Underhill Realty Co., LLC v Almonte
2024 NY Slip Op 33468(U)
February 20, 2024
Civil Court of the City of New York, Bronx County
Docket Number: Index No. 334081/23
Judge: Shorab Ibrahim
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART J

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UNDERHILL REALTY CO., LLC,

Petitioner,

-against-

DARLYN R. ALMONTE & ENEROLIZA GREGORIO VENTURA,

Respondents-Tenants,

"JOHN DOE" & "JANE DOE,"

Respondents-Undertenants.

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Index No. 334081/23

DECISION/ORDER
Motion Seq. 1 & 2

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in review of this motion.

Papers Numbered

Notice of Motion with Affirmation and Affidavit Annexed
[With Exhibits A-D] [NYSCEF Doc. Nos. 9-16] 1
Notice of Cross-Motion with Memorandum of Law and Affirmation Annexed
[With Exhibits A-H] [NYSCEF Doc. Nos. 17-27] 2

After oral argument, and upon the foregoing cited papers, the decision and order on this motion is as follows:

FACTUAL AND PROCEDURAL HISTORY

This is a holdover proceeding commenced by Petitioner Underhill Realty Co., LLC ("petitioner") against Darlyn R. Almonte ("respondent Almonte") and Eneroliza Gregoria Ventura ("respondent Ventura") (collectively, "respondents"). Petitioner seeks possession of 955 Underhill Avenue, Apt. 1603, Bronx, NY 10473, (the "subject premises" or "apartment"), on the basis that respondents are not using the subject premises as their primary residence and are primarily residing elsewhere, at 28 Skidmore Road, Pleasant Valley, New York 12569 (the "upstate residence").

Petitioner alleges several detailed facts in the termination notice (or "Golub Notice") regarding respondents' connection to and alleged primary residence at the upstate residence. (*see* NYSCEF Doc. 3). Respondents interposed an answer alleging as follows: (i) respondents are entitled to a renewal lease as rent stabilized tenants of the subject premises; (ii) attorneys' fees; (iii) "frivolousness" due to the instant proceeding having no merit; (iv) intentional infliction of

emotional distress; and (v) harassment. Respondents also included a jury demand. (*see* NYSCEF Doc. 8). The answer is verified by counsel only.

Prior to the first court date, petitioner moved for discovery and to strike respondents' affirmative defense, counterclaims, and jury demand. Petitioner argues Rent Stabilization Code ("RSC") §2524.4 allows an owner to refuse to renew a rent stabilized lease for tenants who do not occupy the subject premises as their primary residence and the mere assertion in the answer that respondents are rent stabilized tenants and therefore entitled to a lease is not a true defense to the proceeding.

Petitioner further argues that the lease's jury waiver clause and counterclaim waiver requires all the counterclaims and the jury demand to be stricken. In any case, petitioner argues the court does not have subject matter jurisdiction over the emotional distress tort. Finally, petitioner claims that respondents do not plead their harassment, "frivolousness," or emotional distress counterclaims with any particularity, therefore running afoul of the requirements of CPLR §3013.

Petitioner alleges it is entitled to discovery as the information underlying the subject matter of this proceeding, where respondents maintain their primary residence, is largely within respondents' exclusive possession.

In response, respondents cross-moved for leave to amend the answer, dismissal, sanctions and discovery. The proposed amended answer alleges the following defense and counterclaims: (i) respondents are entitled to a renewal lease as rent stabilized tenants; (ii) attorneys' fees; (iii) harassment as this case has no merit, and based on three other housing court proceedings commenced by petitioner against other tenants in the building; and (iv) intentional infliction of emotional distress. Respondents also demand a jury trial. The proposed amended answer is unverified and unsigned by respondents or counsel. (*see* NYSCEF Doc. 24).

Respondents argue dismissal is required pursuant to CPLR §3211 for failure to state a cause of action, as this proceeding is based on "rank speculation," and the allegations in support are bare legal conclusions. Respondents point to petitioner's "admission" that the facts and circumstances underlying their occupancy of the subject premises are within respondents' exclusive possession as proof that petitioner has no basis to maintain its cause of action. Respondents double down on this alleged admission as a basis for sanctions pursuant to 22 NYCRR §130.1-1(c), alleging petitioner made false assertions of material facts.

Respondents argue they should be granted discovery under the "what's good for the goose" theory - "if petitioner is granted discovery, respondents should be granted discovery as well." They submit that their discovery demands are narrowly tailored, and non-prejudicial.

Finally, respondents argue the court should allow their amended answer because, in the absence of surprise or prejudice to petitioner, "it is an abuse of discretion" for the court to deny this portion of their motion.

In what appears to be opposition to the motion, respondents argue they properly pleaded their defense, counterclaims and jury demand. Respondents allege their defense of entitlement to a renewal lease is proper as courts have denied motions to dismiss this defense. Their attorneys' fees counterclaim is proper pursuant to RPL §234 and therefore should not be stricken.

Respondents allege their (amended) harassment counterclaim is properly pleaded; in support, they quote the harassment provision of the Administrative Code. As to the (amended) claim of intentional infliction of emotion distress, the claim is allegedly proper because it is intertwined with the harassment claim. Finally, respondents allege the jury waiver clause is inapplicable since they interposed a personal injury counterclaim.

DISCUSSION

CROSS-MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION

The court will address respondents' cross-motion to dismiss first, as it is a potentially dispositive motion that would render the balance of the parties' arguments moot.

When considering a CPLR § 3211 motion, the court must afford the pleadings a liberal construction, deem facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*see Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). In assessing a motion under CPLR § 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]).

For a pleading to be dismissed for failure to state a cause of action, there can be no legally cognizable theory that could be inferred from the pleading; if the pleading, construed liberally, states in some recognizable form a known cause of action, a motion to dismiss must fail. (*see Howard Stores Corp. v. Pope*, 1 NY2d at 114; *Union Brokerage, Inc. v Dover Ins. Co.*, 97 AD2d 732, 733, 468 NYS2d 885 [1st Dept 1983]; *Shaya B. Pac., LLC v Wilson, Elser,*

Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34, 38, 827 NYS2d 231 [2nd Dept 2006]; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152, 746 NYS2d 131 [2002]). It is of no present concern whether the petitioner will be able to prove the allegations in the pleading. (*see Howard Stores Corp. v Pope*, 1 NY2d 110, 114, 150 NYS2d 792 [1956]; *Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 965, 95 NYS3d 97 [2nd Dept. 2019]).

Here, respondents incredibly claim that the non-primary residence cause of action is based on "rank speculation" and supported with "bare legal conclusions" because petitioner's agent states [in the affidavit supporting the discovery motion] that the facts and circumstances surrounding where respondents maintain their primary residence is best known to them and within their exclusive possession. Respondents deem this an admission but fail to submit any affidavits either in opposition to petitioner's motion or in support of their cross-motion.

Rather that set forth legal reasoning in support of their motion to dismiss, respondents do nothing more than cite to a broad, overreaching legal principle, with no discussion of any facts.

Petitioner, on the other hand, has unequivocally stated a cause of action for non-primary residence based upon the detailed factual allegations in the Golub notice annexed and incorporated into the petition.

In determining whether a predicate notice is adequate, the standard is one of "reasonableness in view of all attendant circumstances." (*Hughes v Lenox Hill Hospital*, 226 AD2d 4, 17, 651 NYS2d 418 [1st Dept 1996]). "A summary holdover petition need only state 'facts upon which the special proceeding is based' so as to inform the tenant of the factual and legal claims that must be met, thus enabling the tenant to interpose any available defense." (*Lambert Houses Redevelopment Co. v Anez*, 2013 NY Misc. LEXIS 7201, *2-3 [Civ Ct, Bronx County 2013], *quoting McGoldrick v DeCruz*, 195 Misc. 2d 414, 415-416, 758 NYS2d 756 [App Term, 1st Dept 2013]; *Rascoff/Zsyblat Org., Inc. v Directors Guild of Am., Inc.*, 297 AD2d 241, 242, 746 NYS2d 388 [1st Dept 2002]).

Predicate notices 'must be clear, unambiguous, and unequivocal in order to serve as the catalyst which terminates a leasehold.'" (*MEP Realty Ltd. v Herman*, 2008 NY Misc. LEXIS 7406, *14, 240 N.Y.L.J. 61 [Civ Ct, Kings County 2008], *quoting Ellivkroy Realty Corp. v HDP 86 Sponsor Corp.*, 162 AD2d 238, 238, 556 NYS2d 339 [1st Dept 1990]). Factual allegations must also be pleaded with sufficient specificity. (*see Concourse Green Assoc., LP v Patterson*,

53 Misc.3d 1206(A), *13, 46 NYS3d 474 [Civ Ct, Bronx County 2016), *citing London Terrace Gardens, L.P. v Heller*, 40 Misc. 3d 135(A), *2, 975 NYS2d 710 [App Term, 1st Dept 2009]

The notice here informs respondents of what petitioner is alleging and allows them to formulate defenses. The notice specifies the ground under the Rent Stabilization Code petitioner is proceeding on - RSC §2524.4(c), failure to maintain the subject premises as respondents' primary residence - and the date that respondents' tenancy is terminated and surrender of the subject premises is required - July 31, 2023.

The predicate notice is also clear as to the *factual* bases for petitioner's claim, that (i) respondents have a deed in their name for another home (the upstate residence); (ii) respondent Almonte is registered to vote at the upstate residence; (iii) respondent Almonte has a bank account and other financial documents with the update residence as his address; (iv) respondent Almonte has a car registered at the upstate residence; (v) respondent Ventura has a bank account and other financial documents with the update residence as her address; and (vi) respondents are only seen at the subject premises during the day, as they are using the apartment to run a daycare business. (*see* NYSCEF Doc. 3).

Based on the foregoing, the court finds petitioner has stated clear facts in support of its cause of action and is not basing its claim on "rank speculation" or bare legal conclusions. (*see also Cosmopolitan Broadcasting Corp. v Miranda*, 143 Misc. 2d 1, 2, 539 NYS2d 265 [Civ Ct, New York County 1989]). That respondents dispute these allegations, or may even ultimately prevail, does not make the notice improper, nor does it mean petitioner failed to state a cause of action. Respondents' cross-motion to dismiss is therefore denied in its entirety.

MOTION TO STRIKE DEFENSES AND COUNTER-CLAIMS AND CROSS-MOTION TO AMEND THE ANSWER

The court shall consider petitioner's motion to strike together with respondents' cross-motion to amend the answer, as the merit, or lack thereof, of the defense and counterclaims will be dispositive of both applications.

CPLR 3025(b) provides that leave to amend a pleading shall be freely given upon such terms as may be just. (*see Norwood v City of New York*, 203 AD2d 147, 148-149, 610 NYS2d 249 [1st Dept 1994]). Amendment can be at any time, especially where there is not significant prejudice to the opposing party. (*see National Union Fire Ins. Co. v Schwartz*, 209 AD2d 289, 290, 619 NYS2d 542 [1st Dept 1994]). Here, the court cannot say that, as a matter of law, the

proposed defense and counterclaims have no merit. It may well be that respondents would be entitled to a renewal lease or attorneys' fees if they prevailed in this proceeding. As such, the cross-motion to amend is granted.

CPLR § 3211(b) allows a party to move to dismiss defenses, on the ground that a defense is not stated or has no merit. (*see O-SB 510 Sixth Fin., LLC v 510 Borrower LLC*, 2024 NY Slip Op 30203[U], *3 [Sup Ct, NY County 2024], *citing Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803, 805, 136 NYS3d 81 [2nd Dept. 2020]).

In assessing a motion to strike, the moving party has the burden of proof and must demonstrate the defenses are without merit as a matter of law. (*see 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541, 935 NYS2d 23 [1st Dept. 2011]; *Lee Tai Enters. USA, Ltd. v Tal Dagan, M.D., P.C.*, 210 AD3d 589, 590, 176 NYS3d 917 [1st Dept. 2022]).

"On such a motion, the allegations set forth in the answer must be viewed in the light most favorable to the defendants and 'the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed'." (*Pugh v New York City Hous. Auth.*, 159 AD3d 643, 643, 74 NYS3d 522 [1st Dept 2018] [internal citations omitted]; *West 115 11-13 Assocs. LLC v Pierre*, 2023 NY Slip Op 31069(U), *7 [Civ Ct, New York County 2023] [internal citation omitted]).

However, "affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand." (*O-SB 510 Sixth Fin., LLC v 510 Borrower LLC*, 2024 NY Slip Op at *3; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028, 47 NYS3d 446 [2d Dept. 2017]).

CPLR §3013 requires that "[S]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences of series of transactions or occurrences intended to be proved and the material elements of each cause of action or defense." A pleaded defense must contain enough particularity to give the court and the plaintiff notice of what is intended to be proven as well as the material elements of that defense. (*see Dept. of Hous. Preserv. & Dev. of the City of NY v Simply Better Apt. Homes*, 67 Misc.3d 1225[A], 2020 NY Slip Op 50637[U], *5 [Civ Ct, Bronx County 2020]), *citing Foley v D'Agostino*, 21 AD2d 60, 62, 248 NYS2d 121 [1st Dept 1964]). Similarly, a defense that is free of facts will be stricken, as defenses that merely plead conclusions of law are insufficient. (*see* CPLR § 3013(b); *Robbins v Growney*, 229 AD2d 356, 358, 645 NYS2d 791 [1st Dept. 1996]; *Brody v Soroka*, 173 AD2d 431, 433, 570 NYS2d 57 [2d Dept 1991]).

The counterclaim for attorneys' fees survives the instant motion to strike. Not only does the petition seek costs and disbursements (*see* NYSCEF Doc. No. 1 at Par. 9), but petitioner attaches the initial lease which contains an attorneys' fees clause (*see* NYSCEF Doc. No. 14 at Par. 20(5)). As such, the counterclaim for legal fees does not "plainly lack merit." However, the court does not pass on the merit of any attorneys' fees claim. (*see 689 E 187th St. LLC v Mathu*, 76 Misc. 3d 1212[A], *4-5 [Civ Ct, Bronx County 2022]). As it is settled law that only the prevailing party may collect legal fees, (*see Nestor v McDowell*, 81 NY2d 410, 415 [1993]), respondents' counterclaim is simply a reservation of a claim they *may* have under the lease.[1]

Respondents also allege a purported counterclaim for harassment as follows: the instant proceeding is frivolous and petitioner knew or should have known this; petitioner asserts material statements of fact that are false or baseless; petitioner only commenced this action to injure respondents; and petitioner brought other baseless or frivolous court proceedings against other tenants in the building, citing to three other index numbers, 335476/23, 305307/21 and 312576/21. This counterclaim must be stricken.

First, this court has already found the instant proceeding is not frivolous or without merit, and petitioner *has* stated a cause of action for non-primary residence.

Second, the meager factual allegations in support of the harassment claim - that the proceeding is frivolous, petitioner made false and baseless statements, and that respondents have been damaged as a result – are not supported by a verification or affidavit from respondents and are therefore insufficient as a matter of law. (*see Lott-Coakley v Ann-Gur Realty Corp.*, 23 Misc. 3d 1114(A), *12 & 16, 886 NYS2d 67 [Sup Ct, Bronx County 2009] ["affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay."]; *Arriaga v Michael Laub Co.*, 233 AD2d 244, 244-245 649 NYS2d 707 [1st Dept. 1996] [attorney affirmation is insufficient]).

In any case, such bare conclusions of law, with no real facts in support, are patently inadequate as a matter of law. (*see* CPLR § 3013(b); *Robbins v Growney*, 229 AD2d at 358; *Brody v Soroka*, 173 AD2d at 433; *138 Spring St. Assocs., LLC v Amano*, 2004 NYLJ LEXIS 3566 at *13; *Foley v D'Agostino*, 21 AD2d at 62).

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[1] To the extent that this court held differently in *744 E 215 LLC v Simmonds* (65 Misc. 3d 1234(A)), the court does not believe the HSTPA's amendments to RPAPL §702 and RPL §234 are a bar to fees being awarded to the prevailing party. There was no lease at issue in *Simmonds*.

Finally, pursuant to the NYC Administrative Code, respondents' amended answer fails to state a cause of action for harassment. NYC Administrative Code § 27-2004(a)(48)(d) and (d-1) define harassment as "commencing repeated baseless or frivolous court proceedings against any person lawfully entitled to occupancy of such dwelling unit" and "commencing a baseless or frivolous court proceeding against a person lawfully entitled to occupancy of such dwelling unit if repeated baseless or frivolous court proceedings have been commenced against other persons lawfully entitled to occupancy in the building containing such dwelling unit."

In order to find harassment under § (d)(1), respondents must show *repeated, baseless* proceedings were commenced by petitioner against other tenants in the building. Simply making a legal conclusion about other cases is clearly insufficient to state a claim. (*see* CPLR § 3013(b)).

Index No. 335476/23, a nonpayment proceeding commenced against the tenant of apartment 404 in the building, was settled by a stipulation wherein respondent agreed to pay $3,080.63 plus February 2024 rent by February 29, 2024. As such, the proceeding was not frivolous or without merit, and cannot be used as the basis for harassment.

Index No. 305307/21, a nonpayment proceeding against the tenant of apartment 104 in the building, was discontinued after being on the ERAP administrative calendar by two-attorney stipulation dated December 13, 2022, as petitioner had a more recent Index No. 325527/22. The follow-up proceeding was settled by two attorney stipulation where respondent agreed to pay $1949.42 plus January 2023 rent by January 31, 2023. As such, the proceedings was/were not frivolous or without merit and cannot be used as the basis for harassment.

Index No. 312576/21, a nonpayment proceeding against the tenant of apartment 804 in the building, was placed on the covid hardship administrative calendar in November 2021 and was discontinued by two-attorney stipulation dated February 28, 2022, stating respondent had paid all rent through February 2022. As such, the proceeding was not frivolous or without merit, and cannot be used as the basis for harassment.

The court reiterates that it is *respondents'* burden to plead how each of the referenced cases were allegedly "baseless." (*see* CPLR §3013). Reference to index numbers, without any further information, is insufficient. Even a cursory review of the matters would have saved the court's time. As such, the harassment counterclaim has no merit and is stricken in its entirety.

Respondents also allege a counterclaim of intentional infliction of emotional distress, as follows: that petitioner has engaged in repeated filing of baseless, frivolous proceedings against

other tenants in the building; that this constitutes extreme conduct intended to cause severe emotional distress, including "threatening Respondent's livelihood and living arrangements;" and that respondents have suffered severe emotional distress. Much like respondents' harassment counterclaim, the emotional distress counterclaim must be stricken for several reasons.

First, this court has already found that neither the instant proceeding nor the three cases against other tenants in the building are frivolous or without merit, and petitioner *has* stated a cause of action for non-primary residence.

Next, the *sole* factual allegation, that respondents "have been [sic] suffered severe emotional distress," is unsupported by a verification or affidavit from someone with personal knowledge and is therefore insufficient as a matter of law to state a claim for emotional distress. (*see Lott-Coakley v Ann-Gur Realty Corp.*, 23 Misc. 3d 1114(A) at *12 & 16; *Arriaga v Michael Laub Co.*, 233 AD2d at 244-245). The bare legal conclusions remaining are patently deficient as a matter of law. (*see* CPLR § 3013(b); *Robbins v Growney*, 229 AD2d at 358; *Brody v Soroka*, 173 AD2d at 433; *138 Spring St. Assocs., LLC v Amano*, 2004 NYLJ LEXIS 3566 at *13; *Foley v D'Agostino*, 21 AD2d at 62).

