

Lange v De La Chapelle
2010 NY Slip Op 34094(U)
January 12, 2010
Supreme Court, New York County
Docket Number: 110635/2009
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61**

JEFFREY LANGE and ELIZABETH LANGE,

Plaintiffs,

-against-

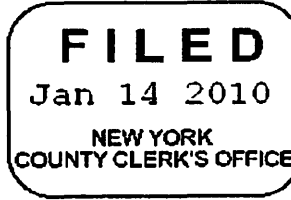
**PHILIPPE DE LA CHAPELLE, DORIA DE LA,
CHAPELLE and THE CORCORAN GROUP
RENTALS, INC.,**

Defendants.

O. PETER SHERWOOD, J.:

**DECISION AND
ORDER**

Index No. 110635/2009



This action has its genesis in a lease agreement between plaintiffs Jeffrey Lange and Elizabeth Lange ("plaintiffs" or "the Langes") and defendants Philippe De La Chapelle and Doria De La Chapelle ("the De La Chapelles") for the rental of the De La Chapelles' house located at 44 Egypt Close, East Hampton, New York ("the premises") for the 2009 summer season commencing on June 26, 2009 and running to September 8, 2009, for the sum of \$80,000, plus security of \$8,000, utility deposit of \$6,000, and animal damage deposit of \$4,000. Defendant NRT New York LLC d/b/a The Corcoran Group s/h/a The Corcoran Group Rentals, Inc. ("Corcoran") was the real estate broker with whom the De La Chapelle's listed the premises for rental and which acted as the conduit between the Langes and the De La Chapelles with respect to the rental. Shortly after the Langes executed the lease agreement on June 17, 2009, but before the rental period began on June 26, 2009, a major construction project ("the construction project") began on an adjoining property located at 40 Egypt Close ("the adjoining property"). Plaintiffs allege that the first morning after taking occupancy of the premises they were "jolted out of bed by the deafening noise from the construction" project (Amended Comp. ¶ 27) and that they immediately contacted Corcoran to complain about the noise from the construction project and to demand return of their rental payment and deposits. Plaintiffs aver that the De La Chapelles knew or should have known that such construction would be taking place during the rental period, but failed to inform them of same. Plaintiffs were advised by Corcoran that the De La Chapelles were not willing to make any concessions in the rent due to the construction noise. Thereafter, plaintiffs continued in occupancy of the premises for the

remainder of the lease period. On August 27, 2009, an upstairs toilet at the premises malfunctioned and overflowed causing water damage to the premises and causing plaintiffs to vacate the premises for eight days during the period preceding the Labor Day weekend.

Plaintiffs commenced this action to recover the full amount of rent paid, together with the deposits, for a total sum of \$98,000. They contend that the “extremely loud and jarring” noise emanating from the construction project, together with severe water infiltration and damage at the premises stemming from the malfunctioning upstairs toilet which required the installation of industrial moisture removal equipment, rendered the premises uninhabitable for the lease period, “depriving them of the quiet enjoyment of the premises and subjecting them to conditions that are hazardous and detrimental to their health, life and safety” (*id.* ¶ 41). The amended complaint alleges causes of action for breach of the implied warranty of habitability (first cause of action); breach of the lease (second and fifth causes of action); negligent and/or intentional misrepresentation (third and seventh causes of action), breach of fiduciary duty (sixth cause of action against Corcoran only); or, alternatively, seeking reformation of the lease agreement (fourth cause of action).

The De La Chapelles now move for an order pursuant to CPLR § 3211 (a) (1) and (7) dismissing the causes of action asserted against them.¹ Plaintiffs oppose the motion. For the reasons that follow, the De La Chapelles’ motion to dismiss is granted in part and denied in part.

The standard for a motion to dismiss pursuant to CPLR § 3211 (a) (7) is well settled. On such a motion to dismiss a plaintiff’s claim for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 318 [1995]; *219 Broadway Corp. v Alexander’s, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to “afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining

¹Corcoran moved for an order pursuant to CPLR § 3211 (a) (1) and (7) dismissing the causes of action alleged against it in the amended complaint for failure to state a cause of action. The action as against Corcoran was discontinued by stipulation dated December 1, 2009. Thus, the main motion by Corcoran is deemed withdrawn and the cross motion filed by the De La Chapelles to dismiss the amended complaint is considered the main motion.

a motion to dismiss” (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court’s role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support therefor (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, allegations consisting of bare legal conclusions, as well as factual claims flatly contradicted by the documentary evidence command no such deference (*see, Maas v Cornell University*, 94 NY2d 87, 91 [1999]; *Gertler v Goodgold*, 107 AD2d 481, 485 [1st Dept 1985, *aff’d for reasons stated below* 66 NY2d 946 [1985]).

Discussion

1. Breach of Warranty of Habitability

Pursuant to section 235-b of the Real Property Law (“RPL”), which at the time of its enactment codified existing law developed by judicial holdings (*see, Park West Mgt. Corp. v Mitchell*, 47 NY2d 316, 325 [1979]), “every residential lease contains an implied warranty of habitability which is limited by its terms to three covenants: (1) that the premises are ‘fit for human habitation’, (2) that the premises are fit for ‘the uses reasonably intended by the parties’, and (3) that the occupants will not be subjected to conditions that are ‘dangerous, hazardous or detrimental to their life, health or safety’” (*Solow v Wellner*, 86 NY2d 582, 587-588 [1995] (quoting RPL § 235-b). As recognized by the Court of Appeals in *Park West Management (supra* at 327), the purpose of this statutory provision is not to render landlords the absolute insurers of services which do not affect habitability and “protects only against conditions that materially affect the health and safety of tenants * * * that ‘in the eyes of a reasonable person * * * deprive the tenant of those essential functions which a residence is expected to provide’” (*Solow, supra*). The warranty also protects “against conditions that, while they do not render [a residence] unsafe or uninhabitable, constitute deficiencies that prevent the premises from serving their intended function of residential occupation” (*id.*). However, the Court in determining whether the implied warranty of habitability has been breached should not consider a tenant’s subjective expectations arising from the terms of the lease agreement (*id.*).

The statute has been interpreted broadly to extend a landlord’s liability under certain circumstances to acts of third parties and may extend to conditions resulting from events beyond the landlord’s control (*Park West Mgt., supra*). Thus, courts have determined that a breach of the

warranty of habitability may be predicated upon: a landlord's failure, after ample notice, to abate noise emanating from a neighboring apartment (*Armstrong v Archives, LLC*, 46 AD3d 465 [1st Dept 2007]; *Matter of Nostrand Gardens Co-Op v Howard*, 221 AD2d 637 [2d Dept 1995]; *Itskov v Rosenblum*, 7 Misc3d 135 [A] [App. Term, 1st Dept 2005]; *Mantica R Corp. NV v Malone*, 106 Misc2d 953 [Civ. Ct., N.Y. Co. 1981]); a landlord's failure to provide legal light, air and ventilation in a second bedroom of a 2-bedroom apartment due to construction of a high rise apartment building along the lot line undertaken by a third party which blocked the windows in the second bedroom (*Sutton Fifty-Six Co. v Fridecky*, 93 AD2d 720 [1st Dept 1983]); noxious odor emanating from a fish store in an adjacent building neither owned nor controlled by the landlord cooperative corporation which may be detrimental to life, health and safety of tenants (*Elkman v Southgate Owners Corp.*, 233 AD2d 104 [1st Dept 1996]); landlord's failure to provide adequate sanitation removal and janitorial services which materially affected the health and safety of tenants during a 17-day strike by porters and janitors (*Park West Mgmt.*, 47 NY2d 316, *supra*); landlord's failure to abate flooding condition caused by an upstairs neighbor (*Sargent Realty Corp. v Vizzini*, 101 Misc 2d 763 [Civ. Ct. N.Y. Co. 1979]); landlord condominium's failure to abate second-hand smoke condition emanating from a next door neighbor's apartment (*Poyck v Bryant*, 13 Misc2d 699 [Civ. Ct. N.Y. Co. 2006]; and flooding caused by extremely heavy rainfall and inadequacy of City's sewers in the vicinity of the apartment (*McBride v 218 E. 70th St. Assocs.*, 102 Misc2d 279 [App. Term, 1st Dept. 1979]; *but, c.f.*, *Grammar v Turits*, 271 AD2d 644 [2d Dept 2000] [summary judgment dismissing the causes of action for breach of the covenant of quiet enjoyment and breach of the warranty of habitability predicated upon noise from construction on a neighboring property was granted where there was no evidence in the record that any act of the landlord deprived plaintiff of the beneficial use of the property or that the premises were uninhabitable, unfit for use, or subject to dangerous or hazardous conditions]).

The De La Chappelles argue that in the absence of any allegations that the construction noise rendered the premises uninhabitable or specific allegations as to how the premises were rendered uninhabitable the cause of action for breach of the implied warranty of habitability should fail. With respect to the toilet malfunction, the De La Chappelles contend that they promptly addressed the problem and such condition did not render the premises uninhabitable or prevent the premises from

serving its intended purpose of residential occupation as there were other available bathrooms on the premises.

Plaintiffs contend that their amended complaint specifically alleges that the leased premises were rendered uninhabitable by the unreasonably loud construction noise and the severe water infiltration and that such allegations are sufficient to support a cause of action for breach of the warranty of habitability.

Assuming the truth of plaintiffs' allegations in the amended complaint and giving them the benefit of every possible inference, the plaintiffs have sufficiently pleaded, at this early stage of the litigation, a breach of the warranty of habitability (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, *supra*). As previously noted, the key question is not whether the landlord caused the condition or had control of the acts of third parties who caused the condition, but rather whether the subject condition, to wit, allegedly excessive noise, rendered the premises uninhabitable, unfit for their intended use or constituted a dangerous or hazardous condition. Here, while noise emanating from a neighboring property may be one of the "penalties of modern society" (*Mantica R Corp NV v Malone*, 106 Misc2d *supra* at 956, quoting from *Justice Court Mutual Housing Cooperative v Sandow*, 50 Misc2d 541, 564 [Sup. Ct. Queens Co.]), the allegations of the amended complaint are at least sufficient to support a claim that the alleged excessive noise rendered the premises unfit for its intended use as a vacation home. The fact that the construction noise may not have rendered the premises unsafe or uninhabitable does not necessarily render this cause of action legally insufficient as one of the three covenants encompassed by the warranty of habitability protects against conditions which prevent a premises from serving its intended function (*see, Solow v Wellner*, 86 NY2d *supra* at 589). The fact that evidentiary support therefor may be lacking in the record at this juncture does not mandate a contrary finding nor does the Court express any opinion about plaintiffs' ability ultimately to establish the truth of their averments.

2. Breach of the Lease Agreement

Plaintiffs allege that the De La Chapelles breached the lease agreement by failing to provide them with habitable premises throughout the lease term, failing to adequately maintain the premises and evicting plaintiffs for eight days prior to the Labor Day weekend (Amended Compl. ¶ 44). They further contend that the De La Chapelles breached the covenant of good faith and fair dealing by

failing to inform them prior to their taking possession of the premises of the noise emanating from the construction project on an adjoining property.

The De La Chapelles acknowledge that plaintiffs vacated the premises for several days while repairs were made as a result of the toilet malfunction, but deny that plaintiffs were “evicted”. Rather, the De La Chapelles contend that plaintiffs chose to vacate the premises while repairs were made, but could have easily remained at the premises as other bathrooms were available. In any event, defendants claim that plaintiffs’ remedy for the few days of inconvenience caused by the toilet malfunction is to seek a rent abatement, rather than return of rent for the entire period. Indeed, the need for repairs was envisioned by the lease which provided for the parties’ respective rights and responsibilities in the event a repair was required.

The lease agreement at issue is a three-page document that provides the term of the lease, total rent due, plus security and damage deposits. It further provides the rights and responsibilities of the parties to the lease agreement. In the amended complaint, plaintiffs have articulated no specific provisions in the lease agreement which they claim the De La Chapelles allegedly breached. The following provisions appear relevant to the stated facts. Paragraph 6 of the lease agreement titled “Condition of the Premises” states, in relevant part, that:

The Premises shall be delivered to Tenant furnished as shown in their inspection thereof. * * * Tenant shall notify Landlord within a reasonable period of time after taking possession of the premises of any malfunction in equipment, breakage and damages existing at the commencement of the Lease term; after this period Landlord shall not be liable for any such deficiencies. Tenant shall Landlord immediately in the event any condition requiring repair or creating an unsafe condition at the premises. Landlord shall be responsible for any repairs Except those resulting from any fault or abuse by Tenant or Tenant’s guests * * *

Paragraph 12 of the lease agreement titled “Inspection of the Premises” provides that:

Tenant has before entering into this Lease inspected the Premises, its fixtures, appliances and equipment and the personal property included in the Lease, knows the condition thereof, and agrees to accept same ‘as is’, i.e. in the condition they are in on the date hereof, without

any obligation on Landlord to repair or modify any item, and Tenant does not rely on any representations made by any Broker or by the Landlord or anyone acting or purporting to act on behalf of the Landlord as to any matters which might influence or affect the decision to execute this Lease.

To the extent that plaintiffs allege plaintiffs failure to advise them of the construction project or the malfunctioning toilet constitute breaches of the lease agreement, the plain language of the lease agreement provides that the plaintiffs inspected the premises and accepted such premises "as is" at the time of such inspection. The De La Chapelles submit as an exhibit to the reply affirmation of their attorney a copy of a building permit posted outside the adjoining property which presumably provided notice, upon inspection, of the construction project. In addition, the provisions of the lease provided the obligations of the landlord with respect to making repairs. Noticeably absent from the allegations of the amended complaint are any allegations that the De La Chapelles breached their obligation by failing to repair the malfunctioning toilet or that such repairs were ineffectual. Although this is a motion to dismiss, rather than a motion for summary judgment, the allegations of the complaint with respect to breach of the lease are duplicative of the breach of the implied warranty of habitability and, are, insufficient, to establish a breach separate and apart from the breach of such implied covenant. Accordingly, the second cause of action for breach of the lease agreement is dismissed.

3. Fraudulent or Negligent Misrepresentation

Plaintiffs allege that the De La Chapelles knew or should have known that construction would be taking place on the adjoining property and either intentionally or negligently omitted any information regarding same with the intention of inducing plaintiffs to enter into the lease agreement and that they have been injured as a result. They further contend that "[p]rior to the Rental Period, [they] did not know that construction would be taking place at the Adjoining Property, despite their reasonable diligence in investigating the suitability of the Premises as a summer rental property."

The De La Chapelles argue that the justifiable reliance element of the fraud cause of action cannot be established as plaintiffs could have discovered the construction project by the exercise of reasonable diligence.

To establish a prima facie case of fraud, plaintiff must demonstrate (1) a material representation of a fact; (2) which was false and known to be false; (3) defendant's intent to induce reliance; (4) plaintiff's justifiable reliance; and (5) as a result of such reliance plaintiff sustained pecuniary loss (*see, Eurycleia Partners v Seward & Kissel*, 12 NY3d 533, 559 [2009]; *Ross v Louise Wise Servs.*, 8 NY3d 478, 488 [2007]). Such claim must be pleaded with the particularity required under CPLR § 3016 (b). However, a cause of action for fraud cannot be sustained when the only fraud charged relates to a breach of contract or where the fraud is duplicative of a breach of contract claim (*see, Ross v DeLorenzo*, 28 AD3d 631 [2d Dept 2006]; *Lee v Matarrese*, 17 AD3d 539, 540 [2d Dept 2005]). Inasmuch as plaintiffs' cause of action for fraud arises out of the identical facts and circumstances as its cause of action for breach of the implied warranty of habitability, dismissal of the fraud cause of action is mandated (*see, Ross*, 28 AD3d at 636). To the extent that such cause of action is distinct from plaintiffs' breach of warranty claim, the allegations with respect to justifiable reliance or fraudulent inducement are not sufficiently specific.

In order to establish a cause of action for negligent misrepresentation a plaintiff must allege a duty to use reasonable care to impart correct information because of some special relationship between the parties, information was incorrect or false, and that plaintiff reasonably relied upon the information provided (*see, Grammar v Turits*, 271 AD2d *supra* at 645; *Pappas v Harrow Stores*, 140 AD2d 501, 504 [2d Dept 1988]). "A simple arm's length business relationship is not enough" (*United Safety of America v Consolidated Edison Co. of New York*, 213 AD2d 283 [1st Dept 1995]; *Andres v LeRoy Adventures*, 201 AD2d 262 [1st Dept 1994]). Assuming the truth of the allegations of the amended complaint as required on a motion to dismiss, the plaintiffs have failed to sufficiently plead the existence of a special relationship with the De La Chapelles and the other elements necessary to recover damages for negligent representation. At most, the amended complaint sets forth facts demonstrating the existence of an arm's length business relationship. Therefore, the third cause of action is also dismissed.

4. Reformation of the Lease

The allegations as contained in the amended complaint with respect to reformation of the lease agreement are stated as an alternative theory based upon an assumption that the De La Chapelles did not know about the construction project when it entered into the lease agreement. The

amended complaint asserts that the parties to the lease agreement were mistaken as to a “critical and fundamental component” of such lease agreement, namely, that the premises would be habitable throughout the term of the lease (Amended Compl. ¶ 57). As such, plaintiffs contend that the lease should be reformed “to reflect the mutual intention of the parties and the substantially diminished rental value of the premises in light of the excessive noise from the construction on the Adjoining Property and the temporary eviction resulting from the water leak” (Amended Compl. ¶ 59).

The De La Chapelles argue that plaintiffs are seeking to reform the contract on the basis of circumstances that were not present at the time the lease agreement was executed, but instead on the basis of subsequently arising conditions. They argue further that such subsequent conditions, whether the construction noise or the malfunctioning toilet, provide no grounds for reforming the lease under the doctrine of mutual mistake.

Defendants correctly note that a claim for reformation of a contract must be based upon a mutual mistake that existed at the time the contract was made (*see, Matter of the Liquidation of New York Agency and Other Assets of Bank of Credit & Commerce Int’l, S.A.*, 90 NY2d 410 [1997]). In addition, the mistake must be substantial resulting in an absence of the requisite “meeting of the minds” (*Gould v Board of Educ.*, 81 NY2d 446, 453 [1993]; *County of Orange v Grier*, 30 AD3d 556, 557 [2d Dept 2006]). However, such mutual mistake may not be invoked by a party to avoid the consequences of his or her own negligence (*see, Da Silva v Musso*, 53 NY2d 543, 552 [1981]; *P.K. Development v Eleven Development Corp.*, 226 AD2d 200, 201 [1st Dept 1996]). Here, the malfunctioning toilet arose after the execution of the lease and may not serve as a basis for reformation of the lease agreement. Even assuming the construction project commenced prior to the execution of the lease, which is not alleged in the amended complaint, plaintiffs, in the exercise of ordinary care, should have known about or could have easily ascertained that the construction project was planned by simply inspecting the adjoining property where the building permit was displayed or making a phone call to the local building department and must, therefore, bear the risk of proceeding on limited knowledge (*see, P.K. Development*, 226 AD2d *supra* at 202). Accordingly, plaintiffs’ fourth cause of action for reformation of the contract must be dismissed.

Conclusion

Based upon the forgoing discussion, it is hereby

ORDERED, that the motion of defendant The Corcoran Group Rentals, Inc. is deemed withdrawn pursuant to the stipulation of the parties, dated December 1, 2009, which discontinued the action as against such defendant; and it is further

ORDERED, that the cross motion of defendants Philippe De La Chapelle and Doria De La Chapelle for an order dismissing the amended complaint is granted in part to the extent that the second, third and fourth causes of action of the amended complaint are severed and dismissed, and in all other respects the cross motion is denied; and it is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that defendants are directed to serve an answer to the amended complaint, if they have not already done so, within 10 days after entry of this decision and order; and it is further

ORDERED, that the caption shall be amended and read as follows:

-----X
JEFFREY LANGE and ELIZABETH LANGE,

Index No. 110635/09

Plaintiffs,

-against-

**PHILIPPE DE LA CHAPELLE and DORIA
DE LA CHAPELLE,**

Defendants.

-----X
and it is further

ORDERED, that the Clerk of the Court shall change the record accordingly to reflect the amended caption; and it is further

ORDERED, that the attorneys for the parties are directed to appear for a scheduled preliminary conference in Part 61, 60 Centre Street, Room 341, on January 20, 2010, at 9:30 a.m.; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: 1/12/10

ENTER,

O. P. Sherwood
**O. PETER SHERWOOD
J.S.C.**

