

**Schwartz v Katz 737 Corp.**

2012 NY Slip Op 32671(U)

October 23, 2012

Sup Ct, NY County

Docket Number: 102295-2012

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER  
Justice

PART 15

Index Number : 102295/2012  
SCHWARTZ, MARTIN  
vs.  
KATZ 737 CORPORATION  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

**FILED**

OCT 25 2012

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

OCT 25 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/24/12

  
\_\_\_\_\_  
HON. EILEEN A. RAKOWER 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

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

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

MARTIN SCHWARTZ and TIBBIE SCHWARTZ,

Plaintiffs,

- v -

INDEX NO. 102295-2012

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001, 002

MOTION CAL. NO. \_\_\_\_\_

KATZ 737 CORPORATION and 737 PARK AVENUE ACQUISITION LLC,

Defendants.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answer — Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**

OCT 25 2012

**NEW YORK COUNTY CLERK'S OFFICE**

PAPERS NUMBERED

1, 2, 3, 4, 5

6, 7

8, 9, 10

Cross-Motion: Yes  No

Martin Schwartz, a 97 year old man, and his wife Tibbie, who is 93 years old and suffers from dementia ("Plaintiffs"), bring this action alleging that they were fraudulently induced by their landlord, Katz 737 Corporation ("Prior Landlord"), to vacate and surrender their rent-regulated apartment, located at 737 Park Avenue, New York ("the building"), for a smaller but less expensive, non-regulated apartment in the building after living there since 1954. Up until 2011, the building was owned by Katz 737, and in August 2011, Katz 737 sold the Building to 737 Park Avenue Acquisition LLC ("Current Landlord").

Plaintiffs lived at 737 Park Avenue, New York, New York, Apartment 7E, for many decades in a "rent controlled" apartment. In 2002, Plaintiffs moved to Apartment 11E, which was not rent regulated. Martin Schwartz asserts that he

signed a new five-year lease for apartment 11E, at or about November 19, 2002. Plaintiffs allege that "in connection with said agreement, the Prior Landlord expressly represented to them that Apartment 11E was and is a rent regulated apartment."

Plaintiffs seek damages from the Prior Landlord for fraud, and allege that the Current Landlord must restore them to their prior apartment or 'reform' the most recent lease agreement for their new apartment, to provide that they can remain in their apartment on a rent-regulated basis. Both Defendants move for Orders dismissing the Complaint in its entirety pursuant to CPLR §3211(a)(1) and (7).

The 2002 lease presumably expired in 2007, and Schwartz recalls signing new leases. The Prior Landlord attaches two leases dated August 15, 2007 and October 19, 2009, which state in bold and capital lettering that the apartment is not subject to the rent stabilization laws. Both leases are multiple page documents, and the last page of each is signed by Martin Schwartz and Daniel Wollen, the CEO for the managing agent for the Prior Landlord.

A dismissal based upon documentary evidence must be denied unless the documentary evidence conclusively resolves all factual issues, utterly and completely refutes all of Plaintiff's factual allegations, and leaves absolutely no question as to Defendant's entitlement to judgment as a matter of law, with any remaining factual questions whatsoever requiring denial of the motion. (*Goshen v. Mutual Life Ins. Co. Of NY*, 98 NY2d 314, 746 NYS2d 858 [2002]). It is well-settled law that affidavits or affirmations not based upon personal knowledge are of no evidentiary value and must be disregarded by the Court. (*GTF Marketing, Inc. v. Colonial Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786 [1985]).

Here, the Prior Landlord's motion does not authenticate the 2007 or 2009 leases they provide, as they are only supported by an attorney affirmation, and not by anyone with personal knowledge of them. The affidavit of Daniel Wollman, the signatory and CEO of Gumley Haft, Inc., the managing agent for the Prior Landlord, is not submitted in the initial motion. Instead, it is submitted with the Prior Landlord's reply papers. The law is settled that a party may not cure a

deficiency in its moving papers by furnishing the missing item(s) on reply and any attempt to do so must be rejected. (*Rozina v. Casa 74<sup>th</sup> Development LLC*, 89 AD3d 508, 932 NYS2d 463 [1<sup>st</sup> Dept 2011]).

Furthermore, Mr. Schwartz's affidavit provides that as to both the 2007 and 2009 leases, he does not believe that Defendants have provided a complete and accurate copy of the leases that he signed. He states that he would not have knowingly signed a lease containing the statement on the first page that the apartment was not subject to rent regulation. As neither lease was properly authenticated and Mr. Schwartz provides affidavit testimony that he does not believe these to be the true and accurate leases that he signed, the leases are not sufficient documentary evidence to rebut Plaintiff's causes of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

With regard to whether the claims were timely, the statute of limitations for a fraud claim is the later of six years from accrual of the claim or two years from the plaintiff's actual or imputed discovery. The complaint indicates that "in 2012, plaintiffs discovered for the first time that the former landlord's representation that apartment 11E was a rent regulated apartment treated as such by the landlord was not true, and that apartment 11E is purported to have been deregulated." Plaintiff's

fraud claim is therefore, not time-barred.

Moreover, the applicable statute of limitations for a declaratory judgment cause of action is dependent upon the substance of the underlying claims and nature of the relief sought. (*See, Backman v. Israel Bio-Engineering Project, LP*, 2008 NY Slip Op. 33020 (U)[Sup. Ct. N.Y. Co. 2008]). Since the underlying nature of the claim and the declaratory judgment cause of action arises out of the Prior Landlord's allegedly fraudulent conduct, the statute of limitation for fraud applies and is therefore, timely, as indicated above.

Additionally, to state a claim for unjust enrichment, one must allege that the defendant was enriched at the plaintiff's expense, and that it is against equity and good conscience to permit the defendant to retain what the plaintiff seeks to recover. (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY2d 173 [2011]). The facts as alleged are sufficient to support such a claim at this juncture.

Wherefore, it is hereby,

ORDERED that Defendants Katz 737 Corporation and 737 Park Avenue Acquisitions motion to dismiss is denied in its entirety without prejudice and preserving the statute of limitations defense.

This constitutes the decision and order of the court. All other relief requested is denied.

**Dated:** October 23, 2012

**FILED**  
OCT 25 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

**HON. EILEEN A. RAKOWER**

Check one:       FINAL DISPOSITION       NON-FINAL DISPOSITION  
Check if appropriate:       DO NOT POST       REFERENCE