Tabor v 148 Duane LLC
2020 NY Slip Op 31474(U)
May 22, 2020
Supreme Court, New York County
Docket Number: 156655/2018
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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TIMOTHY TABOR and AKIKO TABOR,

Plaintiffs,

- v -

148 DUANE LLC,

Defendant.

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INDEX NO. 156655/2018

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 123-135 were read on this motion to amend caption/pleadings.

By order to show cause, plaintiffs move pursuant to CPLR 3025(b) for an order granting them leave to file an amended complaint. Defendant opposes.

I. BACKGROUND

Plaintiffs are residents of the building owned by defendant and located at 148 Duane Street in Manhattan. By summons and complaint dated July 17, 2018, they allege that defendant failed to provide essential services, such as air-conditioning, a working intercom and buzzer system, code-compliant electricity, and adequate heating during the winter months. They seek a judgment declaring that defendant violated the lease and breached the warrant of habitability, injunctive relief, monetary damages, and attorney fees. (NYSCEF 128).

By order dated July 18, 2018, the parties were directed to coordinate an inspection of the premises, and defendant was directed to affect necessary repairs. (NYSCEF 129).

Due to the need for additional repairs, on August 1, 2019, the parties stipulated that plaintiffs would relocate from their apartment for 12 months, with defendant paying all of the moving costs, abating the rent in full, and paying them monthly up to $25,000 for comparable

housing less plaintiffs' current rent. (NYSCEF 133). Since then, plaintiffs reside in a new apartment at a monthly rent of $20,750, paid by defendant. (NYSCEF 134).

A so-ordered stipulation dated February 5, 2020 reflects that depositions of all parties were to be held on or before May 15, 2020 (NYSCEF 135), the receipt by all parties of notice that the next compliance conference would be the last, and a provision that any discovery not previously addressed in previous orders or in the last conference order is waived. (NYSCEF 121).

By so-ordered stipulation dated May 14, 2020, the parties agreed to a discovery schedule if the instant show cause order is granted, and the parties reserved their rights to third-party discovery. (NYSCEF 139).

II. CONTENTIONS

By affidavit dated March 2, 2020, plaintiff Timothy Tabor states that subsequent to the July 18, 2018 order, conditions at the building deteriorated. Thereafter, in early spring 2019, construction activity in the building accelerated, and in September 2019, the conditions became "so unsafe and so unbearable" that relocation was necessary. He describes how defendant demolished and removed one of the walls in the apartment, and alleges that due to scaffolding, his window view was obstructed. Then, on April 2, 2019, the building lost heat for a week, which the building staff attributed to a "mechanical issue." Timothy also reports that warning signs requiring hard hats were posted throughout the building, that electrical panels were left wide open, and that the rooftop door was left unsecured and unlocked, which has allowed unauthorized persons to enter the building. According to Timothy, demolition throughout the building was loud and in excess of 90 decibels, and it produced dust and debris, some of which accumulated in the building's common areas as well as in his apartment. Despite those issues and

others, defendant accelerated construction and failed to remedy his safety concerns. Timothy alleges that defendant sought plaintiffs' relocation during construction, but plaintiffs refused.

On May 15, 2019, plaintiffs complained to defendant that the elevator door had momentarily stuck; defendant fixed it. And then, on May 23, 2019, on less than 24 hours' notice, defendant shut down elevator service for four months for an upgrade. The elevator shaft has since been used by defendant as a drop chute to remove construction debris, causing him, an elderly man in poor health, to climb four flights of stairs to access his apartment. He maintains that defendant's conduct was designed to force the relocation.

In July 2019, defendant, without notice to plaintiffs, began removing the roof of the building. Plaintiffs called 911 after hearing loud, crashing sounds, and learned that defendant had taken the roof off. Without the roof, the apartment's temperature rose above 80 degrees. Rather than address the issue, defendant demanded that plaintiffs vacate the building. On July 22 and 23, 2019, due to a rainstorm, water leaked through the ceiling. Despite their efforts, plaintiffs were unable to contain the water, which would later cause odors in the apartment and spoil food. While plaintiffs, the only tenants left in the building at the time, incurred expenses in preventing the water damage, defendant did nothing. Plaintiffs hired a private company to remedy the flooding, although flooding continued to occur whenever it rained. (NYSCEF 125).

Based on this affidavit, plaintiffs seek to amend their complaint. In addition, they now allege that defendant did not obtain the necessary approval from the Department of Housing and Community Renewal (DHCR) to commence with the construction, and that, to get the necessary permits and approvals, defendant falsely represented to the Department of Buildings (DOB) that the building was vacant and had no rent-stabilized units. Plaintiffs seek to add a cause of action for a judgment declaring that defendant's construction was not approved by DHCR, which they

maintain is necessary when a landlord seeks to reduce tenant services, requires a tenant's relocation, and/or plans to decrease the size of a tenant's rent-stabilized space, and that defendant misrepresented its work plans to the DOB. They also allege that once alerted to these misrepresentations, defendant amended its filings with the DOB but denied that DHCR approval was required. Plaintiffs also seek to add a cause of action for intentional inflictions of emotional distress and a demand for punitive damages. The amended complaint reflects that their causes of action for injunctive relief are withdrawn. (NYSCEF 126).

II. CONTENTIONS

A. Plaintiffs (NYSCEF 123-129)

Plaintiffs contends that leave to file an amended complaint should be granted, and as material facts arose after the commencement of the action, it would be an abuse of discretion not to grant leave. They maintain that their claim for intentional infliction of emotional distress is meritorious, as they allege facts showing a continuing course of conduct engaged in by defendants by refusing to and delaying the remediation of conditions in plaintiffs' apartment, thereby harassing them and causing them severe emotional distress. Moreover, as defendant's refusal and delay were deliberate, plaintiffs claim entitlement to punitive damages. They assert that as discovery is ongoing and no depositions have yet been taken, defendant is not prejudiced by the amendments.

B. Defendant (NYSCEF 132-135)

In opposition, defendant does not oppose plaintiffs' withdrawal of their cause of action for injunctive relief but contends that as plaintiffs voluntarily relocated in September 2019, they cannot state a claim regarding living conditions subsequent to their relocation, and observes that while the new allegations arose after the commencement of this action, they had been known

since at least September 2019, and plaintiffs offer no excuse as to their delay in moving to amend. Moreover, defendant claims prejudice resulting from the amendment as it would now need additional time to obtain medical records and conduct medical examinations concerning their claims for emotional distress. It notes that it has been unsuccessfully trying to obtain the depositions of plaintiffs for over a year.

Defendant also asks that: (1) plaintiffs' motion be denied for improper service, as plaintiffs did not serve it with a signed copy of the court's order; (2) as DOB is an absent necessary party, any claim concerning the validity of DOB permits be denied; (3) plaintiffs' claim that the size of their apartment will decrease be denied as premature; (4) the proposed claim for punitive damages be denied, as the action concerns a private wrongdoing and the allegations of intent are conclusory; and (5) the proposed claim for intentional infliction of emotional distress be denied, as plaintiffs have already sought such recovery under alternative legal theories and because the alleged conduct is insufficiently outrageous, especially as plaintiffs' relocation was pursuant to a stipulation entered into with "significant assistance by the Court."

III. ANALYSIS

Plaintiffs' affidavit of service reflects that a copy of the order to show cause was properly served on defendant's counsel (NYSCEF 131).

Pursuant to CPLR 3025(b), a party may amend its pleadings at any time by leave of court, "which shall be freely given upon such terms as may be just...." It is well-settled that leave to amend pleadings under this section should be liberally granted unless the amendment plainly lacks merit or would prejudice or surprise the other parties. (*MBIA Ins. Corp. v Greystone & Co.*, 14 AD3d 499, 499 [1st Dept 2010]). When moving for leave to amend, the movant bears the

burden of demonstrating that the proposed causes of action are not palpably without merit. (*Id.*).

As plaintiffs offer no authority for the proposition that the approval of DHCR was required before defendant could begin construction, a claim concerning DHCR approval is insufficiently meritorious. Although plaintiffs seek to challenge and revoke DOB permits allowing construction on the property, as the DOB is a necessary party not currently named, and as plaintiffs do not seek leave to add it as a defendant, the proposed claim is palpably without merit. (CPLR 1001). In any event, even if the DOB is not a necessary party, plaintiffs offer no support for contending that defendant's construction is unlawful, as defendant has since corrected its filings.

Notwithstanding defendant's alleged moral culpability, plaintiffs' demand for punitive damages is palpably devoid of merit absent any allegation of "conduct that is part of a pattern of similar conduct directed at the public generally." (*Gedula 26, LLC v Lightstone Acquisitions III, LLC*, 150 AD3d 583, 584 [1st Dept 2017]). Rather, plaintiffs allege that defendant's conduct was aimed at them to harass and evict them alone, nor could they allege otherwise given their representation that they were the sole tenants remaining in the building at the time defendant engaged in the alleged harassment.

To state a claim for intentional infliction of emotional distress, plaintiffs must allege "(1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress." (*Video Voice, Inc. v Local T.V., Inc.*, 156 AD3d 848, 850 [2d Dept 2017]). Defendant's alleged harassment of plaintiffs does not rise to the level of outrageousness required, especially in light of defendant's provision and payment for a replacement apartment at a monthly rent of over $20,000.

While plaintiffs' additional proposed causes of action are palpably without merit, their additional descriptions of the building conditions up until plaintiffs' relocation in September 2019, bolster their claims for breach of the warranty of habitability, and thus, the complaint may be amended to include such allegations.

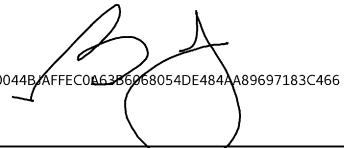
Defendant fails to offer any prejudice suffered by them as a result of permitting plaintiffs to amend their complaint, especially in light of the last compliance conference in which a discovery schedule was set in the event of the granting of leave to amend. Even if plaintiffs delayed in moving, absent prejudice, it is insufficient to deny them leave. (*See Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 959 [1983] [lateness, absent prejudice, is not a basis to deny motion to amend]; *Messinger v Mount Sinai Med. Ctr.*, 279 AD2d 344, 345 [1st Dept 2001] [whether plaintiff offered a reasonable excuse is immaterial absent prejudice]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for leave to amend the complaint is granted to the extent they seek to add factual allegations concerning defendant's alleged breach of the warranty of habitability and to withdraw their claim for injunctive relief, and is otherwise denied; and it is further

ORDERED, that plaintiffs are directed to e-file an amended complaint in accordance with this decision with notice of entry within 20 days of the date of this order.



5/22/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE