737 Park Ave. Acquisition LLC v Goldblatt
2018 NY Slip Op 33407(U)
December 31, 2018
Supreme Court, New York County
Docket Number: 154241/2013
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK :IAS PART 17

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737 PARK AVENUE ACQUISITION LLC,

Index No. 154241/2013

Plaintiff,

-against

LAURA GOLDBLATT [also known as LAURA GOLDBLATT-JENSEN], SETH KATZ and TRACY EDWARDS,

DECISION/ORDER

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

This matter involves a dispute regarding whether the defendants Laura Goldblatt (a/k/a Laura Goldblatt-Jensen), Seth Katz and Tracy Edwards (together, the "Siblings") may sublet Apartment 18C (the "Apartment") in a building located at 737 Park Avenue, New York, New York (the "Building"), without complying with the laws and regulations governing rent stabilization and without the consent of the new owner of the Building, plaintiff 737 Park Avenue Acquisition LLC ("737 Park," or the "New Owner").

737 Park moves for an order: (a) pursuant to CPLR 3211 (b), striking the affirmative defenses of the Siblings; (b) pursuant to CPLR 3001 and 3212, granting summary judgment in favor of 737 Park and declaring that the right of the Siblings to sublet the Apartment is limited by applicable provisions of the Rent Stabilization Law (New York City Administrative Code [Administrative Code] § 26-501, et seq.) and the Rent Stabilization Code (9 NYCRR § 2520, et seq.); (c) pursuant to

CPLR 3211 (a) (1), dismissing defendants' first two counterclaims; and (d) pursuant to CPLR 3001 and 3212, issuing a counter-declaration in favor of plaintiff that defendants have effectively admitted that they have no right to sublet the Apartment.

This matter was previously before this Court on the Siblings' motion to dismiss, which was denied by the court in a decision dated May 13, 2015 (the "Prior Decision"). *See* Prior Decision, NYSCEF Doc. No. 54. The parties' familiarity with that decision, which set forth a detailed history of the matter, will be assumed by this Court, and the facts will only be restated as necessary for this decision.

BACKGROUND

As explained more fully in the Prior Decision, the Siblings' mother, Barbara Goldblatt, who is now deceased, obtained a lifetime tenancy in the Apartment, at a rent of $244.37 per month, from her father, Louis Katz, who owned the Building. That lifetime tenancy was inherited by the Siblings at their mother's death.

In June 1975, Bruce E. Bozzi ("Bozzi"), Mary Ann Bozzi Thimm, Bruce E. Bozzi, Jr. and Palm Management Corp. (the "Bozzis") became the subtenants in the Apartment, under a sublease between Bozzi and Barbara Goldblatt and her husband,

Jacob Goldblatt (the "Goldblatts"). In 1974, prior to the Bozzis' occupancy, the Apartment became subject to the rent stabilization laws. The sublease between Bozzi and the Goldblatts (the "Sublease") was, however, at a rent significantly higher than that paid by the Goldblatts under their lifetime leasehold. The sublease was periodically renewed until, in or about 1986, when the Goldblatts refused to renew it. Bozzi then brought a declaratory judgment action against the Goldblatts (the "Bozzi Action") in Supreme Court, New York County, seeking to have the Apartment declared subject to the rent stabilization laws, which was decided in his favor. The court ruled that the Apartment was subject to the rent stabilization laws and that the Goldblatts were illusory tenants, and directed the then owner of the Building, Katz 637 Corporation, to furnish Bozzi with a rent-stabilized lease at a monthly rent of $244.37 per month. *Bozzi v Goldblatt,* 1991 WL 11767152 (Sup Ct, NY County 1991). The court also directed all defendants to pay Bozzi $121,758.96 for rent overcharges. On appeal, the Appellate Division, First Department, reversed and remanded the decision of the Supreme Court, holding that factual issues existed regarding "whether the Goldblatts [were] illusory tenants and whether they conspired with defendant Katz 737 Corporation to evade the rent stabilization laws" that precluded summary judgment. *Bozzi v Goldblatt,* 186 AD2d 82, 83 (1st Dept 1992). Though noting that

it was undisputed by the parties that the Apartment became subject to rent stabilization laws in 1974, the court opined that "[t]he arrangement whereby the corporate defendant continued to provide the Goldblatts with an apartment at the token rental of $244 for the last 34 years is more consistent with the Goldblatts' claim of a lifetime lease than any conspiracy to evade the rent stabilization laws." *Id.* at 84.

Rather than returning to the Supreme Court for trial, the parties entered into a stipulation, So Ordered by the Appellate Division ("So-Ordered Stipulation"), which resolved the dispute between the parties.

Pursuant to that So-Ordered Stipulation the parties agreed in pertinent part:

> "2) that the Apartment is, and will continue to be, exempt and excluded from protection and provisions of the New York laws regulating rents, including, without limitation, the New York Rent Stabilization Law of 1969, as amended, during the tenancy of plaintiff-appellant, his wife, or any member of plaintiff-appellant's family, by virtue of the facts that (a) the Apartment is not, and will not be occupied by plaintiff-appellant, his wife, or any member of plaintiff-appellant's family, as a primary residence, and (b) defendants-appellants Jacob Goldblatt and Barbara Goldblatt, and their children as their successors in interest, are bona fide lessees of the Apartment, and said defendants-appellants and defendant-respondent Katz 737 Corporation, jointly, severally or in concert, have not violated or evaded any New York laws regulating rents;
>
> "3) that defendants-appellants Jacob Goldblatt and Barbara Goldblatt, or their children who survive them as their successors in interest, need not offer plaintiff-appellant, his wife, or any member of

plaintiff-appellant's family, a renewal or extension sublease agreement subsequent to the written sublease dated as of July 1st, 1993, as amended by agreements dated May 4, 1994, and as of December 26, 1994 (the Stipulation of Settlement), nor is plaintiff-appellant, if any, entitled to demand or receive such a renewal or extension sublease agreement by virtue of the fact, among others, that plaintiff-appellant, his successors in interest, or assignees, if any do not occupy, and will not be occupying, the Apartment as a primary residence;

"4) that the plaintiff-appellant's occupancy under the Sublease shall not create any rights of occupancy as primary tenant;

"5) in the event the parties to the written sublease agreement to be entered into mutually agree to extend the term of such sublease, such tenancy and sublease renewals and extensions, or other agreements entered into pursuant thereto, shall be exempt and excluded from the protection and provisions of the New York laws regulating rents, including, without limitation, the New York Rent Stabilization Laws, as amended;

"6) that the legal sublease regulated rent for the Apartment, pursuant to the New York laws regulating rent, as of July 1st, 1993, is Five Thousand and no/100 ($5,000.00) Dollars per month, and, upon the application by defendants-appellants Jacob Goldblatt and Barbara Goldblatt, or their children, as their successors in interest, or any of them, the New York Division of Housing and Community Renewal (the 'DHCR')shall permit and accept a registration by them, for the Apartment, which provides that the legal sublease regulated rent, as of July 1st, 1993, which can be charged for the Apartment by defendants-appellants Jacob Goldblatt and/or Barbara Goldblatt, and their successors in interest, as sublessor, is Five Thousand and no/100 ($5,000.00) Dollars per month;

"7) that the DHCR shall permit and accept further future registrations for the Apartment by defendants-appellants Jacob Goldblatt and/or Barbara Goldblatt, and their children who survive them, as their successors in interest, as sublessor, providing for permissible rent guideline increases of the said legal sublease regulated rent of the Apartment, provided,

> however, that such guideline increases shall have no force or effect upon the terms and provisions contained in any sublease between defendants-appellants Jacob Goldblatt and/or Barbara Goldblatt, and their successors in interest, as sublessor, and plaintiff-appellant, and his successors in interest, and assignees as sublessee, or any extensions or renewals thereof."

So-Ordered Stipulation, ¶¶ 2-7.

On August 5, 2011, 737 Park purchased the Building from Katz 737 Corporation ("Katz 737" or the "Prior Owner"). On that same date, the Siblings, who had inherited a lifetime interest in the Apartment from their parents, Barbara and Jacob Goldblatt, at a rent of $244.37 per month, entered into a Lease Amendment Agreement with the Prior Owner.[1] The Lease Amendment Agreement modified the terms of their lifetime interest in the Apartment by limiting its duration to the passing of their last surviving aunt, Ruth Haberman or Arlene Katz, plus 90 days. It also modified the section of the lease governing subletting of the Apartment which had previously required, among other things, that the Siblings obtain the permission of the Prior Owner if they wished to sublet the Apartment. The subletting provision, as modified, states as follows:

"Section 11 (Assigning, Subletting) of the Original

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[1] The Court notes that in the Lease Amendment Agreement the Prior Owner is identified as 737 Katz Corporation rather than Katz 737 Corporation. There appears to be no explanation for the slight discrepancy in titles and the court ascribes no significance to that discrepancy and for the sake of simplicity will, going forward, identify the corporation as the Prior Owner.

> Lease shall be deemed deleted in its entirety and replaced with the following:
> Tenant may sublease the Apartment without the Owner's consent thereto, provided that any sublease entered into by Tenant after the date hereof shall have a minimum term of six (6) months and a maximum term of two (2) years (inclusive of all renewals); provided however, that the maximum term limitation contained in the preceding sentence shall not apply to the sublease to Bruce E. Bozzi, Mary Ann Bozzi Thimm, Bruce E. Bozzi, Jr. and [Palm] Management Corp. as co-subtenants. ... Notwithstanding anything to the contrary, in the event that the [Original] Lease shall terminate, Owner agrees that as long as any sublease and its extensions or renewals provided therein shall be in force and effect provided the subtenant under such sublease is not in default of any term, covenant or condition of the sublease beyond applicable notice and cure period, Owner (i) will not make the subtenant a party to any action or proceeding to evict or regain possession of the Apartment, (ii) will not disturb subtenant's possession under the sublease or evict or attempt to evict subtenant and (iii) subject to such sublease having a term not exceeding two (2) years (inclusive of all renewals) from the commencement thereof, will recognize subtenant as subtenant under the sublease and the rights of subtenant under the sublease shall not be diminished, reduced or adversely affect [sic] by reason of the termination of the Lease subject to subtenant's compliance with the terms, provisions, covenants and conditions of the sublease; provided that, Owner shall not be (x) liable for any prior act or omission of Tenant as landlord under the sublease, (y) subject to any offset not expressly provided in such sublease which therefore accrued to subtenant against Tenant, or (z) bound by any prior modification of the sublease or by any prepayment of more than one month's fixed rent."

Moving Affirmation of Richard Claman, exhibit 12 ("Lease Amendment Agreement"), ¶ 2 (b).

Pursuant to the Purchase and Sale Agreement ("PSA") entered into by 737 Park and the Prior Owner, 737 Park purchased, among other things, the Prior Owner's "right, title and interest in and

to the leases, licenses and occupancy agreements." *See*, Claman affirmation, exhibit 13 (PSA), § 1.1 (d). Among those leases were the Katz family leases, as amended, including the Lease Amendment Agreement between the Siblings and the Prior Owner, entered into on August 5, 2011. *See* Katz aff in Support of Motion to Dismiss, exhibit I (PSA), § 5.3 (ii), NYSCEF Doc. No. 30. In that Lease Amendment Agreement, the Siblings and the Prior Owner agreed that "Tenant may sublease the Apartment without Owner's consent thereto, provided that any sublease entered into by Tenant after the date hereof shall have a minimum term of six (6) months and a maximum term of two (2) years (inclusive of all renewals); provided however that the maximum term limitation contained in the preceding sentence shall not apply to the sublease to Bruce E. Bozzi, Mary Ann Bozzi, Andrea Bozzi Thimm, Bruce E. Bozzi, Jr. and Palin (sic) Management Corp. as co-subtenants." *See* Claman affirmation, exhibit 12 (Lease Amendment Agreement), ¶ 2 (b).

In the motion before this Court, 737 Park seeks the following relief: (a) pursuant to CPLR 3211 (b), striking the affirmative defenses of the Siblings; (b) pursuant to CPLR 3001 and 3212, granting summary judgment in favor of 737 Park and declaring that the right of the Siblings to sublet the Apartment going forward is limited by applicable provisions of the Rent Stabilization Law (Administrative Code § 26-501, et seq.) and the

Rent Stabilization Code (9 NYCRR § 2520, et seq.); (c) pursuant to CPLR 3211 (a) (1), dismissing defendants' first two counterclaims; and (d) pursuant to CPLR 3001 and 3212, issuing a counter-declaration in favor of plaintiff that defendants have effectively admitted that they have no right to sublet the Apartment. This Court will first address plaintiff's motion for summary judgment regarding the applicability of the rent stabilization laws to any efforts by the Siblings to sublet the Apartment going forward.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff seeks a declaratory judgment requiring the Siblings, going forward, to comply with applicable provisions of the Rent Stabilization Law and Code in connection with any sublease of the Apartment, including the provision permitting a tenant to sublet a rent stabilized unit "provided further that the tenant can establish that at all times he or she has maintained the housing accommodation as his or her primary residence and intends to occupy it as such at the expiration of the sublease." Rent Stabilization Code, § 2525.6 (a).

Plaintiff first argues that the So-Ordered Stipulation does not excuse the Siblings from such compliance because, to the extent that the stipulation appears to exempt the Apartment from the requirements of the rent stabilization provisions, it does so only during the period of the Bozzi sublease, which, according to

plaintiff, expired by its terms on June 30, 2013. Plaintiff further appears to argue that under the terms of the So-Ordered Stipulation, the Siblings did not have the authority to enter into a renewed sublease with Bozzi, absent approval by the New Owner and compliance with the rent stabilization provisions. Rather, according to plaintiff, only the parents, Barbara and Jacob Goldblatt, had the right to extend the sublease without such compliance.

The Siblings initially respond that, under their lease with the Prior Owner, dated October 3, 2009, they had a right to sublet to Bozzi without term limitation, and that their right to sublet was confirmed in the Lease Amendment Agreement they entered into with the Prior Owner on August 5, 2011, the day the Building was purchased by 737 Park. They further contend that in the PSA, plaintiff, as the new owner, expressly assumed the Prior Owner's obligations under the Goldblatt family leases.

Finally, defendants suggest that, in stating that the arrangement between the Goldblatts and Bozzi was "more consistent with the Goldblatt's claim of a lifetime lease than any conspiracy to evade the rent stabilization laws" in *Bozzi* (186 AD2d at 84), the Appellate Division was suggesting that the Apartment was not governed by the rent stabilization laws.

Defendants also contend that plaintiff has not established that the Apartment is, in fact, governed by the rent

stabilization laws, and that there are documents not in evidence which preclude summary judgment.

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions. *See* CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. *Id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*." *Vega*, 18 NY3d at 503 (internal quotation marks and citation omitted, emphasis in original).

This Court states from the outset that, while there may some dubious terms contained in the So-Ordered Stipulation, as the indicated during oral argument, the stipulation was So-Ordered by

the Appellate Division, First Department, rather than a coordinate justice of this court or the Appellate Division of another department. As a result, to the extent that the So-Ordered Stipulation is relevant to the issues in this case, this Court is constrained to follow it. Furthermore, to the extent that the 1992 decision of the Appellate Division in *Bozzi* (186 AD2d 82) relates to the issues in this case, it is controlling law.

This Court next notes that, to a certain degree, the parties do not directly address each other's arguments. For example, plaintiff seeks a declaratory judgment with respect to the limits on the Siblings' right to sublet the Apartment in the future to subtenants other than the Bozzis. Defendants, however, primarily focus their arguments on whether, as their parents' successors in interest, they had an unfettered right to enter into a sublease or renewal with Bozzi and his successors in interest. They also argue at length that the So-Ordered Stipulation effected the removal of the Apartment from rent stabilization, quoting, on paragraph 2 of the So-Ordered Stipulation which states:

> "that the Apartment is, and will continue to be, exempt and excluded from protection and provisions of the New York laws regulating rents, including, without limitation, the New York Rent Stabilization Law of 1969, as amended, during the tenancy of plaintiff-appellant, his wife, or any member of plaintiff-appellant's family...."

