

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D19828
X/prt

_____AD3d_____

Argued - April 14, 2008

STEVEN W. FISHER, J.P.
JOSEPH COVELLO
DANIEL D. ANGIOLILLO
ARIEL E. BELEN, JJ.

2006-11049
2007-02932
2007-08892

DECISION & ORDER

Alexander Breytman, appellant, v Olinville
Realty, LLC, et al., respondents.

(Index No. 2423/06)

Alexander Breytman, New York, N.Y., appellant pro se.

Jaffe & Asher LLP, New York, N.Y. (Ira N. Glauber and Mark P. Monack of counsel), for respondents Olinville Realty, LLC, Olinville Realty Co., LLC, Weiner Realty Company, Weiner Realtors, Weiner-Mega, LLC, Weiner Realty Co., Pinnacle Holding Company, Pinnacle Holding Company, LLC, Pinnacle Bronx, LLC, Pinnacle Bronx North, LLC, Pinnacle Bronx South, LLC, Pinnacle Bronx West, LLC, Pinnacle Amsterdam, LLC, Pinnacle Flatbush, LLC, Pinnacle Hamilton, LLC, Pinnacle Holding Co. 1, LLC, Pinnacle Holding Co. 2, LLC, Pinnacle Holding Co. 3, LLC, Pinnacle Holding Co. 4, LLC, Pinnacle Holding Co. 5, LLC, Pinnacle Holding Co. 6, LLC, Pinnacle Managing Co., LLC, Pinnacle Midwood, LLC, Pinnacle Parkway, LLC, Pinnacle Uptown, LLC, Praediumgroup, LLC, Kingbridge Realty Associates, LLC, Underhill Realty, LLC, Federal Realty, LLC, Joel Weiner, Harry Hirsh, Effie Galato, Donna Fabrizio, Sadat Rugova, and John Doe “Mr. Foster.”

In an action, inter alia, to recover damages for personal injuries and breach of implied warranty of habitability, the plaintiff appeals (1), as limited by his brief, from stated portions of an order of the Supreme Court, Kings County (Ruditzky, J.), dated October 20, 2006, which, among other things, granted the defendants’ motion to dismiss the complaint pursuant to, inter alia, CPLR 3211(a)(7), (2) from an order of same court (Held, J.), dated March 1, 2007, which, among other

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things, granted, in effect, the renewed motion of the defendants Olinville Realty, LLC, Olinville Realty Co., LLC, Olinville Realty, Weiner Realtors, Weiner Realty, LLC, Weiner Realty, Joel Weiner, Harry Hirsh, Donna Fabrizio, Effie Galato, "Forester," Sadat Rugova, and Bronx Pinnacle, LLC, to dismiss the amended complaint insofar as asserted against them pursuant to CPLR 3211(a)(7), and (3) from an order of the same court (Held, J.), also dated March 1, 2007, which granted the motion of the defendants Rappaport, Hertz, Cherson and Rosenthal, P.C., and John Robalino to dismiss the amended complaint insofar as asserted against them pursuant to CPLR 3211(a)(7) and (8).

ORDERED that the order dated October 20, 2006, is affirmed insofar as appealed from, without costs or disbursements; and it is further,

ORDERED that the first order dated March 1, 2007, is modified, on the law, by deleting the provision thereof granting that branch of the, in effect, renewed motion of the defendants Olinville Realty, LLC, Olinville Realty Co., LLC, Olinville Realty, Weiner Realtors, Weiner Realty, LLC, Weiner Realty, Joel Weiner, Harry Hirsh, Donna Fabrizio, Effie Galato, "Forester," Sadat Rugova, and Bronx Pinnacle, LLC, which was to dismiss the cause of action in the amended complaint to recover damages for negligence causing personal injuries insofar as asserted against the defendant Olinville Realty, LLC, and substituting therefor a provision denying that branch of the, in effect, renewed motion; as so modified, the order is affirmed, without costs or disbursements; and it is further,

ORDERED that the second order dated March 1, 2007, granting the motion of the defendants Rappaport, Hertz, Cherson and Rosenthal, P.C., and John Robalino to dismiss the amended complaint insofar as asserted against them, is affirmed, without costs or disbursements.

On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87; *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408). However, bare legal conclusions are not presumed to be true, nor are they accorded every favorable inference (*see Morris v Morris*, 306 AD2d 449, 451; *Doria v Masucci*, 230 AD2d 764, 765). The Supreme Court was correct in dismissing the plaintiff's cause of action alleging breach of the implied warranty of habitability, asserted in the amended complaint, since the facts as alleged did not fit within any cognizable legal theory.

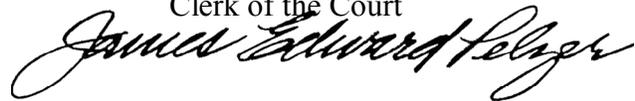
However, contrary to the Supreme Court's determination, the amended complaint sufficiently alleged a cause of action against the defendant Olinville Realty, LLC, the plaintiff's landlord, to recover damages for personal injuries caused by that defendant's negligence. The plaintiff alleged that on January 26, 2003, he suffered physical injuries when a portion of a wall in his apartment fell on him. When accepting all the facts as alleged in the amended complaint to be true and allowing the plaintiff the benefit of every possible inference, the facts as alleged fit within a cognizable legal theory.

The plaintiff's remaining contentions are without merit.

FISHER, J.P., COVELLO, ANGIOLILLO and BELEN, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive style with a large, looping initial "J".