

**East 163 St. LLC v Hill**

2023 NY Slip Op 33567(U)

September 20, 2023

Civil Court of the City of New York, Bronx County

Docket Number: L&T Index No. 305427-23/BX

Judge: Diane E. Lutwak

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CIVIL COURT OF THE CITY OF NEW YORK  
BRONX COUNTY: HOUSING PART K

-----X L&T Index # 305427-23/BX

EAST 163 STREET LLC

Petitioner,

-against-

**DECISION & ORDER**

KEVIN HILL

TOSHIMA GARNER

Respondents.

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Hon. Diane E. Lutwak:

Recitation, as required by CPLR Rule 2219(A), of the papers considered in the review of Respondent Garner’s Motion to Amend Answer, Dismiss Petition and Other Relief:

<u>Papers</u>	<u>NYSCEF Doc #</u>
Notice of Motion	7
Attorney’s Affirmation in Support	8
Respondent’s Affidavit in Support	9
Memorandum of Law in Support	10
Exhibits A-J in Support	11-19

After argument, upon the foregoing papers and for the reasons stated below, respondent Garner’s motion is granted, the proposed Amended Answer is deemed duly served and filed, the Petition is dismissed and this proceeding is transferred to Part X to await assignment to a Trial Part for trial on respondent’s counterclaims.

**PROCEDURAL HISTORY & FACTUAL BACKGROUND**

This is a nonpayment eviction proceeding brought in the name of “East 163 Street LLC” as petitioner against respondent-tenants Kevin Hill and Toshima Garner. The Petition seeks rent arrears of \$5359.80, comprised of \$1066.32 for September 2022 and \$1073.37/month for October 2022 through January 2023, and alleges that the premises are subject to Rent Stabilization, have been duly registered with the New York State Division of Housing and Community Renewal (DHCR) and the rent charged does not exceed the registered, lawful rent. A 14-day predicate rent demand is mentioned in the Petition at ¶ 5; the attached copy of that demand is dated November 29, 2022, seeks unpaid rent for the months of September through November 2022 and is signed by a representative of petitioner “East 163 Street LLC”.

Respondent Toshima Garner<sup>1</sup> *pro se* filed an Answer to the Petition on February 8, 2023 using the court's standard "Answer in Person" form and raising a "general denial"; defenses of payment/partial payment and conditions requiring repair; and a counterclaim seeking "a judgment and/or order based upon the above defense(s)."

After an initial appearance in the court's Intake Part 1 on April 4, 2023 respondent retained counsel who, on June 8, 2023, filed the motion which is now before the court seeking an order granting respondent leave to file an Amended Answer pursuant to CPLR § 3025(b); dismissal pursuant to CPLR R 3211(a)(3) for petitioner's lack of legal capacity to sue and/or CPLR R 3211(a)(7) for failure to state a cause of action; and a hearing on her counterclaims.

Respondent's proposed Amended Answer includes admissions/denials of the statements in the Petition, four objections in point of law and five affirmative defenses based on a challenge to Petitioner's right to bring this proceeding; various deficiencies in the Petition and predicate rent demand; payment; rent overcharge; and breach of the warranty of habitability. The proposed Amended Answer also includes two counterclaims: rent overcharge and breach of the warranty of habitability.

Respondent seeks dismissal based on the alleged deficiencies in the Petition and rent demand: (1) whereas the rent demand and Petition assert that "East 163 Street LLC" is the landlord, the current deed, multiple dwelling registration statement and lease between the parties reflect the landlord and owner of the premises to be "East 163 LLC"; (2) whereas the Petition states that the apartment is duly registered with the DHCR and the rent charged does not exceed the legal registered rent, in fact the apartment is not currently registered with the DHCR, has not been registered since 2019, and the amount sought in the Petition fails to reflect the existence of a DHCR Rent Reduction Order; (3) the rent demand and Petition seek rent arrears without crediting certain payments made by the City's Human Resources Administration; and (4) the rent demand is defective as it fails to reflect the DHCR Rent Reduction Order and to credit certain payments made by HRA. Copies of the current deed to the premises, multiple dwelling registration statement, DHCR rent registration statement, DHCR Rent Reduction Order and a lease between the parties accompany the motion as exhibits.

