CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART H

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245 OWNER LLC,

Petitioner/Landlord,

Index No. 87414/2014

- against -

DECISION/ORDER

JOSHUA YAGHOOBIAN,

Respondent/Tenant.

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Present: Hon. Jack Stoller
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion.

Papers	**Numbered**
Notice of Motion and Supplemental Affirmation and Affidavit Annexed.....	1, 2, 3
Notice of Cross Motion and Supplemental Affirmation and Affidavits Annexed	3, 4, 5, 6[1]
Reply Affirmation and Affidavit	7

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

245 Owner LLC, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Joshua Yaghoubian, the respondent in this proceeding ("Respondent"), seeking possession of 245 West 25th Street, Apt. 4B, New York, New York ("the subject premises") on the ground of termination of a month-to-month tenancy pursuant to RPL §232-a, alleging that the subject premises is not subject to rent regulation. Respondent interposed an answer ("the answer") by service on January 26, 2015, raising, *inter alia*, defenses

[1] After the submission of these motions, the parties resolved the affirmative relief Respondent sought in his cross-motion by a stipulation. Accordingly, the Court construes the supporting papers of Respondent's notice of cross-motion to be opposition to Petitioner's motion.

that the subject premises is subject to the Rent Stabilization Law, that the parties have already extended Respondent's tenancy beyond the dates as purported in the termination notice, and that the building in which the subject premises is located ("the Building") does not have the proper certificate of occupancy. Petitioner interposed a reply asserting a defense of, *inter alia*, statute of limitations.[2] Petitioner now moves for summary judgment in its favor.

Attached to Petitioner's motion is proof that Petitioner is the proper party to commence this proceeding pursuant to RPAPL §721; that there were a series of written leases between the parties, the most recent of which expired on February 28, 2014; that subsequent to the expiration of that lease, Respondent paid rent, which Petitioner accepted, thus creating a month-to-month tenancy pursuant to RPL §232-c; and that Petitioner properly served a thirty-day notice of termination pursuant to RPL §232-a. Petitioner attaches to its motion a lease for the subject premises commencing November 1, 2008 between Respondent and Petitioner's predecessor-in-interest for the subject premises with a monthly rent of $2,500.00. The signature on this lease appears to be the same as the signatures on the most recent lease extension, which is notarized and therefore self-authenticating. Petitioner also annexes to its motion a rider to a lease in 2003 indicating that a prior monthly rent was $1,068.23, and that a vacancy increase of $233.64 plus an increase in rent due to individual apartment improvements ("IAI's") pursuant to 9 N.Y.C.R.R. §2522.4(a)(1) in the amount of $756.17, purporting to raise the rent to $2,038.04.

In opposition to Petitioner's motion, Respondent annexes a registration history from the

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[2] A reply to a counterclaim is actually not required in proceedings before the New York City Civil Court, New York City Civil Court Act §907(a), although this of course does not stop Petitioner from interposing a reply as such.

Division of Housing and Community Renewal ("DHCR") that shows that the rent for the subject premises was $1,068.23 for a lease commencing May 1, 2002 and then increased to $2,100.00 for a vacancy lease commencing November 1, 2003. Respondent avers in opposition to Petitioner's motion that he has lived in the subject premises since 2008, and that the subject premises was not renovated at the time that he moved in, particularly in comparison with another unit at the building in which the subject premises is located ("the Building"). Respondent further avers that he has been in thirteen unrenovated apartments in the Building and eleven renovated apartments in the Building and that the appearance of the subject premises is more similar to the unrenovated apartments than the renovated apartments. Respondent engaged an architect who submitted a report in opposition to Petitioner's motion rendering an opinion that whatever work was done in the subject premises would have been $10,400.26, less than required to raise the rent to the extent it was in 2003.

Normally, the increase of the rent above $2,000.00 during a vacancy turnover before June 24, 2011 effectuates a deregulation of the subject premises. N.Y.C. Admin. Code §26-504.3(a)(3). To ascertain if the rent increase as such for the subject premises complied with the law, the Court normally examines the rent history for the subject premises four years prior to the interposition of the cause of action, which in this case would be January 26, 2011. CPLR §213-a, Ridges & Spots Realty Corp. v. Edwards, 4 Misc.3d 130A (App. Term 1st Dept. 2004). As the rent increase for the subject premises that comprises the basis for Respondent's defense occurred in November of 2003, more than seven years before the so-called "look-back" period, the Court may only consider such an increase to be an illegal overcharge upon proof of incidence of fraud.

Matter of Grimm v. State of New York Div. of Hous. & Community Renewal Off. of Rent Admin., 15 N.Y.3d 358, 366 (2010). However, an increase in the rent alone will not be sufficient to establish a "colorable claim of fraud," and a mere allegation of fraud alone, without more, will not be sufficient to require further inquiry. Id. at 367. What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of the Rent Stabilization Law. Id. A challenge to purported IAI's may raise such an issue of fraud when supported by, among other things, an affidavit of a tenant and a contractor's estimate. Bogatin v. Windermere Owners LLC, 98 A.D.3d 896 (1st Dept. 2012).

While Respondent submits an affidavit from an architect, the architect's affidavit does nothing to establish his qualification as an expert aside from stating that he has been an architect since 1986 and noting that he is licensed. An opponent of summary judgment fails to raise an issue of material fact with an affidavit from a purported expert when such an affiant fails to elaborate on his or her experience or provide any information establishing that he or she is qualified to opine on this issue. Sarasky v. Law Enforcement Training & Consulting Servs., Inc., 108 A.D.3d 401, 402 (1st Dept.), *leave to appeal denied*, 22 N.Y.3d 853 (2013), Schechter v. 3320 Holding LLC, 64 A.D.3d 446, 450 (1st Dept. 2009), Bjorke v. Rubenstein, 53 A.D.3d 519, 520 (2nd Dept 2008). The possession of a license in a particular field is insufficient by itself to demonstrate specialized knowledge, experience, training, or education with regard to the specific issue before the witness. Rosen v. Tanning Loft, 16 A.D.3d 480, 481 (2nd Dept. 2005).

What Respondent is left with is his own subjective evaluations of the subject premises as compared with other units in the Building. This non-expert assessment is also insufficient to

raise an issue of material fact that Petitioner has engaged in fraudulent conduct. Matter of Boyd v. New York State Div. of Hous. & Community Renewal, 23 N.Y.3d 999, 1000-1001 (2014),[3] 1290 Ocean Realty LLC v. Massena, 2015 N.Y. Misc. LEXIS 616 (Civ. Ct. Kings Co. 2015).

Respondent also raised a defense that the parties had established a landlord/tenant relationship through May of 2015, not a month-to-month tenancy, by an exchange of emails. A sworn statement in support of Petitioner's motion denies that such an agreement was made. Respondent's opposition to the summary judgment motion does not show any evidence of a creation of such a landlord/tenant relationship. Given that the most recent lease evidenced in the motion papers expired on February 28, 2014, an agreement to lease the subject premises for the fifteen months after that is required by the statute of frauds to be in writing. General Obligations Law §5-703(2), Carey & Assoc. v. Ernst, 27 A.D.3d 261, 263 (1st Dept 2006). As Respondent does not provide any evidence of such a writing herein, Petitioner has established the right to dismissal of Respondent's defense on a summary judgment motion.

Petitioner also moves to dismiss Respondent's affirmative defenses of breach of covenant of good faith and fair dealing, unclean hands, waiver, laches, estoppel, claims barred by documentary evidence, and failure to state a cause of action. The answer does not set forth any grounds Respondent has to raise these defenses, but merely asserts that they are defenses in a conclusory fashion. Respondent's opposition does not remedy pleading defects by explaining

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[3]The tenant in Boyd, supra, made an allegation of fraud supported by her personal observations of the improvements to the subject apartment and her comparison to unidentified fixtures at a big box home improvement store. Matter of Boyd v. New York State Div. of Hous. & Community Renewal, 110 A.D.3d 594, 596 (1st Dept. 2013) (Gische, J. dissenting), reversed, 23 N.Y.3d 999 (2014)

grounds to raise these defenses. Accordingly, such defenses are subject to dismissal. CPLR §3013.

Accordingly, the Court grants Petitioner's motion for summary judgment to the extent of dismissing the First, Second, Fourth, Fifth, Sixth, Seventh, and Eighth Affirmative Defenses and the First, Second, and Third Counterclaims raised in the answer and awards Petitioner a final judgment of possession only against Respondent. Issuance of the warrant of eviction is permitted forthwith, execution thereof stayed through April 30, 2015 for Respondent to vacate possession of the subject premises. On default in vacatur, the warrant of eviction may execute on service of a marshal's notice.

Petitioner also moves for a judgment sounding in fair market use and occupancy. As the Court has awarded Petitioner a judgment of possession, this cause of action is now ripe. 40 W. 55 LLC v. Kurland, 2003 N.Y. Misc. LEXIS 153 (App. Term 1st Dept. 2003). The Third Affirmative Defense in the answer asserts that the Building does not have the requisite certificate of occupancy to entitle Petitioner to such relief. Petitioner also moves to dismiss this defense. Paragraph 17 of an affidavit of Petitioner's registered managing agent in support of Petitioner's motion avers that "Petitioner is in the process of renovating substantial portions of the [B]uilding[] and, in connection therewith, is in the process of converting the former temporary certificate of occupancy into a full certificate of occupancy."

MDL §301(2) prohibits the occupancy of a dwelling converted or altered into a multiple dwelling after April 18, 1929 without the issuance of a certificate of occupancy. Violation of this law would prohibit Petitioner from maintaining a summary proceeding seeking a judgment for

nonpayment of rent. MDL §302(1)(b). The prohibition on collection of rent in such circumstances applies to causes of action for use and occupancy as well. Jo-Fra Props., Inc. v. Bobbe, 81 A.D.3d 29, 34 (1st Dept. 2010), *leave to appeal dismissed*, 17 N.Y.3d 933 (2011), Hart-Zafra v. Singh, 16 A.D.3d 143 (1st Dept. 2005), Jalinos v. Ramkalup, 255 A.D.2d 293, 294 (2nd Dept. 1998). In order to establish entitlement to summary judgment dismissing Respondent's defense in this regard, Petitioner must tender sufficient evidence to eliminate any material issues of fact as to the claims at issue, regardless of the sufficiency of the opposing papers. People v. Grasso, 50 A.D.3d 535, 545 (1st Dept.), *aff'd*, 11 N.Y.3d 64 (2008). The statement in Petitioner's managing agent's affidavit is too equivocal to meet this standard.

Accordingly, the Court denies Petitioner's motion to dismiss Respondent's Third Affirmative Defense, but grants Petitioner's motion for use and occupancy solely to the extent of setting the motion down for a hearing on the fair market value of use and occupancy, subject to the Third Affirmative Defense that Respondent raises in his answer, on May 7, 2015 at 9:30 a.m. in part H, Room 523 at the Courthouse located at 111 Centre Street, New York, New York.

This constitutes the decision and order of this Court.

Dated: New York, New York
April 3, 2015

HON. JACK STOLLER
J.H.C.