Brown v BK 418 LLC
2018 NY Slip Op 33330(U)
November 29, 2018
Supreme Court, Kings County
Docket Number: 7665/2015
Judge: Lara J. Genovesi

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 29th day of November 2018.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

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MARY BROWN and SANDRETTA BROWN,

Index No.: 7665/2015

Plaintiffs,

-against-

DECISION AFTER TRIAL

BK 418 LLC and GREENROCK MANAGEMENT COMPANY,

Defendants,

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Procedural Background

This action was brought against a landlord and property manager to recover for property damage and damages for mental anguish resulting from a flood.

This action was commenced on June 17, 2015. Issue was joined on or about September 15, 2015. The matter was assigned to this Court for trial on June 24, 2018. A nonjury trial was held before this Court, on July 19, 2018 and July 25, 2018. The matter was then adjourned to October 9, 2018, for submission of the written summations, proposed findings of fact and the minutes of the trial. The Court received plaintiffs' submission on October 9, 2018. A letter was sent to counsel on October 12, 2018, which

stated that if defendants' submission was not received by October 26, 2018, the matter would be fully submitted. Defendants' submission was not received, and the matter was fully submitted on October 26, 2018.

Summons and Complaint

Plaintiffs allege in their summons and complaint that defendants were negligent,

> in failing to use reasonable care; failing to use caution; in maintaining said premises in such a defective and deteriorated condition that it was rendered unsafe and liable to cause injury to the tenants thereat and more particularly the plaintiffs herein; in causing and allowing the premises to become and remain flooded and dangerous which was liable to cause injury and which did cause injury to the plaintiffs; in causing and permitting the pipes thereat to become frozen; in providing inadequate heat; in failing to warn the plaintiffs of such hazardous conditions or to take any precautions whatsoever in order to prevent the flood; in failing to remedy the condition despite having due knowledge and notice of same; in failing to place barricades or warning signs about the defect; in allowing the area to become and remain a trap and a hazard to persons lawfully and properly thereon; in failing to protect the plaintiffs and their property despite having a duty to do so; in failing to exercise prudence and caution; and in violating all applicable statutes and ordinances.

(Summons and Complaint at ¶ Eighteenth).

Findings of Fact

The plaintiffs are mother Mary Brown (Mary) and daughter Sandretta Brown (Sandretta). Sandretta testified that she and her mother, Mary, lived at 815 Marcy Avenue (the property), apartment 3, a rent stabilized apartment, for well over 40 years, without a lease.

In June 2013, defendant BK 418 LLC purchased the property (*see* Trial Exhibit, Plaintiff's 1). On July 8, 2013, a notice was provided to the tenants of the property. The notice, which is on Greenrock Management LLC (Greenrock) letterhead, indicates that the rent should be paid to Mr. Miller or sent to Greenrock. It further indicated that Greenrock should be contacted by telephone or email should any repairs be required. The plaintiffs each signed a copy of the notice, acknowledging their receipt of it (*see* Trial Exhibit, Plaintiff's 2). Their rent was $1,100.00 each month at that time. Plaintiff testified that when defendants purchased the building, Mr. Miller and Mr. Abraham Grunhut visited plaintiffs' apartment and told plaintiffs that the defendants did not intend to renew their lease. Plaintiffs' replied that they did not have a lease, and that Mary "went through DHCR" (Trial Transcript, July 25, 2018 at p 18, ll 7-12; *see also* Trial Transcript July 19, 2018 at p 3, ll 15-24).[1]

In December 2013, the plaintiffs were the only occupied apartment in this brownstone building. The plaintiffs each testified that they were out of town from December 26, 2013, through Saturday, January 11, 2014, for a "home going" memorial service for Anthony Brown, their brother and son. During their drive home to Brooklyn on January 11, 2014, they received a call from their neighbor from the attached building, Sara Peterson, who indicated that the Brown's apartment was flooded. On their return, the apartment was dark, and the stairs were soaked with water. Water was dripping down

[1] This Court notes that HCR, or the New York State Homes and Community Renewal includes of the Office of Rent Administration which provides information on rent stabilized or rent controlled apartments.

from the ceiling. To enter the apartment, Sandretta had to kick in the apartment door. They saw that the ceiling collapsed, the floors buckled, the carpet was soaked, and the water remained in the apartment, at a level so high as to cover their shoes. Sandretta left a voicemail with Greenrock. The next day "Mr. Miller and Mr. Green came to the house to see . . . and Mr. Green gave my mother and I money to pay for one-night room at the Best Western on Atlantic Avenue" (Trial Transcript July 19, 2018, p 10 ll 9-13). Plaintiff testified that the owner learned of the water damage when plaintiff called him (*see id.* at p 34, ll 28-25; p 35, ll 1-4).

It was the plaintiffs' understanding that the cause of the flood was a burst pipe from the apartment above her on the fourth floor. Mary testified that their apartment had a radiator with no thermostatic valve. There was a knob on the radiator that regulated her heat. She indicated that the oil for the entire building was delivered to the basement. And they did not have access to the basement. Further, she testified that "I leave my heat on. And I was paying for the heat." (Trial Transcript July 19, 2018, p 48 ll 21). Maureen Sobers (Sobers) is the neighbor in the attached building to plaintiffs' apartment who first discovered the flood. She lives on the second floor. Sobers testified that when the heat is on in the attached building, the shared wall is warm. At the time of the leak the shared wall was cold (*see* Trial Transcript July 25, 2018, p 4 ll 16-20). The walls felt cold for a couple of days prior to the flood and there was no heat on when Sobers entered the plaintiffs' apartment during the flood (*see* Trial Transcript July 25, 2018, p 6 ll 13-25, p 7 ll 1-5).

The extensive damage to the plaintiffs' apartment is documented in photographs (*see* Trial Exhibit, Plaintiff's 5 a-gg). The plaintiffs were guests at the Best Western from January 12, 2014, through February 24, 2014, for a total cost of $4,573.74 (Trial Exhibit, Plaintiff's 6). Sandretta testified that her landlord gave her $200 for the hotel on their first night stay. Thereafter, the plaintiffs moved into temporary housing at 801 Willoughby Street, Brooklyn, New York until July 2014. During this period, the plaintiffs paid rent, less the costs of storage for their items that they salvaged and mailbox fees. During this time, the plaintiffs paid rent in the amount of $583 (Trial Transcript July 25, 2018, p 13 l 1).[2]

The plaintiffs had renter's insurance through Liberty Mutual at the time of the flood. Sandretta testified the plaintiffs received $36,000.00[3] from Liberty Mutual but their "rental insurance did not cover everything" (Trial Transcript July 19, 2018, p 15 ll 9-10); to wit:

1) Two leather sleeper sofas (*see* Trial Exhibit, Plaintiff's 5m-n) purchased in March 2013 for $2,000.00;
2) Cast iron tub (*see* Trial Exhibit, Plaintiff's 5y), purchased in 1971 for $2,000.00, estimated value $2,400.00;
3) Brass chandelier, estimated value $300.00[4]

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[2] The plaintiffs do not have a claim for reimbursement for the period after they moved into temporary housing (*see* Trial Transcript July 19, 2018, p 15 ll 5-7).

[3] A printout from Liberty Mutual of what items were covered was available but neither party sought it to be marked for identification or moved into evidence.

[4] It is unclear when plaintiffs purchased the brass chandelier. Sandretta testified that she is not quite sure when the chandelier was purchased, and that it was purchased in 2013 (*see* Trial Transcript, July 19, 2018, p 17 ll 15-19). However, she later testified that the chandelier was purchased in 2006 at the same time as the two ceiling fans (*see id.* at p 19, ll 9-13).

4) Cost of cleaning beige couches $200.00;
5) Two ceiling fans (*see* Trial Exhibit, Plaintiff's 5r), purchased approximately in 2006, cost to replace $300.00;
6) Rare comic books (*see* Trial Exhibit, Plaintiff's 7), unknown value;
7) Rug wall hanging, purchased in 2013, unknown value;

All of the fixtures for which plaintiffs seek monetary recovery are fixtures that plaintiffs purchased and installed in their rental apartment. On cross examination, Sandretta testified that the renter's insurance would not cover the items purchased in 2013; the wall hanging and the two leather sofas. Also, she stated that she received an appraisal for the cast iron tub for $2,400.00 but no appraisal was marked for identification or moved into evidence at trial. She further testified that the tub was not damaged, and she instructed the landlord to leave the tub during the renovation, but the landlord claimed the tub was damaged and replaced it with a fiberglass tub. She also testified that the ceiling fans were not replaced but central air-conditioning was installed. Sandretta testified that she did not ask the owner after the flood to keep the cast iron tub or the chandelier. Rather, prior to the flood she had a conversation with the landlord about apartment renovations where she stated that she wants to keep her tub and lights (*see* Trial Transcript July 19, 2018, p 37 ll 17-25; p 38 ll 1-6).

Plaintiffs also seeks reimbursement for the cost of food during their stay at the Best Western. Plaintiffs contend that since the hotel did not have a kitchenette, they had no choice but to purchase their meals out. Sandretta testified that the cost of the plaintiffs' meals from January 12, 2014, through February 24, 2014, was $60.00 per day

(*see* Trial Transcript July 19, 2018, p 22 ll 17-21). She estimates that the cost of meals while living at their apartment is approximately, $40.00 per day (*see* Trial Transcript July 19, 2018, p 22 ll 9-16). Sandretta testified that she had receipts for the food "in my bag" but no receipts were marked for identification or moved into evidence at trial (*see* Trial Transcript July 19, 2018, p 41 ll 7-11).

Abraham Grunhut testified that he was a "member" of BK 418 LLC and Greenrock. He further testified that BK 418 sold the property and the entity is no longer active (Trial Transcript July 25, 2018, p 9 ll 21-25; p 10 ll 1-9). He did not recall the names of other members of the LLC, when the property was sold or if the there was a profit realized from the sale (Trial Transcript July 25, 2018, p 1 ll 2-25; p 15 ll 1-4). He stated the Greenrock "just collect[ed] the rents" (Trial Transcript July 25, 2018, p 10 at 10-12). Grunhut testified that "the tenant [plaintiffs] left for two days and shut off the heat. There was a pipe busted and damaged some stuff" (Trial Transcript July 25, 2018, p 10 ll 19-20). He further testified that he first learned of the leak weeks later, when the property manager told him. He stated that the "[p]roperty manager at the time reimbursed them [plaintiffs], relocated them and had the agreement to pay and they were compensated in full" (Trial Transcript July 25, 2018, p 11 ll 4-6). The rent was waived until the plaintiffs could be accommodated.

Plaintiffs' complaint contains four causes of action. Plaintiffs seek $15,000.00 for damage to their cast iron tub, three fire resistant steel gates, cast iron cage for the air conditioning unit, a brass chandelier, two wooden brass ceiling fans, wall to wall plush carpeting, a hanging wall rug (*see* Complaint, at Twentieth ¶). Plaintiffs also seek

$4,573.74, the cost of the hotel from January 12, 2014 through February 24, 2014 (*see* Complaint, at Twenty-third ¶). Plaintiffs further seek $2,000.00 for the cost of meals eaten at restaurants (*see* Complaint, at Twenty-sixth ¶). Lastly, plaintiffs allege to have sustained "mental and physical pain and discomfort and anguish including but not limited to living away from their . . . apartment" (*see* Complaint, at Twenty-seventh ¶). As a result of this, plaintiffs seek damages in the amount of $50,000.00 (*see* Complaint, at Thirtieth ¶).

Discussion

Credibility

It is well-established that "where the court's findings of fact rest in large measure on considerations relating to the credibility of witnesses ... deference is owed to the trial court's credibility determinations" (*Ganai v. 6910 Fort Hamilton Parkway Corp.*, 149 A.D.3d 914, 52 N.Y.S.3d 411[2 Dept., 2017] citing *Melville Capital, LLC v. Gugick*, 144 A.D.3d 999, 42 N.Y.S.3d 210 [2 Dept., 2016]; *see Superior Vending Servs., Inc. v. Workmen's Circle Home & Infirmary Found. for Aged,* 148 A.D.3d 960, 49 N.Y.S.3d 714 [2 Dept., 2017]). "In a non-jury trial, evaluating the credibility of the respective witnesses and determining which of the proffered items of evidence are most credible are matters committed to the trial court's sound discretion" (*Goldstein v. Guida*, 74 A.D.3d 1143, 904 N.Y.S.2d 117 [2 Dept., 2010], quoting *Ivani v. Ivani*, 303 A.D.2d 639, 757 N.Y.S.2d 89 [2 Dept., 2003], quoting *L'Esperance v. L'Esperance*, 243 A.D.2d 446, 663 N.Y.S.2d 95 [2 Dept., 1997]).

> The credibility of the witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, [are] issues for the trier of the facts . . . The memory, motive, mental capacity, accuracy of observation and statement, truthfulness and other tests of the reliability of witnesses can be passed upon with greater safety by a trial judge who sees and hears the witnesses than by appellate judges who simply read the printed record'" (*Healy v Williams*, 30 AD3d 466, 468, quoting *Barnet v Cannizzaro*, 3 AD2d 745, 747). Accordingly,"[w]here the trial court's findings of fact rest in large measure on considerations relating to the credibility of witnesses, deference is owed to the trial court's credibility determinations" (*Bennett v Atomic Prods. Corp.*, 132 AD3d 928, 930).

(*Annan v. New York State Off. Of Mental Health*, 165 A.D.3d 1020, -- N.Y.S.3d -- [2 Dept., 2018]).

This Court was both the finder of facts and the determiner of questions of law. The Court considered the testimony of the witnesses, gave weight to that testimony, and generally determined the reliability of the witnesses' testimony. The Court also considered the interest or lack of interest in the case and the bias or prejudice of the witnesses.

At the outset, although the plaintiffs failed to proffer evidence to support the value of many of their asserted losses, this Court finds their testimony of the events credible. Furthermore, plaintiffs provided photographs documenting the extensive damage to their apartment and belongings. This Court further finds the testimony of plaintiffs' neighbor Sobers credible. Given Abraham Grunhut's status as a "member" of BK 418 LLC, coupled with his limited knowledge or memory of the events surrounding the flood, the ensuing renovation of plaintiffs' apartment and basic facts surrounding the subsequent

sale of the property, this Court finds much of his testimony ineffectual and, at times, incredible.

Negligent Property Damage

"To establish a prima facie case of negligence on the part of the defendant, the plaintiff was required to show that '(1) the defendant owed the plaintiff a cognizable duty of care, (2) the defendant failed to discharge that duty and (3) the plaintiff suffered damage as a proximate result of such failure'" (*Distribuidora Nacional De Disco of New York, Inc. v. Rappaport*, 92 A.D.2d 559, 459 N.Y.S.2d 307 [1983], quoting *Donohue v. Copaigue Union Free School Dist.*, 64 A.D.2d 29, 407 N.Y.S.2d 874 [2 Dept., 1978], *affd.* 47 N.Y.2d 440, 418 N.Y.S.2d 375 [1979]).

In the case at bar, it is undisputed that BK 418 was the owner and landlord of the property and Greenrock was the management company for the property. It is also undisputed that the damage to plaintiffs' property was caused by flooding from a burst pipe, due to the cold temperature and a lack of heat in the nearly vacant building.

Duty

"Premises liability, as with liability for negligence generally, begins with duty" (*Alnashmi v. Certified Analytical Grp., Inc.*, 89 A.D.3d 10, 929 N.Y.S.2d 620 [2 Dept., 2011], citing *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 611 N.Y.S.2d 817 [1994]). "Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Garda v. Paramount Theatre, LLC*, 145 A.D.3d 964, 44 N.Y.S.3d 163

[2 Dept., 2016], quoting *Espinal v. Melville Snow Constrs.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120 [2002]).

"A landowner's duty may arise under the common law, by statute, or by regulation…or it may be assumed by agreement or by a course of conduct [internal citations omitted]" (*Alnashmi v. Certified Analytical Grp., Inc.*, 89 A.D.3d 10, 929 N.Y.S.2d 620 [2 Dept., 2011]; *see Chapman v. Silber,* 97 N.Y.2d 9, 734 N.Y.S.2d 541 [2001]; *Ritto v. Goldberg,* 27 N.Y.2d 887, 889, 317 N.Y.S.2d 361 [1970]).

> Under New York common law, as significantly modified in *Basso v. Miller* (40 N.Y.2d 233, 386 N.Y.S.2d 564, 352 N.E.2d 868; *see also Peralta v. Henriquez,* 100 N.Y.2d at 143–144, 760 N.Y.S.2d 741, 790 N.E.2d 1170), a landowner "has a duty to maintain his or her premises in a reasonably safe condition" (*Walsh v. Super Value, Inc.,* 76 A.D.3d 371, 375, 904 N.Y.S.2d 121), taking into account all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (*see Galindo v. Town of Clarkstown,* 2 N.Y.3d 633, 636, 781 N.Y.S.2d 249, 814 N.E.2d 419;

(*Alnashmi v. Certified Analytical Grp., Inc.*, 89 A.D.3d 10, *supra*).

However, "[e]ven in the absence of a duty to repair an allegedly defective condition, liability may attach to an out-of-possession landlord who has affirmatively created a dangerous condition or defect" (*Bartels v. Eack*, 164 A.D.3d 1202, 83 N.Y.S.3d 657 [2 Dept., 2018], citing *Calderon v. 88–16 N. Blvd, LLC,* 135 A.D.3d 681, 24 N.Y.S.3d 135 [2 Dept., 2016]; *see also Utica Mut. Ins. Co. v. Brooklyn Navy Yard Dev. Corp.*, 83 A.D.3d 817, 921 N.Y.S.2d 287 [2 Dept., 2011]).

Here, plaintiffs established that defendants owned and managed the property at 815 Marcy Avenue. It is undisputed that plaintiffs did not have a written lease to the

apartment. Further, although plaintiffs pled that defendants had a duty pursuant to "applicable statutes and ordinances", plaintiffs failed to allege violation of any specific statutes. Further, plaintiffs testified that defendants would frequently re-enter the premises to make any necessary repairs, when necessary (*see* Trial Transcript, July 19, 2018 at p 36 ll 22-25; p 37 ll 1-2).

Even assuming, arguendo, that defendants created a duty by course of conduct, they, as property owners also had a common law duty to keep the property in reasonably safe condition. In the instant case, plaintiffs' conclusions of law rely solely on common law duty for the owner and managing company to "use reasonable care to keep the premises in a reasonably safe condition for the protection of its tenants" (Plaintiffs' Findings of Fact and Conclusions of Law, Conclusions of Law at ¶¶ Fourth – Fifth). Similarly, plaintiffs pled four causes of action based upon defendants' alleged failure to exercise reasonable care and failure to maintain the premises (see Complaint at ¶ Eighteenth).

Breach and Causation

Plaintiffs allege that defendants breached their duty of care by failing to properly heat the building and this breach caused the pipe to burst and flood their apartment. Here, plaintiffs do not assert that defendants had actual or constructive notice of an existing problem with the heat. Rather, plaintiffs maintain that "the heat must have been turned" off in the building, while they were away, which caused the pipe to burst on the fourth floor (*see* Trial Transcript July 19, 2018 at p 48 11-25; p 49 ll 1-2).

"To establish a prima facie case of negligence based wholly on circumstantial evidence, [i]t is enough that [the plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred [internal quotation marks omitted]" (*Quiroz v. 176 N. Main, LLC*, 125 A.D.3d 628, 3 N.Y.S.3d 103 [2 Dept., 2015], quoting *Schneider v. Kings Hwy. Hosp. Ctr.*, 67 N.Y.2d 743, 744, 500 N.Y.S.2d 95 [1986]).

> "The law does not require that plaintiff's proof positively exclude every other possible cause of the accident but defendant's negligence" (*Schneider v. Kings Hwy. Hosp. Ctr.*, 67 N.Y.2d at 744, 500 N.Y.S.2d 95, 490 N.E.2d 1221 [interna l quotation marks omitted]; *see Gayle v. City of New York*, 92 N.Y.2d 936, 937, 680 N.Y.S.2d 900, 703 N.E.2d 758). "Rather, [the plaintiff's] proof must render those other causes sufficiently 'remote' or 'technical' to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Schneider v. Kings Hwy. Hosp. Ctr.*, 67 N.Y.2d at 744, 500 N.Y.S.2d 95, 4 90 N.E.2d 1221; *see Gayle v. City of New York*, 92 N.Y.2d at 937, 680 N.Y.S.2d 900, 703 N.E.2d 758). "A plaintiff need only prove that it was more likely or more reasonable that the alleged injury was caused by the defendant's negligence than by some other agency" (*Gayle v. City of New York*, 92 N.Y.2d at 937, 680 N.Y.S.2d 900, 703 N.E.2d 758 [internal quotation marks and citations omitted];

(*Hernandez v. Alstom Transp., Inc.*, 130 A.D.3d 681, 13 N.Y.S.3d 232 [2 Dept., 2015]; *see also Figueroa v. City of New York*, 5 A.D.3d 432, 773 N.Y.S.2d 66 [2 Dept., 2004]; *Bardi v. City of New York*, 293 A.D.2d 505, 739 N.Y.S.2d 747 [2 Dept., 2002]).

Mary testified that when they left on December 26, 2013, the heat in their apartment was on. They did not have a thermostat; they controlled the heat in their unit

by turning a knob on the radiator.[5] Sandretta testified that the building's heat controls are located in the basement. Plaintiffs, as tenants, did not have access to the basement (*see* Trial Transcript July 25, 2018, at p 17, ll 8-21). The building was vacant at the time, except for the plaintiffs' unit on the third floor.

It can be reasonably inferred that since plaintiffs were away from home for approximately 17 days prior to the flood and the building was vacant except for plaintiffs' unit, no one had access to the building's heat controls at the time of the incident, except for defendants and their agents. Abraham Grunhut, a member of defendant BK 418 LLC, testified that "the tenant left for two days and shut off the heat. Therefore, there was a pipe busted and damaged some stuff" (*id.* at p 10, ll 18-20). The court finds this testimony incredible. According to the plaintiffs' neighbor, Sobers, she could tell that the heat had been turned off for only "a couple of days" prior to the flood because she could not feel any heat from their adjoining wall (*see* Trial Transcript, July 25, 2018 at p 6, ll 6-25). There is no testimony to support the proposition that plaintiffs turned the heat off before they left for their trip.

Although there is no direct evidence to demonstrate that defendants turned the heat off, plaintiffs need only show that other possible causes are too remote or technical for the trier of fact to reach a decision based upon logical inferences, rather than speculation (*see Hernandez v. Alstom Transp., Inc.*, 130 A.D.3d 681, *supra, citing Schneider v. Kings Hwy. Hosp. Ctr.*, 67 N.Y.2d 743, *supra*). Here, plaintiffs have met that burden. Under

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[5] Plaintiff testified that "you have to leave and it stays on through the whole building. That mean[s] the whole building was on, not just my apartment" (*see* Trial Transcript July 19, 2018, at p 50, ll 1-4).

this standard, the evidence presented by plaintiffs was also sufficient for this Court to reasonably infer "based on ordinary knowledge and experience, that the lack of heat in a building, when outside temperatures are below freezing, will cause the water in the pipes to freeze and that the pipes can rupture, resulting in flooding when the temperature moderates" (*Distribuidora Nacional De Disco of New York, Inc. v. Rappaport*, 92 A.D.2d 559, *supra,* citing *Cadby v. Hill,* 231 N.Y. 323, 132 N.E. 104 [1921]).

Damages

"The 'fundamental purpose' of compensatory damages is to have the wrongdoer 'make the victim whole'" (*E.J. Brooks Co. v. Cambridge Sec. Seals*, 31 N.Y.3d 441, 105 N.E.3d 301 [2018], quoting *Sharapata v. Town of Islip,* 56 N.Y.2d 332, 452 N.Y.S.2d 347 [1982]). "The goal is to restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred (*McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372 [1989], citing 1 Minzer, Nates, Kimball, Axelrod & Goldstein, Damages in Tort Actions §§ 1.00, 1.02). "'The damages must be compensatory only' and must result 'directly from and as a natural consequence of the wrongful act'" (*E.J. Brooks Co. v. Cambridge Sec. Seals*, 31 N.Y.3d 441, *supra,* quoting *Steitz v. Gifford*, 280 N.Y. 15, 19 N.E.2d 661 [1939]).

"[T]he court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded [in the complaint], imposing such terms as may be just" (CPLR § 3017[a]). "The measure of damages for injury to property resulting from negligence is the difference in the market value immediately before and immediately after the accident, or the reasonable cost of repairs necessary to restore it to its former

condition, whichever is the lesser" (*Oparaji v. 245-02 Merrick Blvd, LLC*, 149 A.D.3d 1091, 54 N.Y.S.3d 408 [2 Dept., 2017], quoting *Babbitt v. Maraia,* 157 A.D.2d 691, 549 N.Y.S.2d 791 [2 Dept., 1990]). "Where property is totally destroyed, 'the measure of damages is its reasonable market value immediately before destruction'" (*Reed v. Cornell Univ.*, 138 A.D.3d 816, 30 N.Y.S.3d 163 [2 Dept., 2016], quoting *Gass v. Agate Ice Cream, Inc.,* 264 N.Y. 141, 144, 190 N.E. 323 [1934]).

> The market value of a merchant's goods is the price at which they could be replaced in the market, not the retail price at which they could be sold (*see Wehle v. Haviland,* 69 N.Y. 448, 450; *Fultonville Frozen Foods v. Niagara Mohawk Power Corp.,* 91 A.D.2d 732, 457 N.Y.S.2d 978). This is because allowing recovery of the retail value of damaged goods "would in effect overcompensate the merchant by allowing recovery of unearned profits" (2–248 Warren's Negligence in New York Courts § 248.01[3][b] [2013]).

(*Ever Win, Inc. v. 1-10 Indus. Assocs.*, 111 A.D.3d 884, 976 N.Y.S.2d 123 [2 Dept., 2013]).

Lost Items

Plaintiffs pled that the following items were lost as a result of the flood and subsequent apartment renovation: (1) a cast iron bathtub; (2) three fire resistant steel gates; (3) cast iron cage for the air conditioning unit; (4) brass chandelier; (5) two wooden brass ceiling fans; (6) wall to wall plush carpeting; (7) a hanging wall rug (*see* Complaint at ¶ Twentieth). Plaintiffs also seek reimbursement for two convertible leather couches with sofa beds, a comic book collection (*see* Trial Transcript, July 19, 2018 at p 15, ll 12-13, ll 21-25). Plaintiffs seek a total of $15,000.00 in damages for the value of these items.

Of the above listed items, plaintiffs testified that the carpeting, two leather couches, wall rug and comic book collection were totally destroyed in the flood. Inasmuch as plaintiffs failed to provide admissible proof of the reasonable market value of these items immediately prior to their destruction, this Court is unable to determine the appropriate measure of damages (*see Reed v. Cornell Univ.*, 138 A.D.3d 816, *supra*). With respect to the leather couches, Sandretta testified that they were purchased in 2013 for $2,000.00, but they no longer have a receipt for that purchase and testified that the store has since gone out of business (*see* Trial Transcript, July 19, 2018 at p 16, ll 1-7). There was no admissible proof provided as to their reasonable market value immediately prior to destruction. Plaintiff testified that the couches were not covered by their renters insurance policy (*see id.* at p 28, ll 22-25; p 29 ll 2-6).

Plaintiff further testified that a collection of "rare" comic books, which belonged to her and her older brother, was destroyed in the flood (*see id.* at p 19, ll 19-23; p 20 ll 21-23). Although plaintiffs testified that the collection included "Super Marvel, Black Panther, The Justice League, Josie and the Pussycats", etc., the plaintiffs provided no further information as to how many comic books were in the collection, the condition and age of the comic books or an estimation of their value (*see id.* at p 31, ll 20-25). Plaintiff testified that she "didn't have time to go get an appraisal from the comic store" (*see id.* at ll 24-25). The value of the collection is unknown (*see id.* at ll 24-25).

Plaintiffs seek compensation for a wall rug, which Mary purchased with the couches (*see id.* at p 38, ll 24-25; p 39, l 1). Sandretta testified that the wall rug was water damaged from the flood. However, she does not know the value of the rug, or the

purchase price (*see id.* at p 39, ll 2-16). She does not have the receipts, and is unable to retrieve them since the store, Castro Convertibles, went out of business (*see id.* at ll 17-21). Plaintiffs also seek compensation of their wall to wall carpeting which was damaged by the flood. Mary testified that the carpeting cost approximately $300.00 (*see id.* at p 47, ll 13-17). Similarly, plaintiffs provided no receipts for the purchase of the carpet, or any other evidence to determine the reasonable market value or the price at which it could be replaced in the market.

Plaintiffs further seek compensation for the cast iron bathtub, brass chandelier, and two ceiling fans. These items were not damaged in the flood (see Trial Transcript, July 19, 2018 at p 29-31, 37). Plaintiffs contend that before the flood occurred, the owners had planned to begin renovations to the property. Plaintiff testified that she asked the owners not to remove the above listed items during the course of the renovation, as they were purchased by the plaintiffs during their rental period at the property. When renovations were completed, the items were gone. Plaintiffs failed to provide proof as to the value of these items.

Sandretta testified that the cast iron tub was purchased in 1971 for $2,000.00 (*see* Trial Transcript, July 19, 2018 at p 16, ll 14-16, 25; p 17, l 1). Sandretta, utilizing a photograph and video of the bathtub, went to a store and tried to ascertain the value of the item in 2014. Plaintiff testified that the value was $2,400.00. She later testified that she had an appraisal done which valued the tub at $2,400.00 (*see id.* at p 29, ll 11-14). However, she has no documentation of any such appraisal or estimated reasonable market value immediately before destruction (*see id.* at p 17, ll 18-23).

Sandretta testified that the brass chandelier was purchased for $300.00 (*see id.* at p 17, ll 15-23). Plaintiff testified that she went to the same store and was told by the store clerk that they would have purchased the chandelier for $300.00 (*see id.* at p 18, ll 1-4). Plaintiff testified that the two ceiling fans were purchased around 2006 (*see id.* at p. 19, ll 10-13). She is not sure of the cost of the ceiling fans and does not have receipts for their purchase (*see id.* at ll 14-17). Plaintiff was told by the same store clerk that she could have sold the fans for $150.00 each (*see id.* at ll 17-18). Here, plaintiffs' testimony regarding the price at which those items could have been sold, with no further documentation is insufficient to establish the reasonable market value. "The market value of a merchant's goods is the price at which they could be replaced in the market, not the retail price at which they could be sold" (*see Ever Win, Inc., v. 1-10 Indus. Assocs.*, 111 A.D.3d 884, *supra*). Plaintiffs failed to provide any proof or testimony with respect to the fire-resistant steel gates and cast-iron cage for the air conditioning unit.

Accordingly, based on plaintiffs' failure of proof, this Court cannot determine the measure of damages for the above listed items lost.

Unreimbursed Expenses

Plaintiffs seek $4,573.74, the cost of the Best Western hotel from January 12, 2014, through February 24, 2014. A copy of plaintiffs' bill from Best Western Plus was admitted into evidence as plaintiff's exhibit 6. Plaintiffs testified that the landlord gave them $200.00 for a hotel room on the night of the flood (*see* Trial Transcript, July 19, 2018 at p 10, ll 9-13; p 25 l 25; p 26, l 1). Therefore, the remaining balance for their stay at the hotel is $4,373.74. Mary testified that she did not believe that their renters

insurance policy covered housing or hotel related costs (see Trial Transcript, July 19, 2018 at p 50, ll 16-25; p 51 ll 1-18. Plaintiff testified that she paid for the hotel by her credit card (*see id.* at p 51, ll 19-22). She does not know whether the monies received by their renters insurance was intended to cover that bill because "her daughter takes care of that" (*see id.* at p 52, ll 1-3). However, Sandretta did not testify as to whether the $36,000.00 received from renter's insurance was intended to cover the hotel bill. Her testimony regarding what was covered by insurance and why certain items were not covered was unclear. Inasmuch as the insurance policy and itemized response with which items were covered or not covered was not offered into evidence, it simply cannot be considered. Sandretta did testify that the plaintiffs paid the hotel bill (*see id.* at p 26, ll 3-4). Accordingly, the plaintiffs should be reimbursed for the cost of staying at the hotel from January 12, 2014, through February 24, 2014, when the defendants provided alternative housing at 801 Willoughby Street. The plaintiffs' need for an alternative place to stay stems directly from and is as a natural consequence of the flood in their apartment). Inasmuch as rent was waived during this period, the plaintiffs should recover $2,723.74, which is the out of pocket cost for the Best Western hotel minus 6 weeks of rent that was waived, which would serve to restore the plaintiffs to the position they would have occupied, had the flood not occurred (*see generally, McDougald v. Garber*, 73 N.Y.2d 246, *supra*).[6]

[6] Since plaintiffs' monthly rent at the time was $1,100.00 per month, and they were displaced for approximately 6 weeks, then they would have paid approximately $1,650.00 in rent for that period.

Plaintiffs seek $2,000.00 in reimbursement for the costs of meals eaten at restaurants during the time they stayed in the hotel and did not have access to a kitchen. It is undisputed that plaintiffs stayed in the Best Western hotel for approximately 44 days, from January 12, 2014 through February 24, 2014, when they were relocated into a temporary apartment on Willoughby Street, in Brooklyn, New York. Sandretta testified that she spent approximately $60.00 per day on meals while they were in the hotel (*see* Trial Transcript July 19, 2018, at p 21-22; p 32, ll 11-16). Therefore, the total spent on food for those 44 days, at $60.00 per day, is $2,640.00. She further stated that, if the plaintiffs were home, they would have only spent approximately $40.00 per day on food. Accordingly, the difference between what plaintiffs spent on food while at the hotel ($2,640.00) and what they would have spent on food at home ($1,760.00), is $880.00. This Court credits plaintiff's testimony that ordering take-out food costs more than home cooking. Accordingly, plaintiffs are entitled to recover the additional $880.00 that they spent on food during this period.

Plaintiffs further seek $200.00 which Sandretta testified is the cost to have Stanley Steamer clean soot and stains from their beige couch after the flood (*see id.* at p 18, ll 5-13). Plaintiff testified that this was not covered by their renters insurance (*see id.*). This Court credits the plaintiffs' testimony as to the cost of repairing the couch and finds that this stems directly from and is a natural consequence of the flood. Accordingly, plaintiffs' may recover the cost of Stanley Steamer.

Emotional Damages

Plaintiffs seek $50,000.00 for "mental and physical pain and discomfort and anguish including but not limited to living away from their . . . apartment" (*see* Complaint at ¶ Twenty-Eighth). "While it is true that New York recognizes a cause of action to recover damages for pure emotional distress (*see, Ferrara v. Galluchio,* 5 N.Y.2d 16, 176 N.Y.S.2d 996, 152 N.E.2d 249), the plaintiffs must produce evidence which is sufficient to guarantee the genuineness of the claim (*see, Johnson v. State of New York,* 37 N.Y.2d 378, 372 N.Y.S.2d 638, 334 N.E.2d 590)." (*Conway v. Brooklyn Union Gas Co.*, 189 A.D.2d 851, 592 N.Y.S.2d 782 [2 Dept., 1993]).

