SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **2**

Justice

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LOUISA CURTIS,

Plaintiff,

- v -

MACDOUGAL & SIXTH REALTY LLC, S.W. MANAGEMENT LLC,

Defendant.

INDEX NO. 161985/2014

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this application to/for Dismiss Affirmative Defenses

Upon the foregoing documents, it is

Ordered that the motion is **granted in part**.

In this action seeking damages for, inter alia, breach of a lease, plaintiff Louisa J. Curtis moves, pursuant to CPLR 3211(b), to dismiss the affirmative defenses asserted by defendants Macdougal & Sixth Realty LLC and S.W. Management LLC. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is **granted in part**.

FACTUAL AND PROCEDURAL BACKGROUND:

Pursuant to a 1987 lease, plaintiff Louisa J. Curtis became tenant of apartment 23 at 270 Sixth Avenue. Doc. 27.[1] Paragraph 20(A)(5) of the lease provided that tenant was to reimburse owner for legal fees "for legal actions or proceedings brought against [tenant] because of a [l]ease default by [tenant] or for defending lawsuits brought against Owner because of [tenant's] actions." Id. Paragraph 20(B) of the lease provided that:

> Tenant's Right. Owner agrees that unless sub-paragraph 5 of this Article 20 has been stricken out of this Lease You have the right to collect reasonable legal fees and expenses incurred in a successful defense by You of a lawsuit brought by Owner against You or brought by You against Owner to the extent provided in Real Property Law section 234.

Id., at par. 20(B).

After plaintiff became tenant of the apartment, defendant Macdougal and Sixth Realty LLC ("Macdougal") became owner of the building. Doc. 2, at par. 4. S.W. Management ("SWM") was the managing agent of the building. Id., at par. 5.

[1] Unless otherwise noted, all references are to the documents filed with NYSCEF in this matter.

At an unspecified point in time, defendants allegedly allowed the apartment "to fall into a condition of disrepair." Id., at par. 7.

On December 4, 2014, plaintiff commenced the captioned action against Macdougal and SWM alleging breach of her lease, breach of warranty of habitability, and actual partial eviction. Doc. 2. The complaint specifically alleged that the following conditions existed in her apartment: holes in the floor; vermin; constant leaks and seepage; falling plaster; mold; sporadic loss of heat and hot water; sloping floors; falling and cracked ceilings and walls; and defective and cracked tile. Id., at par. 8. Plaintiff claimed damages of $35,000 on each of her claims of breach and $30,000 on her eviction claim. She also sought attorneys' fees from Macdougal in an amount of no less than $15,000. Id.

Defendants filed their answer on January 21, 2015. Doc. 3. In their answer, defendants denied all substantive allegations of wrongdoing and asserted as numbered affirmative defenses the following: 1) the complaint fails to state a cause of action; 2) plaintiff's claim is barred by collateral estoppel; 3) plaintiff's claim is barred by res judicata; 4) plaintiff is precluded from recovering based on prior administrative decisions; and 5) there is no basis on which plaintiff may recover legal fees. Doc. 3, at pars. 10-14.

In their discovery responses, defendants produced the file of a proceeding commenced by plaintiff against SWM held before the New York State Division of Housing and Community Renewal ("DHCR") under docket number BT 4102035; the file involving a small claims proceeding commenced by plaintiff against SWM under Index Number 2761 SCNY 2013; the file from a Civil Court case commenced by plaintiff against SWM and the New York City Department of Housing Preservation and Development ("HPD") under Index Number HP 6203/13; a letter from plaintiff to SWM dated October 2, 2013 acknowledging that the Civil Court case had been resolved the day before, when SWM was directed to repair any violations at the premises; and an HPD printout dated March 26, 2014 reflecting that no violations were reported at the premises. Doc. 24.

The DHCR proceeding under docket number BT 4102035 was terminated by order dated April 8, 2014 after a January 29, 2014 inspection revealed that "all conditions" at the premises, which it listed as "bedroom and living room", "floor leveling [apartment] wide", and "rodents" "had been corrected." Doc. 24. The small claims proceeding commenced under Index Number 2761 SCNY 2013, seeking money damages arising from defective repairs and a breach of warranty of

habitability, was discontinued.[2] Plaintiff's Civil Court action, under Index Number 6203/13, sought an order directing SWM to repair mold in walls; crumbling plaster; peeling paint, sloping floors; and mice. Id. That action was resolved by a consent order dated October 1, 2013 directing SWM to make the necessary repairs, a fact acknowledged by plaintiff in a letter to SWM dated October 2, 2013. Id.

In their bill of particulars as to affirmative defenses, defendants alleged as to the first cause of action that "[r]eference is made to all laws, rules and statutes of the State as therein provided." Doc. 25. Defendants further asserted that, as to their second through fourth affirmative defenses, "there is an identity of the parties, the issues and those matters that were or could have been raised or litigated as reflected in: DHCR BT 4102035; SCNY 2761/2013;[3] CIVIL COURT CITY OF NEW YORK HP Part Index # 6203/2013. Also see your client's letter dated October 2, 2013. Also see printout of the HPD Violation Website from March 26, 2014 wherein no violations were reported." Id.

The note of issue was filed in this matter on August 18, 2016. Doc. 18.

[2] As noted above, the stipulation does not contain a date.
[3] Although a stipulation of discontinuance (Doc. 26) reflects that Curtis' small claims action against Macdougal and SWM, brought under Index Number 2761 SCNY 2013, was discontinued without prejudice, the stipulation is not dated.

CONTENTIONS OF THE PARTIES:

Plaintiff's attorney argues that all of defendants' affirmative defenses must be dismissed. He claims that the first affirmative defense, failure to state a cause of action, is not an affirmative defense which can be properly asserted. He further asserts that the third, fourth, and fifth affirmative defenses, asserting collateral estoppel, res judicata, and the preclusive effect of a prior action or proceeding, are all without merit. Finally, he alleges that there is no basis for the fifth affirmative defense that plaintiff is not entitled to legal fees, since the lease provides that defendants are entitled to such fees and plaintiff is thus reciprocally entitled to them pursuant to Real Property Law section 234.

In opposition to the motion, defendants argue that the first affirmative defense, that the complaint fails to state a cause of action, "merely affirms the obligation of the [p]laintiff to prove its case." Doc. 28, at par. 4. Defendants further assert that, as a result of the DHCR proceeding, the affirmative defense of collateral estoppel cannot be dismissed. Finally, defendants assert that, according to paragraph 20(B) of the lease, none of the parties is entitled to attorneys' fees.

LEGAL CONCLUSIONS:

> In moving to dismiss an affirmative defense pursuant to CPLR 3211 (b), the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541, 935 NYS2d 23 [1st Dept 2011]). The allegations set forth in the answer must be viewed in the light most favorable to the defendant (*182 Fifth Ave. v Design Dev. Concepts*, 300 AD2d 198, 199, 751 NYS2d 739 [1st Dept 2002]), and "the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*534 E. 11th St.*, 90 AD3d at 542). Further, the court should not dismiss a defense where there remain questions of fact requiring a trial (*id.*).

Granite State Ins. Co. v Transatlantic Reins. Co., 132 AD3d 479, 481 (1st Dept 2015).

That branch of plaintiff's motion seeking to dismiss defendants' first affirmative defense, failure to state a cause of action, is granted. "Such a 'defense' is mere surplusage which serves no purpose in an answer, belonging more properly in a motion to dismiss under CPLR 3211(a)(7)." *Tache-Haddad Enters. v Melohn*, 224 AD2d 213, 214 (1st Dept 1996).

Insofar as plaintiff's motion seeks to dismiss the second (collateral estoppel), third (res judicata), and fourth (prior administrative determinations against plaintiff)

affirmative defenses, it is denied. "Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]." *Young-Szlapak v Young*, 151 AD3d 1646, 1647 (4th Dept 2017). "The doctrine of collateral estoppel, a narrower species of res judicata, 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 or those in privity, whether or not the tribunals or causes of action are the same (citations omitted)." *Wilson v Dantas*, 29 NY3d 1051 (2017).

Here, plaintiff's small claims proceeding commenced under Index Number 2761 SCNY 2013, pursuant to which plaintiff sought monetary damages arising from defective repairs and a breach of the warranty of habitability, both of which are alleged herein, was discontinued without prejudice and thus had no preclusive effect under the doctrine of res judicata.[4] *Cf. Trapani v Squitieri*, 107 AD3d 696, 696-697 (2d Dept 2013). Plaintiff's DHCR proceeding against Macdougal under docket number BT 4102035 was terminated by order dated April 8, 2014 after a January 29, 2014 inspection revealed that "all conditions" at the premises, which it listed as

[4] As noted above, the stipulation does not contain a date.

"bedroom and living room", "floor leveling [apartment] wide", and "rodents" "had been corrected." Doc. 24. Plaintiff's Civil Court action, under Index Number 6203/13, sought an order directing SWM to repair mold in walls; crumbling plaster; peeling paint, sloping floors; and mice. Id. That action was resolved by a consent order dated October 1, 2013 directing SWM to make the necessary repairs, a fact acknowledged by plaintiff in a letter to SWM dated October 2, 2013. Id. Since plaintiff previously litigated, or had the opportunity to litigate, at least some of the issues raised in this action, this Court declines to dismiss these affirmative defenses since defendants may have a viable defense to this action arising from the prior actions and/or proceedings between the parties.

Finally, the fifth affirmative defense, that plaintiff has no right to collect legal fees herein, is dismissed. Contrary to defendants' claim that paragraph 20(B) of the lease "does not give rise to fees to either party" (Defendants' Aff. In Opp., at par. 11), that paragraph clearly entitles plaintiff to recover such fees from defendants. Doc. 27, at par. 20(B). Plaintiff would have been prevented from recovering such fees only if paragraph 20(A)(5) of the lease had been stricken from the agreement, which it was not. Id., at par. 20 (B).

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff's motion is granted to the extent of striking defendants' first and fifth affirmative defenses, and the motion is otherwise denied; and it is further

ORDERED that this constitutes the decision and order of the court.

8/28/2017
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE