

Armstrong v Archives, LLC

2007 NY Slip Op 31261(U)

May 15, 2007

Supreme Court, New York County

Docket Number: 0118278/2006

Judge: Walter B. Tolub

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SCANNED ON 5/18/2007

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

PRESENT:

PART 15

Index Number **WALTER B. TOLUB**

ARMSTRONG, CELINE M.

vs

ARCHIVES L.L.C.

Sequence Number : 001

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

FILED
MAY 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

IN ACCORDANCE WITH ACCORDANT MEMORANDUM DECISION

Dated: 5/15/07

WALTER B. TOLUB 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 15

-----x
CELINE M. ARMSTRONG

Plaintiff,

-against-

ARCHIVES, LLC

Defendant.
-----x

Index No. 118278/06
Mtn Seq. 001

FILED
MAY 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

WALTER B. TOLUB, J.:

By this motion Plaintiff seeks an order (1) pursuant to CPLR 3212 granting summary judgment as to liability on Plaintiff's first cause of action for breach of her warranty of habitability; (2) granting summary judgment on Plaintiff's sixth cause of action for a declaration that Plaintiff was entitled to terminate her Lease; and (3) dismissing the affirmative defenses and counterclaims asserted by Defendant. Plaintiff's motion is granted.

Facts

Plaintiff was a tenant of Apartment 607 (the "Premises"), 66 Greenwich Street, New York, NY 10014 (the "Building") pursuant to a rental agreement between Plaintiff, as tenant, and Defendant, as landlord. As a condition to executing the Lease (and Extension), Defendant through its parent entity, Rockrose Apartment Buildings ("Rockrose"), required Ms. Armstrong to sign a document entitled "Building Rules for Rockrose Apartment buildings" (the "Building Rules"). Paragraph 3 of the Building

Rules provides:

Noise. No resident shall make or permit any disturbing noises in the Building or do or permit anything to be done therein which will interfere with the rights, comfort or convenience of other residents. No resident shall play upon or suffer to be played upon any musical instrument or permit to be operated a phonograph, stereo, radio, television or other loud speaker in such resident's apartment between the hours of eleven o'clock p.m. and the following eight o'clock a.m. if the same shall disturb or annoy other occupants in the Building.

(Plaintiff's Aff. Ex. B)

Plaintiff claims that for a period of about twenty months, beginning in January 2005, she suffered from her neighbor who was very noisy, anti-social and played loud music at all hours of the day and night, making her walls vibrate and making rest and sleep very difficult. Plaintiff notified Defendant, both orally and in writing, of the noise emanating from the neighbor's apartment. Plaintiff also notified Defendant of an incident in which she claims that her neighbor's behavior was hostile and aggressive.

It was not until August 2006 that Defendant served Plaintiff's neighbor, Ivan Rehder, with a letter and then a notice to cure. The letter, dated August 4, 2006, was sent by Defendant's attorney and states, in relevant part:

The complaints about your conduct have to do with your loud music at unreasonable hours of the night. The complaints also have much to do with your anti-social reaction to those complaints. The landlord believes that the complaints are well-founded and reasonable.

(Plaintiff's Aff. Ex. D). The letter further informed Mr. Rehder that "[i]f the landlord received [sic] even one more complaint about your conduct, your lease will be terminated and you will be asked to leave the building."

The Notice to Cure was served three days after the August 4, 2006 letter and detailed 17 complaints that Defendant had logged in its books and records. (See Plaintiff's Ex. E). The Notice to Cure indicates that each time Plaintiff lodged a complaint with Defendant's staff about the noise from Mr. Rehder's apartment, Defendant would have the doorman call the apartment to no avail.

Plaintiff had made requests to be moved, at her own expense, to a comparably priced apartment in the Building. Plaintiff's request went unanswered and in September 2006, Plaintiff sent a Notice to Landlord terminating her lease. In that letter Plaintiff also demanded a return of her security and a 75% abatement of monthly rent from January 2005 through September 2006 to reflect what she claimed was Defendant's breach of the warranty of habitability. By letter dated September 27, 2006, Defendant's attorney denied Plaintiff's claim for an abatement and stated Defendant's intention to hold Plaintiff liable for the obligations arising out of her lease.

Plaintiff argues that her motion should be granted because (1) there was excessive noise emanating from Mr. Rehder's

apartment and that such noise constitutes a breach of the warranty of habitability; (2) that the letter Defendant's sent Mr. Rehder constitutes an admission that Plaintiff's complaints were well founded and reasonable; and (3) Defendant's failure to serve Mr. Rehder with a Notice to Cure until 19 months after Plaintiff began complaining was inappropriate. Defendant argues that Plaintiff's motion should be denied because (1) Plaintiff has failed to prove a breach of the warranty of habitability; (2) there remain issues of fact that must be addressed at trial; and (3) Plaintiff has failed to show that she rightfully terminated her lease.

Discussion

It is well settled that summary judgment is a drastic remedy which should not be granted when there is any doubt as to the existence of material and triable issues of fact. (Glick and Dolleck, Inc. v. Tri-Pak Export Corp., 22 NY2d 493 [1968]). CPLR §3212 provides that summary judgment shall only be granted if upon all the papers and proof submitted, the cause of action or defense shall be established sufficient to warrant the court as a matter of law in directing judgment is favor of a party. Only where there is no genuine material issue of fact to be resolved at trial should summary judgment be granted. (Andre v. Pomeroy, 35 NY2d 361 [1974]).

The moving party for summary judgment must make a prima

facie showing of entitlement to a judgment as a matter of law. (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). The proponent must tender evidentiary proof in admissible form that would warrant the court, as a matter of law, in directing judgment in movant's favor on the cause of action, defense or particular issue addressed by the motion. (Friends of Animals, Inc. v. Associated Fur Manufacturers, 46 NY2d 1065 [1979]). Since Plaintiff established her prima facie case in her moving papers, the burden shifts to the Defendant to produce proof sufficient to establish a triable issue of fact or a viable defense.

Plaintiff's motion is granted because Defendant's liability for the breach of the implied warranty of habitability is not predicated on any unresolved issues of fact, material or otherwise. Under New York law a warranty of habitability is implied in every residential lease. RPL §235-b provides:

In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.

The landlord impliedly warrants (1) that the premises are fit for

human habitation; (2) that the condition of the premises is in accord with the uses reasonably intended by the parties; and (3) that the tenant will not be subjected to any conditions endangering or detrimental to their life, health or safety.

(Park West Management Corp. v. Mitchell, 47 NY2d 316 [1979]). It is equally well settled that, because RPL §235-b places an unqualified obligation of the landlord to keep the premises habitable, the landlord is liable for a breach of warranty even for conditions not caused by the landlord but rather caused by third-parties including neighboring tenants. (Besser v. Beckett, 253 AD2d 648 [1st Dept 1998]; Nostrand Gardens Co-Op v. Howard, 221 AD2d 637 [2d Dept 1995]).

Here, Defendant breached the warranty of habitability. Excessive noise emanating from Mr. Rehder's apartment in the late evening and early morning hours, and Defendant's failure to act in an effective appropriate manner, represents a breach of Defendant's obligation to provide a habitable apartment pursuant to RPL §235-b.

The evidence establishes that beginning in January 2005, Mr. Rehder began creating excessive noise in the evening and early morning hours, impacting Plaintiff's use and enjoyment of the Premises. The noise was excessive and caused Plaintiff's walls to vibrate. Furthermore, as noted in Defendant's log books, the music was so loud, that when Plaintiff would complain and the

doorman would call upstairs, Defendant would not answer the intercom.

The evidence further establishes that Plaintiff repeatedly notified Defendant, both orally and in writing, of the condition. Defendant did not submit any evidence to counter Plaintiff's claims of repeated complaints. In response to Plaintiff's complaints Defendant's sole action was to have the doorman call Mr. Rehder's apartment to no avail. The evidence also establishes that despite the numerous complaints over the years made by Plaintiff, it was not until nineteen months after the problem began, and after Plaintiff's request to be moved to a different apartment, that Defendant was served with a Notice to Cure.

Defendant failed to undertake effective steps for nineteen months, constituting a breach of the warranty of habitability. Besser v. Beckett, 253 AD2d 648 [1st Dept 1998]; Nosstrand Gardens, 221 AD2d 637 [1995]). Any issue concerning the length and severity of Defendant's breach and the amount Plaintiff may be able to recover against Defendant are questions of damages not at issue on this motion. (Park West Management, 47 NY2d 316 [1979]). Accordingly summary judgment is granted on Plaintiff's first cause of action.

Plaintiff's sixth cause of action seeks a judgment declaring that as a matter of law, Plaintiff's termination of her

lease with Defendant was valid and proper and that Plaintiff is not liable to Defendant for any rent after the effective date of her termination of the Lease. Plaintiff terminated her lease, effective September 22, 2006 by sending a Notice to landlord claiming constructive eviction from the apartment.

Constructive eviction occurs where a landlord's wrong ful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises. (Barash v. Pennsylvania Terminal Real Estate Corp., 26 NY2d 77 [1970]). Regardless of any fault of the landlord, where excessive noise is regularly emanating from a neighboring apartment, a constructive eviction has occurred. (Rockrose Assoc. v. Peters, 81 Misc2d 971, 973, 366 NYS2d 567, 569 [NY Civ. Ct. 1975]). Here, Defendant's failure to cure the excessive noise emanating from Mr. Rehder's apartment materially deprived Plaintiff of the beneficial use and enjoyment of the Premises forcing her to terminate the Lease and vacate the apartment. Therefore, for the same reasons that summary judgment is granted on Plaintiff's first cause of action, summary judgment is granted on Plaintiff's sixth cause of action.

Finally, Defendant's counterclaim is dismissed. Defendant's counterclaim seeks recovery of its attorneys' fees incurred in defense of this action. Defendant's assertion that is entitled to attorneys' fees is without merit since it is not the

prevailing party on the central claims advanced in this motion.
(Board of Managers of 55 Walker St. Condo v. Walter St., 6 AD3d
279 [1st Dept 2004]).

Accordingly it is

ORDERED that Plaintiff's motion for summary judgment on the
issue of liability on her first cause of action is granted; and
it is further

ORDERED that Plaintiff's motion for summary judgment on her
sixth cause of action is granted; and it is further

ORDERED that Defendant's defenses and counterclaims are
dismissed.

Counsel for the parties are directed to appear for a
Preliminary Conference on June 22, 2007 at 11:00 am in room 335
at 60 Centre Street.

This memorandum opinion constitutes the decision and order
of the Court.

Dated: 5/15/07

FILED
MAY 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. WALTER B. TOLUB, J.S.C.

FILED
MAY 18 2007
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