SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

BENJAMIN DIXON,
Plaintiffs,
-against-

INDEX NO. 159846/2014
MOTION DATE 07-08-2015
MOTION SEQ. NO. 002
MOTION CAL. NO.

105 WEST 75TH STREET LLC, NUNZIO RUGGIERO, RUGGIERO REALTY MANAGEMENT CORP., ANGELA RUGGIERO, GINA PATE and DIME SAVINGS BANK OF WILLIAMSBURGH,
Defendants.

The following papers, numbered 1 to 5 were read on this motion for leave to renew and reargue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits	5 - 6
Replying Affidavits	

Cross-Motion: ☐ Yes X No

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

Upon a reading of the foregoing cited papers, it is ordered that this motion by Order to Show Cause for leave to reargue; for a stay of this action; for leave to amend the pleadings; for removal of a pending landlord and tenant summary proceeding to this Court for a joint trial in this action and for renewal are denied.

This is an action for a declaratory judgment, injunctive relief, lease reformation, rent overcharge, fraud and attorney's fees. Benjamin Dixon rented apartment 5B (herein "apartment") at 105 West 75th Street, New York, N.Y. (herein "Building") from defendants 105 West 75th Street LLC, Nunzio Ruggiero, Ruggiero Realty Management Corp., Angela Ruggiero and Gina Pate (herein "Owners") pursuant to a lease dated April 4, 2013 (herein "Lease"). The Lease was for a one year term and a monthly rental amount of $3,200.

Prior to renting the Apartment to plaintiff, the Owners rented the Apartment to Melly Garcia pursuant to a two-year rent stabilized lease in August 1992. Garcia renewed the lease seven times, vacated the Apartment in July 2002, and the Apartment remained vacant throughout 2003. The adjoining apartment also became vacant in September 2003. The Owners decided to make an addition to both the Apartment and the adjoining apartment thereby making both apartments duplex apartments. The Owners obtained the necessary work permits and retained a general contractor and plumber to perform the necessary work. The work was completed in the Spring of 2004 and cost the Owners approximately $200,000 to complete. The Owners then rented the Apartment for fair market value in May 2004.

A new Certificate of Occupancy (herein "C of O") was issued by the New York City Department of Buildings (herein "DOB") on May 2, 2007, but the new C of O incorrectly listed that the Building had nine (9) residential units instead of ten (10) units as the Building had always contained ten (10) units. After the Owners submitted the necessary papers to the DOB, the DOB issued a new C of O on November 3, 2014. The Owners failed to file an exit registration with the New York State Division of Housing and Community Renewal (herein "DHCR") indicating that the Apartment was no longer subject to rent stabilization. On August 14, 2014, the Owners filed an Annual Apartment Registration Form with the DHCR for the year 2005 indicating that the Apartment had been rented at fair market value from May 21, 2004 through May 31, 2005. The Owners stated on the Registration Form that they conducted Major Capital Improvements (herein "MCI") on the Apartment and that the Apartment was a "new duplex apartment" due to a penthouse and terrace being "added to the apartment making it a new duplex apartment with terrace entitling owner to a first rent" (see Moving Papers, Mot. Seq. 001, Exhibit P).

Dixon alleges that the Apartment is still governed by the rent stabilization laws due to the 2007 error in the DOB C of O and the Owners' failure to properly file the necessary paperwork with the DHCR, thereby removing the Apartment from rent stabilization regulations. Dixon seeks the difference between the fair market value rent and the rent stabilized rent from the commencement of the Lease, treble damages, legal fees and costs, that the Apartment be declared rent stabilized and that the Lease be reformed to reflect the rent stabilized monthly rent of $1,117.00.

The Owners moved, pre-answer, under Motion Sequence 001 pursuant to CPLR 3211(a)(1) to dismiss the complaint based on a defense founded upon documentary evidence. In support, the Owners annexed the Lease; the Garcia lease and lease renewals; the DHCR Annual Apartment Registration Forms from 1993 through 2003; a report from the DHCR listing the Apartment as vacant from 2005 through 2014; the architectural drawings for the proposed addition to the Apartment approved by the Landmark Preservation Commission; the work permit issued by the DOB; the invoices paid by the Owners to the general contractor and plumber along with cancelled checks reflecting said payments; the 2007 and 2014 C of O's issued by the DOB; the "No Work" work permit issued by the DOB in 2014 showing the proposed correction of the C of O to reflect ten (10) apartments along with the corrected C of O; and the 2014 late filing of the DHCR Annual Apartment Registration Form for the year 2005.

In an Order dated April 13, 2015, this Court granted the Owners dismissal of the Complaint in its entirety reasoning that the documentary evidence submitted by the Owners utterly refuted the factual claims asserted in the Complaint, and granted the Owners reimbursement of any legal fees and expenses incurred in defending this action pursuant to the Lease. This Court reasoned that the Owners were entitled to "first rent" without rent stabilization restrictions because the documentary evidence established that the Apartment was vacant prior to the renovations; was a newly created duplex apartment which did not previously exist; the C of O prior to the work being conducted showed that no roof-top livable space existed, nor was there a duplex apartment; the DOB work permits and subsequent C of O's showed that the Owners created additional livable space.

Dixon now moves for leave to renew, reargue, and vacate this Court's April 13, 2015 decision; for a stay of this action; for leave to amend the pleadings; and for removal of a pending summary landlord tenant proceeding to this Court for a joint trial in this action.

A motion for leave to renew "shall be identified specifically as such; shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR § 2221[e]).

Renewal applies to the submission of new evidence not available at the time the original motion was submitted (Laura Vazquez v. JRG Realty Corp., 81 A.D. 3d 555, 917 N.Y.S. 2d 562 [1st Dept., 2011]). Failure to offer a reasonable justification for failure to present the facts sought to be asserted at renewal in the original motion results in denial of renewal. Renewal is not available to parties that seek a "second chance" because of failure to exercise due diligence (Chelsea Piers Management v. Forrest Electric Corporation, 281 A.D. 2d 252, 722 N.Y.S. 2d 29 [1st Dept.,2001]). Pursuant to CPLR §2221[e] the Court in its discretion may grant a motion to renew that fails to present new facts, "in the interest of justice" after relying on facts not submitted in the motion papers (Tuccillo v. Bovis Lend Lease, Inc., 101 A.D. 3d 625, 958 N.Y.S. 2d 86 [1st Dept., 2012]).

Dixon first contends that the February 17, 2015 affidavit of Eumelia Garcia is fraudulent because Eumelia Garcia passed away more than ten (10) years prior to the date in the affidavit. However, at oral argument held on Jun 17, 2015, Eumelia Garcia appeared before this Court on behalf of the Owners. This Court stated on the record that:

The Court: "The photograph on the passport looks just like the person that has been addressing the Court regarding the contents of this passport and her birth certificate and social security number. And just for the record, I am going to state the passport number. It's 467088451. And now I have a signature here. And I am going to look for the affidavit that was submitted in support of the motion.

....

The Court: The signature appears pretty close to the one on the affidavit. Can you show it to counsel, please, just so that he can verify that it's the same individual,

Mr. Katz: We don't dispute that.
The Court: You will not dispute?
Mr. Katz: No."

(See Docket No. 129, Pgs. 4-5).

After examining the documents submitted by the Owners and Garcia, and hearing the testimony at oral argument, this Court determined that the witness was alive and well, and signed the affidavit submitted by the Owners in support of dismissal of the Complaint.

Further, leave to renew is based upon information not available at the time the original motion was submitted. The evidence submitted by Dixon in support of renewal as to the authenticity of Garcia's affidavit was available at the time of the underlying motion. Leave to renew on this point is denied.

The Court has discretion to grant a motion to reargue upon a showing that it, "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law "(Kent v. 534 East 11th Street, 80 A.D. 3d 106, 912 N.Y.S. 2d 2 [1st Dept., 2010] citing to Foley v. Roche, 68 A.D. 2d 558, 418 N.Y.S. 2d 588 [N.Y.A.D. 1st Dept., 1979]). Reargument is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted. The movant cannot merely restate previous arguments (Kent v. 534 East 11th Street, 80 A.D. 3d 106, supra and Ul Haque v. Daddazio, 84 A.D. 3d 940, 922 N.Y.S. 2d 548 [N.Y.A.D. 2nd Dept., 2011]).

Dixon cites Altman v. 285 West Fourth, LLC., 127 AD3d 654, 8 NYS2d 295 (1st Dept., 2015) as his first basis for leave to reargue. In Altman, the Appellate Division, First Department held that "[a]lthough defendant was entitled to a vacancy increase of 20% following the departure of the tenant of record, the increase could not effectuate a deregulation of the apartment since the rent at the time of the tenant's vacatur did not exceed $2,000" (Id., at 655). The Court in Altman dealt with the issue of vacancy increases following the departure of the tenant of record, and the prohibition of rent stabilization deregulation for rent under $2,000 at the time of the tenant's departure.

Section 2520.11(r)(10) of the Rent Stabilization Code states that "where an owner substantially alters the outer dimensions of a vacant housing accommodation, which qualifies for a first rent equal to or exceeding the applicable amount qualifying for deregulation, as provided in this subdivision, exemption pursuant to this subdivision shall apply." Once "the perimeter walls of the apartment have been substantially moved and changed and where the previous apartment, essentially, ceases to exist," the apartment is no longer rent stabilized "thereby rendering its rental history meaningless," and entitling the owner to "first rent" within the meaning of Section 2520.11(r)(10) (Matter of Velasquez v. New York State Div. of Hous. & Com., 2015 NY Slip Op 06353, at 5 [2nd Dept., July 29, 2015]; [see Matter of Devlin v. New York State Div. of Hous. & Community Renewal, 309 AD2d 191, 195, 764 NYS2d 100 [1st Dept., 2003]; 446-450 Realty Co., L.P. v. Higbie, 30 Misc. 3d 71, 72-73, 918 N.Y.S.2d 689 [App. Term, 1st Dept.]).

Here, the documentation submitted by the Owners showed that the Apartment was converted from a one floor apartment to a duplex apartment which included additional living space, installation of an internal staircase, and additional roof-top penthouse. This created a new unit obliterating the existing apartment thereby rendering its rental history meaningless. This Court did not misapprehend any relevant facts or misapply controlling principles of law in holding that the Owners were entitled to deregulation of the Apartment's rent stabilization status.

Dixon further argues that this Court should remand this matter to the New York State Division of Housing and Community Renewal (herein "DHCR") for an administrative determination as to the Apartment's rent regulatory status. Dixon contends that this Court overlooked and misapprehended the holding in Davis v. Waterside Housing Company Inc., 274 A.D.2d 318, 711 N.Y.S.2d 4 [1st Dept., 2000], wherein the First Department held that where there is concurrent jurisdiction between a court and an administrative agency "which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort to a judicial tribunal should be withheld pending resolution of the administrative proceeding" (Id., at 319).

Dixon now argues for the first time in support of renewal and rearguement that the doctrine of primary jurisdiction precludes this Court making a determination as to the relief sought by Dixon in his Complaint, and that this Court should stay this action pending a determination by the DHCR. However, Dixon commenced this action in Supreme Court, New York County and sought a declaration from this Court that the Apartment was subject to rent stabilization regulations and injunctive relief enjoining the Owners from holding, demanding or receiving rents from the Apartment in excess of the lawful stabilized rent.

In the Davis case, which Dixon relies on for the proposition that this Court should defer to the DHCR for a determination of the underlying rent stabilization issues, the defendants had previously filed an application with the DHCR for a determination of the issues regarding the subject apartment's rent stabilization status. The First Department held that the trial court should have deferred to the DHCR's determination under the doctrine of primary jurisdiction, and that dismissal or stay of an overcharge action commenced in Supreme Court after making an application for the same relief in DHCR is proper.

Here, Dixon has not made an application to, or filed a complaint with DHCR. There is no administrative proceeding pending against the Owners in relation to the Apartment. The doctrine of primary jurisdiction is inapplicable in this action. Dixon filed his action first in Supreme Court and only after this Court denied him relief does he resort to the doctrine of primary jurisdiction, and requests that this matter be adjudicated by DHCR. Dixon waived DHCR adjudication by commencing this action in Supreme Court.

Dixon next argues that this Court overlooked his request to be considered an "expert" for the purposes of refuting the Owner's documentary showing in the underlying motion. In support of this contention, Dixon submitted an affidavit which stated, in part, that he made a visual inspection of the rooftop enclosure (see Docket No. 57, PP 33 - 36). After taking measurements of the rooftop, Dixon, in his expert opinion, determined that the rooftop did not comport with the plans approved by the DOB because the enclosure was larger than previously approved by the DOB (Id.).

Qualifying or failing to qualify Dixon as an expert has no relevance. Dixon's self-serving affidavit admits the existence of a rooftop, a landing, stairs, and additional livable space created by the Owners. Dixon admits the creation of a new duplex apartment that did not previously exist, thereby entitling the Owners to the rent stabilization deregulation of the Apartment. Leave to renew and reargue based on this point is denied. This Court did not overlook relevant facts or misapprehend controlling points of law.

Dixon next argues as his basis for renewal that the 2004 financial statements contradict the documentary evidence submitted by the Owners in the underlying motion. These documents were not previously available because the documents are subject to an on-going Stipulation and Protective Order entered into by the parties (see Docket No. 126). This argument was not made in the underlying motion, nor are the documents "newly discovered evidence."

Further, even if this Court were to consider this "new evidence"in violation of a stipulation entered into by the parties, the authenticity of the 2004 statements have no bearing on the Court's determination in the underlying motion that the basis for "first-rent" was the creation of an apartment that did not exist before, and subject to rent stabilization deregulation. Besides annexing the 2004 financial statements, the Owners also annexed various cancelled checks showing the amount of payments made by the Owners for the work performed on the Apartment. Renewal on this point is denied.

Dixon next argues that renewal is proper based upon information he received from the DOB after this Court's April 13, 2015 decision. Dixon contends that this information should change this Court's prior determination dismissing the causes of action seeking a declaration that the Apartment is illegal and enjoining the Owners from collecting rent until the Apartment is legalized. Dixon asserts that the C of O issued by the DOB for the Apartment is not legitimate because the apartment was not properly inspected; the DOB officials inspecting the Apartment and issuing the subsequent work permits and C of O were part of an elaborate bribery scheme; and that subsequent DOB violations issued in March 2015 due to the Apartment not comporting to DOB approved plans all show that the DOB "wrongfully issued [a C of O], and would not have issued [a C of O] but for what appears wrongful and unlawful conduct by agents and employees of the [DOB] and, upon information and belief, Defendant Nunzio Ruggiero" (see Moira Brennan Aff in Sup, PP 90-95).

Although Dixon made a DOB FOIL request prior to this Court's decision and the information was not provided to Dixon until after this Court's decision, the newly discovered evidence would not have changed this Court's prior determination. In support of the Owner's underlying motion to dismiss the First and Second causes of action seeking a declaration that the Apartment is illegal and enjoining the Owners from collecting rent until the Apartment is legalized, the Owners submitted DOB documents showing that the Apartment has a legal C of O issued by the DOB. To date, the Owners have been issued four (4) violations pertaining to the Apartment. Three (3) of the violations are still pending before the DOB and involved the size of the penthouse construction and the sprinkler system in the Apartment. A hearing was scheduled for August 6, 2015 to determine whether the construction of the Apartment violated the previously approved DOB construction plans, and what penalties, if any, may be imposed.

In the underlying motion, the Owners submitted proof in the form of the C of O prior to the rooftop construction, the creation of a duplex apartment, DOB work permits, and the subsequent C of O showing the creation of a duplex apartment. In opposition to dismissal, Dixon fails to cite any relevant statute and does not rely on any governing case

law to support his claim that the Apartment is illegal per se due to the Owners being issued DOB violations for the construction of the rooftop, and that the Owners should be enjoined from collecting rent. Renewal as to the dismissal of the First and Second causes of action is denied.

Dixon next seeks removal of a separate Civil Court Housing Part summary holdover proceeding commenced by the Owners against Dixon (see Ind. No. 63487/2015), and a joint trial of this action. Dixon relies on Rogin v. Rogin, 90 A.D.3d 507,936 N.Y.S.2d 109 [1st Dept., 2011] and argues that this action and the holdover proceeding share a substantial common question of law or fact, and that the equitable claims in this action are the same equitable defenses raised in the summary proceeding. However, in Rogin, the First Department held that dismissal of the underlying claims against the landlord were proper, and did not address the issue of removal and joint trial as to the dismissed claims because they were moot.

Here, like in Rogin, the claims asserted in the Complaint against the Owners were dismissed. The question of whether to remove the summary proceeding and of conducting a joint trial in this action is moot because the Complaint remains dismissed.

The final relief sought by Dixon is leave to amend his Complaint. Although leave to amend pleadings should be freely given absent prejudice or surprise (Anoun v. City of New York, 85 A.D.3d 694, 926 N.Y.S.2d 98, 99 [1st Dept., 2011]), leave to amend is improper if the proposed amendment is palpably improper or insufficient as a matter of law (McGhee v. Odell, 96 A.D.3d 449, 450, 946 N.Y.S.2d 134, 135, [1st. Dept., 2012]).

Dixon's proposed amended complaint annexed to his moving papers as Exhibit DD is palpably improper as it reasserts six causes of action that were dismissed by this Court under Mot. Seq. 001, and the causes of action remain dismissed after this Court's Order under Mot. Seq. 002.

Accordingly, it is hereby ORDERED, that Plaintiff's motion for leave to renew and reargue, for a stay of this action, to amend the pleadings, and for removal of a pending summary proceeding and joint trial in this action are denied.

ENTER: MANUEL J. MENDEZ
J.S.C.

Dated: August 10, 2015

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE