Chien Han Chang v Balfour Owners Corp.
2019 NY Slip Op 33851(U)
December 11, 2019
Supreme Court, Queens County
Docket Number: 702562/19
Judge: Darrell L. Gavrin
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

CHIEN HAN CHANG,

Plaintiff,

- against-

BALFOUR OWNERS CORP.

Defendant.

Index No. 702562/19

Motion Date July 30, 2019

Motion Cal. No. 7

Motion Seq. No. 1

The following papers read on this motion by defendant for order dismissing the complaint pursuant to CPLR 3211(a)(1) and (7).

	Papers Numbered
Notice of Motion - Affirmation - Exhibits............................	EF 8-15
Affirmation in Opposition - Exhibits..................................	EF 17-18

FILED DEC 17 2019 COUNTY CLERK QUEENS COUNTY

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

This is an action for declaratory judgment. Plaintiff, Chien Han Chang, is a shareholder and resident of a cooperative apartment in the premises known as 112-20 72nd Drive, Apartment D53, Forest Hills, New York. Plaintiff alleged that a water leak occurred at 112-20 72nd Drive on July 17, 2018. Defendant asserted a claim against plaintiff in the sum of $6,893.75 for property damage that allegedly resulted from said water leak, and for attorney's fees.

Plaintiff alleges that the proprietary lease and house rules do "not contain any provisions placing strict liability on the plaintiff regarding damages to the building absent a finding of negligence." Plaintiff seeks a declaration to the effect that he was not negligent and did not cause or contribute to the subject incident, and that the fees and charges asserted by defendant are unwarranted and unenforceable.

In this pre-answer motion to dismiss the complaint, defendant asserts that on July 17, 2018, a water leak emanated from plaintiff's unit from a water line attached to plaintiff's refrigerator; that the cooperative repaired the damages to three other units caused by said water

leak and expended resources totaling $6,000.00; that the cooperative billed plaintiff for the repair costs and legals fees it incurred due to said water leak; that as of December 18, 2018, the legal fees totaled $893.75; and that plaintiff has refused to pay the costs associated with the repairs and incurred in the collection of said costs.

Defendant in support of its motion submits plaintiff's account statement for January 2019, setting forth repair charges of $6000, legal expenses of $893.75, as well as the monthly maintenance charge; plaintiff's account statement for February 2019, setting forth a previous balance of $6893.75; late fee of $50, and a violation charge for water damage in the sum of $962.50, as well as a repair charge for steam valve change and the monthly maintenance charge; a copy of the propriety lease; a copy of the house rules; copies of correspondence between parties' counsel.

Defendant also submits three invoices from Arta Restoration, each dated October 27, 2018. The first invoice, in the amount of $2,250 (tax included) is for work performed in apartment D23 at the subject address from October 23, 2018 to October 25, 2018; the second invoice, in the amount of $1,400 (tax included) is for work performed in apartment D43 at the subject address on October 23, 2018; and the third invoice, in the amount of $2,350 (tax included) is for work performed in apartment D33 at the subject address from October 23, 2018 to October 25, 2018.

Defendant relies upon paragraph 18 (a) of the proprietary lease, entitled "repairs by the Lessee" which provides, in pertinent part, as follows: "The Lessee shall take possession of the apartment and its appurtenances and fixtures "as is" as of the commencement of the term hereof. Subject to the provisions of Paragraph 4 hereof, the Lessee shall...be solely responsible for the maintenance, repair, and replacement of plumbing, gas and heating fixtures and equipment such as refrigerators, dishwashers and removable and through-the-wall air conditioners, washing machines, ranges and other appliances, as may be in the apartment. Plumbing, gas and heating fixtures as used herein shall include exposed gas, steam, and water pipes attached to fixtures, appliances and equipment and the fixtures, appliances and equipment to which they are attached, and any special pipes or equipment which the Lessee may install within the wall or ceiling, or under the floor, but shall not include gas, steam and water or other pipes or conduits within the walls, ceilings or floors or air conditioning or heating equipment which is part of the standard building equipment...".

Defendant further relies upon paragraph 28 of the proprietary lease, entitled "Reimbursement of Lessor's Expenses," which provides as follows: "If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based upon such default, or defending, asserting a counterclaim in any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including reasonable attorneys' fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent."

Plaintiff in opposition asserts that the within motion is premature; that defendant's reliance on *Mannor v Feldstein* (2012 NY Slip Op 30210[U] [Sup Ct, New York County 2012]) is misplaced; and that the correspondence between the parties' counsel establishes plaintiff's claims.

A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth" (*Bd. of Mgrs. of 136 St. Marks Place Condominium v St. Marks Place Condominiums, II, LLC*, 128 AD3d 877, 878-879 [2d Dept 2015], quoting *Staver Co. v Skrobisch*, 144 AD2d 449, 450 [2d Dept 1988]; *see Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d Dept 2011]). "[W]here a cause of action is sufficient to invoke the court's power to 'render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy' (CPLR 3001; *see* CPLR 3017 [b]), a motion to dismiss that cause of action should be denied" (*Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d at 1150). Here, contrary to defendant's contention, the allegations in the complaint adequately assert a cause of action for declaratory relief with respect to the subject provisions of the proprietary lease. At issue here is whether the proprietary lease permits defendant to impose charges for repairs made to other apartments and to impose attorney's fees, where common elements in said apartments are claimed to have been damaged due to a water leak in plaintiff's apartment.

It is further noted that contrary to defendant's assertions, *Mannor* is not relevant here, and that this court is not bound by the determination of a court of coordinate jurisdiction.

Dismissal under CPLR 3211(a) (1) is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 774 N.E.2d 1190 [2002]). "To be considered 'documentary' under CPLR 3211 (a) (1), evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010] [citation omitted]). Here, paragraph 18 of the subject proprietary lease places the duty for the maintenance and repairs on the unit owner. However, said provision does not refute plaintiff's claims, as it does not explicitly make the unit owner responsible for the payment of expenses incurred by the defendant-lessor for repairs made to other apartments that sustain damage resulting from a unit owner's failure to maintain or repair its own unit. Nor does said paragraph authorize the defendant-lessor to assess expenses, charges and fees against a unit owner for such repairs.

Furthermore, defendant has not demonstrated that it is entitled to assess expenses for repairs and attorney's fees in January 2019, pursuant to paragraph 28 of the proprietary lease, as it has not submitted any admissible evidence that plaintiff was in default under the lease or that an action had been commenced, as of that date. With respect to the invoices submitted herein, defendant has not submitted any evidence of payment of said invoices. Finally, no evidence has been submitted which establishes that legal fees of $893.75 assessed against

plaintiff were actually incurred by defendant prior to the commencement of this action.

In view of the foregoing, defendant's motion to dismiss the complaint pursuant to CPLR 3211(a) (1) and (7), is denied. Defendant is directed to serve its answer within 20 days from the date of service of this order, together with notice of entry and file proof thereof with the Clerk of Queens County.

Dated: December 11, 2019

DARRELL L. GAVRIN, J.S.C.

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QUEENS COUNTY