See defendants' memorandum of law at 13.

As a basic premise, based upon the decision of the Appellate Division, First Department, in *Bozzi,* this Court concludes that the Apartment is subject to the rent stabilization laws. *Bozzi,* 186 AD2d at 83 ("There is no dispute that the [A]partment became subject to the rent stabilization laws in 1974, prior to [Bozzi's] occupancy"). There is nothing in the *Bozzi* decision which governs the status of the apartment after Bozzi's sub-tenancy ends. Furthermore, in the So-Ordered Stipulation, the only explicit discussion of the Apartment being exempt or excluded from the rent stabilization laws is limited to the period during the tenancy of Bozzi and his family. *See* ¶¶ 2 & 5.[2]

To the extent that defendants rely on language in the *Bozzi* decision to argue that the Appellate Division held that the Apartment was not governed by the rent stabilization laws, they fail to address the court's express statement that "[t]here is no dispute that the [A]partment became subject to the rent stabilization laws in 1974, prior to [Bozzi's] occupancy." *Id.* at 83. Furthermore, immediately prior to the language quoted by defendants the Court stated, "[w]e hold that it was error on this

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[2] In contrast with those paragraphs, paragraphs 6 and 7 regarding the regulated rent pursuant to the sublease would appear to treat the Apartment as regulated for any tenants other than the Bozzis, suggesting that the parties to the So-Ordered Stipulation recognized that the Apartment would remain regulated after the end of the Bozzi's sub-tenancy.

record to hold as a matter of law that defendants conspired to evade the rent stabilization laws." Immediately following the passage quoted by defendants, the Court stated, "Whether the Goldblatts are illusory tenants should also be determined after a trial. There is no indication that the Goldblatts devised the sublet with the intention of evading the rent stabilization laws." *Id.* at 84. Thus, the Court was not stating that the laws governing rent stabilization did not apply to the Apartment. Rather, it was commenting on the determination of the Supreme Court that found, as a matter of law, that the tenancy of the Goldblatts was illusory, among other things, and reversed and remanded the matter for a trial of the factual issues regarding whether the actions of the defendants constituted a violation of the rent stabilization laws.

In the absence of evidence to the contrary, based upon the decision in *Bozzi* (186 AD2d at 83), this Court concludes that the Apartment remains subject to the rent stabilization laws, including the portions of those laws that govern subletting of rent stabilized units. However, to the extent that 737 Park purchased the Building subject to the Family Leases and the Lease Amendment Agreement between the Prior Owner and the Siblings, dated August 5, 2011, the Siblings are not required to obtain the consent of 737 Park to sublet.

Thus, as so limited, 737 Park's request for a declaratory judgment that defendants' right to sublet the Apartment in the future to subtenants other than the Bozzis is subject to the provisions of the Rent Stabilization Law and Code is granted.

PLAINTIFF'S MOTION TO DISMISS THE COUNTERCLAIMS

Defendants' First Counterclaim For Tortious Interference With Prospective Economic Relations

In their first counterclaim, the Siblings assert, among other things, that pursuant to the So-Ordered Stipulation, as successors-in-interest to their parents, they were entitled to extend or renew the sublease with Bozzi, that they were in negotiations with Bozzi to extend the sublease for one additional year, and that they had reached an understanding in principle to do so. The counterclaim further asserts that before Bozzi signed and returned the amendment to the sublease, Robert Zirinsky, a principal of 737 Park, threatened to sue Bozzi to regain the Apartment if he signed the amendment to the sublease, despite the promise in paragraph 11 of the Lease Amendment Agreement to refrain from disturbing Bozzi's rights as a subtenant and from making Bozzi a party to any eviction action. The counterclaim also asserts that plaintiff also harassed Bozzi by disconnecting the gas service in the Apartment, refusing his request to supply an electric stove, and other actions impacting the Bozzis' use of the Apartment. Finally, the counterclaim asserts that as a

result of plaintiff's actions, Bozzi did not renew the sublease. The counterclaim contends that plaintiff's actions constituted wrongful means taken for the sole purpose of inflicting harm on defendants, and that but for plaintiff's actions, Bozzi would have renewed the sublease.

Plaintiff contends that both the first and second counterclaims must be dismissed because they cannot establish that "but for" plaintiff's alleged actions, that Bozzi would have entered into a new sublease. Plaintiff's argument turns on its contention that, because defendants could not satisfy the primary residency requirement which it contends is a prerequisite for entering into a sublease under the rent stabilization laws, they could not have entered into a sublease with Bozzi. Therefore, according to plaintiff, its alleged actions with respect to Bozzi could not have been the "but for" cause of Bozzi not entering into a renewal of the sublease for the period commencing on July 1, 2013, which is necessary to establish the tort of interfering with prospective economic relations. *See Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266 (1st Dept 2002).

Plaintiff further contends that the So-Ordered Stipulation did not give the Siblings the authority to extend the sublease. Focusing on the word "parties" in paragraph 5 of the So-Ordered Stipulation, plaintiff argues that, whereas the Goldblatt parents were given the authority to renew or extend Bozzi's sublease if

they chose to, and that such renewals would be exempt and excluded from the rent stabilization laws, because the children are not expressly named in paragraph 5, they were precluded from entering into such renewals with the Bozzis outside of the rent stabilization laws.

The Goldblatts' children (the Siblings) are, however, specifically mentioned in paragraph 3 of the So-Ordered Stipulation, which states that the Goldblatts and their children "need not offer" the Bozzis a renewal or extension of their sublease. The Siblings are also mentioned in paragraph 6 of the So-Ordered Stipulation, which gives both the Goldblatt parents and their children the authority to register with DHCR and to charge, as of July 1, 1993, pursuant to the existing sublease, a rent of $5,000, pursuant to their life tenancy under the family lease.

It would have been unnecessary to mention in paragraph 3 that the children "need not offer" a renewal or extension of the sublease to the Bozzis (which, pursuant to paragraph 5 would be outside of the rent stabilization regulations) if they did not, in fact, have the power to enter into such a sublease.

Furthermore, this Court concludes that plaintiff errs in its interpretation of the language of paragraph 5 which states:

> "in the event *the parties to the written sublease agreement to be entered into* mutually agree to extend the term of such sublease, such tenancy and sublease renewals and extensions, or other agreements entered

> into pursuant thereto, shall be exempt and excluded from the protection and provisions of the New York laws regulating rents, including, without limitation, the New York Rent Stabilization Laws, as amended;"

So-Ordered Stipulation , ¶ 5 (emphasis supplied). Plaintiff contends that the highlighted language refers to *the parties to the litigation*, and because the Siblings were not parties to the litigation, they are not covered by paragraph 5. This Court concludes, however, that the plain reading of that language indicates that the word "parties" refers to the *parties to a future sublease to be entered into* which is mutually agreed upon by those parties, and is not restricted to the parties to the litigation. When read in connection with the language of paragraph 3, which specifies that neither the Goldblatts "or their children who survive them as their successors in interest," need offer a renewal or extension of the lease to the Bozzi family (So Ordered Stipulation, ¶ 3) and paragraph 6 which authorizes both the Goldberg parents and their children to register and collect a legal sublease rent of $5000, it is evident that under paragraph 3, the Siblings are authorized to enter into a sublease with Bozzi which would be exempt from the rent stabilization laws.

The language of the contract does not resolve the question of whether the Apartment could validly be removed from rent stabilization by dint of the SO- Ordered Stipulation, even though that agreement was So-Ordered by the Presiding Justice of the

Appellate Division. In the So-Ordered Stipulation, despite the fact that, as the Appellate Division indicated in its 1992 decision, "[t]here is no dispute that the apartment became subject to the rent stabilization laws in 1974, prior to [Bozzi's] occupancy," (*Bozzi*, 186 AD2d at 83), Bozzi agreed to treat the apartment as non-stabilized. Plaintiff contends that the So-Ordered Stipulation entered into between the Goldblatts and the Bozzi is void, because "'[a]n agreement by the tenant to waive the benefit of any provision of the RSL [Rent Stabilization Law] or this Code is void.'" *Riverside Syndicate, Inc. v Munroe*, 10 NY3d 18, 22 (2008), quoting Rent Stabilization Code (9 NYCRR) § 2520.13. As discussed above, however, the So-Ordered Stipulation at issue here was approved by the Appellate Division, First Department, not by a coordinate Justice of the Supreme Court or by another judicial department of the Appellate Division, and this Court is constrained to follow it, despite the decision of Court of Appeals which raises questions about whether Bozzi could validly waive the protections of the Rent Stabilization Code.[3] Should this Court's decision be appealed by

[3] This Court is also concerned by the fact that the So-Ordered Stipulation appeared to direct the Division of Housing and Community Renewal ("DHCR") to "permit and accept" from the Goldblatts and their children future registrations of rent which can be charged to subtenants as regulated rent of the Apartment in an amount possibly substantially higher than the proper amount under rent stabilization despite the fact that DHCR was not a party to the case or the So-Ordered Stipulation, and there is no apparent basis in the rent stabilization law or regulations

either party, the Appellate Division, First Department can properly reconsider the validity of the So-Ordered Stipulation that it previously approved.

To state a cause of action for tortious interference with prospective economic relations defendants must show that "the interference was accomplished by wrongful means or with malicious intent. 'Wrongful means' include[s] physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure." *Arnon Ltd (IOM) v Beierwaltes*, 125 AD3d 453, 453 (1st Dept 2015), quoting *Carvel Corp. v Noonan*, 3 NY3d 182, 191 (2004)(internal quotation marks and additional citations omitted). Plaintiff's principal, Richard Zirinsky, contends that he merely explained plaintiff's position that the So-Ordered Stipulation did not give the Siblings any right to sublet the Apartment at a higher rent than that permitted by rent stabilization and that defendants are not aware of Bozzi himself having complained about harassment. Defendants, however, submit a series of emails between counsel for the Siblings (Bozzi's landlords) and counsel for plaintiff setting forth Bozzi's complaints. *See* affirmation of Allen H. Brill in opposition to plaintiff's motion for summary judgment,

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providing for tenants to register rents permitted under a sublease, particularly when those rents may not be in compliance with the 10% permitted surcharge under Rent Stabilization Code § 2525.6 (b). *See* So-Ordered Stipulation ¶ 7.

exhibits A and C. Furthermore, since the Siblings were Bozzi's landlord under the sublease, it would not be unusual for the Siblings, as sublessors, through there counsel, rather than Bozzi, to raise Bozzi's complaints with the owner.

As this Court stated in the Prior Decision, on a motion to dismiss, the court must "afford the pleading a liberal construction [and] accept the facts as alleged in the [pleading] as true, accord the [pleader] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994).

Having concluded that, pursuant to the So-Ordered Stipulation, the Siblings had the authority to extend the sublease to Bozzi, this Court concludes that if, as alleged in defendants' first counterclaim for tortious interference with prospective economic relations, plaintiff acted to deter Bozzi from agreeing to the extended sublease, both by threatening lawsuit if Bozzi agreed and/or taking actions which constituted harassment during his family's tenancy such as eliminating access to the passenger elevator, refusing to provide an electric stove when gas was cut off to the apartment during building renovations and refusing to reimburse the family for expensive glassware allegedly broken as a result of renovation activities, a violation of the cause of action might be proved. Plaintiff's

motion to dismiss the first counterclaim is, therefore, denied.

Defendants' Second Counterclaim for Breach of Contract

Defendants' second counterclaim asserts a claim for breach of contract, based on the PSA entered into between 737 Park and the Prior Owner on or about April 29, 2011. In the PSA, 737 Park assumed, among other things, the Katz family leases, as amended, including the Lease Amendment Agreement between the Siblings and the Prior Owner entered into on August 5, 2011, in which the parties agreed that

> "'Tenant may sublease the Apartment without Owner's consent thereto, provided that any sublease entered into by Tenant after the date hereof shall have a minimum term of six (6) months and a maximum term of two (2) years (inclusive of all renewals); provided however that the maximum term limitation contained in the preceding sentence shall not apply to the sublease to Bruce E. Bozzi, Mary Ann Bozzi, Andrea Bozzi Thimm, Bruce E. Bozzi, Jr. and Palin (sic) Management Corp. as co-subtenants.'"

See Lease Amendment Agreement, ¶ 2 (b). Thus, according to defendants, 737 Park was aware it was purchasing the Building subject to the Siblings' right to extend the Bozzi lease without the owner's consent, and to sublet the Apartment to other subtenants without the owner's consent.

The elements of a cause of action for breach of contract are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Defendants contend that plaintiff's alleged

interference with their efforts to renew Bozzi's sublease constituted a breach of contract by plaintiff because defendants were intended third-party beneficiaries of the PSA between 737 Park and Katz 737 Corp. and the Assignment of Leases.

> "A party asserting rights as a third-party beneficiary must allege: (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for its benefit, and (3) that the benefit to it is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate it if the benefit is lost. In determining third-party beneficiary status, it is permissible for the court to look at the surrounding circumstances as well as the agreement."

Board of Mgrs. of 100 Congress Condominium v SDS Congress, LLC, 152 AD3d 478, 480 (2d Dept 2017)(internal quotation marks and citations omitted).

Defendants contend that copies of the Katz family leases were made available to plaintiff before it signed the PSA, that under the PSA, plaintiff assumed the Katz family leases. According to defendants, given the provisions of the PSA providing that the New Owner would assume the Prior Owner's obligations under the family leases intended for their benefit, they were intended beneficiaries of the PSA. Defendants further contend that plaintiff's alleged actions with respect to Bozzi constitute a breach of the PSA. However, as plaintiff argues, the PSA, of which defendants contend they are third-party beneficiaries, contains a provision that expressly precludes

third parties from relying on it. Section 11.11 of the PSA states:

> "The provisions of this Agreement and of the documents to be executed and delivered at Closing are and will be for the benefit of Seller and Purchaser only and are not for the benefit of any third party, and accordingly, no third party shall have the right to enforce the provisions of this Agreement or of the documents to be executed and delivered at Closing."

Claman affirmation, exhibit 13, PSA, § 11,11.

For this reason, plaintiff's motion to dismiss defendants' second counterclaim for breach of contract is granted.

Plaintiff's Request for a Counter-Declaration

In their third counterclaim, the Siblings assert that they have a right to sublet the Apartment without plaintiff's consent and request that this Court issue an order confirming that the Apartment is not subject to the rent stabilization laws by virtue of the So-Ordered Stipulation, and the lease dated October 3, 2009 as amended on August 5, 2011 between defendants, as tenants, and the Prior Owner, as landlord,

> "which was assigned to plaintiff on August 5, 2011, and which provides that the Apartment is not subject to any form of rent regulation, including the [Rent Stabilization Code] and (iii) [Rent Stabilization Code] § 2520.11 (k), which provides that the [Rent Stabilization Code] does not apply to housing accommodations that are not occupied by the tenant, not including subtenants or occupants, as his or her primary residence as determined by a court of competent jurisdiction."

Claman affirmation, exhibit 2 (Answer with counterclaims), ¶ 86.

Rather than moving to dismiss the third counterclaim, plaintiff seeks a counter-declaration in favor of plaintiff "to the effect that Defendants now have effectively admitted that they have no right to sublet." Notice of plaintiff's motion for summary judgment and other relief at 2.

Plaintiff argues that Rent Stabilization Code § 2525.6, which governs subletting and assignment of rent stabilized apartments, requires that in order to sublet in compliance with the Code, the apartment must be the primary residence of the tenant and the tenant must intend to occupy the apartment at the end of the sublease. That provision states as follows:

> "Housing accommodations subject to this Code rented by a tenant pursuant to an existing lease may be sublet in accordance with the provisions, and subject to the limitations, of section 226-b of the Real Property Law, provided that the additional provisions of this section are complied with and provided further that the tenant can establish that at all times he or she has maintained the housing accommodations as his or her primary residence and intends to occupy it as such at the expiration of the sublease."

Rent Stabilization Code § 2525.6 (a).

Plaintiff contends that in support of the Siblings' prior motion to dismiss, counsel for defendants conceded that the Siblings have no intention to leave their homes in other cities and return to the Apartment, their childhood home, and therefore, they have conceded that they do not and cannot comply with section 2525.6 (a), quoted above.

Plaintiff further argues that defendants cannot look to the So-Ordered Stipulation for the authority to sublet the Apartment absent complying with section 2525.6 (a) because, unlike the provision of the section governing the amount of rent which can permissibly be charged for the Apartment, the stipulation never addressed subsection (a) which governs the primary resident of the tenant.

Defendants contend, however, that pursuant to Section 2520.11 (k) of the Rent Stabilization Code, the Apartment must be deemed to be non-stabilized. That section states:

> "This Code shall apply to all or any class or classes of housing accommodations made subject to regulation pursuant to the RSL or any other provision of law, except the following housing accommodations for so long as they maintain the status indicated below:
>
> ***
>
> "(k) housing accommodations which are not occupied by the tenant, not including subtenants or occupants, as his or her primary residence as determined by a court of competent jurisdiction."

Rent Stabilization Code § 2520.11 (k).

This Court has already determined that the So-Ordered Stipulation does not govern whether the Apartment is subject to the rent stabilization laws after the Bozzis' tenancy is concluded. To the extent that defendants are relying on section 2520.11 (k) of the Rent Stabilization Code to establish that the Apartment is not subject to rent stabilization, this argument is lacking. Examining the cases involving section 2520.11 (k), this Court concludes that it was not intended, as defendants seem to

argue, to be a sword to enable tenants, such as defendants, to arbitrarily remove an otherwise rent-stabilized apartment from the ever-dwindling stock of rent regulated apartments by claiming that the Apartment was not occupied as their primary residence. Rather, the provision was intended to require that a tenant, who wished to afford him or herself of the protections of the rent stabilization law, to, in fact, occupy the apartment as his or her primary residence. *See e.g. Hughes v Lenox Hill Hosp.*, 226 AD2d 4, 6 (1st Dept 1996)(The son of a deceased rent-stabilized tenant is not entitled to succeed to his late mother's tenancy where he left the apartment on his mother's death and has resided out of state with his guardian for several years because "the protection afforded by the rent regulations is expressly limited by the governing statutes, which are universal in exempting from their ambit dwelling units 'not occupied by the tenant, not including subtenants or occupants, as his primary residence'" [quoting Administrative Code § 26-504 (a) (1) (f)]); *Friesch-Groningsche Hypotheekbank Realty Credit Corp. v Slabakis*, 215 AD2d 154, 155 (1st Dept 1995)(defendant who maintained two apartments for conducting business was not entitled to protections of rent stabilization laws because "[t]he protections of the Rent Stabilization Code are inapplicable to one who does not maintain an apartment as his primary residence."); (*St Owner LP v Bonczek*, 19 Misc 3d 1139(A)(Civ Ct, NY County 2007)(in non-

primary residence holdover proceeding landlord was not entitled to evict tenant pursuant to section 2520.11 who was able to show, by a preponderance of the evidence, that he resided in the apartment as his primary residence more than 183 days per year); *ACP 150 W. End Ave. Assoc., L.P. v Greene*, 15 Misc 3d 1112(A) (Civ Ct, NY County 2007)(landlord failed to meet its burden to establish by a preponderance of the evidence that tenant did not maintain the apartment as her primary residence). Thus, the reasoning behind defendants' reliance on section 2520.11 (k) is far from clear and plaintiff's entitlement to a counter-declaration has not been established.

On a summary judgment motion, however, the movant must "establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor, and he must do so by tender of evidentiary proof in admissible form." *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 (1979)(quoting CPLR 3212 (b)). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985).

While, following discovery, plaintiff may be able to establish by admissible proof that none of the defendants intend to occupy the Apartment as their primary residence, relying on assertions of defendants' counsel in the context of the motion to

dismiss is an insufficient basis on which to justify summary judgment. Nor can defendants' intentions with respect to the apartment be established, as a matter of law, sufficient to justify summary judgment, by a legal argument offered in their affirmative defense. This is particularly true in light of the complex and unusual history of this matter. Therefore, plaintiff's motion for a counter declaration is denied.

PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' AFFIRMATIVE DEFENSES

Plaintiff also moves to dismiss the affirmative defenses in defendants' answer "primarily for the reasons already indicated in the Decision, and in accordance with the documentary evidence discussed therein." Notice of plaintiff's motion for summary judgment and related relief at 1.

Defendants first affirmative defense asserts that plaintiff has failed to state a cause of action.

While "[t]he pleading of that defense is ... surplusage, as it may be asserted at any time even if not pleaded ... [t]he assertion of that defense in an answer should not be subject to a motion to strike or provide a basis to test the sufficiency of the complaint." *Riland v Todman & Co.*, 56 AD2d 350, 352-533 (1st Dept 1977). However, in denying defendant's motion to dismiss in the Prior Decision, this Court held that the complaint adequately states a cause of action. Thus, plaintiff's motion to dismiss the first affirmative defense is granted.

Defendants' second affirmative defense asserts that there is not an actual justiciable controversy existing between the parties. Plaintiff is correct that in the Prior Decision this Court ruled that a justiciable controversy exists, therefore, plaintiff's motion to dismiss the second affirmative defense is granted.

Defendant's third affirmative defense asserts that the action is barred by the doctrines of collateral estoppel, res judicata, issue preclusion and claim preclusion. This affirmative defense is merely a one-sentence legal conclusion and is, therefore, insufficient to make out an affirmative defense. *Dahl v Prince Holdings 2012, LLC*, 2016 NY Slip Op 32922(U), at **4, *citing Robbins v Growney*, 229 AD2d 356, 358 (1st Dept 1996).

Furthermore, as to the doctrine of res judicata, it "holds that a final judgment bars further actions between the same parties on either the same cause of action or any claim related to the same course of conduct, unless the requisite elements and proof required for the new claim 'vary materially' from those of the claim in the prior action." *Ginezra Assoc. LLC v Ifantopoulos*, 70 AD3d 427, 429 (1st Dept 2010). Here plaintiff was not a party to the prior action, and, therefore, the doctrine of res judicata does not apply.

In addition, the Prior Decision has already considered and rejected the doctrine of collateral estoppel as inapplicable herein.

Defendant's fourth affirmative defense asserts that plaintiff is barred from maintaining this action under the doctrine of equitable estoppel.

> "Equitable estoppel is defined as '[t]he doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had. Under this theory, a party is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct."

Besicorp Group Inc. v Enowitz, 235 AD2d 761, 764 (3rd Dept 1997)(internal quotation marks and citation omitted). However, again, the fourth affirmative defense is merely a one-sentence legal conclusion and is insufficient to make out an affirmative defense. *Dahl v Prince Holdings 2012, LLC*, 2016 NY Slip Op 32922(U) at **4, *citing Robbins v Growney*, 229 AD2d at 358. It is, therefore, dismissed.

Defendant's fifth affirmative defense asserts that the action is barred under the doctrine of unclean hands. "[T]he successful assertion of this defense depends in part upon proof that the alleged wrongful conduct had actually injured the complaining party. *Jonard Indus. Corp. v Jerico Precision Mfg. Corp.*, 80 AD2d 908, 909 (2d Dept 1981). As discussed above in connection with their second counterclaim, defendants allege that plaintiff took wrongful actions to disrupt Bozzi's subtenancy which caused him to fail to renew his sublease, thereby causing

them financial injury. Those allegations would satisfy the requirement that the alleged wrongful conduct injured defendants. Therefore, plaintiff's motion to dismiss the fifth affirmative defense is denied.

Defendant's sixth affirmative defense asserts that the Apartment is not subject to any form of rent regulation, including the rent stabilization laws by virtue, among other things of the So-Ordered Stipulation. As discussed above, to the extent that it indicates that with respect to the Bozzi's sub-tenancy, the Apartment is not to be treated as rent-stabilized this Court is constrained to rule in conformity with the position So-Ordered by the Appellate Division, First Department. Therefore, plaintiff's motion to dismiss the sixth affirmative defense is denied.

Finally, with respect to the public policy arguments raised by both plaintiff and defendants, it is fair to say that neither side in this litigation appears to be acting to further the availability of much needed affordable housing in this City. Moreover, this Court notes that this decision, regarding the applicability of the rent stabilization laws to defendants' lifetime tenancy does not purport to determine the applicability of those same laws to plaintiff's desire to market the Apartment as a condominium unit.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of plaintiff 737 Park Avenue Acquisition LLC is disposed of as follows:

(a) plaintiff's motion to strike the affirmative defenses in the answer of defendants Laura Goldblatt (a/k/a Laura Goldblatt-Jensen), Seth Katz and Tracy Edwards with respect to the first, second, third and fourth affirmative defenses is granted and is otherwise denied;

(b) plaintiff's motion for a declaration that going forward, the right of defendants to sublet the Apartment is limited by the applicable provisions of the Rent Stabilization Law and Code and it is hereby ADJUDGED AND DECLARED that the right of defendants Laura Goldblatt (a/k/a Laura Goldblatt-Jensen, Seth Katz and Tracy Edwards to sublet Apartment 18C in the future is limited by the applicable provisions of the Rent Stabilization Law (Administrative Code § 26-501, *et seq.*) and the Rent Stabilization Code (9 NYCRR § 2520, *et seq.*) except to the extent that the defendants are not required to obtain the consent of plaintiff 737 Park Avenue Acquisition LLC in order to sublet; and it is further

ORDERED that

(c) plaintiff's motion to dismiss defendants' first and second counterclaims is disposed as follows:

plaintiff's motion to dismiss defendants' first counterclaim is denied; and

plaintiff's motion to dismiss defendants' second counterclaim is granted; and

(d) plaintiff's motion for a counter-declaration that defendants' have admitted that they have no right to sublet the Apartment is denied.

Dated: December 31, 2018

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.