

DiGiovanna v ASN Roosevelt Center LLC

2008 NY Slip Op 32493(U)

September 5, 2008

Supreme Court, Nassau County

Docket Number: 0347-08/

Judge: Leonard B. Austin

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NO. 347/2008

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: March 28, 2008
Submission Date: May 2, 2008
Motion Sequence No.: 001/MOT D

JOHN DIGIOVANNA and FARIDEH
DIGIOVANNA,

Plaintiffs,

COUNSEL FOR PLAINTIFFS
DiGiovanna & Khalatbari
32 Court Street-Suite 205
Brooklyn, New York 11201

- against -

ASN ROOSEVELT CENTER LLC d/b/a
ARCHSTONE WESTBURY,

Defendant.

COUNSEL FOR DEFENDANT
Westermann Ball Ederer Miller &
Sharfstein, LLP
170 Old Country Road, Suite 400
Mineola, New York 11501

_____x

Shook Hardy & Bacon LLP
2555 Grand Boulevard
Kansas City, Missouri 64108-2613

ORDER

The following papers were read on Defendant's motion to dismiss the first and third causes of action of the complaint:

- Notice of Motion, dated March 12, 2008;
- Affirmation of William E. Vita Esq., dated March 12, 2008;
- Defendant's Memorandum of Law;
- Affirmation of Odessa Khalatbari, Esq., dated April 19, 2008;
- Affidavit of John C. DiGiovanna, dated April, 15 2008;
- Affidavit of Farideh DiGiovanna, sworn to on April, 17, 2008;
- Defendant's Reply Memorandum of Law.

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Defendant, ASN Roosevelt Center LLC d/b/a Archstone Westbury ("ASN")
moves to dismiss the first and third causes of action of the complaint pursuant to CPLR
3211(a)(7).

BACKGROUND

This action arises out of a lease entered into in September 2006, between ASN
and Plaintiffs, John DiGiovanna and Farideh DiGiovanna ("DiGiovannas"), for a two
bedroom apartment (Apartment #803), located at 1299 Corporate Drive, Westbury, NY.
The apartment building was owned and managed by ASN. The lease was for a seven
month period, at a cost of \$5,000 per month. Following the end of the lease term, in
April 2007, the DiGiovannas remained as month-to-month tenants until September 3,
2007, when they moved out.

In October 2006, the DiGiovannas noticed water leaking inside the apartment.
As a result of the leaking water, the DiGiovannas left the apartment and stayed at the
Marriott Hotel in Uniondale, NY. It is undisputed that ASN paid for the DiGiovannas'
stay at the hotel and attempted to repair the leaks during that time. The DiGiovannas
returned to the apartment and discovered that the leaking in the master bedroom and
breakfast room continued. As a result of an odor caused by the leaking, the
DiGiovannas no longer utilized the master bedroom.

The heating system in the apartment broke down in February 2007. As a result,
the DiGiovannas purchased a separate heating system to heat the apartment.

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Beginning in June 2007, the apartment became infested with worms and/or caterpillars, requiring the apartment to be sprayed. The spraying did not eliminate the infestation. Until the time the DiGiovannas left the apartment in September 2007, the infestation and odor had not abated.

The DiGiovannas commenced this action by filing a summons and complaint with the Nassau County Clerk on January 7, 2008. The complaint asserts five causes of action alleging: (1) breach of the implied covenant of quiet enjoyment; (2) violation of New York Real Property Law ("RPL") § 235-B; (3) unjust enrichment ("equitable restitution"); (4) negligence in maintaining the premises; and (5) fraud. ASN now moves to dismiss the first and third causes of action pursuant to CPLR 3211(a)(7).

DISCUSSION

A. Legal Standard

The standard of review on a motion to dismiss for failure to state a cause of action is that the allegations in the complaint must be assumed to be true and to "accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). However, "such an assumption must fail where there are conclusory allegations lacking factual support." Elsky v. KM Ins. Brokers, 139 A.D.3d 332 (2nd Dept. 1988). In addition, where affidavits have been submitted regarding a motion to dismiss, the court may consider allegations set forth in the affidavits to remedy any

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deficiencies within the pleading. See, Nonnan v. City of New York, 9 N.Y.3d 825 (2007).

“A motion to dismiss... may be granted where the documentary evidence that forms the basis of the defense is such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claims.” HSBC Bank USA, N.A. v. Decaudin, 49 A.D.3d 694, 694 (2nd Dept. 2008), *quoting* Saxony Inc Co., Div. of Springfield Ice Co., Inc. v. Ultimate Energy Restaurant Corp., 27 A.D.3d 445, 446 (2nd Dept. 2006). See also, Leon v. Martinez, *supra*.

B. Breach of Implied Covenant of Quiet Enjoyment

In order to bring a claim for breach of quiet enjoyment, the plaintiff must establish either actual or constructive eviction. 34-35th Corp. v. 1-10 Indus. Assocs., 16 A.D.3d 579, 580 (2nd Dept. 2005). “An actual eviction occurs when a landlord wrongfully ousts a tenant from physical possession” of the premises. Whaling Willie's Roadhouse Grill, Inc. v. Sea Gulls Partners, Inc., 17 A.D.3d 453 (2nd Dept. 2005). A constructive eviction may occur absent physical expulsion if “the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises.” Barash v. Pennsylvania Terminal Real Estate Corp., 26 N.Y.2d 77, 82 (1970); and Grammar v. Turits, 271 A.D.2d 644, 646 (2nd Dept. 2000).

Surrender of the property is necessary to maintain a claim for breach of the implied covenant of quiet enjoyment. Dave Herstein Co. v. Columbia Pictures Corp., 4

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N.Y.2d 117, 121 (1958). However, a partial constructive eviction may be found where a portion of the property becomes unusable; entitling the tenant to the value of the portion of the property that could not be used. See, Oresky v. Azzouni, 232 A.D.2d 463 (2nd Dept. 1996) (recognizing action for partial constructive eviction in residential apartment); and KRU, Inc. v. 1000 Massapequa, Inc., 238 A.D.2d 314 (2nd Dept. 1997) (recognizing action for partial constructive eviction in commercial property).

The allegations do not set forth that the DiGiovannas were actually evicted from their apartment by ASN. However, the allegations do set forth a cause of action for partial constructive eviction from a portion of the premises. The DiGiovannas allege that they were deprived of the benefit of the master bedroom, and that they were unable to make use of it following the water leakage. The DiGiovannas neither allege actual eviction nor contest ASN's arguments to the contrary, rather they rely on a theory of partial constructive eviction.

ASN correctly notes that surrender of the premises is a necessary element of constructive eviction. However, ASN incorrectly asserts that no cause of action will lie for a partial constructive eviction. Although the DiGiovannas rely on Rappaport v. Kessler, 25 N.Y.S.2d 302 (App. Term. 1st Dept. 1941) to justify a cause of action for partial constructive eviction, *Rappaport* relates to actual partial eviction and not partial constructive eviction.

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Nevertheless, the Second Department has recognized that partial constructive eviction may establish a breach of the implied covenant of quiet enjoyment in both residential and commercial settings. See, Oresky v. Azzouni, *supra.*; and KRU, Inc. v. 1000 Massapequa, Inc., *supra.* ASN's citation to the Civil Court of the City of New York cases that do not allow a cause of action for partial constructive eviction are unpersuasive and not binding on this Court. Because the DiGiovannas affidavits allege that they vacated a portion of the premises as the result of the adverse conditions, the element of constructive eviction has been satisfied.

ASN's further contentions that the DiGiovannas did not vacate in a reasonable time and that there are no damages are without merit. The allegations by the DiGiovannas indicate that they did not utilize the master bedroom following the failed attempts to repair the leak. Furthermore, because an action for partial constructive eviction results in an award for the value of the portion of the property that could not be used, the DiGiovannas should be given the opportunity to establish their damages.

The cause of action for breach of the covenant of quiet enjoyment should not be dismissed because partial constructive eviction will sustain such a claim. In addition, the DiGiovannas have alleged sufficient facts which, if proven, would entitle them to recovery. Finally, ASN has failed to produce sufficient documentary evidence to resolve all factual issues relating to its assertions of unreasonable time before vacating or lack

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of damages resulting from the eviction. Therefore, the motion to dismiss the first cause of action must be denied.

C. Unjust Enrichment

“To prevail on a claim of unjust enrichment, a plaintiff must establish that it conferred a benefit upon the defendant, and that the defendant will obtain that benefit without adequately compensating the plaintiff therefor.” MT Prop., Inc. v. Weinstein, 50 A.D.3d 751, 751 (2nd Dept. 2008). Plaintiff must establish that services were performed at the request or behest of the defendant. Clark v. Daby, 300 A.D.2d 732 (3rd Dept. 2002); Prestige Caterers v. Kaufman, 290 A.D.2d 295 (1st Dept. 2002); and Lakeville Pace Mechanical, Inc. v. Elmar Realty Corp., 276 A.D.2d 673 (2nd Dept. 2000).

A claim for unjust enrichment cannot stand “where there is a valid and express agreement between the parties which explicitly covers the same specific subject matter for which the implied agreement is sought.” Kohn v. Hartstein & Hartstein, 294 A.D.2d 543, 543 (2nd Dept. 2002).

The Plaintiffs’ third cause of action alleges that “Plaintiffs are entitled to equitable restitution...” since they paid \$5,000.00 monthly rent payments and ASN failed to provide “a safe and habitable apartments or apartment worth the value of the rent...”. The Court assumes that the Plaintiffs are attempting to set forth a cause of action for unjust enrichment. However, the complaint does not allege that the Plaintiffs

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performed any services for the Defendant at its request for which the Plaintiffs anticipated being compensated.

Furthermore, it is undisputed that there was an agreement between the parties with regard to the lease of the apartment. The documentary evidence produced by ASN clearly indicates the existence of such an agreement. Moreover, the DiGiovannas do not allege either in the complaint or in their opposition that such an agreement did not exist. Therefore, the third cause of action which appears to be one for unjust enrichment cannot stand and must be dismissed.

Accordingly, it is,

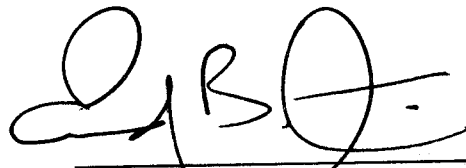
ORDERED, that Defendant's motion to dismiss the first cause of action is **denied**; and it is further,

ORDERED, that Defendant's motion to dismiss the third cause of action is **granted**; and it is further,

ORDERED, that counsel for the parties shall appear for a status conference on October 10, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: Mineola, NY
September 5, 2008



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
SEP 10 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE