SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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INDEX NO. 160597/2018

MOTION DATE 01/28/2020

MOTION SEQ. NO. 002

NERYS BUENO, AMNERYS MARRERA, MILAGROS TEJEDA, MARTINA PEREZ, FELIX REYNOSO, MARITZA RAMOS, JOHN-POUL CHAPARRO, SHANISE VALDEZ-CHAPARRO, REGINA MCRAE, MARCEE MCRAE, NOVELLA THOMPSON, JULIA DEL ORBE, AMANDA LU, and EMMA COATES-FINKE,

Plaintiff,

- v -

562 WEST 174TH STREET EQUITIES, LLC, and SHAMCO MANAGEMENT CORP.,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 55, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80 were read on this motion to/for DISCOVERY.

In this personal injury action, the defendants move pursuant to CPLR 3124 and 3126 to compel the plaintiffs to comply with an April 23, 2019 preliminary conference order by serving bills of particulars, responding to demands for production, and appearing for depositions or, in the alternative, to preclude the plaintiffs from adducing evidence at trial. The plaintiffs oppose the motion. The plaintiffs cross-move pursuant to CPLR 3025(b) for leave to amend the complaint to add causes of action to recover for breach of the warranty of habitability and for rent overcharges, and pursuant CPLR 602 to consolidate, with the instant action, several nonpayment and possession proceedings commenced by the defendants against them in the Civil Court. The defendants' motion is granted to the extent that it is resolved in accordance with a compliance conference order dated January 28, 2020 that directs the plaintiffs to provide the discovery demanded by a date certain and takes into account the anticipated amendment of

the complaint. The motion is otherwise denied. The cross motion is granted to the extent that the plaintiffs may amend the complaint, and it is otherwise denied.

CPLR 3101(a) provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." This language is "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]). CPLR 3126 authorizes the court to sanction parties who "refuse[ ] to obey an order for disclosure or wilfully fail[ ] to disclose information which the court finds ought to have been disclosed" (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998]). A failure to comply with discovery, particularly after a court order has been issued, "may constitute the dilatory and obstructive, and thus contumacious, conduct warranting the striking of the[ ] answer[ ]" (*id.*; *see CDR Creances S.A. v Cohen*, 104 AD3d 17 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]).

Here, however, the defendants failed to establish that the plaintiffs' conduct during this early stage of discovery was willful, contumacious, or in bad faith, inasmuch as the plaintiffs failed timely to comply with only a preliminary conference order, and the parties have adjourned the compliance conference on consent on several occasions (*see generally Butler v Knights Collision Experts, Inc.*, 165 AD3d 406, 407 [1st Dept 2018]). In addition, the defendants sought no conditional order pertaining to discovery compliance prior to making this motion (*see Westchester Med. Ctr. v Amoroso*, 110 AD3d 580, 580 [1st Dept 2013]). Hence, the defendants failed to establish a pattern of willful noncompliance with discovery obligations sufficient to warrant the drastic penalty of precluding the plaintiffs from adducing evidence at trial (*see id.*). "[A]ny mere lack of diligence in furnishing certain requested materials is not a ground for dismissal" or other sanctions (*Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 539 [1st Dept 2017]).

Nonetheless, the defendants established that the plaintiffs remain obligated to provide bills of particulars, copies of documents that are in their possession, and responses to other demands, and to appear for depositions (*see* CPLR 3124). Inasmuch as the plaintiffs failed to present any valid reason why they should not be required to comply with the April 23, 2019 order and provide the requested disclosure, that branch of the defendants' motion seeking to compel that disclosure is granted (*see Willam J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 131 AD3d 960, 963-964 [2d Dept 2015]; *Rocco v Family Foot Ctr.*, 94 AD3d 1077, 1080 [2d Dept 2012]) to the extent that the plaintiffs shall provide such disclosure by the deadlines set forth in the compliance conference order dated January 28, 2020, or be subject to sanctions.

Leave to amend a pleading is to be freely given absent prejudice or surprise resulting from the amendment, provided that the evidence submitted in support of the motion indicates that the proposed amendment may have merit (*see* CPLR 3025[b]; *McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp.*, 59 NY2d 755 [1983]; *360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552 [1st Dept 2011]; *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809 [1st Dept 2008]). The court must examine the sufficiency of the proposed amendment, but only to determine whether the amendment is "palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; *see Hill v 2016 Realty Assoc.*, 42 AD3d 432 [2d Dept 2007]). The court also "should consider how long the amending party was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered" (*Haller v Lopane*, 305 AD2d 370, 371 [2d Dept 2003]).

Applying these considerations here, the court concludes that the plaintiffs may file and serve an amended complaint in the form annexed to their moving papers. New York recognizes a cause of action against a landlord to recover for breach of the warranty of habitability articulated in Real Property Law § 235-b where the plaintiff pleads and proves "the

extensiveness of the breach, the manner in which it affected the health, welfare or safety of the tenants, and the measures taken by the landlord to alleviate the violation" (*Diamond v New York City Hous. Auth.*, _____AD3d_____, 2020 NY Slip Op 00376, *1 [1st Dept, Jan. 21, 2020]). This proposed cause of action was sufficiently pleaded in the proposed amended complaint. Similarly, rent overcharge claims have long been recognized (*see Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382 [2014]; Admin. Code of City of N.Y. §§ 26-516[a]). That cause of action was also sufficiently pleaded in the plaintiff's proposed pleading. The defendants have not shown that the plaintiffs unduly delayed in asserting these causes of action, or that there would be any prejudice if the amendment were permitted.

It is well settled that

> "[c]onsolidation is generally favored in the interest of judicial economy and ease of decision-making where cases present common questions of law and fact, 'unless the party opposing the motion demonstrates that a consolidation will prejudice a substantial right'"

(*Raboy v McCrory Corp.*, 210 AD2d 145, 147 [1st Dept 1994], quoting *Amtorg Trading Corp. v Broadway & 56th St. Assoc.*, 191 AD2d 212, 213 [1st Dept 1993]). Nonetheless, the Civil Court is the preferred forum for landlord-tenant disputes (*see Langotsky v 537 Greenwich, LLC*, 45 AD3d 405 [1st Dept 2007]; *44-46 W. 65th Apt. Corp. v Stvan*, 3 AD3d 440 [1st Dept 2004]; *Scheff v 230 E. 73rd Owners Corp.*, 203 AD2d 151 [1st Dept 1994]). "Civil Court has jurisdiction of landlord tenant disputes . . . and when it can decide the dispute, as in this case, it is desirable that it do so" (*Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 28 [1984]).

Where a landlord in a Civil Court proceeding simply seeks to recover money, and the Civil Court is thus is not called upon to exercise its special jurisdictional role in determining the right to possession of real property, consolidation may be warranted (*see Atherton v 21 E. 92nd St. Corp.*, 149 AD2d 354 [1st Dept 1989]). Where, as here, the Civil Court proceeding is not merely to recover rent, but seeks possession of the subject leasehold, and no party has shown that consolidation is necessary, removal and consolidation are not warranted (*see Simens v*

Darwish, 105 AD3d 686, 686-687 [1st Dept 2013]; *44-46 W. 65th Apt. Corp. v Stvan*, 3 AD3d at 442; *see Waterside Plaza v Yasinskaya*, 306 AD2d 138, 139 [1st Dept 2003]).

Accordingly, it is,

ORDERED that the defendants' motion is granted to the extent that the plaintiffs shall comply with the April 23, 2019 preliminary conference order and provide all requested discovery in accordance with the compliance conference order of this court, dated January 28, 2020, and the motion is otherwise denied; and it is further,

ORDERED that the plaintiffs' cross motion is granted to the extent that they are granted leave to serve and file an amended complaint in the form annexed to their moving papers, and the cross motion is otherwise denied.

This constitutes the Decision and Order of the court.

1/28/2020
DATE

JOHN J. KELLEY, J.S.C.

HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED	[X]	NON-FINAL DISPOSITION		
APPLICATION:	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ] OTHER
CHECK IF APPROPRIATE:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE