

**Yu Hua Chen v Mak**

2015 NY Slip Op 31405(U)

July 28, 2015

Supreme Court, New York County

Docket Number: 112630-2009

Judge: George J. Silver

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

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YU HUA CHEN,

Plaintiff,

Index No. 112630-2009

-against-

**DECISION/ORDER**

Motion Sequence 002

NANCY MAK, CHINATOWN PRESERVATION HDFO,  
ASIAN AMERICAN HOUSING AND DEVELOPMENT  
COMPANY, INC. and ASIAN AMERICANS FOR  
EQUALITY,

Defendants.

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**HON. GEORGE J. SILVER, J.S.C.**

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Affidavit & Collective Exhibits Annexed.....	<u>1, 2, 3, 4</u>
Answering Affirmation, Affidavit & Collective Exhibits.....	<u>5, 6, 7</u>
Reply Affirmation, Affidavit & Collective Exhibits Annexed.....	<u>8, 9, 10</u>
Affidavit of Authentication.....	<u>11</u>
Sur-Replies.....	<u>12, 13</u>
Amended Sur-Reply.....	<u>14</u>

In this landlord-tenant action, defendants Chinatown Preservation HDFO (Chinatown) and Asian American Housing Development Company, Inc. (Asian American) (collectively moving defendants) move pursuant to CPLR § 3212 for an order granting them summary judgment dismissing the complaint of plaintiff Yu Hua Chen (Chen). Chen’s complaint alleges causes of action sounding in breach of contract, rent overcharge, diminution of services, conversion, fraud, deceptive trade practice, unjust enrichment and illegal lockout.

The following facts appear to be undisputed. Chen became a tenant of apartment 6 of the building located at 28 Henry Street (subject building) in New York County on January 3, 2006 pursuant to a vacancy lease. The subject building was owned by co-defendant Nancy Mak (Mak). Mak sold the subject building to Asian American and conveyed to it a bargain and sale deed dated September 6, 2006. Asian American sold the subject building to Chinatown and

conveyed a bargain and sale deed dated February 7, 2007. Asian American and Chinatown are non-profit housing development companies governed by the New York State Private Housing Finance Law. In 2009 Chinatown commenced holdover proceedings against 6 tenants, including Chen, alleging that the tenants failed to cure violations of their leases by failing to remove partitions allegedly installed by the tenants in their apartments. On June 25, 2009, while the holdover proceedings were still pending, The New York City Department of Buildings issued a vacate order mandating that the allegedly illegal partitions be removed. Chinatown cured the violation by removing the illegal walls and bunk beds from the apartments and discontinued the holdover proceeding .

With respect to her first cause of action for breach of contract, Chen alleges in her verified bill of particulars that Mak, as moving defendants' predecessor in interest, advertised a 3 bedroom apartment for rent at the subject building and Chen leased a 3 bedroom apartment but later learned that the apartment could not be used as such under the New York City Building Code. Chen further alleges that moving defendants inspected the subject building prior to purchasing it and knew or should have known that the apartment had 3 bedrooms in violation of the Building Code. Chen seeks damages for the difference between paying to rent a 3 bedroom apartment and the value of a 1 bedroom apartment.

Moving defendants argue that Chen's claim for breach of contract should be dismissed because Chen admitted during her deposition that when she first viewed the apartment it was a 1 bedroom apartment with a kitchen, living room and bathroom and that she converted the apartment into a 3 bedroom by installing the partition walls and bunk beds in order to rent out the bedrooms to transients. Moving defendants also argue that Asian American did not hold title to the building when Chen alleges the breach of contract occurred. In opposition, Chen argues that Mak knowingly rented Chen a 1 bedroom apartment as a 3 bedroom apartment and that Chinatown, as the current landlord, is charged with notice of the agreement between her and Mak. Chen also argues that Chinatown and Asian American had the opportunity, when they purchased the subject building, to insulate themselves from Mak's bad acts by discovering the irregularities in the subject building but chose not to. Chen argues that in the interests of equity and justice Chinatown and Asian American should be estopped from denying responsibility for Mak's bad acts.

