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

PRESENT: DEBRA A. JAMES PART 59
Justice

WILLIAM D. ROTBLUT and LOIS B. ROTBLUT,
Plaintiffs,

- v -

399 EAST 72nd APARTMENT OWNERS INC. and ANTHONY'S CONTRACTING,
Defendants.

Index No.: 603265/07
Motion Date: 01/06/12
Motion Seq. No.: 03
Motion Cal. No.: ____

The following papers, numbered 1 to 2 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	
Replying Affidavits - Exhibits	2

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

The court shall deny plaintiffs' motion for summary judgment against the cooperative.

The gravamen of plaintiffs' complaint upon which summary judgment is sought is that the defendant cooperative should be held liable for the peeling plaster on the walls and ceiling of plaintiffs' apartment.

Plaintiffs' first cause of action sounds in breach of contract. The court must deny summary judgment on this cause of action because plaintiffs fail to establish a prima facie case

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

that the cooperative breached any duty under the proprietary lease. Paragraph 2 of the Proprietary Lease, "Lessor's Repairs," provides in pertinent part that the Lessor "shall at its expense keep in good repair all of the apartments . . . except those portions the maintenance and repair of which are expressly stated to be the responsibility of the Lessee pursuant to Paragraph 18 hereof." Paragraph 18 provides "The Lessee shall take possession of the Apartment and its appurtenances and fixtures 'as is' as of the commencement of term hereof. . . the Lessee shall keep the interior of the Apartment (including interior walls, floors and ceilings, but excluding windows, window panes, window frames, sashes, sills, entrance and terrace doors, frames and saddles) in good repair. . ."

Based upon the terms of the proprietary lease and the damage alleged, plaintiffs have failed to establish that the cooperative has any contractual responsibility to repair the alleged defects. Plaintiffs took the apartment as is and are responsible for the maintenance of the interior surfaces of the apartment. Plaintiffs have the burden on this motion of demonstrating that the damage was caused by conditions which are not within the scope of the lessee's responsibility and he has failed to do so. The fact that the cooperative undertook to repair the ceiling does not, by itself, change the terms of the proprietary lease as concerns the parties' respective maintenance obligations.

Instructive in this regard is the case of Hauptman v 222 East 80th Street Corp., 100 Misc2d 153, 154 (Civ Ct, NY County, Freedman, J., 1979) wherein it was stated that "[p]laintiff brings this action against defendant apartment co-operative to recover the amount he spent to repair the ceilings of his co-operative apartment. . . The sole issue before the court is whether plaintiff or defendant is responsible for the repair of the ceiling in plaintiff's apartment." In Hauptman, the court after conducting a bench trial found that based upon that proprietary lease the "lessor is basically responsible for the foundation, common areas and all of the structural aspects of the building. Beams, supports, roofs, plumbing apparatus and pipes are within the province of the landlord co-operative. The interior of the apartment is the responsibility of the tenant." Id. at 156.

In Hauptman the plaintiff's presented unrefuted expert testimony that "the bubbling and falling of the plaster was caused by either the improper application of, or the use of a defective bonding agent." Id. at 154. In this case, plaintiffs rely upon three reports of defendant's consultants. The consultant's August 24, 2005, report states that there appeared to be a bonding issue with the plaster and paint in a portion of the ceiling of the apartment bedroom. The report noted that the plaster in this case was a thin layer. Plaintiffs state that the

cooperative retained defendant Anthony's Contracting to make repairs based upon this report. In a subsequent report dated October 13, 2005, the same consultant stated that no defects related to bonding of the plaster were observed in the apartment. In a third report dated November 16, 2005, the consultant concluded that "We did not observe any structural damage or concerns in apartment 15F. Although we recommend that the small section of the kitchen ceiling where the plaster bond is in question be addressed in the near future, we do not believe there is any emergency condition in this apartment. We therefore do not find the necessity to either vacate or shore up the ceilings in the apartment at this time."

In contrast to Hauptman, there is no expert testimony on this motion that the cooperative either created or failed to repair a dangerous condition in the apartment assuming that the cooperative had such a duty. To the extent the consultant set forth that there was a problem with the plaster upon initial inspection of the apartment, the consultant's subsequent reports state that the condition no longer existed. Without other evidence, the current record is insufficient to meet plaintiffs' burden on this motion.

As to the part of plaintiffs' claim for breach of contract based upon defendant cooperative's alleged violation of the warranty of habitability (Kent v 534 East 11th Street, 80 AD3d

106 (1st Dept 2010), summary judgment must be denied because "material issues of fact exist, including . . . whether the condition was detrimental to life, health or safety within the meaning of the statute." Elkman v Southgate Owners Corp., 233 AD2d 104, 105 (1st Dept 1996). Plaintiffs only present mere speculation that the cooperative somehow controlled the means and methods of the work performed or that the cooperative was somehow otherwise negligent. See 905 5th Assoc., Inc., v 907 Corp., 47 AD3d 401, 402 (1st Dept 2008). This is insufficient to sustain a summary judgment motion upon a claim of such a breach. Id.

Similarly, plaintiffs present no evidence in support of their causes of action against the cooperative under the ADA or for negligence and therefore summary judgment shall be denied.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is DENIED; and it is further

ORDERED that the parties are directed to attend a status conference on July 31, 2012, at 2:30 p.m. in Part 59, Room 103, 71 Thomas Street, New York, New York 10013.

This is the decision and order of the court.

Dated: July 12, 2012

ENTER:

DEBRA A. JAMES J.S.C.