Agrama Trust of 1984 v O'Mara
2020 NY Slip Op 32162(U)
June 30, 2020
Supreme Court, New York County
Docket Number: 655438/2016
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT R. REED** **PART 43**

Justice

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AGRAMA TRUST OF 1984, FRANK AGRAMA AND OLFET AGRAMA, AS TRUSTEES OF THE AGRAMA TRUST OF 1984

Plaintiff,

- v -

CAROLYN O'MARA, PATRICK O'MARA,

Defendant.

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INDEX NO. 655438/2016

MOTION DATE 06/13/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion for JUDGMENT - SUMMARY.

ROBERT R. REED, J.:

Defendants, Carolyn O'Mara and Patrick O'Mara, move, pursuant to CPLR 3212, for summary judgment dismissing the Amended Complaint seeking unpaid rent, and, pursuant to General Obligations Law §7-103, to recover the security deposit.

Plaintiffs, Agrama Trust of 1984 (the "Trust") and Frank Agrama and Olfet Agrama, as Trustees of the Agrama Trust of 1984 ("Trustees"), cross-move, pursuant to CPLR 305(c), to amend the caption and, pursuant, to CPLR 3025(b), for leave to file a Second Amended Complaint.

BACKGROUND

Plaintiffs commenced this action seeking to recover damages from defendants for their alleged default under a written lease agreement, dated May 18, 2015 (the "First Lease"), for

apartment 15Q at 25 Central Park West, New York, New York (the "Subject Apartment"). The following facts are gleaned from the submissions of the parties.

Plaintiffs are a California Trust and its Trustees (Amended Complaint, NYSCEF Doc. No. 34). The Trustees, husband and wife, own the Subject Apartment (see Deed, NYSCEF Doc. No. 36), and defendants are the tenants (Amended Complaint, *supra*).

The First Lease, which lists the Trust, rather than the Trustees, as Owner, and defendants, as Tenant, is for a two-year term, commencing on June 15, 2015 and expiring on June 14, 2017 (First Lease, NYSCEF Doc. No. 41). The monthly rent under the First Lease is $16,500.00 for the first year and $17,325.00 for the second year (*id.*).

Frank Agrama and defendants executed the First Lease (*id.*), which had been prepared by plaintiffs' real estate broker, Randi Carrey (Dep. Tr., Carrey, NYSCEF Doc. No. 55; Frank Agrama Affid, NYSCEF Doc. No. 60). Neither Owner nor Tenant was represented by counsel when the First Lease was executed (*see* Frank Agrama Affid, *supra*). Due to ongoing renovations, the Subject Apartment was not available on the scheduled move-in date (Dep. Tr., Carolyn O'Mara, NYSCEF Do. No. 54; Frank Agrama Affid., NYSCEF Doc. No. 60).

Defendants entered into a second written lease agreement, dated July 16, 2015 (the "Second Lease"), for the apartment (Second Lease, NYSCEF Doc. No. 42). The Second Lease, for a two-year term commencing on July 15, 2015 and expiring on July 15, 2017, also lists the Trust as Owner and defendants as Tenant (*id.*). The Second Lease further states that the "monthly rent for the Apartment is $16,500.00," and does not include an increase for the second year (*id.*). The lease, which had also been prepared by plaintiffs' real estate broker (Frank Agrama Affid, *supra*), was executed by Frank Agrama and defendants (Second Lease, *supra*).

Defendants moved into the Subject Apartment on July 15, 2016, and remained in occupancy for 13 months (Dep. Tr., Carolyn O'Mara, *supra*). They vacated the apartment on August 15, 2016, after reportedly accepting Owner's offer of early termination, without penalty, due to ongoing noise complaints from a neighbor (*id.*). They paid $16,500.00 for each of the first 12 months and $17,325.00 for the 13th month (*id.*). Shortly thereafter, this action ensued for, among other things, unpaid rent.

In the original Complaint, the Trust sought to recover $34,650.00 in unpaid rent as a result of defendants' default under the First Lease (the first cause of action); $18,032.00 for expenses incurred in putting the Subject Apartment in good condition for re-rental, pursuant to Article 17(c)(2) of the First Lease (second cause of action); and legal fees and expenses incurred as a result of defendants' default under the First Lease, pursuant to Articles 17(c)(3), 19(A)(5), and 19(A)(7) (third cause of action) (Complaint, NYSCEF Doc. No. 1).

Defendants answered, generally denying the allegations in the Complaint and asserting numerous affirmative defenses, including that the Trust lacks standing to maintain this action, and that defendants accepted the early termination offer (Answer, NYSCEF Doc. No. 4). Defendants also asserted counterclaims for a credit for their security deposit, in the amount of $16,500.00 (first counterclaim) and legal fees (second counterclaim) (*id.*).

An Amended Complaint adds the Trustees as plaintiffs and increases the amount of unpaid rent sought in the first cause of action to $69,300.00 (Amended Complaint, *supra*). Defendants' Amended Answer includes general denials, multiple affirmative defenses, and counterclaims for a credit for the security deposit paid, plus interest (first counterclaim); an accounting of the funds held as security deposit (second counterclaim); and attorney's fees (third counterclaim) (Amended Answer, NYSCEF Doc. No. 6). On December 18, 2018, after all

necessary discovery had been completed, counsel for plaintiffs executed the Note of Issue and Certificate of Readiness for Trial (Note of Issue, NYSCEF Doc. No. 28).

Defendants now seek summary judgment dismissing the Amended Complaint and the return of their security deposit, with interest. Plaintiffs seek leave to amend the caption in the pleadings and to file a Second Amended Complaint.

DISCUSSION

Leave to Amend

Plaintiffs seek leave (i) to amend the caption in the pleadings to conform to the proper legal name of the Owner of the Subject Apartment, as set forth in the Deed; (ii) to add a cause of action for reformation of the Second Lease to correct the alleged errors of misidentifying the Owner and omitting the monthly rent for the second year; (iii) to allege additional facts to accurately identify plaintiffs and the operative lease agreement under which plaintiffs are seeking relief for their existing claims; and (iv) to update the damage amounts, which allegedly have continued to accrue since the initial filing of this action (Proposed Second Amended Complaint, NYSCEF Doc. No. 52).

It is well-settled that leave to amend pleadings shall be given freely, unless the party opposing the amendment can demonstrate prejudice or surprise from the delay (*see* CPLR 3025[b]; *Volpe v Good Samaritan Hosp.*, 213 AD2d 398, 399 [2d Dept 1995]). "Mere lateness is not a barrier to the amendment. It is lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983], quoting Siegel, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR 3025.5, p. 477). "Prejudice requires 'some indication that the defendant has been hindered in the preparation of its case or has been prevented from taking some measure in

support of its position'" (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011] [internal citations omitted]).

Furthermore, mistakes or irregularities not affecting a substantial right of a party are not fatal (*see Covina v Alside Aluminum Supply Co.*, 42 AD2d 77, 80 [4th Dept 1973]). Rather, "[m]istakes relating to the name of a party, involving a misnomer or misdescription of the legal status of a party surely fall within the category of those irregularities which are subject to correction by amendment, particularly when the other party is not prejudiced and should have been well aware from the outset that a misdescription was involved" (*id.*).

Here, the court determines that the caption in the pleadings should be amended to conform to the proper legal name of the Owner of the Subject Apartment. The apparent mistake relating to the name of the plaintiff can be traced to the misidentification of the Owner in the lease agreements. In fact, the Owner is verifiable from the Deed. The submissions do not include any evidence to indicate that either party intended to misidentify the Owner in the leases. Moreover, the Trustees acknowledge their intention to rent the Subject Apartment to defendants (*see* Frank Agrama Affid, *supra*; Olfet Agrama Affid, *supra*), and defendants acknowledge their intention to lease the apartment from the Owner (Dep. Tr., Carolyn O'Mara, *supra*). In addition, the real estate broker who prepared the leases testified that "everything was done like pretty rushed at the time," and that "mistake[s]" and "omissions" were made (Dep. Tr., Carrey, *supra*). The amendment to the caption only has the effect of correcting a mistake in designation of a name and does not effectuate any change in the parties (*see Covina v Alside Aluminum Supply Co.*, *supra*, at 81). "Where there is no mistake about the agreement, and the only mistake alleged is in the reduction of that agreement to writing, such mistake of the scrivener, or of either party, no matter how it occurred, may be corrected" (*Nash v Kornblum*, 12 NY2d 42, 46-47 [1962]).

Defendants cannot seriously claim prejudice from an amendment to the caption. They certainly cannot argue that they relied on the fact that it was the Trust, rather than the Trustees, that owned the Subject Apartment when they entered into the lease agreements. Thus, the branch of the cross motion that seeks to amend the caption in the pleadings to conform to the proper legal name of the owner of the Subject Apartment is granted.

However, the remainder of the cross motion is denied. In it, plaintiffs seek leave to further amend the pleadings to include factual allegations seeking to enforce the Second Lease, after reforming that lease to include the proper name of the Owner of the Subject Apartment and the rent increase for the second year, and to increase the amount of damages sought to include the accrued, unpaid rental amount attributable to the second-year rent increase.

CPLR 305(c) permits a court to allow an amendment "[a]t any time, in its discretion and upon such terms as it deems just ... if a substantial right of a party against whom the summons issued is not prejudiced." Nevertheless, "[w]hen an amendment to a pleading ... is sought at or on the eve of trial, judicial discretion in allowing such amendment should be 'discreet, circumspect, prudent and cautious'" (*Garguilo v Port Auth. of N.Y. & N.J.*, 137 AD3d 708, 708-709 [1st Dept 2016]). "In exercising its discretion, the court will 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 is offered" (*Caruso v Anpro, Ltd.*, 215 AD2d 713, 713 [2d Dept 1995]).

Here, plaintiffs assert that it was during the final phase of discovery, during depositions, that questions pertaining to the proposed amendments were explored and resolved. Plaintiffs also argue that a cross motion was made shortly after the parties completed discovery and filed

the Note of Issue. They further contend that they merely seek to update the pleadings to provide for the total damage claim they produced at discovery, and not to assert a new theory of liability.

As stated, plaintiffs executed both leases in 2015, and filed the original and amended pleadings in 2016. They did not seek to further amend pleadings to include factual allegations seeking to enforce a reformed version of the Second Lease until 2018, after the parties had completed discovery, and after the Note of Issue had been filed. The assertion that questions pertaining to the enforcement of a reformed Second Lease were first explored during the final phase of discovery is simply untenable, as all of the documents on which plaintiffs rely have been available for some time. The extended delay in seeking the amendment, without a reasonable excuse, would significantly prejudice defendants (*see* CPLR 3025[b]; *Kocourek v Booz Allen Hamilton, Inc.*, *supra*).

Thus, the cross motion is granted only to the extent of amending the caption in the pleadings to conform to the proper legal name of the Owner of the Subject Apartment, as set forth in the Deed, and the cross motion is otherwise denied.

Summary Judgment

Defendants seek summary judgment dismissing the Amended Complaint, and the return of their security deposit. It is well settled that the proponent of a summary judgment motion must make a prima face showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*JMD Holding Corp. v Congress Fin. Corp.*, 43 NY3d 373, 384 [2005]). However, once the showing has been made, the burden shifts to the party opposing the motion

for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, the Amended Complaint asserts claims against defendants for default under the First Lease. The essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach (*see Plainview Props. SPE, LLC v County of Nassau*, 181 AD3d 731, 733 [2d Dept 2020]).

Here, plaintiffs allege that defendants defaulted under the terms of the First Lease by failing to pay the rent due, in the sum of $69,300.00; that defendants are liable to Owner for expenses, in the sum of $18,032.00, incurred in putting the Subject Apartment in good condition for re-rental; and that the Trustees are entitled to recover damages for legal fees and expenses incurred as a result of defendants' default.

Article 17 of the First Lease states, in part:

"REMEDIES OF OWNER AND YOUR LIABILITY

> If the Lease is ended by Owner because of your default, the following are the rights and obligations of You and Owner ... .
> (c) Whether the Apartment is re-rented or not, You must pay to Owner as damages ...
> (2) Owner's expenses for advertisements, broker's fees and the cost of putting the Apartment in good condition for re-rental; and
> (3) Owner's expenses for attorney's fees"

(First Lease, *supra*). Article 19 states, in part:

> "FEES AND EXPENSES
> Owner's Right. You must reimburse Owner for any of the following fees and expenses incurred by Owner:

> ...
> (5) Any legal fees and disbursements for legal action or proceedings brought by Owner against You because of a Lease default by You or for defending lawsuits brought against Owner because of your actions ...;
> (7) All other fees and expenses incurred by Owner because of your failure to obey any other provisions and agreements of this Lease"

(*id.*).

In seeking summary judgment, defendants argue that the First Lease is invalid because (i) it lists the Trust, rather than the Trustees, as Owner of the Subject Apartment; (ii) it was not signed by the Trustees in their fiduciary capacity; and (iii) it violates General Obligations Law §5-703 (the "Statute of Frauds"). Defendants also contend that, while the allegations in the Amended Complaint are based on the First Lease, the Second Lease expressly voids the First Lease.

As such, defendants argue that the Amended Complaint, based on the First Lease, fails to state a viable cause of action. Defendants further argue that, in the absence of a valid lease, they were, at most, tenants at-will, liable only for use and occupancy during their stay in the Subject Apartment, which they have already paid.

In addition, defendants assert that, even if the Court determines that the First Lease is valid, the Trustees are not in privity of contract with them and, therefore, lack standing to enforce the lease. Defendants also contend that they accepted an offer of early termination without penalty. Thus, defendants insist that they are entitled to the return of their security deposit.

Defendants challenges to the validity of the First Lease are insufficient to establish entitlement to judgment as a matter of law. To be sure, under Estate, Powers and Trusts Law §7-2.1(a), "an express trust vests in the trustee the legal estate ...." Furthermore, §11-1.1(b)(5)(C) authorizes the trustee of an express trust "to lease [property] for a term not exceeding ten years

...." Here, however, the Court is satisfied that the naming of the Trust, rather than the Trustees, as Owner of the Subject Apartment is simply the result of a transcription error by the real estate broker who prepared the lease.

"[I]n contract law, a scrivener's error, like a mutual mistake, occurs when the intention of the parties is identical at the time of the transaction but the written agreement does not express that intention because of that error; this permits a court acting in equity to reform the agreement" (*Bldg. ABI Enters., LLC v Second Ave. Corp.*, Sup Ct, NY County [Mills, J.], index No. 110703/2011, December 20, 2012, quoting Williston on Contracts §70.93 [4th ed.]). Reformation is designed "solely for the purpose of stating correctly a mutual mistake shared by both parties to the contract" (*Nash v Kornblum*, *supra* at 46). Furthermore, reformation based on mutual mistake requires a showing "by 'clear, positive and convincing evidence' that the agreement does not accurately express the parties' intentions or previous oral agreement" (*313-315 West 125th Street LLC v Arch Specialty Ins. Co.*, 138 AD3d 601, 602 [1st Dept 2016], quoting *Amend v Hurley*, 293 NY 587, 595 [1944]). In addition, reformation is the appropriate remedy where the wrong party is named in a contract (*see 313-315 125th St. L.L.C. v Arch Specialty Ins. Co.*, *supra*).

The submissions do not include any evidence to dispute the fact that the Owner of the Subject Apartment intended to rent the apartment to defendants, or that defendants intended to lease the apartment from the Owner. Thus, it clearly and convincingly appears to this court that the First Lease, as written, does not embody the true agreement as mutually intended, and that it must be reformed to name the Trustees as Owner of the Subject Apartment.

The assertion that the First Lease is invalid because it was not properly signed by the Trustees is also insufficient to establish entitlement to judgment as a matter of law. Defendants

assert that Frank Agrama signed the lease in his individual capacity, not in his fiduciary capacity as Trustee, and that Olfet Ahmed Agrama never signed the leases at all. However, the Trustees submit affidavits stating, in essence, that Frank Agrama signed the lease in his capacity as Trustee (*see* Frank Agrama Affid, *supra*); that Olfet Agrama was aware of, and consented to, the terms of the lease (*see* Olfet Agrama Affid, *supra*); and that she granted Frank Agrama authority to execute the lease on her behalf (*id.*).

As Frank Agrama, a Trustee, is authorized to sign the lease, his signature as it appears on the lease is sufficient (*see Kesselman v London Paint & Wallpaper Co., Inc.*, 54 Misc 3d 639, 642 [Civ Ct, NY County 2016]). Furthermore, co-Trustee Olfet Agrama is permitted, after exercising her own judgment and discretion, to authorize an agent to carry it into execution (*see Gates v Dudgeon*, 173 NY 426, 430 [1903]). Frank Agrama, being authorized by Olfet Agrama, his signing binds both (*see Roe v Smith*, 42 Misc 89, 90 [Sup Ct, Orange County1903]). In addition, Olfet Agrama's acknowledgement of the lease, and her acceptance of its benefits of lease without protest, amount to ratification of the lease, even if it once was voidable (*see Anderson v Conner*, 43 Misc 384, 388 [Surr Ct, NY County, App Term 1904]). As such, the First Lease, as executed by Frank Agrama, is satisfactory.

Furthermore, contrary to defendants' position, as the Trust is an express trust, the Trustees have standing to bring this action in their own names (*see* CPLR 1004; *Trustees of the Plumbers Local Union No. 1 Additional Sec. Ben. Fund v City of New York*, 2009 WL 497306 [Sup Ct, NY County (Madden, J.), Feb. 13, 2019]).

The assertion that the First Lease fails to satisfy the Statute of Frauds is equally unavailing. General Obligations Law §5-703(2) states, in part, that "[a] contract for leasing for longer than one year ... is void unless the contract ... is in writing, subscribed by the party to be

charged, or by [a] lawful agent thereto authorized by writing." As stated, defendants' assertions that the lease misidentified the Owner of the Subject Apartment, and was not properly executed by the Trustees, are insufficient to establish entitlement to judgment as a matter of law. Furthermore, to the extent that either party asserts that California law should apply since the Trust is a California trust, California law is consistent with New York law regarding the misidentification of the Owner of the Subject Apartment in the lease (see *California PAC. Title Co., Sacramento Div. v Moore*, 229 Cal App 2d 114, 116 [1964]), and the ability of one trustee to grant a co-trustee the authority to act on its behalf (*see Duncan v Kahn*, 151 Cal App 402, 406 [1957]).

Defendants also seek to invalidate the First Lease by asserting that it was voided by the Second Lease. They rely on the section of the Preamble to the Second Lease that states:

> "Once you and Owner sign this Lease You and Owner will be presumed to have read it and understood it. You and Owner admit that all agreements between You and Owner have been written into this Lease. You understand that any agreements made before or after this Lease was signed and not written into it will not be enforceable"

(Second Lease, *supra*). However, defendants accepted the benefits of the First Lease for more than a year, even paying an increase during the second year, without seeking to avoid the lease. "It is well settled in this State that where, as in the case at bar, one party has received the full benefit of an *ultra vires* contract, it cannot plead the invalidity of the contract to defeat an action upon it by the other party" (*Washington Hgts. Fed. Sav. & Loan Assn. v Brooklyn Fur Stor. Corp.*, 5 Misc 2d 997, 998-999 [Sup Ct, King's County 1957]). Thus, the branch of the motion that seeks summary judgment dismissing the Amended Complaint is denied.

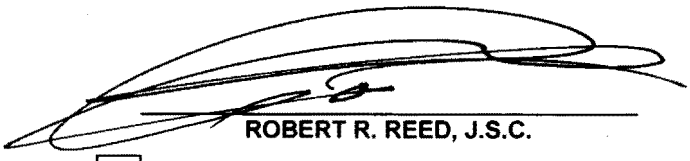
Defendants also submit copies of an email exchange with nonparty Jehan Agrama, the Trustees' son (Dep. Tr., Jehan Agrama, NYSCEF Doc. Nos. 39, 40), in which, defendants assert,

they accepted an offer of early termination without penalty (*see* Emails, NYSCEF Doc. Nos. 43, 44). Thus, defendants insist that they are entitled to the return of their security deposit. However, the request for the return of the security deposit is inextricably intertwined with the underlying lease agreement, thereby precluding an award of summary judgment on that issue (*see Black Bear Fuel Oil, Ltd. v Swan Lake Dev., LLC*, 128 AD3d 1191, 1194 [4th Dept 2015]).

Accordingly, it is

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that the cross motion is granted to the extent that the caption is amended to conform to the proper legal name of the Owner, as set forth in the Deed, and the motion is otherwise denied.



6/30/2020
DATE

ROBERT R. REED, J.S.C.

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