"To the extent the claim seeks damages for negligent infliction of emotional distress, the Court of Appeals has stated: 'A breach of the duty of care resulting directly in emotional harm is compensable even though no physical injury occurred when the mental injury is a direct, rather than a consequential, result of the breach and when the claim possesses some guarantee of genuineness'" (*Sawitsky v. State*, 146 A.D.3d 914, 46 N.Y.S.3d 123 [2 Dept., 2017], *lv. denied*, 29 N.Y.3d 908, 80 N.E.3d 405 [2017], quoting *Ornstein v. New York City Health & Hosps. Corp.*, 10 N.Y.3d 1, 852 N.Y.S.2d 1 [2008]).

> The Court of Appeals has thus required that the mental injury be "a direct, rather than a consequential, result of the [negligence]" (*Kennedy v. McKesson Co.*, 58 N.Y.2d at 506, 462 N.Y.S.2d 421, 448 N.E.2d 1332), and that the claim of emotional distress possess "some guarantee of genuineness" (*Ferrara v. Galluchio,* 5 N.Y.2d at 21, 176 N.Y.S.2d 996, 152 N.E.2d 249). The latter element may be satisfied where the particular type of negligence is recognized as providing an assurance of genuineness, as in cases involving the mishandling of a corpse or the transmission of false information that a parent or child had died

> (*see Johnson v. State of New York,* 37 N.Y.2d 378, 383–384, 372 N.Y.S.2d 638, 334 N.E.2d 590; *Massaro v. O'Shea Funeral Home,* 292 A.D.2d 349, 351, 738 N.Y.S.2d 384; *see also Hering v. Lighthouse 2001, LLC,* 21 A.D.3d 449, 451, 799 N.Y.S.2d 825; Restatement [Third] of Torts § 47[b] [hereinafter the Third Restatement]). However, in the absence of such specific circumstances, the guarantee of genuineness "generally requires that the breach of the duty owed directly to the injured party must have at least endangered the plaintiff's physical safety or caused the plaintiff to fear for his or her own physical safety" (1–2 Warren's Negligence in New York Courts § 2.04[1][a]; *accord Kennedy v. McKesson Co.,* 58 N.Y.2d 500, 462 N.Y.S.2d 421, 448 N.E.2d 1332; Third Restatement § 47[a]).

(*Taggart v. Costabile*, 131 A.D.3d 243, 14 N.Y.S.3d 388 [2 Dept., 2015]).

Here, plaintiffs did not testify as to any physical injuries caused by defendants' purported negligence. With respect to emotional damages, Sandretta testified,

> Q So, you made a claim for mental pain discomfort and anguish. Can you describe what that means to you?
>
> A To me it is when you just buried your love[d] one and you think you are coming home to your home it has been by [*sic*] home since I was three. And I am believing we can come home and just breath[e]. And to find out on the road going home that we have no home that in itself was turmoil. My mother was panicking. She didn't know what to do. And I couldn't do anything but what I could do. And just add on top of that the fact that she had to bury her child. Or cremate her child.

Here, plaintiffs' claims for emotional damages do not fall within the usual line of cases relating to emotional damages. The panic testified to by Sandretta appears to be a consequential rather than direct consequence of defendants' breach. Plaintiffs failed to proffer any proof as to their emotional damages, or symptoms therefore, and failed to

establish that the particular type of negligence here, is one recognized as providing the required "assurance of genuineness". They further failed to establish that their physical safety was endangered or that they feared for their physical safety (*see Taggart v. Costabile*, 131 A.D.3d 243, *supra*). Accordingly, plaintiffs' claims for emotional damages are denied.

Conclusion

Plaintiffs' first causes of action to recover $15,000.00 for items lost as a result of defendants' negligence is denied based upon failure of proof. Plaintiffs' second cause of action to recover $4,573.74 for the hotel bill is granted to the extent that plaintiffs may recover $2,723.74, which is their out of pocket cost, less the approximately 6 weeks of rent which was waived during that period. Plaintiffs may also recover $200.00 as reimbursement for the cost of cleaning their remaining couch. Plaintiffs' third cause of action to recover $2,000.00 for the cost of meals during the period they were in the hotel is granted to the extent that plaintiffs may recover $880.00 which is the difference between their meal cost in the hotel and what the cost would have been if they were home. Plaintiffs' fourth cause of action for emotional damages in the amount of $50,000.00 is denied based upon failure of proof.

Accordingly, based upon the foregoing, it is,

ORDERED, that the plaintiffs are awarded $2,723.74 on their second cause of action for unreimbursed expenses plus statutory interest from entry of the judgment; and it is further

ORDERED, that the plaintiffs are awarded $200.00 plus statutory interest from entry of the judgment as reimbursement for the cleaning bill; and it is further

ORDERED, that the plaintiffs are awarded $880.00 on their third cause of action plus statutory interest from entry of the judgment.

This constitutes the decision and order of the Court.

ENTER:

Lara J. Genovesi
J.S.C.

Hon. Lara J. Genovesi
J. S. C.

Lara J. G
J.S.C.

FILED
KINGS COUNTY CLERK
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