

**Dembeck v Laguna**

2004 NY Slip Op 30284(U)

October 13, 2004

Supreme Court, New York County

Docket Number: 120532/03

Judge: Marilyn Shafer

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_

PART \_\_\_\_\_

0120532/2003

Justice

DEMBECK, LOUISE E.

VS

LAGUNA, DEBBIE

SEQ 2

PARTIAL SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*non motion*  
*be denied pursuant to attached fees*  
*preliminary conference scheduled*  
*for December 3, 2004 10:00 am*

**FILED**

OCT 18 2004

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/13/04

HON. MARILYN SHAFER, JSC

J.S.C.

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Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER PART 36  
Justice

DEMBECK, INDEX NO. 120532/03  
Plaintiff,  
-against- MOTION SEQ. NO. 2

LAGUNA, et. al.,  
Defendant.

FILED  
OCT 18 2004  
NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 8, were read on this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion — Affidavits — Exhibits	1,2
Cross-Motion — Answering Affidavits — Exhibits	3,4
Replying Affidavits	5,6,7,8

Upon the foregoing papers, it is ordered that defendants' motion and plaintiff's cross-motion are decided below.

*Background*

Plaintiff Louise Dembeck resides at 220 Central Park South in a two bedroom apartment with a terrace located on the 14<sup>th</sup> floor ("the premises"). Plaintiff entered into a lease for the premises that began on April 1, 2000, and expired on March 31, 2002. Upon expiration of the lease, plaintiff signed a one year renewal lease for April 1, 2003 to March 31, 2003. Monthly rent was \$5,300.00, and upon renewal increased to \$5,400.00. On October 16, 2003, plaintiff sent a letter to the defendant seeking to terminate her tenancy prior to the expiration of the lease, alleging that the elevator services were inadequate. Specifically, plaintiff explained that because

the passenger elevator was not operating properly, she was forced to climb up the stairs on more than one occasion. Plaintiff further explained that she wanted to move out because the service elevator was undergoing renovation and the passenger elevator was "faulty," because she was concerned that the passenger elevator would also undergo renovation, and because there are other repairs needed in the premises. In response, the defendant, by letter dated October 24, 2003, informed the plaintiff that the service elevator would not be renovated, reminded plaintiff of her lease obligation to pay rent through the end of the lease term, but offered to put the premises on the market and show it to prospective new tenants. More letters were exchanged with no amicable resolution. Plaintiff withheld rent for October and November 2003, and deposited it into a separate bank account. Plaintiff then commenced the instant action alleging ten causes of action against the defendant and its employees, while the defendant 220 Central Park commenced a nonpayment proceeding in housing court. Defendants bring the instant motion for partial summary judgment to dismiss the first, second, fifth, eighth, and tenth causes of action alleged in plaintiff's complaint.

#### *Discussion*

It is well settled that to obtain summary judgment it is necessary that the movants establish their cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in their favor (CPLR 3212 [b]). The burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which their claims rest (*Zuckerman v City of New York*, 427 NY2d 595 [1980]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*id.*)

*Defendant 220 Central Park*

220 Central Park seeks summary judgment on the first, second, fifth, eighth, and tenth causes of action alleged in plaintiff's complaint.

Fraud

The first and second causes of action allege fraud. To establish a claim for common-law fraud, plaintiff must demonstrate defendant's knowing misrepresentation of a material fact, made with intent to deceive, plaintiff's reasonable reliance, and damages (*Salles v Chase Manhattan Bank*, 300 AD2d 266 [1<sup>st</sup> Dept 2002]). Defendants met their initial burden of establishing as a matter of law that there are no material issues of fact with respect to those elements of fraud (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Essential to a fraud cause of action is the existence of a material misrepresentation made with the intention of inducing the plaintiff's reliance thereon (*see Gizzi v. Hall*, 300 AD2d 879, 880 [3<sup>rd</sup> Dept 2002]). Here, plaintiff asserts that the defendants had a duty to disclose to her that the service elevator would be out of service for one-third to one-fourth of her renewal term, and that plaintiff relied on the elevator services being the same as before. This Court finds that although plaintiff may have raised an issue of fact regarding whether she would have renewed the lease had she known that the service elevator would be under renovation, leaving only the regular passenger elevator available, there is no evidence that defendants willfully or intentionally concealed the information regarding the elevator repairs from her in order to induce her to sign the lease. Accordingly, since defendants have established their entitlement to judgment dismissing that cause of action against them and plaintiff has failed to raise a triable issue of fact, summary judgment dismissing the causes of action for fraud is granted.

### False Imprisonment

The fifth cause of action alleges false imprisonment. To establish a prima facie case of false imprisonment, a plaintiff must show that: (1) defendant intended to confine them; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent; and (4) the confinement was not otherwise privileged (*Arrington v Liz Claiborne, Inc.*, 260 AD2d 267 [1<sup>st</sup> Dept 1999]). Plaintiff alleges that on November 7, 2000, which was prior to her renewal of the lease, the elevator stopped in between floors while she was the sole occupant. The doors would not open and the plaintiff contends that she rung the alarm and called for help but the intercom did not work and the doorman allegedly ignored her. While the experience of being trapped in the elevator was traumatic alleged by the plaintiff, plaintiff fails to show any evidence that the defendant acted with the requisite intent to confine her. Accordingly, summary judgment dismissing the cause of action for false imprisonment is granted.

### Constructive Eviction

The eighth cause of action alleges constructive eviction. In December 2003, defendants discovered that a steam pipe was leaking under plaintiff's terrace and causing water to pour on the apartment below. In order to fix the pipe, the front to the terrace and the outer wall of plaintiff's living room underwent demolition. For the next several weeks, more problems were found and further demolition and repairs done. Defendants caused construction workers to enter the premises, break down walls in the premises, and set up and use construction equipment and cleaning materials. Plaintiff's living room wall and terrace were demolished, rendering her terrace, dining room and living room uninhabitable. As a result of defendant's work in her apartment, which included the removal of asbestos, plaintiff contends that she was deprived of

the use and enjoyment of the premises and forced to abandon the terrace and parts of the entrance foyer, dining room, living room, and bedroom.

There is an implied covenant in every lease that a tenant will have quiet enjoyment and possession of the premises (*Sauer v Xerox Corp.*, 95 F.Supp2d 125 [WDNY 2000]), which can be breached by a constructive or actual eviction (*Grammer v Turits*, 271 AD2d 644 [2d Dept 2000]). A constructive eviction occurs when a tenant, though not physically barred from the area in question, is unable to use the area for the purpose intended (*Dinicu v Groff Studios Corp.*, 257 AD2d 218, 224 [1<sup>st</sup> Dept 1999]). A constructive eviction may be partial, rather than total, in which case the tenant must have abandoned only the portion of the premises affected (*Minjak Co. v Randolph*, 140 AD2d 245, 248-40 [1st Dept 1988]; *see also East Haven Associates Inc. v Gurian*, 64 Misc. 2d 276 [Civ. Ct. 1970]; *Zamzok v 650 Park Ave. Corp.*, 80 Misc. 2d 573 [Sup. Ct. 1974]). Issues of fact are presented regarding whether defendants' acts were wrongful and whether the plaintiff had abandoned a portion of the premises due to the landlord's acts in making that portion of the premises uninhabitable by the plaintiff. Accordingly, summary judgment on the cause of action for partial constructive eviction is denied.

#### Retaliatory Eviction

The tenth cause of action alleges retaliatory eviction. While a tenant may assert retaliatory eviction as a defense or counterclaim to a nonpayment proceeding where the allegation of nonpayment is baseless and solely manufactured by the landlord to harass (*see 601 West 160 Realty Corp. v Henry*, 189 Misc.2d 352 (Civ. Ct. Kings County 2001)), such circumstances are not present in the instant action wherein past rent was owed and unpaid by the plaintiff. Accordingly, Real Property Law sect. 223-b bars plaintiff's claim of retaliatory eviction against

defendants for their commencement of a nonpayment proceeding (*390 West End Associates v Raiff*, 166 Misc.2d 730 [Sup. Ct. App. Term 1995]), and the cause of action for retaliatory eviction is dismissed.

*Defendants Laguna and Kleinhans*

Plaintiff's complaint against Debbie Laguna ("Laguna") and Elyzabeth Kleinhans ("Kleinhans"), employees of defendant 220 Central Park who responded to plaintiff's letters as agents of the landlord, is dismissed since plaintiff has failed to submit any evidence tending to show that material issues of fact exist regarding whether Laguna and Kleinhans acted tortiously or beyond the scope of their employment. Accordingly, summary judgment is granted and the action dismissed against the individual defendants.

*Plaintiff's Cross-Motion*

Plaintiff's cross-motion seeking to lift the stay on discovery during the pendency of the instant summary judgment motion is denied as moot.

*Conclusion*

For all the foregoing reasons, it is

Ordered that defendants' motion for partial summary judgment is granted to the extent that the first, second, and fifth causes of action are dismissed; and it is further

Ordered that defendants' motion is granted to the extent that the complaint is dismissed in its entirety against defendants Laguna and Kleinhans; and it is further

Ordered that defendants' motion for partial summary judgment on the eight cause of action is denied; and it is further

Ordered that the instant action continues against the defendant 220 Central Park South on the remaining causes of action: the third cause of action for emotional distress, fourth cause of action for negligence, sixth cause of action for breach of contract, seventh cause of action for negligent representation, eighth cause of action constructive eviction, and ninth cause of action for breach of the warranty of habitability.

This reflects the decision and order of this Court.

Dated: October 13, 2004

  
\_\_\_\_\_  
J.S.C.  
HON. MARILYN SHAFER, JSC

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