Bartis v Harbor Tech, LLC
2020 NY Slip Op 34404(U)
November 17, 2020
Supreme Court, Kings County
Docket Number: 501635/2013
Judge: Devin P. Cohen

Supreme Court of the State of New York
County of Kings

Part 91

Index Number 501635/2013
SEQ # 010, 012, & 013

AMENDED DECISION/ORDER

JASON BARTIS, DOUGLAS FANNING, NERISSA CHARLES-FANNING, NIDA CHESONIS LEE, VINCENT LEE, DAVID SCOTT, ALLISON REEVES, LESLEY UNRUH, JENNIFER COHEN, JAMES WISZ, KELSEY KNIGHT MOHR, BRYAN JOHNSON, BENJAMIN SOTO, RACHEL FOULLON, IAN COOPER, RALF GRAEBNER, CRAIG LACOURT, ANDREW COATES, L. ANN NEUMANN, NICK DITMORE, ROBERTO RHETT, KYLE GARNETT, JEFFREY MEANS, RITA PASSERI, PATRICK FRANCOIS, STEPHANIE HEINEGG DE OROZCO, PATRICK SEELEY, MICHAEL ECKBLAD, DON ECHOLES CONWAY, MARK MCELHATTEN, JORDAN WOLFSON, SARA BOWER, JUSTIN KNAPP, SEAN GILLIGAN, AND ALFREDO CORREA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

against

HARBOR TECH, LLC,

Defendant.

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Affidavits Annexed	1, 2
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	
Replying Affidavits.....	
Exhibits	
Other.....	

Upon review of the foregoing papers, defendant's motion for partial summary judgment with regard certain plaintiffs' fifth cause of action and plaintiffs' sixth cause of action (Mot. Seq. 010), plaintiffs' motion for summary judgment regarding their fifth and sixth causes of action (Mot. Seq. 012), and defendant's cross-motion for partial summary judgment as to plaintiffs' fifth and sixth causes of action (Mot. Seq. 013), are decided as follows:[1]

Factual and Procedural Background

Plaintiffs are current and former tenants of buildings owned by defendant and located at 5

1 This amended decision and order, issued *nunc pro tunc*, modifies the prior decision, dated May 19, 2020, to correct an error with respect to plaintiff Alfredo Correa.

Delevan Street, 19 Delevan Street, and 14 Verona Street, in Brooklyn, New York. Plaintiffs commenced this action against defendants seeking judgment declaring that their apartments are subject to the Rent Stabilization Law and that a default rent formula should be applied to their leases, and damages for the excess rent they paid. Plaintiffs also assert claims for violation of GBL § 349, breach of the warranty of habitability pursuant to RPL § 235-b, commingling of security deposits in violation on Article 7 of the GOL, and a final claim for attorneys fees. Defendant asserts counterclaims for judgment declaring that its buildings are exempt from the Rent Stabilization Law and the Emergency Tenant Protection Act of 1974.

By order, dated June 16, 2014, the court (Silber, J.) dismissed plaintiffs' first through fourth causes of action, leaving only plaintiffs' fifth cause of action for breach of the warranty of habitability and sixth cause of action for comingling of security deposits. The court also declined to certify this lawsuit as a class action.

Additionally, by order dated May 15, 2019, the court (Schneier, J.H.O.) dismissed the claims of Jason Bartis, Roberto Rhett, Mark McElhatten, Jordan Wolfson, Sara Bower, Justin Knapp and Sean Gilligan for failure to comply with a prior discovery order.

Analysis

The parties submit competing motions for summary judgment on plaintiffs' fifth and sixth causes of action. On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

As an initial matter, defendant's cross-motion for summary judgment (Mot. Seq. 013) is

denied as an improper successive summary judgment motion. Successive motions for summary judgment are generally disfavored and should not be permitted absent a strong showing of new evidence not available at the time of the prior motion (*Capuano v Platzner Int'l Grp., Ltd.*, 5 AD3d 620, 621 [2d Dept 2004]). The Second Department has determined that new evidence must be "facts that were not available to the party at the time it made its initial motion for summary judgment and which could not have been established through alternative evidentiary means" (*Vinar v Litman,* 110 AD3d 867, 869 [2d Dept 2003]).

A review of defendant's motions show no facts that were unavailable to defendant at the time of its first summary judgment motion, and defendant makes no such argument. Accordingly, defendant's cross motion for summary judgment is denied. Because the papers are submitted also in opposition to plaintiffs' motion, the papers are accepted as opposition only.

Plaintiff's Fifth Cause of Action

In their fifth cause of action, plaintiffs assert that defendant breached the warranty of habitability. Defendant moves for summary judgment to dismiss the claims of Vincent Lee, Benjamin Soto, Alfredo Correa, Jeffrey Means, Douglas Fanning and David Scott pursuant to the doctrine of res judicata. These plaintiffs were respondents in separate Housing Court proceedings brought by Harbor Tech, the defendant in this case. In the Housing Court actions, the plaintiffs in this case asserted a counterclaim for breach of the warranty of habitability.[2] The plaintiffs entered into a stipulation, which states, in relevant part:

> 3. Petitioner [Harbor Tech] consents to give Respondent [plaintiff in this case] an abatement in the amount of . . . in consideration of any warranty of habitability claims [Respondent] may have against [Petitioner] to date leaving a balance of . . . .

[2] Neither plaintiffs nor defendant provide a copy of the answers and counterclaims from the Housing Court actions.

> 6. Petitioner represents that they have filed for a passenger elevator with the Department of Buildings, which should be code compliant and installed on or before 12/31/16. This provision shall be a material provision of this agreement and its violation shall be deemed a breach pursuant to ¶ 13, subject to any and all reasonable defenses that [Petitioner] may have.
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> 13. This Court shall retain jurisdiction over this proceeding and this Stipulation, and, in the event of a default hereunder, either party may restore this proceeding to the court's calendar (by motion or by order to show cause) for appropriate relief and/or enforcement of this Stipulation.

Pursuant to the doctrine of res judicata, stipulations of settlement that resolve claims will bar future claims based on the same facts between the same parties (*Waterfront Joints, Inc. v Tarrytown Boat Club, Inc.*, 119 AD3d 553, 553-54 [2d Dept 2014]). Plaintiffs argue that the stipulations are not enforceable because defendant breached them by failing to comply with paragraph 6. Defendant does not dispute the lack of compliance, but argues that any delay in compliance was not in its control. Pursuant to paragraph 13 of the stipulations, the Housing Court retained jurisdiction over the issue of noncompliance with that stipulation, together with plaintiffs' breach of warranty of habitability claims. Accordingly, the breach of warranty of habitability claims for the tenants who signed the stipulations would be subject to dismissal, if those tenants are still in possession of their units. In its moving papers, defendant states that Alfredo Correa, Vincent Lee and Benjamin Soto are still tenants. Consequently, those plaintiffs must first go to Kings County Housing Court to pursue their breach of warranty claims.

Defendant states that Jeffrey Means, Douglas Fanning and David Scott are no longer tenants. Therefore, their breach of warranty claims need not be litigated in Housing Court. However, the court does find that the stipulations bar plaintiffs' claims in part. These plaintiffs accepted a benefit of rent abatement in return for settling their claims through a certain date. They do not argue that the settlement agreements should be rescinded as a result of this breach, such that they must give back the rent abatement in return for re-litigating their breach of

warranty claims. Thus, their breach of warranty claims are limited to the period that begins the day after they signed their respective stipulations.

Turning to the merits of this claim for the remaining plaintiffs, Real Property Law § 235-b directs that every written or oral lease be deemed to include three covenants. These covenants warrant that: (1) the premises are fit for human habitation; (2) the premises are fit for the uses reasonably intended by the parties; and (3) the occupants shall not be subjected to any conditions that are detrimental to their life, health or safety (*Solow v Wellner*, 86 NY2d 582, 587-88 [1995]).

In support of their motion, plaintiffs submit the affidavit of Brenda Bello, a registered architect, which attaches Ms. Bello's inspection report. In her affidavit, Ms. Bello states that she visited the premises on July 18 and 26, 2013. On those days, Ms. Bello observed various conditions that she opines were detrimental to plaintiffs' life, health or safety. In her affidavit, Ms. Bello states that these conditions include, but are not limited to: (1) inadequate plumbing systems that cause raw sewage to flow into apartments; (2) gas meter rooms that are a fire hazard because they are not properly ventilated and not properly "fire stopped"; and (3) water penetration and flooding throughout defendant's buildings that has also caused mold.

In her report, Ms. Bello's re-states the text of numerous laws, such as the Multiple Dwelling Law and New York City Building Code, relating to residential buildings. She includes photos and brief captions describing what the photos show. The report contains photos and captions for the issues relating to the gas rooms and mold due to water penetration. The report shows water leakage in at least one apartment, but not raw sewage in apartments.

Plaintiffs also submit deposition testimony from Andrew Coates, Jennifer Cohen, Don Echoles Conway, Ian Cooper, Alfredo Correa, Douglas Fanning, Nick Ditmore, Michael

Eckblad. Rachel Foullon, Patrick Francois, Kyle Garnett, Ralf Graebner, Stephanie Heinegg de Orozco, Bryan Johnson, Craig LaCourt, Jeffrey Means, Kelsey Knight Mohr, Nerissa Charles-Fanning, Nida Chesonis Lee, L. Ann Neumann, Rita Passeri, Allison Reeves, David Scott, Patrick Seeley, Benjamin Soto, Lesley Unruh, Vincent Lee and James Wisz.

In their depositions, these plaintiffs testify about conditions in both the common areas and in their individual apartments. All told, the list of conditions is long, and it includes conditions suffered by many of the plaintiffs, as well as conditions suffered by one or a few plaintiffs. As testified by various plaintiffs, these conditions include, but are not limited to, water infiltration that, plaintiffs contend, caused damage to the structure of the building, as well as mold and slippery floors and stairs. Plaintiffs also testified that at least one elevator was often inoperable, would get stuck between floors, and that its doors would open to an empty shaft, creating a falling hazard. They also testified that the common areas did not have proper heat, forcing certain apartments to set up space heaters for the common areas. Additionally, they testified that the dryer for the laundry room would overheat, which would cause fires and burn clothes. Although plaintiffs identify these and other conditions, and provide some information about them, there is not sufficient detail offered about these conditions to award summary judgment.

There is merit to plaintiffs' argument that these conditions support a claim for breach of warranty of habitability. Indeed, defendant admits that many of these conditions existed. However, as defendant argues, plaintiffs do not provide sufficient information about many of the conditions in order to award summary judgment. Thus each plaintiff must address: (1) the severity of the conditions; (2) whether plaintiff provided notice to the landlord of the conditions; (3) the duration of the condition after notice to the landlord; and (4) the effectiveness of the

efforts by the landlord to remedy the condition (*Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 326-28 [1979]; *Green Garden Corp. v Mansoor*, 64 Misc 3d 128[A], 2019 NY Slip Op 50991[U], *1 [App Term, 2d Dept 2019]; *EB Mgt. Properties, LLC v Maruf*, 63 Misc 3d 155[A], 2019 NY Slip Op 50813[U], *1 [App Term, 2d Dept 2019]). Plaintiffs do not provide this information for all of the conditions they claim, and this court will not adjudicate the elements of each condition in piecemeal fashion.

Likewise, although defendant argues that they addressed some of plaintiffs' concerns and remedied some of the conditions, they do not dispute that the conditions existed and they do not establish that the conditions were so insignificant that they do not amount to a breach of the warranty of habitability. Defendant also argues that plaintiffs have no such claim because they were not physically injured. However, defendant references no case law that holds physical injury to be a prerequisite for claiming breach of the warranty of habitability. In fact, the warranty of habitability may be breached not just when there is a condition that is detrimental to life, but also where there are conditions that render premises unfit for human habitation or unfit for the uses reasonably intended by the parties (*Solow*, 86 NY2d at 587-88).[3]

Plaintiffs' Sixth Cause of Action

For their sixth cause of action, plaintiffs assert that defendant violated General Obligations Law §7-103, which prohibits a landlord from commingling security deposits with personal funds. Defendant does not dispute that it did so. Generally, when a landlord commingles security deposits with personal funds, the tenant has an immediate right to the entire

[3] Defendant also argues that plaintiffs' claims should be dismissed in part on the basis of the statute of limitations, because certain plaintiffs did not use their units for residential purposes, and because certain plaintiffs continued their leases and for higher rents. These arguments are offered in support of their subsequent motion for summary judgment, and so the court will not consider them.

security deposit (*Milkie v Guzzone*, 143 AD3d 863, 864 [2d Dept 2016]; *Solomon v Ness*, 118 AD3d 773, 773-74 [2d Dept 2014]).

Defendant argues that it is not required to return the funds because it cured its violation by separating the security deposits from the personal funds before each plaintiff's respective tenancy terminated (*see, e.g., Harlem Capital Ctr., LLC v Rosen & Gordon, LLC*, 145 AD3d 579, 580 [1st Dept 2016]). Plaintiffs agree that defendant may cure prior to the termination of the lease, but further argue that defendant must also cure before plaintiffs commence an action to recover the security deposit (*Hansen v Lorenzo*, 25 Misc 3d 1221 [A], 2009 NY Slip Op 52231[U], *4 n.2 [NY Dist Ct, Suffolk County 2009], citing *McMaster v Pearse*, 9 Misc 3d 964, 967 n. 2 [Civ Ct, NY County 2005]).

Neither party provides authority that binds this court's decision. In such an absence, the court finds that plaintiffs' argument is the more reasoned approach. As an initial matter, the law dictates that, when the court determines that the landlord has violated General Obligations Law §7-103, the tenant's right to the return of security deposit is ***immediate*** (*Milkie*, 143 AD3d at 864; *Solomon*, 118 AD3d at 773-74). Additionally, to hold otherwise would force tenants still in possession of their apartments to spend the time, money and energy to sue their landlords in order to enforce the law, but allow the landlord correct the issue at any time after the litigation commenced but before the tenant surrendered the apartment.

Defendant makes a separate argument regarding plaintiff Stephanie Heinegg de Orozco. Defendant contends that, when Ms. de Orozco vacated her apartment, defendant applied some portion of her security deposit to unpaid rent and returned the remainder to her. Ms. de Orozco is entitled to the full amount of her security deposit without regard to any purported breach of her lease as to rents due (*Paterno v Carroll*, 75 AD3d 625, 628 [2d Dept 2010]).

Conclusion

For the reasons stated above, defendant's motion for summary judgment (Mot. Seq. 010) is granted only to the extent that the claims for breach of the warranty of habitability for Alfredo Correa, Vincent Lee and Benjamin Soto are dismissed without prejudice, and with leave to bring those claims in Housing Court, and the claims of Jeffrey Means, Douglas Fanning and David Scott are limited to the period that begins the day after the stated date of their respective stipulations. Defendant's subsequent motion for summary judgment (Mot. Seq. 013) is denied. Plaintiffs' motion for summary judgment (Mot. Seq. 012) is granted to the extent that this court awards judgment to plaintiffs on their claims for violation of General Obligations Law § 7-103.

This constitutes the decision and order of the court.

November 17, 2020
DATE

DEVIN P. COHEN
Justice of the Supreme Court