

Chen v 813 Park Corp.
2007 NY Slip Op 34083(U)
December 7, 2007
Supreme Court, New York County
Docket Number: 0102744/2006
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

Hon. Doris Ling-Cohan

PART 36

Index Number : 102744/2006

CHEN, HERBERT

vs

813 PARK

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 Summary judgment /
03 min & 15 sec Ling-Cohan

PAPERS NUMBERED

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

1, 2

Answering Affidavits — Exhibits _____

Repeating Affidavits _____

3, 4, 5, 7, 8

² Cross-Motion: ⁵ Yes No

3, 4, 5, 6

Upon the foregoing papers, it is ordered that this motion by plaintiff for summary
judgment + cross-motion by defendant are decided
in accordance with the attached memorandum decision.

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

FILED
DEC 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/7/07

Hon. Doris Ling-Cohan J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
HERBERT CHEN,

Plaintiff,

-against-

813 PARK CORP.,

Index № 102744/06

Motion Seq. No. 001

Defendant.

-----X
813 PARK CORP.,

Third-Party Plaintiff,

-against-

BREEZE AIR CONDITION INC.,

Third-Party Defendant.

-----X
DORIS LING-COHAN, J.:

FILED
DEC 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

In this breach of contract action, plaintiff Herbert Chen (Chen) moves for an order, pursuant to CPLR 3212, granting summary judgment on the issue of liability against defendant 813 Park Corp. (813 Park) based upon plaintiff's claim for breach of the implied warranty of habitability, as codified by Real Property Law § 235-b. 813 Park opposes the motion and cross-moves for an order, pursuant to CPLR 3212, dismissing the first, second, third and fifth causes of action. Third-party defendant Breeze Air Condition Inc. (Breeze Air) submitted a cross motion for an order dismissing the third-party complaint sounding in indemnification and/or contribution against it which has since been withdrawn¹.

By written lease, dated August 15, 1999, plaintiff leased apartment 5PH, at 13 East 69th Street, New York, New York, from 813 Park, the owner of the property at that location. The

¹By written stipulation, dated June 21, 2007, the parties discontinued, with prejudice, the third-party action against Breeze Air condition Inc., and as part of the stipulation, the cross motion by Breeze Air Condition Inc. was withdrawn.

gravamen of the complaint is that, commencing in 2001/2002 and continuing until Chen and his family moved out in 2006, the apartment sustained repeated damage from water leaking through the ceiling into several areas in his apartment, and that despite having received notice of this problem, defendant failed and/or refused to adequately maintain and/or remedy the roof to prevent further leaking.

Plaintiff commenced this action by service of a summons and complaint on or about February 9, 2006. Issue was joined by the service of 813 Park's answer on or about May 4, 2006. On or about December 22, 2006, 813 Park commenced the now discontinued third-party action against Breeze Air Condition Inc., a company called upon by 813 Park to remedy any heating, ventilation and air conditioning (HVAC) problems pertaining to plaintiff's apartment. On or about February 16, 2007, Breeze Air served an answer together with seven affirmative defenses. Discovery ensued and the parties exchanged documents and took depositions.

The complaint contains six causes of action which sound in negligence and breach of contract, and for which plaintiff seeks damages in the amount of \$180,000.00. The second cause of action, which is the subject of plaintiff's motion, is a statutory claim for breach of the implied warranty of habitability based upon the repeated leakage of water into different areas of the apartment which caused damage to the ceilings, walls, and flooring/carpeting as well as to various valuable contents in the apartment. Chen claims that 813 Park failed to maintain the premises in a condition fit for human habitation and for all reasonably intended uses, and that defendant subjected the apartment occupants to conditions which are dangerous, hazardous and/or detrimental to their life, health or safety, in violation of its duties under Real Property Law § 235-b. It is plaintiff's position that 813 Park breached the implied warranty of habitability entitling him to a finding of liability on his motion for summary judgment.

4]

According to Chen, the premises began to suffer leaks from the roof which is immediately above his penthouse apartment, commencing in or about 2001/2002. The leaks would last the duration of any rain showers outside. Chen testified at his deposition that, while he could not recall when the initial leak occurred, he did recall that the first leaks appeared no later than 2002, that the leaks were small at first, that the living room was the most problematic area, and that water would drip down through the air conditioning ducts each time it rained. Chen testified that the leakage problem continued throughout 2003, 2004, and 2005, with water leaking, not only in the living room, but also in the kitchen, the central hallway, the master bedroom, and in his daughter's room. He explained that during these years, he took protective action by moving and/or covering his furniture with plastic drop cloths, and by placing pots, pans, and garbage cans in various places to catch the dripping water. It is undisputed that Chen repeatedly notified, orally and/or in writing, the management company as well as 813 Park's managing agent, Michael King (King), of the leak problem. Chen further testified that he complained to either King, Suzanna Chan, Carrie Chiang or to Carrie Chiang's assistant, and that regardless of which individual he spoke with, he was assured that they would look into the situation. Work was in fact performed on the roof, on more than one occasion, in an attempt to remedy the problem, but the leakage problem persisted, triggering plaintiff to commence the instant action.

In addition to the series of denials and conclusory affirmative defenses contained in its answer, 813 Park both opposes plaintiff's motion and seeks, by way of a cross motion pursuant to CPLR 3212, summary dismissal of the first, second, third and fifth causes of action. Defendant also seeks an order limiting both the time period relevant to plaintiff's claims, and the amount of damages recoverable by plaintiff to a maximum of \$11,124.00, based on defendant's

calculation of the amount of time Chen may have been deprived of his use of parts of his apartment. It is defendant's position that although there was a water leakage problem in Chen's apartment, there was no breach of the implied warranty of habitability by its inability to correct the leakage to Chen's satisfaction.

In support of its opposition and cross motion, 813 Park submits King's sworn affidavit in which he states that Chen contacted him on more than one occasion regarding the leaks, and he details the steps taken to uncover the source of the leaks and to resolve the problem. According to King, non-party C.J. Construction was hired in 2003 to replace defective piping involving the HVAC, and defendant hired non-party L.A. Construction to clean the roof. When further leaks were found in Chen's apartment in 2004, 813 Park did a further investigation, and hired Fine Art Construction and Painting Corp. to clear the roof of snow and ice, and to seal areas where the leaks originated. 813 Park brought back C.J. Construction in 2004 to remove the existing roof and install a new roof. Additional leaks found in Chen's apartment in or about 2005 resulted in the installation, by Breeze Air², of new air ducts on the roof, and additional leaks found in November 2005 resulted in waterproofing of the air ducts and repairs to the roof by non-party Rocco's All-Type Roofing, Inc. in or about January 2006, approximately one month before plaintiff commenced the instant action. King states that 813 Park re-plastered the ceilings and walls, paid for Chen's carpet to be cleaned, and offered to pay for certain other damages caused by the leaks, but that offer was refused by Chen. Finally, 813 Park submits copies of the invoices and payment checks for each entity it hired to address the water leakage problem.

With respect to Chen's claims regarding the habitability of the apartment, 813 Park

²At his EBT, Eran Oberlander, president of Breeze Air, testified that when he inspected 13 East 69th Street to see why water was leaking into penthouse apt. 5PH, he told King that the leaks were not coming from the air conditioning ducts, explained why that was the case and indicated that the problem was with the roof itself.

argues that his allegations are belied by his deposition testimony in which he acknowledges that after the leak subsided, his use of the kitchen did not diminish (Chen Deposition, at 97), and that, while he enjoyed it less, the amount of time he spent in his living room did not change as a result of the leak problem (*id.* at 96). According to King, there are no grounds for a breach of warranty of habitability claim or for the first (*res ipsa loquitur*), third (breach of quiet enjoyment), or fifth (partial constructive eviction) causes of action because of the efforts by 813 Park to address each of Chen's complaints in a prompt and efficient manner and because of the minimal impact the leaks had on Chen's use of his apartment.

In the seminal case of Park W. Mgt. Corp. v Mitchell (47 NY2d 316, cert denied 444 US 992 [1979]), the Court of Appeals explained that a residential lease is similar to a purchase of shelter and services, and held that an implied warranty of habitability exists to protect residential tenants against defective conditions in their apartments. The Court interpreted Real Property Law (RPL) § 235-b, stating that every residential lease contains an implied warranty of habitability which covenants that: (1) the premises are fit for human habitation; (2) the premises are fit for the uses reasonably intended by the parties; and (3) the occupants of the leased premises will not be subjected to conditions that are dangerous, hazardous or detrimental to their life, health or safety (*id.* at 324-326; see also Solow v Wellner, 86 NY2d 582, 587-588 [1995]). By ensuring that the implied warranty of habitability cannot be waived by lease or otherwise, the owner/landlord is compelled to make necessary repairs for conditions that pose a material risk to a tenant's health and safety, which are not caused by the misconduct of the tenant or by the lessee or by persons under his or her direction or control (Park West Mgt., at 315; RPL § 235-b [1]).

"[T]he implied warranty protects only against conditions that materially affect the health and safety of tenants or deficiencies that 'in the eyes of a reasonable person' deprive the tenant of

those essential functions which a residence is expected to provide” (Solow v Wellner, 86 NY2d at 588 [citation omitted; emphases in original]). With respect to the type of water problems experienced by Chen, the courts have long held that a landlord’s failure to repair or protect against repeated water leaks may constitute a breach of the warranty of habitability (Strauss v 926 Park Ave. Corp., 184 AD2d 293, 294 [1st Dept 1992], order amended 192 AD2d 477 [1st Dept 1993]).

In this matter, although the parties dispute the efforts taken by 813 Park to properly address the situation, there is no question that defendant took steps intended to stop the leaks, but that the leaks continued, unabated, from 2002 until Chen and his family moved out in 2006. The water leakage problem resulted in repeated water-damage to the premises and to Chen’s personal property. Moreover, while plaintiff did not abandon the entire premises, it is not disputed that rainy weather prevented Chen and his family from using the affected rooms for the duration of each rainfall. Defendant’s apparent inability to repair the water leaks caused more than mere inconvenience to the tenants. The elements of a breach of the implied warranty of habitability are met by the all-consuming nature of this water problem; the arguments and evidence submitted by defendant fail to raise a question of fact sufficient to preclude this court from granting summary judgment in plaintiff’s favor (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]). The evidence, however, may be probative on the issue of the amount of damages, if any, are owed to plaintiff as a result of the breach.

The balance of defendant’s cross motion is resolved as follows. To the extent that defendant seeks an order dismissing the first, third, and fifth causes of action, these causes of action are dismissed, as the damages sought mirror the damages sought in the second cause of action. Accordingly, the issues presented in these claims have been rendered moot. The Court

has examined defendant's remaining contentions and find them to be without merit.

Accordingly, it is

ORDERED that the motion by plaintiff for partial summary judgment on the second cause of action for breach of implied warranty of habitability is granted as to liability only; and it is further

ORDERED that the issue of damages is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the cross motion by defendant is granted to the limited extent that the first, third and fifth causes of action are dismissed for the reasons set forth above; and it is further

ORDERED that within 45 days of entry, plaintiff shall serve a copy of this order with notice of entry upon defendant and the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee; plaintiff's failure to timely comply with this order will result in a dismissal of the pleadings; and it is further

ORDERED that this matter is scheduled for a conference in Part 36 on February 15, 2007, as a control date to insure compliance with this order.

Dated: December

FILED
DEC 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

Hon. Doris Ling-Cohan, J.S.C.