Eve Cuyen Butterworth v 281 St. Nicholas Partners, LLC
2014 NY Slip Op 31981(U)
July 22, 2014
Supreme Court, New York County
Docket Number: 150121/14
Judge: Geoffrey D. Wright

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 47

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EVE CUYEN BUTTERWORTH and CHRISTINE ASCENSIO,
Plaintiff-Petitioner(s),

-against-

281 ST. NICHOLAS PARTNERS, LLC, and MONARCH REALTY, INC.,
Defendants.

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Index #150121/14
Motion Cal. #
Motion Seq. #
DECISION/ORDER
Pursuant To Present:
Hon. Geoffrey Wright
Judge, Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: strike various claims in the complaint

PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	2
Replying Affidavits & Exhibits Annexed	
Other (Cross-motion) & Exhibits Annexed	
Supporting Affirmation	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The Defendants move to strike various paragraphs and claims in the prolix complaint in this matter, which consumes 239 paragraphs and 39 pages before its culmination. The Hemingway interpretation of the complaint (as opposed to James Joyce in Ulysses), is a landlord and tenant dispute involving allegations of failing to maintain the property as required state and municipal building maintenance codes and/or rent stabilization rules.

The above basic claims have been subdivided to extend the complaint to ten causes of action as follows: (1) rent overcharge; (2) rent overcharge; (3) false filing of rent registration statements with DHCR; (4) harassment through breaches of the warranty of habitability; (5) nuisance, (6) intentional infliction of emotion harm; (7) negligent infliction of emotional harm; (8) misrepresentation of the regulated status of the Plaintiffs' apartment; (9) violation of General Business Law 349(g); (10) harassment as defined in Admin. Code 27-2005(d); 27-2115(h)(I); 27-2004.

Some of the allegations in the complaint do not support claims recognized in the courts of New York, to wit, claims eight and nine, sounding in misrepresentation as to the

regulated status of the subject apartment, and violation of the Martin Act (GBL 394(g)). Martin Act violations are to address misrepresentations made to the public at large, and do not cover private agreements [***RAMSEUR v. HUDSONVIEW CO.***, 59 A.D.3d 308, 874 N.Y.S.2d 51, 2009 N.Y. Slip Op. 01355, "renewed lease[s] were private contracts between individual parties and did not affect consumers at large.." (citing Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741 [1995]; ;_Revlon Consumer Prods. Corp. v. Arnow, 238 A.D.2d 223, 224, 657 N.Y.S.2d 9 [1997]. Therefore, the Martin Act claims must be and are dismissed.

The claims for pain and suffering, and intentional and negligent infliction of emotional harm must also be dismissed. These are based on the alleged failure to maintain services in the building. Pain and suffering are recognized damages for the failure to maintain an apartment or for a breach of the warranty of habitability [***ELKMAN v. SOUTHGATE OWNERS CORP.***, 233 A.D.2d 104, 649 N.Y.S.2d 138, "pain and suffering are not recoverable under Real Property Law § 235–b" (citing Court v. Westchester Country Club, 186 A.D.2d 712, 589 N.Y.S.2d 491, **lv. dismissed in part, lv. **140 denied in part,** 81 N.Y.2d 912, 597 N.Y.S.2d 931, 613 N.E.2d 963]. The fraud claims must also fail, as there is no indication in the complaint or in the opposing papers that these Defendants made any representation to the Plaintiffs, since by the very words of the complaint, any representation was made to the Plaintiffs prior to the Defendants assuming ownership and control of the building. In addition, any relief for the filing of inaccurate registration statements is covered by the Rent Stabilization Code [***BRADBURY v. 342 WEST 30TH STREET CORP.***, 84 A.D.3d 681, 924 N.Y.S.2d 349, 2011 N.Y. Slip Op. 04512, "although defendant filed rent registration statements in 2002 and 2003 listing the purported legal regulated rent as $2,000, the trial court's findings, which we now affirm, establish that those filings were intentionally false...In light of these findings, we conclude that defendant's 2002 and 2003 DHCR filings were not "proper" within the meaning of Administrative Code § 26–517(e). This Court recently upheld the imposition of a rent freeze in a similar situation (see Jazilek v. Abart Holdings, LLC, 72 A.D.3d 529, 899 N.Y.S.2d 198 [2010], supra [rent registration statement listing a legal rent in excess of the highest possible legal rent was defective and not a "proper" filing]; see also Thornton v. Baron, 5 N.Y.3d 175, 181, 800 N.Y.S.2d 118, 833 N.E.2d 261 [2005] [rent registration statement listing illegal rent was a nullity]). Because defendant failed to file proper statements in 2002 and 2003, and because the record does not show that any such proper statements were subsequently filed, defendant was barred from collecting any rent in excess of the last properly registered rent, i.e., the $402.43 rent listed in the 2001 registration.."]. Although not specifically raised in the moving papers, there is the question of treble damages sought in the complaint. On the facts revealed in the moving and opposing papers, the Defendants, as new owners, may have a valid defense to the claim for punitive damages. New owners are generally only liable for overcharges collected after they assume title [***EAST 163RD STREET LLC v. NEW YORK STATE DIV. OF HOUSING & COMMUNITY RENEWAL,*** 4 Misc.3d 169, 779 N.Y.S.2d 896, 2004 N.Y. Slip Op. 24125, "While the reliance by a new owner on the amount of rent charged by the prior landlord can subject the new owner to damages for rent overcharges including treble damages, the rule, at least in the First Department, is that carryover liability for treble damages will be imposed on a case-by-case

basis, depending upon the succeeding owner's degree of knowledge or culpability as to an existing overcharge." (citing S.E. & K. Corp. v. Division of Hous. & Community Renewal, 239 A.D.2d 123, 657 N.Y.S.2d 601 (1st Dept.1997); Goldstein v. New York State Div. of Hous. & Community Renewal, 226 A.D.2d 722, 642 N.Y.S.2d 530 (2nd Dept.1996); Nagobich v. New York State Div. of Hous. & Community Renewal, 200 A.D.2d 388, 606 N.Y.S.2d 190 (1st Dept. 1994); 4947 Assocs. v. New York State Div. of Hous. & Community Renewal, 199 A.D.2d 179, 605 N.Y.S.2d 91 (1st Dept.1993); Round Hill Management Co. v. Higgins, 177 A.D.2d 256, 575 N.Y.S.2d 842 (1st Dept.1991); Polanco v. Higgins, 175 A.D.2d 729, 572 N.Y.S.2d 916 (1st Dept.1991)].

In addition to the above, there is a temporal limitation on the start date for demanding damages for a rent overcharge [New York City Administrative Code, § 26–517, **subd. a;** McKinney's CPLR 213–a, ***THORNTON v. BARON,*** 5 N.Y.3d 175, 833 N.E.2d 261, 800 N.Y.S.2d 118, 2005 N.Y. Slip Op. 05457]. This issue, however, has not been argued here, and will not be decided.

I now turn to the claim of fraud. Any misrepresentation made to the Plaintiffs must have been made at the time that the apartment was rented, several year prior to the Defendants' involvement with the building. In any event, as to any post purchase "misrepresentation" in the form of annual registration statement, comes with its own legislative relief, in the form of a rent freeze [Administrative Code § 26–517(e)]. Other than the annual rent registration, the fraud claims are not pled with the requisite particulars [3016 (b) Fraud or mistake. Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail]. The fraud claims are therefore dismissed., as are all claims for misrepresentation.

The claims for the infliction of emotional harm, either from intent or neglect must also be dismissed. At best, the Plaintiffs have outlined a claim for inconvenience. The infliction of emotional harm, under any guise, requires a good deal more, and the Plaintiff has not cited any case standing for the argument that they can piggy back on the potential complaints of others. Unless there is a claim that the Defendants induced or introduced vermin into the building, the claims for emotional distress cannot stand. Even the case relied upon by the Plaintiffs does not avail, the matter of ***GERMAN v. FEDERAL HOME LOAN MORTG. CORP.***, 885 F.Supp. 537 was a class action involving lead paint and its effects on small children.

The motion to dismiss the complaint for failure to join a necessary party is denied. The prior owner of the premises, the supposed necessary party is at best a proper party, and assuming that the statute of limitations has not expired, can be joined in this matter, or at least deposed. As set forth above, the current owner has a defense to the claim for treble damages, as well as the over charge claim. The risk here is with the Plaintiffs for not suing

all those with responsibility for the maintenance of the building. The movants, as well as the Plaintiffs, are free to add the prior owner of the building.

The motion to dismiss the complaint as to the managing agent is granted. The opposing papers do not challenge this part of the motion.

I decline to strike those several paragraphs of the complaint, some 30 in all. Although fulsome, I do not consider them to be of the scandalous nature suggested by the defense. They are certainly surplusage, and unnecessary to sustain the complaint, but do not depart so much from the usual gilding of the lily in pleading as to require their excision from the complaint.

As requested in the motion, the following claims are dismissed as duplicative for the reasons given in the motion: the second cause of action; the eighth cause of action.

The foregoing constitutes the decision and order of the court.

Dated: July 22, 2014

GEOFFREY D. WRIGHT
AJSC