

Graham v Marshall

2007 NY Slip Op 32228(U)

July 10, 2007

Supreme Court, New York County

Docket Number: 0115816/2005

Judge: Barbara Kapnick

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PRESENT: **BARBARA R. KAPNICK**

PART 12

Index Number : 115816/2005

GRAHAM, LAMAR

vs

MARSHALL, DAVID

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO.

115816/05

MOTION DATE

MOTION SEQ. NO.

001

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

and cross motion are decided in accordance with the accompanying memorandum decision.

FILED

JUL 18 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/16/07

BARBARA R. KAPNICK 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

Gnatham
v.
Mausthall

INDIVIDUAL ASSIGNMENT PART 12

STIPULATION

INDEX NO. 115 816/05

MOTION CALENDAR NO.

DATE 11/22/06

IT IS HEREBY STIPULATED AND AGREED by and between the below-named attorney(s) as follows:

1. All parties to respond to PC order dated 2/15/06
w/in 30 days;

2. All parties to serve discovery demand w/in 30
days.

3. All outstanding discovery demands to be responded
to, to the extent they are currently outstanding
w/in 30 days.

4. ~~Attorney for Defendant~~

FILED

JUL 18 2007

NEW YORK
COUNTY CLERK'S OFFICE

Attorney for Plaintiff

208 for LBBS (D Mowball)
Attorney for Defendant

Attorney for Defendant

Date: 11/22/06

So Ordered.

ENTER:

~~Signature~~

J.S.C.
BARBARA R. KAPNICK
J.S.C.

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

Graham

v.

Marshall

INDIVIDUAL ASSIGNMENT PART 12

STIPULATION

INDEX NO. 115816/05

MOTION CALENDAR NO.

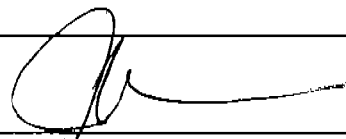
DATE 11/22/06

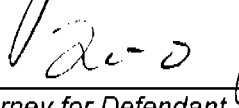
IT IS HEREBY STIPULATED AND AGREED by and between the below-named attorney(s) as follows:

⑤ All parties to appear for EBI on or before 3/12/07

⑥ U.S. to appear for IME w/in 45 days of completion of U.S. EBI. Report to be exchanged w/in 30 days of U.S. IME.

Date: 11/22/06


Attorney for Plaintiff

 for LBBS (vs Marshall)
Attorney for Defendant

So Ordered.

ENTER: 
BARBARA R. KAPNICK
J.S.C.

~~Attorney for Defendant~~

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

-----X
LAMAR GRAHAM and DINA VICTORIA BONOMO,

Plaintiffs,

-against-

DAVID MARSHALL,

Defendant.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 115816/05
Motion Seq. No. 001

In this action, plaintiffs Lamar Graham and Dina Victoria Bonomo claim that they and their eight month old daughter were forced to vacate the subject premises, Apartment 1 in the building located at 168 Pacific Street in Brooklyn, on or about October 31, 2005, prior to the expiration of their Lease, as a result of (i) a lead paint condition, (ii) a mold condition, and (iii) defective chimneys and fireplaces (which allegedly permitted soot and ash to seep into the living area of the premises). The building is owned by defendant David Marshall.

There is no dispute that on or about September 10, 2005, defendant arranged for a mold inspector from East Coast Mold Specialists to inspect the apartment in response to plaintiffs' complaint of a purported mold condition, and that defendant subsequently provided plaintiffs with lab reports from the inspection which verified the presence of strains of mold in the premises.

There is also no dispute that the City of New York Department of Housing Preservation and Development ("HPD") inspected the premises on or about October 11, 2005, after receiving a complaint from plaintiffs regarding defendant's failure to remedy the mold condition. As a result, on October 18, 2005, HPD issued six lead paint C-class violations due to the presence of lead paint in the premises.

Plaintiffs' Complaint seeks to recover damages for: (i) negligence (first cause of action); (ii) actual and/or constructive eviction (second cause of action); (iii) breach of warranty of habitability (third cause of action); (iv) breach of quiet enjoyment (fourth cause of action); (v) nuisance (fifth cause of action); (vi) toxic tort (sixth cause of action); (vii) reimbursement of moving expenses, brokers' fees, loss of belongings and laundry expenses (seventh cause of action); (viii) return of the security deposit (eighth cause of action); (ix) rent abatement (ninth cause of action); (x) intentional infliction of emotional distress (tenth cause of action); and (xi) attorneys' fees (eleventh cause of action).

Defendant's Answer sets forth the following affirmative defenses: (i) plaintiffs' alleged injuries and/or damages were caused in whole or in part by plaintiffs' culpable conduct (first affirmative defense); (ii) voluntary assumption of risk (second affirmative defense); (iii) plaintiffs' alleged injuries and

damages were caused by the culpable conduct of some third person over whom defendant neither had nor exercised control (third affirmative defense); (iv) Article 16 of the CPLR applies (fourth affirmative defense); (v) plaintiffs' award, if any, must be reduced pursuant to CPLR § 4545 by the amount of any applicable collateral sources (fifth affirmative defense).

Defendant has also asserted a counterclaim in the sum of \$20,000 for breach of the lease, claiming that plaintiffs vacated the premises after he remedied or was in the process of remedying the alleged lead paint condition (first counterclaim).

Plaintiffs now move for an order: (i) granting them summary judgment on the issue of liability in connection with plaintiffs' warranty of habitability and constructive eviction causes of action; (ii) striking defendant's first, second and third affirmative defenses; (iii) dismissing defendant's first counterclaim; and (iv) granting plaintiffs legal fees for the prosecution of the instant action in an amount to be determined by the Court, but in no event less than \$15,000.00.

Defendant opposes the motion and cross-moves for an order striking that portion of plaintiffs' second cause of action asserting a claim for constructive eviction and plaintiffs' fifth,

sixth, seventh, eighth, ninth and eleventh causes of action on the ground that they do not constitute proper causes of action.

Defendant argues that plaintiffs are not entitled to summary judgment on the issue of liability because: (a) plaintiffs have failed to establish that the lead levels in the subject apartment were dangerous or hazardous to their life, health or safety; (b) the six violations were allegedly cured in November 2005; and (c) there has been no showing that the plaintiffs' child had elevated blood lead levels.¹

Defendant further argues that plaintiffs have failed to establish that the level of mold spores found in the apartment were toxic or hazardous. Defendant has also annexed a Clearance Report dated November 23, 2005 from Mike Liebhard of East Coast Mold Specialists, Inc., which states, in relevant part, that "[t]hree air tests were taken. On all tests no stachybotrys was found. And all tests had only a small fraction of the original mold spores from the pre-remediation tests. I wasn't able to see mold on any of the surfaces."

Finally, defendant argues that plaintiffs cannot establish that the soot and ash constituted a dangerous condition.

¹ It should be noted, however, that plaintiffs are not seeking damages in this action for any personal injuries sustained by their child.

RPL § 235-b(1) provides, in relevant part, as follows:

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.

In Juarez v. Wavecrest Management Team Ltd., 88 N.Y.2d 628 (1996), the Court of Appeals observed that

[t]he serious health hazard posed to children by exposure to lead-based paint is by now well established. Children under the age of six, whose nervous systems are still developing, are particularly vulnerable to the damage caused by lead poisoning. High blood lead levels can produce brain damage, coma or death, and even relatively low levels can lead to significant nervous system damage (citations omitted).

supra at 640-641.

Thus, "[t]he existence of a lead-based paint hazard in any multiple dwelling where a child of applicable age resides is... declared to constitute a condition dangerous to life and health." New York City Administrative Code, § 27-2056.3

The undisputed presence of a lead paint condition in the apartment, therefore, constituted a breach of the warranty of habitability. See, Chase v. Pistolese, 190 Misc.2d 477 (City Ct.,

Watertown 2002); Edgemont Corp. v. Audet, 170 Misc.2d 1040 (App. Term, 2nd Dep't 1996).

Accordingly, based on the papers submitted and the oral argument held on the record on October 25, 2006, this Court finds that plaintiffs are entitled to summary judgment on the issue of liability on their second cause of action for constructive eviction, and on their third cause of action for breach of warranty of habitability, based on the lead paint condition.²

That portion of the plaintiffs' motion seeking to dismiss defendant's counterclaim for breach of the lease is, therefore, granted.

That portion of the motion seeking to strike defendant's first and third affirmative defenses is denied as premature, since there has been no discovery on the issue of whether any actions on the part of plaintiffs or a third party may have contributed to the growth of mold in the premises.

That portion of the motion seeking to strike the second affirmative defense is, however, granted, as there is no basis

² It is not clear from the papers submitted whether or not the levels of mold in the apartment were toxic. Thus, the motion is denied to the extent that it also seeks summary judgment on plaintiffs' claim for breach of warranty of habitability based on the mold condition.

under the alleged facts to find that plaintiffs voluntarily assumed the risk of exposure to toxic or poisonous conditions.

That portion of the motion seeking to recover legal fees is denied as premature.

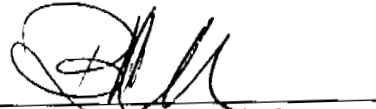
Defendant's cross-motion is granted only to the extent of dismissing plaintiffs' sixth cause of action since it is encompassed in plaintiffs' first cause of action for negligence and dismissing plaintiffs' seventh, eighth and ninth causes of action for failure to state an independent cause of action since they merely seek specific items of damages encompassed under plaintiffs' other causes of action.

The cross-motion is otherwise denied as this Court finds that plaintiffs' remaining causes of action set forth properly pleaded claims.

A status conference shall be held in IA Part 12, 60 Centre Street, Room 341 on August 8, 2007 at 9:30 a.m. to ensure compliance with both parties' discovery obligations as set forth in a Stipulation dated November 22, 2006 and so-ordered by this Court.

This constitutes the decision and order of this Court.

Date: July 10, 2007


Barbara R. Kapnick
J.S.C.