408 East 10th St. Tenants Assoc. v Nespral
2013 NY Slip Op 32172(U)
September 11, 2013
Sup Ct, New York County
Docket Number: 108910/2010
Judge: Cynthia S. Kern

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ PART _____

Justice

Index Number : 108910/2010
408 EAST 10TH STREET TENANTS
vs.
CHARO NESPRAL
SEQUENCE NUMBER : 003
PARTIAL 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

is decided in accordance with the annexed decision.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 9/11/13

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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408 EAST 10TH STREET TENANTS ASSOCIATION,

Plaintiff,

Index No. 108910/2010

-against-

DECISION/ORDER

CHARO NESPRAL, "JOHN DOE"
and "JANE DOE,"

Defendants.

----------x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

This action involves the lease entered into by defendant Charo Nespral for apartment 4A in the building located at 408 East 10th Street, New York, NY, which is owned by the City of New York. Plaintiff now moves pursuant to CPLR § 3212 for an order granting partial summary judgment declaring that the lease entered into by defendant for apartment 4A is null and void. Defendant cross-moves for an order granting summary judgment dismissing plaintiff's complaint and declaring defendant's lease for apartment 4A valid. In the alternative, defendant seeks leave to amend her answer. For the reasons set forth below, plaintiff's motion is granted and defendant's cross-motion is denied.

The relevant facts are as follows. Plaintiff 408 East 10th Street Tenants Association (the

"Tenant Association") is an unincorporated association of the low income residential tenants of the building located at 408 East 10th Street, New York, New York (the "Building"). The Building is owned by the City of New York and participates in the City's Tenant Interim Lease ("TIL") Program. TIL is part of the City's Division of Alternative Management Programs ("DAMP").

As a member of the TIL program, a written net lease with respect to the building was issued by the City through its Department of Housing Preservation and Development ("HPD") to the Tenant Association in 2000 (the "Net Lease"). Pursuant to the Net Lease, the Tenant Association was to enter into month to month leases with the current residents of each unit. If any of the apartments were vacant at the time, the Tenant Association was required to get prior written approval from HPD prior to renting out such apartment.

At the time the Building entered into the TIL program, defendant Charo Nespral ("Nespral" or "defendant") occupied apartment 4B. Apartment 4A, located adjacent to apartment 4B, was vacant. Sometime in 2004, while Nespral was serving as President of the Tenant Association, she requested that the Tenant Association issue a lease to her with respect to apartment 4A in addition to 4B. Defendant claims that she required the extra space to care for her two children that were born with disabilities. Pursuant to her affidavit, defendant attests that on or about January 22, 2004, she sent a letter to HPD requesting the approval to lease apartment 4A. Sometime thereafter, defendant alleges that she spoke with the then deputy director of HPD who told her to "take the apartment." However, it is undisputed that defendant never received a written authorization to lease apartment 4A.

On or about February 1, 2004, plaintiff issued a lease to defendant for apartment "No. 4

A/B" (the "Lease"). Defendant continues to reside in apartment 4A and 4B and has done construction on the apartments such that these apartments are now connected. According to the affidavit of Edwin Lugo, Deputy Director of HPD's Program Unit, in late 2008, the Program Unit of TIL became aware that the Tenant Association had issued defendant a lease for both apartment 4A and 4B and that this "had been done despite the absence of written approval by the Program Unit of TIL." Once this fact came to light, HPD authorized and directed the Tenant Association to commence litigation in order to declare the portion of the lease issued to defendant with respect to apartment 4A null and void.

On or about July 7, 2010, plaintiff commenced the instant action seeking, among other things, a declaratory judgment declaring the Lease to be null and void and declaring the modifications made to apartments 4A and 4B unauthorized by association rules and a violation of defendants's tenancy. Thereafter, on or about April 23, 2011, defendant moved to dismiss this action on the ground that plaintiff's causes of action were barred by the statute of limitations. In the alternative, defendant sought leave to serve an amended answer which contained additional counterclaims and affirmative defenses. By order dated August 8, 2011, the Honorable Jane S. Solomon denied the motion in its entirety. In her decision, Justice Solomon found that the proposed additional counterclaims and affirmative defenses did not have merit and as such "there [was] no basis for allowing them here."

Plaintiff now brings a motion for partial summary judgment on the issue of whether the portion of the Lease giving defendant a right to apartment 4A is null and void. It is plaintiff's position that the issuance of a lease to the defendant with respect to apartment 4A was an act that was null and void *ab initio* on the ground that defendant never received written authorization

from HPD and as such the Tenant Association never had authority to enter into the Lease. Defendant cross-moves for summary judgment on the same issue but seeks a declaration that her Lease is valid. Additionally, defendant seeks to dismiss plaintiff's complaint on the ground that plaintiff's causes of action are time-barred "and other reasons including laches, waiver, estoppel, retaliatory eviction, jurisdictional, constitution due process and other statutes and reasons." In the alternative, defendant seeks leave to amend her answer to clarify existing defenses and to add additional affirmative defenses.

The court first turns to the parties' respective motions for summary judgment. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

In the present case, plaintiff has established its *prima facie* right to a declaratory judgment declaring defendant's Lease as it pertains to apartment 4A void as a matter of law and defendant has failed to raise a triable issue of fact. As a member of the TIL program, the Building is subject to 28 R.C.N.Y. § 34-04(b), which explicitly provides that "[i]f any dwelling unit in the Building is or becomes vacant, the Tenant Association will not sign a lease for such vacant dwelling unit, or allow such vacant dwelling unit to be come occupied, without the *prior written approval* of HPD." (emphasis added). This requirement is reiterated in the Net Lease and the

Programmatic Agreement between HPD and the Tenant Association. Accordingly, the Tenant Association only has the authority to enter into a lease for a vacant apartment when it is given written approval from HPD. Here, it is undisputed that apartment 4A was vacant at the time the Building entered into the TIL program. Additionally, plaintiff provides the affidavit of Edwin Lugo, deputy director of HPD's Program Unit, wherein he attests that HPD never provided approval in writing, either in advance or after the fact, to allow defendant to lease apartment 4A. Indeed, defendant concedes this fact and argues only that she was given oral permission from HPD at the time she entered into her lease for apartment 4A. However, oral approval is insufficient as a matter of law to authorize the Tenant Association to lease a vacant apartment. Accordingly, plaintiff has established that the Tenant Association was never authorized to enter into a lease with defendant for apartment 4A and as such defendant's Lease for apartment 4A is void as a matter of law.

In response, defendant has failed to raise a material issue of fact as to whether HPD provided written approval authorizing the Tenant Association to lease apartment 4A to defendant. As an initial matter, defendant's self-serving conclusory assertion that a representative from HPD told her over the phone to "take the apartment" is unavailing as the applicable law and lease provisions explicitly require "written approval." Accordingly, even assuming, *arguendo*, that such assertion is true, it would be insufficient as a matter of law to give the Tenant Association authorization to lease apartment 4A to defendant. To the extent defendant argues that written authorization is only a ministerial requirement which should be overlooked by this court, such contention is without merit as she fails to cite any authority for this proposition. Additionally, while defendant asserts that the requirement of a written

authorization by HPD was waived, she fails to present any authority or relevant facts to support such a contention. Indeed, contrary to defendant's opinion, it is immaterial that other members of the Building were okay with her taking apartment 4A at the time she entered into the Lease or that she has continued to pay rent for the apartments. These facts simply have no bearing on whether HPD waived the requirement for written approval as to defendant. Moreover, they do not change the essential fact that the law requires that the Tenant Association receive prior written approval from HPD before entering into a lease for any vacant apartment, which was never provided in this instance.

Additionally, defendant's contention that this action is time-barred is without merit. The Court of Appeals recently affirmed that an action to declare that a contract is void *ab initio* is not subject to the six year statute of limitations applicable to "an action upon a contractual obligation or liability." *Riverside Syndcate, Inc. v. Munroe*, 10 N.Y.3d 18, 24 (2008). Indeed, the Court noted, in dismissing the defendant's argument that the six-year statute of limitations should apply that such an argument "misconceives the nature of a statute of limitations; it does not make an agreement that was void at its inception valid by the mere passage of time." *Id.* Accordingly, as plaintiff brought this action to declare defendant's Lease as it pertains to apartment 4A void *ab initio*, it is not subject to the six-year statute of limitations and is timely.

Additionally, the remaining portion of defendant's cross-motion seeking leave to amend her answer is denied. Pursuant to CPLR 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit. On a motion for leave to amend, [the party] need not establish the merit of its proposed new allegations, but simply show that the

proffered amendment is not palpably insufficient or devoid of merit." *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted). Here, this court has already determined that the proposed additional amendments are without merit. By order dated August 8, 2011, Justice Solomon explicitly denied defendant the same relief that she now seeks on the ground that the proposed amendments did not have merit and as such "there [was] no basis for allowing them." Accordingly, defendant's motion for leave to amend must be denied.

Based on the foregoing, plaintiff's motion for partial summary judgment is granted and defendant's cross-motion is denied in its entirety. Accordingly, it is hereby

ORDERED and ADJUDGED that defendant Charo Nespral's Lease for apartment 4A in the Building is void *ab initio*. This constitutes the decision and order of the court.

Dated: 9/11/13

JSC

J.S.C.