

**Safe Horizon, Inc. v Academy of Medicine of Queens
County, Inc.**

2005 NY Slip Op 30038(U)

May 10, 2005

Supreme Court, Queens County

Docket Number: 0003092/3092

Judge: Thomas V. Polizzi

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA Part 14
Justice

SAFE HORIZON, INC.,
2004

x

Index
Number 3092

Plaintiff,

Motion
Date December 7,

2004
- against-

ACADEMY OF MEDICINE OF QUEENS
COUNTY, INC.,

Motion
Cal. Number 44

Defendant.

x

The following papers numbered 1 to 7 read on this motion by the defendant to dismiss the complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits - Service ...	1-4
Answering Affidavits - Exhibits - Service	5-7

Upon the foregoing papers it is ORDERED that the motion is granted, only to the extent indicated, and is otherwise denied.

This action presents a leasehold dispute between plaintiff, as tenant, and defendant as landlord. Plaintiff leased the third floor of defendant's building, as well as a portion of the basement (the premises). The lease requires the defendant to provide maintenance services, so as to keep the premises in good repair. Plaintiff claims that water leaked into the premises, causing serious damage and preventing the use of the premises. It is alleged that the leaks persisted over a period of years, despite the plaintiff's repeated demands for the defendant to repair them. Plaintiff has asserted 13 separate causes of action, including causes of action for mandatory injunctive relief, nuisance and damages. For the reasons that follow, all causes of action except the third, for direct damages, and the

eighth, for an abatement of rent, are severed and dismissed.

The first cause of action demands an injunction directing the defendant to repair the leaks. The second cause of action demands an order allowing the plaintiff to hire contractors in the defendant's name, and utilizing the rental payments, to repair the leaks. The third cause of action seeks direct and consequential damages. The fourth cause of action seeks a declaratory judgment holding the defendant liable for future leaks. The fifth cause of action also seeks an injunction directing the defendant to cure the defective conditions alleged. This cause of action is framed in terms of negligence, alleging a "duty of care" and notice to the defendant. The sixth cause of action seeks damages of "not less than \$1,000,000." The seventh cause of action seeks damages for breach of the quiet enjoyment clause of the lease. The eighth cause of action seeks an abatement of rent pursuant to the lease. The ninth cause of action alleges a partial actual eviction, and the tenth cause of action alleges a partial constructive eviction. The eleventh cause of action seeks what is described as an order pursuant to RPAPL § 803, allowing the plaintiff to make repairs to the premises. The twelfth cause of action alleges that the premises have become a nuisance, and demands both money damages and an injunction directing the defendant to repair the leaks. The thirteenth cause of action describes the defendant's conduct as "outrageous," and demands attorney's fees.

Although this action is over a year old, no answer to the complaint has yet been served. After a motion for a preliminary injunction had been made and denied, the parties entered into an extended period of settlement discussions. The parties stipulated that if the plaintiff failed to demand an answer by September 13, 2004, the action would be discontinued. This deadline was extended by a later stipulation to October 1, 2004. Plaintiff's demand for an answer was dated October 6, 2004. Defendant demands that the stipulation be strictly enforced, and that the action should be deemed discontinued. The court is not persuaded that the parties intended that the stipulation should be taken as creating an automatic deadline for dismissal, or that the defendant should be rewarded for its extended failure to answer the complaint. The branch of the motion seeking dismissal on that ground is, therefore, denied.

On this motion, counsel for the plaintiff now concedes that the defendant has made repairs, rendering the first and second causes of action moot, "to some extent." Counsel states in one place that these causes of action are withdrawn, and in the same paragraph states that plaintiff "might agree" to withdraw them. Voluntary discontinuance of a claim is governed by CPLR 3217. Pursuant to that section, a party asserting a claim may withdraw

it by mere notice only until the responsive pleading is served, or within 20 days of the service of the pleading asserting it. Since the service of this motion is equivalent to a response to the complaint, plaintiff no longer has the right to unilaterally withdraw causes of action (see Siegel, Practice Commentaries to McKinney's, CPLR § C3217:8), and the defendant is entitled to a determination of its motion. The court must, therefore, decide the branches of the motion dealing with these causes of action. The first and second causes of action, seeking mandatory injunctive relief for enforcement of obligations under a lease, are meritless, and are dismissed. Plaintiff clearly has a remedy at law, in the form of money damages, and in fact demands this remedy in other causes of action.

So much of the third cause of action as seeks consequential damages is not opposed by plaintiff on this motion, and counsel also purports to "withdraw" it. Therefore, so much of the third cause of action as seeks consequential damages is dismissed. Defendant does not claim any defect in so much of the third cause of action as seeks direct damages.

The fourth cause of action seeks a declaratory judgment as to all leaks which may occur in the future, without limitation as to cause. This entirely speculative claim is without basis in the law, and is dismissed.

The fifth and sixth causes of action are based in tort, and seek, respectively, a mandatory injunction to cure the alleged defects and damages. Plaintiff cannot assert tort remedies in this action, which is based on alleged breaches of a lease agreement. A tort may accompany a breach of contract claim only where the contract creates a relation out of which springs a duty, independent of the contract obligation, and where that independent duty is also violated (Luxonomy Cars, Inc. v Citibank N.A. 65 AD2d 549, 550 [1978]; see also Vought v Teachers Coll., Columbia Univ., 127 AD2d 654 [1987]; Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 [1987]). No independent duty is alleged here.

Plaintiff also purports to withdraw without prejudice the seventh, ninth, tenth and eleventh causes of action. For the reasons stated above, the defendant is entitled to a determination of its motion regarding them. As to the ninth and tenth causes of action, alleging, respectively, actual and constructive eviction, it is well-settled that a tenant remaining in possession cannot assert either claim (Barash v Pennsylvania Term. Real Estate Corp., 26 NY2d 77 [1970]; Whaling Willie's Roadhouse Grill, Inc. v Sea Gulls Partners, Inc., ___ AD3d ___ [2005]; 428 Camera Corp. v Tandy Corp., 272 AD2d 72 [2000]). As to the eleventh cause of action, based on RPAPL § 803, the

plaintiff has not stated the nature of the alterations it proposes to make to the premises, nor has it served the requisite notice on the defendant, nor has it shown the amount of the required security. All of these are required to be shown before a tenant is entitled to relief under that statute. These causes of action are, therefore, also dismissed.

Defendant's only arguments in favor of dismissing the eighth cause of action are that it fails to contain factual allegations apart from those contained elsewhere in the complaint, and that it is duplicative of the third cause of action. These arguments are meritless. The CPLR explicitly provides that prior statements in a pleading are deemed repeated (CPLR 3014). This cause of action overlaps the third, to a great extent, but that is not grounds for dismissing it.

The twelfth cause of action alleges that the conditions complained of constitute a nuisance. "The elements of the tort of private nuisance are: (1) an interference, substantial in nature; (2) intentional in origin; (3) unreasonable in character; (4) with plaintiff's right to use and enjoy land; (5) caused by the defendant's conduct" (Weinberg v Lombardi, 217 AD2d 579 [1995]; Ward v City of New York, ___ AD3d ___ [2005]; see Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564 [1977]). Here, there is no allegation of intentional conduct. Further, this cause of action sounds in tort, and so falls afoul of the rule discussed above, against asserting tort claims in a contract action, absent an independent duty. This cause of action must, therefore, be dismissed.

The thirteenth cause of action alleges that the defendant's conduct has been "outrageous," and demands an award of attorney's fees. No facts are stated, anywhere in the complaint, which justify that characterization of defendant's conduct. No legal or factual justification is advanced which would allow the award of attorney's fees. It is well settled that in the absence of a contractual provision or statutory authority, attorney's fees may not be recovered (U.S. Underwriters Ins. Co. v. City Club Hotel, LLC, 3 NY3d 592 [2004]; Mighty Midgets v Centennial Ins. Co., 47 NY2d 12 [1979]; Wu v Kao, 194 AD2d 666 [1993]). The thirteenth cause of action is, therefore, dismissed.

The court notes that before this motion was made, the parties appeared in the Compliance, Settlement and Conference Part, and that an order was made directing disclosure. The parties are directed to comply with that order in all respects, including the filing of a note of issue on or before May 13, 2005. To the extent that the parties may already be in default of complying with that order, the court now directs an expedited schedule for the completion of pretrial proceedings, as follows:

The defendant is directed to serve an answer, not later than 10 days from the service of this order with notice of entry (CPLR 3211[f]).

The parties are directed to appear for depositions, on June 21, 2005, or on such earlier date as may be agreed by counsel. Any demands for documents arising out of the depositions are to be served within 20 days of the depositions, and to be responded to within 20 days of service. This schedule is to be strictly observed. The pleading of any party failing to comply shall be deemed stricken, without further order.

A copy of this order is this date being mailed to the attorneys for the respective parties.

Dated: May 10, 2005

J.S.C.