SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

Justice

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DECKER ASSOCIATES LLC,

Plaintiff,

- v -

WALTER KIM, LESLIE ANN FELDMAN-KIM, JOHN DOE, JANE DOE

Defendant.

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INDEX NO. 153701/2018

MOTION DATE 01/09/2020

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Defendants Walter Kim and Leslie Ann Feldman-Kim (defendants) in motion sequence number 004, move for leave to amend their answer, add new affirmative defenses and counterclaims, and amend the existing counterclaims (NYSCEF Doc. No. 100). Plaintiff Decker Associates LLC opposes the motion and cross-moves in motion sequence number 005, for leave to reargue the court's September 10, 2019 order to the extent that it purportedly overlooked the fourth prong of plaintiff's earlier motion (NYSCEF Doc. No. 126). The motions are consolidated for disposition.

Plaintiff owns the building located at 33 Union Square West in Manhattan. Defendants have rented apartment 4R in the building since March 15, 2013. The complaint asserts that the building is subject to the Loft Law (Multiple Dwelling Law §284[2]) but is not subject to the rent stabilization provisions of the law because "it is a housing accommodation in a building

completed or a building substantially rehabilitated as family units on or after both January 1, 1974 and December 1, 1981" (NYSCEF Doc. No. 102, ¶ 10). The complaint notes that the certificate of occupancy forbids short-term rentals of less than 30-day duration, and it states that defendants previously ignored this prohibition and rented the apartment for short periods without plaintiff's consent. According to the complaint, this means that defendants have used the apartment as a commercial rather than a residential space. The complaint asserts violations of the building code, the multiple dwelling code, the fire code, and the housing maintenance code. The complaint notes that on February 24, 2018, plaintiff served defendants with a notice of termination of tenancy, which required defendants to surrender possession of the apartment by March 31, 2018.

On April 23, 2018, plaintiff initiated this action. Plaintiff's first cause of action seeks an order that permanently enjoins defendants from renting the apartment on a short-term basis. The second cause of action seeks a declaration that defendants operated an illegal hotel or bed and breakfast in violation of numerous lease provisions as well as provisions of the State and City loft laws. In the third cause of action, plaintiff asks for an order of ejectment. Finally, the fourth cause of action seeks use and occupancy for the apartment at the fair market rate.

In its verified answer dated May 11, 2018 (the answer), defendants do not deny or concede that they offered short-term rentals between March 2013 and March 2016. As a first affirmative defense to the first cause of action, however, defendants assert that since March 2016 they have resided in the apartment on a full-time basis. As a second affirmative defense, defendants allege that plaintiff has unclean hands because it has rented out apartments for commercial purposes and it "has received violations from the New York City Department of Buildings and the New York City Fire Department arising from the illegal commercial use of

several floors of the Premises and such illegal use has continued unabated to this date" (NYSCEF Doc. No. 103, ¶ 8). The third affirmative defense asserts that to the extent that defendants may have rented the apartment for short periods, they did so with plaintiff's knowledge and consent. Therefore, defendants claim that plaintiff has waived its objections to their alleged violations.

Defendants also assert affirmative defenses to the second cause of action. First, they claim that because any alleged short-term rentals ceased two years earlier, there is no justiciable controversy. Second, they allege that because plaintiff has unclean hands it also cannot seek this equitable relief. Third, defendants point out that they applied "for protected status and harassment under OATH Index Nos. 199/18 & 279/18 docket number to determine if Defendants KIM and their six-year-old daughter are entitled to protection under Article 7-C of the Multiple Dwelling Law" (NYSCEF Doc. No. 103, ¶ 22), and that plaintiff and defendants moved for relief in these proceedings.[1] They state that the Loft Board proceeding renders this lawsuit superfluous.

With respect to the third cause of action, defendants assert that the notice of termination is unclear on its face and therefore inadequate. Their second affirmative defense states that if defendants prevail before the Loft Board and the unit is protected, the notice of termination is a nullity. In response to the fourth cause of action, defendants assert that plaintiff's illegal use of units in the building for commercial purposes prevented it from collecting rent from defendants. Finally, defendants' counterclaim seeks a declaration that their unit was improperly deregulated, the notice of termination was a nullity, and they are protected from ejectment.

In its reply to defendants' counterclaim/request for declaratory relief, plaintiff states that the issue of whether the apartment is a covered unit under the Loft Law is barred because the

[1] OATH is the acronym for the Office of Administrative Trials and Hearings.

issue is pending before the Loft Board. Plaintiff also states, in reply, that even if the unit is covered by the Loft Law, then defendants are in violation of 29 RCNY §2-08.1(a)(2), 29 RCNY 2- 08.1(a)(3), 29 RCNY § 2-09(c)(4)(ii)(A) and should still be evicted. In addition, plaintiff alleges unclean hands and waiver, among other defenses.

On October 25, 2018, plaintiff moved for partial summary judgment, in which it sought dismissal of defendants' counterclaim, a declaration that defendants operated an illegal hotel or business in their apartment, an order of ejectment, and both outstanding and ongoing use and occupancy (NYSCEF Doc. No. 9). In response, on March 25, 2019, defendants opposed the motion and cross-moved to amend the answer "to add new affirmative defenses and additional counterclaims sounding in retaliation, unjust enrichment, rescission and fraudulent inducement" (NYSCEF Doc. No. 84, ¶ 1). This court's September 10, 2019 decision and order denied plaintiff's motion in its entirety motion (NYSCEF Doc. No. 98). Specifically, it determined that plaintiff supported its motion with inadmissible as well as irrelevant evidence. In addition, the court denied defendants' cross-motion as untimely.

Cross-Motion

As stated, this court's September 10, 2019 order denied plaintiff's motion in its entirety because plaintiff failed to present admissible or relevant evidence (NYSCEF Doc. No. 98). The denial of use and occupancy was intentional for this reason. On October 7, 2019, plaintiff brought a motion to reargue its request for use and occupancy, by way of order to show cause (NYSCEF Doc. No. 113 [motion sequence number 005]). On October 7, the court declined to sign the order to show cause (NYSCEF Doc. No. 136). After this denial, plaintiff cross-moved for the same relief the court had just denied. There is no explanation for the reiteration of the application, which the court has denied twice, and plaintiff raises no additional arguments. As

defendants assert, the court's September 10, 2019 order was comprehensive, and plaintiff cannot continue to relitigate this matter.

Motion to Amend

The proposed amended answer contains the same factual contentions and affirmative defenses to the causes of action (NYSCEF Doc. No. 106).[2] In addition, defendants add general affirmative defenses. First, they state that plaintiff's history of acceptance of their rent despite their alleged "objectionable behavior" nullifies its notice of termination (*id.*, ¶ 43). The second general affirmative defense alleges waiver. Third, defendants assert that the notice of termination is fatally vague. Fourth and fifth, defendants argue that the notice relies on inapplicable provisions of the lease and that, moreover, plaintiff did not provide the requisite predicate notice. Sixth, defendants contend that plaintiff does not enumerate all the lease provisions that defendants allegedly breached. Seventh, the amended answer asserts that plaintiff cannot bring this action after commencing, and not acting upon, the prior notice of termination. Eighth, the amended pleading asserts waiver, estoppel, ratification, unclean hands, and laches.

Defendants also have added to their counterclaims. The amended answer stresses that, despite their repeated requests, plaintiff never provided them with a signed copy of the lease. It reasserts defendants' belief that they are entitled to protections under the Loft Law and that plaintiff did not provide them with such protections. The first counterclaim again seeks declaratory relief as to the status of the apartment and their concomitant protection under the Loft Law. The second counterclaim asserts that this action is retaliatory in response to their Loft Board complaints, and defendants seek damages accordingly. The third counterclaim, for unjust enrichment, seeks to recoup any alleged overcharges. According to the fourth counterclaim, the

[2] There are minor changes, such as updating defendant's daughter's age from six to seven.

contract, which plaintiff never signed, must be rescinded. Fifth, defendants assert that plaintiff fraudulently induced them to sign the contract by saying that the unit was not regulated, and subletting was allowed.

In support, defendants submit a copy of the notice of termination plaintiff served on April 25, 2017 (NYSCEF Doc. No. 109). Plaintiff did not act on the notice, which threatened legal action if defendants did not leave the premises by May 31, 2017. Further, the first notice sought to evict them solely because, it alleged, their written lease had expired around two years earlier. It did not mention defendants' purportedly unauthorized short-term rentals (*see id.*). Defendants state that, shortly after they received the first notice, they hired an attorney who stated that their apartment was entitled to protected status and they had been overcharged. For this reason, defendants state, they stopped paying rent, and, on May 7, 2017, they filed their first application with the Loft Board (*see* NYSCEF Doc. Nos. 110, 111). They filed their overcharge application on or around January 28, 2018.[3]

Defendants contend instead of responding to their Loft Board filings, plaintiff issued a second notice of termination in February 2018 and filed this lawsuit two months afterward. According to defendants, plaintiff acted both in retaliation and as an attempt to circumvent the Loft Board. Defendants state that plaintiff's retaliatory actions continue and that, among other things, plaintiff has "purposefully deprive[] the Loft of air conditioning or heat since mid-2017, call[ed] off repairmen summoned to rectify these issues; and [paid] cash to a subpoenaed witness to the OATH trial who could testify damagingly against his interest" (NYSCEF Doc. No. 101, ¶ 22). Defendants argue that this matter should be resolved in the preexisting Loft Board case, where arguments already have occurred. Finally, they argue that their amendments are not

[3] Defendants also allege that plaintiff harassed them and denied them critical services (NYSCEF Doc. No. 101, ¶ 18).

prejudicial, because their complaints of retaliation, unjust enrichment, rescission, and fraudulent inducement arise from the same facts that they assert in their original pleading and because there has been no discovery. Defendants have filed the proposed amended answer, redlined to show the proposed changes, as NYSCEF Doc. No. 106. The amended answer, the filing indicates, will be verified by co-defendant Walter Kim.

In opposition, plaintiff submits the affidavit of its member and agent, Albert Laboz. Laboz states that defendants violated the lease agreement and the certificate of occupancy, and that plaintiff did not consent to these violations. He submits a copy of the original lease, which is not signed by a representative of plaintiff. Laboz also states that only 16 units in the building are covered units under the Loft Law, and defendants' apartment is not on this list.

Plaintiff's counsel's affirmation and the supporting legal brief assert that plaintiff initiated this lawsuit 18 months before defendants file this motion.[4] Plaintiff also challenges the legal and factual bases for the amended answer's assertions. Plaintiff contends that an affidavit by a party with knowledge is necessary to support all changes, including the new defenses and counterclaims (citing *Romel v Reale*, 155 AD2d 747 [3rd Dept 1989]).[5] Further, plaintiff alleges, plaintiff did not consent to any short-term rentals and he could not have done so because the rentals were illegal. It argues that because the short-term rentals were illegal, they cannot be cured, and therefore the amendment lacks merit (relying on *East Midtown Plaza Hous. Co. v. Gamble*, 60 Misc 3d 9, 11 [App Term, 1st Dept 2018] [*East Midtown Plaza*] [defendant denied leave to amend to add limitations-related defenses that were inapplicable]). Plaintiff also states

[4] The complaint was served on April 24, 2018, and this motion was filed 17 months later.
[5] According to plaintiff, defendants' reply papers cannot remedy these purported fundamental defects (citing, inter alia, *Migdol v City of New York*, 291 AD2d 201, 202 [1st Dept 2002] [ruling that summary judgment motion without supporting evidence cannot be remedied with an affidavit in the reply papers]). However, as discussed below, defendants' motion papers are not defective.

that defendants have not set forth sufficient evidence that any purported waiver was intentional. It asserts that defendants' argument that the notice of termination was vague lacks specificity. Plaintiff contends that defendants' retaliation claim lacks merit because plaintiff had a valid and nonretaliatory reason for its actions, and that defendants have no evidence supporting their claim that the apartment is a protected unit. Further, because the Loft Board has not ruled that the apartment is a protected unit, plaintiff states that defendants cannot argue unjust enrichment, and rescission is not available because plaintiff delivered possession of the apartment to defendants. They argue that the fraudulent inducement claim also lacks validity.

Defendants reply to plaintiff's opposition. According to defendants, by insisting on evidentiary support, plaintiff improperly applies the standard for summary judgment. When a party moves for leave to amend a pleading, on the other hand, courts freely grant such leave. Courts do not "examine the merits or legal sufficiency of the proposed amendment unless it is palpably insufficient or patently devoid of merit on its face" (NYSCEF Doc. No. 138, ¶ 29 [quoting *Giunta's Meat Farms, Inc. v Pina Constr. Corp.*, 80 AD3d 558, 559 (2d Dept 2011)]). According to defendants, plaintiff has not shown that their claims, if true, are devoid of merit or palpably insufficient. Here, too, where discovery has not commenced, no higher standard is triggered. Defendants argue that plaintiff's principal point, that it cannot consent to the illegal use of the premises, does not apply if, as plaintiff contends, the apartment is not rent stabilized. Moreover, defendants stress that plaintiff has not shown profiteering, which requires subletting of a rent-regulated apartment for a substantial period and at high profits. Even if the apartment is rent stabilized, they argue, plaintiff cannot rely on their past apartment rentals years after defendants moved into the unit as their primary residence.

Further, defendants state that plaintiff improperly relies on the argument of illegality, which applies to crimes like drug trafficking, based on actual convictions, rather than the type of alleged wrongdoing at hand. They state that their claims of retaliation pass legal muster because plaintiff did not commence this action or seriously attempt to evict defendants until after they filed their Loft Board challenges. Defendants note that they have claimed overcharge before the Loft Board, which is sufficient to support unjust enrichment, that they have adequately stated that, if the lease is deemed to be valid, rescission is proper, and that their fraudulent inducement counterclaim – that plaintiff induced them to rent the unit by representing that it was not rent regulated, and that they could sublet the apartment on a short-term basis – is also valid.

Analysis

Courts freely grant leave to amend "upon such terms as may be just" (*Rivera v State of New York*, 34 NY3d 383, 400 [2019], quoting CPLR 3025 [b]). Amendment is allowable if the movants support their motion with "sufficient factual pleadings" (*Kaiafas v Ammos NYC LLC*, 179 AD3d 416, 417 [1st Dept 2020]), so long as there is no prejudice and the amendment is not palpably bereft of merit (*Coleman v Worster*, 140 AD3d 1002, 1003 [2d Dept 2016]). If a plaintiff opposes a motion to amend the answer, it bears the burden to establish prejudice, surprise, or the complete lack of merit (*id.*). If there is no prejudice, courts may allow the amendment even after a trial has started (*Rivera*, 34 NY3d at 400; *see Ayers v Dormitory Auth. of the State of N.Y.*, 165 AD3d 441, 442-443 [1st Dept 2018]). The matter is left to the trial court's sound discretion (*id.*, citing *Kimso Apts., LLC v Gandhi*, 34 NY3d 383, 411 [2014]).

Plaintiff's first argument, that defendants did not submit an affidavit by a party with knowledge, lacks merit. As defendants argue, plaintiff has not applied the applicable standard of proof in opposition to a motion to amend. "At this stage of the pleadings, plaintiff need only

plead allegations from which damages attributable to defendants' conduct "might be reasonably inferred" (*Risk Control Assoc. Ins. Group v Maloof, Lebowitz, Connahan & Oleske, P.C.*, 127 AD3d 500, 500 [1st Dept 2015] [internal quotation marks and citation omitted]). Therefore, no affidavit of merit is required (*see US Bank N.A. v Murillo*, 171 AD3d 984, 985-986 [2d Dept 2019]). For the contrary position, plaintiff improperly relies on the summary judgment standard the Third Department articulated in its 1989 ruling in *Romel* (155 AD2d at 747).[6] Here, factual issues abound, including whether the unit should be rent regulated, whether the short-term rentals constitute impermissible profiteering, and whether plaintiff had the ability to consent to the short-term rentals. This alone is sufficient to refute most of the challenges to defendants' motion.

The court also rejects plaintiff's position that the defenses and counterclaims related to its purported consent and laches must fail because the claims lack merit. Plaintiff bases this argument on its contentions that: 1) it did not consent to the short-term rentals; 2) it cannot have consented to defendants' short-term rentals because they constituted illegal activity; and 3) defendants cannot cure their profiteering. The first of plaintiff's contentions, relating to consent, fails because this raises an issue of fact. Plaintiff has not satisfied its burden of proof as to the second issue, that defendants engaged in illegal activity. The cases to which plaintiff points in support relate to criminal activity, such as prostitution (*Murphy v Relaxation Plus Commodore, Ltd.*, 83 Misc 2d 838 [App T, 1st Dept 1975]) or running an illegal rooming house (*47 East 74th St. Corp. v Simon*, 188 Misc 885 [App T, 1st Dept 1947]). Moreover, these decisions were rendered after trials had been held which determined whether there had been an illegal use. Here,

[6] Though defendants do not raise this issue, the court notes as dicta that the original answer is verified by defendant Walter Kim (NYSCEF Doc. No. 103), and the proposed amended answer is to be verified by Mr. Kim in its final form (NYSCEF Doc. No. 106).

on the other hand, there have been no such factual determinations. Instead, the liberal standard for granting leave to amend applies.

Plaintiff's third contention on this issue also fails. Plaintiff is correct that "a rent-stabilized tenant who sublets her apartment at market rates to realize substantial profits not lawfully available to the landlord, and does so systematically, for a substantial length of time, places herself in jeopardy of having her lease terminated on that ground, with no right to cure" (*Goldstein v Lipetz*, 150 AD3d 562, 563 [1st Dept 2017]; *see Aurora Assoc. LLC v Hennen*, 157 AD3d 608, 608 [1st Dept 2018] [*Aurora*]). However, even though defendants' amended answer concedes that defendants rented their unit on a short-term basis until two years before plaintiff initiated this action, issues remain as to the nature and frequency of the rentals, and the amount of profit defendants received (*see 54 Greene St. Realty Corp. v Shoo*, 8 AD3d 168, 168 [1st Dept 2004]; *261/271 Seaman Ave. LLC v Jordaan*, 65 Misc.3d 141[A], 2019 NY Slip Op 51714 [U] [App Term, 1st Dept, 2019]). Moreover, as *Goldstein* and *Aurora* make clear, this principle applies to rent-regulated apartments, and plaintiff has based its arguments here and before the Loft Board on its position that the unit in question is not rent-regulated. Defendants contest plaintiff's position and state that, in fact, the apartment is a rent-regulated one. This remains a disputed issue of fact, and therefore it is unclear whether the principles upon which plaintiff relies are even applicable.[7]

Additionally, plaintiff has not alleged any prejudice (*see Risk Control Assoc. Ins. Group*, 127 AD3d at 501). Instead, as defendants note, the amendments merely raise issues already being litigated here and before the Loft Board, and there has been no discovery in this lawsuit.

[7] Plaintiff also has not satisfied its burden of showing that, if there is a finding of illegality, then defendants must be evicted. Specifically, plaintiff relies on cases in which a tenant is guilty of ongoing illegal conduct cannot cure the breach. However, it has not shown that this principle applies with equal force when the alleged illegal conduct ended nearly two years earlier.

For the same reason, the lack of a showing of "significant prejudice" also mandates rejection of plaintiff's argument that this court should deny the motion because nearly a year-and-a-half has passed since the filing of the complaint (*Park v Home Depot U.S.A., Inc.*, 183 AD3d 645, 646 [2d Dept 2020] [internal quotation marks and citation omitted]).

As stated, "[i]n determining a motion for leave to amend a pleading, a court shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt" (*Great Homes Group, LLC v GMAC Mtge., LLC*, 180 AD3d 1013, 1015 [2d Dept 2020] [internal quotation marks and citation omitted]). Plaintiff's legal challenges to the new defenses and counterclaims therefore also are misplaced. Plaintiff relies on *East Midtown Plaza*, in which the Appellate Term, First Department affirmed the denial of leave to amend because the respondent-undertenant had no standing to assert a challenge and the claimant also relied on the incorrect statute of limitations (60 Misc 3d at 11-12). These are legal rather than factual reasons. On the other hand, defendants here prematurely raise factual disputes. For example, plaintiff argues that defendants' retaliation claim has no merit because there is no rebuttable presumption where, as here, defendants have violated the lease. Here, however, as defendants point out, it is unclear whether a viable lease ever existed. Plaintiff has not produced a duly signed copy of the lease or other incontrovertible documentary evidence. At best, plaintiff has shown that an issue of fact exists – which, in turn, shows that the amendment is not palpably improper.

However, plaintiff is correct in its position that the fraudulent inducement claim has no legal or factual basis. Defendants assert that plaintiff induced them to sign the lease by assuring them that short-term sublets were permissible and that the rent listed was the legal rent for the unit. There are two possible scenarios, both of which preclude this claim. If, as defendants assert,

the lease is unenforceable because plaintiff neither signed nor delivered it, the cause of action is a nullity. On the other hand, if the lease is enforceable, the parties are governed by the clauses that explicitly require written consent for any sublet and state the purported legal rent for the apartment. Thus, any argument would be for breach of the contract rather than fraudulent inducement. Accordingly, the court denies the prong of the motion that seeks to add the fifth counterclaim.

The court finally notes that all these issues are currently pending before the Loft Board. Indeed, both parties have pointed out this fact when it benefits a particular argument of theirs. Further, not only do defendants' Loft Board applications predate the current lawsuit, but at least some of the issues in dispute here have been considered by an OATH hearing officer. Since the submission of their motion papers, the parties have not updated the court as to the status of the Loft Board applications. Therefore, it is not clear whether any of the issues here have been resolved. In this circumstance, the court does not consider it appropriate to rule on the underlying case (*see Wong v Gouverneur Gardens Hous. Corp.* (308 AD2d 301, 303 [1st Dept 2003]).

Accordingly, it is

ORDERED that the motion by defendants Walter Kim and Leslie Ann Feldman-Kim is granted except to the extent that it seeks to add the fifth counterclaim, for fraudulent inducement, and it is further

ORDERED that the cross-motion by plaintiff Decker Associates LLC is denied in its entirety; and it is further

ORDERED that defendants shall serve the amended answer with counterclaims on plaintiff as proposed, with the omission of the fifth counterclaim; and it is further

ORDERED that plaintiff shall have 20 days from the date of service to file an amended reply.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

12/24/2020
DATE

W. FRANC PERRY, J.S.C.

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