SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Hon. James E. d'Auguste** **PART 55**

Justice

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KATE NOVOSEL,

Plaintiff,

- v -

SAMANTHA MARTIN-NEYREY, ANDRE NEYREY,

Defendants.

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INDEX NO. 153952/2020

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62

were read on this motion to/for DISMISSAL.

In Motion Sequence 003, Samantha Martin-Neyrey and Andre Neyrey ("Defendants") move to dismiss Plaintiff's amended complaint against them. Plaintiff Kate Novosel ("Plaintiff") opposed Defendants' motion to dismiss and filed a cross-motion for default judgment. Defendants oppose the cross-motion for default judgment. The motion and cross-motion are hereby resolved in this decision and order.

Defendants' Motion to Dismiss

As an initial matter, plaintiff argues that a procedural defect in attaching the wrong version of the complaint equates to a default in answering despite a timely motion to dismiss. Notably, the Court has wide latitude to cure such a procedural defect where the correct document was elsewhere in the record. Pandian v. New York Health & Hosps. Corp., 863 NYS2d 668 [2008] ("We reject the contention that the court should have dismissed defendants' motion for failure to annex their answer to the initial moving papers, inasmuch as the responsive pleading was attached to the reply papers."). Here, the operative Amended Complaint was in the record before the Court, having been attached by Plaintiff's counsel as Exhibit D to her affirmation.

NYSCEF Doc. No. 56. Therefore, despite Defendants' mistake, the Court finds the record to be complete.

Moving on to the motion's substance, Defendants seek dismissal of the second, third, fourth, fifth, sixth, and seventh causes of action because they allegedly fail to state a claim upon which relief can be granted. Defendants have not moved to dismiss Plaintiff's First or Eighth Causes of action – for assault and constructive eviction, respectively – and those claims are not addressed in this decision and order.

Plaintiff's second cause of action is for defamation with regards to statements that Defendant posted on Plaintiff's professional Yelp page. When determining whether a cause of action exists to recover damages for defamation, the dispositive inquiry is "whether a reasonable listener or reader could have concluded that the statements were conveying facts about the plaintiff." Goldberg v Levine, 97 AD3d 725, 725 [2d Dept 2012]. In distinguishing fact from opinion, the Court considers whether the specific language at issue has a precise meaning which is readily understood, whether the statement is capable of being objectively characterized as true or false, the full context of the entire communication in which the statement appears, and the broader social context or setting surrounding the communication, including customs or conventions that might signal to readers that the content is likely to be opinion, not fact. Steinhilber v Alphonse, 68 NY2d 283, 292 [1986].

Here, Defendants' statements that Plaintiff is a "complete psychopath," that Plaintiff is "a liar, pathological and out of control," and that "I would be terrified to see her as a doctor" read as disgruntled comments rooted in opinion, not facts. The statements do not signal any actual experience with Plaintiff as a chiropractor. Specifically, the statements refer to Plaintiff's "personal life" and effectively reveal that the writer (Defendant) has *not* seen Plaintiff operate in

a professional capacity. The challenged statements fall short of conveying facts as required for an actionable cause of action.

Finally, the broader social context of the Yelp platform is one of user-generated content largely understood by the public to be unmoderated, unconfirmed, anonymous, and "the virtual opposite of a fact-laden context." Feinberg v. Lans, 67 Misc.3d 1232(A), 2020 WL 3422679 (Sup. Ct. Westchester. Cty. 2020). Even in cases where the review-writer posts from direct experience with the subject of their review, courts have found that "such assertions as calling a person a thief, a liar, dishonest, corrupt and a scam artist" on a platform like Yelp may be found to amount to opinions and beliefs of dissatisfied clients. P.D. & Associates v. Richardson, 64 Misc.3d 763, 104 N.Y.S.2d 876 (Sup. Ct. Westchester, 2019). "[R]eaders give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts." Sandals Resorts Intl. Ltd. v. Google, Inc., 86 A.D.3d 32, 44, 925 N.Y.S.2d 407 [1st Dept.2011]). Because the comments are rooted in opinion, and considering the broader context of Yelp as an anonymous and unmoderated review site, the second cause of action is dismissed.

The third cause of action is for conversion. Plaintiff asserts that theft of her mail and packages. Defendants assert that Plaintiff has not properly identified the specific mail and property belonging to Plaintiff, and that the claim must therefore be dismissed. However, such specificity is not required at this stage of litigation. In this regard, Defendants' reliance on Luong v. Luong, 2020 Slip Op. 50489 (N.Y Sup. Ct., 2020) as establishing a requirement of specificity is misplaced. This decision simply notes that "the complaint must plead the "(1) plaintiff's possessory right or interest in the property and (2) defendant's dominion or interference with it in derogation of plaintiff's rights." Plaintiff has alleged these required elements. NYSCEF Doc. No. 56, p. 8-9. Therefore, the third cause of action is not dismissed.

Plaintiff's fourth cause of action is for breach of warranty of habitability, alleging that Defendants did not address a rodent problem; Defendants created dangerous physical conditions preventing Plaintiff from escaping the apartment in case of emergency; and Defendants failed to provide any heat or electricity. Plaintiff's fifth cause of action is for abatement, for the entirety of Plaintiff's $28,000 rental payment and $8,000 security deposit. Defendants argue that Plaintiff does not have a right to recoup payments where those payments could voluntarily be withheld. But this specific legal assertion conclusion stems from a misplaced reliance on Carcione v. Rizzo, where Plaintiff sought to recoup payments after the landlord violated the Multiple Dwelling Law. Carcione v. Rizzo, 154 Misc. 2d 13, 14 (N.Y. App. Term 1992). The Multiple Dwelling Law, which explicitly prohibits the recouping of such voluntary payments, is irrelevant in the case at bar, and Defendants have not cited alternative authority to support their argument that the requested relief is unavailable to Plaintiff. As such, the fourth and fifth causes of action are not dismissed.

The sixth cause of action is for breach of contract. As Defendants have not provided sufficient substance to support their application, the sixth cause of action is not dismissed.

The seventh cause of action is for unjust enrichment based upon a claim that Defendant Martin kept $28,000 in rental payments and $8,000 in a security deposit from Plaintiff after failing to maintain a safe and habitable living environment. Defendant argues that under Whitman Realty Group, Inc v. Galano, recovery for unjust enrichment is barred by a valid enforceable contract, but Whitman specifically states that the valid enforceable contract must exist that governs the relationship *between the contracted parties*. Whitman Realty Group, Inc v. Galano, 41 A.D 3d 590, 838 N.Y.S 2d 585 (2d Dept. 2007). Here, the lease was between Plaintiff and Landlord Angela Gardner – Defendant Martin was not a named party to the

contract. Although Defendant Martin presented and acted as an agent for Gardner, serving as de facto landlord while Gardner resided in Hong Kong, there is no evidence in the record suggesting that Defendant Martin was legally authorized under the contract as an agent or a party otherwise. Therefore, the seventh cause of action is not dismissed.

Plaintiff's Cross-Motion for Default

Plaintiff filed a cross-motion for default judgment, premised on the argument that Defendants failed to timely respond to the Amended Complaint as ordered by the Court on September 29, 2021. The Court has wide discretion to act in the interest of judicial economy, including choosing to evaluate a case on its merits regardless of harmless procedural deficiencies. Having considered the application, the Court denies Plaintiff's cross-motion for a default judgment.

Accordingly, the motion is granted to the extent of dismissing the second cause of action and otherwise denied. The cross-motion is denied.

This constitutes the decision and order of the Court.

11/19/2024
DATE

James d'Auguste, J.S.C.

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