

York Towers, Inc. v Kotick

2013 NY Slip Op 32062(U)

September 3, 2013

Supreme Court, New York County

Docket Number: 107479/10

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SCANNED ON 9/5/2013

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

PRESENT: Sahar Scarpulla
Justice

PART 19

Index Number : 107479/2010
YORK TOWERS
vs.
KOTICK, JOEL
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined
in accordance with the
accompanying decision/order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
SEP 05 2013
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
SEP 05 2013
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

Dated: 9/3/13

Sahar Scarpulla s.c.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
YORK TOWERS, INC.,

Plaintiff,

Index No.:107479/10
Submission Date: 5/1/13

JOEL KOTICK AND DALE KOTICK,

DECISION AND ORDER

Defendants.

-----X

For Plaintiff:
Nicoletti Hornig & Sweeney
88 Pine Street, 7th Floor
New York, NY 10005

For Defendants:
Joel M. Kotick
501 East 79th Street
New York, NY 10075

FILED
SEP 05 2013
NEW YORK
COUNTY CLERK'S OFFICE

Papers considered in review of the motion for summary judgment:

- Notice of Motion 1
- Aff in Opposition 2
- Aff in Reply 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for breach of contract, York Towers, Inc. (“York”) moves for summary judgment dismissing the counterclaims asserted by defendants Joel Kotick and Dale Kotick (“the Koticks”) in their amended answer dated April 5, 2012.

The relevant underlying facts and procedural history are fully set forth in this court's prior decision and order dated March 13, 2012 (“the prior order”), and will not be restated here, except as necessary for clarification.

York is a cooperative housing company and owner of a cooperative apartment building where the Koticks are the proprietary lessees of a penthouse apartment. York

commenced this action alleging that the Koticks failed to maintain their apartment, their terrace, and the greenhouse on the terrace in good repair, failed to reimburse York after it made repairs at its own expense, and failed to pay monthly maintenance as of September 2009.

The Koticks answered the complaint, denied all material allegations, and asserted numerous affirmative defenses and counterclaims. The Koticks alleged that they stopped paying maintenance because York constructively evicted them, deprived them of the use and enjoyment of their residence, and harassed them. York moved for summary judgment seeking, *inter alia*, dismissal of the Koticks' counterclaims. In the prior order, this court dismissed 11 of the 15 counterclaims asserted by the Koticks and granted them leave to amend their answer and counterclaim to assert a claim for trespass.

On or about April 5, 2012, the Koticks filed an amended answer. They asserted: (1) the first counterclaim, alleging that York was negligent in failing to maintain the air conditioning unit in the hallway of the apartment, which caused leaking and damage to the floor; (2) the second counterclaim, alleging that the superintendent and certain cooperative board members entered the apartment and "trespassed into the apartment and all through the apartment;" (3) the third counterclaim, alleging that York's management wilfully and wantonly did not "protect the floor of the defendants when workers go to the roof and as a direct result it has become worn and shabby and a disgrace to the defendants

and their guests;" and (4) the fourth counterclaim, alleging that the sound emanating from the air conditioning has caused them to be constructively evicted from their apartment.

York now moves for summary judgment dismissing the counterclaims asserted in the Koticks' amended answer. York argues that (1) the first counterclaim must be dismissed because the Koticks are responsible for maintaining the air conditioning unit pursuant to the lease agreement for the apartment and, in any event, the Koticks both testified that the damage to the floor is much improved; (2) the second counterclaim must be dismissed because the lease permits building representatives to enter the apartment without prior consent from the tenant; (3) the third counterclaim must be dismissed pursuant to the business judgment rule; and (4) the fourth counterclaim must be dismissed because the Koticks have not made any allegation that they abandoned their apartment due to noise, and in any event, no evidence has been presented of any noise emanating from the equipment room that is above acceptable and allowable levels. York also seeks payment of the amount of back maintenance currently being held in escrow.

In opposition, the Koticks first argue that this motion is duplicative because, as the court held in its prior order, (1) an issue of fact exists as to whether the noise generated by the air conditioning constructively evicted the Koticks from their apartment and deprived them of their continued quiet enjoyment of the property; (2) an issue of fact exists as to whether York breached its assumed duty to maintain the air conditioning unit; and (3) an

issue of fact exists as to whether York breached its duty to maintain the common hallways.

They next maintain that according to York representative, Phyllis Ferber, at a board meeting held in 2009, the members of the building's board discussed the noise problem complained of by the Koticks and then directed the superintendent to check if the Koticks were in the apartment. Once the superintendent determined that the Koticks were not home, the board members directed him to get the pass key for the apartment so that they could hear the noise for themselves. The Koticks claim that the superintendent and board members' entry into the apartment, without prior permission and/or notice, constitutes trespass.

In reply, York argues that this motion is not duplicative in that the prior motion was filed and decided prior to completion of discovery in the case. Since the prior decision was issued, depositions have been conducted in the case which establish that the Koticks have never abandoned their apartment, an element which is necessary to establish constructive eviction.

Discussion

The Court first notes that by order dated May 16, 2013, this action was consolidated with *Joel Kotick and Dale Kotick v. Esther Kasmin et al.*, Index No.: 156446/12.

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

The court first finds that the first, third, and fourth counterclaims asserted in the amended answer will not be dismissed. They are merely restatements of the second, tenth and fifteenth counterclaims, respectively, stated in the original answer, and in the prior order, the court found that the existence of certain issues of fact preclude dismissal of those counterclaims. York's claim that certain new evidence requires dismissal of those counterclaims at this time is without merit.

In their second counterclaim, for trespass, the Koticks maintain that in 2009, the board members and the superintendent entered their apartment when they were not home, without prior notice or consent, to listen to the noise emanating from the air conditioning unit that they were complaining about. A claim for trespass requires an affirmative act constituting or resulting in an intentional intrusion upon plaintiff's property. *Congregation B'Nai Jehuda v. Hiye Realty Corp.*, 35 A.D.3d 311 (1st Dept. 2006). York argues that pursuant to the "right of entry" clause in the lease for the premises, it was entitled to enter the Koticks' apartment at any time without their prior consent or notice, and therefore, the

trespass claim must be dismissed. York would like this court to read the “right of entry” clause to allow the lessor and its agents to enter the apartment at any time, without notice, *for any reason*. However, the clause clearly provides that the lessor, its agents, or any workmen authorized by the lessor or its agents “shall be permitted to visit and examine the apartment at any reasonable hour of the day...to make or facilitate repairs in any part of the building.” Here, York has presented no evidence that the superintendent and board members entered the Koticks’ apartment to “make or facilitate repairs.” *Cf. Schaller v County of Suffolk*, 2008 NY Slip Op 31699(U)(Sup. Ct. Suffolk Co., June 17, 2008) (trespass claim was dismissed because landlord’s entry into tenant’s premises was for the purpose of examining and making repairs to the plumbing, a right reserved in the lease, and to which the tenant consented) *aff’d* 71 A.D.3d 978 (2nd Dept. 2010). As such, the trespass counterclaim will not be dismissed at this time.

In accordance with the foregoing, it is hereby

ORDERED that York Towers, Inc.’s motion for summary judgment dismissing the counterclaims asserted by defendants Joel Kotick and Dale Kotick in their amended answer dated April 5, 2012 is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
September 3, 2013

FILED

SEP 05 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

ENTER:

Barbara Margulies

J.S.C.