

**Tafrate v Gucciardo**

2014 NY Slip Op 30330(U)

January 24, 2014

Supreme Court, New York County

Docket Number: 111268/10

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

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

HON. JOAN A. MADDEN  
J.S.C.

PRESENT: \_\_\_\_\_  
Justice

PART 11

Index Number : 111268/2010  
TAFRATE, JILL  
vs.  
GUCCIARDO, RICHARD  
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 summary judgment  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

## FILED

FEB 06 2014

NEW YORK  
COUNTY CLERK'S OFFICE

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NYS SUPREME COURT - CIVIL

Dated: January 24, 2014

\_\_\_\_\_, J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
JILL TAFRATE and JOEL ROODMAN,

Plaintiffs,

INDEX NO. 111268/10

-against-

RICHARD GUCCIARDO and SUSAN GUCCIARDO,

**FILED**

Defendants.

FEB 06 2014

-----X  
JOAN A. MADDEN, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

This is an action for damages for personal injuries and breach of contract arising out of an alleged bed bug infestation. Defendants are moving for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint. Plaintiffs oppose the motion.

Plaintiffs leased defendants' East Hampton house from June 1, 2010 to September 12, 2010, for \$18,500. Plaintiffs allege that after sleeping at the house on the nights of June 12 and 18, 2010, they were bitten by bed bugs. Defendants hired an exterminator, who on July 23, 2010, reported that no live bed bugs were present in the house. Plaintiffs did not return to the house after June 18, 2010, and requested a full refund of the rental amount. Defendants offered to return \$5,000.

Plaintiffs thereafter commenced the instant action in August 2010, asserting claims for negligence and breach of contract. According to their Bill of Particulars, plaintiffs are seeking as damages the \$18,000 paid to defendants for the house rental, \$16,000 for medical and hospital expenses, and \$2,000 for "misc purchases." The parties have conducted discovery and defendants are now moving for summary judgment dismissing the complaint.

To support the motion, defendants rely on the parties' deposition testimony and argue they are entitled to dismissal of the first and second causes of action for negligence, on the ground that they had no actual or constructive notice of any bed bug infestation. Specifically, defendant Susan Gucciardo testified that she was responsible for cleaning the house, including changing the bedding and taking it to a laundry, and she did not observe any bugs during the cleaning she performed prior to plaintiffs' taking possession. Defendants also argue they are entitled to dismissal of the third cause of action for breach of contract, as the only applicable lease clause is paragraph 2, which states that the premises were to be delivered in a "clean condition." Defendants assert plaintiffs cannot establish a violation of paragraph 2, since plaintiff Jill Tafrate testified that when they first took possession of the house, it was in clean and neat condition, and the only further cleaning she described as needed was some dog hair on the floor. Defendants submit that even if bed bugs were present, the presence of bed bugs would not constitute a breach of contract. Defendants also argue that plaintiffs have not asserted a claim for breach of warranty of habitability and even if they have, plaintiffs would only be entitled to a rent abatement of less than 50% for one month, since they first complained on June 20 and defendants "promptly retained" Orkin Exterminating, which concluded on July 23 that there was no further infestation.

In opposing the motion, plaintiffs argue that defendants fail to establish prima facie entitlement to summary judgment, as they submit no admissible evidence establishing that they did not have constructive notice of the bed bugs. Specifically, plaintiffs assert defendants fail to submit an affidavit from an expert or an independent third-party as to the condition of their home prior to plaintiffs' arrival. Plaintiffs submit their own affidavit from a bed bug expert, Louis N.

Sorkin. Plaintiffs further argue that defendants breached the lease agreement requiring them to have the house professionally cleaned, as it is undisputed that defendants cleaned the house themselves. Plaintiffs assert that had a third-party had cleaned the house, defendants would potentially have a “non-biased account of the conditions in the home” prior to plaintiffs’ occupancy. Plaintiffs argue that defendants also breached the implied warranty of habitability by renting the house while it was infested with bed bugs. Plaintiffs point to their bill of particulars, which asserts that defendants constructively evicted them from the premises by permitting the bed bug infestation to prevent their safe habitation.

In reply, defendants argue that they have met their burden to establish lack of notice based on Susan Gucciardo’s testimony that she thoroughly cleaned the house within one week before plaintiffs’ arrived. Defendants also object that the findings of plaintiffs’ expert are based on “speculation and conclusory assertions.”

Ordinarily, the proponent of a motion for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986); see also JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384 (2005); Ayotte v. Gervasio, 81 NY2d 1062 (1993). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to demonstrate that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, *supra* at 324.

Defendants' motion for summary judgment is denied, as triable issues of fact exist as to whether they had constructive notice of the presence of bedbugs in their house. To constitute constructive notice, a defect must be visible and apparent, and must have existed for a sufficient length of time prior to the incident, for the owner to have discovered the defect and remedied it. See Gordon v. American Museum of Natural History, 67 NY2d 836 (1986); Pappalardo v. New York Health & Racquet Club, 279 AD2d 134 (1<sup>st</sup> Dept 2000).

Here, the parties' conflicting testimony raises issues of credibility as to whether defendants knew or should have known about the bed bugs prior to plaintiffs' occupancy, which can only be resolved at trial by the trier of fact, and not by summary judgment. See S.J. Capelin Assoc. Inc v. Globe Mfg Corp, 34 NY2d 338 (1974); Shapiro v. Boulevard Housing Corp, 70 AD3d 474 (1<sup>st</sup> Dept 2010). Despite defendant Susan Gucciardo's testimony that she did not observe any bed bugs when she cleaned the house and changed the bed linens the week before plaintiffs took occupancy, plaintiff Jill Tafrate testified that when she woke up on June 19, she had numerous bites all over her body, and later that day, when she inspected the bed and the area around the bed, she found a bugs on the floor near the bed, on the dust ruffle, and on the mattress pad, and bugs in "various forms of development" on the underside of the mattress pad; she observed "little blood stains" and "black lines" on the sheets; and when she pulled the bed out from the wall, she observed bugs on the wall, and at the base and in the corner of the molding. Notably, plaintiffs took photographs of the conditions in and around the bed.

Furthermore, the affidavit from plaintiffs' expert, Louis N. Sorkin, sets forth genuine issues of fact as to the length of time the bed bugs were present in defendants' house. Sorkin explains that he is a Board Certified Entomologist under the auspices of the Entomological

Society of America and Consultant at Entsalt Associates, and he specializes “in bed bug identification, biology, life history, canine detection, as well as eradication of bed bugs and bed bug infestations.” Sorkin finds that the number and multiple generations of bugs present, “including both nymph and adult bugs and fecal droppings,” indicate that the bed bugs were present before plaintiff’s arrival, and based on existence of hiding spots in the moldings and the bed bug debris under the bed ruffle and mattress pad, the “bed bug community predated” plaintiffs’ occupancy. Sorkin concludes that defendants should have noticed the “tell-tale signs” of bed bugs, consisting of the number of live and dead nymph and adult bugs, shredded skins of nymphs, and black marks on the mattress and bed linens, all of which would have been apparent had they “simply looked.”

While defendants object that Sorkin’s findings are “speculative and conclusory,” they have not offered an affidavit from their own expert to refute his opinions. Moreover, the fact that Sorkin did not physically inspect defendants’ house, and relies on plaintiffs’ testimony and photographs, does not discredit his opinion as a matter of law, since he is permitted to render his opinion based upon facts otherwise developed in the record. See Admiral Insurance Co v. Joy Contractors, Inc., 19 NY3d 448 (2012); Oboler v. City of New York, 31 AD3d 308 (1<sup>st</sup> Dept 2006). Thus, since plaintiffs have established the existence of triable issues of fact as to whether defendants had constructive notice of the presence of bedbugs in their house, defendants are not entitled to summary judgment dismissing plaintiffs’ negligence claims.

Defendants are likewise not entitled to summary judgment dismissing plaintiffs’ breach of contract claim. The third cause of action for breach of contract alleges that defendants “violated the express and implied terms and warranties contained in the aforesaid lease.”

Plaintiffs assert that their breach of contract claim is based on the undisputed fact that defendants did not have the house cleaned by a professional, in violation of paragraph 2 of the parties' Lease Agreement; defendant Susan Gucciardo testified that she personally cleaned the house. While defendants are correct that paragraph 2 of the lease agreement requires that the premises "shall be delivered in clean condition," paragraph 2 also includes an explicit provision requiring defendants to "have the premises professionally cleaned prior to occupancy." Moreover, as indicated in their Bill of Particulars, plaintiffs' breach of contract claim is also based on a breach of the implied warranty of habitability, and includes a theory of constructive eviction. The presence of bed bugs may constitute a breach of the warranty of habitability. See e.g. Valoma v. G-Way Management, LLC, 29 Misc3d 1222(A) (Civ Ct, Kings Co 2010); Bender v. Green, 24 Misc3d 174 (Civ Ct, NY Co 2009); Ludlow Properties, LLC v. Young, 4 Misc3d 515 (Civ Ct, NY Co 2004). At this time, however, the court need not make any determination as to the issue raised by defendants as to the measure of damages for such breach.

Based on the foregoing, defendants' motion for summary judgment is denied in its entirety. The parties shall proceed to mediation.

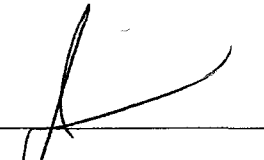
Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further ORDERED that the parties shall proceed to mediation.

DATED: January 24, 2014

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 FEB 06 2014  
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 J.S.C.