

Tenreiro v Park 58 Corp.
2009 NY Slip Op 30339(U)
February 6, 2009
Supreme Court, New York County
Docket Number: 105340/08
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Marilyn Shafer
Justice

PART 8

Index Number : 105340/2008
TENREIRO, DANIEL
vs.
PARK 58 CORPORATION
SEQUENCE NUMBER : 002
ORDER OF PROTECTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 2, 3, 4
MOTION CAL. NO. _____
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~~ these consolidated
motions and cross-motion are
placed in accord with the annexed
memorandum.

FILED
FEB 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/6/09

Marilyn Shafer
HON. MARILYN SHAFER, JSC
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 8

-----X
DANIEL TENREIRO,

Plaintiff,

-against-

PARK-58 CORPORATION,

Defendant.

MARILYN SHAFER, J.:

Motion sequence numbers 002, 003, and 004 are consolidated for disposition.

The defendant Park-58 Corporation moves, pursuant to CPLR 3103 (a), for a protective order in both its, and the non-parties Elliot Wolk's and Dennis Nagel's favor, and pursuant to 22 NYCRR § 130-1.1 for an order imposing sanctions against the plaintiff Daniel Tenreiro (motion sequence number 002). The defendant Park-58 Corporation also moves, pursuant to CPLR 3211 (a) (1), for an order dismissing the complaint on the ground a defense is founded upon documentary evidence (motion sequence number 004).

The plaintiff Daniel Tenreiro cross-moves pursuant to CPLR 3025 (b) for an order granting leave to amend the first amended complaint (motion sequence number 004). The plaintiff Daniel Tenreiro also moves, pursuant to CPLR 3124, for an order compelling the defendant Park-58 Corporation to submit to deposition and to produce documents, and pursuant to CPLR 3126 upon the defendant's failure to comply, for an order striking the answer (motion sequence number 003).

The defendant Park-58 Corporation is a residential cooperative corporation, and the landlord of the plaintiff Tenreiro who is the owner, along with his wife, of the shares allocated to

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apartment 8D in the building located at 470 Park Avenue, in Manhattan.

The amended complaint alleges that the defendant Park-58 Corporation permitted a long-term ongoing water leak to infiltrate the apartment from the external wall of the building. Because of the resulting dust, lead and asbestos, the plaintiff, and his wife and three children, have temporarily moved out of the apartment. The amended complaint pleads causes of action for: a judgment declaring that the lease requires that the defendant complete the repair of the external wall before the interior is restored (first cause of action); a judgment declaring that the lease obliges the defendant to clean up the damage to the apartment caused by the leaks (second cause of action); an injunction staying the defendant, until the exterior restoration work is completed, from seeking to enforce the lease provision requiring re-painting the apartment, (third cause of action); a constructive eviction (fourth cause of action); and attorney's fees (fifth cause of action).

The proposed second amended complaint adds both a sixth cause of action for the failure to properly maintain the exterior wall in breach of the Facade Law (New York City Administrative Code § 27-129) and the New York City Facade Ordinance (1 RCNY § 32-03), and a seventh cause of action for a breach of the warranty of habitability.

The court will first dispose of the plaintiff's cross motion for leave to amend the first amended complaint, before turning to the defendant's motion to dismiss based on documentary evidence. It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay (CPLR 3025 [b]; *Thomas Crimmins Constr. Co. v City of New York*, 74 NY2d 166 [1989]). The proposed second amended complaint is based upon the same water leak as both the original complaint, and the first amended complaint, does not result in either prejudice or surprise, and it cannot be said that the second amendment is palpably

insufficient as a matter of law or totally devoid of merit. Therefore, the cross motion to amend must be granted.

On a motion to dismiss pursuant to CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]). The document that forms the basis of the defense must be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim (*Saxony Ice Co., Div. of Springfield Ice Co., Inc. v. Ultimate Energy Rest. Corp.*, 27 AD3d 445 [2d Dept 2006]).

In support of its motion to dismiss, the defendant Park-58 Corporation argues that the plaintiff's claims are barred by: the proprietary lease, a stipulation entered into between the parties on May 28, 2008, an engineer's report, and a rescinded or closed HPD lead paint violation. However, nothing in the documents relied upon, bars the plaintiff's claims.

Contrary to the defendant's assertion, Paragraph 16 of the lease, General Obligations Law (GOL) § 5-321, and Multiple Dwelling Law § 78, all clearly provide that the defendant landlord is liable for its negligence. Paragraph 16 of the lease specifically mentions that the landlord is liable for damages to person or property cause by its negligence.

Multiple Dwelling Law § 78 provides in relevant part :

Every multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair. The owner shall be responsible for compliance with the provisions of this section...

The Multiple Dwelling Law protects tenants, guests and invitees on the premises and places liability on the owner should it not keep the premises in a safe condition

(*Trimarco v Klein*, 56 NY2d 98 [1982]; *Preldakaj v Alps Realty of NY Corp.*, 47 AD3d 511

[1st Dept 2008]).

GOL § 5-321 provides:

Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

Therefore, the proprietary lease does not conclusively establish a defense to the asserted claims as a matter of law.

The May 28, 2008 stipulation, said to be dispositive of the plaintiff's claims, by its terms, merely disposed of the plaintiff's April 22, 2008 motion for a stay of the notice to cure served upon the plaintiff by the defendant Park-58 Corporation. Therefore, the stipulation does not conclusively establish a defense to the asserted claims as a matter of law.

The engineer's report dated September 16, 2008, submitted by the defendant Park-58 Corporation in support of its dispositive motion, on its face states that the brick joint repointing and water repellant work is not complete, and recommends that the water leak test not be conducted until the work is complete. Therefore, the engineer's report does not conclusively establish a defense to the asserted claims as a matter of law.

Finally, the rescinded, or closed HPD violation, is limited to a lead-based interior paint complaint, and therefore cannot possibly be construed as entirely disposing of the plaintiff's claims.

The question of a breach of the warranty of habitability, it has been held, is rarely capable of resolution on a dispositive motion. (*Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316 [1979]). In addition, the second amended complaint states a viable tort claim. The abrupt nature of the injury

and resulting damages, are typical of tort claims, and flow from the defendant's breach of its statutory nondelegable duty to maintain the premises in good repair (Multiple Dwelling Law § 78).

The defendant having seriously misinterpreted the documents submitted in support, its motion to dismiss the complaint on the ground that it is barred by documentary evidence must be denied.

Turning to the discovery motions, the defendant claims that no discovery is necessary in this case, refuses to respond to any discovery demands, and claims that it is being harassed by the plaintiff. Contrary to the defendant's assertion, it appears that all the plaintiff is seeking is the repair of a leak, and the damages that flowed from the defendant's failure to repair the leak.

Therefore, the defendant's discovery motion must be denied, and the plaintiff's discovery motion must be granted.

Finally, having itself advanced arguments that border on the frivolous, the defendant Park-58 Corporation's motion for sanctions must be denied.

Accordingly, it is

ORDERED that the defendant Park-58 Corporation's motions (sequence numbers 002 and 004) to dismiss, for a protective order, and for sanctions are all denied; and it is further

ORDERED that the plaintiff Daniel Tenreiro' cross motion (sequence number 004) for leave to serve a second amended complaint is granted and the second amended complaint as attached to the moving papers is deemed served upon service of a copy of this order with notice of entry; and it further

ORDERED that the defendant serve and file its second amended answer within 20 days of the service upon it of a copy of this order with notice of entry; and it is further

ORDERED that the plaintiff Daniel Tenreiro's motion (sequence number 003) to compel and to strike is granted; and it is further

ORDERED that the defendant produce, by March 4, 2009, the documents called for in Schedule "A" attached to the plaintiff's notice dated June 18, 2008; and it is further

ORDERED that the defendant produce for oral examination Messrs. Wolk and Nagel, on March 11, 2009 in Room 315, 60 Centre Street, New York, New York, at 10:00 AM, or at such other time and place as counsel shall in writing agree; and it is further

ORDERED that upon the defendant's failure to fully and timely comply with the directives above, the plaintiff may settle an order on notice directly to chambers striking the answer. Include an attorney's affirmation detailing the nature of the failure to comply.

Dated: 2/6/09

ENTER:


MARJORIE SHAFER

J.S.C.

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