Third, the emotional distress claim is unrelated to the instant proceeding and has no bearing on the outcome of this case, as respondents would not be precluded from commencing their own action seeking this relief. (*see 150 W. End Owners Corp. v Chestnut Holdings of N.Y. Inc.*, 49 Misc.3d 1147, 1149, 17 NYS3d 831 [Civ Ct, Kings County 2015] [a counterclaim is related where it must be raised to a avoid the risk of preclusion under collateral estoppel, "where the issues in the plaintiff['s] claims are potentially identical and decisive of issues raised in the counterclaims."], *citing Textile Technology Exch., Inc. v Davis*, 81 NY2d 56, 59, 595 NYS2d 729 [1993]).

The law is clear that where, as here, a defense or counterclaim has no bearing on the outcome of the proceeding, it must be severed and stricken. (*see City of NY v Candelario*, 223 AD2d 617, 618, 637 NYS2d 311 [2d Dept 1996]) ["counterclaim for injunctive relief has no bearing on the outcome of this summary eviction proceeding and, therefore, should have been severed from the proceeding *(see,* CPLR 407)."]; (*Matter of Merkin v Berman*, 130 AD3d 434, 434, 11 NYS3d 481 [1st Dept 2015]); *78 Havemeyer LLC v Abuzaid*, 50 Misc.3d 1223[A], *1, 31 NYS3d 924 [Civ Ct, Kings County 2016]). Further, "if the Civil Court lacks jurisdiction to hear a particular counterclaim because it cannot be litigated in the first instance, that

counterclaim is unrelated because it could not be barred by collateral estoppel in a later proceeding." (*150 W. End Owners Corp. v Chestnut Holdings of N.Y. Inc.*, 49 Misc.3d at 1149 [internal citations omitted]).

Pursuant to Civil Court Act § 204, the Civil Court shall have jurisdiction over summary proceedings only to "recover possession of real property located within the city of New York, to remove tenants therefrom, and to render judgment for rent due without regard to amount." The Civil Court does *not* have subject matter jurisdiction to hear a claim for emotional distress. As such, the emotional distress counterclaim has no merit. It is therefore severed and stricken in its entirety for all of the reasons discussed above. (*see Town Mgt. Co. v Leibowitz*, 37 Misc. 3d 49, 50, 953 NYS2d 813 [App Term, 1st Dept 2012]).

Finally, paragraph 27 of the lease states as follows: "If Owner begins any court action or proceeding against You which asks that You be compelled to move out, You cannot make a counterclaim unless You are claiming that Owner has not done what Owner is supposed to do about the condition of the Apartment or the Building." (*see* NYSCEF Doc. No. 14)

Courts have consistently upheld counterclaim waiver provisions. (*see Bomze v Jaybee Photo Suppliers, Inc.*, 117 Misc.2d 957, 958, 460 NYS2d 86 [1st Dept 1983] ["Lease provisions precluding tenants from interposing counterclaims in summary proceedings have generally been enforced"]; *Chinatown Preserv. HDFC v Yu Hua Chen*, 27 Misc.3d 1213[A], *4-5, 910 NYS2d 761 [Civ Ct, New York County 2010] ["Generally, '[c]ourts enforce lease provisions precluding a tenant from interposing a counterclaim unless the counterclaim is inextricably intertwined with the landlord's entitlement to rent or possession of subject apartment of the underlying proceeding.'"] [internal citations and quotations omitted]; *see also Amdar Co. v Hahalis*, 145 Misc. 2d 987, 987-988, 554 NYS2d 759 [App Term, 1st Dept 1990]); *Ring v Arts Intl., Inc.*, 7 Misc.3d 869, 879-880, 792 NYS2d 296 [Civ Ct, New York County 2004]; *Danyluk v Glashow*, 2003 NY Slip Op 51441[U], *10 [Civ Ct, New York County 2003]).

In fact, in *Bomze*, the Appellate Division, First Department held as follows:

> Not only is such a provision a matter of contract but the character of summary proceedings, which are designed to expeditiously resolve disputes between landlord and tenant, would be undermined if tenants were permitted to litigate complex counterclaims in the context of summary proceedings. That is not to say that the tenant is deprived of a cause of action which he is barred from asserting as a counterclaim in a summary proceeding; the tenant is merely relegated to asserting such cause of action in a plenary action.

> An exception to enforcement of tenant's waiver of his right to assert counterclaims in summary proceedings exists where tenant asserts a counterclaim of breach of warranty of habitability (Real Property Law, § 235-b) in a nonpayment proceeding involving residential leaseholds …

See Bomze v Jaybee Photo Suppliers, Inc., 117 Misc.2d at 958 [internal citations omitted].

For this final reason, respondents' counterclaims, none of which are inextricably intertwined with petitioner's right of possession to the subject premises, and do not allege breach of warranty of habitability, are entirely barred as a matter of law.

Petitioner's motion to strike the counterclaims is granted in its entirety, except as limited regarding attorneys' fees, and respondents' cross-motion to amend the counterclaims is denied.

As to respondents' sole defense, that they are entitled to a renewal lease, the court does not strike this defense at this time. A "defense of failure to state a cause of action is not subject to a motion to dismiss, as this defense remails open to respondent throughout the action, until petitioners prevail through summary judgment or trial." (*Ring v Arts Intl., Inc.*, 7 Misc.3d at 871, *citing Cromwell v Le Sannom Bldg. Corp.*, 177 AD2d 372, 576 NYS2d 125 [1st Dept 1991]; *see also 544 W. 157th St. Hous. Dev. Fund Corp. v Alliance Prop. Mgt. & Dev., Inc.*, 2013 NY Slip Op 33429[U], *5 [Sup Ct, New York County 2013]).

Respondents' claim that they, as rent stabilized tenants, are entitled to a renewal lease, is essentially an allegation that petitioner failed to state a cause of action for non-primary residence.

MOTION TO STRIKE JURY DEMAND

Standard leases generally contain jury waiver clauses. Courts have consistently held such clauses are presumptively valid. (*see Avenue Associates, Inc. v. Buxbaum*, 83 Misc. 2d 719, 719, 373 NYS2d 814 [App Term, 1st Dept 1975] ["A provision in a lease waiving a trial by jury in the event of any litigation between the parties is valid and binding … except in an action for personal injury or property damage."]; *Teitler v Tetenbaum*, 123 Misc. 2d 702, 703, 477 NYS2d 544 [App Term, 1st Dept 1984] ["It is well settled that a lease provision waiving a trial by jury is not in conflict with emergency rent statutes and is generally carried over into statutory tenancies and holdover tenancies…"] [internal citations omitted]; *P & J Hous. Partners, LLC v Alvarado*, 34 Misc. 3d 130(A), *2, 941 NYS2d 539 [App Term, 1st Dept 2011]; *Inwood Gardens, Inc. v Udoh*, 49 Misc. 3d 137(A), *2, 26 NYS3d 213 [App Term, 1st Dept 2015]).

The Lease Agreement between the parties contains an unequivocal jury waiver clause. Paragraph 27 states in relevant part: "Both You and Owner agree to give up the right to a trial by

jury in a court action, proceeding or counterclaim on any matters concerning this Lease, the relationship of You and Owner as Tenant and Landlord or Your use or occupancy of the Apartment. This agreement to give up the right to a jury trial does not include claims for personal injury or property damage." (*see* NYSCEF Doc. 14).

Furthermore, as the right to a jury trial is mutually waived by both parties and the size of the print of the jury waiver clause is the same size as all other provisions in the lease, the jury waiver clause is valid on its face and not unconscionable. (*see Estate of Greenberg v Schefler*, 102 Misc. 2d 308, 309 425 NYS2d 909 [App Term 1st Dept, 1979]).

As such, the jury waiver clause in the lease is valid, especially as neither side has a claim for personal injury or property damage and the jury waiver clause is not unconscionable (nor was unconscionability alleged). Given the foregoing, the jury demand is stricken in its entirety.

CROSS-MOTION FOR SANCTIONS, COSTS AND FEES PURSUANT TO 22 NYCRR § 130-1.1

"Conduct during litigation, including on an appeal, is frivolous and subject to sanction and/or the award of costs when it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false." (*Mascia v Maresco*, 39 AD3d 504, 505 [2d Dept 2007] [internal citations omitted]; *see also* 22 NYCRR §130-1.1).

However, "where a party asserts colorable, albeit unpersuasive, arguments in good faith and without an intent to harass or injure," sanctions are not appropriate, "even if, arguendo, an argument lacks support in authority." (*Santaliz v OR FM Assoc*, 2022 N.Y. Misc. LEXIS at *4, *citing Gordon Group Invs., LLC v Kugler*, 127 AD3d 592, 594-595, 8 NYS3d 115 [1st Dept 2015]; *Matter of L & M Bus Corp. v N.Y.C. Dep't of Educ.*, 83 AD3d 432, 433, 920 NYS2d 331 [1st Dept 2011]).

Respondents are categorically not entitled to sanctions. While they cite to the relevant statute, 22 NYC §130-1.1, and *one* single case for the general principle that false assertions of material facts can be sanctionable, respondents' discussion of the actual facts is sparse at best and based on the same flawed reasoning as their cross-motion to dismiss.

Indeed, respondents are unclear as to what conduct of petitioner's they are seeking to sanction. Respondents disingenuously claim that, because the circumstances surrounding their

use of the subject premises and the upstate residence are within respondents' possession and knowledge, the instant proceeding is automatically frivolous because it has "no factual basis." In fact, petitioner *has* stated a cause of action for the instant proceeding, supported by several detailed factual allegations, as fully discussed above.

Petitioner's cause of action is neither without merit, nor undertaken primarily to delay this proceeding or to harass respondents. To the contrary, it appears it is *respondents'* motion for sanctions that is without merit. As such, the cross-motion for sanctions is denied in its entirety.

DISCOVERY

The availability of discovery in summary holdover proceedings is well established, and courts have consistently held that discovery is not "inherently hostile" to the nature of a summary proceeding. (*see New York Univ. v Farkas*, 121 Misc. 2d 643, 645, 468 NYS 2d 808 [Civ Ct, New York County 1983] *quoting 42 West 15th Street Corp. v Friedman*, 208 Misc. 123, 125 [App Term, 1st Dept 1955]).

Leave to conduct such discovery may be granted by leave of court pursuant to CPLR §408 where "ample need" is shown by the party requesting disclosure. (s*ee New York Univ. v Farkas*, 121 Misc. 2d at 646; *Mautner-Glick Corp. v. Higgins*, 64 Misc. 3d 16, 18 [App Term, 1st Dept 2019]). Courts will consider the following factors in determining whether the "ample need" standard is met:

> "In determining whether ample need has been established, courts consider a number of factors, not all of which need to be present in every case, including whether the party seeking discovery has asserted facts to establish a claim or defense; whether there is a need to determine information directly related to the claim or defense; whether the requested disclosure is carefully tailored and likely to clarify the disputed facts; whether prejudice will result from granting leave to conduct discovery; whether any prejudice caused by granting a discovery request can be diminished by an order fashioned by the court for that purpose; and whether the court, in its supervisory role, can structure discovery so that pro se tenants in particular will be protected."

(*Mautner-Glick Corp. v Higgins*, 64 Misc. 3d at 18-19, *citing New York Univ. v Farkas*, 121 Misc. 2d at 647).

Respondents have not alleged prejudice, nor have they opposed petitioner's motion for discovery. Petitioner argues it shows ample need for its documents demands and depositions.

In holdover proceedings predicated upon non-primary residence, there is a presumption in favor of discovery for petitioner. (*see Hughes v Lenox Hill Hosp.*, 226 AD2d 4, 18, 651

NYS2d 418 [1st Dept 1996] ["[F]acts concerning a tenant's residence and the use made of leased premises are peculiarly within the tenant's knowledge. Therefore, … the law recognizes a presumption in favor of discovery in summary proceedings commenced by the landlord on the basis of nonprimary residence."] [internal citations omitted]; *41 E. 1st St. Rehab Corp. v Pearson*, 33 Misc.3d 140[A], *1, 2011 NY Slip Op 52168[U] [App Term, 1st Dept 2011]).

Indeed, *New York University v Farkas* grants discovery to the petitioner in a non-primary residence proceeding. Furthermore, the types of items sought therein are similar to those sought by petitioner here. ("[T]here is a need to clarify information which is likely to have a direct bearing on a finding regarding the respondent's residence such as where she files tax returns from or where she is registered to vote. Here, the landlord's requests have been carefully tailored to focus in on and hopefully clarify the disputed factual issues. I further find that the information is likely to be within the knowledge of the respondent, is not burdensome and is capable of being answered or produced in a relatively short period of time." [121 Misc. 2d at 648]).

This information is exclusively within respondents' knowledge, possession and control. (*see 374 E. Parkway Common Owners Corp. v Albernio*, 32 Misc. 3d 1240(A), *7, 938 NYS2d 230 [Civ Ct, Kings County 2011] ["Ample need generally refers to a situation where the non-moving party is in possession of the relevant evidence or information."], *citing New York Univ. v Farkas*, 121 Misc. 2d at 648; *Roger Morris Apt. Corp. v Varela*, 51 Misc. 3d 1220(A), *7, 41 NYS3d 452 [Civ Ct, New York County 2016]; *Smilow v Ulrich*, 11 Misc. 3d 179 at 183; *IA2 Serv. LLC v Quinapanta*, 51 Misc.3d 1222(A), *4, 37 NYS3d 207 [Civ Ct, Kings County 2016]).

The portion of discovery seeking to depose respondents is necessary to obtain information regarding their actual residence, which will have a direct bearing on whether they are occupying the subject premises as their primary residence because the use of the subject premises, as well as the upstate residence, is peculiarly within respondents' knowledge.

As to the document demands, petitioner has also shown ample need for most items for the reasons discussed above. Items 1-7, 9-21, 23-31, 35-37 and 40-41 are therefore granted, although respondents may redact privileged, confidential, personal, financial or medical documentation. Respondents may not redact any portions of said documents that would reveal dates, information identifying that the documents pertain to or regard any of the named respondents, or any address or other residential information. If said documents do not exist, respondents may submit sworn affidavits attesting to same.

Items 8, 22, 32, 33, 34, 38, 39 and 42 are denied as discussed below. (*see Renaissance Equity Holdings LLC v Webber*, 61 Misc. 3d 298, 309, 82 NYS3d 810 [Civ Ct, Kings County 2018] ["Although palpably improper demands may be struck as a whole …, the better course in *this* instance is to craft an order narrowly tailored to the issue…"] [citations omitted] [emphasis added]; *Estate of John D. Rockefeller*, 2018 NYLJ LEXIS 1267, 12-13 [Sur Ct, New York County, 2018]).

These items are overbroad, unduly burdensome, unlimited in scope/not narrowly tailored. "[A] demand for the production of documents must specify the items sought with 'reasonable particularity,' and the burden of specificity is on the requesting party. (*Mendelowitz v Xerox*, 169 AD2d 300, 573 N.Y.S.2d 548 [1st Dept 1991].) The language in these items indicate a lack of the requisite specificity. (*see WM Wellington, LLC v Grafstein Diamond, Inc.*, 22 Misc. 3d 1123[A], *3, 2009 NY Slip Op 50255[U] [Civ Ct, New York County 2009]). These demands would not tend to narrow the issues at trial.

Petitioner cannot seek "all correspondence" from "any governmental tax authority" regarding respondents, and any business remotely related to them. Such demand is patently overbroad and makes it impossible to determine what types of documents it refers to. Similarly, it is unclear how "all bills and records" for any portable or cellular phone, including "*itemized usage portions*" of the bills would help shed light on respondents' primary residence. Not only is this demand overbroad, but a list of numbers that respondents call or text, contents thereof, or other such personal information about their phone usage, is highly invasive of privacy for seemingly little or no pertinent information.

Likewise, petitioner cannot show ample need for "any wills or codicils" where respondents are named as executors or legatees. Again, this demand is overbroad and seeks information invasive of third parties' privacy while lacking in probative value regarding respondents' primary residence. The demand seeking any evidence of joint bank accounts or credit cars "of whatever kind and nature" is overbroad and improper, unlimited in time, and fails to identify what documents petitioner could be referring to. Petitioner's demand for social security cards is improper as such information has nothing to do with respondents' primary residence, nor is any such information contained therein.

The demand seeking any ATM receipt or records is impermissibly vague and overbroad and does not attempt to define the type of document it may refer to. Similarly, the demand

seeking "evidence" of investment and/or stock accounts is vague, makes it impossible to determine what information and documents constitutes such "evidence," is unlimited in time, and is duplicative of earlier demands seeking bank and other account information.

As to the cross-motion for discovery, respondents make no legal argument in support, save for citing to the legal standard in *New York Univ. v Farkas* and CPLR §408. They state no facts in support and do not even attempt to pay lip service to the ample need standard. Respondents merely state that if their motion to dismiss is denied, and if petitioner is granted discovery, they *also* be granted discovery.

First, as to the request for depositions, this request is denied. Respondents do not identify a potential individual to depose. They have not and cannot show ample need to depose unidentified individuals. The notice seeking to depose "petitioner" is deficient; petitioner is an LLC and respondents must therefore identify specific individuals. Where the law is clear that no disclosure lies absent a showing of ample need that the information cannot be obtained through ordinary testimony, and where respondents do not allege that they seek information that they cannot obtain through testimony at trial, the demand to depose an unquantified number of unidentified individuals, must be denied. (*see Zirinsky v. Violet Mills, Inc.*, 152 Misc.2d 538, 542, 578 NYS2d 88 [Civ Ct, Queens County 1991]).

Furthermore, as respondents do not state specific reasons for deposition, such as a known individual who possesses vital knowledge about any claims or defenses not stricken, ample need cannot be shown. Only "[w]here the information sought is vital and within the knowledge of the other party or within the knowledge of a non-party witness" can ample need be found. (*IA2 Serv. LLC v Quinapanta*, 51 Misc. 3d 1222(A) at *4); *NYCHA v Mordan*, 62 Misc. 3d 1216[A], 2019 NY Slip Op 50145[U] [Civ Ct, Bronx County 2019]). Should respondents identify specific individuals and state with specificity why each requested deposition is necessary, respondents may renew their request.

Items 1-7 are granted. Although respondents do not bother to discuss ample need and their sole remaining defense is essentially a general denial, the court cannot hold that they are not entitled to review the documents petitioner relied upon in commencing the instant proceeding. As items 1-7 all seek documents regarding the factual allegations in the termination notice, such demands are proper. However, petitioner may redact privileged, confidential, personal, financial or medical documentation. Petitioner may not redact any portions of said documents that would

reveal dates, information identifying that the documents pertain to or regard any of the named respondents, or any addresses or other residential information. If said documents do not exist, petitioner may submit sworn affidavits attesting to same.

Items 8, 9, 10 11 are denied as vague, overbroad, unlimited, not narrowly tailored or unduly burdensome. The demands for any photographs or video of respondents that petitioner has are utterly improper as they are unlimited in time to the relevant time period of this action, they are not limited to subject matter relevant to petitioner's cause of action, and it is impossibly to ascertain what photographs or videos respondents are referring to, if any exist.

The demands for any subpoenas or documents received in response to any subpoenas are improper and overbroad. Respondents do not ascertain whether any such subpoenas or related documents exist, nor identify any documents they seek to be produced. This type of fishing expedition is not condoned.

CONCLUSION

It is Ordered, that petitioner's motion to strike defense(s), counterclaims and the jury demand, and for discovery, is granted to the extent set forth herein; respondents' cross-motion to dismiss and sanctions is denied in all respects. The portion of the cross-motion for leave to amend the answer granted and the portion of the cross- motion for discovery is granted to the extent set forth herein.

The parties are directed to comply with this Order and respond to the discovery demands and notices of deposition within 30 days of service of this Order upon their counsel, with notice of entry (to be filed on NYSCEF). This matter is adjourned to April 29, 2024 at 9:30 am for the court to monitor compliance.

This constitutes the decision and order of the court. It will be posted on NYSCEF.

Dated: February 20, 2024
Bronx, New York

SO ORDERED,

HON. SHORAB IBRAHIM
Judge, Housing Part

TO:

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