

**33rd St. Acquisition LLC v Feng**

2025 NY Slip Op 34101(U)

October 24, 2025

Supreme Court, New York County

Docket Number: Index No. 158102/2024

Judge: Arthur F. Engoron

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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. ARTHUR F. ENGORON PART 37

Justice

33RD STREET ACQUISITION LLC,

Plaintiff,

- v -

ANNIE FENG,

Defendant.

INDEX NO. 158102/2024
MOTION DATE 08/28/2025
MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 167, 168, 169, 170, 171, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183,

were read on this motion to

AMEND PLEADINGS

Upon the foregoing documents, after extensive oral argument on October 22, 2025, and for the reasons hereinbelow, plaintiff's motion is granted in part as follows and defendant's cross-motion is denied.

Background

In a Decision and Order dated July 29, 2025, this Court rejected plaintiff's First Amended Complaint "as untimely, without prejudice for plaintiff to move for leave to file a Second Amended Complaint." NYSCEF Doc. No. 163. In that same Decision the Court noted that the First Amended Complaint's ejectment cause of action was improper, as plaintiff had not given predicate notice prior to the commencement of the instant action that defendant's failure to comply would result in an ejectment. Id.

On August 4, 2025, plaintiff served a "Rent Demand Pursuant to Lease and as a predicate to Real Property Actions and Proceedings Law § 641," dated July 29, 2025, upon defendant personally and then, on August 5, 2025, again "via regular first-class mail, with a certificate to prove mailing; via certified mail; via certified mail return receipt requested; and via overnight mail." NYSCEF Doc. No. 166 at 185-195.

Plaintiff now moves by Order to Show Cause, pursuant to CPLR 3025(b), to amend the complaint to add a cause of action for ejectment, and, pursuant to the lease between the parties, to strike some of defendant's counterclaims filed at NYSCEF Doc. No. 70 and her Jury Demand filed at NYSCEF Doc. No. 66. NYSCEF Doc. No. 173. Plaintiff argues, essentially, that it has now properly served defendant a predicate notice of ejectment while defendant continues in possession of the subject apartment and remains \$74,777.14 in arrears, and, therefore, plaintiff is entitled to a pursue an ejectment cause of action pursuant to Real Property Actions and Proceedings Law ("RPAPL") § 641. NYSCEF Doc. No. 168.

In opposition, defendant argues, inter alia, that plaintiff is estopped from amending the complaint, and that there was still no predicate notice because the instant action was commenced on September 3, 2024. NYSCEF Doc. No. 175. Defendant also cross-moves, inter alia, to dismiss the complaint as legally insufficient, to strike the Note of Issue, and for various sanctions against plaintiff's counsel. NYSCEF Doc. No. 176.

In reply and opposition, plaintiff argues, inter alia, that there is no reason to strike the Note of Issue because plaintiff provided defendant a response to her first and second demands for Discovery and Inspection, which she has not objected to, and therefore discovery is complete. NYSCEF Doc. No. 180. Plaintiff also argues that none of defendant's filings have been properly sworn statements, pursuant to CPLR 2106, and therefore should not be considered, arguing that "[d]efendant, who is allegedly pro se, has become quite a stickler for procedure detail when it comes to alleged infractions by Plaintiff. What is good for the goose is good for the gander." Id.

In reply, defendant acknowledges that she was served notice but argues it was "post-notice, not a predicate notice." NYSCEF Doc. No. 183.

#### Discussion

Pursuant to CPLR 3025(b), leave to amend a complaint "shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Pursuant to CPLR 2106, affirmations to be used in New York with the same force and effect as an affidavit

shall be in substantially the following form:

I affirm this \_\_\_ day of \_\_\_\_\_, \_\_\_\_, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Pursuant to CPLR 2001, "At any stage of an action ... the court may permit a mistake, omission, defect or irregularity ... to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded."

Here, plaintiff is correct that defendant's filings have not substantially followed the form prescribed by CPLR 2106; however the Court, having interacted with pro se defendant, believes that those errors were unintentional, that defendant believes her statements to be true, and that plaintiff is not prejudiced by them. Accordingly, pursuant to CPLR 2001, the Court accepts defendant's improperly affirmed filings.

Similarly, the Court notes that here, plaintiff has failed to submit a copy of the proposed amended complaint "clearly showing the changes or additions to be made to the pleading."

However, the Court sees no prejudice in this oversight and, pursuant to CPLR 2001, disregards it. Sauce for the goose is sauce for the gander.

As to the substance of the motion, plaintiff moves to add a cause of ejectment action pursuant to RPAPL Article 6, which does not prescribe any notice periods, and the subject lease, which states, as relevant, at § 17 (Default), that:

(3) If You do not pay your Rent when this Lease requires after a personal demand for rent has been made... Owner may do the following: (a) enter the apartment and retake possession of it if you have moved out; or (b) go to court and ask that You and the other occupants in the Apartment be compelled to move out.

The parties do not dispute that there is a lease between them, or that defendant has been served a rent demand warning her that if she did not pay her arrears by August 21, 2025, “Landlord may go to court and ask that you and all other occupants of the apartment be compelled to move out.” NYSCEF Doc. No. 166.

According to the affirmation of plaintiff’s authorized representative, Michael Heletz, since plaintiff served its demand, defendant “has paid absolutely nothing.” NYSCEF Doc. No. 181. Defendant has not disputed this allegation. (Indeed, plaintiff has credibly alleged that defendant has not paid any rent since October 2021).

Accordingly, plaintiff has given proper predicate notice, pursuant to the lease, that it intended to commence an ejectment action, which it now does by amending its complaint. cf. Olympic Galleria, Co., Inc. v Sitt, 241 AD3d 1092 (1st Dept 2025) (month-to-month tenant entitled to common law notice to terminate period). Simply put, defendant is not prejudiced, as she has been fully cognizant of her arrears and that they might lead to an ejectment. Thus, that part of plaintiff’s motion seeking to amend the complaint to add an ejectment cause of action should be granted.

In addition, as the parties to the subject lease clearly “agree[d] to give up the right to a trial by jury in a court action, proceeding or counterclaim on any matters concerning the Lease,” that part of plaintiff’s motion to strike defendant’s jury demand (NYSCEF Doc. No. 66) should be granted.

That part of plaintiff’s motion seeking to strike certain counterclaims should be denied, without prejudice, solely as moot, as defendant is entitled to file a new answer to the amended complaint. The Court notes, however, that, the subject lease contains a “no counterclaims” clause at § 27(B) which states

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 of the Building.

Accordingly, defendant is barred from raising many of the counterclaims she has previously raised (NYSCEF Doc. No. 70), other than for (#2) rent overcharge and (#6) housing violations in breach of the implied warranty of habitability, and the Court will not consider those other counterclaims if raised again.

Defendant’s argument that plaintiff is estopped from amending is incorrect, as the Court clearly rejected plaintiff’s prior amended complaint as untimely without prejudice to file again. Defendant’s argument that plaintiff’s notice is not predicate is incorrect, as it was clearly made prior to plaintiff’s amended complaint. Defendant’s request to strike the Note of Issue based on lack of discovery is unsupported by the record.


The Court has considered the parties’ remaining arguments and finds them unavailing and/or non-dispositive.

Conclusion

Those parts of plaintiff’s motion to strike defendant’s jury demand and for leave to file an amended complaint are hereby granted, that part of plaintiff’s motion seeking to strike defendant’s counterclaims is denied, without prejudice, solely as moot, as defendant is entitled to file a new answer, and defendant’s multi-faceted cross-motion is denied.

Accordingly, the Second Amended Complaint, filed at NYSCEF Doc. No. 170, is hereby deemed operative and served. Defendant has until November 7, 2025, to answer the Second Amended Complaint and assert counterclaims not barred by the subject lease, if she so chooses. Defendant may file only ONE (1) answer to the Second Amended Complaint, and the Court will not consider any further “answers,” unless the Court gives her written dispensation to do so.

10/24/2025  
DATE

**HON. ARTHUR F. ENGORON**  
  
ARTHUR F. ENGORON, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SETTLE ORDER  SUBMIT ORDER  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE