CIVIL COURT OF THE CITY OF NEW YORK
KINGS COUNTY : HOUSING PART E
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590 Leonard Owner LLC,

Petitioner,

INDEX NO. L&T: 52129/18

DECISION/ORDER

-against-

Evyatar Lapidot and
Sook Hing Leung,

-and-

John and Jane Doe

Respondent(s).
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HON .**KIMBERLEY SLADE, J.H.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in review of this Motion for summary judgment against respondents and to dismiss their affirmative defenses, *inter alia.*

Papers	**Numbered**
Notice of Motion and accompanying papers	1
Notice of Cross-Motion	2
Affirmation in Support/Opposition	3
Petitioner's memorandum	3A
Petitioner's Amended reply	4
Court file	*passim*

The within motion seeks an order granting petitioner summary judgment on its possessory claim and striking respondents' affirmative defenses. Respondents cross-move for an order awarding them summary judgment of dismissal or, alternatively, for discovery.

The petition ensued following service upon respondents of a thirty-day notice terminating

their month-to-month tenancy effective February 28, 2018. The case appeared on the court calendar on March 22, 2018 when respondents appeared by counsel who had been newly retained and was then adjourned until May 14, 2018. Respondents interposed their answer on April 2, 2018 in which they raised seven affirmative defenses and three counterclaims. On May 14, 2018 the parties entered into a briefing schedule and the matter was adjourned until July 20, 2018. In the interim, respondents agreed to continue making use and occupancy payments.

The petition alleges the apartment is deregulated, that respondents have been in possession since 2007 as they were tenants of the former owner, that petitioner has owned the building for approximately two years and during this time respondents have been month-to-month tenants until service of the termination notice. The answer seeks to raise as affirmative defenses traverse claims (1st and 2nd), vitiation of the termination notice (3rd), improper/failure to register with DHCR (4th), retaliation for respondents having commenced a proceeding with the DHCR (5th), improper DHCR deregulation registrations/rent overcharge (6th), and breach of the warranty of habitability with a corresponding abatement claim (7th).

Petitioner argues that all of the above affirmative defenses should be stricken and summary judgment granted in its favor. Petitioner asserts that the tenancy in not regulated, that it was deregulated in 2007 by the prior owner and that the time to challenge this has long since elapsed as the statute of limitations or "look back" period is four years and this period expired in 2011. Petitioner further argues that the asserted claim to fraudulent deregulation is insufficiently raised as the claim is conclusory, devoid of facts, speculative and otherwise fails to rise to a level that would even permit an examination of the records in the form of discovery. Petitioner argues it would be prejudiced as a new owner in having to answer for activities that occurred a decade

ago and eight years prior to its ownership.

Petitioner notes that the challenge to service was raised by the respondents' attorney in the form of an unverified answer and that the belated attempt to remedy this by the filing of a detailed affidavit in responsive papers should be disregarded by the court, arguing that the service defense was waived when it was improperly raised. Petitioner further argues that its retention of one month of rent, without more, neither demonstrates nor proves an intent to revive or reinstate the tenancy and that there has been no vitiation of the termination notice. Likewise, petitioner argues that even assuming the within holdover is in retaliation for respondents having commenced an action with DHCR that does not defeat the petition and the possessory claim as the remedies available in each proceeding differ from one another.

The claimed warranty of habitability breach would also not defeat the claim to possession and at most, in this proceeding, would go to an offset of claimed use and occupancy.

Respondents oppose the motion and seek summary judgment of dismissal or, alternatively, an order granting discovery on their claim to a rent overcharge and that the apartment was improperly deregulated. Respondents ask the court to examine the rental history and to accept their affidavits related to the conditions as they existed when they rented the apartment in 2007 as sufficient to establish a "colorable claim to fraud" by petitioner's predecessor in interest in 2007.

Respondents argue, among other things, that the omission of the verification in the answer is essentially a *de minimus* defect and should be disregarded, that the retention of a rent check vitiated the termination notice and, most significantly, argue that the apartment is regulated and that there is an overcharge, seeking either dismissal or discovery.

The motion to strike the affirmative defenses is granted. Service was waived when the answer was filed without an affidavit that challenged service by an individual providing details that specifically refute the affidavit of the process server. Respondents correctly assert that an answer need not be verified, but they are incorrect when they argue that an unverified or unsworn statement is competent to challenge the sworn statement of the process server.

The mere retention of one month of rent will not give rise to an inference that the petitioner intended to reinstate a tenancy. The question of intent is a fact-specific inquiry and in the context of this proceeding there is no other allegations that supports such a conclusion and the court will not infer intent under the specific limited facts articulated in this proceeding.

The issue of whether the apartment was properly deregulated, or whether an overcharge occurred is not timely raised. Respondents' long-term acquiescence in the terms of their tenancy, as they were understood, to be a month to month or yearly leased tenancy cannot be challenged at this late date, particularly where the allegations related to improper removal from rent regulation and overcharge are essentially speculative. In *Matter of Grimm v. State of NY Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 364—365 [2010]) the Court held,

> Generally, 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 DHCR to inquire further. What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protection of rent stabilization. As in *Thornton*, the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date.

The *Grimm* Court holding was reiterated in *Gomez v. New York State Division of Housing and Community Renewal*, 79 AD3d 878 (2d Dep't 2010) ,where that court noted "[a] rent

overcharge claim, whether made in a judicial or administrative forum is subject to a four year statute of limitations...except in situations where there is a substantial indicia of fraud." *Id.* at 879 (internal citations omitted).

Consequently, Petitioner's motion for summary judgment is granted as is the motion to strike the affirmative defenses. Respondents' cross-motion is denied. The counterclaims are dismissed without prejudice.

Petitioner is a awarded a final judgment of possession. Warrant to issue forthwith. Execution stayed through March 31, 2019 so long as use and occupancy continues as previously agreed upon.

This constitutes the decision and order of the court.

Dated: January 4, 2019
Brooklyn, NY

Kimberley Slade
Judge, Housing Court

KIMBERLEY S. SLADE
JUDGE, HOUSING COURT