

**Opera House Lofts LLC v Carnahan**

2023 NY Slip Op 34215(U)

November 28, 2023

Supreme Court, Kings County

Docket Number: Index No. 507079/2020

Judge: Debra Silber

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Part Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28<sup>th</sup> day of November, 2023.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

OPERA HOUSE LOFTS LLC,

Plaintiff,

-against-

CHRISTOPHER CARNAHAN, ET. AL.,

Defendants.

-----X

**DECISION/ORDER**

Index No.: 507079/2020

Motion Seq. 11 & 16

The following e-filed papers were read herein:

NYSCEF Doc Nos.:

Notice of Motion/Cross Motion and Affidavits (Affirmations) \_\_\_\_\_

388-401; 454-458

Opposing Affidavits (Affirmations) \_\_\_\_\_

455-458; 462-468

Reply Affidavits (Affirmations) \_\_\_\_\_

468

In this declaratory judgment and breach of contract action, plaintiff Opera House Lofts LLC (plaintiff) moves (in motion sequence [mot. seq.] eleven) for an order granting it leave to reargue the decision and order dated October 24, 2022 (October 24, 2022 decision), pursuant to CPLR 2221 (d), and, upon receiving leave to reargue:

- (1) vacating that portion of the October 24, 2022 decision that dismissed plaintiff's second cause of action against defendants Ryan Shollenberger (Shollenberger), Celina Vicioso (Vicioso), Michael Chesbro (Chesbro), Tatiana Reid (Reid), Piya Malik (Malik), Laura Newman (Newman), Diana Osorio (Osorio), Kelsey Fairhurst (Fairhurst), Bryan Wells (Wells), Shannon Lumpkin (Lumpkin), Jessica Muller a/k/a Miller (Muller), Gavin Koepke (Koepke), Sara Labriola (Labriola), Paula Smith, Jordan Smith, Hellen Smith a/k/a Shaharya Carter

(Carter), Hector Macel a/k/a Hector Malacaria (Malacaria), Daniel McInerney (McInerney), Richard Einhorn (Einhorn), Ari Finkel (Finkel), Michael Ralston (Ralston), Ryan Schweitzer (Schweitzer), Molly Wypyski (Wypyski), Sylvie Wise (Wise), Kendall Payne (Payne), Mutaurwa Mapondera (Mapondera), Subantita Suwan (Suwan), Cassandra Emmett (Emmett), Alex Regan a/k/a Regen (Regen), Bethany Reeves (Reeves), Jaka Vinsek (Vinssek), Caroline Silverman (Silverman), William Klimpert (Klimpert), Beth Morgan (Morgan), David Richter (Richter), David Call (Call), Richard Maguire (Maguire), Dana Cataldo (Cataldo), Chelsea Spencer (Spencer), Johannes Staudt (Staudt), Amber Renaye a/k/a Amber Thomas (Thomas), Josh Reames (Reames) and Zachary Pless (Pless) (collectively, defendant-tenants)<sup>1</sup> for rent arrears and additional rent accruing from November 1, 2021 through the date of the judgment;<sup>2</sup>

(2) granting summary judgment in plaintiff's favor pursuant to CPLR 3212 for rent arrears and additional rent accruing from November 1, 2021 through the date of the judgment against the defendant-tenants who failed to raise a triable issue of fact, including Schweitzer, Payne, Emmett and Reeves (collectively, ERAP

---

<sup>1</sup> After the filing of the instant motion, plaintiff and Shollenberger, Chesbro, Koepke, Labriola, McInerney, Einhorn, Finkel, Ralston, Payne, Mapondera, Regen, Vinsek, Silverman, Klimpert, Morgan, Richter, Cataldo, Spencer, Staudt, Reames, Thomas, Vicioso, Schweitzer, Wypyski, Wise, Maguire and Malacaria discontinued all claims, defenses and counterclaims against each other with prejudice and without costs, disbursements or fees, by stipulations of discontinuance dated June 16, 2023 and October 24, 2023 (*see* NYSCEF Doc Nos. 461 and 484). Therefore, any relief sought against or by these defendant-tenants in the motion and cross motion is denied as moot.

<sup>2</sup> Plaintiff erroneously states that the court dismissed its second cause of action for rent arrears and additional rent accruing from November 1, 2021 through the date of judgment, as there was no such dismissal, since plaintiff's second cause of action did not include a claim for unpaid rent from November 1, 2021 forward. Instead, the court denied plaintiff's request to amend its complaint to include such claims.

- defendants); and upon such grant, modify the order of reference to include the rent arrears and additional rent accruing from November 1, 2021 through the date of the judgment and direct the special referee to hear and determine the amount of same;
- (3) granting summary judgment in plaintiff's favor, pursuant to CPLR 3212, on its third cause of action for attorneys' fees against the ERAP defendants; and upon such grant, modify the order of reference to include attorneys' fees against the ERAP defendants and direct the special referee to hear and determine the amount of same;
- (4) vacating that portion of the October 24, 2022 decision that transferred plaintiff's second and third causes of action against Fairhurst, Wells, Vicioso, Lumpkin, Koepke and Labriola (collectively, the transferred defendants) and their counterclaims for damages based on breach of the warranty of habitability to the Kings County Housing Court, so that they can proceed in this action; and
- (5) vacating the portion of the October 24, 2022 decision that directed the calculation of statutory prejudgment interest on plaintiff's second cause of action from November 1, 2021 against the defendant-tenants, other than the transferred defendants, and modifying the October 24, 2022 decision to direct the calculation of statutory prejudgment interest from either the date of accrual or a reasonable intermediate date.

Malik, Newman, Call,<sup>3</sup> Fairhurst, Wells, Muller, Paula Smith, Jordan Smith,

---

<sup>3</sup> Although Call was not included in the list of represented defendant-tenants noted in defendant-tenants' counsel's memo of law, since plaintiff's claims against Call remain active and as defendant-tenants' counsel has not moved to be relieved as counsel for Call, Call is included as a cross movant herein (*see* NYSCEF Doc Nos. 456 and 468, defendant-tenants' counsel's memo

Carter, Malacaria, Wise, Suwan, Emmett, Maguire, and Pless (collectively, cross movants) cross move (in mot. seq. sixteen) for an order granting them leave to reargue the October 24, 2022 decision, pursuant to CPLR 2221 (d), and, upon such leave, vacating the October 24, 2022 decision and all judgments entered as a result thereof, and denying plaintiff's motion for summary judgment in its entirety.

### **Background**

On October 1, 2013, plaintiff entered into an 18-year net lease with property owner Arion Enterprises, LLC (Arion) relating to a building that was converted from commercial to residential use in 2005, located at 11-27 Arion Place in Brooklyn (Block 3136, Lot 40) (Building), and an adjacent vacant lot, located at 9 Arion Place (Block 3136, Lot 48), on which are stairs and a ramp appurtenant to the Building's emergency exit door. On March 22, 2020, plaintiff commenced this action by the filing a summons and complaint, after defendant-tenants stopped paying rent, asserting that plaintiff was barred from collecting rent pursuant to Multiple Dwelling Law (MDL) § 302 because the Building lacked a valid residential certificate of occupancy (C of O) pursuant to MDL § 301. The complaint was subsequently amended on October 23, 2020, February 23, 2021 and August 16, 2021.

### ***Third Amended Complaint***

In its third amended complaint dated August 16, 2021, plaintiff claims that the New York City DOB issued a final C of O on February 22, 2005 (2005 C of O) certifying 66 residential units for the Building, but inadvertently listed the address and lot designation for the adjacent vacant lot, instead of the Building at issue. Notwithstanding the foregoing,

---

of law at 2, and plaintiff's counsel's affirmation at 1, respectively). Defendant-tenants' counsel was granted leave to withdraw as counsel solely for Reid, Osorio, Lumpkin and Reeves. There is an upcoming motion to be relieved for Pless.

plaintiff alleges that the 2005 C of O contains the Building's metes and bounds description and the application, plans and supporting documents filed for issuance of the 2005 C of O solely refer to the Building's address and lot designation. As such, plaintiff asserts that, despite DOBT's error, the Building has been compliant with MDL § 301 since issuance of the 2005 C of O, thus, it is not barred from collecting rent under MDL § 302. Given this, plaintiff claimed that defendant-tenants were improperly withholding rent contrary to their leases and, therefore, are in breach of contract, particularly since the DOB issued a "corrected final C of O"<sup>4</sup> in September 2020 (2020 C of O) and denied defendant-tenants' subsequent request for revocation of the 2020 C of O by letter dated February 18, 2021. Plaintiff asserts three causes of action in the complaint: seeking a declaratory judgment against DOB confirming that the 2005 C of O is valid and has applied to the Building since its issuance; monetary damages for breach of contract against defendant-tenants for failure to pay rent and additional rent in the form of late fees and gas utility service fees pursuant to their leases through February 2021; and an award of attorneys' fees, costs and disbursements against defendant-tenants based upon their breach of contract.

### ***DOB's Motion to Dismiss***

On September 22, 2021, DOB moved to dismiss the third amended complaint as against it, pursuant to CPLR 3211 (a) (7), asserting that there is no justiciable controversy between plaintiff and DOB, since both agree that the 2005 C of O listed the vacant lot's address and lot designation in error; the 2005 C of O has applied to the Building since its issuance; and the 2005 C of O remains valid. DOB further asserted that it corrected the

---

<sup>4</sup> This Certificate of Occupancy was issued after plaintiff complained to the DOB about their error, but was not retroactive.

error upon its issuance of the 2020 C of O. However, at oral argument of the motion on September 24, 2021, it was explained that the 2020 C of O did not properly correct the error, in that it did not utilize the same C of O number as the 2005 C of O; it did not remove the vacant lot from the C of O, instead it just added the Building; and it included two additional addresses and lot designations for the Building, namely 25 Arion Place/Lot 16 and 11 Arion Place/Lot 41, instead of solely stating the Building's address and lot designation as 11-27 Arion Place/Lot 40. Given this, DOB requested that the court issue an order directing the DOB to amend the 2005 C of O, since it is not authorized to amend the C of O, on its own, without an order by the Board of Standards and Appeals (BSA) or the court, pursuant to the New York City Charter. Thereupon, the court granted DOB's motion to the extent of granting plaintiff's first cause of action for declaratory relief against DOB, subject to the plaintiff settling the order on notice with a direction to DOB to amend the 2005 C of O. The court further stated that, after the 2005 C of O was amended, plaintiff's third amended complaint as against DOB would be dismissed (*see* NYSCEF Doc Nos. 205 and 297 – transcript of the proceedings on September 24, 2021 and order dated September 24, 2021, respectively). On November 3, 2021, the order was settled after notice.

***Order and Judgment dated November 3, 2021***

By order and judgment dated November 3, 2021 (November 3, 2021 judgment), the court declared the 2005 C of O valid and applicable to the Building since its issuance. The court further directed DOB to revoke the 2020 C of O and amend the 2005 C of O to reflect the correct address and lot designation for the Building, namely 11-27 Arion Place/Lot 40, and remove the address and lot designation of the vacant lot nunc pro tunc to February 22,

2005. After DOB revoked the 2020 C of O and amended the 2005 C of O by final C of O dated October 6, 2021 but effective February 22, 2005 (amended 2005 C of O), the court dismissed plaintiff's third amended complaint as against DOB by order dated January 11, 2022.

### ***Defendant-Tenants' Answer***

On February 10, 2022, defendant-tenants and nonparty tenant Miranda Amey (Amey) jointly filed an answer to the third amended complaint, denying the material allegations and asserting affirmative defenses and counterclaims, including lack of a valid residential C of O under MDL § 301, bar to collection of rent under MDL § 302, breach of the warranty of habitability and entitlement to attorneys' fees pursuant to RPL § 234.<sup>5</sup>

### ***Plaintiff's Summary Judgment Motion***

On April 25, 2022, plaintiff moved for an order (1) granting summary judgment in its favor and against defendant-tenants, pursuant to CPLR 3212, on its second cause of action for outstanding rent and additional rent plus interest under CPLR 5001, and on its third cause of action for reasonable attorneys' fees, costs and disbursements plus interest under CPLR 5001 and, upon granting same, setting this matter down for a hearing to determine the amount of damages; (2) granting plaintiff leave to amend its third amended complaint, with regard to the amount of damages sought in its second cause of action, to conform the pleading to the evidence adduced in its motion, pursuant to CPLR 3025 (c), by including rent and additional rent due through April 2022 and payments received; and (3) granting plaintiff a default judgment against the non-answering and non-appearing

---

<sup>5</sup> Defendant-tenants previously filed an answer to the original complaint on December 7, 2020 and an amended answer on December 28, 2020, asserting affirmative defenses primarily based upon MDL § 301 and § 302. The breach of the warranty of habitability affirmative defense was not asserted in either prior answer.

defendants Alexander Azzure (Azzure), Andres Rincon (Rincon), Andrew Wehnke (Wehnke) and Jeremy Hawkins (Hawkins) (collectively, defaulting defendants) pursuant to CPLR 3215.

In its motion, plaintiff claimed entitlement to summary judgment on its second and third causes of action on the basis that defendant-tenants' argument for failing to pay rent, namely that the Building did not have a valid C of O, was previously resolved by the November 3, 2021 judgment. Plaintiff also pointed out that, on February 22, 2022, the Loft Board dismissed the applications filed by defendant-tenants in May 2020, seeking coverage and protected occupancy status under Article 7-C of the MDL (the Loft Law), on the basis that defendant-tenants did not qualify for Loft Law coverage since the Building had a valid residential C of O as of February 22, 2005.

In opposition, defendant-tenants argued that plaintiff's motion should be denied, since there remained triable issues of fact as to whether the Building conforms with the 2005 C of O (and the amended 2005 C of O), which is predicated on the same building plans, based on their allegations that the Building does not conform with the plans and is not currently code compliant. Additionally, defendant-tenants asserted that triable issues of fact remained as to whether plaintiff breached the warranty of habitability.

#### ***October 24, 2022 Decision***

In the October 24, 2022 decision, the court, among other things, granted summary judgment to plaintiff on its second cause of action with regard to rent, and utility fees as additional rent, up to and through October 2021, as well as its third cause of action for attorneys' fees, against certain defendant-tenants; and awarded prejudgment interest at 9% per annum on all awarded outstanding rent, additional rent, and attorneys' fees, pursuant

to CPLR 5001 and 5004, to be computed by the Clerk of the Court from November 1, 2021 to the date a money judgment is entered. Additionally, the court severed plaintiff's second and third causes of action against the transferred defendants, together with said defendants' breach of the warranty of habitability and attorneys' fees counterclaims, for prosecution in Housing Court; and dismissed plaintiff's third amended complaint, as satisfied, as against Wypyski, Schweitzer, Payne, Emmett, and Reeves, pursuant to CPLR 3212 (b).

***Plaintiff's Instant Motion***

Plaintiff now moves for reargument asserting, among other things, that the court overlooked and/or misapprehended applicable law and fact, in that, by denying its request to amend its third amended complaint to include rent (additional damages) from November 1, 2021 forward, without prejudice to pursue the claims in Housing Court, the court deprived plaintiff of full relief since the Housing Court lacks jurisdiction to adjudicate plaintiff's legal fees claims. Similarly, plaintiff argues that the court should not have transferred the transferred defendants' breach of warranty of habitability and legal fees counterclaims to Housing Court. Plaintiff also argues that the October 24, 2022 decision erroneously limits prejudgment interest, as it states that it should be calculated from November 1, 2021, and claims that this is not based on the "earliest ascertainable date" standard under CPLR 5001. Additionally, plaintiff argues that the court erred in denying its request for summary judgment on its third cause of action seeking legal fees against the ERAP defendants.

***Cross movants' Opposition and Cross Motion***

Cross movants oppose plaintiff's motion and cross move to reargue those portions

of the October 24, 2022 decision that granted summary judgment in favor of plaintiff on its second and third causes of action and awarded prejudgment interest at 9% per annum. Upon such grant, cross movants seek vacatur of the October 24, 2022 decision and all judgments entered as a result thereof. Cross movants argue, among other things, that the court erred in granting summary judgment in plaintiff's favor on its second and third causes of action for the period prior to October 2021, since there remain triable issues of fact as to whether the Building has a valid C of O, and that the court hadn't considered their affirmative defense regarding breach of the warranty of habitability. Additionally, although agreeing with the court as to the interest commencement date of November 1, 2021, cross movants argue that the applicable prejudgment interest rate is 2% per annum, pursuant to CPLR 5004, on the basis that this action involves a consumer debt transaction.

### ***Plaintiff's Opposition and Reply***

In opposition, plaintiff argues that the cross motion should be denied as untimely, since it was not made within thirty days of the filing of the October 24, 2022 decision with notice of entry. Notwithstanding this, plaintiff argues, among other things, that the cross motion should be denied, since cross movants have not demonstrated entitlement to reargument, since they reiterate their previous arguments, raise new arguments, and do not demonstrate that the court overlooked or misapprehended any law or fact upon rendering the October 24, 2022 decision. In reply, plaintiff reasserts the arguments set forth in its motion to reargue.

### **Discussion**

As an initial matter, although CPLR 2221 (d) (3) requires that a motion for leave to reargue be made within thirty days after service of the prior decision with notice of entry

and the cross motion was made outside of this window, the court exercises its discretion to consider the cross motion since a timely notice of appeal of the October 24, 2022 decision was filed and the appeal had not yet been perfected when the cross motion was made (*see Itzkowitz v King Kullen Grocery Co., Inc.*, 22 AD3d 636, 638 [2d Dept 2005]; *see also* CPLR 2004).

Turning to the merits of the motions, it is well settled that a motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221 [d] [2]). “While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011] [internal quotation marks and citations omitted]).

Upon review of the papers submitted, the court grants the parties’ requests for leave to reargue the October 24, 2022 decision and, upon granting such leave, finds as follows:

As the court agrees it overlooked the fact that the Housing Stability and Tenant Protection Act of 2019 (HTSPA) [L. 2019, ch. 36, § 1, part M, § 11] prevents litigation of attorneys’ fees claims in Housing Court, that portion of the October 24, 2022 decision that transferred plaintiff’s second and third causes of action against the transferred defendants, together with the transferred defendants’ breach of the warranty of habitability and attorneys’ fees counterclaims to Housing Court, is vacated. Plaintiff’s second and third

causes of action against Fairhurst, Wells, and Lumpkin,<sup>6</sup> and said defendant-tenants' breach of the warranty of habitability and attorneys' fees counterclaims, can proceed in this action, in light of HTSPA. This matter shall appear on the CCP calendar, to determine if any further discovery is needed, on January 11, 2024. All parties should refer to the Kings County Central Compliance Part Rules for information about how to proceed to obtain a CCP order. [Discovery Part Rules 2jd | NYCOURTS.GOV](#)

Next, the court declines to modify that portion of the October 24, 2022 decision that directed calculation of the prejudgment interest at 9% per annum on all outstanding rent and additional rent awarded in this action, pursuant to CPLR 5001 and 5004, from November 1, 2021 to the date of judgment. While interest should have been computed by the Clerk of the Court from November 3, 2021, which is the "earliest ascertainable date the cause of action existed" given the November 3, 2021 judgment by which the court declared the 2005 C of O valid and retroactive since its issuance, the difference is *de minimis* and does not justify resettling the judgments. It is noted that for any defendant-tenant that received funds via the COVID-19 Emergency Rental Assistance Program (ERAP) [L. 2021, ch. 56, part BB, amended by L. 2021, ch. 417, part A] during the period of November 3, 2021 to the date of judgment, the covered ERAP period must be excluded from the interest calculation.<sup>7</sup>

---

<sup>6</sup> Plaintiff's claims against the other transferred defendants (Vicioso, Koepke, and Labriola) have been discontinued, together with said defendants' counterclaims.

<sup>7</sup> ERAP payments are earmarked for a certain period and, thus, must be applied to the period specified (*see* L. 2021, ch. 417, Part A, § 4, amending L. 2021, ch. 56, part BB, subpart A, § 8). Furthermore, when accepting an ERAP payment, a landlord agrees that the payment fully satisfies the tenant's arrears for the covered period and waives any late fees (*see* L. 2021, ch. 417, Part A, § 5, amending L. 2021, ch. 56, part BB, subpart A, § 9 [2] [d]).

Cross movants' argument that the applicable prejudgment interest rate under CPLR 5004 should be 2% per annum is unavailing, since this action does not involve a consumer debt transaction, as they argue (*see Rhumb W 21 LLC v Wolfe*, 2023 NY Misc Lexis 2832 [Sup Ct, NY County 2023] [where the court, in an action based upon breach of lease for failure to pay unpaid rent, dismissed the tenant's affirmative defense asserting that the landlord's claim involved a consumer debt transaction governed by a three-year statute of limitation]). As stated by the court, in *Rhumb W 21 LLC*, "[b]reaching a lease is not an issue typically characterized as a consumer debt dispute. A lease is not governed like a secured transaction. Instead, leases operate under the plethora of landlord tenant laws applicable in this state" (*Rhumb W 21 LLC v Wolfe*, 2023 NY Misc Lexis 2832 at 4-5).

Although not cited by cross movants, *Romea v Heiberger & Associates* (163 F.3d 111 [2d Cir 1998]) does not require a different result. In that action, a tenant sued his landlord's law firm alleging that the firm's letter demanding unpaid rent violated the Fair Debt Collection Practices Act (FDCPA) [15 USC § 1692, et seq.], which was enacted to protect consumers from abusive debt collection practices. Upon affirming the trial court's denial of the firm's motion to dismiss the complaint for failure to state a claim, the court found that the firm was a debt collector under 15 USC § 1692a (6); that the rent arrears was a debt for the purposes of the FDCPA; and that the rent demand letter was a debt collection communication subject to the FDCPA (*see Romea v Heiberger & Associates*, 163 F.3d at 116-118).

However, the court's holding, in *Romea*, is inapposite to this case, since the FDCPA does not apply to any person or entity to whom a debt is owed [such as the plaintiff herein], or to their officers or employees, who collect, or attempt to collect, debts in the person or

entity's name (*see* 15 USC § 1692a [4] and [6] [A]; *see also* *Maquire v Citicorp Retail Servs.*, 147 F.3d 232, 235 [2d Cir. 1998]; *United Cos. Lending Corp. v Candela*, 292 AD2d 800, 801-802 [4d Dept 2002]; *Ben. Homeowner Serv. Corp. v Butler*, 14 Misc. 3d 1233[A] [Sup Ct, Kings County 2007]; *BLDG ABT Enters., LLC v 711 Second Ave. Corp.*, 2012 Misc. Lexis 2354 [Sup Ct, NY County 2012]; *Eina Realty v. Calixte*, 178 Misc. 2d 80, 83-87 [Civ Kings 1998]; *Monogram Credit Card Bank of Ga. v Mata*, 195 Misc2d 96 [Civ NY 2002]).

Moreover, the case cited by cross movants, *23 E. 39<sup>th</sup> St. Mgt. Corp. v 23 E 39<sup>th</sup> St. Dev., LLC* (134 AD3d 629 [1<sup>st</sup> Dept. 2015]), is also distinguishable, since the 2% interest rate applied in that case was based upon a provision in the lease between the parties. “Parties are permitted to contract for the rate of interest to be paid, in such cases, the contract rate rather than the statutory rate will govern the prejudgment interest to be paid” (*Secular v Royal Athletic Surfacing Co.*, 66 AD2d 761 [1<sup>st</sup> Dept 1978], appeal dismissed 46 NY2d 1075 [1979]; *see also* *NML Capital v Republic of Argentina*, 17 NY3d 250, 258 [2011]; *Astoria Fed. Sav. & Loan Assoc. v Rambalacos*, 49 AD2d 715 [2d Dept 1975]); *Board of Mgrs. of the 25<sup>th</sup> Charles St. Condominium v Seligson*, 126 AD3d 547 [1<sup>st</sup> Dept 2015]). Here, as the parties' leases do not set an interest rate, the statutory prejudgment rate of 9% per annum was properly applied.

Next, the court must address that portion of the October 24, 2022 decision that states “as the court has denied the plaintiff's request to conform the pleadings to the proof with regard to rent and additional rent due on or after November 1, 2021, plaintiff may assert them as against these 47 tenants residing in the 33 subject apartments, in Housing Court. Neither side may raise laches as a defense as to any claims of non-payment or to any

counterclaims for any period on or after November 1, 2021 so long as such proceeding(s) are commenced in Housing Court on or before February 5, 2023.” This provision must be modified to state that, as the court has denied the plaintiff’s request to conform the pleadings to the “proof” in the motion papers, with regard to rent and additional rent due on or after November 1, 2021, plaintiff may assert them against the applicable tenants in Housing Court or in a separate plenary action.

Despite plaintiff’s contentions to the contrary, the court properly denied its request to amend the third amended complaint, pursuant to CPLR 3025 (c), to include damages incurred from November 2021 to April 2022, without prejudice, since there remain triable issues of fact as to whether the proposed amendment is palpably insufficient or completely devoid of merit under MDL § § 301 and 302, as explained in the October 24, 2022 decision (*see DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 240 [2d Dept 1984] [where the court held that the same legal standard applies to both a motion seeking amendment of pleadings to conform to the evidence pursuant to CPLR 3025 [c] and a motion seeking amendment of pleadings generally pursuant to CPLR 3025 [b]; *see also Gioio v Ching Fu Lin*, 173 AD3d 982 [2d Dept. 2019]). Plaintiff’s argument that MDL § 302 does not preclude recovery of rent based upon its failure to conform to the last issued C of O is unavailing, given *Chazon, LLC v Maugenest* (19 NY3d 410 [2012]), where the court held that a landlord is barred from collecting rent from the entire premises under MDL § 302 during any period where the premises lacked a valid C of O or failed to conform to the last issued C of O (*see Chazon, LLC v Maugenest*, 19 NY3d at 416; *see also MDL § 302 (1) (b); 208 Himrod St., LLC v Irizarry*, 42 Misc 3d 145 [A], 2014 NY Slip Op 50344 [U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2014]; *GVS Props. LLC v Vargas*, 59

Misc 3d 128 [A], 2018 NY Slip Op 50396 [U] [App Term 1<sup>st</sup> Dept. 2018]). The tenants have raised seemingly consequential issues of fact with regard to their claims that the configuration of the apartments do not conform to the plans on file with the DOB and the Certificate of Occupancy.

Next, that portion of the October 24, 2022 decision that denied plaintiff's request for summary judgment on its third cause of action as against Emmett (unit 106) and Reeves (unit 315), and dismissed the plaintiff's third cause of action against Emmett and Reeves pursuant to CPLR 3212 (b), is vacated.<sup>8</sup> Although plaintiff's second cause of action against Emmett and Reeves was properly dismissed as satisfied by ERAP payments pursuant to CPLR 3212 (b), plaintiff demonstrated its entitlement to summary judgment against Emmett and Reeves on its third cause of action by showing that it was the prevailing party on its first cause of action with the submission of the November 3, 2021 judgment, which declared that the 2005 C of O was valid and applicable to the Building since its issuance in 2005, and the submission of Emmett and Reeves' leases, which provide in paragraph 1 of the lease riders, that "[t]enant is responsible for any and all reasonable legal fees (including, but not limited to, reasonable attorneys' fees) which Landlord may incur in enforcement of any term and/or condition of this lease (including non-payment of rent and/or added/additional rent)."

Since plaintiff did not submit any evidence as to the legal fees and costs it seeks, this matter will be referred to a Special Referee, who shall hear and determine the amount of reasonable attorneys' fees and costs to be awarded to plaintiff, including the amount

---

<sup>8</sup> Although the October 24, 2022 decision also dismissed plaintiff's third cause of action against Schweitzer, Wypyski, and Payne, plaintiff subsequently discontinued its claims against these defendants.

owed by Emmett and Reeves, based upon their proportionate share of the total determined amount of reasonable attorneys' fees, costs and disbursements due. The October 24, 2022 order also included a referee referral order [Doc 363], which has been amended to reflect this change, and is being issued simultaneously herewith.

The parties' remaining contentions either seek to reargue issues previously decided, present arguments different from those originally presented, or lack merit. As such, with regard to the remainder of the October 24, 2022 decision, the court adheres to its original determination.

Accordingly, it is

**ORDERED** that plaintiff's motion (mot. seq. eleven) is granted solely to the extent that plaintiff is granted leave to reargue the October 24, 2022 decision, and, upon reargument,

- (1) the portion of the October 24, 2022 decision which transferred plaintiff's second and third causes of action against the transferred defendants, and their counterclaims based on the alleged breach of the warranty of habitability, to Housing Court, is vacated; plaintiff's second and third causes of action against Fairhurst, Wells, and Lumpkin, and said defendant-tenants' breach of the warranty of habitability and attorneys' fees counterclaims, shall proceed in this action; and
- (2) These claims shall proceed to a Compliance Conference to determine what discovery is needed, which is schedule for January 11, 2024, and the parties are directed to the Discovery Part Rules to determine if an appearance is required; and

- (3) that portion of the October 24, 2022 decision and order that dismissed plaintiff's third cause of action against Emmett and Reeves pursuant to CPLR 3212 (b) is vacated; plaintiff is granted summary judgment on its third cause of action (for attorney's fees) as against Emmett and Reeves; and
- (4) the motion is otherwise denied; and it is further

**ORDERED** that cross movants' cross motion (mot. seq. sixteen) is granted solely to the extent that cross movants are granted leave to reargue the Court's October 24, 2022 decision, and, upon reargument, the relief sought in the cross motion is denied in its entirety; and it is further

**ORDERED** that, except upon the filing of a stipulation of settlement between the parties as is permitted by CPLR 4317, this matter is referred to a Special Referee pursuant to an Amended Referee Referral Order, to hear and determine the following issues: (1) the amount of rent and additional rent due and owing on plaintiff's second cause of action as against Azzure (105), Malik (111), Newman (113), Osorio Rincon (114), Muller (206), Paula Smith, Jordan Smith and Carter (210), and Hawkins (409), as guided herein, after proper application of received ERAP payments; and (2) the amount of reasonable attorneys' fees, costs and disbursements to be awarded to plaintiff as against Azzure (unit 105), Reid (unit 109), Malik (unit 111), Newman (unit 113), Osorio and Rincon (unit 114), Wehnke (unit 205), Muller (unit 206), Paula Smith, Jordan Smith, and Carter (unit 210), Suwan (unit 305), Call (405), Hawkins (unit 409), Pless (unit 415), Emmett (unit 306) and Reeves (unit 315); and it is further

**ORDERED** that the parties are directed to provide the Special Referee with copies of the relevant ERAP approvals or other documentation that establishes the ERAP

earmarked period from the New York State Office of Temporary and Disability Assistance (OTDA) to enable the Special Referee to ascertain the exact amount of damages owed through October 2021; and plaintiff is to provide the Special Referee with copies of its specific billing and time records, together with a summary and breakdown of the categories of legal services provided, and the hours attributed to each category of services; and it is further

**ORDERED** that counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 482), who is directed to place this matter on the calendar of the Special Referee's Part (Part 82) for the earliest convenient date; the Special Referee's fee shall be shared equally by the parties; and it is further

**ORDERED** that failure to comply with the immediately preceding paragraph will result in the dismissal of the second and third causes of action as against the relevant defendant-tenants, unless good cause is shown.

This constitutes the decision and order of the court.

**E N T E R:**



---

**Hon. Debra Silber, J.S.C.**