204 Columbia Hgts., LLC v Manheim
2014 NY Slip Op 33811(U)
October 21, 2014
Supreme Court, New York County
Docket Number: 161520/2013
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy M. Bannon PART 42
Justice

204 COLUMBIA HEIGHTS, LLC — INDEX NO. 161520/2013

- v - — MOTION DATE 6/11/14

ANTHONY MANHEIM — MOTION SEQ. NO. 001

The following papers, numbered 1 to 4, were read on the plaintiff's motion for summary judgment and on the defendant's cross-motion to amend its answer and for summary judgment dismissing the complaint.

Notice of Motion/Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law	No(s). 1
Notice of Cross-Motion/Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law and Opposition to Motion	No(s). 2
Answering Affirmation(s) — Affidavit(s) — Exhibits	No(s). 3
Replying Affirmation — Affidavit(s) — Exhibits	No(s). 4

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

In this action for, *inter alia*, a judgment declaring the parties' rights and obligations under a lease and for permanent injunctive relief, the plaintiff moves for summary judgment on its first and second causes of action for a declaratory judgment and permanent injunction. The defendant seeks to amend its answer to assert the affirmative defenses of collateral estoppel and res judicata and cross moves for summary judgment dismissing the complaint. For the reasons set forth below, the plaintiff's motion is denied and the defendant's cross-motion is granted in part.

The complaint contains four causes of action for a declaratory judgment, a permanent injunction, damages, and attorney's fees. The gravamen of the complaint is that water originating from a shower basin installed by the defendant leaked into the bathroom in the apartment below, causing property damage. The defendant contends that, under a 1975 lease, he is not responsible for any repairs to the apartment below.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64

NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010). "'[S]ummary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970). Both the plaintiff and the defendant failed to meet their respective burdens on their motion and cross-motion for summary judgment. Further, triable issues of fact exist which preclude summary judgment being granted in either party's favor.

The court notes that neither an action for declaratory judgment nor for a permanent injunction is appropriate when other means are available which afford the plaintiff an adequate remedy. See Lemle v Lemle, 92 AD3d 494, 500 (1st Dept. 2012); Mini Mint Inc. v Citigroup, Inc., 83 AD3d 596 (1st Dept. 2011); Elow v Svenningsen, 58 AD3d 674, 675 (2d Dept. 2009); Singer Asset Finance Co., LLC v Melvin, 33 AD3d 355, 358 (1st Dept. 2006); Artech Information Systems, LLC v Tee, 280 AD2d 117, 125 (1st Dept. 2001); Apple Records, Inc. v Capitol Records, Inc., 137 AD2d 50, 54 (1st Dept. 1988). Nevertheless, the plaintiff's motion and defendant's cross-motion for summary judgment are both denied.

Leave to amend is freely given absent prejudice or surprise resulting directly from the delay and where the evidence submitted in support of the motion indicates that the amendment may have merit. See CPLR 3025(b); McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp., 59 NY2d 755 (1983); 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552 (1st Dept. 2011); Smith-Hoy v AMC prop. Evaluations, Inc., 52 AD3d 809, 811 (1st Dept. 2008). As the record indicates no prejudice or surprise to the plaintiff and suggests that the defenses may have merit, the defendant's motion to amend his answer is granted.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment on the first and second causes of action is denied, and it is further,

ORDERED that the defendant's motion for summary judgment dismissing the complaint is denied, and it is further,

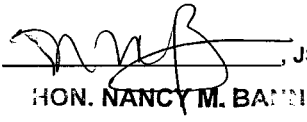
ORDERED that the defendant's motion for leave to amend his answer pursuant to CPLR 3025(b) is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof, and it is further,

ORDERED that the parties shall appear for a preliminary conference on December 11, 2014 at 9:30am, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: October 21, 2014



HON. NANCY M. BANNON, JSC

1. Check one:	☐	CASE DISPOSED	■	NON-FINAL DISPOSITION				
2. Check as appropriate: MOTION IS:	☐	GRANTED	■	DENIED	☐	GRANTED IN PART	☐	OTHER
CROSS-MOTION IS:	☐	GRANTED	☐	DENIED	■	GRANTED IN PART	☐	OTHER
3. Check as appropriate:	☐	SETTLE ORDER	☐	SUBMIT ORDER				
	☐	DO NOT POST	☐	FIDUCIARY APPOINTMENT	☐	REFERENCE		