SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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NANCY KANE,

Plaintiff, Decision and order

- against - Index No. 4054/12

SDM ENTERPRISES INC., SALVATORE MENDOLIA and DOMINIC MENDOLIA,

Defendants, March 10, 2014

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PRESENT: HON. LEON RUCHELSMAN

Defendant SDM Enterprises, Inc. moves pursuant to CPLR §3212 for partial summary judgment, limiting plaintiff's damages to those injuries sustained between July 1, 2011 and July 14, 2011. Plaintiff opposes the motion. Papers were submitted by all parties and arguments held and after reviewing all the arguments this court makes the following determination.

Plaintiff, Nancey Kane entered into a lease agreement with the defendant SDM Enterprises, Inc., to occupy apartment #3R at 293 Grove Street, Brooklyn, New York from July 1, 2011 to June 30, 2012. On July 1, 2011, Ms. Kane moved into apartment #3R. Within her first week in the building, Ms. Kane discovered a bed bug violation issued by the HPD regarding apartment #3R. Indeed, Ms. Kane then telephoned her landlords to alert them of the violation and have her apartment inspected. Shortly thereafter, and within two weeks of moving into the apartment, Ms. Kane saw a live bed bug and immediately telephoned her landlord. Thus, on July 14, 2011 Ms. Kane's landlord advised her that she had the option to move out of her apartment and obtain a refund for any

money spent. Ms. Kane chose to stay in the apartment. This lawsuit was commenced alleging the defendants were negligent in leasing an apartment they knew was infested with bed bugs. Further, the complaint alleges the defendants intentionally failed to disclose the condition of the apartment and as a result of that conduct the plaintiff has suffered injuries and the loss of personal belongings. Lastly, the plaintiff sues for a breach of the warranty of habitability. The defendants have now filed the instant summary judgement motion arguing the plaintiff was informed two weeks after she moved into the apartment that she could leave the apartment without any negative consequences concerning the lease and that she would be refunded any money already expended. Thus, the defendants argue the plaintiff chose to remain in the apartment after July 14, 2011 and therefore any damages after that date cannot be attributed to the defendants.

Conclusions of Law

Summary Judgment may be granted where the movant establishes sufficient evidence, which would compel the court to grant judgment in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). "However, once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action

(Romano v. St. Vincent's Med. Ctr. of Richmond, 178 AD2d 467, 577 NYS2d 311 [2d Dept., 1991]). Summary Judgment would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

It is generally true that evidence of a bed bug infestation permits a tenant to an abatement of rent on the grounds the premises are not inhabitable (see, Ludlow Properties LLC v. Young, 4 Misc3d 515, 780 NYs2d 853 [Civil Court of the City of New York 2004]). Furthermore, a plaintiff generally maintains a duty to mitigate any damages.

In this case there are questions of fact, which require resolution by a jury whether the plaintiff had the ability to mitigate the damages by moving out of the apartment when so offered by the defendant. It is true that such offer was made within two weeks of entering the apartment, however, whether such mitigation was feasible is a question for the jury. The case of Cunningham v. Anderson, 85 AD3d 1370, 925 NYS2d 693 [3rd Dept., 2011] supports this conclusion since the decision clearly holds that mitigation issues should not be dismissed entirely but should be limited based upon the facts and circumstances of each case. Therefore, the extent and possibility of any mitigation and whether such mitigation would have exposed the plaintiff to any further risk or expense (see, Eskenazi v. Mackoul, 72 AD3d 1012, 905 NYS2d 169 [2d Dept., 2010]must be decided by a jury.

Likewise, the issues concerning the loss of property based upon claims of negligence cannot by definition be limited to any particular time frame since the damage has already occurred and must be assessed accordingly.

Therefore, based on the foregoing the motion of the defendant seeking partial summary judgement limiting the claims to the first two weeks the plaintiff was in the apartment is denied.

So Ordered.

ENTER:

DATED: March 10, 2014
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC