

Cornelius v 164 W. 79th St. Corp.

2015 NY Slip Op 31602(U)

August 7, 2015

Supreme Court, New York County

Docket Number: 654482/2013

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

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KAREN CORNELIUS and CARL B. SCHECTER,

Plaintiffs,

Index Number: 654482/2013

-against-

Motion Sequence No. 001

164 WEST 79TH STREET CORP. and THE
BOARD OF DIRECTORS OF 164 WEST 79TH
STREET CORP.,

Defendants.

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DEBRA A. JAMES, J.:

In this property damage action, plaintiffs Karen Cornelius and Carl B. Schecter (plaintiffs) move, pursuant to CPLR 3212, for partial summary judgment of liability in their favor on their complaint.

Defendants 164 West 79th Street Corp. and the Board of Directors of 164 West 79th Street Corp. (together, the Cooperative) oppose and cross-move, pursuant to CPLR 3216, to strike the complaint and for other relief.

The Cooperative occupies a 15-story building, with 61 residential units. Plaintiffs, husband and wife, purchased the stock and lease associated with a three bedroom apartment on the top floor in 1999, and have lived in the apartment ever since. They claim that they have experienced water damage from leaks and infiltration through the walls and in and around the windows of the apartment throughout the unit on numerous occasions from 2002

through 2011. Additionally, plaintiffs claim that repair work to the building's roof, exterior facade, and mechanical systems further damaged their apartment's walls, floors, windows and ceilings, rendering their apartment uninhabitable or unusable, in part or whole, over several years. Finally, they state that mold has been detected in the apartment. According to plaintiffs, repairs were made variously at their own expense, by the Cooperative, or through insurance coverage.

Plaintiffs commenced this action on December 30, 2013. In the complaint, they assert causes of action for breach of the warranty of habitability, breach of the proprietary lease, breach of fiduciary duty, negligence, and private nuisance.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." Dallas-Stephenson v Waisman, 39 AD3d 303, 306 (1st Dept 2007), citing Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" People v Grasso, 50 AD3d 535, 545 (1st Dept 2008), quoting

Zuckerman v City of New York, 49 NY2d 557, 562 (1980). "If there is any doubt as to the existence of a triable issue, the motion should be denied." Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 (1st Dept 2002). "But only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978).

Plaintiffs see summary judgment in their favor on liability on the complaint's causes of action for breach of the warranty of habitability and breach of the proprietary lease. Their supporting papers include dozens of photographs of evident damage to the Cooperative's building's exterior and to the interior of plaintiffs' apartment, dating back to 2005. They show that many of the photographs were attached to e-mail messages to the Cooperative reporting the conditions plaintiffs at the time such communications were sent.

In light of the allegations in the complaint and the weight and bulk of the materials illustrating their damage claims that plaintiffs submit with the motion, the Cooperative's rebuttal, to wit: "The subject apartment is a four (4) bedroom, nine (9) room apartment and their complaint boils down to one of minor leaks in one (1) of their multiple bathrooms," is unpersuasive. The

Cooperative states that "[m]any of the photographs relied upon by plaintiffs show hairline type plaster and paint cracks or show minor water damage around plaintiffs' windows and air-conditioning sleeves." The court observes that other photographs show substantial damage to the apartment's interior, while several show visible defects in the building's facade that may be the source of the alleged water infiltration.

While the factual evidence of damage may be more conclusive than the Cooperative acknowledges, the factual issues with respect to liability exist. The Cooperative argues that plaintiffs' repairs and renovations to their apartment caused or contributed to much of the damage that they have suffered. Of great significance is the Cooperative's argument on its cross motion that plaintiffs have failed to comply with its discovery demands. It answered the complaint on or about February 19, 2014. Despite combined demands for discovery and inspection served with the Cooperative's answer, many months later, plaintiffs have produced a verified bill of particulars only. Plaintiffs claim their failure to respond to Cooperative's discovery demands was "due to an oversight."

Under these circumstances, discovery is necessary to on the Cooperative's assertions that, inter alia, plaintiffs' conduct

substantially contributed to the damages incurred from water leakage and infiltration, as well as to the actual extent of the damages. Yun-Shou v City of New York, 29 AD3d 449 (1st Dept 2006) (summary judgment properly denied "where was motion made before any disclosure had been conducted"); see CPLR 3212(f).

Accordingly, it is

ORDERED that the motion by plaintiffs Karen Cornelius and Carl B. Schechter for partial summary judgment in their favor is denied, without prejudice to renew upon completion of discovery; and it is further

ORDERED that the cross motion by defendants 164 West 79th Street Corp. and the Board of Directors of 164 West 79th Street Corp. to strike the complaint and for other relief is denied without prejudice to seek such relief should plaintiffs fail to comply with discovery orders; and it is further

ORDERED that counsel shall appear for a preliminary conference on September 10, 2015 at 9:30 a.m. in Room 103, 71 Thomas Street, New York, New York.

Dated: August 7, 2015

ENTER:

~~Debra A. James~~
DEBRA A. JAMES

J.S.C.