

Litwack v Plaza Realty Investors, Inc.

2006 NY Slip Op 30458(U)

April 3, 2006

Supreme Court, New York County

Docket Number: 104745/02

Judge: Marilyn Shafer

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

PRESENT: _____

PART _____

Index Number : 104745/2002

LITWACK, WENDY

vs

PLAZA REALTY INVESTOS

Sequence Number : 003

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided pursuant to attached Rev

FILED

APR 12 2006

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/3/06

[Signature]
HON. MARILYN SHAFER, JSC

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----x
WENDY LITWACK,

Plaintiff,

-against-

Index No.
104745/02

PLAZA REALTY INVESTORS, INC.,
LAURENCE T. GINSBERG, ALBERT
GINSBERG, LAURENCE TOWERS
COMPANY LLC and ALGIN MANAGEMENT
CO., LLC,

Defendants.

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-----x
Shafer, J.:

Plaintiff moves for leave to reargue this Court's decision and order entered on April 26, 2005 (the Order), dismissing the first, third, and fifth causes of action of the complaint. Defendants cross-move for leave to reargue the Order to the extent that it did not dismiss the second and sixth causes of action.

The substantive facts here have already been fully set forth in this court's decision and order dated November 12, 2004 (the Initial Order), and briefly reiterated in the Order, and will not be repeated here, except as necessary.

The procedural facts have some relevance. In the Initial Order, this court dismissed the third cause of action for breach of warranty of habitability, but denied summary judgment to defendants on the third and fifth causes of action for common law negligence, finding that plaintiff had raised a triable issue as to whether defendants had actual or constructive notice of the alleged toxic mold condition in plaintiff's apartment. Upon renewal and reargument by

defendants, based on a case, decided several days after the Initial Order, in the Appellate Division, First Department, Beck v J.J.A. Holding Corp. (12 AD3d 238 [1st Dept 2004], lv denied 4 NY3d 705 [2005]), this court granted renewal, dismissing the first, third, and fifth causes of action. In Beck, also a toxic mold case, the First Department, for the first time, clarified the issue of the landlord's duty in a case where a tenant was alleging a mold condition in the premises caused personal injuries. In that case, in September 1998, the tenant's apartment was flooded, severely damaging the flooring and walls (id. at 239). The landlord repainted, and the carpeting was replaced (id.). The tenant alleged that her apartment had a moldy odor and discoloration of the walls (id. at 239-40). She stated that she found out about the mold in her apartment in November 1999, and moved out less than a month later (id.). The court held that the tenant failed to show that the landlord either created, or had actual or constructive notice of the mold hazard, dismissing the claims (id. at 240).

Finding Beck substantially analogous to this case, this court dismissed the third and fifth causes of action based on plaintiff's failure to meet her burden of establishing that defendants either created, or had actual or constructive notice of the alleged mold condition in her apartment (Order at 3-4).

Both parties now seek to reargue the Order, but on different grounds. Plaintiff argues that Beck is distinguishable, and then argues that another new mold case has come down from the Appellate Division, warranting reinstatement of the Initial Order. Defendants reargue that the Order failed to dismiss the second and sixth causes of action, and seek that relief now.

Plaintiff's motion to reargue is denied. A motion for leave to reargue is addressed to the discretion of the court, and may be granted upon a showing that the court overlooked or

misapprehended the facts or the law, or for some reason mistakenly arrived at its decision. See, William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 (1st Dept), lv dismissed in part, denied in part 80 NY2d 1005 (1992). A motion to reargue is not designed to give the unsuccessful party additional opportunities to reargue issues previously decided, or to present different arguments from those originally asserted. See Rubinstein v Goldman, 225 AD2d 328 (1st Dept), lv denied 88 NY2d 815 (1996); William P. Pahl Equip. Corp. v Kassis, supra; Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979), appeal denied 56 NY2d 507 (1982). Plaintiff here is attempting to argue again that defendants had constructive notice of the alleged mold problem in her apartment, which argument was made to and addressed by this court in the Order. She fails to demonstrate that this court misapprehended or overlooked any facts or law.

To the extent that plaintiff's motion relies upon a recent decision (January 19, 2006) of the Appellate Division, First Department, Daitch v Naman (2006 NY Slip Op 00313, 807 NYS2d 95), it is a motion to renew. This branch of the motion also is denied, because that case is factually distinguishable. In Daitch v Naman, a tenant brought an action against the landlord, and a contractor hired by the landlord, for personal injuries allegedly caused by the contractor's negligent performance of exterior facade work on the building. The tenant and other tenants had repeatedly complained about the entry of water and dust into their apartments from the onset of the facade work (Daitch v Naman, 807 NYS2d at 96). The court assumed that the plaintiff tenant had not complained about mold until after the onset of his respiratory problems, and found a factual issue as to whether the mold was a foreseeable consequence of the repeated entry of water and dust into the apartment during the facade work, giving the owner constructive notice of a potential mold hazard (id. at 96-97). Here, in contrast, there was no proof of continuous

complaints about the repeated entry of water, based on repair work undertaken by the owner, which could warrant an issue as to the foreseeability of a mold hazard. Instead, similar to Beck v J.J.A. Holding Corp. (12 AD3d 238, supra), the defendants had notice of the discoloration of the dining room wall, and knowledge of the steam pipe leak in April 1999. This did not constitute notice of the likelihood of mold growth. Therefore, upon renewal, the court adheres to the Order, granting dismissal of the third and fifth causes of action.

Defendants' cross motion to reargue is granted. While defendants' motion for summary judgment and first motion to reargue stated vaguely that they sought dismissal of the complaint, defendants never argued or even addressed the second and sixth causes of action. In the interest of justice, however, their arguments for dismissal of these claims are considered, and the claims are dismissed (see Dhillon v Bryant Assocs., 306 AD2d 40 [1st Dept 2003] [exception to rule against successive summary judgment motions where record demonstrates party was, in fact, entitled to summary judgment as to a claim]; Varsity Transit, Inc. v Board of Educ., 300 AD2d 38 [1st Dept 2002] [exception because matter could be further disposed of without burdening resources of court and movants with a plenary trial]).

The second cause of action for violation of statutes, codes, or rules, fails as a matter of law, because plaintiff has failed to identify any such statute, code, or rule, and this court is not aware of any which required a landlord, back in 1999, to test for mold after a leak or upon observing a brownish discoloration on the wall. Plaintiff has failed to address defendants' argument, and, therefore, the second cause of action is dismissed.

The sixth cause of action for fraud also is dismissed. As already determined, plaintiff cannot establish either actual or constructive notice of the alleged mold condition. Therefore, she

cannot establish that defendants fraudulently misrepresented that the apartment was habitable. Moreover, this claim fails to specifically set forth the alleged misrepresentations (see CPLR 3016[b]). Plaintiff, again, fails to address this claim, and it is dismissed.

Finally, with regard to the fourth cause of action for constructive eviction, which defendants have neglected to address, the court finds this claim fails as a matter of law. A constructive eviction occurs where the landlord's "wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises" (Barash v Pennsylvania Term. Real Estate Corp., 26 NY2d 77, 83 [1970]). In view of the determination in the Order that plaintiff failed to show a breach of defendants' duty as landlord to maintain the property in a reasonably safe condition under the circumstances, she also cannot show the wrongful acts required for the constructive eviction claim. Therefore, the fourth cause of action is dismissed.

Accordingly, it is

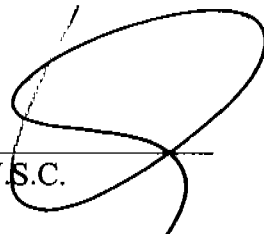
ORDERED that plaintiff's motion for leave to renew and reargue is granted, and, upon renewal, the court adheres to the prior Order entered on April 26, 2005, to the extent that it dismissed the first, third, and fifth causes of action; and it is further

ORDERED that defendants' cross motion for leave to reargue is granted, and upon reargument, the court modifies the Order entered on April 26, 2005, to the extent of dismissing the remainder of the complaint (the second, fourth, and sixth causes of action) with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 4/3/06

ENTER:



J.S.C.

HON. MARILYN SHAFER, JSC

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