As Justice Gische previously held in a decision an order dated March 14, 2012 in the related action entitled *Zheng v Mak, et al*, Index No. 112693-2009, in which the defendants, causes of actions and facts alleged are the same, that none of the facts alleged with respect to Chen's cause of action for breach of contract involve Asian American and Asian American cannot be held liable for breach of contract because it did not own the building at the time the lease was entered into and is not the current owner of the building. Accordingly, Chen's first cause of action for breach of contract against Asian American is dismissed.

Chen's breach of contract claim should also be dismissed as against Chinatown. As Chen argues in her opposition papers, her breach of contract claim is based upon the agreement between her and the prior owner of the building, Mak, to rent a 3 bedroom apartment. Even accepting as true Chen's claim that Chinatown, as transferee, took possession of the subject building subject to the conditions as to tenancy (*Sharp v Melendez*, 139 AD2d 262 [1<sup>st</sup> Dept 1988]), Chen cannot establish a prima facie claim of a breach of contract claim against

Chinatown. Chen testified at her deposition that when she first viewed the apartment it consisted of a kitchen, a bathroom, a living area and one bedroom. Chen also testified that she paid a contractor to install partition walls and bunk beds within the apartment. The essential elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages (*Morpheus Capital Advisors LLC v. UBS AG*, 105 AD3d 145 [1<sup>st</sup> Dept 2013]). Based upon Chen's admissions, she cannot establish that she contracted for and rented from Mak a 3 bedroom apartment when she knowingly rented a 1 bedroom apartment or that Mak breached the lease agreement by renting Chen a 1 bedroom apartment. Chen claim for unjust enrichment is dismissed as duplicative of her breach of contract claim

Chen's third cause of action for diminution of services, which is also predicated upon Mak having allegedly rented a 3 bedroom apartment that was in fact a legal 1 bedroom apartment, must also be dismissed as against moving defendants for the reasons stated above.

Moving defendants are also entitled to dismissal of Chen's illegal lock out claim. Chen has admitted in her deposition that she paid a contractor to install the partitions and bunk beds in her apartment that gave rise to the vacate order and her claim that summary judgment should be denied because there is a question of fact as to whether Chinatown, in an attempt to subvert the judicial process in Housing Court, was responsible for anonymously reporting the violations to the Department of Buildings, is without merit. Such speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact (*Castore v Tutto Bene Rest. Inc.*, 77 AD3d 599 [1<sup>st</sup> Dept 2010])<sup>1</sup>. Moreover, Chen's claim that she installed the partitions based upon Mak's suggestion and that she did not know that partitioning the apartment violated the New York City Buildings Code does not raise a triable issue of fact.

According to the bill of particulars, Chen's fraud cause of action is based upon Mak allegedly increasing the rent for Chen's apartment in or about August 2001 in violation of the Rent Stabilization Law. The bill of particulars further alleges that Mak committed fraud by advertising and renting a 3 bedroom apartment in violation of applicable law, including the certificate of occupancy for the subject building. Chen alleges that Chinatown and Asian America had access to the facts constituting such fraud and therefore knew or should have known of Mak's fraudulent conduct. Chen's rent overcharge claim, as set forth in the bill of particulars, is based upon Mak having allegedly increased the rent for Chen's apartment from \$427.29 to \$1,200 in August 2001. Chen also alleges that she paid Mak cash as a broker's fee and as key money.

Plaintiff argues that Justice Gische's March 14, 2012 order in *Zheng* should be given collateral estoppel effect herein and that defendants' motion for summary judgment should be denied with respect to her claims for rent overcharge and fraud. In the *Zheng* action, which asserts identical causes of action against the same defendants herein, the defendants moved to

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<sup>1</sup> It should be noted that in addition to the breach of contract claim, Justice Gische also dismissed the diminution of services, and illegal lockout claims in *Zheng* as against Asian American on the ground that Asian American was not the owner of the subject building when the relevant events took place and was not the current owner.

dismiss or for summary judgment. Justice Gische treated the motion as one for summary judgment and granted it to the extent of dismissing the causes of action for breach of contract, diminution of services, conversion, deceptive trade practice, unjust enrichment and illegal lockout against Asian American. Justice Gische did not dismiss the causes of action for rent overcharge and fraud against Asian American. With respect to Chinatown, Justice Gische dismissed Zheng's claims for conversion, deceptive trade practices and unjust enrichment. Justice Gische denied the motion with respect to the causes of action for overcharge and fraud and Chinatown did not move to dismiss Zheng's breach of contract, diminution of services or illegal lockout claims. Regarding the claims for rent overcharge and fraud, Justice Gische stated:

The issue of whether plaintiff's overcharge claim should be restricted to the 4 year limitation period is closely intertwined with her fraud claim because, if there is a substantial indicia of fraud, then the rent history for Apartment 2 is unreliable. To state a cause of action for fraud, plaintiff must show: (1) that defendants intentionally made a misrepresentation or material omission of fact; (2) that the misrepresentation or material omission of fact was false or known to be false to defendants; (3) plaintiff's reliance; and (4) that the misrepresentation resulted in some injury to plaintiff (citation omitted).

The fraud alleged by plaintiff is two-fold: she claims that the jump in rent for apartment 2 from \$150.01 in 1998 to \$1,100 in 200 is 'inconsistent with applicable law.' To further illustrate her point, plaintiff provides the rent history for two other unrelated apartments. The rent for apartment 6, for example, increased from \$427.29 to \$1,200.00 upon becoming vacant and the rent for apartment 19 increased rent [sic] from \$369.73 to \$1,050 upon vacancy. Plaintiff contends that this not only shows Mak defrauded her tenants, but that moving defendants could and should have discovered this fraud through due diligence. Her second fraud allegation involves the size of her apartment. She contends she rented apartment 2 as a three (3) bedroom apartment when, in fact, it is only a legal one (1) bedroom apartment.

The March 14, 2012 order further states:

They [defendants] have not met their burden and, in any event, plaintiff has pleaded and raised triable issues of fact supporting a tenable claim for fraud, requiring denial of Asian America and Chinatown Preservation's motion for summary judgment dismissing (or limiting) the overcharge (2<sup>nd</sup> COA) claim based on the applicable statute of limitations and fraud claim (5<sup>th</sup> cause of action).

Collateral estoppel, or issue preclusion, "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500, 467 NE2d 487, 478 NYS2d 823 [1984]). The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the party against whom estoppel is sought had a full and fair

opportunity to litigate the issue in the earlier action.

Moving defendants cannot be collaterally estopped from seeking summary dismissal of Chen's rent overcharge and fraud claims. Although Justice Gische found that there were issues of fact in *Zheng* with respect to these claims, the motion in *Zheng* was made before depositions in this case had been held. With regard to the second prong of the estoppel doctrine, some of the factors to be considered concern the nature of the forum and the importance of the claim in the prior litigation, the incentive to litigate, the competence of counsel and the availability of new evidence that would have altered the prior outcome (see *id.* at 501). The deposition of Chen, conducted well after the *Zheng* motion, constitutes new evidence (see generally *Morales v Coram Materials Corp.*, 64 AD3d 756 [2d Dept 2009]) and based upon this new evidence, moving defendants are not collaterally estopped from challenging Chen's rent overcharge and fraud claims.

The four-year statute of limitations applicable to both administrative and judicial rent overcharge claims (Rent Stabilization Law [Administrative Code of City of NY] § 26-516 [a] [2]; CPLR 213-a), by its terms, commences to run with the "first overcharge alleged" (*Mozes v Shanaman*, 21 AD3d 854 [1<sup>st</sup> Dept 2005]). Here, Chen claims that the alleged overcharge upon which she is relying occurred in 2001. Justice Gische found that the plaintiff in *Zheng* had pleaded and raised triable issues of fact supporting a tenable fraud claim based upon the plaintiff's allegations that Mak defrauded tenants by impermissibly increasing the rent and by renting her a legal 1 bedroom apartment as a 3 bedroom apartment. Here, however, there is no tenable claim for fraud with respect to the number of bedrooms in the apartment because Chen has admitted that she knowingly rented a 1 bedroom apartment<sup>2</sup>. Accordingly, Chen's claim for fraud, as alleged in the bill of particulars, is dismissed. It is well settled that an increase in rent alone is insufficient to establish the colorable claim of fraud necessary to examine the rental history beyond the four year look back period (*Conason v Megan Holding, LLC*, 25 NY3d 1, 29 NE3d 215, 6 NYS3d 206 [2015]). "The fact that there has been a sizeable increase in the rent for the subject apartment prior to the look-back period does, alone, support or establish that the tenant has a colorable claim of fraud" (*Matter of Boyd v N.Y. State Div. of Hous. & Community Renewal*, 110 AD3d 594 [1<sup>st</sup> Dept 2013] [Gische, J. dissenting] *rev'd* 23 NY3d 999, 16 NE3d 1243, 992 NYS2d 764 [2014]). The only basis for looking beyond the 4 year statutory period set forth in CPLR § 213-a offered by Chen is her claim that Mak improperly increased the rent of various apartments in the subject building in excess of the rents permitted by the Rent Guidelines Board. These allegations do not establish the substantial indicia of fraud necessary to trigger an examination of the rental history beyond the 4 year statutory period (*IWC 879 Dekalb, LLC v Walsh*, 46 Misc3d 1227 [A] [Civ Ct, Kings County 2015]; *Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999, 992 NYS2d 764, 16 NE3d 1243 [2014] [DHRC properly declined to examine an apartment's rental history for fraud where a tenant merely alleged that the registered monthly rent increased from \$572 in July 2004 to \$1,750 in October

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<sup>2</sup> The court granted defendants' motion to renew their summary judgment motion in *Zheng* based upon a similar admission made by *Zheng* in her deposition testimony but adhered to Justice Gische's determination because *Zheng* offered an excuse for the inconsistencies between her affidavit and deposition testimony, thereby raising questions of credibility to be resolved by a jury.



2004]). Therefore, Chen's claim fro rent overcharge is dismissed.

Chen has chosen to voluntarily discontinued her conversion and deceptive trade practices claims in accordance with Justice Gische's ruling in *Zheng*. Any claims by Chen against Chinatown and Asian American pertaining her alleged payment of a broker's fee and key money to Mak are also dismissed as Chinatown and Asian American did not own the subject building when these transactions allegedly occurred and there is no allegation that either entity was involved in such transactions.

In accordance with the foregoing, it is hereby

ORDERED that Chinatown Preservation HDFC and Asian American Housing Development Company, Inc.'s motion for summary judgment is granted and the complaint against them is dismissed; and it is further

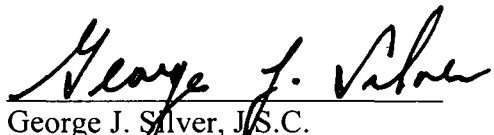
ORDERED that the Clerk is directed to entry judgment accordingly; and it is further

ORDERED that the plaintiff's action is severed and continued against the remaining defendant, Mak, and that moving defendants' counterclaims against plaintiff are continued as well ; and it is further

ORDERED that the parties are to appear for a pre-trial conference on September 29, 2015 at 9:30 a.m. in Part 40, room 422 of the courthouse located at 60 Centre Street, New York New York 10007; and it is further

ORDERED that the movants are to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry.

Dated: 7/28/15  
New York County

  
George J. Silver, J.S.C.

**GEORGE J. SILVER**