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

**PRESENT:** **HON.** JOAN A. MADDEN **PART** 11
*Justice*

Soledad Dominguez

**Plaintiffs,**

- v -

Ilan Zinner

**Defendants.**

INDEX NO. : 116709/06

MOTION DATE:

MOTION SEQ. NO. 10

MOTION CAL. NO.

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

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: [ ] Yes [X] No

**Upon the foregoing papers, it is ordered that** this motion is decided in accordance with the annexed memorandum Decision and order.

FILED
NOV 06 2009
NEW YORK
COUNTY CLERK'S OFFICE

**Dated:** October 29, 2009

J.S.C.

**Check one:** [ ] **FINAL DISPOSITION** [X] **NON-FINAL DISPOSITION**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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SOLEDAD DOMINGUEZ, LUGENE KEYS, IRENE TERRELL, MARCELINA CASTILLO, LEROY JONES, DELROY JONES, CLAUDIA MCEACHIAN, CESARIODE LOS SANTOS, IRENE FALCON, MARGARITO TONY VEGA, GLADIS VEGA, GEORGE MADISON, JOSE A. RAMOS, LAVERNE JOSEPH, JOSE ALVAREZ, JOSE E. RAMOS, LOIUSE MCCLEMME, GILDARDO GARCIA, ELSIA VASQUEZ, LUCIA AYALA, ALTAGRACIA QUESADA, GERNIMOSANTANA, CORA GORDON, JOSELUIS GARCIA, MARIA DELGADO, ROSA DE LOS SANTOS, MIKHAIL MAMEDOV, MARIA GONZALEZ, ALVARO GONZALEZ, SCOTT PATERSON, KENNY BENTLY, ANA RAMOS, VIRGINIA (LUISA) AGUIRRE, LEONOR LEIVA, PAULETTE BURTON, ALEJO BENITO SUAREZ, MANUEL JUAREZ, FLOR OLMEDO, MILLOR PENZO, HENRY KOFFA, ROMEO RAMOS, JOSE ROSA SARAVIA, GODOFREDO RAMOS, MARGARITA A LA TORRE, ANA OLMEDO, MELVIN ALAS, NATASHA ROBERTS, MAMADOU CAMARA, LANISE HERMAN, DENISE HERMAN, PATRICK HAGGREN, THOMAS REIVINGE, JOHNSON, REBECCA BOSSELAIT, PAMELA BOSSELAIT, PHILORA GHARIB and NAKIA L. BRUSTER,

INDEX NO: 116709/06

Plaintiffs,

- against -

ILAN ZINNAR, ISAAC NESHALAM, ROYAL ESTATE, 412 EAST 9TH STREET REALTY CORP., 225 W. 146 ST REALTY LLC, LKH ASSETS LLC, and AI HOLDINGS LLC,

Defendants,

CHASE GROUP ALLIANCE LLC., VINTAGE VENTURES LLC. and ESQUIRE GROUP ESTATES LLC.,

Defendants-Intervenors.

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JOAN A. MADDEN, J.:

In this latest round of motion practice, plaintiffs move for an order pursuant

CPLR 3025 (b) granting leave to amend their complaint to add three new causes of action.[1] Defendants Ilan Zinnar, Isaac Neshalam, Royal Estate, 412 East 9th Street Realty Corp., 225 W. 146 St Realty LLC, LKH Assets LLC, and AI Holdings LLC (collectively, "prior owners"), and defendants-intervenors Chase Group Alliance LLC., Vintage Ventures LLC. and Esquire Group Estates LLC. (collectively, "intervenors" or "new owners") oppose the motion.

Plaintiffs assert that they are or have been rent-stabilized tenants of residential buildings located at 225 West 146th Street, New York, New York (225), 235 West 146th Street, New York, New York (235), and 301 West 141st Street, New York, New York (301) (collectively, the "subject buildings"). Plaintiffs seek to amend their complaint to add causes of action for breach of the warranty of habitability (proposed third cause of action), fraudulent conveyance (proposed sixth cause of action), and attorneys' fees in connection with bankruptcy proceedings filed by defendants AI Holdings LLC and LKH Assets LLC.[2]

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[1]The portion of plaintiffs' motion for a default judgment against defendants was denied by this court on the record. Plaintiffs sought a default judgment, premised on defendants' purported failure to serve a timely answer to the amended complaint or, alternatively, to timely reject that complaint. Defendants argued that they timely rejected the amended complaint, and that it should be deemed a nullity, since plaintiffs failed to obtain leave of court prior to serving defendants with an amended complaint. Plaintiffs argued that they were not required to seek leave of court because their time to serve an amended complaint as of right, pursuant to CPLR 3025 (a), had not expired.

[2]By leave of court and on defendants' consent, plaintiffs have withdrawn their request to add the proposed second cause of action for an order directing intervenors to turn over to the 7-A Administrator any funds "set aside by Intervenors in any client trust or escrow account for the purposes of performing maintenance repairs or improvements to the Subject Buildings"; the portion of their proposed seventh cause of action for attorneys' fees arising from the HP, Article 7-A, and non-payment proceedings in Civil Court; and the proposed eighth cause of action for usury.

Leave to amend and supplement pleadings should be freely granted at any time absent surprise or prejudice to defendants, unless the proposed amendment is devoid of merit or palpably insufficient, as a matter of law. *See* CPLR 3025(b); *Thompson v. Cooper*, 24 AD3d 203 (1st Dept 2005); *Zaid Theatre Corp. v. Sona Realty Co.*, 18 AD3d 352 (1st Dept 2005). A plaintiff seeking to amend the complaint must demonstrate the merit of the proposed amendment by alleging legally sufficient facts to establish a prima facie cause of action. *See Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 (1st Dept 1989). "If the facts alleged are incongruent with the legal theory relied on by the proponent the proposed amendment must fail as matter of law." *Id.* Once plaintiff establishes the merit of the proposed amendment, defendant "must overcome a presumption of validity in favor of the moving party, and demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are insufficient." *Id.*

Breach of the Warranty of Habitability

In support of the breach of warranty of habitability cause of action, the proposed amended complaint alleges that prior to the commencement of this action, plaintiffs commenced HP and Article 7-A proceedings against 225, 235 and 301 in Civil Court. Plaintiffs allege that in the 7-A proceeding, the Civil Court determined there were conditions hazardous to plaintiffs' life, health and safety, and appointed a 7-A administrator. Plaintiffs also allege that HPD inspected the subject buildings and issued "numerous violations for conditions needing repairs." Plaintiffs further allege that the pleadings in both the HP and 7-A proceedings contain allegations of the same

conditions, the prior owners had actual or constructive notice or knowledge of the conditions, and that at or about the time the HP and 7-A proceedings were commenced and before the new owners purchased the subject buildings, plaintiffs filed notices of pendancy for each building. The proposed amended complaint alleges that defendants "failed to provide necessary repairs and services to plaintiffs' respective apartments," which "caused" a breach of the warranty of habitability.

In opposing the breach of the warranty of habitability claim, defendants argue that plaintiffs fail to identify the specific conditions or time periods during which each of the conditions was present, the current state of each condition, and the specific conditions purportedly suffered by each plaintiff in his or her respective apartment, or the common areas of the subject buildings. Defendants also argue that the doctrine of res judicata precludes plaintiffs from asserting any claim for breach of the warranty of habitability, since the identical alleged conditions served as the factual basis for both the HP and 7-A proceedings.[3]

"Typically, principles of res judicata require that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.'" *Chen v. Fischer*, 6 NY2d 94, 98 (2005) (quoting *O'Brien v. City of Syracuse,* 54 NY2d

[3]While defendants note that plaintiffs asserted counterclaims for breach of warranty of habitability in their answers in the non-payment proceedings brought by the prior owners in Civil Court, defendants acknowledge that those proceedings were ultimately discontinued without prejudice by stipulation of the parties. A discontinuance without prejudice is not a disposition on the merits, and does not bar the institution of a second action. CPLR 3217(c); Siegel, NY Practice §298.

353, 357 [1981]). "The primary purposes of res judicata are ground in public policy concerns and are intended to ensure finality, prevent vexatious litigation and promote judicial economy." *Id.* The Court of Appeals emphasizes, however, that "unfairness may result if the doctrine is applied too harshly; thus '[i]n properly seeking to deny a litigant two days in court, courts mut be careful not to deprive [the litigant] of one.'" *Id* (quoting *Reilly v. Reid*, 45 NY2d 24, 28 [1978]). Since it is often difficult to determine whether particular claims are part of the same transaction for the purposes of res judicata, the Court of Appeals applies a "pragmatic test," which analyzes "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Chen v. Fisher*, *supra* (citing Restatement [Second] of Judgments §24 [2]).

Applying these principles, it is clear that neither an HP nor a 7-A proceeding is convenient trial unit with a plenary action asserting claims for breach of the warranty of habitability. The purposes behind those proceedings and the plenary action are quite different, as HP and 7-A proceedings are derivative in nature in terms of the role played by a tenant, as opposed to a plenary action where tenants assert direct claims on their own behalf for damages. See *Shapiro v. Townan Realty Co.*, 162 Misc2d 630, 634 (Civ Ct, NY Co (1994); *Amsterdam, v Goldstick*, 136 Misc2d 831 (Civ Ct, NY Co, 1987); *Lawrence v. Martin*, 131 Misc2d 256 (Civ Ct, NY Co 1986).

An HP, or "Housing Part" proceeding is brought by a tenant or the Department of Housing Preservation and Development ("HPD"), in the Housing Part of the Civil Court,

for the limited purpose of enforcing provisions of the Multiple Dwelling Law, the Building and Health Codes and the Housing Maintenance Code, to correct violations or conditions. *See D'Agostino v Forty-Three East Equities Corp.*,12 Misc3d 486, 488-490 (Civ Ct, NY Co 2006), aff'd 16 Misc3d 59 (App Term, 1st Dept 2007). The court issues an order requiring the landlord to correct outstanding violations, and while the court may also assess penalties against the landlord, those penalties are payable only to HPD, even where a tenant initiates the proceeding. *See Amsterdam v Goldstick, supra.*

Similarly, a RPAPL Article 7-A proceeding is designed to protect tenants from conditions that are dangerous to life, heath and safety. *See* RPAPL §770(1); *Wall Street Transcript Corp. v Finch Apartment Corp.,* 148 Misc2d 181 (Civ Ct, NY Co, 1990). A 7-A proceeding is commenced by HPD or at least one-third of the tenants in the building, for the appointment of an administrator to take over the operation of a building, including collecting rent from the tenants, performing necessary maintenance and repairs, and removing dangerous conditions. *See Department of Housing Preservation & Development v. Mill River Realty,* 169 AD2d 665 (1st Dept 1991); *Wall Street Transcript Corp. v Finch Apartment Corp., supra; Lawrence v. Martin, supra.*

Therefore, HP and 7-A proceedings, and plaintiffs' claim for damages for breach of the warranty of habitability, seek different types of relief, and involve, in part, different types of proof and different types of parties. Although the HP and 7-A proceedings involve the same conduct and conditions underlying a claim for breach of the warranty of habitability, as those proceedings are derivative in nature, whose central objections are to correct conditions to remove violations with penalties payable only to HPD, it

cannot be said that the parties expectations were such that a claim for breach of the warranty of habitability would necessarily have to be joined. Significantly, the parties to and the remedies available in 7-A and HP proceedings, are substantively different from a tenant asserting a claim or defense based on breach of the warranty of habitability, where the tenant is directly seeking a rent abatement or money damages. Moreover, HP and 7-A proceedings are decided by a judge, but a claim for money damages is usually tried by a jury. Defendants' reliance on *Thenebe v Ansonia Assocs*, NYLJ, June 27, 1994, p. 28, col. 2 (App Term 1st Dept), *affd* 226 AD2d 211 (1st Dept), lv app dism 89 NY2d 858 (1996), is misplaced. In that case, the Civil Court simply consolidated non-payment proceedings, in which the tenants had interposed breach of warranty of habitability defenses, together with a 7-A proceeding.

Under these circumstances, plaintiffs' claim for breach of the warranty of habitability is not barred by doctrine of res judicata. [4]

The court agrees, however, that the proposed amended complaint lacks factual detail as to the specific conditions in the individual apartments, which allegedly constitute a breach of the warranty of habitability. Although more than fifty individual tenants are named as plaintiffs in this action, the proposed amended complaint merely refers to them collectively as "plaintiffs," and alleges that "[d]efendants failed to provide necessary repairs and services to Plaintiffs' respective apartments and the Subject

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[4]At oral argument, defendants objected that if the breach of warranty of habitability cause of action were permitted to proceed, inconsistent results might result. Even assuming without deciding that the factual bases for the determination of the 7-A or HP proceedings, and plaintiffs' claim for breach of the warranty, are similar, that reason alone is insufficient to support the application of the res judicata doctrine.

Premises." In opposing the motion, the intervenors submit the petition in the 7-A proceeding, which lists both the alleged conditions and the affected tenants through October 2006, and the trial decision of the Hon. Pam Jackson Brown, Civil Court, New York County, dated November 9, 2007, in the consolidated 7-A and HP proceedings, which includes a detailed description of the conditions. While these exhibits provide sufficient factual support to establish the merits of plaintiffs' breach of the warranty of habitability claim, the proposed amended complaint must include factual allegations identifying each individual tenant's apartment and the conditions in each apartment on which each tenant's breach of warranty claim is based. The complaint should also identify which conditions, if any, are building wide, and the specific building.

Plaintiffs' motion to amend, therefore, is granted to the extent of permitting the proposed third cause of action for breach of the warranty of habitability, but on condition that plaintiffs serve and file a new amended complaint which includes the factual allegations described above.[5]

Fraudulent Conveyance

In support of the fraudulent conveyance cause of action, the proposed amended complaint alleges that as a result of the Civil Court proceedings, a majority of plaintiffs obtained a judgment for $50,000 against LKH Assets LLC and AI Holdings LLC, which was dated February 26, 2008 and filed with the County Clerk on April 8, 2008. Plaintiffs also allege that when the new owners took title of the subject buildings they were aware of the $50,000 judgment, and that the deeds for the subject buildings, dated March 26,

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[5]This determination does not preclude plaintiffs from supplementing the complaint in a bill of particulars.

2008, were filed with the New York County Register on or about April 8, 2008. Based on the timing of those events, plaintiffs allege that the conveyance of the subject buildings to the new owners was undertaken, in whole or part, to avoid payment of plaintiffs' $50,000 judgment. Plaintiffs further allege that the filings in the Civil Court show that the new owners, as LLC's, "have other LLC's as their members (second tier owners) and a group of individual owners own the second tier owners," and that the records of the New York State Department of State show "some or all of the second tier owners were not formed as of the purported transfer date, as recited in the deeds." Plaintiffs allege that the deeds were dated in a manner so as to avoid the lien for the judgment, the sale was structured in a manner so as to avoid payment of plaintiffs' judgment, and the funds used to purchase the building "were paid at the direction of Defendants in such manner as to defraud Plaintiffs and others to whom Defendants owed obligations." Specifically, plaintiffs allege that defendants transferred funds "to persons or entities controlled or nominated by Defendant Zinnar for no consideration or insufficient consideration, so as to defraud Plaintiffs and other creditors," the new owners "knew of and participated in the scheme" to defraud creditors, and the new owners paid the funds to purchase the buildings "to entities other than LKH and AI holdings, with knowledge and/or intention that said funds would be concealed from judgment creditors of said Defendants."

In opposing the fraudulent conveyance cause of action, defendants argue that plaintiffs fail to plead the necessary element that the sale of the buildings rendered the prior owners insolvent, or that at the time of the sale, the prior owners were inadequately capitalized. Defendants' argument is without merit.

