IWC 879 DeKalb LLC v Walsh
2015 NY Slip Op 30339(U)
March 10, 2015
Civil Court, Kings County
Docket Number: 89553/14
Judge: Andrew Lehrer
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART S
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IWC 879 DEKALB, LLC,

Petitioner-Landlord,

-against-

VALERIE WALSH & TYRONE WALSH,

Respondents-Tenants.

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Index No. 89553/14

(Sequence No. 001)

DECISION/ORDER

Petitioner IWC 879 DeKalb LLC commenced this nonpayment proceeding against respondents-tenants Valerie Walsh and Tyrone Walsh (the "Respondents") in September 2014. The petition alleges, among other things, that the subject apartment (the "Apartment") is exempt from Rent Control and Rent Stabilization because the rent was $2,000.00 or more and the Apartment was deregulated before the Respondents took possession; that Respondents are in possession of the Apartment pursuant to a written rental agreement in which they promised to pay petitioner a preferential rent in the amount of $1,600.00 per month; and that as of September 4, 2014 Respondents owed petitioner $4,200.00 in rent.

In their answer, Respondents, who, at the time, were not represented by counsel, assert a general denial and further allege that they attempted to pay the rent but petitioner refused to accept it; that a part of the rent sought by petitioner has already been paid; and that there are or were conditions in the Apartment which petitioner did not repair and/or services which it did not provide.

By notice of motion dated November 24, 2014, Respondents, now represented by

counsel, move for an order granting them leave to file an amended answer and to conduct discovery relating to the regulatory status of the Apartment and their overcharge claims.

Leave to File an Amended Answer

In their proposed amended answer Respondents assert a general denial and several "affirmative defenses" and counterclaims, including that the Apartment is subject to Rent Stabilization as it was improperly deregulated; that specifically, the rent was improperly increased in 2003 or 2004 "in violation of the Rent Guidelines Board Order and so all subsequent increases are thereby voided"; that the amount requested in the rent demand was not made in good faith and the monthly rent sought therein is based on an improper rent increase; that they have been overcharged because their rent should be $548.35 per month; that they tendered $1,000.00 to petitioner, who returned it to them; and that petitioner has breached the warranty of habitability.

Petitioner opposes this part of Respondents' motion, arguing that it is untimely; that it is prejudiced by Respondents' delay in seeking relief; that their claims that the Apartment is Rent Stabilized and that they have been overcharged are time-barred; that they failed to demonstrate that petitioner is seeking any monies that it did not believe were owed; and that they failed to plead their breach of warranty and habitability defense and counterclaim with the particularity required by Section 3013 of the CPLR.

Section 3025(b) of the CPLR provides that "[a] party may amend his or her pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." Leave to amend should be freely given absent prejudice or surprise resulting directly from the delay in moving to amend. (*See Fahey v. County of Ontario*, 44 NY2d 934 [1978]). Absent such prejudice, a court

may even allow amendment of an answer to include a case-determinative defense such as statute of limitations. (*See id.*). That being said, leave to amend will be denied where the proposed pleading is palpably insufficient or patently devoid of merit. (*See Favia v. Harley-Davidson Motor Co., Inc.*, 119 AD3d 836 [2d Dept 2014]; *Maldonado v. Newport Gardens, Inc.*, 91 AD3d 731, 731-732 [2d Dept 2012]; *Lucido v. Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]).

A. Whether Petitioner Has Demonstrated It Will Be Prejudiced By Allowing Respondents to File an Amended Answer?

> [T]he showing of prejudice that will defeat [a motion to amend a pleading] must be traced right back to the omission from the original pleading of whatever it is that the amended pleading wants to add—some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one now wants to add.

Siegel, NY Prac § 237 (5th ed 2015). (*See Kimso Apts., LLC v. Gandhi*, 24 NY3d 403, 411 [2014], quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23-24 [1981][for there to be prejudice sufficient to defeat a motion to amend a pleading "there must be some indication that the (party) has been hindered in the preparation of (the party's) case or has been prevented from taking some measure in support of (its) position"]). The burden of establishing prejudice is on the party opposing the amendment. (*See Kimso Apts., LLC v. Gandhi*, *supra*, 24 NY3d at 411).

Here, Respondents filed their *pro se* answer on September 16, 2014. Their attorney served this motion on November 24th, less than a month after filing its notice of appearance. Petitioner has not shown that it has lost any rights or changed its position as a result of Respondents' delay in filing their motion. Nor has it shown that it will face any significant trouble or expense, or that that it will suffer any other legally cognizable prejudice, as a result of

such delay. Accordingly, the Court finds that petitioner has not met its burden of proving that it would be prejudiced by allowing Respondents to file their amended answer.

B. Whether Any of the Defenses and Counterclaims Asserted in the Proposed Amended Answer Are Palpably Insufficient or Patently Devoid of Merit?

Having found that petitioner will not be prejudiced by granting Respondents' motion for leave to file an amended answer, the Court "need only determine whether the proposed amendment is 'palpably insufficient' to state a cause of action or defense, or is patently devoid of merit." (*Lucido v. Mancuso, supra*, 49 AD3d at 229). "No evidentiary showing of merit is required . . ." (*Id.*). Indeed, "a court shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt." (*United Fairness, Inc. v. Town of Woodbury*, 113 AD3d 754, 755 [2d Dept 2014]).

The Court finds that Respondents' first affirmative defense, asserting that the Apartment is Rent Stabilized and was improperly deregulated, is not palpably insufficient or patently devoid of merit. Although they allege that the basis for that defense is an improper rent increase which allegedly took place in 2003 or 2004, more than 10 years before they asserted the defense and well beyond the four-year statute of limitations for asserting a rent overcharge claim (*see* CPLR § 213-a), a court may consider events beyond the four-year limitations period for the purpose of determining whether an apartment is regulated. (*See East W. Renovating Co. v. New York State Div. of Hous. & Community Renewal*, 16 AD3d 166, 167 [1st Dept 2005]). Indeed, a challenge to an apartment's regulatory status may be made at any time. (*See Gersten v. 56 7th Ave. LLC*, 88 AD3d 189, 199 [1st Dept 2011]).

The Court also finds that Respondents' second affirmative defense, asserting that the amount requested in petitioner's rent demand was not made in good faith, and its second "third"

affirmative defense,[1] asserting that they tendered $1,000.00 to petitioner and that petitioner returned those funds to them, are not palpably insufficient or patently devoid of merit.

So too, the Court finds that Respondents' fourth affirmative defense and second counterclaim, asserting breach of warranty of habitability, are not palpably insufficient or patently devoid of merit. The proposed amended answer describes specific conditions that exist in the Apartment and alleges that petitioner was notified about them and failed to correct them.

Finally, the Court finds that Respondents' "first" third affirmative defense and first counterclaim, asserting rent overcharge, are not palpably insufficient or patently devoid of merit to the extent they are based on improper rent increases that were imposed on or after the "base date," defined as the date four years prior to the date their claim is asserted (*see* Rent Stabilization Code [9 NYCRR] § 2520.6[f]). However, they are patently devoid of merit to the extent they are based on improper rent increases that were imposed before the "base date" since they are barred by the four-year statute of limitations for overcharge claims, set forth in Section 213-a of the CPLR, and the prohibition on examining an apartment's rental history more than four years before an overcharge claim is asserted, set forth in both Section 213-a of the CPLR and Section 26-516(a)(2) of the Rent Stabilization Law. Although the Court of Appeals has held that where a tenant presents "substantial indicia of fraud" the rental history beyond four years may be examined "for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date" (*see Matter of Grimm v. State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366-367 [2010]), here Respondents merely allege there was a rent increase in 2003 (or 2004) that

[1] The proposed amended answer includes two "third" affirmative defenses. The first asserts rent overcharge and the second asserts tender and refusal.

exceeded the amount permitted by the Rent Guidelines Board. Because, generally, an increase in the rent alone will not be sufficient to establish a colorable claim of fraud (*see Matter of Grimm*, *supra*, 15 NY3d at 367), Respondents' rent overcharge defense and counterclaim are insufficient to trigger an inquiry into the legitimacy of the base date rent.

Accordingly, the Court grants Respondents' motion for leave to file an amended answer to the extent of deeming the proposed amended answer annexed as Exhibit E to their motion papers to have been served and filed. However, the grounds for their "first" third affirmative defense and first counterclaim shall be limited to improper rent increases imposed on and after the "base date." Petitioner may serve a reply to the counterclaims by March 31, 2015.

Leave to Conduct Discovery

In summary proceedings, a party requesting discovery must obtain leave of court (*see* CPLR § 408) and to obtain such leave, must demonstrate "ample need." (*Antillean Holding Co. v. Lindley*, 76 Misc 2d 1044, 1047 [Civ Ct, New York County 1973]). In determining whether a party has established ample need, courts consider a number of factors, including:

- whether the movant has asserted facts to establish a cause of action;
- whether there is a need to determine information directly related to the cause of action;
- whether the requested disclosure is carefully tailored and is likely to clarify the disputed facts;
- whether prejudice will result from granting leave to conduct discovery;
- whether any prejudice caused by granting a discovery request can be diminished by an order fashioned by the court for that purpose; and
- whether the court can structure discovery so that unrepresented parties will be protected and not adversely affected.

(See New York Univ. v. Farkas, 121 Misc 2d 643, 647 [Civ Ct, New York County 1983]). Another factor in deciding whether to grant leave to conduct discovery is whether material evidence is in the sole possession of others. (*See 217 E. 82nd St. Co. v. Perko*, 10 Misc 3d 146[A], 2006 NY Slip Op 50157[U][App Term, 1st Dept 2006]; *Quality & Ruskin Assoc. v. London*, 8 Misc 3d 102, 103-104 [App Term 2d & 11th Jud Dists 2005]; *Malafis v. Garcia*, 2002 NY Slip Op 40180[U][App Term, 2d & 11th Jud Dists 2002]; *Benjamin Shapiro Realty Co. v. Henson*, 162 Misc 2d 1, 9 [Civ Ct, New York County 1994]).

The Court finds that Respondents have asserted facts to establish a defense that the Apartment was improperly deregulated and that they may have been overcharged; that they have a need to obtain information regarding all rents charged, and rent increases imposed, from 2004 to the present, as well as documentation regarding the tenancies during that period .[2] The Court further finds that Respondents' document request is carefully tailored and likely to clarify whether the Apartment was properly deregulated and whether they have been overcharged. Finally, because petitioner should be able to promptly provide Respondents with whatever relevant documents it has, any delay caused by granting their discovery request will be minimal.

Accordingly, Respondents' motion for leave to conduct discovery is granted. Petitioner shall provide Respondents with the documents described in paragraph 20 of their attorney's affirmation, to the extent they are in its custody or control, by March 31, 2015. However, petitioner need not provide copies of applications for major capital improvement rent increases, since Respondents may obtain such documents from the New York State Division of Housing

[2]The Court notes that the New York State Division of Housing and Community Renewal rent history for the Apartment, annexed as an exhibit to Respondents' motion papers, indicates at least seven vacancies since 2004. It also indicates that the apartment registrations for 2008, 2009, 2010, and 2011 were not filed until 2012.

and Community Renewal.

Upon completion of discovery, either party may move on at least eight days' written notice, or by stipulation, to restore the case to the calendar.

This constitutes the decision and order of the Court.

Dated: March 10, 2015
Brooklyn, New York

Hon. Andrew Lehrer
Judge, Housing Court