

Granirer v The Bakery, Inc.

2007 NY Slip Op 32868(U)

September 10, 2007

Supreme Court, New York County

Docket Number: 0109915/2006

Judge: Barbara Kapnick

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

PRESENT: KAPNICK
Justice

PART 12

DAN GRANIRER

- v -

THE BAKERY INC

INDEX NO. 109915/06

MOTION DATE _____

MOTION SEQ. NO. 2

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

SEP 17 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/10/07

BARBARA R. KAPNICK J.S.C.
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 12

-----X
DAN GRANIRER and KEIKO HONDA, individually,
and on behalf of their infant daughter
MAYA HONDA-GRANIRER,

DECISION/ORDER
Index No. 109915/06
Motion Seq. No. 002

Plaintiffs,

-against-

THE BAKERY, INC., JOSHUA HOLDEMAN,
MATTHEW LOVE, AMELIA NICKLES, IRV
LERNER, VICTORIA TILLOTSON and
CRAIG SHIPLER,

Defendants.

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

FILED
SEP 17 2007
NEW YORK
COUNTY CLERKS OFFICE

This action arises out of the alleged refusal of defendant The Bakery, Inc. ("the apartment corporation") and defendants Joshua Holdeman, Matthew Love, Amelia Nickles, Irv Lerner, Victoria Tillotson and Craig Shipler, the individual members of the apartment corporation's Board of Directors, to repair leaks and remediate mold in plaintiffs' cooperative apartment (4B) in the 16-unit building located at 521 West 47th Street, New York, New York.

In their Verified Complaint, plaintiffs Dan Granirer and Keiko Honda, individually, and on behalf of their infant daughter, Maya Honda-Granirer seek:

- (a) a declaratory judgment adjudging that (i) defendants breached the Lease; (ii) defendants breached the warranty of habitability; (iii) plaintiffs are entitled to a full rent abatement based upon the apartment corporation's breach of

the warranty of habitability; and (iv) plaintiffs have been constructively evicted from the apartment (first cause of action);

(b) to recover damages for breach of warranty of habitability (second cause of action) and breach of lease (third cause of action);

(c) a rent abatement (fourth cause of action);

(d) to recover damages for breach of fiduciary duty (fifth cause of action) and constructive eviction (sixth cause of action);

(e) injunctive relief directing defendant The Bakery, Inc. to immediately and expeditiously repair all the leaks in the apartment and to remediate the mold in the apartment, at the sole cost and expense of the apartment corporation (seventh cause of action); and

(f) to recover attorneys' fees (ninth cause of action).¹

Plaintiffs now move by Order to Show Cause for an order:

(1) declaring that the maintenance due from plaintiffs to defendant The Bakery, Inc. in accordance with the parties' proprietary lease dated December 17, 2004 be and is one hundred percent (100%) abated for the period commencing June 1, 2006 until such time that (i) defendants repair the roof and leaks at the subject building; (ii) the mold in plaintiffs' cooperative apartment is remediated, and (iii) plaintiffs' cooperative apartment is restored to a habitable condition;

¹ Plaintiffs have withdrawn their eighth cause of action for negligence.

(2) pursuant to CPLR § 6301 et. seq., directing defendants to pay plaintiffs' increased alternate housing expenses on an ongoing basis until such time as the roof is repaired, the leaks are eliminated and the mold is remediated, and their cooperative apartment is made habitable; and

(3) pursuant to CPLR § 3025(b), granting plaintiffs leave to serve and file the proposed Amended Verified Complaint to assert as a tenth cause of action a claim for a declaratory judgment adjudging and declaring that the amendment in or about December 2006 to the apartment corporation's by-laws so as to include a transfer fee that was payable on all "nonexempt transfers" pursuant to the proprietary lease is void and a legal nullity, and awarding compensatory, punitive and exemplary damages to plaintiffs.

Defendants oppose the motion and cross-move for an order:

(1) dismissing plaintiffs' first cause of action for a declaratory judgment on the ground that plaintiffs have claims for monetary damages;

(2) dismissing the claims against the individually named members of the Board of Directors on the ground that plaintiffs cannot demonstrate that they acted in bad faith or with malice;

(3) dismissing plaintiffs' fifth cause of action for breach of fiduciary duty on the ground that the Board exercised its business judgment in determining what repairs to perform;

(4) dismissing the seventh cause of action for injunctive relief;

(5) amending the caption to delete reference to the child;

(6) compelling plaintiffs to deposit all outstanding and future maintenance into a trust and/or escrow account pending the disposition of this litigation and/or directing plaintiffs to post a bond; and

(7) compelling plaintiffs to respond to the demand for a bill of particulars dated April 24, 2007 and the discovery notices dated April 24, 2007, April 26, 2007 and September 2006.

Based on the papers submitted and the oral argument held on the record on August 8, 2007, this Court finds that plaintiffs are entitled to a 100% abatement of their maintenance from June 1, 2006 until the apartment is restored to a habitable condition, in accordance with RPL § 235-b and pursuant to paragraph 4(b) of the proprietary lease which provides as follows:

In case the damage resulting from fire or other cause shall be so extensive as to render the apartment partly or wholly untenable, or if the means of access thereto shall be destroyed, the rent hereunder shall proportionately abate until the apartment shall again be rendered wholly untenable or the means of access restored (emphasis supplied); but if said damage shall be caused by the act or negligence of the Lessee or the agents, employees, guests or members of the family of the Lessee or any occupant of the apartment, such rental shall abate only to the extent of the rental value insurance, if any, collected by the Lessor with respect to the apartment.

That portion of the cross-motion seeking to compel plaintiffs to deposit future maintenance into escrow and/or to post a bond is, therefore, denied.

That portion of plaintiffs' motion seeking an order directing defendants to pay plaintiffs' increased alternate housing expenses is denied absent any showing that plaintiffs are entitled to said relief under the terms of the proprietary lease.

That portion of the motion seeking leave to amend the complaint is granted absent any showing of surprise or prejudice to the defendants.

The proposed Amended Complaint, in the form annexed to the moving papers, is deemed served nunc pro tunc as of the date of service of the Order to Show Cause.

Defendant shall serve an Answer to the Amended Verified Complaint within 30 days of entry of this order.

Those portions of defendants' cross-motion seeking to dismiss plaintiffs' first, fifth and seventh causes of action are denied as premature, as very little discovery has been conducted in this case.

That portion of the cross-motion seeking to dismiss plaintiffs' claims against the individual defendants is granted as plaintiffs have not alleged sufficient facts to impose personal liability on said individuals for actions undertaken in their capacities as members of the Board of Directors.

That portion of the cross-motion seeking to amend the caption to remove any reference to the infant plaintiff is granted on consent, and the caption is amended to read as follows:

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

-----X
DAN GRANIRER and KEIKO HONDA,

Plaintiffs,

Index No. 109915/06

-against-

THE BAKERY, INC.,

Defendant.

-----X

Upon service of a copy of this order with notice of entry, the Clerk of the Trial Support Office and the County Clerk shall mark their records to reflect the amended caption.


That portion of the cross-motion seeking to compel plaintiffs to respond to defendants' demand for a bill of particulars and discovery notices was granted on the record on August 8, 2007 to

the extent of directing plaintiffs to provide said responses within 30 days.

A preliminary conference shall be held in IA Part 12, 60 Centre Street, Room 341 on October 10, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: September 10, 2007



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
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