

**317 W. 89th St., LLC v Engstrom**

2012 NY Slip Op 32225(U)

August 21, 2012

Supreme Court, New York County

Docket Number: 111136/11

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

317 WEST 89<sup>th</sup> SREET, LLC,  
Plaintiff,

-v-

LYNDA ENGSTROM,  
Defendant.

INDEX NO. 111136/11  
MOTION DATE 07 -18-2012  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 6 were read on this motion to Dismiss Pursuant to CPLR §3211 [a] [7] and for Summary Judgment and Cross-Motion to Dismiss Pursuant to CPLR §3211 [a][1][7] and for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3 , 4 - 5</u>
Answering Affidavits — Exhibits _____ cross moti	_____
Replying Affidavits _____	<u>6</u>

**FILED**  
AUG 27 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:     Yes     No

Upon a reading of the foregoing cited papers, plaintiff's motion pursuant to CPLR §3211[a][7], CPLR §3212[a], CPLR §3212[e], for summary judgment on its first and second causes of action and for summary judgment dismissing the defendant's first and second affirmative defenses and first through seventh counterclaims, is granted to the extent that the defendant's second affirmative defense, first, third through eighth counterclaims are severed and dismissed, the remainder of the relief sought is denied. Defendant's cross-motion pursuant to CPLR §3211[a][1],[7] and CPLR §3212 for summary judgment dismissing the plaintiff's first, second, third and fourth causes of action is granted, to the extent that plaintiff's first, third and fourth causes of action are severed and dismissed without prejudice to the commencement of an eviction proceeding, the remainder of the relief sought is denied.

Plaintiff makes this motion pursuant to CPLR §3211[a][7], CPLR §3212[a], CPLR §3212[e], for summary judgment on its first and second causes of action and for summary judgment, dismissing the defendant's first and second affirmative defenses and first through seventh counterclaims.

Defendant opposes the motion and cross-moves pursuant to CPLR §3211[a][1],[7] and pursuant to CPLR §3212 for summary judgment dismissing plaintiff's first, second, third and fourth causes of action.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

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

A motion to dismiss pursuant to CPLR §3211[a][1], requires that the party seeking dismissal produce documentary evidence that "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). A motion to dismiss pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled (Guggenheimer v. Ginzberg, 43 N.Y. 2d 268, 401 N.Y.S. 2d 182, 372 N.E. 2d 17, [1977]). Documentary evidence that contradicts the allegations, or pleadings that consist of bare legal conclusions will not be presumed to be true and are a basis for dismissal (Morgenthow & Latham v. Bank of New York Company, Inc., 305 A.D. 2d 74, 760 N.Y.S. 2d 438 [N.Y.A.D. 1<sup>st</sup> Dept.,2003]).

The complaint asserts four causes of action (Mot. Exh. R). The first cause of action seeks a declaratory judgment that defendant has violated 9 NYC RR §2204.2(1) and §2204.2(6), of the Rent Control Law thereby entitling plaintiff to terminate defendant's tenancy and seek eviction upon service of proper notices. The second cause of action is for a permanent injunction compelling the defendant to provide plaintiff with access to her apartment for purposes of obtaining a Department of Buildings (DOB) electrical sign off, so that the Certificate of Occupancy can be amended. The third cause of action seeks a further declaratory judgment that plaintiff's actions constitute a nuisance and a further violation of the Rent Control Law under 9 NYC RR §2204.2(2), entitling the defendant to seek eviction upon service of proper notices and the fourth cause of action is for exemplary and punitive damages.

Defendant has asserted two affirmative defenses in her answer, failure to serve the required predicate notices and breach of warranty of habitability requiring an abatement of rent (Mot. Exh. T). Defendant asserts eight counterclaims, the first counterclaim seeks a permanent injunction and retroactive abatement of rent pursuant to Real Property Law 235[b] and the second counterclaim is for a permanent injunction enjoining the plaintiff from committing any further acts of nuisance, trespass, harassment and intentional infliction of emotional anguish. The third counterclaim is intentional and reckless infliction of emotional distress; the fourth counterclaim is for nuisance; the fifth counterclaim is for trespass; the sixth counterclaim is for breach of warranty of quiet enjoyment; the seventh counterclaim pursuant to Real Property Action and Proceedings Law §853 (RPAPL), seeks treble damages for unlawful eviction; and the eighth counterclaim seeks a retroactive abatement for breach of the warranty of habitability.

Defendant resides in a rent controlled apartment, #2W1, located at 317 West 89<sup>th</sup> Street, New York, New York. She is over 70 years old and has resided in the building over forty years. In 2006, the building was converted to condominiums.

Plaintiff is attempting to amend the building's certificate of occupancy to reflect additional units that were added to the second floor between 1953 and 1956 and perform electrical repairs to comply with current electrical code requirements. It seeks summary judgment on the first and second causes of action claiming verbal and written requests for access to the defendant's apartment to perform electrical repairs, were denied when defendant made unnecessary and unreasonable demands. Plaintiff retained the services of Vlashava Electric, utilizing Vladimir Vata, a licensed master electrician, and obtained a DOB permit for electrical work on May 31, 2011. Vladimir Vata, states that electrical repairs were performed in apartments 2W2 and 2W3 on May 18 and May 21, 2011, and electrical repairs to defendant's apartment will not take more than a day or two. Plaintiff claims this action only seeks declaratory relief, and until it commences an eviction proceeding, predicate notice is not required. Plaintiff seeks to dismiss the defendant's first and second affirmative defenses because they do not apply to the stated causes of action. It claims

that the statute of limitations has run on those counterclaims relying on facts that occurred more than one year prior to this action, except for those counterclaims based on nuisance and trespass which have a three year statute of limitations. Plaintiff seeks to dismiss defendant's first through seventh counterclaims because they are not sufficiently stated.

Defendant opposes plaintiff's motion claiming summary judgment should be denied on the first and second causes of action because there remain issues of fact as to the reasonableness of plaintiff's actions. She claims the plaintiff should be denied injunctive relief because there has been no predicate notice. Defendant seeks to dismiss the complaint and obtain summary judgment claiming the plaintiff has no outstanding DOB violations and is attempting to harass her into leaving her rent controlled apartment. Defendant claims that plaintiff has attempted to perform electrical repairs in her apartment prior to obtaining an electrical permit as occurred in apartments 2W2 and 2W3, and that all the required permits were not obtained. In support of her claim that more permits are needed, she provides the affidavit of Gerald I. Goldstein, a registered architect, who states that the work described by Vladimir Vata is not a minor one or two day repair, but a renovation that would affect weight bearing walls and requires additional construction permits.

Pursuant to CPLR §214[4], the statute of limitations for claims of nuisance and trespass is three years (*Sova v. Glasier*, 192 A.D. 2d 1069, 596 N.Y.S. 2d 228 [N.Y.A.D. 4<sup>th</sup> Dept., 1993]). A claim of nuisance can have an extended statute of limitations if it is continuing in nature giving rise to successive causes of action (*Lucchesi v. Perfetto*, 72 A.D. 3d 909, 899 N.Y.S. 2d 341 [N.Y.A.D. 2<sup>nd</sup> Dept., 2010]). Wrongful eviction claims asserted pursuant to RPAPL §853 have a one year statute of limitations (*Gold v. Schuster*, 264 A.D. 2d 547, 694 N.Y.S. 2d 646 [N.Y.A.D. 1<sup>st</sup> Dept., 1999]). Pursuant to CPLR §215 claims for constructive eviction, intentional infliction of emotional distress and harassment pursuant to the administrative code have a one year statute of limitations (*Kent v. 534 East 11<sup>th</sup> Street*, 80 A.D. 3d 106, 912 N.Y.S. 2d 2 [N.Y.A.D. 1<sup>st</sup> Dept. 2010], *Spinale v. Guest*, 270 A.D. 2d 39, 704 N.Y.S. 2d 46 [N.Y.A.D. 1<sup>st</sup> Dept., 2000] and *Bruce v. College Properties, Inc.*, 10 A.D. 3d 538, 782 N.Y.S. 2d 61 [N.Y.A.D. 1<sup>st</sup> Dept., 2004]).

The right of a building owner to evict tenants protected by the New York City Rent Control Laws is governed by Administrative Code of the City of New York §26-408. Tenants may be evicted for cause pursuant to NYC Code §26-408[a], for an unreasonable refusal of access for repairs and renovations (*Sohn v. Calderon*, 78 N.Y. 2d 755, 587 N.E.2d 807, 579 N.Y.S. 2d 940 [1991]). Pursuant to 9 NYCRR §2204.3, jurisdictional prerequisite to commencing an action to evict a rent controlled tenant is to serve a thirty day notice of termination of tenancy. The notice is required to advise the tenant of the ground under 9 NYCRR §2204.2, which the landlord relies on for removal or eviction (*Kaycee West 113 Street Corp. v. Diakoff*, 160 A.D. 2d 573, 554 N.Y.S. 2d 216 [N.Y.A.D. 1<sup>st</sup> Dept., 1990]). A claim of harassment can be sustained when asserted pursuant to NY Administrative Code §27-2004, which is designed to protect tenants from giving up their occupancy rights (*Aguaiza v. Vantage Properties, LLC*, 69 A.D. 3d 422, 893 N.Y.S. 2d 19 [N.Y.A.D. 1<sup>st</sup> Dept., 2010]).

Breach of warranty of habitability based on claims affecting an individual's health, requires evidence of a causal connection (*Kent v. 534 East 11<sup>th</sup> Street*, 80 A.D. 3d 106, 912 N.Y.S. 2d 2 [N.Y.A.D. 1<sup>st</sup> Dept. 2010]). Breach of warranty of habitability is an affirmative defense to a claim for rent arrears (*R.V.R. Realty v. Tenants Alliance*, 305 A.D. 2d 289, 761 N.Y.S. 2d 158 [N.Y.A.D. 1<sup>st</sup> Dept., 2003]).



The basis for a claim of infliction of emotional distress is conduct that is so extreme and outrageous, "...it transcends the bounds of human decency as to be regarded as atrocious and intolerable in civilized society." The extreme and outrageous conduct is required to result in either reckless or intentional severe distress (*Friehofer v. Hearst Corp.*, 65 N.Y. 2d 135, 480 N.E. 2d 349, 490 N.Y.S. 2d 735 [1985]).

The elements of a claim for private nuisance are, "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failing to act" (*Jennings v. Fisher*, 258 A.D. 2d 722, 684 N.Y.S. 2d 680 [N.Y.A.D. 3<sup>rd</sup> Dept., 1999]). In determining whether a private nuisance exists the court must weigh the gravity of the harm against utility and necessity (*Copart Indus., Inc. v. Consolidated Edison Co. Of N.Y.* 41 N.Y. 2d 564, 362 N.E. 2d 968, 394 N.Y.S. 2d 169 [1977]). Trespass requires either an unlawful act or a lawful act performed in an unlawful manner that interferes with a person's right of possession (*Kurzner v. Sutton Owners Corporation*, 245 A.D. 2d 101, 666 N.Y.S. 2d 135 [N.Y.A.D. 1<sup>st</sup> Dept., 1997] citing to *Ivancic v. Olmstead*, 66 N.Y. 2d 349, 488 N.E. 2d 72, 497 N.Y.S. 2d 326 [1985]).

A claim of actual eviction requires the tenant be ousted from the premises. A claim of constructive eviction requires an abandonment of the premises. A claim of breach of the covenant of quiet enjoyment requires a party demonstrate either an actual or constructive eviction (*Jacobs v. 200 E. 36<sup>th</sup> Owners Corp.*, 281 A.D. 2d 281 722 N.Y.S. 2d 137 [N.Y.A.D. 1<sup>st</sup> Dept., 2001] citing to *Dave Herstein Co. v. Columbia Pictures Corp.*, 4 N.Y. 2d 117, 149 N.E. 2d 328, 172 N.Y.S. 2d 808 [1958]).

A claim for punitive damages requires "morally reprehensible" conduct, not just unpleasant living conditions (*Jacobs v. 200 East 36<sup>th</sup> Owners Corp.*, supra ). Punitive damages cannot be asserted as a separate cause of action because it constitutes an element of the total claim for damages on underlying causes of action (*Einhorn v. Seeley*, 136 A.D. 2d 132, 525 N.Y.S. 2d 212 [N.Y.A.D. 1<sup>st</sup> Dept. 1988]).

This Court finds that the plaintiff has failed to meet its prima facie burden and establish a basis to obtain summary judgment on its first and second causes of action. Plaintiff cannot maintain its first and third causes of action for declaratory relief as to defendant's refusal to provide access or nuisance. Plaintiff is seeking a means of circumventing jurisdictional prerequisites by having this Court declare it is entitled to evict the defendant. Until proper notice is served and eviction proceedings are commenced, the relief sought in the first and third causes of action is premature. The plaintiff cannot obtain summary judgment but has stated a second cause of action for injunctive relief and defendant has not met its burden of proof for purposes of obtaining dismissal. There remain issues of fact concerning whether NY Administrative Code §27-2004 has been violated. Plaintiff's fourth cause of action seeks only punitive and exemplary damages, that relief can only be stated as an element of the total claim for damages on underlying causes of action.

Plaintiff has not asserted a basis to dismiss the defendant's first affirmative defense of lack of predicate notice. Plaintiff has asserted a basis to dismiss the second affirmative defense, since this action does not involve a claim for rent owed. Defendant's counterclaims pertaining to events occurring prior to the expiration of the relevant statute of limitations are time barred. Defendant has a stated a counterclaim for injunctive relief, but only as it pertains to harassment, there remain issues of fact as to whether her actions have been reasonable and whether defendant's actions violate NY Administrative Code

§27-2004. Plaintiff has stated a basis to dismiss the counterclaims for nuisance, trespass and intentional infliction of emotional distress. Defendant has not sufficiently stated a claim that the repairs were unwarranted and had no utility, that plaintiff acted either unlawfully or in an unlawful manner, or a claim of extreme and outrageous conduct. Plaintiff has stated a basis to dismiss the counterclaims for breach of warranty of quiet enjoyment and pursuant to Real Property Action and Proceedings Law §853 (RPAPL). Defendant has not established she was either actually or constructively evicted. Defendant has not stated a causal connection for purposes of maintaining the first counterclaim for breach of warranty of habitability. Defendant concedes in paragraphs 26-27 of the cross-motion that the eighth counterclaim states the same relief as the first counterclaim and both counterclaims seek a retroactive abatement of rent. The first and eighth counterclaims are dismissed.

Accordingly, it is ORDERED and ADJUDGED that plaintiff's motion pursuant to CPLR §3211[a][7], CPLR §3212[a], CPLR §3212[e], for summary judgment on its first and second causes of action and for summary judgment dismissing the defendant's first and second affirmative defenses and first through seventh counterclaims, is granted to the extent that the defendant's second affirmative defense, first, third, fourth, fifth, sixth, seventh and eighth counterclaims are severed and dismissed, and it is further,

ORDERED and ADJUDGED, that the second counterclaim seeking injunctive relief will remain in effect but only as to the asserted claim of harassment occurring prior to the expiration of the relevant statute of limitations,

ORDERED and ADJUDGED, that the remainder of the relief sought in plaintiff's motion is denied, and it is further,

ORDERED and ADJUDGED that defendant's cross-motion pursuant to CPLR §3211[a][1],[7] and CPLR §3212 for summary judgment dismissing the plaintiff's first, second, third and fourth causes of action is granted, to the extent that plaintiff's first, third and fourth causes of action are severed and dismissed without prejudice to the commencement of an eviction proceeding, the remainder of the relief sought is denied, and it is further,

ORDERED that plaintiff's second cause of action seeking a permanent injunction will remain in effect, and it is further,

ORDERED and ADJUDGED, that the remainder of the relief sought in defendant's cross-motion is denied.

ENTER:

**FILED**

AUG 27 2012

COUNTY CLERK'S OFFICE  
NEW YORK

MANUEL J. MENDEZ,  
J.S.C.

Dated: August 21, 2012

MANUEL J. MENDEZ  
J.S.C.

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