

**Goldstone v Gracie Terrace Apt. Corp.**

2010 NY Slip Op 30106(U)

January 19, 2010

Supreme Court, New York County

Docket Number: 604235/07

Judge: Debra A. James

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

MARO A. GOLDSTONE and THOMAS R. NEWMAN,  
Plaintiffs,

Index No.: 604235/07

Motion Date: 08/21/09

- v -

Motion Seq. No.: 06

GRACIE TERRACE APARTMENT CORPORATION,  
Defendant.

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED

1

2

3 - 5

**FILED**

JAN 20 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers,

Plaintiffs move, pursuant to CPLR 3212, for partial summary judgment on liability on the first, second, third, sixth and eighth causes of action. The first cause of action seeks a declaration that Maro A. Goldstone (Goldstone) is entitled to a 100% abatement on her maintenance/rent from August 16, 2003 until her unit, Penthouse B, is restored to a habitable condition. The second cause of action on behalf of Goldstone seeks damages for breach of the warranty of habitability; the third cause of action on behalf of both plaintiffs seeks damages for breach of the covenant of quiet enjoyment; and the sixth cause of action on

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):

behalf of Goldstone seeks damages for constructive and actual eviction. In the eighth cause of action, plaintiffs seek damages for negligence based on a theory of res ipsa loquitur. This motion is made prior to the note of issue being filed and depositions have not yet been conducted in this action.

This action arises out of the flooding and subsequent growth of allegedly toxic mold in Goldstone's unit. Goldstone is the tenant/shareholder of the cooperative apartment known as Penthouse B in the cooperative residential building owned and managed by defendant Gracie Terrace Apartment Corporation. Thomas R. Newman is plaintiff's husband.

On August 15, 2003, Penthouse B became flooded when the building's water tank, located directly above Goldstone's apartment, overflowed. This overflow occurred subsequent to a wide-spread electrical outage on the East Coast of the United States. Luciano Carrasquillo (Carrasquillo), the building's superintendent, stated in an affidavit that prior to the electrical outage, the water tank and pump were working properly, without any problem of water overflow. Carrasquillo also said that the water tank and pump normally operate in the "automatic position," and that he turned the water pump to "automatic" once power was restored by Consolidated Edison following the outage. Carrasquillo further averred that the overflow was apparently caused by a system failure due to the failure of the high and low

water safety cut-off switch. According to Carrasquillo, the boiler room in which the domestic water pumps are located is not locked, and anyone in the building has access to this room.

Plaintiffs assert that, because defendant failed to use prompt and effective methods of drying out Penthouse B, highly toxic mold grew in the unit, rendering the unit uninhabitable. As part of the reply papers, plaintiffs submit the affidavit of Larry A. Vetter (Vetter), president of Enviropect, in which Vetter affirms that toxic mold exceeding normal levels existed everywhere in the unit, except for the hall ceiling and the living room wall. Attached to Vetter's affidavit are copies of the reports his company generated, which were sent to defendant.

Plaintiffs argue that because of the toxic mold and flooding they were forced to vacate the apartment and place their personal property in storage, starting in September of 2003. Plaintiffs further state that, as part of the remedial effort on the part of defendant, Penthouse B has been totally gutted, and remains so to the present time. Goldstone notes in her affidavit that the rent for her alternate living arrangements has been paid by defendant's insurer, and that Goldstone has not paid any rent/maintenance to defendant since September, 2003, even though she has been continually billed for such rent/maintenance.

According to section 4 (b) of the proprietary lease,

In case the damage resulting from fire or other cause shall be so extensive as to render the apartment partly

or wholly untenable, or if the means of access thereto shall be destroyed, the rent hereunder shall proportionately abate until the apartment shall again be rendered wholly tenable or the means of access restored; but if said damage shall be caused by the act or negligence of the Lessee or the agents, employees, guests or members of the family of the Lessee or any occupant of the apartment, such rental shall abate only to the extent of the rental value insurance, if any, collected by the Lessor with respect to the apartment.

Section 10 of the proprietary lease states

The Lessee, upon paying the rent and performing the covenants and complying with the conditions on the part of the Lessee to be performed as herein set forth, shall, at all times during the term hereby granted, quietly have, hold and enjoy the apartment without any let, suit, trouble or hindrance from the Lessor, subject, however, to the rights of present tenants or occupants of the apartment, and subject to any and all mortgages and underlying leases of the land and building, as provided in Paragraph 22, below.

Section 12 of the proprietary lease states

The Lessee will pay the rent to the Lessor upon the terms and at the times herein provided, without any deduction on account of any set-off or claim which the Lessee may have against the Lessor, and if the Lessee shall fail to pay any installment of rent promptly, the Lessee shall pay interest at the rate of six percent (6%) per annum from the date when such installment shall have become due to the date of the payment thereof, and such interest shall be deemed additional rent hereunder.

Section 29 (a) of the proprietary lease states

The Lessor shall not be liable, except by reason of the Lessor's negligence, for any failure or insufficiency of heat, water supply, electric current, gas, telephone, or elevator service or other service to be supplied by Lessor thereunder, or for the interference with light, air, view or other interests of the Lessee. No abatement of rent or other compensation or claim of eviction shall be made or allowed because of the making or failure to make or delay in making any repairs, alterations or decorations to the building, or any fixtures or

appurtenances therein, or for such space taken to comply with any law, ordinance or governmental regulation, or for interruption or curtailment of any service agreed to be furnished by the Lessor, due to accidents, alterations or repairs, or to any difficulty or delay in securing supplies or labor or other cause beyond Lessor's control, unless due to the Lessor's negligence.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Santiago v Filstein, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006) (internal quotation marks and citation omitted). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurck v Metropolitan Museum of Art, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978).

Defendant initially challenges Goldstone's motion as being procedurally defective, in that the motion failed to include a copy of the pleadings, the toxic mold reports were not properly authenticated, and Goldstone failed to provide a complete and signed copy of the proprietary lease. In her reply papers, Goldstone has corrected these errors.

A copy of the complaint is necessary to enable the court to determine the motion, and the failure of the parties to attach a copy of the pleadings could result in an automatic denial of the motion. Alizio v Perpignano, 225 AD2d 723 (2d Dept 1996).

However, because the complaint in this action had been filed with the court prior to the filing of the instant motion, the mandates of CPLR 2214 (c) have been sufficiently met so as to conclude that the complaint is "already in the possession of the court." Further, with respect to the reports and proprietary lease, any errors in the original motion have been cured by the reply papers (see eg Oeffler v Miles, Inc., 241 AD2d 822 [3d Dept 1997]), so that the substance of the motion may be considered and defendant claims no prejudice as a result of the omissions in the initiatory motion papers.

A "warranty of habitability sets forth a minimum standard to protect tenants against conditions that render residential premises uninhabitable or unusable." Solow v Wellner, 86 NY2d 582, 588 (1995). Although it is uncontroverted that the flooding and mold conditions in Penthouse B render the unit uninhabitable, plaintiffs provide no evidence that more than sufficient time has passed in which to remedy the problem. See Matter of Nostrand Gardens Co-Op v Howard, 221 AD2d 637 (2d Dept 1995). Considering the nature and extent of the damage to the apartment, plaintiffs conjecture that defendant's actions are ineffective, based only

on the passage of time without any substantiation to support the conclusion that the time factor alone renders defendant's efforts ineffective, are insufficient to warrant granting plaintiffs' motion on the second cause of action for breach of the warranty of habitability. Even though several years have past, it is a question of fact as to whether defendant's remedial efforts are reasonable under the circumstances. See Granirer v The Bakery, Inc., 54 AD3d 269 (1<sup>st</sup> Dept 2008); Dixon v City of New York, 33 AD3d 840 (2d Dept 2006). Therefore, summary judgment as to plaintiffs' claim for breach of the habitability warranty shall be denied.

"To make out a prima facie case of breach of the covenant of quiet enjoyment, a tenant must establish that the landlord's conduct substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises". Jackson v Westminster House Owners Inc., 24 AD3d 249, 250 (1<sup>st</sup> Dept 2005). As indicated above, plaintiffs have not presented prima facie evidence that it is defendant's conduct that has deprived them of the use of the cooperative unit and therefore summary judgment on the third cause of action shall be denied.

To establish a cause of action for constructive or actual eviction, a tenant must prove that the cooperative committed a wrongful act that caused the tenant's eviction from the unit. Barash v Pennsylvania Terminal Real Estate Corp., 26 NY2d 77, 82

(1970) ("To be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises"). Plaintiffs have "failed to present any evidence that the damage was in any way caused by the cooperative rather than by other [persons and sources]." 905 5<sup>th</sup> Associates, Inc. v. 90<sup>th</sup> Corporation, 47 AD3d 401, 402 (1<sup>st</sup> Dept 2008).

Simply stated, in order to prevail on any of the above causes of action, plaintiffs must present evidence in admissible form that the flooding and subsequent mold growth were caused by defendant's actions. Plaintiffs' submissions on this motion do not set forth a prima facie case establishing defendant's liability on such grounds.

Plaintiffs' allegations that defendant was negligent under an application of the doctrine of res ipsa loquitur are also unavailing. "[O]nly in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment." Morejon v Rais Construction Company, 7 NY3d 203, 209 (2006). Res ipsa loquitur has merely a procedural role with respect to evidence, and does not itself constitute substantive evidence. The criteria for the application of the doctrine of res ipsa loquitur are "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the

defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." Corcoran v Banner Super Market, 19 NY2d 425, 430 (1967).

In the instant matter, plaintiff has presented no evidence to establish that the water tank overflowing was in any way caused by an agency or instrumentality within defendant's exclusive control.

The evidence submitted on this motion sets forth that prior to the electrical outage, the water tank and pump were working properly. Questions of fact exist as to whether the overflow could have been caused by a design or manufacturing defect, the negligence of Consolidated Edison, the instrumentality that caused the electrical outage, or the intentional act of a person or persons unknown who tampered with the water pumps in the building's unlocked boiler room. "[P]laintiff [is] not entitled to summary judgment on the issue of liability under the theory of res ipsa loquitor. Because that doctrine is a rule of evidence, which merely provides a permissible inference of negligence rather than a presumption, its application as a basis for an award of summary judgment as to liability in favor of the plaintiff in this case is inappropriate." McDonald v Sunstone Associates, 39 AD3d 603, 605-606 (2d Dept 2007).

The evidence presented on this pre-discovery motion is insufficient for the court to conclude, as a matter of law, that

defendant's actions in any way caused or contributed to plaintiffs' injuries.

Lastly, the court cannot grant Goldstone a declaration that she is entitled to a 100% abatement in the rent/maintenance for her cooperative unit. Plaintiffs concede that Goldstone has had the rent for her alternate living arrangements, as well as her storage costs, paid by defendant's insurer. Defendant asserts that Goldstone is not entitled to receive both the rent for her replacement apartment and an abatement of her maintenance costs, which would have the effect of a double recovery. Plaintiffs argue that Goldstone never agreed to accept the alternate rent in lieu of a maintenance abatement. However, this unsupported assertion, raised for the first time in the reply papers, is insufficient to support the declaration sought by the plaintiffs in light of their conceded receipt and retention of the insurance payments. Plaintiffs also do not dispute the fact that no rent has been paid since the unit was vacated. Under these circumstances, a determination that Goldstone is entitled to a 100% rent/maintenance abatement would be inappropriate. Granirer v. Bakery, Inc., supra, 54 AD3d 269, 271-272 (1<sup>st</sup> Dept 2008) ("court properly declined to compel the cooperative to pay for plaintiffs' alternate living expenses without regard to insurance reimbursement or maintenance abatement and absent a hearing thereon").

Accordingly, it is

ORDERED that the plaintiffs' motion for partial summary judgment is DENIED; and it is further

ORDERED that the parties are directed to attend a compliance conference on February 9, 2010 in TAS Part 59, Room 1254, 111 Centre Street, at 11:00 A.M.

This is the decision and order of the court.

Dated: JAN 19 2010

ENTER:

~~Debra A. James~~  
J.S.C.  
**DEBRA A. JAMES**

**FILED**  
JAN 20 2010  
NEW YORK  
COUNTY CLERK'S OFFICE