SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 58

----------x

HECTOR SIGUENCIA,

Plaintiff,

- against -

BSF 519 WEST 143RD STREET HOLDING LLC, 414-519 WEST 143 OWNER LLC, 519 WEST 143 OWNER LLC, MAJESTIC PARTNERS LLC, BARBERRY ROSE MANAGEMENT COMPANY, INC., LEWIS BARBANEL, JOSE DIAZ, and CHRISTOPHER SCIOCCHETTI,

Defendants.

----------x

DECISION AND ORDER

Index No. 158420/2017

DAVID B. COHEN, J.:

The court sua sponte recalls and vacates the decision and order dated October 29, 2018 in its entirety and substitutes this decision therefor.

In motion sequence no. 002, defendants BSF 519 West 143rd Street Holding LLC (BSF), Barberry Rose Management Company, Inc. (Barberry), Lewis Barbanel (Barbanel), Jose Diaz (Diaz), and Christopher Sciocchetti (Sciocchetti) (collectively, defendants) move, pursuant to CPLR 2221 (d), for leave to reargue that portion of their pre-answer motion to dismiss the complaint against Barberry, Barbanel, Diaz, and Sciocchetti. For the reasons set forth below, the motion is granted, and the complaint against Barberry, Barbanel, Diaz, and Sciocchetti is dismissed.

BACKGROUND

Plaintiff, the tenant in apartment 52 at 519 West 143rd Street, New York, New York (complaint ¶ 1), commenced this action to recover damages for a rent overcharge, conversion of his security deposit, and attorneys' fees under Real Property Law § 234 against former building owners 414-519 West 143 Owner LLC, 519 West 143 Owner LLC, and Majestic Partners LLC (id., 20-21); BSF, the current building owner (*id.*, ¶ 11); Barberry, the management company for

the building (*id.*, ¶ 13); Barbanel, a principal of Barberry and BSF's head officer (*id.*, ¶¶ 8, 15); Diaz, BSF's managing agent for the building (*id.*, ¶¶ 14, 16); and Sciocchetti, Barberry's chief operating officer (*id.*, ¶ 17). It is alleged that Barbanel and Sciocchetti exercised control over the daily operations at the subject building (*id.*, ¶ 18).

On the prior motion, defendants had moved for dismissal of the first cause of action on the ground that the New York State Division of Housing & Community Renewal maintains primary jurisdiction on the rent overcharge claim and that the complaint failed to allege facts sufficient to impose liability upon Barberry and Barbanel, Diaz and Schiocchetti (collectively, the Individual Defendants). In a decision and order dated March 29, 2018, the court granted the defendants' motion to dismiss the first cause of action and severed and continued the second cause of action for conversion (affirmation of defendant's counsel, exhibit F at 3). Defendants now contend that the court overlooked that part of the motion seeking to dismiss all claims against Barberry and the Individual Defendants. Plaintiff opposes the application. The court notes that the instant motion is timely (*see* CPLR 2221 [d] [3]).

DISCUSSION

"A motion for reargument is addressed to the court's discretion and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (*Kent v 534 E. 11th St.*, 80 AD3d 106, 116 [1st Dept 2010] [Roman, J, concurring]; *accord William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part and denied in part*, 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]). Since reargument is not intended to "serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]), a party moving for reargument should not include new or different arguments from those raised previously (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 971 [1st Dept 1984], *appeal dismissed*, 64 NY2d 646 [1984]).

The court hereby grants the motion for reargument as the prior determination failed to address that part of defendants' motion seeking to dismiss the claims against Barberry, Barbanel, Diaz and Sciocchetti.

As to the first cause of action, it is well settled that a tenant cannot hold a managing agent liable on a rent overcharge claim (*see Crimmins v Handler & Co*, 249 AD2d 89, 91 [1st Dept 1998] [stating that "the managing agent of the premises, is not liable for any portion of the overcharge"]; *accord West v B.C.R.E.-90 W. St., LLC,* 57 Misc 3d 428, 440-441 [Sup Ct, NY County 2017], *revd on other grounds* 161 AD3d 566 [1st Dept 2018]; *Taylor v 72A Realty Assoc., L.P.*, 2016 NY Slip Op 32737[U], *6-7 [Sup Ct, NY County 2016], *mod* 151 AD3d 95 [1st Dept 2017]; *Paganuzzi v Primrose Mgt. Co.*, 181 Misc 2d 34, 36 [Sup Ct, NY County 1999], *affd* 268 AD2d 213 [1st Dept 2000]). Furthermore, "an agent for a disclosed principal 'will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal'" (*Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964], quoting *Mencher v Weiss*, 306 NY 1, 4 [1953]). Absent clear and explicit evidence indicating otherwise, it is presumed that the agent intends to bind the principal and not itself (*see RKO-Stanley Warner Theatres v Plaza Pictures*, 54 AD2d 623, 624 [1st Dept 1976]). But, an agent may be held individually liable where the principal's identity was not previously disclosed (*see Courthouse Corporate Ctr. LLC v Schulman*, 74 AD3d 725, 727 [2d Dept 2010]). Here, although the complaint identified Barberry and Diaz as BSF's managing agents, plaintiff failed to plead any specific allegations showing that they, or Barbanel and Sciocchetti, intended to be held personally liable to plaintiff.

Plaintiff in opposition submits that liability on a rent overcharge claim may be imposed upon managing agents such as Barberry and the Individual Defendants because they qualify as owners, as the term is defined in the Rent Stabilization Code (*see* Rent Stabilization Code [9 NYCRR] § 2520.6 [i]; *see also* Rent Stabilization Law of 1969 [Administrative Code of City of

NY] § 27-2004 [45]). The Appellate Division, First Department, though, has expressly rejected this position (*Fuentes v Kwik Realty LLC*, 2017 NY Slip Op 32195[U], *12-13 [Sup Ct, NY County 2017], citing *Crimmins*, 249 AD2d at 91-92). Moreover, the documentary evidence establishes that Barberry and the Individual Defendants did not own the building (affirmation of defendants' counsel, exhibit B), or lease the subject apartment to plaintiff in their individual capacities (complaint, exhibit B at 9). Therefore, the first cause of action asserting a rent overcharge claim is dismissed as against Barberry and the Individual Defendants.

The second cause of action asserts a claim for conversion of the $1,400 security deposit plaintiff had paid to the then-owner of the building at the beginning of his initial lease term (complaint ¶ 29). A claim for conversion arises when "someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006], citing *State of New York v Seventh Regiment Fund*, 98 NY2d 249, 259 [2002]). Where the property allegedly converted is money, then "the funds must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner" (*Matter of Clark*, 146 AD3d 495, 496 [1st Dept 2017], *lv denied* 29 NY3d 907 [2017]).

General Obligations Law § 7-103, which governs security deposits for rental properties, provides that a tenant's security deposit "shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same" (General Obligations Law § 7-103 [1]). Additionally, a landlord in receipt of a security deposit must deposit the money into a separate, interest-bearing account and notify the tenant in writing of the name and address of the banking organization in which the funds were deposited (General Obligations Law § 7-103 [2], [2-a]). When a landlord fails to give a tenant

written notice of the banking institution, then a rebuttable presumption arises that the landlord has commingled a tenant's security deposit with its own funds (*see Dan Klores Assoc. v Abramoff*, 288 AD2d 121, 121 [1st Dept 2001]).

The complaint identifies the specific funds that have been withheld, alleges that plaintiff has not been furnished with the requisite written notice as required by statute, and alleges that plaintiff holds a possessory interest in the funds. Thus, the complaint "adequately alleges a cause of action for conversion in violation of General Obligations Law § 7-103" (*Rubman v Oscuhowski*, 163 AD3d 1471, 1473 [4th Dept 2018]). Nevertheless, this cause of action is dismissed as against Barberry and the Individual Defendants.

A shareholder of a corporation is generally shielded from personal liability for a corporation's actions unless a plaintiff has alleged "facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation and 'abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice'" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011], quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142 [1993]). Factors that warrant veil-piercing include:

> "[the] disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the allegedly dominated corporation; whether dealings between the entities are at arm's length; whether the corporations are treated as independent profit centers; and the payment or guaranty of the corporation's debts by the dominating entity"

(*Fantazia Intl. Corp. v CPL Furs N.Y., Inc.*, 67 AD3d 511, 512 [1st Dept 2009], citing *Freeman v Complex Computing Co.*, 119 F3d 1044, 1053 [2d Cir 1997]). Apart from asserting that Barbanel is a principal in Barberry and BSF, the complaint fails to allege other facts sufficient to show that Barbanel completely dominated either entity so that he could commit a wrongful act against

plaintiff, notwithstanding Barbanel's familiarity with the rent stabilization laws and his alleged control over operations at the building (*see Itamari v Giordan Dev. Corp.*, 298 AD2d 559, 560 [2d Dept 2002] [finding that the plaintiff failed to allege facts sufficient to sustain a cause of action against a shareholder in his individual capacity]).

Similarly, an officer of a corporation cannot be held individually liable for a corporation's actions unless the officer participated in the commission of a tort, and even then, the officer must have engaged in "misfeasance or malfeasance, i.e., an affirmative tortious act" (*Peguero v 601 Realty Corp.*, 58 AD3d 556, 559 [1st Dept 2009], citing *Michaels v Lispenard Holding Corp.*, 11 AD2d 12, 14 [1st Dept 1960]; *Ingram v Machel & Jr. Auto Repair*, 148 AD2d 324, 325 [1st Dept 1989], *appeal dismissed* 74 NY2d 792 [1989] [stating that "[o]fficers and agents of corporations are personally liable for their own acts which bring about a conversion of a third party's property, and it is no defense to personal liability that the officer or agent may have been acting on behalf of a corporate principal"]).

The complaint alleges that Sciocchetti served as Barberry's chief operating officer, that Diaz worked as the managing agent, and that Barbanel was its principal. However, "[a] corporate officer is not held liable for the negligence of the corporation merely because of his official relationship to it" [*Aguirre v Paul*, 54 AD3d 302, 304 [2d Dept 2008]). Even after affording the complaint every favorable inference, as the court must (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the complaint is devoid of any specific, factual allegations describing the Individual Defendants' affirmative actions related to the conversion of plaintiff's security deposit (*Shimamoto v S&F Warehouses, Inc.* 257 AD2d 334, 340 [1st Dept 1999], *lv dismissed* 94 NY2d 837 [1999] [stating that "(t)he pleadings contain no separate allegations against (the individual defendants)" and that "(n)o showing was made . . . that they personally participated in the alleged conversion"]). The only allegations concerning Sciochetti, Diaz and Bernabel pertain to their positions within Barberry or BSF, which is plainly inadequate. Moreover, plaintiff did not allege that the Individual

Defendants "profited personally from the alleged . . . conversion" (*Ackerman v Vertical Club Corp.*, 94 AD2d 665, 666 [1st Dept 1983]). Thus, the complaint fails to allege facts sufficient to impute personal liability upon the Individual Defendants.

The court reaches the same conclusion with regards to Barberry. CPLR 3013 states in pertinent part that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." "[C]onclusory allegations do not satisfy this requirement" (*117 E. 24th St. Assoc. v Karr*, 95 AD2d 735, 735 [1st Dept 1983]). Here, the complaint fails to allege when Barberry received plaintiff's security deposit and that it exercised or continues to exercise control over those funds.

Plaintiff failed to correct these pleading deficiencies in his opposition (*see Board of Mgrs. of 411 E. 53rd St. Condominium v Dylan Carpet*, 182 AD2d 551, 551-552 [1st Dept 1992] [denying the individual defendants' motion to dismiss the cause of action for conversion because "[t]he allegations in the complaint, that the individual defendants ran the corporation to further their own personal interests, as opposed to those of the corporation, as supported, specifically by . . . affidavit . . . which provides examples of their conduct, are sufficient to state causes of action against the individual defendants herein"]). Consequently, the second cause of action is dismissed as against Barberry and the Individual Defendants.

Finally, "Real Property Law § 234 affords the tenant a reciprocal right to attorney's fees where the lease contains a provision entitling the landlord to their recovery" (*Walentas v Johnes*, 257 AD2d 352, 354 [1st Dept 1999], *lv dismissed* 93 NY2d 958 [1999]). A tenant may recover such fees "when the ultimate outcome is in his favor, whether or not such outcome is on the merits" (*Matter of 251 CPW Hous. LLC v Pastreich*, 124 AD3d 401, 403-404 [1st Dept 2015] [internal quotation marks and citation omitted]). The complaint fails to allege that Barberry and the Individual Defendants are landlords against whom plaintiff may recover his attorneys' fees.

Furthermore, none of them were signatories on the lease and the lease extensions (complaint, exhibits A and B). As Barberry and the Individual Defendants bear no liability on the first cause of action, the third cause of action for attorney's fees is dismissed as against them.

Accordingly, it is

ORDERED, that the motion of defendants BSF 519 West 143rd Street Holding LLC, Barberry Rose Management Company, Inc., Lewis Barbanel, Jose Diaz, and Christopher Sciocchetti for leave to reargue that portion of their motion seeking dismissal of the complaint against defendants Barberry Rose Management Company, Inc., Lewis Barbanel, Jose Diaz, and Christopher Sciocchetti is granted; and it is further

ORDERED that, upon reargument, the Court modifies its prior decision and order, dated March 29, 2018, solely to the extent of granting defendants' motion to dismiss the complaint against defendants Barberry Rose Management Company, Inc., Lewis Barbanel, Jose Diaz, and Christopher Sciocchetti; and it is further

ORDERED that the complaint is dismissed as against defendants Barberry Rose Management Company, Inc., Lewis Barbanel, Jose Diaz, and Christopher Sciocchetti, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 58, Room 574, 111 Centre Street, New York, New York, on January 7, 2019, at 9:30 a.m/~~p.m~~.

Dated: Nov. 19, 2018

ENTER:

J.S.C.

HON. DAVID B. COHEN
J.S.C.