in the interest of judicial economy because DHCR's determination of FMRAs could partially or fully resolve the parties' dispute. Haber expounds that it "appears" the registration forms were not filed or properly filed with DHCR and not served or properly served upon plaintiffs, but her recent filing of the RR-1 forms enables the agency to review the matter

and plaintiffs to file FMRAs (NYSCEF Doc No. 105 at ¶ 18). Haber argues FMRAs will address “a technical ‘overcharge,’” if any, from the absence of the forms before June 2022 (*id.* at ¶ 20). Defendants’ attorney relies on *Jacin Inv., Corp., N.V. v Von Vogt* (NYSCEF Doc No. 113, [Civ Ct, NY County, October 25, 2019, Thermos, J., Index No. 68953/18, *5-6] [*Jacin*]) to argue that the four-year statute of limitations to file an FMRA is tolled when a landlord does not file an RR-1 form and serve it upon a tenant, and thus plaintiffs here can still file FMRAs. In the alternative, counsel argues defendants timely served Meinrenken since his first lease is dated May 13, 2019.

In opposition, plaintiffs contend a stay is inappropriate because there are no pending DHCR proceedings, as DHCR filings do not start a proceeding. Counsel argues Rent Stabilization Code § 2522.3 (2) prohibits FMRA filings more than four years after an apartment is decontrolled. Given this prohibition, counsel claims defendants are pressuring plaintiffs to file futile FMRAs that DHCR has no jurisdiction to consider and will dismiss if interposed.

Plaintiffs are correct. The First Department has held that when “a FMRA is filed four years or more after the first date the housing accommodation is no longer subject to rent control, the application ‘shall be dismissed’ as untimely” (*Liggett v Lew Realty LLC*, 211 AD3d 473, 475 [1st Dept 2022] citing 9 NYCRR §§ 2522.3 [c], 2523.1; *see Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105, 113 [1st Dept 2017] [finding a landlord’s “amended (or late) filings did not toll or extend the time within which an FMRA could be filed”]). The 2019 Civil Court’s decision in *Jacin* is inapposite because it is inconsistent with First Department precedent. Here, the last rent-controlled tenants vacated apartment 3A in October 1992 and apartment 4C in August 2015, and thus the deadlines to submit FMRAs were October 1996 and August 2019 respectively. Defendants filed the RR-1 forms in June 2022, long after the deadlines passed.

In addition, defendants’ forum argument is without merit as part F of the Housing Stability and Tenant Protection Act of 2019 (HSTPA) contains a tenant choice of forum provision for overcharge claims. The provision states:

“Unless a tenant shall have filed a complaint of overcharge with the division which complaint has not been withdrawn, nothing contained in this section shall be deemed to prevent a tenant...claiming to have been overcharged, from commencing an action...in a court...for damages equal to the overcharge and the penalty provided....*The courts and the division shall have concurrent jurisdiction,*

subject to the tenant's choice of forum" (McKinney's Uncons Laws of NY § 8632 [a] [1] [f]; [b], L 2019, ch 36, part F, §§ 1, 3, [eff June 14, 2019] amdg Emergency Tenant Protection Act of 1974, ch 576, § 4 [§ 12]) (emphasis added).

In *Collazo v Netherland Prop. Assets LLC* (35 NY3d 987, 990 [2020]), the Court of Appeals held that under part F of the HSTPA, "plaintiffs' choice of forum controls." Plaintiffs chose this forum by commencing this action in November 2019. Meinrenken, in his September 2022 letter to DHCR, explicitly states he wishes to proceed with this action and asks DHCR not to process his FMRA unless the court rules that DHCR is the appropriate forum. Due to the unique circumstances surrounding Meinrenken's DHCR filing, the court denies defendants' cross-motion with the caveat that Meinrenken must withdraw the DHCR complaint, submit proof on NYSCEF, and notify the part clerk of the filing by October 20, 2023.

The Amended Complaint

It is undisputed that in August 2020 plaintiffs moved to amend their complaint, in September 2020 the court granted leave, and in January 2021 defendants filed an answer entitled, in part, "answer to proposed amended complaint" (NYSCEF Doc Nos. 77, notice of motion seq. 1, 79, September 2020 decision and order, and 80, answer [block capitalization omitted]). This was defendants' third answer, and it added the affirmative defense of failure to serve and file an amended complaint. The answer also declared that defendants interposed the pleading, despite the purported failure to serve the complaint, to prevent entry of a default.

Defendants contend that plaintiffs' current motion should be denied because they base it on a complaint that was not served upon defendants and filed with the court. Defendants argue that, although plaintiffs served and filed a proposed amended complaint as part of their motion, plaintiffs were required to serve and file an additional copy of the amended complaint after the court issued its order. Plaintiffs contend that defendants' argument is disingenuous because the preliminary conference order states defendant accepts service of the amended complaint and defendants proceeded in discovery (*see* NYSCEF Doc No. 23, preliminary conference order). The court agrees with plaintiffs.

Plaintiffs' Lease Reformation and Overcharge Claims

Next, the court considers plaintiffs' request for partial summary judgment on their lease reformation and overcharge claims. Courts will grant a summary judgment motion "if, upon all

the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party” (CPLR § 3212 [b]). Courts will deny the motion if the opposing parties “show facts sufficient to require a trial of any issue of fact” (*id.*). To make this determination, courts “view the evidence in the light most favorable to the nonmoving part[ies], including drawing all reasonable inferences in [their] favor” (*Vega v Metro. Transp. Auth.*, 212 AD3d 587, 588 [1st Dept 2023]).

Plaintiffs assert summary judgment is warranted as they have proved defendants engaged in a fraudulent scheme to unlawfully deregulate their apartments, culminating in defendants’ failure to provide rent-stabilized leases and charge proper LRRs throughout plaintiffs’ tenancies. To elaborate, plaintiffs’ position is that defendants knowingly and falsely represented that the subject apartments were not rent-stabilized when they provided plaintiffs with market-rate leases and plaintiffs relied on this representation. Thus, plaintiffs claim they were injured by being denied rent stabilization’s protections.

For apartment 3A, Dixon bases his argument on the nature of the apartment’s occupancy before 2006 and argues defendants fraudulently failed to register the unit as rent-stabilized beginning in 2005 or 2006 and continuing through 2022. Dixon refers to discovery documents from defendants to establish some occupancy history of the apartment. Two are lists of the building’s apartments and describe the subject apartment as vacant; the first covers tenancies as of February 19, 2001 and the second covers tenancies expiring February 29, 2020 through February 28, 2021 (NYSCEF Doc Nos. 93 and 94). Third is a chart of the building’s deregulated apartments through July 2017, and Dixon stresses that the subject apartment is not listed (NYSCEF Doc No. 95). Dixon contends defendants may have knowingly and falsely registered the unit as temporarily exempt from regulation due to owner or employee occupation in 2005. Alternatively, he argues that if the 2005 registration was accurate, then defendants intentionally and deceptively failed to register the unit as rent-stabilized when the temporary exemption ended. Dixon points to defendants’ failure in discovery to produce the leases preceding his tenancy. Specifically, he notes that in interrogatory No. 8, he sought information about employee occupation in the apartment from 1998 to the present, and despite their statement to the contrary in the DHCR registration, defendants responded that they have no “information suggesting that defendants arranged for an employee of either defendant to occupy any apartment at the premises during recent years” (NYSCEF Doc No. 89 at 8).

For apartment 4C, Meinrenken avers defendants' fraudulent scheme began when the last rent-controlled tenant vacated. Meinrenken compares the DHCR registration record, which lists the apartment's status as rent-controlled through 2022 as opposed to permanently exempt from rent stabilization, with defendants' interrogatory response No. 5, which states that the last rent-controlled tenant vacated the apartment "in or about 2015" (NYSCEF Doc No. 89 at 7). Meinrenken's view is that defendants' failure to timely and properly register the vacatur is demonstrable evidence of defendants' fraudulent scheme.

In opposition, defendants argue plaintiffs' motion rests on conclusory fraud allegations, and thus, plaintiffs are not entitled to summary judgment. Defendants maintain that plaintiffs provided no evidence that defendants intentionally and improperly deregulated the apartments. Haber claims her father served as 1819 Weeks' president in the 1970s, and it was not until she assumed control upon his death in 1999 that she discovered the corporation's records were incomplete. Once in control, she attributes missing records and filing errors to her family responsibilities and to a prior managing agent's poor performance. Haber also disputes the reliability of "old tentative lists" produced in discovery, claiming they were prepared when she was a new corporate officer (NYSCEF Doc No. 105 at ¶ 9). Additionally, counsel contends the inaccurate labeling of Haber as an owner in the leases is evidence that defendants lacked the sophistication to engage in a fraudulent scheme.

Even if the court classifies defendants as sophisticated actors, counsel opines that the parties' disparate contentions present triable issues of fact. Counsel questions whether the court can draw negative inferences from defendants' poor recordkeeping, avowing defendants were only required to retain records dating back to four years from the apartments' last annual DHCR registrations. Defendants claim their incomplete records and filing errors raise material issues of fact including whether the apartments are rent-stabilized, whether defendants knowingly misrepresented that the parties' leases were not subject to rent stabilization, and whether overcharges occurred. In addition, defendants also rely on the June 2022 initial apartment registrations that state the apartments are permanently exempt from rent stabilization. Counsel notes that late registrations do not lead to an overcharge finding if a landlord lawfully increased the rent.

As detailed above, plaintiffs essentially assert regulatory status claims and overcharge claims. An overcharge occurs when a landlord collects rent from a tenant that is above the LRR in

a regulated apartment (*see Matter of H.O. Realty Corp. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 103, 106-107 [1st Dept 2007]). The Court of Appeals has distinguished between regulatory status and overcharge claims, noting that “[w]hile an overcharge may arise from an improper deregulation, . . . overcharge claims are routinely brought to challenge the rent associated with apartments that have never been destabilized” (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 351 n 4 [2020]).

The court denies plaintiffs’ request for lease reformation at this time. The court can review all apartment records in its consideration of plaintiffs’ challenge to the two apartments’ deregulation (*see Matter of Kostic v New York State Div. of Hous. & Community Renewal*, 188 AD3d 569, 569 [1st Dept 2020]). This includes the annual statements that landlords are required to file for their rent-stabilized apartments (Administrative Code of the City of NY § 26-517 [f]). In addition, landlords are required to retain apartment records for prescribed time periods (*see Fuentes v Kwik Realty LLC*, 186 AD3d 435, 438 [1st Dept 2020]). Here, however, the disputed deregulations occurred before the HSTPA’s passage in June 2019, which is relevant because pre-HSTPA, landlords were only required to retain apartment records four years from the last annual registration statement (*Matter of Regina Metro. Co., LLC*, 35 NY3d at 353, 362). Thus, contrary to plaintiffs’ contentions, defendants’ production of incomplete records is not dispositive at this juncture. Instead, plaintiffs’ request for lease reformation is premature as defendants’ opposition raises triable issues of fact as to whether the apartments were properly deregulated prior to plaintiffs’ tenancies (*see Highline 22 LLC v Lawler*, 74 Misc 3d 130[A], 2022 NY Slip Op 50132[U], *1-2 [App Term, 1st Dept 2022]). For the same reason, summary judgment on plaintiffs’ overcharge claims is denied as premature.

Haber’s Abuse of Process Counterclaim

A claim is deemed abandoned when a party fails to oppose a summary judgment motion seeking the claim’s dismissal (*Ng v NYU Langone Med. Ctr.*, 157 AD3d 549, 549-550 [1st Dept 2018]). Haber has not opposed the branch of plaintiffs’ motion seeking dismissal of the abuse of process counterclaim, and therefore the counterclaim is dismissed.

Haber’s Prima Facie Tort Counterclaim

Haber’s prima facie tort counterclaim alleges there is no legitimate claim against Haber, and therefore plaintiffs were solely motivated by malice in naming Haber as a defendant. It further alleges plaintiffs’ disinterested malevolence forfeits any right to make Haber a party. As for

damages, Haber seeks \$50,000 minimum, plus \$80,000 in special, exemplary, and punitive damages.

Plaintiffs' motion argues the answer fails to plead the special damages element of a prima facie tort, necessitating the counterclaim's dismissal. It also argues dismissal is warranted as defendants produced no evidence that disinterested malevolence was plaintiffs' sole motivation for naming Haber as a defendant. Counsel claims the complaint demonstrates other motivations such as the need for repairs and reformed leases. The opposition argues the counterclaim was properly pled, and in the alternative, seeks leave to amend. As evidence of disinterested malevolence, counsel quotes an alleged email from his counterpart stating plaintiffs are against additional courtesies; the email was not provided. Plaintiffs' reply argues an amended answer is prejudicial at this stage of litigation and notes defendants' amendment request is improperly made in the opposition to plaintiffs' motion.

The counterclaim is dismissed. "The requisite elements for a cause of action sounding in prima facie tort are (1) the intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal" and that "disinterested malevolence" must be the defendants' "sole motivation" (*AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 403 [1st Dept 2014]). In the case at hand, there is no evidence that plaintiffs acted solely with disinterested malevolence (*see Cotton Field v Samsung Am.*, 295 AD2d 259, 260 [1st Dept 2002]). Haber also has not properly pled the special damages element of prima facie tort (*see Britt v City of New York*, 151 AD3d 606, 607 [1st Dept 2017]). Haber's allegation of \$80,000 in special damages is, in fact, an allegation of general damages as it is a rounded number standing alone "with no attempt at itemization" (*Phillips v New York Daily News*, 111 AD3d 420, 421 [1st Dept 2013] [citations omitted]; *see Britt*, 151 AD3d at 607). Indeed, Haber refused to respond to plaintiffs' interrogatory request to state her specific measurable loss and provide an itemized list of damages or a damages calculation.

Additionally, Haber's request to amend the answer is untimely and improper. This action commenced in 2019, defendants already have filed three answers, and the pleading stage has ended. It would be prejudicial to allow Haber to interpose a fourth answer at this late date.

The court has considered the parties remaining contentions and finds them unavailing.

Accordingly, it is


ORDERED that plaintiffs’ motion for partial summary judgment is granted to the extent of dismissing Haber’s counterclaims, without prejudice, and is otherwise denied; and it is further

ORDERED that Meinrenken is directed to withdraw the DHCR complaint, submit proof on NYSCEF, and notify the Part 46 clerk of the filing by October 20, 2023 at SFC-Part46-Clerk@nycourts.gov; and it is further

ORDERED that defendants’ cross-motion is denied; and it is further

ORDERED that counsel are directed to submit a proposed preliminary conference order to the Court by October 23, 2023 at 12:00pm.

This constitutes the decision and order of the court.

<u>10/4/2023</u> DATE		 RICHARD LATIN, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <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