Short Form Order

Index Number: 21697-2006

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

HON. EMILY PINES
Justice Supreme Court

Original Motion Date: 08-14-2007
Motion Submit Date: 12-06-2007
Motion Sequence No.: 001 MD
002 MD

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KATHLEEN LEE,

Plaintiff,

-against-

TOMASIN ALEGRE, DEBORAH ALEGRE AND THE MILL-GARTH COUNTRY INN, INC.,

Defendants.

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Attorney for Plaintiff
David Lee Heller, Esq.
3334 Noyac Road, Suite One
Sag Harbor, New York 11963

Attorney for Defendant
Eileen A. Powers, Esq.
P.O. Box 1361
Riverhead, New York 11901

ORDERED, that the motion (motion sequence number 001) by plaintiff pursuant to **CPLR §3212** for partial summary judgment is denied; and it is further

ORDERED, that the cross-motion (motion sequence number 002) by defendants pursuant to CPLR §3212 for summary judgment dismissing the complaint is also denied; and it is further

ORDERED, that a preliminary conference is scheduled for April 3, 2008 at 9:30 a.m. before the undersigned.

Plaintiff commenced this action against defendants by filing of a Summons and Verified Complaint on August 3, 2006. Issue was joined by defendants' service of a Verified Answer on or about September 9, 2006. The gravamen of the action is a lease between plaintiff and defendants for the rental of a bungalow located at 23 Windmill Lane, Amagansett, New York. Plaintiff alleges that, pursuant to the lease, she paid defendants the sum of $15,000 plus a $1,500 security deposit for the lease of the subject premises for a three (3) month period from May 25, 2006 to September 6, 2006, but upon taking occupancy, found it

uninhabitable and demands a refund of the $16,500. Plaintiff also alleges that subsequent to the execution of the lease, defendants inserted a provision stating "Deposit Non-Refundable" and that such provision was not in the lease when she signed it. Thus, she seeks damages for fraud.

With regard to the claim that the subject premises was uninhabitable, plaintiff states in her affidavit that the windows would not open and doors did not shut properly; there was a wide gap between the bottom of the front door and floor as to allow rodents or snakes to enter; the rooms were dank and smelled of mold and mildew; and there were not sleeping accommodations for three (3) as promised. Plaintiff states that a "day bed high riser" located on the subject premises did not function properly and the mattress "smelled foul" and could not be used. She states she asked for a new mattress but defendants refused. Plaintiff alleges she was not provided with a written copy of the lease at the time it was executed and when she obtained a copy the following day, it contained the aforementioned provision regarding the deposit being non-refundable. Plaintiff vacated the subject premises two days after taking occupancy.

Based upon the foregoing, plaintiff seeks partial summary judgment, or in the alternative, a determination finding (1) the premises were uninhabitable and (2) the lease was materially altered. Plaintiff annexes a copy of the pleadings, the lease for the subject premises, a personal affidavit, a supporting affidavit, and a statement. First, plaintiff annexes an affidavit from Jonathan Houston, who states that he viewed the condition of the premises and the high rise bed did not function properly and the mattress smelled terrible. Mr. Houston states he observed a partly broken wall, windows that did not open, doors that did not shut properly and cockroaches located in the premises. He states that plaintiff was caused to leave the day following her arrival because she was unable to breathe due to allergies caused by mold and mildew in the subject premises. Plaintiff also annexes a statement by Mary Moran, which is purportedly notarized, but does not contain language indicating it was sworn and thus is not considered by the Court.

Defendants cross-move for summary judgment dismissing the complaint in its entirety on the ground the complaint fails to state a cause of action for breach of contract and/or fraud. Defendants argue they were in full compliance with the terms of the lease and any breach was caused by plaintiff who vacated without good cause. Defendants argue that plaintiff has not articulated a specific lease provision allegedly violated and thus they are assuming she is asserting a breach

of the implied warranty of habitability statutorily mandated in residential leases under **RPL §235-b**. Defendants assert the allegations in both the complaint and affidavits do not establish the subject premises was uninhabitable. Additionally, they argue the allegations do not support a finding that plaintiff was entitled to vacate for uninhabitability. Defendant Deborah Alegre submits an affidavit in which she states that at the time the parties entered into the lease agreement the subject premises was being repaired following a fire. She states the entire cottage was painted and plaintiff visited the property before the lease signing to check the renovations. Additionally, she states that plaintiff made certain requests regarding repairs, etc., and defendants agreed. Mrs. Alegre states that when plaintiff took possession on May 25, 2006, one day earlier than provided in the lease, the subject premises was in good condition and there were no conditions that were "dangerous, hazardous or detrimental to the life, health or safety of the occupants." She states there was no gap between the door and the floor, no broken walls and no mold or mildew. Mrs. Alegre states plaintiff arrived on May 27, 2006 and advised the following day she was moving out after making only a single complaint about the mattress on the day bed. She states the mattress was less than a year old. Defendants annex correspondence from plaintiff's counsel dated June 5, 2006 and July 13, 2006, which do not refer to any complaints regarding inability to breathe, a broken wall, gap at the door or doors or windows that did not work. Defendants state these allegations did not surface until the making of the within motion.

With regard to the alteration of the lease, defendants argue that all of the written terms of the lease were contained in the lease signed by plaintiff and there were no written changes in the terms after execution. Defendants argue that plaintiff's claim that the lease was "materially altered" does not set forth a cause of action for fraud.

In opposition to the cross-motion, plaintiff states that she complained about the smell and mildew when she first arrived at the subject premises and that it forced her to leave the cottage. She states the area under the sink was "filthy and unsanitary" and asked that it be painted and cleaned. Additionally, she claims she asked for a pull-out couch for guests but was provided only a "dirty, smelly high-riser." Plaintiff asserts that although the premises appeared to be "fine" at first look, "the superficial decor was achieved with paint and hid the mold and mildew." She claims she complained "again and again" about the conditions but nothing was done. Finally, she states that the term "Deposit non-refundable" was not on the

lease when she signed it. Thus, she argues that defendants breached the contract and altered the lease and summary judgment should be granted.

The "Lease Agreement" at issue is a two page document which provides that the term was May 25, 2006 to September 6, 2006 at a rental of $15,000 plus a $1,500 security deposit. The lease stated $9,000 was payable on signing and $7,500 to be paid by April 30, 2006. The lease contained the notation "Deposit non-refundable". The lease also provided that if the property was furnished, the furnishings would be listed on "Schedule A". No such schedule is annexed to either the lease or the moving papers. Finally, the lease provided that it could only be changed by an agreement in writing signed by the parties.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. ***Winegrad v. New York University Medical Center,*** 64 N.Y2d 85, 487 N.Y.S.2d 316 (1985); ***Zuckerman v. City of New York,*** 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial. ***State Bank of Albany v. McAullife,*** 97 A.D.2d 607, 467 N.Y.S.2d 944 (3d Dept. 1983). The role of a court in deciding a motion for summary judgment "is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist." ***Dyckman v. Barrett,*** 187 A.D.2d 553, 590 N.Y.S.2d 224 (2d Dept. 1992).

In order to plead a cause of action for breach of contract, the complaint must allege the provisions of the contract upon which the claim is based. ***Maldonado v. Olympia Mechanical,*** 8 A.D.3d 348, 777 N.Y.S.2d 730 (2d Dept. 2004). However, **Real Property Law §235-b** provides that:

> 1. 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.

But, the Court of Appeals has held that this implied warranty of habitability sets forth a "minimum standard to protect tenants against conditions that render residential properties uninhabitable or unusable." ***Solow v. Wellner,*** 86 N.Y.2d 582, 635 N.Y.S.2d 132, 658 N.E.2d 1005 (1995). The purpose of the provision is not to insure the premises is maintained in accordance with the reasonable expectations of the tenants; that is the purpose of the lease agreement itself. Rather, the statutory 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." ***Id.*** (internal citations omitted).

To prevail on a cause of action alleging fraud, plaintiff must demonstrate that defendant made material representations he knew to be false and made them with the intent to deceive the plaintiff, the plaintiff justifiably relied on the representations, and plaintiff was injured as a result of the defendant's representations. ***Heaven v. McGowan,*** 40 A.D.3d 583, 835 N.Y.S.2d 641 (2d Dept. 2007); ***Watson v. Pascal,*** 27 A.D.3d 459, 811 N.Y.S.2d 422 (2d Dept. 2006); ***Avecia v. Kerner,*** 299 A.D.2d 380, 749 N.Y.S.2d 422 (2d Dept. 2002).

In the case at bar, both sides have failed to meet her burden of demonstrating the absence of a material fact entitling them to summary judgment. Initially, plaintiff has not articulated a specific provision of the Lease Agreement allegedly violated by defendants. To the extent plaintiff alleges defendants' failure to provide a pull-out couch constitutes a breach of the lease, the plain language of the Lease Agreement did not require defendants to provide any specific furniture or fixtures in the subject premises. Regarding the implied warranty of habitability, the conflicting affidavits by the parties regarding the mold and mildew and insect infestation raise an issue of fact requiring a trial. Thus, the motion and cross-motion for summary judgment on the breach of contract cause of action are denied.

Similarly, with respect to the cause of action for fraud, the Court finds that a question of fact exists as to whether the term "Deposit non-refundable" was inserted prior or subsequent to the execution of the Lease Agreement. If the term was in fact inserted after plaintiff signed the agreement, and she can demonstrate she relied on such provision to her detriment and was damaged thereby, she may

be entitled to recover against defendants. However, these are questions of fact and credibility that cannot be resolved on a motion for summary judgment.

Based upon the foregoing, the motion and cross-motion for summary judgment are denied in their entirety. This matter is scheduled for a preliminary conference on April 3, 2008 at 9:30 a.m. before the undersigned.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: January 29, 2008
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.