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SUPREME COURT OF THE STATE OF NEW YORK
JUDITH J. GISCHE, J.S.C. NEW YORK COUNTY

Index Number : 112693/2009
ZHENG, CHAN JUAN
vs
MAK, NANCY
Sequence Number : 001
DISM ACTION/ INCONVENIENT FORUM

PART 10

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO: 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: MAR 14 2012

JUDITH J. GISCHE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Chang Juan Zheng,

Plaintiff (s),

-against-

Nancy Mak, Chinatown Preservation HDFC, Asian American Housing Development Fund Company, Inc., and Asian Americans for Equality,

Defendant (s).

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DECISION/ ORDER
Index No.: 112693-2009
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Chinatown Preservation, Asian American, AAFE n/m (3211 and 3212) w/STG affirm, HLY, CK affids, exhs	1
Pltf's opp w/GF affirm, CJZ affid, other affids (as exhs), exhs	2
Chinatown, AAHDFC, AAFE reply w/STG affirm, exh	3
Other:	
GF affirms to adjourn motion (10/17/11, 11/8/11)	4
Steno minutes OA 1/19/12	5

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by Chan Juan Zheng ("plaintiff") against various defendants, including Chinatown Preservation HDFC ("Chinatown Preservation"), the current record owner of the buildings and real property located at Block 277 Lots 43 and 44, also known as 28-30 Henry Street, New York, New York. Plaintiff is a tenant and resident of

28 Henry Street ("building"), apartment 2.

Each of the defendants has answered the complaint. Defendants Chinatown Preservation, Asian American Housing Development Fund Company, Inc. ("Asian American") and Asian Americans for Equality ("AAFE") (collectively "moving defendants") now move for the dismissal of the claims against them on the basis of CPLR 3211 [a] or, in the alternative, summary judgment pursuant to CPLR 3212. Plaintiff opposes the motion. Although properly served and having appeared for oral argument of this motion, co-defendant Nancy Mak has not opposed this motion either in writing or orally.

As will be seen, although the moving defendants are moving under CPLR 3211 "or" 3212, what they actually seek is summary judgment on their affirmative defenses. Although they have not articulated which subsection of CPLR 3211 they are moving under, apparently it is subsection [5] (statute of limitations) (CPLR 3212 [c]; see generally, Rich v. Lefkovits, 56 N.Y.2d 276 [1982]). In any event, summary judgment relief is available since the requirements of CPLR 3212 have been met (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]).

Facts

The following facts are established or unrefuted:

Plaintiff is the new or vacancy tenant of apartment 2 at 28 Henry Street. Her tenancy began October 1, 2003 when she signed a one year lease for $1,100.00 per month rent. Plaintiff's rent history shows this apartment had, at one time, been rent controlled. There was, however, a tenant between the termination of rent control and plaintiff's tenancy.

Plaintiff's lease was with defendant Mak, then the landlord and record owner of the building. Mak owned the building from August 12, 1997 to September 25, 2006 when Mak sold the building and conveyed a bargain and sale deed dated September 25, 2006 to Asian American. Asian American later sold the building to Chinatown Preservation and conveyed a bargain and sale deed dated February 7, 2007, effective as of January 7, 2007. Asian American and Chinatown Preservation are each housing development fund companies ("HDFC"), meaning they are not-for-profit New York State corporations governed by New York State Private Housing Finance Law.

Plaintiff contends (and has provided receipts showing that) she paid Mak a broker's fee or "key money" of $1,100, although the apartment is rent stabilized. Plaintiff also paid $6,800 for "repairs" that she claims were either not necessary or the landlord's responsibility.

Following her initial lease, plaintiff renewed her lease each year for one year terms as follows: October 1, 2004 renewal lease - $1,138.50; October 1, 2005 renewal lease - $1,169.81; October 1, 2006 renewal lease - $1,219.53; October 1, 2007 renewal lease - $1,256.12; October 1, 2008 renewal lease - $1,312.65; October 1, 2009 renewal lease - not provided; October 1, 2010 renewal lease - $1,342.18. The October 2006 renewal was with Asian American, then the new owner and landlord. The ensuing renewal leases were with Chinatown Preservation, the current owner. None of the leases were with AAFE. Plaintiff does not claim any of the increases during these years misapplied the guideline increases permitted by law.

In June 2009, the New York City Department of Buildings ("DOB") and the New York City Fire Department ("FDNY") inspected the building and discovered that

plaintiff's apartment (and others) had been illegally partitioned to create three bedrooms. In September 2009, Chinatown Preservation commenced a holdover proceeding against plaintiff and, while that was pending, DOB issued a vacate order. Chinatown Preservation discontinued the holdover proceeding, removed the walls at its expense and plaintiff moved back in. The moving defendants have a counterclaim against plaintiff for breach of the lease, alleging that it was plaintiff who erected these partitions illegally.

Plaintiff has asserted seven causes of action ("__COA"). Chinatown Preservation has only moved with respect to the 2nd, 4th, 5th, 6th and 7th COA against it. Asian American and AAFE seek the dismissal of all the claims against them. AAFE separately contends it is not now, nor has it ever been, an owner of or held a property interest in the building.

The 1st COA is for breach of contract based on claims that in October 2003, plaintiff rented a 3 bedroom apartment from Mak that turned out to be a legal one bedroom and that in June 2009, she was forced to vacate the apartment while partition walls were moved causing her $250,000 in damages. Chinatown Preservation has not moved with respect to this cause of action.

The 2nd COA is an overcharge claim based on plaintiff having paid Mak a brokerage fee, being overcharged for rent and having been charged for "repairs." Plaintiff contends that the initial rent of $1,100 that Mak charged her was not the legal rent and therefore, the subsequent rent increases are illegal as well. Plaintiff's attorney, Geovanny Fernandez, Esq. ("Attorney Fernandez") states that he has represented other tenants at the building and that he knows plaintiff's rent is illegal because:

> As of 2007 (4 years after plaintiff executed [her] vacancy lease agreement...), of the 20 units at [the] subject premises, 12 have rents below the $1,100 first rent set by prior owner Nancy Mak for [plaintiff's apartment]. Of the remaining 7 rents/apartment (other than subject premises) that have rents over $1,100 set by prior owner Nancy Mak ... on October 2003, your affirmant [has] settled overcharge claims...

Attorney Fernandez also provides three stipulations of settlement he negotiated for other tenants in housing court as well as their rent histories. Plaintiff contends this establishes a pattern of fraud that justifies the application of the so called default or "Thornton" formula (Thornton v. Baron, 5 N.Y.3d 175 [2005]), in deciding her overcharge claim. Thus, plaintiff seeks a recalculation of the rent for apartment 2 by having the court go back to 1998, when the apartment was rent controlled.

The 3rd COA is for diminution of services, the 4th COA is for conversion and her 6th COA is for deceptive practices. These claims assert that the removal of the partition walls in apartment 2 reduced the apartment from a 3 bedroom to a legal one bedroom. Plaintiff claims that she wanted, leased, needed and expected a three (3) bedroom apartment because she has a large family. She contends further that by reducing the apartment to a one bedroom, defendants have taken away something of value from her, thereby converting her property (i.e the money she paid as rent for a three bedroom) for their benefit. Chinatown Preservation has not moved with respect to this cause of action.

Plaintiff's 5th COA is for fraud and her 7th COA is for unjust enrichment. Plaintiff alleges in these claims (and also the 6th COA, *supra*) that the moving defendants knew, should have known, or could have discovered through due diligence, Mak's "prior bad

acts." She claims that having failed to taken appropriate actions, they stand in Mak's shoes.

The 8th COA is for illegal lockout. Chinatown Preservation has not moved with respect to this cause of action.

Arguments

AAFE argues that the complaint should be dismissed as to it because AAFE has never held an ownership interest in the subject building. Although Christopher Kui ("Kui") is the president of Asian American and the executive direction of AAFE, Kui denies that the companies are alter egos of Chinatown Preservation or Asian American or that AAFE had any involvement with the tenants at the building, including plaintiff. Therefore, AAFE seeks summary judgment dismissing the entire complaint against it.

All the moving defendants argue that plaintiff's overcharge claim (2nd COA) is time barred insofar as she seeks judicial review of her rent prior back to 1998. The moving defendants contend the court can only review the rent for apartment 2 for the four (4) year period from September 2005 forward (this action was commenced September 2009). They argue that there is no overcharge during that four (4) year period because only rent guidelines increases were applied.

While acknowledging in reply (and at oral argument) that the court can, in certain situations, review plaintiff's rent history beyond the four (4) year limitation established by CPLR 213-a, defendants argue that this requires facts supporting plaintiff's fraud claim. Thus, defendants also contend that the fraud claim (5th COA) is unsupported and unfounded. In addition to seeking dismissal of the fraud claim for that reason, defendants also seek dismissal of the tort claims (4th, 6th and 7th COAs) on the basis

that they are not pleaded with specificity, as required by CPLR 3016. Defendants also contend the conversion claim (4th COA) is time barred because this action was commenced more than 5 years after Mak allegedly charged her a broker's fee and for repairs and, furthermore, any bad acts by Mak should not to attributed to Asian American or Chinatown Preservation.

AAFE and Asian American contend the breach of contract (1st COA), diminution of services (3rd COA) and lockout cause of action (8th COA) should be dismissed against them because neither of them owned the building when plaintiff became the vacancy tenant (1st COA) or when DOB issued it's vacate order.

In opposition to the motion, plaintiff argues that the court must establish the legal rent for the apartment and cannot rely on the 4 year look back period because Mak engaged in fraud to circumvent the Rent Stabilization Law. Plaintiff provides the affidavits of other tenants to support this claim. Each of the tenants states he or she rented a "larger" apartment that later turned out to be a legal one bedroom. Plaintiff also claims that her overcharge claims are timely because this action was commenced within six (6) years.

Discussion

Where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the cause of action has no merit, sufficient to warrant the court, as a matter of law, to direct judgment in its favor (Bush v. St. Claire's Hosp., 82 NY2d 738, 739 [1993]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The defendant's motion must be denied if it fails to produce admissible evidence demonstrating the absence of any material issues of fact (Winegrad v. New

York Univ. Med. Ctr., supra; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]; Silverman v. Perlbinder, 307 AD2d 230 [1st Dept. 2003]).

Where an issue of law is raised in a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing (Hindes v. Weisz, 303 AD2d 459 [2nd Dept 2003]).

Since the moving defendants are also moving under CPLR 3211 [a] [5] (statute of limitations), defendants must demonstrate they have that defense (Park Associates v. Crescent Park Associates, Inc., 159 A.D.2d 460 [2nd Dept. 1990]).

The claims against AAFE

AAFE contends it has no ties to the subject premises because it is not now, nor has it ever been, an owner of, or had an ownership interest in, 28 Henry Street. The deed shows that the current owner of the building is Chinatown Preservation. AAFE is not a party to the most recent deed or any of the prior deeds for the applicable time period. The moving defendants have also provided the certificates of incorporation for each of the corporations which have been sued herein. AAFE has, therefore, met its burden of proving that it did not have, nor does it have, an ownership interest in the subject premises and that AAFE is a distinct entity from its moving co-defendants.

In an effort to raise a triable issue of fact, plaintiff states that Kui's involvement with Chinatown Preservation, Asian American and AAFE shows that AAFE "completely controls" the other moving defendants. "Closely associated corporations, even ones that share directors and officers, will not be considered alter egos of each other if they were formed for different purposes, neither is a subsidiary of the other, their finances are not integrated, assets are not commingled, and the principals treat the two entities

as separate and distinct" (Longshore v. Paul Davis Systems of Capital Dist., 304 A.D.2d 964, 965 [3rd Dept 2003]). Since plaintiff offers no facts to support her claim that AAFE is an alter ego of the other two moving defendants, AAFE's motion for summary judgment dismissing the complaint against it in its entirety is granted.

Overcharge claim and statute of limitations issue

Under CPLR § 213-a, an action on a residential rent overcharge "shall be commenced within four years of the first overcharge alleged and no determination of an overcharge, and no award or calculation of an award of the amount of any overcharge may be based on an overcharge having occurred more than four years before the action is commenced." The moving defendants have correctly identified the statute of limitations applicable to this dispute as being 4 years, whether measured under the CPLR or the Rent Stabilization law, not 6 years, as plaintiff claims. The 6 year statute of limitations, however, does apply to plaintiff's breach of contract claim which is discussed later in this decision. Therefore, based upon the commencement date of this action in September 2009, the applicable base rent for the overcharge claim is, September 2005.

A court may, however, look beyond the 4 year statutory period where, as here, it is alleged that the standard base date rent is tainted by fraudulent conduct on the part of a landlord (Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin., 15 N.Y.3d 358 [2010]). In Grimm, an Article 78 summary proceeding which was appealed to the state's highest court, the Court of Appeals held that DHCR had completely disregarded the petitioner's claim of fraud by not investigating it and, instead, "blindly using the rent charged on the date four years prior to the filing of the

rent overcharge claim" (Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin., 15 N.Y.3d at 366).

The Court of Appeals has held that the default or "Thornton" formula is applicable "when no reliable records are available" (Grimm, supra at 366; Thornton v. Baron, 5 N.Y.3d 175 [2005]). Applying these legal principles, this court must first ascertain whether the tenant's allegations of fraud warrant the use of the default formula in calculating any rent overcharge that may have occurred (Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin, supra at 367).

The 4 year statute of limitations cannot, however, be simply circumvented by plaintiff couching the claim as one for fraud or where the fraud allegations are only incidental to the rent overcharge claims (Brinckerhoff v. New York State Div. of Housing and Community Renewal, 275 A.D.2d 622 [1st Dept 2000]; Daniel v. New York State Div. of Housing and Community Renewal, 179 Misc.2d 452 [Sup Ct. N.Y. Co. 1998]). As with Grimm, there must be sufficient indicia of fraud in the record.

Asian American and Chinatown Preservation have provided renewal leases showing that allowable rent guideline increases were taken each year starting with the October 2004 - September 2005 renewal lease. Plaintiff does not raise any triable issue of fact in that regard. She does, however, argue that the court must use the default formula in deciding her overcharge claim because Mak's fraud renders the rental history for apartment 2 unreliable.

Plaintiff correctly states that for overcharge complaints filed or overcharges collected on or after April 1, 1984 "a current owner shall be responsible for all overcharge penalties, including penalties based upon overcharges collected by any

prior owner" (RSC § 2526.1[f] [2][i]). Consequently, any argument by the moving defendants that they are not liable for Mak's "prior bad acts" is inconsistent with the law and does not satisfy their burden on this motion for summary judgment.

The issue of whether plaintiff's overcharge claim should be restricted to the 4 year limitation period is closely intertwined with her fraud claims because, if there is a substantial indicia of fraud, then the rent history for Apartment 2 is unreliable. To state a cause of action for fraud, plaintiff must show: (1) that defendants intentionally made a misrepresentation or material omission of fact; (2) that the misrepresentation or material omission of fact was false or known to be false to defendants; (3) plaintiff's reliance; and (4) that the misrepresentation resulted in some injury to plaintiff (Held v. Kaufman, 91 N.Y.2d 425 [2d Dept. 1998]).

The fraud alleged by plaintiff is two-fold: she claims that the jump in rent for apartment 2 from $150.01 in 1998 to $1,100.00 in 2000 is "inconsistent with applicable law." To further illustrate her point, plaintiff provides the rent history for two other unrelated apartments. The rent for apartment 6, for example, increased from $427.29 to $1,200.00 upon becoming vacant and the rent for apartment 19 increased rent from $369.73 to $1,050 upon vacancy. Plaintiff contends that this not only shows Mak defrauded her tenants, but that the moving defendants could and should have discovered this fraud through due diligence. Her second fraud allegation involves the size of her apartment. She contends she rented apartment 2 as a three (3) bedroom apartment when, in fact, it is only a legal one (1) bedroom apartment.

In Grimm, the court observed that there was "substantial indicia of fraud on the record" which DHCR disregarded. Generally, an increase in rent alone will not be

sufficient to establish a 'colorable claim of fraud' and a mere allegation of fraud, without more, is insufficient. There must also be "evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization...and the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date" (Grimm v. State Div. of Housing and Community Renewal Office of Rent Admin., 15 N.Y.3d at 367).

If there is any doubt as to the existence of a triable fact, a motion for summary judgment must be denied (Rotuba Extruders, Inc. v. Ceppos, 46 NY2d 223 [1978]). Here, the moving defendants have the burden of producing admissible evidence demonstrating the absence of any material issues of fact with respect to plaintiff's overcharge and fraud claims (Winegrad v. New York Univ. Med. Ctr., supra; Zuckerman v. City of New York, supra; Silverman v. Perlbinder, supra). They have not met their burden and, in any event, plaintiff has pleaded and raised triable issues of fact supporting a tenable claim for fraud, requiring the denial of Asian American and Chinatown Preservation's motion for summary judgment dismissing (or limiting) the overcharge (2nd COA) claim based on the applicable statute of limitations and the fraud claim (5th COA).

In her conversion claim (4th COA), plaintiff asserts that defendants converted plaintiff's funds by failing to provide an apartment with three (3) bedrooms and that defendants' agents represented to plaintiff that apartment 2 was a three (3) bedroom apartment. Conversion is the denial or violation of the dominion, rights or possession of another's property (Allen v. Murray House Owners Corp., 174 A.D.2d 400 [1st Dept

1991]). Where "conversion of funds" is alleged, the claim is that the funds were used for an unintended purpose. Here, plaintiff paid rent pursuant to her lease and her claim is that she did not get the apartment she leased (i.e. bargained for). There is, therefore, no conversion claim, only a claim for breach of contract. The moving defendants have proved they are entitled to summary judgment dismissing the 4th COA for conversion.

The deceptive practices (6th COA) contains allegations that Mak advertised the apartment as a three (3) bedroom when, in fact, it is a legal one bedroom. Plaintiff contends the moving defendants were complicit in these acts and also engaged in deceptive acts of their own. Presumably, plaintiff means the defendants violated GBL § 349.

GBL § 349 provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." It is an intentionally broad statue, applying "to virtually all economic activity" (Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 324 [2002]). However, to establish a violation of GBL § 349, the conduct complained of must be consumer oriented and have a broad impact on consumers at large as compared to a private contract dispute that is unique or particular to one of the parties to the lawsuit (New York University v. Continental Ins. Co., 87 N.Y.2d 308, 324 [1995]; Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 25 [1995]).

The moving defendants have proved they had no involvement with the building at the time plaintiff entered into a vacancy lease with Mak. In opposition, plaintiff has failed to come forward with a triable issue that these defendants had any involvement in the marketing (if any) of this apartment or that any of them have engaged in any kind of

deceptive act since becoming involved with the building. Furthermore, the actions alleged only support a breach of contract since the claims of deception are personal to her. Therefore, the moving defendants' motion for summary judgment dismissing the deceptive practices claim (6th COA) is granted.

Plaintiff's 7th COA for unjust enrichment is redundant of her other claims. The principle of unjust enrichment is an equitable principle that applies to a situation where someone has received the money or goods of another which is inequitable or against good conscience for him or her to retain (Miller v. Schloss, 218 NY 400, 407 [1916]). The remedy for unjust enrichment is restitution, which is essentially returning the money or property unjustly conferred. Since there is a lease, there is no need to rely on equitable principles. Furthermore, if plaintiff prevails on her overcharge claims, she has statutory remedies available. The moving defendants' motion for summary judgment dismissing the 7th COA is granted and this claim is severed and dismissed as to them.

The breach of contract (1st COA), diminution (3rd COA) and lockout (8th COA) claims all arise from actions that took place in June 2009, when DOB issued its vacate order and plaintiff had to vacate her apartment temporarily. Additionally, in the breach of contract COA, plaintiff asserts facts surrounding her execution of the vacancy lease with Mak in October 2003. Although Chinatown Preservation does not move with respect to these claims, Asian American does (as has AAFE, already dismissed from this case by virtue of this order, *supra*).

Turning to the events of June 2009 first, plaintiff contends she was damaged in the sum of $250,000 because she did not have use of her apartment and it was converted into a one bedroom. She contends this was an illegal lockout. None of

these claims have any supporting facts as they pertain to Asian American. Asian American has established that it did not own the building in June 2009. With respect to the 1st COA for breach of contract, none of the facts alleged involve Asian American, but even if they do, fail to state a claim against Asian American because it was neither the owner at that time nor is it the current owner of the building. Therefore, Asian American has met its burden of proving it is entitled to summary judgment, as a matter of law. Plaintiff has failed to raise issues of fact. Therefore, Asian American's (and AAFE's) motion for summary judgment dismissing the 1st, 3rd, and 8th COAs is granted and those COAs are dismissed only as to Asian American and AAFE.

Recapitulation and Conclusion

The moving defendants' motion for summary judgment dismissing the complaint based upon affirmative defenses pleaded is granted as follows:

All claims against AAFE are dismissed.

The 1st, 3rd and 8th COAs are dismissed as to Asian American and AAFE

The motion to dismiss or limit the 2nd COA and for dismissal of 5th COA is denied

The motion to dismiss the 4th, 6th and 7th COAs is granted as to all the moving defendants.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 14, 2012

So Ordered:

Hon. Judith J. Gische, JSC