CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK, HOUSING PART B

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MICHELE TURCO, ELENA NUNEZ,
PHYLIS HILLIARD, and SALEH HEGAZY

Petitioner, Tenant,

-against-

Index No. L&T 962/20

AMENDED
DECISION AND ORDER

NOVITA LLC, TEAMS MANAGEMENT LLC,
and FRANK PECORA

Respondent(s)-Owner(s)

DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT,

Co-Respondent, and

NEW YORK CITY DEPARTMENT OF BUILDINGS,

Co-Respondent.

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FRANCES A. ORTIZ, JUDGE

Recitation as required by CPLR 2219(a), of the papers considered in the review of the petitioner's motion to dismiss affirmative defenses and/or discovery.

Papers	**Numbered**
Notice of Motion, Affirmation & Exhibits	1/NYSCEF 29-41
Affirmation in Opposition & Exhibit	2/NYSCEF 42-43

Upon the foregoing cited papers, the Decision/Order of this Court on petitioner's motion to dismiss affirmative defenses and/or discovery is as follows:

This is an HP Action brought by petitioners/tenants seeking correction of conditions at the subject premises, 307 West 39th Street, apts. 1, 5, 10, 14 New York, NY 10018. According to paragraph five (5) of the petition, petitioners have been displaced from the subject apartments

since November 3, 2020 because of a fire at the subject building. The Department of Buildings ("DOB") issued a vacate order for every apartment in the entire building. There are sixty-two (62) outstanding Department of Housing Preservation and Development ("HPD") violations for the subject premises.

Respondent/owner moved to dismiss the petition on February 3, 2021, upon grounds of impossibility and/or infeasibility or leave to interpose an answer. This Court on February 3, 2021 denied the motion to dismiss and ordered respondent/owner to file and serve an answer within ten (10) days. Respondent/owner filed the written answer raising twenty-seven affirmative defenses.

Now, petitioners move to dismiss those defenses. In a motion to dismiss an affirmative defense pursuant to *CPLR 3211(b),* a plaintiff or petitioner bears the heavy burden of showing that the defense is without merit as a matter of law. *Granite State Ins. Co. v. Transatlantic Reinsurance Co., 132 A.D.3d 479, 481, (1st Dep't 2015); 534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick, 90 A.D.3d 541 (1st Dep't 2011).* The allegations set forth in the answer must be viewed in the light most favorable to the defendant or respondent. *182 Fifth Ave. v. Design Dev. Concepts, 300 A.D.2d 198, 199 (1st Dep't 2002).* "[T]he defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed." *534 E. 11th St v. Hendrick, 90 A.D.3d at 542.* Further, the court should not dismiss a defense where there remain questions of fact requiring a trial. *Id.*

Petitioners move to strike the first affirmative defense for failure to state a cause of action. Here, petitioners have facially stated a cause of action for an HP Action, since there are at least sixty-two (62) outstanding HPD violations for the subject premises. The purpose of an

HP Action is to address and enforce "housing standards" under either the building code, the Housing Maintenance Code or health code. As such, the first affirmative defense is stricken.

Petitioners move to dismiss the second and third affirmative defenses for lack of improper service, lack of personal and subject matter jurisdiction. According to *CPLR §3211 (e),* an objection based upon a ground specified in *CPLR §3211 (a) (8)* for lack of personal jurisdiction is waived, if a party moves on any other grounds set forth in *CPLR §3211* (a) without raising such a lack of personal jurisdiction objection. Here, respondent/owner moved pursuant to *CPLR §3211* to dismiss the petition, upon the grounds of impossibility and/or infeasibility. However, the owner in that motion did not move to dismiss the petition for lack of personal jurisdiction. Now, petitioners assert in their third affirmative defense lack of subject matter jurisdiction defense. The purpose of *New York City Civil Court Act §110* explicitly provides subject matter jurisdiction to the Housing Part of the Civil Court to grant injunctive relief to enforce "state and local laws for the establishment and maintenance of housing standards, including, but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code…" *(CCA 110 [a]).* This language makes it clear that the housing court has subject matter jurisdiction to enforce "housing standards" under either the building code, the Housing Maintenance Code or health code. As such, the first and second affirmatives are stricken.

Petitioners move to strike the twenty-fifth (25th) affirmative defense claiming that the conditions alleged do not constitute violations of the Housing Maintenance Code or other laws relating to the housing standards. This is simply inaccurate. Currently, there are seventy-eight (78) HPD violations for the subject building which constitute violations of the Housing Maintenance Code. Accordingly, the twenty-fifth (25th) affirmative defense is stricken.

Petitioners ask that twenty-sixth (26th) affirmative defense of economic infeasibility be stricken. According to the defense, the cost of the building and/or to correct the housing code violations will likely exceed the building's value after the repairs. An owner should not be compelled to expend large amounts of money in a property where the cost of removing the violations and restoring the premises is prohibitive and will not warrant the same results. Further, an owner should not be compelled to expend such large amounts, under those circumstances. *Hous. & Dev. Admin. of City of New York v. Johan Realty Co., 93 Misc. 2d 698 (AT 1st Dep't 1978)*. Here, respondent has facially articulated a defense for economic infeasibility which can not be stricken at this time and warrants a trial on the issue. As such, the motion to strike the twenty-sixth (26th) affirmative defense of economic infeasibility can not be stricken.

Lastly, petitioners move to strike the remaining defenses. Specifically, petitioners move to strike the seventh (7th) defense of waiver and estoppel and thirteenth (13th) affirmative defense of laches. Private parties may not waive a right that affects the public interest or contravenes statutory policy. The doctrines of estoppel or laches overcome public policy. Nor can an individual acquiesce in or ratify a public wrong. Therefore, as a matter of law, defenses of laches, estoppel, and waiver do not apply to an order to correct in an HP proceeding. As such, the seventh (7th) and thirteenth (13th) affirmative defenses are stricken. *Allen v. 219 24th St. LLC, 67 Misc. 3d 1212(A) (NY Cty Civ Ct 2020).*

Petitioners move to strike affirmative defenses regarding the fourth (4th) doctrine of unclean hands, fifth (5th) failure to mitigate damages, eleventh (11th) breach of contract, fourteenth (14th) acts and/or omission, fifteenth (15th) bad faith, willful misconduct, negligence, and/or abuse, sixteenth (16th) respondents owed no duty to the petitioners, seventh (17th) no

privity of contract between petitioners and respondent, twenty-second (22nd) no contract because it has been terminated and petitioners can not sue the owner, eighth (8th) no actual injury or damages suffered, ninth (9th) statute of limitation, tenth (10th) doctrines of payment, accord and satisfaction and set off, twelfth (12th) unjust enrichment, eighteenth (18th) failure to comply with conditions necessary to recover under the contract, nineteenth (19th) breach contract with damages not contemplated by the parties, twentieth (20th) failure to comply with a material condition of the contract, twenty-third (23rd) no claim of fraud against the owner has been made with specific particulars, and twenty-fourth (24th) frustration of purpose of the contract. affirmative defenses for failure to plead with specificity.

None of these affirmative defenses assert a legally cognizable defense as a matter of law to an Order to Correct nor are they sufficiently pled to articulate a defense. *Granite State Ins. Co. v. Transatlantic Reinsurance Co., supra.* Most of these defenses sound in principles of contract law and are inapplicable to an Order to Correct. Accordingly, the fourth (4th), fifth (5th), eleventh (11th) and fourteenth (14th), fifteenth (15th), sixteenth (16th), seventeenth (17th), twenty-second (22nd), eighth (8th), ninth (9th), tenth (10th), twelfth (12th), eighteenth (18th), nineteenth (19th), twentieth (20th), twenty-third (23rd), and twenty-fourth (24th) affirmative defenses are stricken.

Lastly, petitioners seek to strike the twenty-seventh (27th) affirmative defense that seeks to reserve the right to assert additional affirmative defenses pending outcome of discovery or otherwise. This is not a valid affirmative defense. A party cannot raise a catch-all provision in an attempt to preserve any and all potential defenses for future use without affording notice to the opposing party. *Kowalczyk v. Vill. of Monticello, 107 A.D.3d 1365, 1366 (3rd Dep't 2013).* As such, the twenty-seventh (27th) affirmative defense is stricken.

Alternatively, petitioners seek leave to conduct discovery regarding respondent/owner's defense of economic infeasibility. In summary proceedings leave to conduct discovery may be granted where the movant demonstrates a meritorious claim, ample need, that the discovery sought is tailored to the facts of the case, and no prejudice to the opposing party. *New York University v. Farkas, 121 Misc.2d 643 (Civ. Ct. NY Cty 1983).*

Here, petitioners have shown a meritorious claim, ample need, that the discovery sought is tailored to the facts of the case, and no prejudice to the opposing party. *New York University v. Farkas, supra.* Petitioners have merit to their claim for discovery in order to rebut the owner's defense of economic infeasibility. Ample need is shown in these documents sought because they are narrowly tailored to the owner's claim for economic infeasibility such has the requested insurance policy carrier and coverage, construction contracts, subject building appraisals, architectural and engineering reports for the subject building, and cost of completing repairs to the subject building. Respondent/owner is not prejudiced by obtaining these documents, and these documents should be readily available and in the owner's control.

Accordingly, petitioners' cross motion for discovery is granted to the extent that respondent/owner is to reply to items 1 **through** 15 in the "Notice of Discovery and Inspection" in *Exhibit J* to the motion within 45 days of the date of this decision. However, the documents sought in item 16 are stricken as too broad in scope.

Lastly, this Court declines to sign the petitioners' proposed *Subpoena Duces Tecum* for Division of Housing and Community Renewal ("DHCR")/FOIL request because the reason for disclosure is improperly described as related to defenses against a judgment of possession, regulatory status and amount of legal rent. These are not defenses to an HP Action. The denial

is without prejudice to petitioner resubmitting the *Subpoena Duces Tecum* for Division of Housing and Community Renewal ("DHCR")/FOIL request with the appropriate reasoning for disclosure.

The matter is marked off calendar pending completion of discovery.

ORDERED: Petitioners' motion to strike affirmative defenses is granted in part and denied in part.

ORDERED: Petitioner's motion for discovery is granted.

This is the decision and order of the Court, copies of which are being emailed to those indicated below.

Date: April 6, 2021

Frances A. Ortiz
Judge, Housing Court

Judge, Frances A. Ortiz

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