Needham v Migdal2 Mgt. 2010, LLC
2016 NY Slip Op 31253(U)
July 5, 2016
Supreme Court, New York County
Docket Number: 161690/2014
Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

COREY NEEDHAM,
Plaintiffs,
-against-
MIGDAL2 MANAGEMENT 2010, LLC, RONI ABUDI, and CARLOS "DOE",
Defendants.

INDEX NO. 161690/2014
MOTION DATE 05/25/2016
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 10 were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	5-8
Replying Affidavits	9-10

Cross-Motion: X Yes ☐ No

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

Upon a reading of the foregoing cited papers, it is ordered that defendants' motion and plaintiff's cross-motion are granted to the extent stated herein.

Corey Needham (herein "Plaintiff") rented the basement apartment (herein "apartment") at 307 East 104th Street, New York, N.Y. (herein "Building") from defendants Migdal2 Management 2010, LLC (herein "Migdal2") and Roni Abudi (herein "Abudi") pursuant to a lease dated June 3, 2013, (herein "Lease"). The Lease was for a two year term and a monthly rental amount of $1,400.

Plaintiff brought the instant action on November 24, 2014, issue was joined on January 20, 2015, and the parties proceeded with discovery. Pre-trial discovery conferences were held on April 29, 2015, September 23, 2015, and December 16, 2015.

The Complaint asserts twelve causes of action based on: the apartment being subject to rent stabilization laws, the apartment being declared illegal by the Department of Buildings (herein "DOB") because there is no residential Certificate of Occupancy for the apartment, Plaintiff being subjected to constructive and partial actual eviction from his apartment due to the lack of repairs and up keep of his apartment and the building, and Plaintiff being subjected to fear and harassment by Migdal2, Abudi, and Carlos "Doe" (herein "Carlos") (herein collectively "defendants") by their threats of retaliation for Plaintiff complaining and bringing court action against the defendants, for plaintiff's living conditions.

Defendants now move to strike nine out of the twelve causes of action, though it is not clear in defendants' moving papers whether this is a motion to dismiss or a motion for summary judgment. Defendants also move to dismiss the claims as against Defendant Carlos and seek leave to amend their answer to add a counterclaim for unpaid rent and additional rents due from plaintiff.

Plaintiff opposes the motion, and cross-moves to compel defendants to comply with plaintiff's discovery demands, and preclude defendants from further discovery. In opposition to plaintiff's cross-motion, defendants assert for the first time that defendants' are moving to dismiss the nine causes of action pursuant to CPLR §§3211(a)(7) and 3212. In addition, defendants contend that upon the nine causes of action being dismissed, the scope of discovery should be limited to only those materials relevant to causes of action for monetary damages.

Defendants argue that because plaintiff voluntarily surrendered the apartment to defendants on January 15, 2015, he no longer has standing to seek any preliminary injunctive relief. Further, defendants argue that the claims as against defendant Carlos should be dismissed because defendant Carlos is the agent, as superintendent of the building, of the principal Migdal2. Defendants specifically argue that causes of action one through six, eight, ten and eleven should be dismissed. Again, the motion papers do not make clear which arguments the Court should address under either a motion to dismiss or a motion for summary judgment.

In order to prevail on a motion for summary judgment, 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 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). 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(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

In view of the evidence provided, or lack thereof, defendants have not stated a basis for summary judgment, therefore the Court will address the arguments under §3211(a)(7).

CPLR §3211(a)(7) provides that a party may move for a judgment dismissing a cause of action on the grounds that the pleading fails to state a cause of action. On a motion to dismiss the complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts alleged in the pleading to be true, afford the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Leon v. Martinez 84 N.Y.S.2d 83, 614 N.Y.S.2d 972, 638 N.E.2d 511). The test of the sufficiency of a complaint is whether liberally construed it states in some recognizable form a cause of action known to the law (Union Brokerage, inc., v. Dover Insurance Company, 97 A.D. 2d 732, 468 N.Y.S.2d 885 [1st. Dept. 1983]). The sole criterion is whether the pleading states a cause of action, and if 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 (Quinones v. Schaap, 91 A.D. 3d 739, 937 N.Y.S.2d 262 [2nd. Dept. 2012]).

Applying the liberal pleading standard afforded in CPLR 3211(a)(7), plaintiff has sufficiently stated causes of action one through three, five and six. However, causes of action four, eight, ten and eleven must be dismissed.

Plaintiff asserts claims for harassment against defendants Abudi and Carlos in cause of action four, and claims for intentional harassment against the defendants under cause of action ten. However, "...New York does not recognize a common-law cause of action for harassment." (Edelstein v. Farber, 27 A.D.3d 202, 811, N.Y.S.2d 358 [1st Dept. 2006], citing Hartman v. 536/540 E. 5th St. Equities, 19 A.D.3d 240, 797 N.Y.S.2d 73 [1st Dept. 2005]). Therefore, causes of action four and ten are dismissed.

The complaint is dismissed in its entirety as to defendant Carlos. As being the superintendent, and thus the agent of Migdal 2 and Abudi, in order to be held liable "it must appear that the acts were other than the ordinary acts of [agents] acting for their principal or that they were in exclusive and complete control of the management and operation of the building." Michaels v. Lispenard Holding Corp., 11 A.D.2d12, 201 N.Y.S.2d 611, [1st Dept. 1960]).

The eighth cause of action asserts that the defendants' unlawful deceptive acts and practices violate GBL §349. However, plaintiff's allegations are asserted as only a private dispute between tenant and landlord... "and not consumer-oriented conduct aimed at the public at large, as required by the statute." (Aguaiza v. Vantage Properties, LLC, 69 A.D. 3d 422, 893 N.Y.S.2d 19 [1st Dept. 2010], citing City of New York v. Smokes-Spirits.com, Inc., 12 N.Y.3d 616, 883 N.Y.S.2d 772, 911 N.E.2d 834 [2009]). Therefore, the eighth cause of action is dismissed.

The eleventh cause of action asserts that the Notice of Termination plaintiff received in October of 2014 violates Multiple Dwelling Law §34, and seeks declaratory and injunctive relief in relation thereto. However, because plaintiff has since surrendered the apartment, there is nothing stated in this cause of action upon which relief could be granted. This injunctive and declaratory relief has been rendered moot as a result of plaintiff no longer living in the apartment. Therefore, the eleventh cause of action is dismissed.

Furthermore, in the opposition and cross-motion, plaintiff has since withdrawn his claims for injunctive relief as to the Complaint in general.

Defendants also seek leave to amend their answer in order to institute a counterclaim for unpaid rents and additional rents due defendants from plaintiff's failure to pay from March 2014 through the end of the lease term which was June of 2015.

Leave to amend pleadings pursuant to CPLR 3025 (b) should be freely given "absent prejudice or surprise resulting directly from the delay" (Anoun v. City of New York, 85 A.D.3d 694, 926 N.Y.S.2d 98, 99 [1st Dept., 2011] citing to, Fahey v. County of Ontario, 44 N.Y.2d 934, 935, 408 N.Y.S.2d 314, 380 N.E.2d 146 [1978]), "or if the proposed amendment is palpably improper or insufficient as a matter of law" (McGhee v. Odell, 96 A.D.3d 449, 450, 946 N.Y.S.2d 134, 135, [1st. Dept., 2012] citing to, Shepherd v. New York City Tr. Auth., 129 A.D.2d 574, 574, 514 N.Y.S.2d 72 [2nd Dept., 1987]). "Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment" (Valdes v. Marbrose Realty, Inc., 289 A.D.2d 28, 29, 734 N.Y.S.2d 24 [1st Dept., 2001]).

Though issue has been joined, it appears that not much discovery has been exchanged or completed. There is no showing that plaintiff will be prejudiced by the addition of this counterclaim. The Defendants annex the proposed amended answer and counterclaims and it is not palpably improper (Mot. Exh. F). Leave to serve the amended answer and counterclaims is granted.

Plaintiff cross-moves for an Order compelling defendants to respond to plaintiff's discovery demands and to preclude defendants from seeking any further discovery. In the Status Conference Order of December 16, 2015, defendant was directed to respond to plaintiff's discovery and inspection by March 16, 2016, or if defendant failed to respond, to be preclude them from further discovery. Defendants filed the instant motion on March 14, 2016.

CPLR 3214(b) provides in part that "Service of a notice of motion under 3211 [or] 3212...stays disclosure until determination of the motion, unless the court orders otherwise."

Disclosure was stayed pending the determination of the instant motion, no matter how belatedly it was made. The parties may now continue to proceed with discovery.

Accordingly, it is hereby ORDERED, that Defendants' Migdal2 Management 2010 LLC's, Roni Abudi's, and Carlos "Doe's" motion is granted to the following extent:

-Causes of action four, eight, ten and eleven are hereby dismissed;

-The complaint as against and counterclaims as asserted by Carlos "Doe" are hereby dismissed;

-Defendants Migdal2 Management 2010, LLC and Roni Abudi are granted leave to serve an Amended Answer and Counterclaims,

and it is further,

ORDERED, that causes of action four, eight, ten, and eleven asserted in the Complaint are hereby severed and dismissed, and it is further,

ORDERED, that the complaint as against Defendant Carlos "Doe" and counterclaims as asserted by Defendant Carlos "Doe" are hereby severed and dismissed, and it is further,

ORDERED, that the Amended Answer and Counterclaims attached as Exh. F to the instant motion are deemed served and filed, and it is further,

ORDERED, that Defendants Migdal 2 Management 2010 LLC and Roni Abudi are to respond to plaintiff's notice for discovery and inspection within 30 days from the date of service of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that within 20 days from the date of entry of this Order, Defendants serve a copy of this Order upon the Clerk of the Court who is directed to enter judgment dismissing the fourth, eighth, tenth and eleventh causes of action in the complaint, and it is further,

ORDERED, that the parties appear for a Status Conference in IAS Part 13, 71 Thomas Street, Room 210, New York, New York 10013, at 9:30 A.M., on September 21, 2016.

ENTER:

Dated: July 5, 2016

MANUEL J. MENDEZ
J.S.C. MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE