

Strout v CF 88 LLC

2023 NY Slip Op 33890(U)

October 26, 2023

Supreme Court, New York County

Docket Number: Index No. 161439/2019

Judge: Sabrina Kraus

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**SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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BRIAN STROUT,

Plaintiff,

- v -

CF 88 LLC, SM E 88 LLC, THE CHETRIT GROUP LLC,
 STELLAR MANAGEMENT LLC, JUMEAUX MANAGEMENT
 LLC,

Defendants.

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INDEX NO. 161439/2019
 MOTION DATE 08/21/2023
 MOTION SEQ. NO. 022

**DECISION + ORDER ON
 MOTION**

Plaintiff moves: (1) to dismiss all of defendants’ affirmative defenses, pursuant to CPLR 3211(b); (2) for partial summary judgment seeking, *inter alia*, a finding of willful overcharge for treble damages, a declaratory judgment for a fraudulent scheme by defendants to set the base date rent, and a monetary judgment for damages and reasonable attorneys’ fees and costs, pursuant to CPLR 3212(a) and (e); and (3) to sever any awarded claims from the remaining claims, pursuant to CPLR 3212(e)(1). Defendants oppose and plaintiff replies.

BACKGROUND

Plaintiff, currently self-represented, is a tenant of apartment 12C at 160 East 88th Street, New York, NY 10128 (subject premises). Plaintiff filed a summons and complaint on November 22, 2019 (NYSCEF Doc. No. (Doc.) 1) and an amended complaint on January 8, 2021 (Doc. 30). The amended complaint asserts nine causes of action. Plaintiff seeks, *inter alia*: a declaratory judgment that the subject premises is rent stabilized; a permanent injunction preventing defendants from commencing eviction actions against him except in accordance with the Rent Stabilization Law (RSL) and the Rent Stabilization Code (RSC); a declaratory judgment that the base date is June 20, 2014, for determining the legal rent under the default formula by the New

York State Division of Housing and Community Renewal (DHCR); a declaratory judgment that defendants' engaged in a fraudulent scheme to deregulate the subject premises; and a monetary judgment seeking treble damages and reasonable attorneys' fees and costs. (Doc. 30). On July 9, 2021, defendants filed their answer to the amended complaint (Doc. 38).

Plaintiff has filed several motions, including the following. On September 15, 2022, he moved for partial summary judgment on seven causes of action (Mot. Seq. 015, Doc. 283). On December 21, 2022, defendants filed their opposition (Doc. 322; Doc. 323). By decision and order dated November 22, 2022, this court denied that motion, as it failed to contain an affidavit in support and failed to make a *prima facie* showing of entitlement to judgement as a matter of law (Doc. 336).

On December 1, 2022, plaintiff moved again for partial summary judgment on seven causes of action (Mot. Seq. 017; Doc. 337). On December 12, 2022, defendants filed their opposition (Doc. 371). By decision and order dated February 3, 2023, the court denied that motion (Doc. 384). Although the court noted that plaintiff's motion included an affidavit, the motion was not supported by any documentation that differed from that which accompanied the earlier motion for partial summary judgment. The court found that the papers failed to establish a *prima facie* entitlement to judgment as a matter of law.

On June 15, 2023, plaintiff moved again for partial summary judgment and to dismiss all of defendants' affirmative defenses (Mot. Seq. 020; Doc. 430). On July 24, 2023, defendants filed their opposition. By decision and order dated October 11, 2023, this court denied that motion (Doc. 636). The court found that the plaintiff failed to demonstrate that defendants' affirmative defenses are without merit as a matter of law and failed to provide new facts to override the policy against multiple summary motions. Additionally, the court denied the

remaining relief to declare the plaintiff's apartment subject to the RSL and RSC and declare the base date for rent overcharge calculation of June 20, 2014, because this court had already denied similar or identical relief sought in plaintiff's previously denied summary judgment motions.

THE INSTANT MOTION

On August 21, 2023, plaintiff moved again for partial summary judgment under CPLR 3212, and moved to dismiss all of defendants' affirmative defenses pursuant to CPLR 3211(b) (Mot. Seq. 022; Doc. 536). The partial summary judgment plaintiff seeks, *inter alia*, is to declare willful overcharge by defendants for treble damages, that defendants engaged in a fraudulent scheme to set the base date for rent by the DHCR default formula, and monetary judgments for damages and reasonable attorneys' fees and costs (Doc. 536). Plaintiff also asserts, *inter alia*, that the policy against multiple summary judgment motions is inapplicable since there is a change in law for pleading fraud; that he is *pro se* and should be afforded latitude in his pleadings; and that defendants have successor liability when they acquired the property in question from the previous owner (Doc. 538 at 8-9, 12). Defendants' opposition asserts, *inter alia*, that plaintiff seeks relief which is identical or similar to that requested in his prior partial summary judgment motion that was denied, the evidence plaintiff submits is without proper foundation, plaintiff has not demonstrated that defendants' affirmative defenses are without merit as a matter of law, and that plaintiff being *pro se* does not entitle him to greater rights than any other litigant (Doc. 604).

CPLR 3211(b)

CPLR 3211(b) states that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The plaintiff bears the burden of showing that the affirmative defenses asserted by defendants are without merit as a

matter of law when moving to dismiss them pursuant to CPLR 3211(b) (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1st Dept 2011]). When deciding a motion to dismiss a defense, “the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed” (*id.* at 542, citing *Warwick v Cruz*, 270 AD2d 255, 255 [2d Dept 2000]). Further, “[a] defense should not be stricken where there are questions of fact requiring trial” (*id.* at 542 [citation omitted]).

Plaintiff failed to meet his burden. Plaintiff asserts, *inter alia*, that defendants’ affirmative defenses should be dismissed but does not demonstrate that the defenses are without merit as a matter of law. Plaintiff makes only general statements and assertions. These include that: the defendants’ affirmative defenses are conclusory or consist of boilerplate language, or that the defense of a failure to state a cause of action cannot stand and should be dismissed (Doc. 538).

CPLR 3212

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Without a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Further, multiple motions for summary judgment are generally disfavored unless there is a showing of newly discovered evidence or sufficient cause (*National Enters. Corp. v Dechert Price & Rhoads*, 246 AD2d 481, 482 [1st Dept 1998]). As a practical matter, “the doctrine of law of the case applies only to legal determinations resolved on the merits” (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005] [citations omitted]). This doctrine tries to prevent relitigating issues of law that have

already been addressed at an earlier stage of a proceeding (*Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722 [2d Dept 2006]). “Although not an absolute mandate on the court, the doctrine is one that rests in a sound policy not to be ignored except in extraordinary circumstances (*Politi v Irvmar Realty Corp.*, 13 AD2d 469, 469 [1st Dept 1961]). Extraordinary circumstances may include a change in law or a showing of new evidence (*Brownrigg*, 29 AD3d at 722 [citing *Foley v Roche*, 86 AD2d 887 [2d 1982]).

Plaintiff fails to overcome the policy against multiple summary judgment motions. Plaintiff acknowledges that courts disfavor multiple summary judgment motions but asserts that new law exists to warrant departure from this policy (Doc. 538 at 8; Doc. 539). However, plaintiff relies on legislation that was passed by the New York State Legislature but has not been acted on by the Governor – neither signed into law nor vetoed – when he filed the instant motion (Doc. 538 at 8; Doc. 539; 2023 NY Senate Bill S2980-C).¹ In any event, plaintiff’s reliance is misplaced as he points to text that is already in law (Doc. 539 at 6). Thus, there has been no new change in law that would allow this court to ignore the doctrine of the law of the case. The court has already denied plaintiff’s previous summary judgment motions having already resolved the legal determinations on the merits (Doc. 336; Doc. 384; Doc. 636).

The Court Already Denied The Relief Sought In This Motion

Generally, pleadings by a *pro se* litigant are “to be liberally construed” and, however inartful, must be held to a less stringent standard than formal pleadings drafted by lawyers (*Erickson v Pardus*, 551 US 89, 94 [2007], quoting *Estelle v Gamble*, 429 US 97, 106 [1976]).

¹ Plaintiff explicitly states that the instant motion is based on his second amended complaint (Doc. 538 at 6, 8; Doc. 609 at 1). However, at the time plaintiff filed this motion, the court had not yet ruled on plaintiff’s motion to amend the pleadings for a second amended complaint (Mot. Seq. 021; Doc. 458 *et. seq.*). In any event, this court denied that motion (Doc. 659).

While courts may afford a *pro se* litigant some latitude, a *pro se* litigant does not have a greater right than any other litigant and will be held to the same standards of proof as those who are represented by counsel (*Limani Realty, LLC v Zayfert*, 40 Misc 3d 32, 35 [App Term, 2d Dept 2012] [citations omitted]). A *pro se* litigant's failings at a trial does not mean they will be granted "a second bite at the apple" (*id.* at 36 [internal quotation marks and citation omitted]).

As previously noted, plaintiff made motions in September 2022 and December 2022 seeking similar or identical relief (Doc. 283; Doc. 337). The relief sought included, *inter alia*, a determination that defendants engaged in a fraudulent scheme to deregulate the subject premises, willful overcharge by defendants for treble damages, and monetary judgment for damages and attorneys' fees. In both instances, the court denied the motions finding that the moving papers failed to establish a *prima facie* entitlement to judgment as a matter of law (Doc. 336; Doc. 384).

Here, plaintiff again seeks similar, if not identical, relief to the prior motions (Doc. 536), which were previously denied. Here, as well, the moving papers fail to meet plaintiff's *prima facie* burden on entitlement to judgment as a matter of law. Any relief not expressly addressed has nonetheless been considered and is hereby denied.

Pursuant to status conference orders dated March 31, 2023, June 27, 2023, and September 7, 2023, the parties are reminded pre-motion conferences are *required* before filing motions (Doc. 409; Doc. 464; Doc. 601 [emphasis added]). It does not appear that plaintiff sought leave for this motion.

WHEREFORE, it is hereby:

ORDERED that plaintiff's motion to dismiss defendants' affirmative defenses, pursuant to CPLR 3211(b), and for partial summary judgment pursuant to CPLR3212(a), (e), and (e)(1), is denied; and it is further

ORDERED that, within 20 days from entry of this order, defendants shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the court.

10/26/23

DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE