[* 1]

Lee v 2075-2081 Wallace Avenue Owners Corp (April 23, 2012)

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART Justice — IA Part 18

EDMINA C. LEE, x

Plaintiff,

-against-

2075-2081 WALLACE AVENUE OWNERS CORP.,

Defendants.

x

Index Number 12460 2008

Motion Date January 25, 2012

Motion Cal. Numbers 19 and 20

Motion Seq. Nos. 3 and 4

The following papers numbered 1 to 15 read on this motion by self-represented plaintiff Edmina C. Lee for an order granting summary judgment in her favor. Defendant 2075-2081 Wallace Avenue Owners Corp. cross-moves for an order dismissing the complaint pursuant to CPLR 3211(a)(1)(5)(7) and (10), and in the alternative granting summary judgment dismissing the complaint in its entirety. The New York State Division of Housing and Community Renewal (DHCR) separately moves for an order quashing that portion of a subpoena dated December 15, 2011 requiring expert testimony on the part of its employees.

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Upon the foregoing papers these motions and the cross motion are consolidated for the purposes of a single decision and are determined as follows:

The Pleadings:

Plaintiff Edmina C. Lee, a resident of Queens County, commenced this action on May 19, 2008, and alleges in her verified complaint that the defendant 2075-2081 Wallace Avenue Owners Corp., (Wallace Avenue Owners) is located at 2075-2081 Wallace Avenue, Bronx, New York and that its managing agent is Metro Management Development (Metro), located at 42-25 21st Street, Long Island City, New York.

Plaintiff, in her first cause of action, alleges that she is the owner of 184 shares of stock, represented by Unit 275, a rent controlled apartment, in the cooperative apartment complex located at 2075-2081 Wallace Avenue, Bronx, New York; that the New York State Division of Housing and Community Renewal (DHCR) requires that applications for increases in the Maximum Base Rent (MBR) for rent controlled apartments be filed by the managing agent or its representatives, and prohibits individual owners of cooperative or condominium apartments from filing for such rent increases; that plaintiff's request for a hardship exemption from this rule was denied by the DHCR. Plaintiff alleges that she has exhausted all efforts to have the cooperative's Board of Directors or its managing agent to file MBR applications, so that she might obtain a rent increase for Unit 275, and that the required applications were either not filed or were not perfected and were denied on the grounds of "failure to meet violation criteria" in 1998-1999, 2000-2001 and 2002-2003. Plaintiff alleges that defendant failed to file an MBR application for 2004-2005, and that defendant failed to timely file an MBR application for the periods of 2006-2007 and 2007-2008.

Plaintiff, in her second cause of action, alleges that in a letter dated December 24, 2007 and delivered on December 26, 2007, she informed the cooperative's Board of Directors and its president Gertrude Tejado that if they did not settle the matter within 30 days of receipt of the letter she would commence legal action. She alleges that Ms. Tejado in a telephone conversation on January 24, 2007, denied receiving said letter but did not deny that the cooperative was obligated to file the MBR applications.

Plaintiff in her wherefore clause seeks to recover "damages in a sum equal to the aggregate rent increases that would have been granted had the defendants-cooperative

fulfilled the obligation to file MBR applications and met the violation criteria for the overall building complex as set forth by DHCR for the years 1998 through 2008, together with interest, costs and disbursements" and an injunction directing "defendants to file future timely MBR applications and meet building-wide violation criteria; or make maintenance fee adjustments comparable to DHCR's scheduled rent control increase."

Defendant Wallace Avenue Owners in its answer interposed the following eight affirmative defenses: failure to state a cause of action; lack of jurisdiction based upon the failure to allege damages in an amount in excess of the jurisdictional limit of all lower courts; failure to mitigate damages; contributory negligence, breach of contract, or culpable conduct on the part of the plaintiff and not the defendant; a defense based on documentary evidence; statute of frauds; statute of limitations; and that if plaintiff sustained the injuries alleged in the complaint, they were caused by other parties over whom the answering defendants were obligated to exercise supervision and control.

Plaintiff served a "Response to Answer," dated July 28, 2008, in which she set forth additional information pertaining to her efforts to compel the cooperative's Board of Directors and managing agent to file the MBR applications, and responded to the defendant's affirmative defenses. Plaintiff also served a response to the defendant's first set of interrogatories, dated July 29, 2008. In response to a demand for expert witness disclosure, plaintiff stated that her witnesses would take the form of official documents published by the DHCR, plus other written materials, including DHCR forms and instructions pertaining to MBR applications, DHCR orders denying MBR increases issued in 1999, 2001, 2003 and 2007, and other documents from a notice from the DHCR dated February 16, 2001.

Proceedings Before the Court and the Judicial Subpoena:

Plaintiff was deposed on February 24, 2011. The Hon. Martin E. Ritholtz, in an order dated June 24, 2011, and pursuant to a so-ordered stipulation dated June 24, 2011, vacated the order dated March 2, 2011 dismissing the action pursuant to CPLR 3216, and further ordered that the action be restored to pre-note status and directed the plaintiff to file a note of issue no later than July 29, 2011, and stated that the CPLR 3216 demand in the Compliance Conference Order shall remain in effect.

Plaintiff filed her note of issue on July 29, 2011, and thereafter served the within motion for summary judgment, which she filed with the court on September 16, 2011. Defendant served its cross motion to dismiss the complaint on September 29, 2011. Prior to these motions being fully submitted to the court, defendant obtained a judicial subpoena, dated December 20, 2011, directing Mr. Gurdeep Ahlualia, an employee of the DHCR to appear and give testimony and evidence as a non-party witness at the oral argument of

plaintiff's motion and defendant's cross motion, on January 25, 2012, and to produce "all requirements, regulations, documents, applications, forms , etc." in connection with the MBR program, particularly as it relates to building with rent controlled apartments and/or condominium owners.

Plaintiff's motion and defendant's cross motion were fully submitted to the court on January 25, 2012. No oral argument was conducted prior to this submission of these motions and the DHCR submitted the documents requested in the subpoena on said date.

The DHCR's Motion to Quash the Judicial Subpoena:

The DHCR in its separate motion, seeks an order quashing that portion of the subpoena which seeks expert testimony on the part of DHCR employees. Defendant does not oppose this motion.

The DHCR is a not a party to this action. It is well settled that although this court may compel Mr. Ahlualia to appear via subpoena (CPLR 2301), it cannot compel him to give opinion testimony, in his official capacity as an employee of the DHCR which is exactly the type of testimony for which the defendant seeks his appearance (*see*, *People ex rel. Kraushaar Bros. & Co. v Thorpe*, 296 NY 223 [1947]; *Caldwell v Cablevision Sys. Corp*., 86 AD3d 46 [2011]; *Plummer v Macy & Co.*, 69 AD2d 765 [1979]; *Palma S. v Carmine S*., 134 Misc 2d 34, 36 [1986]; *Matter of Browning,* 125 Misc 2d 896 [1984]). Therefore, the DHCR's motion to quash that portion of the subpoena which seeks to compel the testimony of its employee Gurdeep Ahlualia, is granted.

Plaintiff's motion and defendant's cross motion : **Applicable Legal Standards**

These motions were timely served and will be determined on the merits (*Miceli v State Farm Mut. Auto. Ins. Co*., 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY2d 648[2004]; CPLR 3212[a]).

Plaintiff seeks summary judgment in her favor and asserts that defendant's responsive pleading lacks merit and fails to raise any triable issues of fact. Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v Pomeroy*, 35 NY2d 361 [1974]; *Kwong On Bank, Ltd. v Monrose Knitwear Corp*., 74 AD2d 768 [1980]; *Crowley Milk Co. v Klein*, 24 AD2d 920 [1965]). Even the color of a triable issue forecloses the remedy *(Newin Corp. v Hartford Acci. & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Benincasa v Garrubbo*, 141 AD2d 636 [1988]; *Weiss v Garfield*, 21 AD2d 156 [1964]). The proponent of a motion for summary judgment carries the initial

burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 32 923 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp*., 3 NY2d 395 [1957]; *Pizzi by Pizzi v Bradlee's Div. of Stop & Shop, Inc*., 172 AD2d 504, 505 [1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v Di Napoli*, 134 AD2d 235 [1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v Tallman*, 278 AD2d 811 [2000]).

Defendant seeks to dismiss the complaint on the grounds of documentary evidence, statute of limitations, failure to state a cause of action, and failure to join a necessary party. It is well established that on a motion to dismiss pursuant to CPLR 3211(a)(7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer,* 72 AD3d 803 [2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc*., 70 AD3d 928 [2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 [2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1985], *affd* 66 NY2d 946 [1985]).

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 NY2d 268, 275, *supra*). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see*, *id.*; *accord*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2006]; *Hispanic Aids Forum v Estate of Bruno*, 16 AD3d 294, 295 [2005]; *Sesti v N. Bellmore Union Free Sch. Dist.*, 304 AD2d 551, 551-552 [2003]; *Mohan v Hollander*, 303 AD2d 473, 474 [2003]; *Doria v*

Masucci, 230 AD2d 764, 765 [1996], *lv. to appeal denied* 89 NY2d 811 [1997]; *Rattenni v Cerreta*, 285 AD2d 636, 637 [2001]; *Kantrowitz & Goldhamer v Geller*, 265 AD2d 529 [1999]; *Mayer v Sanders*, 264 AD2d 827, 828 [1999]; *Sotomayor v Kaufman, Malchman, Kirby & Squire*, 252 AD2d 554 [1998]).

"A motion to dismiss pursuant to CPLR 3211(a)(1) may be granted only where 'the documentary evidence that forms the basis of the defense [is] such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claims' " (*HSBC Bank USA, N.A. v Decaudin*, 49 AD3d 694, 695 [2008], quoting *Saxony Ice Co., Div. of Springfield Ice Co., Inc. v Ultimate Energy Rest. Corp.*, 27 AD3d 445, 446 [2006]; *see Leon v Martinez*, 84 NY2d at 88; *Uzzle v Nunzie Ct. Homeowners Assn., Inc., supra*; *McMorrow v Dime Sav. Bank of Williamsburgh*, 48 AD3d 646 [2008]; *Sullivan v State of New York*, 34 AD3d 443, 445 [2006]; *Museum Trading Co. v Bantry*, 281 AD2d 524, 525 [2001]; *Nevin v Laclede Professional Prods.*, 273 AD2d 453, 453 [2000]). Affidavits submitted by a defendant in support of the motion, however, do not constitute documentary evidence (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2003]).

Defendant also seeks, in the alternative, summary judgment dismissing the complaint. It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Clare's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Thus, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact *(Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v City of New York*, *supra*; *Silverman v Perlbinder*, 307 AD2d 230 [2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [2002]). A party can prove a prima facie entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman*, *supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212[b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck* Co., 68 NY2d 714, 717 [1986]; *Zuckerman, supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that

material triable issues of fact exist (*Zuckerman*, *supra* at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1983], *affd* 62 NY2d 686 [1984]).

The MBR Program:

In 1970, the City of New York enacted Local Law No. 30 substantially revising New York City rent control laws. By virtue of the Omnibus Housing Act of 1983 (L 1983, ch 403), all functions and responsibilities of administering the rent control program were transferred to the DHCR. The MBR system was established for all rent-controlled housing accommodations in the City of New York, effective January 1, 1972 (NY Rent and Rehabilitation Law [Administrative Code of City of NY § 26-405 [a] [3]; 9 NYCRR § 2201.4 [a] [1] [NY City Rent and Eviction Regulations]), with biennial adjustments thereafter. The system was established at a time of significant price inflation to assure increased building revenues for owners to operate and maintain their buildings (*see e.g. Matter of 89 Christopher v Joy*, 35 NY2d 213, 217 [1974]). By legislative design, the legal rent for a rent-controlled apartment is determined by reference to the history of the premises dating back to the time the initial base rent was established. With respect to fixing the maximum rent, the Rent and Rehabilitation Law mandates that the DHCR establish an initial base rent for rent-controlled accommodations effective January 1, 1972, and thereafter make biennial adjustments to the MBR based upon periodic examination of an owner's books and records to assess the actual operating expenditures for the building (Administrative Code of the City of New York § 26-405 [a] [3] [4]; *see also Matter of Hicks v New York State Div. of Hous. & Community Renewal*, 75 AD3d 127, 135 [2010]; *Matter of Drennan v New York State Div. of Hous. & Community Renewal*, 30 AD3d 281, 282 [2006]).

A landlord may file an application to increase the MBR on forms prescribed by the DHCR (9 NYCRR § 2202.3), and is required to pay the DHCR a processing fee of $30.00 for each controlled housing unit in the subject building, for each successive two-year period, commencing January 1, 1990 (9 NYCRR § 2200.17). The governing regulations define a landlord as including "a person who is receiving or entitled to receive rent for the use and occupancy of any housing accommodation" (9 NYCRR § 2200.2[h]). Therefore, by definition, a shareholder in a cooperative who leases an apartment and collects rent, is a landlord. Although the governing law and regulations do not specifically prohibit the an individual owner of a rent controlled apartment from filing for an MBR increase, the DHCR does not accept such applications, on the grounds that individual owners are not generally in possession of, or privy to, the information required for an MBR application.

In applying for such an increase, an owner must certify that it is maintaining and will continue to maintain all essential services (*see* Administrative Code of the City of New York § 26-405 [g] [6] [a] [2]; 9 NYCRR §§ 2201.2, 2202.21 [a]), and that six months prior to the effective date of the MBR increase it has corrected all rent-impairing and at least 80% of all non-rent-impairing housing code violations (Administrative Code of the City of New York § 26-405 [h] [6]; *Drennan v New York State Div. of Hous. & Cmty. Renewal*, 30 AD3d 281, 282 [2006]). The DHCR regulates the MBR that a landlord may collect by utilizing a specified formula which takes into account, among others, real estate taxes, water and sewer charges, operating and maintenance charges and return on capital value (*see* Administrative Code of the City of New York § 26-405[a] [3]; 9 NYCRR § 2201.4).

The DHCR's MBR application form states, in pertinent part, that: "To expedite processing an application for cooperative or condominium buildings, the managing agent or representative must file for all Rent Controlled Apartments in the subject building. Only one filing will be accepted for each building. Applications will not be accepted for individual owners of co-op/condo apartments."

Defendant's cross motion:

That branch of defendant's cross motion which seeks to dismiss plaintiff's first cause of action, pursuant to CPLR 3211(a)(1) and (7) is denied. The first cause of action sufficiently alleges that plaintiff, as a shareholder who owns a rent controlled apartment, pursuant to the DHCR's application procedures cannot file an MBR application solely for the rent controlled unit she owns, and must rely on the cooperative's managing agent or representative to file an application on her behalf, and that defendant has failed to file said applications in a timely and proper manner.

That branch of the defendant's cross motion which seeks to dismiss the second cause of action is granted, as plaintiff does not state a cognizable claim against the cooperative based upon the alleged failure of the Board of Director or the cooperative's president to settle plaintiff's claims.

That branch of defendant's cross motion which seeks to limit plaintiff's claim for damages to the period of 2002 through 2008 is granted. Plaintiff's claim is governed by a six year statute of limitations, and plaintiff having commenced this action in May 2008 cannot recover any alleged damages prior to May 2002 (CPLR 213). It is noted that plaintiff has not moved to amend her complaint in order to seek continuing damages for each two year period the defendant failed to file an MBR application. Neither plaintiff's "response" to the defendant's answer nor her "supplemental demand for relief" constitutes an amendment of her complaint (*see* CPLR 3025).

That branch of defendant's cross motion which seeks to dismiss the complaint on the grounds that plaintiff failed to sue the management company, is denied. Plaintiff does not allege that the management company is a necessary party to this action, and the failure to name the management company is not fatal here.

To the extent that plaintiff's complaint can be read as a claim for breach of contract, defendant's documentary evidence is insufficient to establish that it has no contractual duty to file MBR applications on behalf of a shareholder who holds shares to a rent controlled apartment. Defendant has failed to submit copies of the offering plan or plans filed with the Attorney General, a complete copy of the cooperative's bylaws, or its operating agreement, a copy of plaintiff's proprietary lease, and a copy of the shares of stock issued to the plaintiff. The court, therefore, makes no determination as to whether any contractual agreement exists between the cooperative and the shareholder with respect to the filing of the MBR application.

Plaintiff is a shareholder in the cooperative corporation, and pays a monthly maintenance fee. Defendant has presented no evidence which establishes that shareholders, in additional to paying monthly maintenance, are required to individually fund particular functions of the managing agent or the cooperative's representative hired by the cooperative corporation or its Board of Directors. Furthermore, defendant has failed to establish that the Board of Directors duly adopted any bylaw or house rule which would require a shareholder who holds shares to a rent controlled unit to hire a third party to perform the functions of the managing agent or representative of the cooperative, including the filing of an MBR application. Rather, the documentary evidence submitted herein establishes that after this action was commenced, the cooperative's present managing agent, Metro Management, acknowledged in May 2010, that it was responsible for filing the MBR application on behalf of Ms. Lee, without requesting a fee for this service.

It is noted that although defendant's counsel refers to David Shurin Consulting Associates Inc. as a third party, who plaintiff could have hired, it is unclear as to whether this entity was seeking to act as the cooperative's managing agent, was a representative of the managing agent or the cooperative, or merely solicited shareholders who held shares to rent controlled units.

In view of the foregoing, that branch of defendant's cross motion, which seeks in the alternative, summary judgment dismissing the complaint on the grounds that plaintiff cannot establish a claim for breach of contract, is denied.

Plaintiff's motion:

Plaintiff Lee states in her supporting affidavit that Article II, Section 7 of the cooperative's bylaws states that "The affairs and business of this corporation shall be managed by its board of directors. . .," and that Metro and its predecessor managing companies manage the physical buildings and not the "affairs and business" of the cooperative. Plaintiff states that Article IV of the bylaws specifically provides for the indemnification of board members, and that as there have been many board members whose terms spanned the course of this action, the corporation is the "logical" defendant.

Ms. Lee states that at the time she purchased the shares of stock to the apartment unit in July 1991 at an auction sale, she was informed at the closing that the cooperative conversion principals (sponsor) would file for MBR increases. She states that these principals and the then managing agent performed this service for several years, without any charge to her. She further states that when said principals relinquished control and ownership of the cooperative, substantial maintenance increases were imposed and that the MBR applications were either not filed, or were incompletely filed, and that defendant currently denies that it is responsible for filing the MBR applications.

The documentary evidence submitted herein establishes that prior to plaintiff's purchase of the shares of stock in the cooperative, and perhaps before the buildings were converted to cooperative ownership, the DHCR issued orders of eligibility, increasing the MBR for rent controlled apartments for the subject apartment complex in 1976, 1978, 1980, 1982, 1984. The DHCR also issued an order denying the 1986-1987 MBR increase. After Ms. Lee became a shareholder in July 1991, the MBR Master Building Rent Schedules for the subject buildings were filed by the cooperative or its managing agent "Finkelstein-Morgan real estate" in 1992; by "Excelsior Mgmt" in 1994, 1995 1996 and 1997. These schedules reflect increases in the MBR and include Unit 275.

The DHCR , in an order issued August 26, 1999, denied the application to adjust the MBR for 1988-1999, on the grounds of "failure to meet violation criteria." This order states that the mailing address of the owner is "Beegee Excelsior Management c/o David Shurin" at a post office box address in Brooklyn. Ms. Lee filed applications with the DHCR to adjust the 2000-2001MBR and the 2002-2003 MBR. These applications were denied on the grounds of "failure to meet violation criteria" and it does not appear that the DHCR was aware of the fact that Ms. Lee is an individual shareholder in a cooperative, and only owns a single rent controlled apartment.

The DHCR also issued notices in 2001 concerning the 2002-2003 MBR application, which were addressed to "Michael Williams c/o D. Shurin" which requested payment of the

processing fee, and further information regarding violations. It is unclear as to whether the said application was filed only by Ms. Lee or whether the cooperative's managing agent or representative also filed an application.

The DHCR in an order issued September 13, 2007, and addressed to Metro Management, denied an application to increase the 2006-2007 MBR on the grounds of "failure to submit one or more required application forms (VC, O &M and RS)." As to this application, it is also unclear as to whether it was filed by Ms. Lee or by Metro Management.

Ms. Lee testified at her deposition that David Shurin was someone that the managing agent brought in to sign contracts with the shareholders in order to file for the MBR. She further testified that she had contacted the DHCR, and was told that the cooperative was responsible for filing the MBR application. Ms. Lee testified that she did not execute the retainer agreement, as she felt the fees sought were excessive. Plaintiff has submitted a copy of a fax from David Shurin Consulting Associates, Inc., dated September 17, 1988, and a proposed retainer agreement dated November 17, 1998, which set forth projected rent increases for each rent controlled apartment in the building, and a fee schedule for filing the MBR application.

Plaintiff has also submitted a letter she received from the current managing agent, Metro, dated May 26, 2010, Metro's employee states that is responding to Ms. Lee's letter of April 15, 2010; that Metro was the agent for Wallace Avenue Owners; that Metro along with the cooperative's attorney and the Board of Directors had been "laboring over prior managements records in an attempt to bring a semblance of order to the record keeping of the Corporation." Metro's employee "thanked" Ms. Lee for bringing to her attention her concerns regarding the filing of the MBR application, and stated that; "this matter will be investigated immediately covering the timeframe in which Metro Management has been the agent for Wallace Avenue Owners Corporation." Metro further stated as follows:

> "Please be aware that any building filing an MBR application must submit a violation application verifying that all rent impairing violations, and 80% of all non rent impairing violations on record have been removed. As you are aware the Cooperative is in the process of removing rent impairing violations by making building wide repairs to the outside facade as well as the installation of a new roof."
>
> "Your desire for this matter to be corrected is recognized and as soon as the building has corrected all of the rent impairing violations, an MBR application can be submitted for review by the Division of Housing and Community Renewal."

> "Your continued patience would be greatly appreciated until some building wide issues can be resolved. In closing please be aware that you remain obligated to pay your monthly maintenance in a timely manner; failure to do so can or will result in foreclosure."

Plaintiff's evidence thus establishes that the cooperative filed MBR applications on her behalf, without charging a fee, from 1992 through 1997, or 1998. The cooperative, or its managing agent, or representative, thereafter either failed to filed for, or did not obtain, MBR increases. Plaintiff's motion for summary judgment on her claim for damages, however, must be denied, as the evidence presented fails to establish that the DHCR would have granted a MBR increase for the period of 2002 through 2008, even if the defendant had filed for such increases.

Defendant's counsel argues, in his reply affirmation states that "it is clear that the DHCR application requires that the management agent submit all such (MBR) applications on behalf of condominium (sic) owners, however, the form takes no position whatsover on whether that third-party manager should be compensated for his/her service." Defendant asserts that plaintiff's unwillingness to compensate someone for the desired services is the sole reason she has sustained damages. Defendant also reiterates some of the arguments previously stated in its cross motion, which will not be repeated here.

Defendant, however, now concedes that the DHCR requires that MBR applications be filed by the building owner's managing agent or representative. Defendant's managing agent, in its letter of May 2010, acknowledged that it was the proper entity to perform such filings. The managing agent also agreed that it would file an MBR application on Ms. Lee's behalf. It is noted that the managing agent acts on behalf of its principal, the cooperative corporation. Furthermore, the evidence presented establishes that between 1991 and 1998, the managing agent or the cooperative's representative filed MBR applications on behalf of shareholders, including plaintiff, who own rent controlled housing units in the subject cooperative apartment complex. As there is no documentary evidence that the defendant cooperative ever imposed a fee for this service on such shareholders, and defendant has not established any right to withhold this service from its shareholders. That branch of plaintiff's motion which seeks summary judgment on her request for an injunction directing defendant to timely file future MBR applications on her behalf, is granted.

Conclusion:

In view of the foregoing, the DHCR's motion to quash that portion of the judicial subpeona which seeks to compel the testimony of one of its employees is granted.

Plaintiff's motion for summary judgment is granted to the extent that defendant is directed to file future MBR applications as requested by the plaintiff with the DHCR. The remainder of plaintiff's motion for summary judgment on her claim for damages is denied.

Defendant's cross motion is granted to the extend that plaintiff's claim for damages is limited to the years 2002 through 2008, and the second cause of action is dismissed. The remainder of defendant's cross motion is denied in its entirety.

Dated: April , 2012

_____

J.S.C.