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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 110782/2011
GORMAN, KAREN
vs.
151-161 OWNERS CORP.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). 4, 5

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

FILED

AUG 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/9/12

_____, J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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KAREN GORMAN,

Plaintiff,

-v-

151-161 OWNERS CORP. AND GERARD J. PICASO INC.,

Defendant.

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Index No. 110782-2011

DECISION and ORDER

Motion Seq. 001

HON. EILEEN A. RAKOWER:

Plaintiff brings this action to recover damages that occurred as a result of a plumbing incident in her apartment, located at 151-161 West 86th Street. Plaintiff is a shareholder in 151-161 West 86th Street, New York, NY, and has signed a Proprietary Lease with 151-161 Owners Corp, the owners and operators of the building. On April 16, 2011, Plaintiff and her husband discovered that plumbing within the walls of the apartment building caused human excrement to flow into their apartment. Human excrement was found on the floor, carpets and furniture in the apartment. As a result, Plaintiff and her husband both had to live with friends, family, in their home in East Hampton, and in hotels until May 14, 2011. Plaintiff caused and paid for all repairs. Plaintiff now brings this motion for summary judgment pursuant to CPLR §3212 on the fourth and fifth counts of her Complaint for breach of contract and breach of warranty of habitability.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the

party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

Plaintiff's fourth cause of action alleges breach of contract. The elements of a cause of action for breach of contract are : the existence of a contract, performance by plaitniff, the breach by defendant, and resulting damages. (*See, Harris v. Seward Parking House Corp.*, 79 AD3d 425 [1st Dept 2010]). In order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based. (*Sud v. Sud,* 211 AD2d 423, 621 NYS2d 37 [1st Dept 1995]).

Plaintiff provides a copy of the Proprietary Lease entered into between the parties. Plaintiff sets out the provisions upon which the claim is based:

> Paragraph 2: "the Lessor shall at its expense keep the apartment in good repair, including all apartments... except those portions of the maintenance and repair of which are expressly stated to be the responsibility of the Lessee pursuant to Paragraph 18 hereof."
>
> Paragraph 3: "the Lessor shall maintain and manage the building as a first class apartment building."
>
> Paragraph 4(a): "If the apartment or the means of access thereto or the building shall be damaged by fire or other cause covered by multiperil policies commonly carried by cooperative corporations in New York City.... the Lessor shall at its own cost and expense, with reasonable dispatch after receipt of notice of said damage, repair or replace or cause to be repaired or replaced with materials of a kind and quality then customary in buildings of the type of the building, the building, the apartment, and the means of access thereto, including the walls, floors, ceilings, pipes, wiring and conduits in the apartment."

> Paragraph 18(a): "The Lessee shall... not be responsible for the maintenance, repair, and replacement of... pipes or conduits within the walls, ceilings or floors..."

Plaintiff contends that Owners Corp. breached the contract in not paying for the repair of the apartment and items inside the apartment. Plaintiff annexes invoices evidencing the cost of repair to the apartment in the amount of $23,363.59. Plaintiff attaches emails written by Susan Sullivan, the President of Owners Corp., which states, "since the Waste Stack was within the walls- it is a corporation responsibility. The managing agent is responsible for dealing with this type of event." She also provides emails sent by Ken Ryan, the representative of Picaso Inc., the apartment's management, admitting that this was a Corporate Infrastructure failure, and that they would cut a check to Plaintiff.

In response to Plaintiff's breach of contract argument, Defendant provides evidence that it offered to reimburse Plaintiff for certain expenses, but Plaintiff rejected the offer. Specifically, Defendant attaches an email whereby Ken Ryan writes to Plaintiff, "Will you settle this matter and be happy if the Board is willing to pay your contractor $7000, the cleaning service $6925, and for the floor $6454." Plaintiff rejected the offer and according to Defendant, sought additional sums which the cooperative is simply not responsible for according to the Proprietary Lease. Defendant points out that pursuant to Paragraphs 2, 3, 4 and 18(a) of the Proprietary Lease, the Cooperative is not responsible for the repair or replacement of furniture, carpeting, area rugs, furnishings, decorations, painting and wallpapering . Moreover, Defendant disputes that the invoices provided by Plaintiff are accurate. Specifically, Defendant states that one of the contractors hired by plaintiff, Interior Done Wright, presented two different invoices with different monetary amounts owed; the first being $7,570, and the second being $9,050.

Plaintiff also moves for summary judgment on its fifth cause of action for breach of the covenant of habitability. Section 235-b of the Real Property Law requires a landlord to impliedly warrant: first, that the premises are fit for human habitation; second, that the condition of the premises is in accord with the uses reasonably intended by the parties; and, third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety. (*See, Park West Management Corp. V. Arthur Mitchel, et. al.*, 47 NY2d 325, 418 NYS2d 310,

391 NE2d 1288 [1979]). A breach of the implied warranty of habitability occurs where "in the eyes of a reasonable person, defects in the dwelling deprive the tenant of those essential functions which a residence is expected to provide." *Id.* At 328. A housing or sanitation code violation is relevant but not determinative of a breach of warranty. (*See, Park West Management Corp. V. Mitchell*, 47 NY2d 316, 418 NYS2d 310, 391 NE2d 1288 [1979]).

It is uncontested that, by reason of the plumbing failure on April 16, 2011, the Apartment was not habitable for an extended period of time. In support of Plaintiff's motion for summary judgment, she provides Paragraph 4(b) of the Proprietary Lease which states, "In case the damage... shall be so extensive as to render the apartment untenantable.... the rent hereunder shall proportionately abate until the apartment shall again be rendered wholly tenantable." Although Plaintiff does not provide any rent checks or other indications of how much she pays in rent on a monthly basis, she states that daily rent for the apartment is $42.67, and therefore she asserts that the proper abatement of rent is $1,152.09 for the 27 days she was not living there. Additionally, Plaintiff provides receipts for the cost of commuting to East Hampton, and staying in a hotel for one night, in the total amount of $1,1227.08. Plaintiff alleges that she is owed $25,642.76 in total for breach of habitability costs.

In opposition, Defendant admits that there was human excrement found in Plaintiff's apartment but provides an affidavit of Susan Sullivan's which states that the Cooperative worked with Plaintiff on a daily basis and offered a maintenance abatement, but Plaintiff rejected the offer.

Plaintiff has sufficiently proven that she is entitled to summary judgment as to the issue of liability on the fourth and fifth causes of action. Defendants do not raise an issue of fact as to liability. As such, Plaintiff's motion for summary judgment is granted on the issue of liability only.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for summary judgment is granted on the fourth and fifth causes of action on the issue of liability only, and the issue of damages shall be determined at the time of trial of the remainder of the action.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: August 6, 2012

EILEEN A. RAKOWER, J.S.C.