

<b>E.M. v 2345 83rd St., LLC</b>
2021 NY Slip Op 31580(U)
May 10, 2021
Supreme Court, Kings County
Docket Number: 507010/2020
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

\_\_\_\_\_ X

**E.M. and A.B., Infants, by YURIRIA LOPEZ, their  
mother and natural guardian,**

**DECISION/ORDER**

**Plaintiffs,**

**Index No. 507010/2020**

**-against-**

**Motion Seq. No. 1**

**Date Submitted: 3/11/2021**

**2345 83<sup>rd</sup> Street, LLC, ANGELO DIGREGORIO  
and ITALIA DEGREGORIO,**

**Defendants.**

\_\_\_\_\_ X

***Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' pre-answer motion to dismiss***

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>3-5</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>7</u>
Reply Affirmation.....	<u>9</u>

**Upon the foregoing cited papers, the Decision/Order on this application is  
as follows:**

All three defendants move pre-answer to dismiss several of the causes of action in the complaint. This is an action arising from bed-bug bites sustained by the infant plaintiffs at defendants' property.

The first branch of the motion seeks to dismiss the Third, Fourth, Sixth, Seventh and Eighth causes of action as duplicative of the First and Second causes of action for negligence, one cause of action for each infant plaintiff. The second branch of the motion seeks to dismiss the Ninth cause of action as duplicative of the First and Second causes of action. The third branch seeks to dismiss the Fifth cause of action for constructive eviction and the sixth cause of action for intentional infliction of emotional distress on the grounds that the statute of

limitations has run, and they are time barred.

In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the court's role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v Daimler Chrysler Corp.*, 292 AD2d 118 [1<sup>st</sup> Dept 2002]. On such a motion, the court must accept as true the factual allegations of the complaint and accord the plaintiff all favorable inferences which may be drawn therefrom. *Dunleavy v Hilton Hall Apartments Co., LLC*, 14 AD3d 479, 480 [2<sup>nd</sup> Dept 2005]. See also *Leon v Martinez*, 84 NY2d 83, 87–88; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2<sup>nd</sup> Dept 2000].

The standard of review on such a motion is not whether the party has artfully drafted the pleading, “but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” *Offen v Intercontinental Hotels Group*, 2010 NY Misc. LEXIS 2518 [Sup Ct NY Co 2010] quoting *Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1<sup>st</sup> Dept 1990]; See also *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1<sup>st</sup> Dept 1997]; *Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1<sup>st</sup> Dept 1978]; *Edwards v Codd*, 59 AD2d 148, 149 [1<sup>st</sup> Dept 1977]. If the plaintiff can succeed upon any reasonable view of the allegations, the complaint may not be dismissed. *Dunleavy v Hilton Hall Apartments Co. LLC*, 14 AD3d 479, 480 [2d Dept. 2005]; *Board of Educ. of City School Dist. of City of New Rochelle v County of Westchester*, 282 AD2d 561, 562. The role of the court is to “determine only whether the facts as alleged fit within any cognizable legal theory” *Dee v Rakower*, 2013 NY Slip Op 07443 (2d Dept), citing *Leon v Martinez*, 84 NY2d 83 at 87 (1994). Finally, when considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed. *Offen v Intercontinental Hotels Group*, 2010 NY Misc LEXIS 2518.

The court will address the causes of action in the numerical order they are listed in the complaint.

The Third cause of action is for a “violation of RPL § 235-b.” This section is the warranty of habitability for tenants. The presence of bed bugs may constitute a breach of the warranty of habitability. See e.g. *Tafrate v Gucciardo*, 2014 N.Y. Misc. LEXIS 536; *Valoma v G-Way Management, LLC*, 29 Misc 3d 1222(A), 918 N.Y.S.2d 401 (Civ Ct, Kings Co 2010); *Bender . Green*, 24 Misc 3d 174, 874 N.Y.S.2d 786 (Civ Ct, NY Co 2009); *Ludlow Properties, LLC v Young*, 4 Misc 3d 515, 780 N.Y.S.2d 853 (Civ Ct, NY Co 2004). Therefore, this cause of action is not dismissed.

The Fourth cause of action is for “Reckless cause of action of prior notice.” The complaint states that the claim is that defendants “took no steps to remedy the condition, illegally delegated their duty to remedy the conditions to individual tenants and acted recklessly in allowing the condition to spread throughout the building including Plaintiffs' apartment.” This does not state a claim recognized in New York law, or is part of the claim for negligence or for breach of the warranty of habitability and is not a separate claim. There is no tort with this name in New York, and this cause of action is dismissed.

The Fifth cause of action is for constructive eviction. Defendants correctly aver that the statute of limitations for this cause of action is one year (See *Kent v 534 E. 11th St.*, 80 AD3d 106 [1st Dept 2010]). Moreover, the measure of damages for constructive eviction "is limited to rent abatement" (*Walls v Prestige Mgt., Inc.*, 73 AD3d 636, 636, 900 N.Y.S.2d 867 [1st Dept 2010]) rather than the damages plaintiff seeks. Finally, constructive eviction "may only be asserted defensively" (*Musk v 13-21 E. 22nd St. Residence Corp.*, 2012 NY Slip Op 33021[U], [Sup Ct, NY County 2012]). This cause of action is dismissed.

The Sixth cause of action is for “Intentional/negligent infliction of emotional distress.” The statute of limitations for intentional infliction of emotional distress is one year, and thus is time barred. This action was commenced in 2020 and the bed bug bites are alleged to have been in 2018 “and continuing.” However, there is no evidence submitted in opposition to this motion, only an attorney’s affirmation, and the court must assume the infestation was remediated (See *James v Flynn*, 132 AD3d 1214 [3d Dept 2015]; *Benyo v Sikorjak*, 50 AD3d 1074 [2d Dept 2008]). In addition, the conduct alleged, here, inaction, cannot be said to “rise to the level of extreme and outrageous conduct” required for this cause of action (See *Nauheimer v Archdiocese of NY*, 260 AD2d 615 [2d Dept 1999]). The cases require conduct “so outrageous and extreme as to go beyond all possible bounds of decency, which can be regarded as atrocious and intolerable in a civilized society.” (*John Doe v Archbishop Stepinac High Sch.*, 286 AD2d 478, 479 [2d Dept 2001]). Further, a cause of action for negligent infliction of emotional distress requires evidence that the conduct complained of unreasonably endangered the plaintiff’s physical safety, or caused her to fear for her safety (see, *Johnson v New York City Bd. of Educ.*, 270 AD2d 310; *Perry v Valley Cottage Animal Hosp.*, 261 AD2d 522; *Davies v County of Nassau*, 260 AD2d 531). These elements are not present here. (*E.B. v Liberation Pubs., Inc.*, 7 AD3d 566 [2d Dept 2004]). This cause of action is dismissed.

Next, the Seventh cause of action is for nuisance. Defendants claim this cause of action is duplicative of the cause of action for negligence. The complaint alleges (¶¶ 77-79) “That the presence of bed bugs in Defendant(s)' apartment constitutes a nuisance. That Defendant(s) created or maintained that nuisance. That Defendant(s) knew of or had notice of the bed bug infestation yet failed to abate or remedy the condition.” This is duplicative of the causes of action for negligence and for breach of the warranty of habitability and is dismissed.

The Eighth cause of action is for “breach of warranty of habitability”. This is what the Third cause of action is for as well. One cites the statute and one does not. The Eighth cause of action is dismissed.

The Ninth cause of action is for breach of contract. This refers to the lease, and defendants’ alleged failure to “make timely repairs to the Premises, including extermination for infestation of bed bugs.” This is not duplicative of the negligence claim, as, for example, if plaintiff had to retain her own exterminator, that cost would not be reimbursable in the negligence cause of action but would be reimbursable in the breach of contract cause of action.

The defendants also ask the court to dismiss the claims for punitive damages and attorneys’ fees. This is granted. The complaint does not set forth any basis for the claim for attorneys’ fees, which, in New York, requires a statute or a contract provision. The complaint does not set forth a basis for punitive damages either (See *Brown v Maple3, LLC*, 88 AD3d 224 [2d Dept 2011] [punitive damages not available to child in apartment building who suffered from lead poisoning, where there had been numerous lead paint violations over a number of years, as the landlord’s conduct was not so “flagrant as to transcend mere carelessness”]).

In conclusion, defendants shall serve their answer to the remaining causes of action in the complaint within thirty days.

This constitutes the decision and order of the court.

Dated: May 10, 2021

ENTER :



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Hon. Debra Silber, J.S.C.