SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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ELENI D. MAKRIS,

Index No. 101022/2010
Motion Sequence: 003

Plaintiff,

-against-

QUARTZ ASSOCIATES, LLC, EMPIRE MANAGEMENT AMERICA CORP., DOV BENNISH, APARTMENTS BY OWNERS, INC., ABO VACATION RENTALS, DARREN LACHAR, MICHAEL EISENBERG and "JOHN/JANE DOE NO. 6" through "JOHN/JANE DOE NO. 10," the names of the last five defendants being fictitious, the persons intended being persons, corporations, companies and/or business playing any role in the removal and disposal of plaintiff's property from her apartment at 213 East 31st Street, Apartment C New York, NY in August 2009,

DECISION/ORDER
ARLENE P. BLUTH, JSC

Defendants.

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The motion by defendants Apartments by Owners, Inc., Dov Bennish, ABO Vacation Rentals, Darren Lachard and Michael Eisenberg (collectively, "ABO") to amend their answer to add the defense of statute of limitations against plaintiff's causes of action for intentional infliction of emotional distress and forcible/unlawful entry pursuant to RPAPL 853 and to dismiss said causes of action on the ground that they are time-barred is denied.

This action arises out of an incident that occurred on or about August 29, 2009 at plaintiff's apartment located at 213 East 31st Street, Apartment C, New York, NY. In this building, ABO allegedly sublet a separate apartment, 1C, located directly above plaintiff's ground floor apartment; ABO sublet 1C for short-term transient use. As part of subletting apartment 1C, ABO would hire cleaning staff after one subtenant vacated in order to ready the

apartment for the next occupants. On August 29, 2009, the cleaning person hired to clean apartment 1C allegedly entered plaintiff's apartment, C, and discarded plaintiff's belongings.

Plaintiff claims that when the cleaning person arrived, she notified her supervisor at ABO that the apartment was filled with lots and lots of items (apparently much more than people who rent furnished apartments short-term usually leave behind). The ABO supervisor, who had just dropped off the cleaning person, called defendant Eisenberg, who called defendant Lachar to determine how to proceed. Plaintiff claims that at some point, the cleaning person was instructed to remove the items in the apartment. Plaintiff alleges that ABO did not instruct the cleaning person, who was subsequently fired, to keep valuables. Plaintiff returned to her apartment to find that her belongings were gone.

Defendants Quartz Associates, LLC and Empire Management America Corp., were the property owner and managing agent of the apartment building.

Discussion

"Leave to amend pleadings is to be freely given absent prejudice or surprise directly resulting from the delay" (*Cseh v New York City Tr. Auth.*, 240 AD2d 270, 271, 658 NYS2d 618 [1st Dept 1997] [citing CPLR 3025[b]]). "[T]he late assertion of a Statute of Limitations defense, by itself, is no barrier to amendment; lateness must be coupled with significant prejudice to plaintiff' (*id.* [internal quotations and citation omitted]). "Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment" (*Valdes v Marbrose Realty, Inc.*, 289 AD2d 28, 29, 734 NYS2d 24 [1st Dept 2001]).

ABO claims that plaintiff will suffer no prejudice if ABO is allowed to amend its answer. ABO further argues that plaintiff did not tailor her discovery to exploring the absence of a statute of limitations defense.

In opposition, plaintiff claims that she certainly would be prejudiced because the statute of limitations defense, if timely pleaded, would have required her to explore additional issues during the 19 depositions held in this matter. Specifically, plaintiff claims that she would have explored whether ABO was united in interest with the original defendants named in the lawsuit (Quartz and Empire)[1] by virtue of the short-term furnished transient rental business operated in the building. Plaintiff claims that because the defendants are united in interest, the claims against ABO would not be time-barred.

In reply, ABO admits that there have been 19 depositions, but claims that there have been fewer than 19 deponents because some witnesses have been deposed more than once. ABO asserts that plaintiff has had ample opportunity to explore these issues while the instant motion was pending.

Plaintiff has demonstrated that she would suffer substantial prejudice if this amendment was permitted. This action was filed on January 26, 2010 and ABO was brought in via a supplemental summons and amended complaint dated December 9, 2010. ABO answered on February 21, 2011 and served their amended answer on or about November 1, 2011. ABO failed to raise the statute of limitations defense in either answer. Instead, ABO waited over four years from the date of its original answer to raise this issue.

Of course, delay is not sufficient, by itself, to deny a request to amend. But plaintiff has demonstrated that she would have explored the united in interest issue as a possible defense to

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1Quartz and Empire submitted a partial reply to plaintiff's opposition that took no position on ABO's motion, but objected to plaintiff's claim that ABO was united in interest with Quartz and Empire.

the statute of limitations claim if it had been timely raised. Further, plaintiff was prejudiced by expending more resources on discovery (*see Cseh*, 240 AD2d at 271-72). If ABO had timely raised the statute of limitations defense, and was successful, plaintiff would have focused only on the remaining causes of action. Instead, plaintiff conducted discovery with all defendants on all causes of action and took 19 depositions. Surely plaintiff may have taken some of these depositions anyway, but plaintiff's litigation strategy *for the past several years* would have changed dramatically had ABO raised the statute of limitations in a timely manner. [2]

Finally, if ABO's assertion of the statute of limitations is successful, plaintiff would be prejudiced by having an avenue of recovery removed five years after she amended her complaint (*see id.* at 272). While leave to amend pleadings must be freely given, the circumstances of this case compel the Court to deny ABO's request to amend.

Accordingly, it is hereby

ORDERED that the motion by ABO is denied.

Next Conference: July 26, 2016 at 2:15 p.m.

This is the Decision and Order of the Court.

Dated: July 11, 2016

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2 Had ABO made this motion years ago, before depositions, and plaintiff countered with an argument that ABO and plaintiff's landlord were united in interest, this Court could not have just shrugged off the united in interest theory. Depositions would have been allowed to explore it – after all, how did another tenant, movant/ABO, get the keys to plaintiff's apartment and/or why did ABO's cleaning lady's keys open plaintiff's door if plaintiff's landlord and ABO were not in some aspect united in interest? ABO should not benefit to plaintiff's extreme detriment just because ABO sat on its hands for many years. Courts do not condone "gotcha" litigation tactics.

New York, New York

HON. ARLENE P. BLUTH, JSC