A plaintiff seeking to set a set aside a fraudulent conveyance under Debtor and Creditor Law § 276, on the grounds that the transaction was made with actual intent to defraud, is not required to demonstrate insolvency or undercapitalization. *See Ford v Martino*, 281 AD2d 587 (2nd Dept 2001); *Wall Street Associates v Brodsky*, 257 AD2d 526 (1st Dept 1999). Likewise, insolvency and undercapitalization are not necessary elements of a fraudulent conveyance claim under Debtor and Creditor Law § 273-a, which requires a plaintiff to establish that: 1) the transfer in question was made without fair consideration; 2) at the time of the transfer, the transferor was a defendant in an action for money damages or a judgment had been docketed against the transferor; and 3) a final judgment has been rendered against the transferor which remains unsatisfied. See *Mega Personal Lines, Inc. v. Halton,* 9 AD3d 553 (3rd Dept 2004).

While defendants further object that some of plaintiffs' factual allegations are premised on "information and belief" rather than on personal knowledge, the allegations are adequate to permit amendment, as the "rule requiring particularity of pleadings in cases of fraud "is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud.'" *Lanzi v Brooks,* 43 NY2d 778 (1987) (quoting *Jered Contracting Corp. v. New York City Transit Authority,* 22 NY2d 187 [1968]); *see also UBS Real Estate Securities Inc. v. Fairmont Funding*, 19 Misc3d 1123(A) (Sup Ct NY Co. 2008)(cause of action under Debtor and Creditor Law §276 pleaded upon information and belief was not subject to dismissal when parties had not conducted discovery and facts were in the exclusive knowledge of defendant).

Thus, plaintiffs will be permitted to amend the complaint to assert a fraudulent conveyance claim based on Debtor and Creditor Law §§ 273-a and 276.

Attorneys' Fees

Plaintiffs motion to amend is denied as to the proposed seventh cause of action for attorneys' fees incurred in connection with the bankruptcy proceeding filed by defendants AI Holdings LLC and LKH Assets LLC.[6] Plaintiffs fail to establish that they have either a statutory or contractual right to attorneys' fees. Ordinarily, in landlord-tenant litigation, attorneys' fees may be awarded to the prevailing party, based on a provision in the parties' lease which gives the landlord a contractual right to attorneys' fees, and Real Property Law §234, which creates a reciprocal statutory right on the part of the tenant to recover attorneys' fees. *See Duell v Condon,* 84 NY2d 773, 780 (1995). Plaintiffs, however, do not submit a copy of any lease. Notably, in the 7-A proceeding, the Civil Court denied plaintiffs' application for attorneys' fees after successfully defending a motion to remove the 7-A administrator, based on plaintiffs' failure to include with their motion papers copies of the relevant lease provisions.

Thus, the motion to amend is denied as to the proposed seventh cause of action, without prejudice to renewal upon sufficient proof.

Accordingly, it is hereby

ORDERED that plaintiffs' motion to amend the complaint is granted only to the extent of the proposed third cause of action for breach of warranty of habitability and

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[6]As noted above, plaintiffs have withdrawn the portion of their proposed seventh cause of action for attorneys' fees incurred in connection with the HP and 7-A proceedings, and the non-payments proceedings in Civil Court.

the proposed sixth cause of action for fraudulent conveyance; and it is further

ORDERED that the motion to amend the complaint is denied without prejudice as to the proposed seventh cause of action for attorneys' fees,

ORDERED that within 20 days of the date of this decision and order, plaintiff shall serve and file a amended complaint that complies with the above determination, including withdrawing those portions of the proposed amended complaint that this Court has permitted to be withdrawn, specifying that the sixth cause of action seeks relief under Debtor and Creditor Law §§ 273-a and 276 only, and providing the factual allegations described above in support of the cause of action for breach of the warranty of habitability; and it is further

ORDERED that within 20 days of receipt of the amended complaint, defendants shall serve and file answers to the amended complaint; and it is further

ORDERED that the parties shall appear for a status conference in Part 11, 60 Centre Street, Room 351, on November 19, 2009 at 10:00 a.m.

The court is notifying the parties by mailing copies of this decision and order.

Dated: October 29 2009



ENTER:

J.S.C.