

Rodriguez v Himrod Owners LLC

2020 NY Slip Op 33239(U)

October 2, 2020

Supreme Court, Kings County

Docket Number: 503225/2017

Judge: Lillian Wan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

Index No.: 503225/2017
Motion Date: 9/9/20
Motion Seq.: 04

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PEDRO ROSARIO RODRIGUEZ,

Plaintiff,

- against -

DECISION AND ORDER

HIMROD OWNERS LLC and PLAZA
MANAGEMENT USA, INC.,

Defendants.
-----X

The following e-filed documents, listed by NYSCEF document number (Motion 04) 52-67; 72-77 were read on this motion for summary judgment and dismissal of all claims and cross-claims against defendant, HIMROD OWNERS LLC.

In this action to recover damages for personal injuries, the defendant, Himrod Owners LLC (hereinafter Himrod), moves for an Order, pursuant to CPLR § 3212, seeking summary judgment on the issue of liability and for dismissal of all claims and cross-claims. For the reasons set forth below, the defendant’s motion is denied.

This action arises from personal injuries sustained by the plaintiff on June 19, 2014, when he was bitten by a rat while he slept in his bedroom. At the time of the incident the plaintiff was a tenant in the building owned by defendant Himrod, located at 657 Knickerbocker Avenue, County of Kings, City and State of New York. Pursuant to Real Property Actions and Proceedings Law § 778, a 7-A administrator was appointed for the building by Order and Judgment of the Hon. Kevin McClanahan on July 27, 2012 in Housing Court, Kings County. There is no dispute that the living conditions in the building posed a danger to the life, health and safety of the tenants when the defendant purchased the premises in December, 2013, with a 7-A administrator in place. According to the defendant, the 7-A administrator was removed 30 days after the parties entered into a Consent Order dated July 17, 2014.

In support of the motion the defendant submits, *inter alia*, the affidavit of David Behin, an officer of defendant Himrod, the July 27, 2012 Order and Judgment appointing the 7-A administrator for the premises, HPD records, various uncertified Housing Court documents, an unsigned draft of a “Consent Order” dated July 17, 2014 for the removal of the 7-A administrator, and New York City real property transfer records.

The defendant argues that summary judgment should be granted because Himrod did not have any control over the building from the date of purchase by Himrod in December, 2013, until August, 2014, when it obtained operational control of the property. Himrod contends that during that period it made “numerous visits to the Housing Court in an effort to regain control over the property and make necessary renovations.” The defendant asserts that it “explicitly

requested permission to obtain access to the building to begin repairs, including extermination..." during that time period. The defendant argues that it is entitled to summary judgment because it was an out-of-possession landlord of the premises which was in the 7-A program. Defendant further asserts that the 7-A appointment order of July 27, 2012, as well as other Housing Court orders explicitly prohibited the owner from performing renovations, including extermination services at the premises, and that no strict liability statute applies. The July 27, 2012 court order states in pertinent part:

[T]he Owner, the managing agent, any person acting under authority from the owner or managing agent, and any person who does not have authorization from the Administrator are hereby enjoined and restrained from (i) entering the Premises without the prior knowledge and consent of the Administrator, (ii) interfering in any way with the Administrator's management, operation or control of the Premises...

The plaintiff opposes the motion, arguing that the defendant's summary judgment motion has no factual or legal foundation, and that the defendant has not met its *prima facie* burden for summary judgment. The plaintiff contends that the defendant's submissions are deficient, as the Housing Court documents are barely legible and not certified, and omit the underlying motions showing that it requested authorization to exterminate the premises. Plaintiff further argues that the affidavit of David Behin lacks probative value and should not be considered, as there is no venue designation or notary stamp with the notary's commission number, expiration date or county of qualification, as required by Executive Law § 137. Lastly, the plaintiff argues that the defendant had a non-delegable statutory duty to maintain its premises in a reasonably safe condition, which may give rise to strict liability.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). The moving party is required to make a *prima facie* showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez* at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). The papers submitted in the context of the summary judgment application are always viewed in the light most favorable to the party opposing the motion. *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). If the *prima facie* burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212(b); *see also Alvarez* at 324; *Zuckerman* at 562. Generally, the party seeking to defeat a motion for summary judgment must tender evidence in opposition in admissible form, and mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. *Zuckerman* at 562.

An out-of-possession landlord is liable for injuries occurring on its premises where the law imposes a duty by statute or regulation. *Goggins v Nidoj Realty Corp.*, 93 AD3d 757 (2d Dept 2012); *see also Rivera v Nelson Realty, LLC*, 7 NY3d 530 (2006). Moreover, the appointment of a 7-A administrator "does not prevent an owner from making repairs to the building so long as the owner does not interfere with the administrator's operation of the

building.” *Lawrence v Martin*, 131 Misc2d 256, 268-259 (Civ Ct, NY County, Feb. 13, 1986). Article 7-A imposes no restrictions on the owner other than preventing the owner from interfering with the administrator’s ability to carry out his/her duties. *Id.*

Furthermore, Real Property Law § 235-b creates a warranty of habitability on the part of a landlord/lessor that the premises are “fit for human habitation and...that the occupants of such premises shall not be subject to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.” Under New York law, the warranty of habitability that is implied in all residential leases is breached by vermin infestation. *Shlivko v Good Luck Travel, Inc.*, 196 Misc.2d 164 (Civ Ct, Kings County, June 6, 2003); *see also Aponte v New York City Hous. Auth.*, 54 Misc.3d 220 (Sup Ct, Richmond County, Oct. 13, 2016). Moreover, Multiple Dwelling Law (hereinafter MDL) § 80(1) states that “[t]he owner shall keep all and every part of a multiple dwelling, the lot on which it is situated, and the roofs, yards, courts, passages, areas or alleys appurtenant thereto, clean and free from vermin, dirt, filth, garbage or other thing or matter dangerous to life or health.” MDL § 80(6) provides that buildings shall be constructed to be rat-proof. In *Weiss v City of New York*, 16 AD3d 680, 681 (2d Dept 2005), the court determined that MDL § 80 imposes a “nondelegable duty on owners to maintain their premises in a reasonably clean and safe condition.”

Likewise, pursuant to §§ 27-2017 and 27-2019 of the Administrative Code of the City of New York, an owner has a statutory duty to take measures to eradicate vermin from the property. “A party who is injured as a result of an owner's failure to fulfill those [statutory] duties may recover damages from the owner despite the fact that the duty of maintenance has been delegated to another.” *Id.* at 682. In *Abdul v Hirschfield*, 21 Misc3d 764 (Sup Ct, Kings County, Oct. 6, 2008), the court found that the appointment of a 7-A administrator does not absolve an out-of-possession owner who may be held strictly liable for injuries caused by unsafe conditions on the property.

In the instant case, the defendant has failed to produce evidentiary proof in admissible form that no genuine issues of fact exist, and therefore has not established its *prima facie* entitlement to summary judgment. The exhibits submitted by the defendant to support its contention that it was explicitly denied access to the building for rodent extermination have no probative value. The Housing Court documents are mostly illegible, and do not establish that the defendant was denied access to the building for that purpose. For example, the March 6, 2014 order of the Hon. Kevin McClanahan does not preclude the defendant from entering the building. Further, the three-attorney stipulation of May 29, 2014, upon which the defendant heavily relies, is not so-ordered by the court, and in any event it refers to a collapsing ceiling. It does not state that the defendant was denied entry to the premises for extermination services. Additionally, the motions to which the exhibits refer are not included with the defendant’s submission, and therefore it is impossible to discern whether the defendant even sought access to the premises for rodent extermination.

The “Consent Order” of July 17, 2014 is not in admissible form, as it is an unsigned draft copy of the order. Likewise, the affidavit of David Behin is facially deficient in that it fails to meet the requirements of Executive Law § 137. The defendant’s attempt to rectify these errors by submitting a corrected affidavit with its reply papers must also fail. The purpose of reply

papers is to address arguments made in opposition to the movant's papers, and "not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion." *Lee v Law Offices of Kim & Bae, P.C.* 161 AD3d 964, 965 (2d Dept 2018); *see also USAA Federal Savings Bank v Calvin*, 145 AD3d 704 (2d Dept 2016).

As such, contrary to defendant's assertions, issues of fact exist which preclude summary judgment as to whether the defendant had a non-delegable statutory duty to maintain the premises in a clean and safe condition, notwithstanding the appointment of a 7-A administrator. There is also a genuine issue of fact as to whether the defendant requested authorization to enter the premises for the purpose of rat extermination, and whether the appointment order of July 27, 2012 specifically prevented the owner from performing extermination services in the building.

The defendant's remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the defendant's motion for summary judgment and dismissal of the claims and cross-claims is denied.

This constitutes the decision and order of the Court.

Dated: October 2, 2020



Hon. Lillian Wan, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.