In her supporting affidavit, Respondent states she has lived in her apartment since 2007 and it was not until she retained an attorney that she learned about the defenses and counterclaims she has to the Petition which she now seeks to raise in an Amended Answer. Respondent also lists and provides details about 49 conditions in her apartment needing repair.

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<sup>1</sup> As Toshima Garner is the only respondent to appear, references hereinafter to "respondent" refer solely to her unless otherwise stated.

Respondent's motion was made returnable June 20, 2023 and then adjourned with a briefing schedule first to August 1, 2023 and then to September 18, 2023. Petitioner failed to file any opposition to the motion. At oral argument, petitioner's counsel asserted that while there was no objection to dismissal of the proceeding, without prejudice, amendment of the Answer and a trial on the counterclaims should not be permitted as respondent can pursue them elsewhere, by filing an "HP Action" to address the conditions in her apartment and a rent overcharge complaint at the DHCR.

## DISCUSSION

It is well-settled that leave to amend a pleading is freely granted under CPLR R 3025 absent a showing of prejudice or surprise. *O'Halloran v Metro Transp Auth* (154 AD3d 83, 88, 60 NYS3d 128, 133 [1<sup>st</sup> Dep't 2017]); *Mezzacappa Bros, Inc v City of New York* (29 AD3d 494, 815 NYY2d 549 [1<sup>st</sup> Dep't 2006]); *Valdes v Marbrose Realty, Inc* (289 AD2d 28, 29, 734 NYS2d 24 [1<sup>st</sup> Dep't 2001]). As explained by the Court of Appeals, "The decision to allow or disallow the amendment is committed to the court's discretion. 'Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine.'" *Edenwald Contracting Co v New York* (60 NY2d 957, 959, 471 NYS2d 55, 56, 459 NE2d 164, 165 [1983])(quoting *Siegel, New York Practice*). The kind of prejudice that must be shown is described as, "some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add." *A J Pegno Constr Corp v New York* (95 AD2d 655, 656, 463 NYS2d 214, 215 [1<sup>st</sup> Dep't 1983]).

The proposed amended pleading should be permitted unless it is "patently insufficient on its face." *Hospital for Joint Diseases Orthopaedic Institute v James Katsikis Environmental Contractors, Inc et al* (173 AD2d 210, 569 NYS2d 91 [1<sup>st</sup> Dep't 1991]). On a motion for leave to amend a pleading the movant "need not establish the merit of its proposed new allegations, but [must] simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins Corp v Greystone & Co, Inc* (74 AD3d 499, 500, 901 NYS2d 522 [1<sup>st</sup> Dep't 2010])(internal citation omitted); *accord, e.g., Miller v Cohen* (93 AD3d 424, 425, 939 NYS2d 424 [1<sup>st</sup> Dep't 2012]).

Courts have held that to permit the full benefit of legal representation, once counsel has been retained a respondent should be permitted to file an amended answer. *See, e.g., 3225 Holdings LLC v Imeraj* (65 Misc3d 1219[A] at fn 5, 119 NYS3d 392 [Civ Ct Bx Co 2019]); *W 152 Assocs LP v Gassama* (65 Misc3d 1218[A], 119 NYS3d 392 [Civ Ct NY Co 2019]); *699 Venture Corp v Zuniga* (64 Misc3d 847, 851, 105 NYS3d 806, 809 [Civ Ct Bx Co 2019]); *Morris I LLC v Baez* (62 Misc3d 1227[A], 113 NYS3d 833 [Civ Ct Bx Co 2019]); *La Casa Nuestra HDFC v Harris* (2018 NYLJ LEXIS 2442 [Civ Ct NY Co 2018]); *Harlem Restoration Project v Alexander* (NYLJ, July 5, 1995, at 30, col 5, 1995 NY Misc LEXIS 783 [Civ Ct NY Co 1995]).

Here, the motion to amend was made promptly after counsel was retained by respondent, who asserts that when she filed her original Answer without counsel she was not aware of all of the claims she could raise. The proposed Amended Answer includes an elaboration of claims respondent asserted in her original Answer, additional standard defenses; and counterclaims for breach of the warranty of habitability and rent overcharge which are inextricably intertwined with petitioner's claim for rent arrears. There is evident no unfair prejudice or surprise to petitioner, who filed no opposition to the motion and merely argued that upon dismissal of this proceeding respondent can pursue her claims elsewhere. Based on these facts, the proposed Amended Answer will be permitted.

To state and maintain a cause of action for nonpayment of rent, the petition must state the facts upon which the proceeding is based. RPAPL § 741(4). One of those facts is that a proper demand for the rent was made as required by RPAPL § 711(2). *Schwartz v Weiss-Newell* (87 Misc2d 558, 561, 386 NYS2d 191 [Civ Ct NY Co 1976]), *quoted in 542 Holding Corp v Prince Fashions, Inc* (46 AD3d 309, 848 NYS2d 37 [1st Dep't 2007]). A proper predicate rent demand is a "long-established prerequisite to the maintenance of a summary proceeding" for nonpayment of rent, *Zenila Realty Corp v Masterandrea* (123 Misc2d 1, 22, 472 NYS2d 980, 987 [Civ Ct NY Co 1984]), which cannot be amended *nunc pro tunc*, *Chinatown Apts v Chu Cho Lam* (51 NY2d 786, 787, 412 NE2d 1312, 433 NYS2d 86 [1980]).

On a motion to dismiss under CPLR R 3211(a)(7) for failure to state a cause of action, the court is required to afford a liberal construction to the pleading, accept the facts alleged as true and ascertain whether the petition alleges facts which fit within any "cognizable legal theory." *Leon v Martinez* (84 NY2d 83, 638 NE2d 511, 614 NYS2d 972 [1984]). Here, respondent's unopposed motion to dismiss for failure to state a cause of action must be granted both because it is based on a defective, unamendable rent demand and because the Petition fails to assert facts which fit within any "cognizable legal theory" under which petitioner is entitled to seek rent arrears from respondent in this nonpayment proceeding.

As is evident from the deed, multiple dwelling registration statement and lease, unrefuted by petitioner, the owner and landlord of the premises is "East 163 LLC", not "East 163 Street LLC". Accordingly, the rent demand from "East 163 Street LLC" is an improper basis for this proceeding. In addition, a proceeding is a nullity if brought by an improper party. *SBH Realty Inc v Santana* (55 Misc3d 1211[A], 57 NYS3d 677 [Civ Ct Bx Co 2017]) citing *Oppenheim v Spike* (107 Misc2d 55, 437 NYS2d 827 [App Term 1<sup>st</sup> Dep't 1980]). Further, as is evident from the DHCR rent registration statement, respondent's apartment is not currently registered, contrary to what is stated in the Petition, and the amount demanded in the predicate rent demand and Petition is higher than the last registered rent. To obtain a judgment against a rent-stabilized tenant in a nonpayment proceeding, a landlord must not only plead compliance with the Rent Stabilization Code, but actually comply therewith. *MSG Pomp Corp v Jane Doe* (185 AD2d 798, 586 NYS2d 965 [1<sup>st</sup> Dep't 1992]); *2515 LLC v Bencosme* (77 Misc3d 1229[A], 181 NYS3d 876 [Civ Ct NY Co 2023]).

CONCLUSION

Based on the foregoing, respondent's motion is granted and it is hereby ORDERED that the proposed Amended Answer is deemed duly served and filed; the Petition is dismissed without prejudice; and this proceeding shall be transferred to Part X to await assignment to a Trial Part for a hearing on respondent's counterclaims based on allegations of rent overcharge and breach of the warranty of habitability. This constitutes the Decision and Order of the Court, which is being uploaded on NYSCEF.



Diane E. Lutwak, HCJ

Dated: Bronx, New York  
September 20, 2023

APPROVED  
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