Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ERNEST F. HART IA Part 6
Justice

LISA NEUMAN, x

Plaintiff,

-against-

CITY OF NEW YORK AND NEW YORK CITY DEPARTMENT OF BUILDINGS,

Defendants.

x

Index Number 716291 2017

Motion Date September 17, 2018

Motion Seq. No. 2

The following numbered papers read on this motion by defendants City of New York and the New York City Department of Buildings pursuant to CPLR 3211(a)(5) and (7) and CPLR 217(1) to dismiss the complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF 25-36
Answering Affidavits - Exhibits.....	EF 38-41
Reply Affidavits.....	EF 43-44

Upon the foregoing papers it is ordered that this motion is determined as follows:

The plaintiff commenced this action to challenge the issuance by the Department of Buildings of seven notices of violations to plaintiff for failing to comply with the periodic elevator testing requirement of Section 28-304.6 of the New York City Administrative. Administrative Code Section 28-304.2 sets forth the general inspection and/or testing requirement applicable to all elevators. It states that "elevators...shall be inspected and tested in accordance with the schedule in Table N1." It further states that "elevators located in one-family...dwellings that service only a single owner-occupied dwelling unit which is not occupied by boarders, roomers or lodgers...that are not open to

non-occupants on a regular basis are not subject to the periodic inspection requirement...." Section 28-304.6.1 distinguishes between periodic inspections performed by the Department of Buildings and testing to be performed by an approved agency.

The plaintiff is the owner of a one-family dwelling located at 8440 Avon Street, Jamaica Estates, New York. Since the early 1990s there has been an elevator in the subject building. In January 2011 the plaintiff received a Notice of Elevator Violation for 2009 from the Department of Buildings. The plaintiff responded to this notice by sending a letter that the violation was in error because the statute exempted single-family dwellings. The plaintiff did not hear back from the Department of Buildings. Each year, thereafter, the plaintiff would receive the same notice from the Department of Buildings. In December 2016, the plaintiff called the Department of Buildings. She eventually spoke with the Department of Building's Audit Liaison. He explained that though there was an exemption for annual inspection there was still a requirement for annual testing. The plaintiff alleges that she was told by the audit liaison that if she got her elevator tested in 2016, the Department of Buildings would waive penalties assessed for 2009, 2010 and 2012. The plaintiff had her elevator tested in 2016, but the Department of Buildings did not waive the violations for 2009, 2010 and 2012. The plaintiff then commenced this action asserting three causes of action. In the first cause of action, the plaintiff demands a judgment declaring Administrative Code 28-304.6.1 unconstitutional. In the second cause of action, the plaintiff alleges that the defendants breached an oral agreement. The third cause of action is based on promissory estoppel.

The defendant has moved to dismiss the complaint. When deciding a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" *(Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 56 [2005], quoting *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300 [2001]). The court's sole criterion is whether the pleading states a cause of action, and from its four corners factual allegations are discerned, which taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail *(Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Gizburg*, 43 NY2d 268, 275 [1977]). Upon review of the complaint in the instant matter, it does not, on its face, allege sufficient facts to support any of the causes of action alleged.

To succeed on a facial challenge of a statute, a plaintiff bears a substantial burden and must demonstrate beyond a reasonable doubt that the statute suffers from wholesale constitutional impairment (*People v Davis*, 13 NY3d 17, 23 [2d Dept 2009]). First, the allegation that the statute is unconstitutional because it violates due process is without merit. Here, statute does not infringe on a fundamental right. A fundamental right is a right that is deeply rooted in this nation's history and tradition (*People v Knox*, 12 NY3d 60 [2009]). The statute only requires the plaintiff to hire an elevator company to test her elevator once a year and to submit this testing report to the Department of Buildings. The right not to have an elevator inspected in your home, is not fundamental in this sense. Thus, the statute will be valid if it is rationally related to a legitimate government interest (*Knox*, 12 NY3d at 67). Here, the requirement that elevators in a private residence get tested ensures that they are kept and maintained in good condition and thus reduces the risk of substantial harm. Therefore, the purpose of the statute serves a legitimate government interest. Second, the plaintiff argues that the statute denies the plaintiff equal protection. Here, this argument is without merit as the statute is applied in the same manner as other similarly situated individuals (*see FSK Drug Corp. v Perales*, 960 F.2d 6, 10 (2d Cir. 1992). Third, the plaintiff argues that the statute is unconstitutionally vague. This argument fails as a matter of law. To determine if a statute is vague, the courts use a two part test. The first part is whether the statute is sufficiently definite and gives a person of ordinary intelligence fair notice that the contemplated conduct is forbidden by the statute (*People v Stuart*, 100 NY2d 412 [2003]). The second part is whether the enactment provides officials with clear standards for enforcement. Here, the statute meets both prongs of this test. Finally, contrary to the argument put forth by the plaintiff, the statute does not have any retroactive effect. The statute became effective after its enactment and has been applied prospectively. The fact that it applies to existing elevators does not make the statute's application retroactive (*Forti v New York State Ethics Commn.*, 75 NY2d 596, 609 [1990]). Thus, the first cause of action fails to state a cause of action and must be dismissed.

The court next turns to the second and third causes of action. In the second cause of action, the plaintiff alleges that the City breached an oral contract that it would remove the violations for 2009, 2010, 2012 if she had her elevator tested in 2016. In the third cause of action the plaintiff alleges that the Department of Buildings made a clear and unambiguous promise to the plaintiff that if she had her elevator tested for 2016, the Department of Buildings would remove the violations for 2009, 2010 and 2012.

Both of these causes of action must be dismissed. First, the second and third causes of action must be dismissed as they were not included in the notice of claim (Administrative Code § 7-201[a]). The elements to be included in a notice of claim are, "the nature of the claim, the time when, the place where and the manner in which the claim arose" (*Parochial Bus Sys. V Bd. Of Educ. of City of N.Y.*, 60 NY2d 539, 547 [1983]). Here, when plaintiff filed her notice of claim, the only claim contained in the notice of claim was to have the statute invalidated as unconstitutional. There was no mention of any claim for breach of contract or promissory estoppel. Thus, the notice of claim does not set forth any request for relief or give any facts related to the breach of contract or promissory estoppel causes of action. Therefore, these causes of action must be dismissed. Furthermore, the plaintiff cannot circumvent the notice of claim requirement by arguing that she seeks specific performance. Inasmuch as money damages are an adequate remedy to protect her interest, she cannot seek specific performance (*see T.F. Demilo Corp. v E.K. Constr. Co.*, 207 AD2d 480 [2d Dept 1994]). Additionally, the plaintiff cannot maintain a breach of contract cause of action as the alleged oral agreement lacks consideration. Here, the plaintiff was already bound by law to perform the testing. The performance of a pre-existing legal duty does not constitute valid consideration (*see Goncalves v Regent Intl. Hotels*, 58 NY2d 206. 220 [1983]). Finally, the plaintiff cannot state a cause of action for promissory estoppel as such a claim may not be invoked against governmental bodies to prevent them from performing their enforcement duties (*see Agress v Clarkstown Cent. School Dist.*, 69 AD3d 769 [2d Dept 2010]). The exception to this rule is inapplicable, here, as there is no allegation of misleading nonfeasance that would otherwise result in a manifest injustice (*id.* at 771).

Accordingly, the motion to dismiss is granted and the complaint is dismissed.

Dated: December 24, 2018

ERNEST F. HART, J.S.C.