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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD F. BRAUN J.S.C. Justice

PART 23

TENNANT, CHRISTOPHER et al.
-v-
MANHATTAN SKYLINE MGMT CORP., et al.

INDEX NO. 116372/08
MOTION DATE 9/27/12
MOTION SEQ. NO. 003
(FORMERLY 004)

The following papers, numbered 1 to ____, were read on this motion to/for STRIKE AFFIRMATIVE DEFENSES AND FOR SUMMARY JUDGMENT

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1, 1A

Answering Affidavits — Exhibits No(s). 2

Replying Affidavits No(s). 4

Upon the foregoing papers, it is ordered that this motion is granted to the extent of striking defendant anne Rogers Mitchell's second, third, fourth, fifth, sixth, and seventh affirmative defenses, and awarding plaintiffs summary judgment as to liability on their second cause of action, and upon a search of the deed defendant anne Rogers Mitchell is awarded the same declaration as afforded to the other defendants, this constitutes the decision and order of this Court.

See separate Opinion.

FILED
OCT 26 2012
COUNTY CLERK'S OFFICE
NEW YORK

Dated: New York, New York, October 19, 2012

ENTER: _____, J.S.C.

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

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 23

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CHRISTOPHER TENNANT and ZOE TURNBULL — Index No. 116372/08

Plaintiffs,

OPINION

-against-

MANHATTAN SKYLINE MANAGEMENT CORPORATION, 450 VILLAGE COMPANY, L.P., 450 VILLAGE COMPANY, LLC, and ANNE ROGERS MITCHELL

Defendant.

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RICHARD F. BRAUN, J.:

This is an action for a declaratory judgment that plaintiffs are the lawful rent stabilized tenants of the subject premises and that defendant Anne Rogers Mitchell (Mitchell) is an illusory prime tenant; for money damages for overcharged rent by Mitchell; and for legal fees. Plaintiffs moved, pursuant to CPLR 3211, to strike Mitchell's first through eighth affirmative defenses and most of the affirmative defenses of co-defendants Manhattan Skyline Management Corporation, 450 Village Company, L.P., and 450 Village Company, LLC (the co-defendants), and, pursuant to CPLR 3212, for summary judgment. The co-defendants cross moved for summary judgment dismissing the complaint, or alternatively, a denial of the motion (such a cross motion is always unnecessary [*see Sullivan v 40 West 53rd Partnership*, NYLJ, Oct. 16, 2000, at 27, col 2 (Sup Ct, NY County 2000)]) and leave to amend their answer.

By this court's November 23, 2010 decision and order, plaintiffs' prior motion was granted on default as against Mitchell to the extent of striking Mitchell's second, third, fourth, fifth, sixth, seventh and eighth affirmative defenses, and awarding plaintiffs' summary judgment as to liability on the third cause of action against Mitchell. This court also granted the cross motion of the co-defendants to the extent of granting those defendants summary judgment. This court declared that

plaintiffs' tenancy is not an illusory prime tenancy and that plaintiffs are not the lawful rent stabilized tenants of the subject premises. The November 23, 2010 order was appealed by plaintiffs and affirmed in *Tennant v Manhattan Skyline Mgt. Corp.* (85 AD3d 557 [1st Dept 2011]). Mitchell moved to vacate and set aside her default in appearing for oral argument and the resultant November 23, 2010 decision and order. By this court's June 6, 2012 decision and order, Mitchell's motion was granted to the extent of vacating the November 23, 2010 decision and order as to Mitchell. By stipulation, dated September 27, 2012, the parties agreed that the papers on the motion that are related to the co-defendants are now moot.

Plaintiffs sublet Mitchell's rent stabilized apartment. Plaintiffs allege that they were overcharged by Mitchell. Plaintiffs claim that, because Mitchell willfully charged them rent above the rent stabilized rent, they are entitled to treble damages.

The Court in *Krantz v Garmise* (13 AD2d 426, 429 [1st Dept 1961]) set forth the standard to be applied in relation to striking affirmative defenses:

> The matter set out in the answer as an affirmative defense should be weighed in the light of the allegations of the complaint. The truth of the allegation is assumed, and the pleading liberally construed. If there is any doubt as to the availability and applicability of the defense or a mere belief that the proof might fall short of the defense, it should not be stricken. (citations omitted.)

This court did not strike Mitchell's first affirmative defense for failure to state a cause of action, which is mere surplusage (*Tache-Haddad Enters. v Melohn*, 224 AD2d 213, 214 [1st Dept 1996]; *Riland v Todman & Co.*, 56 AD2d 350, 352 [1st Dept 1977]) and may only be dismissed if all the affirmative defenses are found to be legally insufficient (*see Raine v Allied Artists Prods.*, 63 AD2d 914, 915 [1st Dept 1978]). In this action, the court did not strike her eighth affirmative defense, and plaintiff did not move with respect to her ninth affirmative defense.

This court struck Mitchell's second affirmative defense of failure to name a necessary party and her third affirmative defense of lack of standing. Mitchell does not provide any opposition to the striking of these affirmative defenses.

In order for the doctrine of unclean hands to apply, Mitchell would have to show that plaintiffs are guilty of immoral and unconscionable conduct (*National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15 [1966]). Mitchell would also have to demonstrate that plaintiffs' conduct relied on by Mitchell is directly related to the subject matter in litigation, and that Mitchell was injured by plaintiffs' conduct (*id.* at 15-16; *Citibank, N.A. v American Banana Co., Inc.*, 50 AD3d 593, 594 [1st Dept 2008]; *Frymer v Bell,* 99 AD2d 91, 96 [1st Dept 1984]). There are no factual allegations that would make the doctrine of unclean hands applicable. Accordingly, the court struck her fourth affirmative defense.

As unjust enrichment is a claim, a theory of recovery, rather than a defense (*see Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011]), this court struck her fifth affirmative defense. In any event, there are no factual allegations that plaintiffs were unjustly enriched.

Plaintiffs could not waive their rights to the protection of the Rent Stabilization Law (*see Matter of Jo-Fra Props., Inc.*, 27 AD3d 298, 299 [1st Dept 2006]). "[C]overage under a rent regulatory scheme is governed by statute and may not be created or destroyed by laches, waiver and estoppel (*id.*; *see Ruiz v Chwatt Assoc.*, 247 AD2d 308 [1st Dept 1998]). There are no factual allegations that plaintiffs knowingly waived a known right (*see Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]). Therefore, this court struck the doctrine of waiver in her sixth affirmative defense, as it did the doctrine of estoppel.

This court also struck her seventh affirmative defense invoking the doctrine of laches. The

Court in *Matter of Barabash* (31 NY2d 76, 81 [1972]), explained: "Laches is defined as 'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.' The essential element of this equitable defense is delay prejudicial to the opposing party." (citations omitted.) There are no factual allegations that there was a change in circumstances that would make it inequitable to grant the relief sought by plaintiffs. Prejudice may be established by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 816 [2003]). A conclusory allegation of prejudice is inadequate (*Macon v Arnlie Realty Co.*, 207 AD2d 268, 271 [1st Dept 1994]). Mitchell has not demonstrated prejudice (*see Amsterdam Sav. Bank v City View Mgt. Corp.*, 45 NY2d 854, 855-856 [1978]).

This court did not strike her eighth affirmative defense based on the statute of limitations. Mitchell claims the statute of limitations as an affirmative defense, noting that CPLR 213-a provides for a four year statute of limitations for rent overcharges (*see Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149 [2002]; *Matter of Nur Ashki Jerrahi Community v New York City Loft Bd.*, 80 AD3d 323, 329 [1st Dept 2010]). To the extent that Mitchell can show that plaintiffs' complaint alleges overcharges beyond the four year statute of limitations, Mitchell has a valid affirmative defense.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st Dept 2011]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]; *Zuckerman*

v City of New York, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]).

A tenant may charge a subtenant ten percent above the legal rent where the apartment is furnished (*BLF Realty Holding Corp. v Kasher*, 299 AD2d 87, 90-91 [1st Dept 2002]). Plaintiffs have demonstrated that Mitchell charged them a rent more than ten percent above the legal rent (Rent Stabilization Code §2526.1). Thus, plaintiffs are entitled to summary judgment as to liability on their second cause of action. There are questions of fact as to the sum that plaintiffs were overcharged.

Plaintiffs have not made a prima facie showing of entitlement to legal fees. Plaintiffs have not shown a contract, statute, or rule that would entitle them to collect attorney's fees (*see Chapel v Mitchell*, 84 NY2d 345, 348-349 [1994]; *Campbell v Citibank*, 302 AD2d 150, 154 [1st Dept 2003]).

Thus, by separate October 19, 2012 decision and order, plaintiffs' motion was granted to the extent of striking Mitchell's second, third, fourth, fifth, sixth, and seventh affirmative defenses, and awarding plaintiffs summary judgment as to liability against Mitchell on plaintiffs' second cause of action. Upon a search of the record, Mitchell was awarded the same declaration as afforded the other defendants.

Dated: New York, New York
October 23, 2012

RICHARD F. BRAUN, J.S.C.