

Misra v Yedid

2008 NY Slip Op 31531(U)

June 3, 2008

Supreme Court, New York County

Docket Number: 0603857/2003

Judge: Marylin G. Diamond

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48
Justice

GEETANJALI MISRA

Plaintiff,

-against-

SAMUEL YEDID et al.,

Defendants.

INDEX NO.603857/03

MOTION DATE

MOTION SEQ. NO. 007

MOTION CAL. NO.

FILED
JUN 05 2008

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 007 and 008 are consolidated herein for decision. In January, 2003, plaintiff purchased a cooperative apartment from defendants Samuel Yedid and Gregory Allen. The apartment is located directly below the building's ventilation system, which is housed in an equipment room on the 28th floor. Plaintiff claims that she did not discover that the ventilation system was above her apartment until after she purchased the unit. According to the plaintiff, the system created noise and vibrations which rendered her apartment uninhabitable. She brought this action against Yedid, Allen, the cooperative corporation (Masters Apartments, Inc.), the real estate brokerage firm and its employee who procured the sale (Brown Harris Stevens Residential Sales, LLC ["BHS"] and David Anderson), and the building's managing agent and property manager (Orsid Realty Corp. and Seth Jacovy). She alleges that Yedid, Allen and their real estate brokers defrauded her by tampering with the fan in the ventilation system in order to conceal from her the existence of the system and the noise and vibrations which it created in the apartment. Plaintiff also alleged that the cooperative breached the warranty of habitability.

By decision and order dated July 6, 2006, this court denied motions for summary judgment brought by defendants BHS, Anderson, Yedid and Allen. The court, however, granted the plaintiff's summary judgment motion against the cooperative on her seventh cause of action for breach of the warranty of habitability. The court's order was affirmed by the Appellate Division, First Department. *See Misra v. Yedid*, 37 AD3d 284, 285 (1st Dept. 2007). The note of issue has been filed and all discovery has concluded. The case is now ready for trial. In motion sequence number 007, BHS, Anderson and Yedid have made a pre-trial motion seeking to preclude the plaintiff from introducing various types of evidence at trial. In motion sequence number 008, the plaintiff has moved to amend her complaint and for an order precluding certain expert testimony. The cooperative has cross-moved to strike the plaintiff's jury demand and to preclude the plaintiff from offering certain evidence at trial.

Discussion

A. Motion Sequence Number 007 - - In motion sequence number 007, BHS, Anderson and Yedid move to preclude the plaintiff from offering evidence at trial as against them relating to (1) the rental values of comparable New York City apartments to that of the subject apartment for the years 2003 to 2007, including, but not limited to, the expert testimony and report of Diego Plaza, (2) damages incurred subsequent to March, 2005, the time the noise condition at the apartment was allegedly repaired, (3) attorney's fees and (4) punitive damages.

The only claim which remains against these three defendants is the allegation that they defrauded the plaintiff by tampering with the ventilation system in order to conceal the noise and vibrations in the apartment. In New York, the true measure of damages for fraud is, under what is known as the "out of pocket" rule, the actual economic loss sustained as a result of the wrongful conduct. *See Lama Holding Co. v. Smith Barney Inc.*, 88 NY2d 413, 421 (1996). Under this rule, the loss is computed by ascertaining the difference between the value of the bargain and the value of the consideration exacted as a price of the bargain. *Id.* at 421. Such damages are intended to compensate the plaintiff for what she actually lost because of the fraud, not to compensate her for what she might have gained had there been no fraud. *Id.* *See also Cayuga Harvester v. Allis-Chalmers Corp.*, 95 AD2d 5 (4th Dept. 1983).

Here, the moving defendants argue that the only damages the plaintiff is entitled to is a partial or total abatement of her rent for the time period in which the noise condition rendered the apartment uninhabitable. This limitation, however, is excessively restrictive since it does not allow plaintiff to recover all of the consequential damages incurred as a result of the defendants' allegedly fraudulent conduct. Where a party is unable to reside in an apartment because it is uninhabitable, she should be permitted to recover not just the rent which she paid for the apartment during the period of uninhabitability, but also the reasonable and necessary costs of obtaining alternative housing insofar as those costs exceeded the rent of the uninhabitable apartment. Here, rather than secure alternative living arrangements in New York while the cooperative remedied the noise condition, the plaintiff chose to fly back and forth between India and New York, working in both countries and, when in New York, staying with friends or at hotels. Although this arrangement was unusual, the plaintiff is nevertheless entitled to recover the costs which she thereby incurred so long as those costs did not exceed the fair rental value in New York of an apartment which she could have rented that would have been comparable to her cooperative apartment. The defendants' motion to preclude this evidence at trial, which includes the out-of-pocket expenses plaintiff incurred, as well as expert testimony about the fair rental value of a comparable apartment which she could have rented, must therefore be denied.

On her fraud claim, the plaintiff also seeks to recover the loss of income which she allegedly suffered by not working full time in New York during the period the cooperative apartment was uninhabitable. The court agrees with the moving defendants that the plaintiff is not entitled to these damages since they are speculative and not a direct and proximate result of the defendants' alleged fraudulent conduct. *See Geary v. Hunton & Williams*, 257 AD2d 482 (1st Dept. 1999); *Taschman v. University of Rochester*, 199 AD2d 1016, 1017 (4th Dept. 1993). Indeed, any loss of income which the plaintiff may have suffered was the result of her independent decision to fly back and forth between India and New York rather than obtain a comparable apartment in New York during the period her cooperative apartment was uninhabitable. *See Taschman v. University of Rochester*, 199 AD2d at 1016.

As to the request that plaintiff be precluded from introducing any evidence of damages she may have incurred subsequent to March, 2005, the court notes that there is a dispute as to whether, in fact, the noise condition affecting the apartment was actually repaired as of that date. The cut-off date for damages, if any, cannot therefore be determined until trial.

Finally, the court agrees with the moving defendants that there is no legal basis for the plaintiff to recover attorney's fees or punitive damages against them. As to legal fees, it is well settled that in the absence of an applicable statutory or contractual provision authorizing such an award, this relief is unavailable. *See Obas v. Kiley*, 149 AD2d 422 (2nd Dept 1989); *Rahabi v. Morrison*, 81 AD2d 434, 437 (2nd Dept 1981). The plaintiff has not cited any such provision with respect to the moving defendants and is therefore not entitled to obtain an attorney's fees award against them. As to punitive damages, such relief is not available in an "ordinary fraud" case unless the defendant's conduct has been malicious and reckless in its nature, evincing such a high degree of moral culpability, moral turpitude or wanton dishonesty as to

imply criminal indifference to civil obligations. See *Giblin v. Murphy*, 73 NY2d 769, 772 (1988); *Randi A.J. v. Long Island Surgi-Center*, 46 AD3d 74, 79-82 (2nd Dept. 2007); *Outside Connection, Inc. v. DiGennaro*, 18 AD3d 634 (2nd Dept. 2005). In this respect, the conduct of the moving defendants in this case was not sufficiently egregious so as to warrant an award of punitive damages.

B. Motion Sequence Number 008 - - In motion sequence number 008, the plaintiff moves for leave to amend her complaint so as to include a claim for punitive damages against the cooperative and for an order precluding the testimony of Adam Pollak, the proposed expert witness for BHS and Anderson. The cooperative cross-moves for an order striking the plaintiff's jury demand and precluding the plaintiff from offering evidence against the cooperative concerning punitive damages, attorney's fees and any damages incurred after the noise condition was allegedly resolved in March, 2005. The cooperative also seeks to preclude testimony concerning various items of damages which it contends are unrecoverable, including, *inter alia*, plaintiff's mortgage interest payments, construction costs and storage fees.

As already noted, in its July 6, 2006 decision and order, this court found the cooperative liable for breach of the warranty of habitability and indicated that the amount of damages which plaintiff suffered as a result of this breach should be determined at trial. The plaintiff now moves, pursuant to CPLR 3025(b), to amend her complaint so as to include a claim for punitive damages against the cooperative. It is well settled that punitive damages for breach of the warranty of habitability should only be awarded if the conduct was intentional and malicious or rose to a level of high moral culpability or indifference to civil obligations. See *Minjak Co., v. Randolph*, 140 AD2d 245, 249 (1st Dept. 1990); *390 West Associates v. Raif*, 166 Misc2d 730, 734 (Sup Ct NY Co 1995). The facts of this case do not rise to such an exacting standard and the plaintiff's request to amend her complaint must therefore be denied.

As to the expert testimony of Adam Pollak, the defendants' expert disclosure statement indicates that Mr. Pollak is expected to testify as to "remedies that are available in landlord-tenant court to persons situated similarly to plaintiff herein claiming defective conditions in their apartment... [Mr] Pollak will testify that plaintiff had available to her remedies in landlord-tenant court, and that pursuing such remedies would have resulted in a prompt resolution of plaintiff's claims." The plaintiff argues, *inter alia*, that the proposed expert testimony is irrelevant and not a proper subject for expert testimony. The court agrees. The plaintiff's claims against BHS and Anderson are fraud claims having to do with the initial sale of the apartment and, as such, would not have been a proper subject for landlord-tenant court. Mr. Pollak should therefore be precluded from testifying.

As to the cooperative's cross-motion, its request for an order striking the plaintiff's jury demand is based on a provision in the proprietary lease which waives trial by jury in any action arising out of or in anyway connected with the lease, the lessee's use or occupancy of the apartment, or any claim of damage "resulting from any act or omission of the parties in any way connected with this lease or the apartment." In opposing this application, the plaintiff argues that the cooperative unduly delayed in moving to strike her jury demand and is therefore not entitled to rely on the waiver provision. The plaintiff's argument is without merit. In *A.J. Fritschy Corp. v. Chase Manhattan Bank*, 36 AD2d 600 (1st Dept 1971), the First Department held that although it is preferable that it be brought as early as possible, a motion to strike a jury demand by invoking a jury waiver clause may nevertheless be made at any time before trial so long as the delay does not unduly prejudice the other side. See also *Empire State Building Co., LLC v. EAI Consulting & Trading, Inc.*, 2007 WL 2003763 (Civil Ct NY Co 2007). Here, there has been no apparent prejudice to the plaintiff by reason of the defendants' failure to have brought the motion earlier. Under the circumstances, the court agrees that the plaintiff's jury demand should be stricken as to her claims against the cooperative.

Nevertheless, the plaintiff is entitled to a jury trial against the other defendants on her fraud claim. CPLR 4102(c) provides that "A party shall not be deemed to have waived the right to trial by jury of the

issues of fact arising upon a claim, by joining it with another claim with respect to which there is no right to trial by jury and which is based upon a separate transaction..." This provision is clearly applicable since the plaintiff has herein brought multiple claims against different parties which arise out of separate, although related, transactions. The issue of whether or not the trial should be bifurcated and/or unified with separate findings of fact by the court with respect to plaintiff's claim against the cooperative for breach of the warranty of habitability and by the jury with respect to her fraud claim against the other defendants will be discussed and resolved at a pre-trial conference.

As to the remainder of the cooperative's cross-motion, it argues that plaintiff's damages should be limited to a rent abatement for the period from January, 2003 to March, 2005 and that any award of attorney's fees made to the plaintiff pursuant to the proprietary lease should be limited to fees incurred on or before March 17, 2005, the date when the cooperative alleges it remedied the noise condition. These arguments are without merit. As to the cut-off date for damages, as already discussed, there is a factual dispute as to when the noise condition was actually remedied. As to the limitation of plaintiff's damages to a rent abatement, both this court and the First Department have specifically held that the plaintiff was not limited to recovering a maintenance abatement on her breach of warranty claim but, rather, could also seek to recover other damages which she may have suffered, including expenses she would not otherwise have incurred had the apartment been habitable. A final determination as to the specific items of damages which plaintiff is entitled to recover will be made at trial.

Accordingly, in motion sequence number 007, the motion by the defendants Yedid, BHS and Anderson is granted to the extent that the plaintiff is hereby precluded from offering against these defendants at trial any testimony or evidence concerning her loss of income, attorney's fees or punitive damages. The motion is otherwise denied.

In motion sequence number 008, the plaintiff's motion is granted to the extent that the defendants' expert Adam Pollack is hereby precluded from testifying at trial. The motion is otherwise denied. The cross-motion of the cooperative is granted to the extent that the plaintiff's jury demand as against it is hereby stricken. The cross-motion is otherwise denied.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on June 24, 2008 at 10:00 a.m. for a pre-trial conference. At that time, the parties should be prepared to discuss the settlement of this action and/or to pick a final trial date. No adjournments will be permitted.

ENTER ORDER

Dated: 6/3/08

Check one: FINAL DISPOSITION

MGD

MARYLIN G. DIAMOND, J.S.C.
 NON-FINAL DISPOSITION

FILED
JUN 05 2008
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