Paris-Merchant v Giscombe-Henderson, Inc.

2013 NY Slip Op 30489(U)

March 7, 2013

Supreme Court, New York County

Docket Number: 117134/2009

Judge: Saliann Scarpulla

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SCANNED ON 3/11/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA PART 19
Justice

Index Number : 117134/2009
PARIS-MERCHANT, MILAGROS
vs.
GISCOMBE-HENDERSON
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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

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

motion and cross-motion are decided in accordance with accompanying memorandum decision.

FILED
MAR 11 2013
NEW YORK COUNTY CLERK'S OFFICE

RECEIVED
MAR 08 2013

Dated: 3/7/13

Saliann Scarpulla, J.S.C.
HON. SALIANN SCARPULLA

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 19

---X

MILAGROS PARIS-MERCHANT, successor administratrix c.t.a. of the Estate of Elizabeth Paris, deceased,

Plaintiff,

-against-

GISCOMBE-HENDERSON, INC., ESTHER BLUE GONZALEZ and NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendants.

---X

Index No.: 117134/09
Submission Date: 10/24/12

DECISION AND ORDER

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Papers considered in review of this motion for partial summary judgment:

Notice of Motion 1
Aff in Support 2
Mem of Law 3
Aff in Partial Opp. 4
Aff in Opp 5
Mem of Law 6
Reply Affs 7,8

HON. SALIANN SCARPULLA, J.S.C.:

In this residential landlord/tenant action, plaintiff Milagros Paris-Merchant ("plaintiff") moves for partial summary judgment on the first cause of action of her complaint for rescission against defendants Giscombe-Henderson, Inc. ("Giscombe-Henderson"), and Esther Blue Gonzalez ("Gonzalez").

Plaintiff is the granddaughter and administratrix of the estate of her late grandmother (the "estate"), Elizabeth Paris ("Paris"). Paris was the owner of a rent stabilized building located at 158 East 30th St., a/k/a 430 Third Ave. (the "building"). Giscombe-Henderson is a real estate management company that was hired by the New York County Public Administrator's office (the "PA") to manage the building after Paris' death. Gonzalez is a former employee of Giscombe-Henderson and the current occupant of apartment unit 8 (the "apartment") in the building. Defendant New York State Division of Housing and Community Renewal ("DHCR") is the state agency charged with regulating rent stabilized apartment buildings.

Paris passed away on December 24, 1993. Plaintiff was designated as the administratrix of her grandmother's estate via an order of the Surrogate's Court, New York County (Roth, J.), dated December 21, 2006. It is not disputed that prior to plaintiff's designation, the PA administered the decedent's estate for the period of August 29, 1997 through December 21, 2006.

Pursuant to an agreement dated December 15, 1998, and titled "New York County Public Administration Management Agreement," (the "management contract"), the PA retained Giscombe-Henderson as its "agent" to manage the building. The management contract provided, in pertinent part:

> Section 2 - Duties of Agent
>
> The agent shall perform the following services with due diligence and care:
>
> a. Cause to be hired, paid and supervised all persons necessary to be employed in order to properly maintain the building who, in each instance, shall be an Independent Contractor and not the employee of the Owner [i.e., the Estate of Elizabeth Paris], and cause to be discharged all unnecessary or undesirable persons, except that no person presently employed at the Building shall be discharged without the Owner's prior written consent.
>
> ***
>
> f. Accept application and references from all prospective tenants and subtenants, obtain credit reports relating to prospective tenants and subtenants of space being leased or subleased by the Owner (and, as it requests, for any other space in the building), and submit the same to Owner.
>
> ***
>
> p. Use its best efforts to keep space in the building rented to desirable tenants on such terms as the Owner may approve.

By its terms the management agreement was effective beginning December 15, 1998, and for a term of one year. Plaintiff notes that the PA terminated the management contract on May 23, 2006.

Giscombe-Henderson (as landlord/managing agent) issued its employee, Gonzalez (as tenant), a two-year, non-Rent Stabilized lease for the apartment commencing on May 1, 2004 (the "lease") at a monthly rental of $440.00. Giscombe-Henderson first notified

the PA of this arrangement in a letter, dated August 25, 2005, wherein it stated that in addition to being a licensed real estate salesperson at Giscombe, Gonzalez had been appointed as the building's superintendent, a position for which "[s]he does not receive a salary, but was allowed to rent apartment #8 at rental of $440/month in lieu of a salary." On December 7, 2005, Giscombe-Henderson sent the PA another letter wherein it admitted that Gonzalez was actually an "independent contractor and licensed real estate salesperson" employed by Giscombe-Henderson who had been "assigned the duty of Superintendent wherein she oversees all repairs to the property and coordinates with the tenant in the building. For this work she receives no compensation. The general poor condition of the building precludes obtaining top dollar for rent."

Counsel for the PA corresponded with Giscombe-Henderson over the next several months discussing, among other things, Gonzalez's lease, and then, on March 17, 2006, sent Giscombe-Henderson a letter directing Giscombe-Henderson to immediately end the arrangement wherein Giscombe-Henderson rented Gonzalez "an apartment in the building at a reduced rent in exchange for services rendered as a superintendent." The PA also directed Giscombe-Henderson to have Gonzalez execute a General Release in favor of the PA, to rent the apartment to a tenant at market rent, and to not rent any apartment to a tenant that is not "located in an arm's length transaction and/or for an amount that it [sic] less than the market rent for an apartment of its size and condition."

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On March 24, 2006, Giscombe-Henderson notified the PA that it had terminated Gonzalez's employment and requested further instructions. On April 5, 2005, counsel for the PA responded to Giscombe-Henderson that it should either relocate Gonzalez itself, or have her sign a Rent Stabilized lease, otherwise the PA would seek her eviction on grounds of fraud. When Giscombe-Henderson failed to take either of these measures, the PA terminated Giscombe-Henderson's contract on May 23, 2006.

When Gonzalez's lease expired on April 30, 2006, she requested a renewal lease, but the PA refused to issue one. Thereafter, on July 24, 2006, Gonzalez commenced a proceeding before the DHCR to compel the PA to issue the renewal lease. The PA filed an answer on October 10, 2006. On December 7, 2006, the DHCR issued an order acknowledging that the PA "claimed a relationship between the complainant [Gonzalez], being a real estate professional and the managing agent [Giscombe-Henderson] of the prior owner attempting to defraud the estate." The DHCR found, in view of the allegations, that "the Rent Administartor [sic] does not render a decision in that the issues raised are beyond the scope of DHCR jurisdiction to adjudicate a tenant's complaint. The owner is advise [sic] to purse the matter in a housing court." In conclusion, the DHCR ordered "that the relief requested is denied, and/or this proceeding is terminated." In support of this motion, plaintiff submits correspondence between Gonzalez, Giscombe-Henderson and the PA which was originally submitted in the DHCR proceeding. First, plaintiff presents a letter, dated August 25, 2005, from Giscombe-Henderson to the PA

which states that Giscombe-Henderson engaged Gonzalez as the building's superintendent, and issued her the $440.00 per month lease for the apartment "in lieu of a salary."

Next, plaintiff presents a letter, dated October 12, 2006, from the PA's counsel to the DHCR which states that, pursuant to an internal investigation, the PA determined that the legal rent for the apartment prior to Gonzalez's taking occupancy was actually $1,225.51 per month, and that the PA decided to terminate Gonzalez's tenancy on the grounds of fraud, because Gonzalez was *not* the building's superintendent, but merely a sales agent employed by Giscombe-Henderson, and her improperly low monthly rent was causing financial harm to the estate. Finally, plaintiff presents a letter, dated May 23, 2006, from the PA to Giscombe-Henderson terminating Giscombe-Henderson as its agent.

Plaintiff also presents excerpts of Gonzalez's deposition testimony, wherein she states that Giscombe-Henderson offered her the apartment as part of her compensation for her work as a sales agent and construction overseer. She also acknowledged prepaying her rent to Giscombe-Henderson for several months in advance, in view of the fact that she worked on commission.

In addition, plaintiff submits excerpts of the deposition testimony of Giscombe-Henderson's CEO, Eugene Giscombe ("Giscombe"), who stated that his wife, Shirley Giscombe ("Mrs. Giscombe"), was an attorney employed by Giscombe-Henderson, and

had been responsible both for renting the apartment to Gonzalez, and for negotiating the terms of the lease.

Giscombe-Henderson maintains that it hired Gonzalez as the building's superintendent. Giscombe stated in his affidavit submitted in partial opposition to the motion that his wife, Shirley Giscombe, Esq., a former Giscombe-Henderson employee, offered Gonzalez the superintendent position to oversee he building and construction projects.

Gonzalez submits an affidavit in which she denies that she was employed as, or actually worked as, the building's superintendent. She states, instead, that Mrs. Giscombe offered her "a management level independent contractor position" with a salary to be paid by Giscombe-Henderson, and that the PA agreed to this arrangement.

Both Gonzalez and plaintiff agree that Gonzalez has never paid rent to either the PA or to the estate. Gonzalez does state, however, that the building is poorly maintained and has a number of open Building Code violations filed against it, that she slipped and fell down the stairs on two occasions, and that, after the last occasion, she commenced a personal injury action against plaintiff and the estate in this court under Index Number 101238/09. Because of this, Gonzalez states that she found the timing of plaintiff's subsequent speedy institution of this action to be suspicious.

Plaintiff commenced this action on December 7, 2009 by filing a summons and complaint that sets forth causes of action for: 1) rescission of the lease; 2) money

damages; and 3) a declaratory judgment. Giscombe-Henderson filed its answer on February 1, 2010; Gonzalez filed her amended answer November 28, 2011; and the DHCR filed its answer on January 26, 2010. Gonzalez's amended answer sets forth counterclaims against plaintiff and the estate for: 1) money damages based on retaliatory eviction; 2) an injunction against paying rent based on breach of the warranty of habitability; 3) money damages based on breach of the warranty of habitability; 4) money damages based on negligence and emotional distress; and 5) punitive damages based on negligence and emotional distress; and a cross claim against Giscombe-Henderson for common-law indemnification.

Plaintiff now moves for summary judgment on her first cause of action for recision of the lease between Giscombe-Henderson and Gonzalez for the apartment. In support she argues that pursuant to the terms of the management agreement, Giscombe-Henderson was not authorized to enter into a new lease for vacant space or to set the rental amount. Plaintiff further argues that the lease is also in violation of General Obligations Law §5-703(2), as it was entered into by Giscombe-Henderson, a party not authorized to do so, making it void.

Plaintiff further asserts that the lease was improper as it set a reduced rent, without the knowledge or approval of the PA. In addition, plaintiff argues that Gonzalez knew that all actions by Giscombe-Hendeson required approval by the PA, and Mrs. Giscombe, who arranged for the lease and its terms, knew or should have known the that Giscombe-

Henderson was not authorized to enter into leases on behalf of the PA. Plaintiff asserts that because Gonzalez knew that the PA had to approve the lease, even though she was under the impression that Mrs. Giscombe had acquired the necessary prior approvals, she cannot maintain the affirmative defense of apparent authority.

In partial opposition, Giscombe- Henderson "takes no position on Gonzalez's entitlements," but opposes plaintiff's motion to the extent that it makes any allegations of wrongdoing by Giscombe-Henderson. Giscombe-Henderson argues that it was authorized to hire a superintendent or other person necessary to properly maintain and operate the building, and that there was nothing in the management agreement which prevented Giscombe-Henderson from compensating a person for such services in the way of a reduced rent apartment. Giscombe-Henderson further asserts that if the occupancy of the apartment is incidental to a superintendent's services, it does not create a landlord-tenant relationship, and such a superintendent must vacate the apartment upon termination of employment.

Gonzalez, in opposition to plaintiff's motion, asserts that there exist many issues of material fact which prevent grant of summary judgment, including whether plaintiff's action is an unlawful attempt at retaliatory eviction, whether Giscombe-Henderson had actual, apparent or inherent authority to lease apartments, whether plaintiff waived her right to challenge the lease, the reasonable value of the apartment, Gonzalez's status as a superintendent, whether the lease was incident to Gonzalez's employment and whether

receipt of a lease rendered Gonzalez a tenant. Gonzalez also asserts that plaintiff lacks standing to assert the statute of frauds, has waived any defense under the statute of frauds, and has ratified the lease through conduct.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, plaintiff seeks summary judgment on her first cause of action for rescission of Gonzalez's lease. Plaintiff argues that, "since the action by Giscombe-Henderson [i.e., the execution of Gonzalez's lease] was 'not authorized' as required, the lease was void." Plaintiff asserts that the act of executing Gonzalez's lease exceeded Giscombe-Henderson's authority under the Giscombe-Henderson contract, and as such also violated

General Obligations Law § 5-703 (2).[1] The Court finds there exist material issues of fact which prevent the granting of summary judgment.

With respect to authority under the Giscombe-Henderson contract, plaintiff argues that: 1) Gonzalez was not authorized to be a tenant because Giscombe-Henderson did not obtain her credit report or any other background documentation from her and submit it to the PA or the estate for approval; and 2) Gonzalez was not authorized as a "person necessary to be employed in order to properly maintain the building" because she was not a superintendent, but merely a property leasing agent employed by Giscombe-Henderson. With respect to General Obligations Law § 5-703 (2), plaintiff notes that Gonzalez's two-year lease did not contain any written memorialization regarding consideration, as the statute requires.

It is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and . . . circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where . . . the intention of the parties can be gathered from the instrument itself.'" *Maysek & Moran, Inc. v. S.G. Warburg & Co., Inc.*, 284 A.D.2d 203, 204 (1st

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[1] The Statue of Frauds as codified at General Obligations Law § 5-703 (2), provides, in relevant part, that:

> A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.

Dept 2001), quoting *Lake Constr. & Dev. Corp. v. City of New York*, 211 A.D.2d 514, 515 (1st Dept 1995). Terms of a contract should be interpreted in accordance with their plain meaning, and courts will interpret an agreement to give meaning to each provision. *Petracca v. Petracca*, 302 A.D.2d 576 (2nd Dept. 2003). "The question of whether a writing is ambiguous is one of law to be resolved by the courts." *In re Wallace*, 86 N.Y.2d 543, 548 (1995).

Here, subparagraphs 2 (f) and 2 (p) of the Giscombe-Henderson contract plainly require all new tenants and subtenants of the building to submit application materials to the owner (i.e., the decedent's estate) and await the owner's approval. Plaintiff maintains that Giscombe-Henderson failed to perform either of these duties with respect to Gonzalez. In support, she submits her own affidavit, in which she states that after being appointed as executrix of the estate and as successor administrator to the PA, the PA assigned to plaintiff all of its claims and causes of action against Giscombe-Henderson and Gonzalez, and that the PA also turned over to the plaintiff all records, documents and correspondence for the period prior to her appointment. Plaintiff notes that among the documents there was no rental application or credit report for Gonzalez, nor was there any documentation from Giscombe-Henderson notifying the PA of the apartment to Gonzalez.

Plaintiff also submits excerpts of Giscombe's deposition testimony, in which he states that he provided all relevant documentation to counsel for the PA. Plaintiff maintains that as there is nothing in the record to show that Giscombe-Henderson had

Gonzalez complete the requisite rental application and credit check prior to renting her the apartment, she has made a prima facie showing that Giscombe-Henderson lacked authority under the agreement when it entered into the lease with Gonzalez, and the lease is therefore void pursuant to Gen, Oblig. L. § 5-703 (2).

Also, by executing a non-rent stabilized lease with Gonzalez for what was admitted to be a rent stabilized apartment, Giscombe-Henderson may have violated 9 NYCRR 2520.13, which provides that "[a]n agreement by the tenant to waive the benefit of any provision of the [Rent Stabilization Law] or this Code [i.e., the Administrative Code of the City of New York] is void." *See e.g. Drucker v. Mauro*, 30 A.D.3d 37, 40 (1st Dept 2006). However, if the unit were registered as employee-occupied, then it would be exempt from rent stabilization." *Treasure Tower Corp. v. Santos*, 28 Misc. 3d 140(A) (App. Term 1st Dep't 2010).

There is also no dispute that any rent paid by Gonzalez under the lease was paid to Giscombe-Henderson, and not to the PA or to the Estate. There is nothing in the record to suggest that Giscombe-Henderson ever passed the rent onto the PA. However, Giscombe states in his affidavit that Giscombe-Henderson did not need to meet the rental application and credit check requirements because Giscombe-Henderson did not rent Gonzalez the apartment as her landlord, but rather provided her with the apartment at a reduced rate in exchange for her uncompensated work as a superintendent.

Giscombe-Henderson argues that it was authorized to retain a superintendent and to provide this superintendent with a reduced rent lease. Giscombe-Henderson points to subparagraph 2 (b) of the Giscombe-Henderson agreement which states that Giscombe-Henderson was authorized to hire, pay and supervise "all persons necessary to be employed in order to properly maintain the building" in the capacity of independent contractors, but not the employees of the estate. Giscombe-Henderson also submits correspondence to the PA in which it identifies Gonzalez as the superintendent.

However, Gonzalez testified at her deposition that she was never employed as a superintendent, although she was asked to supervise a number of construction projects at the building, and that Ms. Giscombe offered her the apartment at a reduced rent in exchange for her uncompensated work at the building. Gonzalez also submits in opposition an affidavit in which she states that she was given a management level position, making "sure the construction projects were moving on time." In this role, Gonzalez stats that she collected estimates and bids for repair projects, served as a liaison between tenants and management when tenants complained about deficiencies, and explained new building development, such as repaired mailboxes, to the tenants. Gonzalez stated that it was "not a superintendent position," and that she never performed tasks typically assigned to a building superintendent, such as removing the trash, cleaning the common areas or inspecting or repairing the water heater. There is therefore a question of fact as to the exact duties performed by Gonzalez at the building, if she was in

fact properly employed by Giscombe-Henderson as a superintendent, and if so if her apartment rental was incident to her employment.

"A superintended who occupies an apartment purely as an incident of employment is a licensee and must vacate the unit upon termination of his or her employment." *Treasure Tower Corp. v. Santos*, 28 Misc. 3d 140(A) (App. Term. 1st Dep't 2010) (citing RPAPL § 713(11); *Genc Realty LLC v. Nezaj*, 52 A.D.3d 415 (1st Dep't 2008)). In such a case, no landlord-tenant relationship exists. *Treasure Tower Corp.*, 28 Misc. 3d 140(A); *York Sham Wong Yee v. Indelicato*, 67 Misc. 2d 634, 635 (Civ. Ct. N.Y. Co. 1971) (quoting 1 New York Law of Landlord and Tenant, § 79, p. 139) ("'If the occupation is incidental to the service, or if it is required, expressly or implicitly, by the employer for the necessary or better performance of the service, it is then for his benefit, and, as a general rule, the relation of landlord and tenant does not arise.'").

I also find there are questions of fact as to whether plaintiff has waived her right to challenge the lease because actions of the PA ratified the arrangement. Even assuming that Giscombe-Henderson was not authorized to enter into the lease with Gonzalez, "[a]n unauthorized execution of an instrument affecting the title to land or an interest therein may be ratified by the owner of the land or interest so as to be binding upon him." *Holm v. C.M.P. Sheet Metal, Inc.*, 89 A.D.2d 229, 232 (4th Dep't 1982) (citation omitted).

The letters submitted show that the PA was first notified by Giscombe-Henderson of its lease with Gonzalez by letter dated August 25, 2005. There was an exchange of

letters back and forth between Giscombe-Henderson and the counsel for the PA discussing this arrangement, with the PA eventually instructing Giscombe-Henderson to terminate the arrangement March 17, 2006. Giscombe-Henderson submitted an interoffice memorandum dated March 31, 2006, addressed to Gonzalez from Giscombe, copying the PA, which states that Gonzalez's "services as superintendent . . . are no longer needed effective March 31, 2006." Giscombe-Henderson also submitted a copy of a letter from Giscombe to the PA dated May 15, 2006, in which Giscombe-Henderson tendered its resignation as managing agent effective May 31, 2006.

In 2006, Gonzalez filed a complaint with the DHCR seeking renewal of her lease. And in January 2009, she brought a personal injury action in this court against plaintiff over the alleged awful living conditions in the building. While that action was pending, on December 7, 2009, plaintiff initiated this action, over four (4) years from Giscombe-Henderson's initial disclosure of the arrangement. The delay between learning of the alleged fraudulent lease and the PA or plaintiff actually taking any action to remove Gonzalez from the apartment creates a question of fact as to whether the PA or plaintiff ratified this arrangement, or waived the right to seek rescission of the lease. *See R & A Food Services, Inc. v. Halmar Equities, Inc.*, 278 A.D.2d 398 (2d Dep't 2000) ("after learning of the alleged fraud, the plaintiff waited more than one year before commencing this action, and failed to take any other action to rescind the lease. Because the plaintiff

failed to promptly seek rescission after learning of the alleged fraud, it has waived its claim").

Gonzalez also argues that "a triable issue of fact remains as to whether plaintiff's case is an unlawful attempt at retaliatory eviction." Real Property Law (RPL) § 223-b, which governs the affirmative defense of retaliatory eviction, provides, in pertinent part, as follows:

> 1. No landlord of premises or units to which this section is applicable shall serve a notice to quit upon any tenant or commence any action to recover real property or summary proceeding to recover possession of real property in retaliation for:
>
> a. A good faith complaint, by or in behalf of the tenant, to a governmental authority of the landlord's alleged violation of any health or safety law, regulation, code, or ordinance, or any law or regulation which has as its objective the regulation of premises used for dwelling purposes or which pertains to the offense of rent gouging in the third, second or first degree; or
>
> b. Actions taken in good faith, by or in behalf of the tenant, to secure or enforce any rights under the lease or rental agreement, under section two hundred thirty-five-b of this chapter, or under any other law of the state of New York, or of its governmental subdivisions, or of the United States which has as its objective the regulation of premises used for dwelling purposes or which pertains to the offense of rent gouging in the third, second or first degree; or
>
> c. The tenant's participation in the activities of a tenant's organization
>
> ***
>
> 5. In an action or proceeding instituted against a tenant of premises or a unit to which this section is applicable, a rebuttable presumption that the

landlord is acting in retaliation shall be created if the tenant establishes that the landlord served a notice to quit, or instituted an action or proceeding to recover possession, or attempted to substantially alter the terms of the tenancy, within six months after:

a. A good faith complaint was made, by or in behalf of the tenant, to a governmental authority of the landlord's violation of any health or safety law, regulation, code, or ordinance, or any law or regulation which has as its objective the regulation of premises used for dwelling purposes or which pertains to the offense of rent gouging in the third, second or first degree; or

b. The tenant in good faith commenced an action or proceeding in a court or administrative body of competent jurisdiction to secure or enforce against the landlord or his agents any rights under the lease or rental agreement, under section two hundred thirty-five-b of this chapter, or under any other law of the state of New York, or of its governmental subdivisions, or of the United States which has as its objective the regulation of premises used for dwelling purposes or which pertains to the offense of rent gouging in the third, second or first degree.

c. Judgment under subdivision three or four of this section was entered for the tenant in a previous action between the parties; or an inspection was made, an order was entered, or other action was taken as a result of a complaint or act described in paragraph a or b of this subdivision.

But the presumption shall not apply in an action or proceeding based on the violation by the tenant of the terms and conditions of the lease or rental agreement, including nonpayment of the agreed-upon rent.

Here, Gonzalez asserts that the instant action should be deemed to be retaliatory against her personal injury action (Index Number 101283/09) because the action was commenced

on January 30, 2009, a Request for Judicial Intervention ("RJI") was filed on September 30, 2009, and a preliminary conference was held on November 5, 2009, and then this action was commenced on December 7, 2009. Plaintiff replies that Gonzalez is not entitled to the statutory presumption set forth in RPL § 223-b (1) because "a non-retaliatory motive for this action clearly exists" in the form of the estate's fraud allegations against Gonzalez, which she has been aware of since early 2006.

Based on the information before me, I find there is a question of fact as to whether plaintiff had a non-retaliatory motive for bringing this action. As plaintiff asserts, she and/or the PA were aware of Gonzalez's lease, since early 2006. In July 2006, the PA returned Gonzalez's rent check uncashed, with a letter stating that Gonzalez's lease was "apparently obtained by a scheme to defraud the Estate of Elizabeth Paris," and giving Gonzalez until July 31, 2006 to either vacate the apartment or enter into a lease with the Estate for the "maximum legal rent permitted for the apartment," and that failure to do so would result in legal action. However, no legal action was taken by the PA or plaintiff until this action was commenced at the end of 2009, over three years later.

In light of the delay by plaintiff in commencing an action against Gonzalez, and the timing relative to Gonzalez's personal injury action, there is a question of fact preventing granting of summary judgment.

In accordance with the foregoing it is

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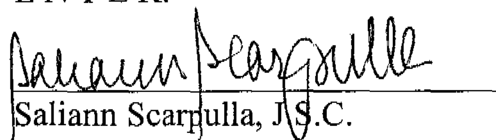
ORDERED that the motion, pursuant to CPLR 3212, by plaintiff Milagros Paris-Merchant, as successor administratrix c.t.a. of the Estate of Elizabeth Paris, deceased for partial summary judgment on the first cause of action for rescission against defendants Giscombe-Henderson, Inc. and Esther Blue Gonzalez is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
March 7, 2013

ENTER:



Saliann Scarpulla, J.S.C.

FILED

MAR 11 2013

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