

**Manette v 5537-225 W. 23rd & 220 W. 24th St.  
Manhattan LLC**

2020 NY Slip Op 31900(U)

June 16, 2020

Supreme Court, New York County

Docket Number: 157363/2018

Judge: Arlene P. Bluth

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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**

**PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14**

*Justice*

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**INDEX NO. 157363/2018**

ALEXANDER MANETTE,

**MOTION DATE N/A**

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

5537 - 225 WEST 23RD AND 220 WEST 24TH STREET  
MANHATTAN LLC, AKELIUS REAL ESTATE  
MANAGEMENT LLC

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48

were read on this motion to/for JUDGMENT - SUMMARY.

The motion for summary judgment by defendants dismissing the complaint is granted in part and denied in part and the cross-motion by plaintiff for summary judgment is denied.

**Background**

Plaintiff seeks redress for a bedbug infestation in his apartment. Defendants claim that these were isolated incidents that predated the purchase of the building by the Owner (defendant 5537-225 West 23rd and 220 West 24th Street Manhattan LLC). They claim the Owner did not get title to the building until August 31, 2017 and then it subsequently appointed defendant Akelius Real Estate Management LLC to manage the building.

Defendants question why plaintiff did not assert these claims against the previous owner when his purported bedbug issue began in 2015. They also claim that after they took over the building, they exercised due care in addressing the issue and all of the alleged property damage

and expenses incurred by plaintiff from the bedbug problem happened prior to when the Owner took title to the property.

In opposition, plaintiff submits an affidavit of Cindy Bergersen (a resident at the premises) who claims that the building has been infested with bedbugs since 2015 (NYSCEF Doc. No. 31). She claims that the current Owner sent dogs to search for bedbugs on request but she claims these were ineffective. She also complains that spray treatments were used although it is not clear when these took place. Plaintiff also submits the affidavit of Wellington Love (another resident of the premises) who claims that the building has been infested with bedbugs starting in 2015 (NSYCEF Doc. No. 32). He claims the current Owner did nothing for over a year.

Plaintiff submits his own affidavit which details his experiences with bedbugs (NYSCEF Doc. No. 33). He contends that he suffered from anxiety, has scars from scratching itches caused by bedbugs and needed therapy. Plaintiff contends the bedbug problem has cost him more than \$70,000 in out of pocket expenses including costs for hotel stays, therapy, exterminator bills and legal fees.

### **Discussion**

“The proponent of a summary judgment motion 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 prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material

issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]).

### **Negligence Causes of Action**

“Landowners have a duty to maintain their property in a reasonably safe condition, and to warn of latent hazards of which they are aware” (*Delia v 1586 N. Blvd. Co., LLC*, 27 AD3d 269, [1st Dept 2006]). Defendants’ basis to dismiss these claims is that they did not take over the property until 2017. And there is no dispute that the bedbug problem arose prior to defendants’ taking control of the building. But that does not permit defendants to allegedly ignore the bedbug problem once they took over. A landlord cannot ignore a potentially dangerous condition simply because that problem may have started before it took title to the property. Of course defendants are correct that they are not responsible for damages that were incurred prior to when they acquired the premises, but the affidavits submitted by plaintiff demonstrate that problems continued after August 31, 2017. The Court denies this branch of the motion.

### **Negligent Infliction of Emotional Distress**

“A cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff’s physical safety, or causes the plaintiff to fear for his or her own safety” (*Sheila C. v Povich*, 11 AD3d 120, 130, 781 NYS2d 342 [1st Dept 2004]). “Moreover, a cause of action for either intentional or negligent infliction of emotional distress must be supported by allegations of conduct by the defendants so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community” (*id.* 130-31 [internal quotations and citations omitted]).

The Court grants summary judgment dismissing this claim. Defendants point to plaintiff's deposition testimony admitting that defendants took some steps to address the bedbug problem (NYSCEF Doc. No. 20 at 75, 77-79). The standard for this cause of action is whether the conduct was extreme or outrageous; it is not whether defendants actually eradicated the bedbugs or even whether they acted reasonably to address the issue. There is nothing on these submissions to show that a jury could justifiably conclude that defendants are liable under this claim (*see Davila v Sleepy's LLC*, 142 AD3d 851, 37 NYS3d 525 [1st Dept 2016]).

### **Breach of Warranty of Habitability**

“Under the warranty of habitability, the obligation of a tenant to pay rent (or maintenance) is dependent upon a landlord's satisfactory maintenance of the premises in a habitable condition” (*12-14 E. 64th Owners Corp. v Hixon*, 130 AD3d 425, 425, 13 NYS3d 57 [1st Dept 2015]). And bedbug infestation has been found to support a cause of action for breach of the warranty of habitability (*Bender v Green*, 24 Misc3d 174, 874 NYS2d 786 [Civ Ct, New York County, 2009]).

Defendants argue that there was no landlord-tenant relationship or contractual relationship with plaintiff when the bedbug incident occurred. This branch of the motion is denied. As stated above, plaintiff submitted multiple affidavits demonstrating that there were bedbugs in the building when defendants took over the building and complaints were made to defendants.

### **Constructive Eviction**

“Constructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the

tenant of the beneficial use and enjoyment of the premises” (*Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, 83, 308 NYS2d 649 [1970]).

The Court grants this branch of the motion. Plaintiff’s deposition demonstrates that the hospital stay he purportedly had due to the bedbugs occurred before defendants ran the building (NYSCEF Doc. No. 20 at 44). Plaintiff also testified that he stayed at hotels on several occasions but that these also were before defendants took title to the premises (*id.* at 37-38). Plaintiff’s psychological treatment also occurred prior to August 2017.

Simply put, the record before this Court does not show that plaintiff left the building or that the bedbug infestation after defendants assumed control of the property rose to the level where a jury could find that plaintiff was materially deprived of the use of his apartment. Merely having bedbugs in the apartment does not automatically mean that plaintiff was constructively evicted.

### **Punitive Damages**

“Since there can be no separate cause of action for punitive damages, plaintiffs’ separate cause of action for punitive damages should be dismissed” (*Gostein v Winard*, 173 AD2d 201, 202, 569 NYS2d 425 [1st Dept 1991]). This portion of the motion is therefore granted. Even if a separate cause of action for punitive damages could be alleged, punitive damages are not appropriate here. Plaintiff’s claim is that defendants took over a building infested with bedbugs and did not do enough to remedy the problem, although he admits they did inspections and treatments. That does not describe conduct for which punitive damages may be appropriate (*Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 612 NYS2d 339 [1994] [observing that punitive damages are to vindicate public rights not private wrongs]).

### Summary for Defendants' Motion

Unfortunately, plaintiff's complaint does not clearly set forth his causes of action (*see* NYSCEF Doc. No. 16 at 5-10). The claims are not labeled and the allegations under each cause of action contain overlapping theories of liability. For instance, constructive eviction is mentioned in both the sixth and eighth causes of action. Plaintiff alleges "That the negligence of the Defendants as described herein above amounts to a breach of contract, including, but not limited to breach of the warranty of habitability, as well as partial and/or constructive eviction of the Plaintiff herein" and asks for a rent abatement" (*id.* ¶¶ 50 [Sixth Cause of Action]). The eighth cause of action contains this same exact phrase, word for word, in consecutive paragraphs (*id.* ¶¶ 56-57).

This inartful drafting makes it difficult to dismiss a cause of action that references multiple claims. Rather than overanalyze what each of plaintiff's causes of action seek, the Court rules as follows: plaintiff cannot pursue a claim based on negligent infliction of emotional distress, constructive eviction or seek punitive damages. A jury must decide plaintiff's theories of liability based on negligence and the warranty of habitability. The Court also declines to dismiss the ninth cause of action based on attorneys' fees because defendants did not offer any affirmative arguments to dismiss this claim.

### Cross-Motion

The Court denies plaintiff's cross-motion for summary judgment. The fact is that plaintiff admitted in his deposition that defendants took steps to try to eliminate the bedbug problem. That does not mean they are free from liability, but it does raise an issue of fact. A jury must decide whether defendants took enough steps to remediate the issue sufficient to defeat a negligence claim (or a breach of the warranty of habitability claim). The Court cannot, as a

matter of law, find that what defendants did (or failed to do) merits summary judgment in plaintiff's favor.

The Court also denies plaintiff's motion to the extent that it sought summary judgment on defendants' counterclaim(s). As an initial matter, plaintiff's notice of cross-motion fails to mention that he seeks summary judgment on the counterclaims. In his affidavit, plaintiff asserts that the first counterclaim based on his purportedly placing a live bedbug in a common area of the building should be dismissed because it is false (NYSCEF Doc. No. 33 ¶¶ 58-59). He also argues that the court should dismiss the second counterclaim (*id.* ¶ 66) but does not provide a reason. The affirmation from plaintiff's attorney only mentions a counterclaim in one paragraph and states, without citation, that the defamation counterclaim should be dismissed because defendants' witness had no understanding or evidence (*id.* ¶ 22). This is not a sufficient basis to dismiss any of defendants' counterclaims.

### Summary

In this action, the parties differ about whether defendants took enough steps to address the bedbugs once they took ownership of the building. As stated above, the Court finds that defendants are not responsible for any acts or damages that occurred prior to August 31, 2017—they did not own the building prior to this date and cannot be held liable for torts that occurred prior to their ownership of the building. A jury must assess whether defendants took reasonable steps—the Court cannot, as defendants insist, grant summary judgment simply because defendants contend that they diligently addressed all bedbug complaints. Plaintiff does not agree.

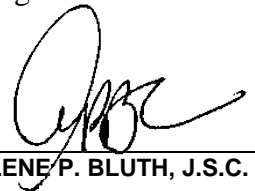
Accordingly, it is hereby



ORDERED that the motion for summary judgment dismissing the complaint is granted only to the extent that plaintiff's claims based on negligent infliction of emotional distress, constructive eviction and punitive damages are severed and dismissed and that defendants are not liable for any damages allegedly incurred prior to the date defendants took title to the building, and denied as to the remaining claims; and it is further

ORDERED that the cross-motion by plaintiff for summary judgment is denied.

06/16/2020  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: