

**Gershberg v Kotlus**

2011 NY Slip Op 31578(U)

June 7, 2011

Supreme Court, Putnam County

Docket Number: 504-2011

Judge: Lewis Jay Lubell

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1x  
PC July 18, 2011

To commence the 30 day statutory  
time period for appeals as of right  
(CPLR 5513[a]), you are advised to  
serve a copy of this order, with  
notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK  
COUNTY OF PUTNAM**

-----X  
LAWRENCE GERSHBERG and GLENN TELLER,

Plaintiffs,

-against -

ANN G. KOTLUS a/k/a GAIL KOTLUS,

Defendant.

-----X  
**LUBELL, J.**

**DECISION/ORDER**

Index No. 504-2011

Sequence No. 1

The following papers were considered in connection with this motion by defendant for an Order: (a) dismissing the complaint pursuant to CPLR 3211(a)(4) and/or 3211(a)(7); (b) awarding immediate possession of a certain premises to defendant during the pendency of this action; (c) granting summary judgment to defendant on her counterclaims; (d) imposing sanctions against Lawrence Lee Gershberg for filing a frivolous pleading with the Court; (e) awarding defendant reasonable attorney's fees in the sum of \$3,737.50; and (f) for such other and further relief as this Court may deem just and proper:

<b>PAPERS</b>	<b>NUMBERED</b>
Order to Show Cause/Affidavit/Affirmation/Exhibits A-F	1
Affidavit in Opposition (plaintiff Lawrence L. Gershberg)	2
Affidavit in Opposition (plaintiff Glenn Teller)	3
Affirmation in Reply	4

By lease dated June 11, 2010, with riders, (the "Lease") plaintiffs Larry Gershberg, a duly licensed New York State attorney, and Glenn Teller (the "Lessors") leased the premises located at 260 West Shore Drive, Putnam Valley, New York (the "Premises") from defendant Ann G. Kotlus a/k/a Gail Kotlus (the "Lessor") for a one-year period ending June 30, 2011. Although due by the close of the initial six-month period, Lessees paid the full

term rent of \$51,600 by the end of the third month.

This action follows Lessees possession of the Premises and their asserted experiences with, among other things, the operation of the fireplace, the heating and air conditioning systems, the dishwasher and kitchen plumbing as the first occupants of what is described as a "rebuild" of an existing home.

The Landlord now moves to dismiss the various causes of action in the complaint pursuant to CPLR §3211(a)(4), another action pending, and CPLR §3211(a)(7), failure to state a cause of action. She also seeks the immediate possession of the Premises; summary judgment on her counterclaims; frivolity sanctions against Lawrence Lee Gershberg, the attorney/litigant herein, and counsel fees as are allowed by paragraph "16" of the Lease.

By way of their first cause of action, Lessees claim to have been constructively evicted by virtue of a "serious problem with the air conditioning" in September 2010 which causes the air conditioner to "keep freezing up"; a one-zone heating system which resulted in the downstairs "always [being] too cold" and the "upstairs always too warm"; an inoperable fireplace which, when used, caused the house to fill up with smoke; the lack of water resulting from a turned off water supply necessitated by a broken outside faucet/missing spigot. Breach of the warranty of habitability and breach of contract are pleaded as the second and third causes of action, respectively. Fraud in the inducement is advanced as the fourth cause of action. Finally, breach of the warranty of quiet enjoyment serves as the fifth cause of action.

As and for her first counterclaim, Lessor sues for breach of contract upon Lessee's failure to have tendered the full amount of the security deposit, thus leaving a balance of \$6,000. In her second counterclaim, Lessor seeks monetary relief for various property damage to the Premises in the total amount of \$10,000.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . In assessing a motion under CPLR 3211(a)(7), . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the

complaint . . . and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17).

(Leon v. Martinez, 84 NY2d 83, 87-88 [1994]).

Upon application of the above stated standard, the Court finds that Lessees have stated valid claims as to call causes of action.

[C]onstructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises . . . The tenant, however, must abandon possession in order to claim that there was a constructive eviction .

. . .

(Barash v. Pennsylvania Term. Real Estate Corp., 26 NY2d 77, 83 [1970]). The assertions necessary for a constructive eviction claim have been sufficiently advanced in the complaint.

The same holds true for Lessees' fifth cause of action for breach of the covenant of quiet enjoyment. Here, the Lessees must plead an actual or constructive eviction (see, Herstein Co. v. Columbia Pictures Corp., 4 N.Y.2d 117, 172 N.Y.S.2d 808, 149 N.E.2d 328), which they have adequately done (see, supra).

The Court also upholds the second cause of action for breach of the warrant of habitability. Whether or not an inoperable fireplace or a defective dishwasher are insufficient, in and of themselves or when taken together, to make out a claim for a breach of said warranty, a pleading, such as exists here, which contains allegations of lack of sufficient heat or lack of water is, on its face, sufficient to state a cause of action for breach of the warranty of habitability (see, Green v. Fischbein Olivieri Rozenholc & Badillo, 119 AD2d 345 [1st Dept 1986]).

The essential elements of a cause of action for fraud are representation of a material existing fact, falsity, scienter, deception and injury . . . At the very threshold, then, plaintiff must allege a misrepresentation or material omission by defendant, on which it relied, that induced

plaintiff to [take action].

(New York Univ. v. Cont. Ins. Co., 87 NY2d 308, 318 [1995]). A review of the complaint shows adequate allegations of same.

Finally, upon giving the complaint a liberal reading, as it must, the Court finds that the third cause of action, breach of contract, has been adequately stated.

Lessor's application for summary judgment on its counterclaims, which motion was made simultaneous with service of her verified answer with counterclaims and, thus, prior to the Lessee's service of their reply to counterclaims is denied as premature (Westchester Exp., Inc. v. State Ins. Fund, 151 AD2d 357, 357 [1st Dept 1989][summary judgment under CPLR 3212(a) does not lie where issue had not been joined on counterclaim]).

Lessor's motion for frivolity sanctions against the attorney/litigant is denied, the Court not being satisfied that movant has met her burden regarding same (22 NYCRR 130.1-1[c][1-3]).

In that the Court has not given notice of an intention to treat Lessor's 3211(a)(7) motion as one for summary judgment (see, CPLR 3211[c]), whether or not and to what extent there is any evidentiary support for plaintiffs' or defendant's allegations are questions which must await the more "embrasive and exploratory" motion for summary judgment (Four Seasons Hotels Ltd. v. Vinnik, 127 AD2d 310, 318 [1st Dept 1987] quoting Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314, 357 N.E.2d 970), if and when properly and timely made.

That aspect of Lessor's motion seeking the dismissal of the complaint due to another action pending (CPLR §3211[a][4]) is denied for want of any proof of same.

To any further extent, the motion is denied.

The parties are directed to appear before the Court for a Preliminary Conference at 9:30 A.M. on July 18, 2011.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York  
June 7, 2011

S/

HON. LEWIS J. LUBELL, J.S.C.

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