

Meinwald v 205 Third Ave. Owners' Inc.

2005 NY Slip Op 30600(U)

October 3, 2005

Supreme Court, New York County

Docket Number: 106447/04

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER PART 36
Justice

MEINWALD, INDEX NO. 106447/04
Plaintiff,

-against- MOTION SEQ. NO. 1

205 THIRD AVENUE OWNERS' INC., et. al.,
Defendants.

The following papers, numbered 1 to 4, were read on this motion for consolidation and removal :

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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that plaintiff's motion for removal and consolidation is granted.

Background

The above-captioned action arises out of a flood that occurred in the apartment directly above plaintiff Barbara Meinwald's cooperative apartment in the building located at 205 Third Avenue in New York County ("the premises"). Ms. Meinwald commenced this action against, *inter alia*, 205 Third Avenue Owners' Inc., the Board of Directors of 205 Third Avenue Owners' Inc., PRC Management Company LLC, Property Resources Corporation and the owners of the apartment that cause the flood (collectively "the defendants"). Plaintiff seeks to recover damages

for personal injuries sustained as a result of exposure to toxic mold and fungi which formed as a result of the flood and the defendants' alleged failure to timely correct the condition. Defendant 205 Third Avenue Owners' Inc ("the Cooperative") subsequently commenced a summary non-payment proceeding against Ms. Meinwald in Civil Court, New York County, captioned *205 Third Avenue Owner's, Inc. v Barbara Meinwald*, L & T Index No. 85864/04, for failure to pay \$4,581.04 in maintenance and other fees from December 2003 through July 2004. Ms. Meinwald contends that she stopped paying the maintenance due to the conditions in her apartment.

Discussion

Consolidation is permitted where there is a common question of law and fact (CPLR 602[a]) and is generally favored by the courts "in the interest of judicial economy and ease of decision making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right" (*Amtorg Trading v Broadway*, 191 AD2d 212 [1st Dept 1993]).

Ms. Meinwald claims that both the summary proceeding and this action¹ arise from a common nucleus of facts, all arising from the nature of the living conditions at the premises. Her defense to the non-payment claim, i.e. breach of warranty of habitability, and her complaint alleging injuries resulting from defendants' negligence, arises out of and are premised upon the alleged presence of toxic mold due to the flooding condition. The testimony and other evidence, if any, to support the allegations of mold and its effect on the plaintiff are material and necessary

¹ Ms. Meinwald commenced the above-captioned action for breach of contract to timely repair the flood damage to her ceiling, breach of the warranty of habitability and quiet enjoyment, attorney's fees, breach of fiduciary duty, nuisance, and negligence.

to both tenant's defense to the summary proceeding and to her claim for damages for personal injuries. The law of the case, by decision of Justice Kapnick dated February 2005, prevents transferring this action to Civil Court, given the liberal discovery procedures permitted in the instant action. The Cooperative does not seem to contest that both the summary and the Supreme Court action involve the same questions of fact, but instead objects to consolidation on the grounds that Ms. Meinwald's allegations are impermissible "counterclaims" in the summary proceeding pursuant to the lease whose provisions may not be circumvented by removing the proceeding to this Court. However, unlike counterclaims which are properly relegated to plenary actions (*Titleserv, Inc. v Zenobio*, 210 AD2d 310 [2d Dept 1994]), Ms. Meinwald is permitted to assert her claims of, *inter alia*, the breach of the warranty of habitability, to offset the obligation to pay rent (*Nottenberg v Walber 985 Co.*, 160 AD2d 574, 575 [1st Dept 1990]), and these defenses are not waivable by contract (see McKinney's Consolidated Laws of New York Real Property Law § 235-b [warranty of habitability cannot be modified or waived as against public policy]).

The Cooperative further argues that they will suffer prejudice if consolidation is granted because they continue to not receive rent. However, it is undisputed that this Court has the jurisdiction not only to adjudicate the nonpayment claim but also to order interim payment of use and occupancy pending resolution of the nonpayment claim. The summary proceeding is not on the trial calendar in Civil Court, and can be placed on expedited discovery schedule in this Court.

While it has also been held that staying or removing summary proceedings are disfavored (*see Scheff v 230 East 73rd Owners Corp.*, 203 AD2d 151 [1st Dept 1994]), where, as here, there is a common question of law and fact, where the summary proceeding is one to recover money,

and there is no demonstrable prejudice to the cooperative upon consolidation, consolidation under CPLR 602(b) is warranted (*see Moretti v 860 West Tower*, 221 AD2d 191[1st Dept 1995]). Consolidation is also further warranted due to the risk of inconsistent judgments regarding the plaintiff's defenses or causes of action raised in the Civil Court and the Supreme Court proceedings, respectively.

Conclusion

For all the forgoing reasons, it is

ORDERED that the motion is granted and the above-captioned action is consolidated in this Court with *205 Third Avenue Owner's, Inc. v Barbara Meinwald*, L & T Index No. 85864/04 (Civil Court, New York County), under New York County Index No.106447/04 and the consolidated action shall bear the following caption:

=====X
BARBARA MEINWALD,
Plaintiff,
-against-

205 THIRD AVENUE OWNERS' INC., THE BOARD
OF THE DIRECTORS OF 205 THIRD AVENUE OWNERS'
INC., PRC MANAGEMENT COMPANY LLC, PROPERTY
RESOURCES CORPORATION, JOHN WARTTI,
VIVIAN WARTTI and BETH WARTTI,
Defendants,

=====X
205 THIRD AVENUE OWNERS' INC.,
Petitioner,
-against-

BARBARA MEINWALD,
Respondent.
=====X

And it is further

ORDERED that the Clerk of the Civil Court, New York County, shall transfer the papers on file under L & T Index No. 85864/04 to the Clerk of this Court upon service of a certified copy of this order and payment of the appropriate fee, if any; and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that upon service on the Clerk of this Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation, and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation; it if further

ORDERED that this action is remanded to the Trial Support Office for reassignment to another IAS Part. as this Court recuses itself from further involvement in this case.

This reflects the decision and order of the Court.

Dated: October 3, 2005

NEW YORK STATE

J.S.C.

Check one: [] FINAL DISPOSITION [x] NON-FINAL DISPOSITION

FILED
OCT 13 2005
NEW YORK
COUNTY CLERK'S OFFICE