

Hersh v One Fifth Ave. Apt. Corp.

2016 NY Slip Op 30835(U)

May 5, 2016

Supreme Court, New York County

Docket Number: 157593/14

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ANITA HERSH,

Plaintiff,

—against—

Index No. 157593/14
Motion Seq. Nos. 003

DECISION AND ORDER

ONE FIFTH AVENUE APARTMENT CORP., ALAN
BELZER, SUSAN MARTIN, CONSTANCE ELLIS,
JAMIE GRAU, PAUL GIGANTE, ZACHARY PACK,
PETER PIETRUCHA, ROBERT SCHULMAN,
JEANETTE VARGAS, SHIVASHISH
CHATTERJEE, MICHAEL DEL NIN, CORSON
ELLIS, CHARLES HARBUTT, KAREN HARRIS,
DALE PONIKVAR, RICHARD STEWART and
CYNTHIA WILBY,

Defendants.

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CAROL R. EDMED, J.S.C.:

In a case involving leaks at a cooperative building, plaintiff Anita Hersh moves, under CPLR 3212, for partial summary judgment against defendant One Fifth Avenue Apartment Corp. (the Coop) as to liability on her claims for breach of the proprietary lease and breach of the warranty of habitability (motion seq. No. 003). The Coop cross-moves for summary judgment dismissing the claims for breach of the proprietary lease and the warranty of habitability.

BACKGROUND

Plaintiff Anita Hersh is a proprietary leaseholder in a cooperative building located at 1 Fifth Avenue near Washington Square Park in lower Manhattan. Specifically, Hersh has, since 1998, held a proprietary lease in apartment 19G (the Apartment), which has been subject to recurring leaks. Plaintiff alleges that a fundamental cause of these leaks is the terrace greenhouse

directly above her in apartment 20C/D, the proprietary lessors of which are defendants Alan Belzer (Belzer) and Susan Martin (Martin).

In 2005, the Coop hired nonparty Superstructures Engineers + Architects (Superstructures) to perform an investigation into the existing conditions of the terrace greenhouses in the Coop building. As to Belzer and Martin's 125-foot greenhouse, located at the south-east portion of the terrace, Superstructures wrote "general overall condition is poor" and added, more specifically, that:

"a. The existing roof counter-flashing at the rising wall adjacent to the greenhouse appears to be regletted into the existing brick masonry. b. The counter-flashing at the bottom of the greenhouse that protects the terrace roof base flashing is in poor condition. Portions have become detached and/or have [become] damaged/deformed. c. There is evidence of water infiltration on the interior of the greenhouse at the south and east walls just below the roof. There is also a leak into the apartment below the roof. Extensive water tests have been performed at this location and several points of entry were observed at the greenhouse, adjacent roof and parapets. Many of these points are being addressed as part of the current exterior restoration campaign as well as in the previous work phase"

(Superstructures October 2005 Greenhouse Report at 10-11).

Superstructures recommended removing the greenhouse in order to fix the problems causing the leaks into Hersh's apartment:

"In order to correctly install new counter-flashing it would have to be installed underneath the greenhouse framing. This would be possible if the entire assembly was removed and rebuilt correctly. As stated in previous recommendations, this is a very expensive repair. A more cost efficient but less effective repair would be the installation of surface-mounted counter flashing. This repair would require regular inspections and maintenance. Approximate Cost (flashing modification): \$1,500 - \$2,000, Approximate Cost (rebuild entire greenhouse): \$35,000 - \$40,000."

(*Id.* at 11).

The Coop chose not to rebuild the greenhouse and leaks continued in Hersh's apartment. In May 2006, after investigating the continuing leaks in Hersh's apartment through "watertests," Superstructures issued another report that once again recommended a rebuild of the greenhouse:

"Water was then sprayed on the wall just above the window sills of the greenhouse. Water was observed dripping through the ceiling of the bedroom within 2-1/2 hours. The water appears to be entering through open joints in the greenhouse framing and traveling down and behind the roof membrane. The existing counter-flashing is in poor condition and does not appear to extend under the greenhouse wall system. If the cap flashing was properly installed, any water that entered the wall would be directed out instead of being allowed to enter the building. As stated in the Superstructures' Greenhouse Conditions Report the correct solution to this condition is to install new counter-flashing that extends beneath the greenhouse and directs water out of the wall system. In order to install this flashing the walls would have to be disassembled and then rebuilt. This is a costly repair. New flashing can be surface mounted at the base of the greenhouse but this will only protect the roof base flashing it will do nothing to direct water out of the greenhouse wall system.

(Superstructures May 2006 Report at 2).

Despite this more unequivocal recommendation -- which plainly informed the Coop that, in order to stop the leaks into Hersh's apartment, it would need to remove the greenhouse and install new counter-flashing beneath it -- the Coop again decided against this course of action. Superstructures' May 2006 Report also recommended that, "in addition to the counter-flashing," the Coop should also seal the exterior joints of the greenhouse, but warned that the greenhouse's "butt joints" -- the "most likely source of the current leak" -- are difficult to seal; thus, Superstructures recommended that the Coop put in place "a maintenance program consisting of regular inspections of the joints and replacement of deteriorated sealant" (Superstructures May 2006 Report at 2).

Over a year after these recommendations were made, the Coop elected to seal the exterior joints of the greenhouse instead of removing the greenhouse in order to make the structural

repairs. After the work was complete, Superstructures' Matthew Cronin (Cronin) reiterated, in an email to the Coop's superintendent, John Maudsley (Maudsley) that these repairs were temporary and required regular maintenance: "These repairs," Cronin concluded, "should last longer than one year but to be on the safe side their condition should be reviewed regularly" (Cronin August 17, 2007 email to Maudsley). The Coop also commissioned work to repair the south-facing facade abutting Hersh's apartment (Hersh aff, ¶ 11). The east-facing facade, which was also identified by Superstructures as an area where water infiltration was taking place, was not repaired. Hersh believes that the reason the east-facing facade has not similarly been repaired is because of difficulty accessing this part of the facade without disassembling Belzer and Martin's greenhouse (*id.*, ¶ 37).

Superstructures' unheeded recommendation regarding removal of the greenhouse to install new counter-flashing proved prescient, as leaks recurred in Hersh's apartment. In November 2007, Hersh wrote to the Coop's superintendent, Maudsley: "There is a newly developing water leak in the living room ceiling, in the same area where we had previous water leaks from the terrace above and its drainage problems, etc." (Plaintiff's November 11, 2007 email to Maudsley). The following month, Hersh emailed Maudsley about the status of repair work and noted that: "The damage in the ceiling is expanding slowly but surely, and at some point we'll have a much bigger problem" (Plaintiff's December 20, 2008 email to Maudsley).

That much bigger problem would visit Hersh's apartment when it suffered what Hersh describes as "catastrophic leaks" on September 19, 2012 and again on November 27, 2013. Prior to September 2012, she continued to notify the Coop of the recurring leaks and plead with them to do the work Superstructures recommended in 2005 and 2006. In June 2008, Hersh again

wrote to Maudsley noting that additional cracks had formed on the walls of her living room after rain, suggesting that work done by the Coop had not addressed the structural problems causing the leaks (Plaintiff's 6/16/ 2008 email to Maudsley). In June 2009 and again in March 2010, Hersh notified Maudsley that there were recurrences of the leak in her living room ceiling (Plaintiff's 6/6/09 and 3/16/2010 emails to Maudsley).

On January 6, 2012, Hersh wrote to Maudsley regarding the discovery of a crack in her bedroom ceiling and asked to have the building's engineer inspect the greenhouse above (Plaintiff's 1/6/12 email to Maudsley). A day earlier, in response to Hersh's question about whether inspections were taking place, as recommended by Superstructures, Maudsley informed her that the Coop had no records of inspection but that Belzer "is pretty diligent with his greenhouse." Thus, the Coop not only did not do the counter-flashing repairs recommended by Superstructures, it also did not do the maintenance recommended, as a bare minimum, to monitor the cheaper, temporary fix it attempted.

The day Hersh's apartment was subjected to a major leak, September 18, 2012, the Coop received a report titled "Preliminary Review of Existing Terrace Locations" from another firm, nonparty WJE Engineers & Architects, P.C. (WJE). WJE noted that another terrace greenhouse in the building, which had been leaking into an apartment below, had been removed in 2012, and stated that "it is likely that roofing replacement will be required at additional existing locations within the next 5 to 10 years." With specific reference to the terrace above Hersh's apartment, WJE recommended "full replacement of existing quarry tile surface and waterproofing" (WJE Terrace Report at 5).

On September 24, 2012, Hersh emailed Richard Stewart (Stewart), the president of the Coop's board of directors, to formalize her belief that her apartment had been rendered uninhabitable by leaks:

"On September 18-19, 2012, my apartment 19G sustained significant damage due to a flood of water entering through the living room ceiling and west wall from the 20C-D apartment/terrace directly above. As of last night, September 23, water was continuing to leak into my apartment through the ceiling. It is clear that the apartment is uninhabitable because of the substantial leak conditions."

Hersh went on to detail the extent of the damage caused by the leaks, outline the steps she had taken to mitigate damages, and to underline her hope that the problem with the terrace greenhouse above her would finally be solved:

"The floors are buckling and lifting up, plaster is flaking off and falling, and water continues to enter my apartment through the ceiling. The building staff are going in and out at all times of the day and night to monitor the situation and to try to prevent further damage. Engineers will be conducting water tests and investigations . . . to determine how to effectively remediate this problem. I recognize that this determination and remediation will require some time, probably many months. Repairs and restoration to my apartment cannot begin until the water seepage problem is effectively solved. My insurance company, Fireman's Fund, is recommending that the contents of the apartment be put in storage, to mitigate additional damage . . . until the 20C-D apartment/terrace water leak problem is effectively resolved. This will leave the apartment empty of furniture."

Plaintiff moved out of the apartment after the September 2012 leak. The Coop contracted with nonparty Canido Basonas Construction Corp. (CBCC) to perform temporary emergency repairs, and on October 18, 2012, the Coop's Amy Goldstein (Goldstein) emailed plaintiff to let her know that the Coop, following WJE's recommendation, finally "approved full replacement of the 20th Floor terrace" as a long-term solution. However, that work was not commenced in 2013.

According to David Von Hollweg (Hollweg), a property manager for the Coop's managing agent, Rose Associates, WJE finalized its plans to permanently remediate the leaks by replacing Belzer and Martin's terrace in March 2013 (Hollweg aff, ¶ 5). Those plans and specifications were emailed to Hersh on March 8, 2013 by Rose Associates' Mitchell Gelberg (Gelberg).

On April 11, 2013, Hersh's prior counsel, Weg and Myers, wrote to Stewart and Gelberg to request that plaintiff's own engineering firm, Simpson Gumpertz & Heger (SGH) be given access to inspect the terrace above Hersh's apartment, for the purpose of creating its own scope of work. The letter also requested that SGH be allowed to discuss the project with WJE. Weg & Myers, noting that it had not received a response to a previous letter making the same requests, wrote that, "[s]hould you refuse to grant access or otherwise fail to respond, we will be forced with no alternative but to take steps through all necessary means to obtain your cooperation."

The Coop responded, via counsel, on April 12, 2013 by rebuffing the requests without specifically addressing them: "[t]he Project has been bid to potential contractors and work is expected to commence very shortly. As [the Coop] is in the final stage of implementing this Project, it must proceed without any delay to meet the Project timetable." Hersh made good on the promise to "use all necessary means" to obtain the Coop's cooperation by filing a petition in New York County Supreme Court seeking pre-action discovery. That application was resolved pursuant to an order from Judge Wooten dated July 1, 2013, which, among other things, gave Hersh 45 days to examine the terrace roof above her for one hour and precluded the Coop from making repairs on the roof until the inspection had taken place. The inspection took place on July 23, 2013 (Hollweg aff, ¶ 14).

On November 27, 2013, Hersh's apartment was subjected to another major leak. Hersh again wrote to Stewart, notifying him that "there are visible active dripping leaks into the living room . . . Water is puddling on the floor, both in the living room and in the bedroom due to seepage/traveling along the slab." In addition to the structural problems caused by the persistent leaks culminating in this second major leak, plaintiff's apartment developed signs of mold that caused her to engage nonparty Leighton Associates, Inc. (Leighton) to do tests both before and after the November 2013 leak.

On June 4, 2013, Leighton issued a report on its investigation of the Apartment, which found mold contamination in the apartment and in the area outside the apartment and recommended an extensive remediation that included removal of some of the flooring, as well as some of the walls in the apartment. Following the November 2013 leak, Hersh engaged Leighton to conduct a follow-up inspection and Leighton once again found elevated mold levels: "Air quality continues to be unacceptable with regard to airborne mold species inside the apartment, with additional areas of mold growth and concern found during this latest inspection, and conditions conducive to mold growth in many areas, new as well as remaining before the previous inspection" (Leighton 1/25/2014 mold report at 3). Additionally, Leighton once again found "extremely high amount of airborne *Aspergillus*/*Penicillium*-type spores" in the common hall outside of Hersh's apartment, a condition Leighton found "troubling, suggestive of significant mold growth source in the hall or other areas of the building," adding that "this situation must be fully investigated and corrected as soon as possible, as it may be contaminating other apartments and exposing unsuspecting residents, staff and visitors to unacceptable air quality" (*id.*).

Pursuant to Leighton's recommendations, Hersh has had walls removed at her own expense (Complaint, ¶ 47). While Hersh has provided the mold reports to the Coop, Hersh alleges that it has done nothing to investigate or remediate the mold condition in the common area just outside of her apartment (*id.*, ¶ 50).

As to the structural problems related to the November 2013 leak, the Coop again engaged WJE to perform an investigation. WJE found that the leak was caused by a drain line backup and recommended immediate temporary, emergency work to be done on the terrace above plaintiff's apartment. WJE also once again recommended that "[i]n order to provide a sound roof system, we need to proceed with the designed replacement" (WJE 12/12/2013 report at 2). According to Michael Petermann (Petermann), a WJE principal, replacement of the roofing structure on the 20th floor terrace finally took place between July 2014 and October 2014 (Petermann aff, ¶ 13; *see also* Hollweg aff, ¶¶ 18-19).

The Coop has also conducted repairs to Hersh's ceiling. On April 4, 2014, nonparty Gilsanz, Murray, Steficek LLP (GMS) inspected "the underside of the roof framing within Unit 19G and the terrace above" and issued a report finding that "[t]he existing roof slab exhibits signs of distress, especially with regards to the deterioration of the steel wire mesh reinforcing within the slab and proposed repairs to the slab" (GMS report at 1). A year later, in April 2015, the Coop commissioned work for the repair of Hersh's ceiling.

Hersh and the Coop disagree as to whether the roof replacement and ceiling repair have prevented moisture from the terrace above from leaking into Hersh's apartment. Hersh submits a report from Walter Maffei (Maffei), an architect who did inspections on Hersh's apartment after several rainless days and again after heavy rains, and who found, that, in the latter circumstance,

“the majority of wall sampling indicated areas of 85% and even 89% saturation corroborating the theory of water migration from the roof area” (Maffei November 2015 report at 2). Maffei was not granted access to the terrace above Hersh’s apartment, but he nonetheless concluded:

“the exterior east wall and roof terrace at the location of the greenhouse of this building is failing and allows significant amounts of water to infiltrate the brick into the interior of the apartment every time it rains and for a significant amount of time thereafter. It is also my opinion, based on my observations as an architect, that the greenhouse located on the 20 C/D terrace roof above apartment 19G is contributory to the conditions allowing water to enter the apartment. If these conditions are not remedied, the apartment will continue to suffer from major water infiltration along the east wall and southeast corner every time it rains.”

(*Id.* at 5).

The Coop responds with a affidavit from Petermann, a WJE architect who has inspected Hersh’s apartment, who stated that he does not agree with Maffei’s opinion that “there continues to be water infiltration into the east wall of the Apartment as set forth in my July 21, 2015 report” (Petermann aff, ¶ 16). In his July 21, 2015 report, Petermann opined that:

“Based on WJE’s observations, no sources of on-going water infiltration could be identified at the east wall of unit 19G. However, we recognize that this wall will eventually be re-finished with dry wall and insulation. Since that creates a cavity on the inside of the exterior wall, care needs to be taken with the construction of the interior wall to alleviate the possibility of causing condensation. In order to prevent condensation within the east facing exterior wall, WJE recommends considering removal of the existing coating applied at the interior face. Additionally, WJE recommends applying a vapor permeable barrier at the interior of the wall along with a layer of foil-faced insulation prior to the reinstallation of the finished dry-wall”

(Petermann report at 2).

Maffei dismissed Petermann’s suggested solutions, opining that, “if implemented,” they “would only address the conditions found in this apartment and building cosmetically” (Maffei report at 4). As the parties continue to disagree as to whether water incursions are still taking

place and as to whether the east-facing facade needs to be replaced, repairs on Hersh's apartment have come to a halt. According to Hersh, substantial work needs to be done to make her apartment habitable, including mold remediation, both inside her apartment and in the hallway leading to it, as well as work on the walls, floors and ceilings within the apartment (Hersh aff, ¶ 2). However, Hersh believes that none of this work can be done until the Coop does work on the exterior of the building, specifically "repairs to the east facade, southeast corner and parapet to resolve the ongoing and persistent moisture infiltration in the east wall, ceiling and floor of my bedroom" (*id.* at 38).

In September 2012, plaintiff stopped paying her monthly maintenance, although the Coop sends her monthly statements showing unpaid maintenance (Hersh aff, ¶ 41). However, plaintiff has continued to pay her smaller monthly assessment charge, which, she argues, should also be abated because of the uninhabitable condition of her apartment.

Plaintiff breaks her claims for breach of the warranty of habitability and breach of the proprietary lease into three time periods: June 2008 through September 18, 2012; September 19, 2012 through September 30, 2015; and October 1, 2015 "through such time as the Apartment is fully restored to a habitable condition." The first period begins with the last day that is within the statutory period for these claims and ends with the major leak in September 2012. The second period begins with that major leak but plaintiff never specifies why September 30, 2015 is the last day of the second period and first day of the third period.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'regardless of the sufficiency of the opposing papers'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Before analyzing the two causes of action at issue, the court addresses the Coop's technical arguments that are made against Hersh's motion as a whole. First, the Coop argues that Hersh's motion should be denied as premature. Specifically, the Coop argues that plaintiff moved before discovery had begun in earnest and before Hersh herself was deposed. Per the court's preliminary conference order dated, the end date for all discovery is July 29, 2016.

In support of this argument defendants cite, among others, to *Elkman v Southgate Owners Corp.* (233 AD2d 104 [1st Dept 1996]), which involved a claim that an apartment was no longer habitable because of smells emanating from an adjacent fish store. However, *Elkman* does not stand for the proposition that a court should deny as premature a plaintiff's motion for summary judgment as to liability because discovery is incomplete. Although *Elkman* noted in dicta that discovery was incomplete, it denied plaintiff's motion for summary judgment as to liability on his breach of the warranty of habitability because issues of fact existed as to "whether any portion of the apartment was affected and whether the condition was detrimental to life, health or safety within the meaning of the statute" (233 AD2d at 105). Thus, the Court decided the motion on the merits.

Here, CPLR 3212 (f), "Facts unavailable to opposing party," controls. It provides:

“[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.”

As the Coop has not pointed to any “essential facts” it needs to oppose the motion, it has not made a showing that the motion should be denied as premature (*see Kent v 534 E. 11th St.*, 80 AD3d 106, 114 [1st Dept 2010] [holding that the “mere hope of locating additional evidence does not establish a basis for reversal of summary judgment”]). Indeed, the Coop undermines its prematurity argument by making its application for summary judgment on the same two claims on which Hersh has moved.

Next, the Coop contends that Hersh fails to make a prima facie showing because many of the 40 exhibits she submitted with her affidavit are not in admissible form. First, the Coop argues that the court cannot consider photographs submitted with Hersh’s affidavit because they lack proper authentication. The Coop cites to *Arnold Herstand & Co. v Gallery : Gertrude Stein, Inc.*, 211 AD2d 77 [1st Dept 1995]), which held that “a decision which rests wholly on hearsay evidence cannot stand in any court” (*id.* at 83 [internal quotation marks and citation omitted]). The Coop argues that, while Hersh addresses these pictures in her affidavit and states what day they were taken, she failed to state that they fairly and accurately depict the subject conditions. However, plaintiff submits a reply affidavit in which she states that these photos fairly and accurately represent the damage caused by the water intrusion into her apartment on September 19, 2012. Thus, the photos are admissible and, despite the Coop’s objection, Hersh is permitted to submit the supplementary affidavit on reply, as she was directly responding to the

admissibility argument raised by the Coop in opposition (*see Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 672 [1st Dept 2009] [a supplemental affidavit was properly admitted where it responded to a technical omission raised in the opposition papers]).

Second, the Coop argues that the court may not consider the unsworn reports from its own contractors, such as Superstructures and WJE. Plaintiff argues that it is not submitting the Coop's contractors' reports for their truth, but to show that the Coop had notice that the greenhouse terrace was causing leaks into her apartment. Here, even though the Coop does not challenge the authenticity of these reports, and, indeed submits some of the same reports in support of its own arguments, the court acknowledges that the recommendations of these reports amount to hearsay and cannot provide the basis for a prima facie showing of entitlement to summary judgment for Hersh.

I. Warranty of Habitability

Hersh is covered by the protection of Real Property Law (RPL) § 235-b (1), as courts have long held that “[a] proprietary lessee is entitled to the statutory protection [of the warranty of habitability] as well as the noninvesting, ordinary tenant” (*Granirer v Bakery, Inc.*, 54 AD3d 269, 271 [1st Dept 2008] [internal quotation marks and citation omitted]). RPL § 235-b (1) provides that:

“In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warrants.

The Court of Appeals has interpreted the phrase “for the uses reasonably intended by the parties” in RPL § 235-b (1) broadly, holding that it refers to general standards rather than individual agreements between lessors and lessees:

“the implied warranty of habitability sets forth a minimum standard to protect tenants against conditions that render residential premises uninhabitable or unusable. Thus, the statutory reference to uses reasonably intended by the parties, rather than referring to a broad spectrum of expectations arising out of the parties' specific contractual arrangement, reflects the Legislature's concern that tenants be provided with premises suitable for residential habitation, in other words, living quarters having those essential functions which a residence is expected to provide. This prong of the warranty therefore protects against conditions that, while they do not render an apartment unsafe or uninhabitable, constitute deficiencies that prevent the premises from serving their intended function of residential occupation”

(*Solow v Wellner*, 86 NY2d 582, 588-589 [1995] [internal quotation marks and citation omitted]).

More generally, in distilling the standard for a violation, the Court of Appeals has turned to a reasonableness standard: “If, in the eyes of a reasonable person, defects in the dwelling deprive the tenant of those essential functions which a residence is expected to provide, a breach of the implied warranty of habitability has occurred” (*Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 328 [1979]).

For the sake of clarity, the court diverges slightly from Hersh’s suggested timeline for analyzing this claim and instead ends the second period and begins the third period in June 2015, the first month after which both the terrace and ceiling repairs were completed:

A. June 2008 through September 18, 2012

For this period, plaintiff seeks a partial abatement of her maintenance costs, along with reimbursement of repair costs that were not covered by her insurance. While Hersh caps her

claims by the statutory limitations period, she notes that recurring leaks have been a problem in her apartment since 2003.

Hersh submits emails that she sent to the Coop during this period complaining of recurring leaking problems to the Coop's superintendant, Maudsley. "In addition to my many emails," Hersh writes in her affidavit, "I had numerous conversations with Mr. Maudsley, both on the telephone and in person, and he came to my Apartment on numerous occasions to view the evidence of ongoing water leakage and damage" (Hersh aff, ¶ 11). Hersh goes on to more specifically detail the problems she experienced during this period due to water leaks:

"Throughout this entire period, there was intermittent water damage to my Apartment, which I had repaired, only to have the damage re-occur as the leaks continued. Between August 2008 and September 2012 my apartment continued to exhibit large cracks and water damage in the living room and bedroom ceilings. There was a large hole in my living room ceiling and damage to the living room walls due to water infiltration from the south wall. Although the south wall was repaired by [the Coop] in or about 2007, the damage to my apartment was not repaired by the Corporation until more than two years later. The living room wall was opened up in 2007, and remained in a continuous state of disrepair until the hole in the wall was closed in 2010. A few months later, the wall again started exhibiting cracks"

(*id.*).

Hersh's showing is insufficient to warrant summary judgment as to liability on her warranty of habitability claim with respect to this period. While leaks can serve as the basis of a summary judgment as to liability on a warranty of habitability claim, there is a question of fact here as to whether a reasonable person would find that the leaks, whose frequency during this period, at this stage of discovery, is still somewhat unclear, deprived Hersh of the essential functions which a residence is expected to provide. As there is a question of fact as to this issue,

neither plaintiff nor the Coop is entitled to summary judgment on plaintiff's cause of action for breach of the warranty of habitability for the period of June 2008 through September 18, 2012.

B. September 18, 2012 - June 2015

Here, through her affidavit, Hersh establishes that the leak of September 18, 2012 and the damage caused by it deprived her of the essential function which a residence is expected to provide. The Coop fails to rebut this evidence. Instead, it claims that Hersh was the cause of the damage because of her efforts to have a voice in the Coop's remedial measures. These efforts, specifically Hersh's request that her engineers be allowed to inspect the terrace greenhouse, began in April 2013. Thus, there is no question of fact that the Coop breached the warranty of habitability between September 18, 2012 and April 2013.

The Coop's invocation of the business judgment rule should not distort analysis of this time period. The business judgment rule, an import from commercial law, protects coop boards from judicial inquiry into the efficacy of decisions made within the scope of their authority: "So long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]). However, no court has ruled that the shield of the business judgment rule may be fashioned into a sword that cuts away proprietary lessees' rights under the statutory warranty of habitability. Indeed, the case that the Coop cites in reference to the business judgment rule, *Konrad v 136 E. 64th St. Corp.* (254 AD2d 110, 110 [1st Dept 1998] [holding that the coop board was protected from judicial inquiry into the manner and extent of repairs and renovations]) did not involve a claim for breach of the warranty of

habitability. The Coop's protection from suits against its board for good faith decisions made within its scope of power is simply a separate issue from its obligations under RPL § 235-b (1).

Thus, the question is not whether the board of the Coop had the right to unilaterally make decisions about renovations, but whether the conditions that rendered Hersh's apartment uninhabitable were "caused by the misconduct of the tenant" (RPL § 235-b [1]). Here, Hersh's efforts to participate in these decisions, and her application to the court for pre-action discovery were not misconduct. On the contrary, it is only reasonable that Hersh would want to have a voice in the remedial efforts after years of notifying the Coop of recurring leaks only to have the Coop respond with measures that ultimately led to a major leak into her apartment. Thus, the Coop's obligation to maintain habitable conditions was not voided by Hersh's conduct.

The period of uninhabitability lasted at least until Hersh's ceiling was repaired in April 2015. Accordingly, the branch of Hersh's motion that seeks summary judgment as to liability on her claim for breach of the warranty of habitability between September 18, 2012 and April 2015 is granted. As a corollary, the branch of defendant's motion seeking dismissal of Hersh's breach of the warranty of habitability claim for this period is denied.

C. June 2015 to Present

There is a question of fact as to whether the ceiling repairs, along with the repair of the terrace above, in Hersh's apartment resolved the problem of water infiltration. Maffei and Petermann, Hersh and the Coop's respective experts, both inspected the apartment after the terrace and ceiling repairs were conducted, and issued reports that conflict on the issue of whether water is still infiltrating the apartment. As this question is essential to determining whether the apartment is still uninhabitable, there remains a question of fact as to whether the

Coop breached the warranty of habitability for this period. Moreover, there is a question of fact, raised by the affidavit of Patrick Sweeney (Sweeney), whether Hersh prevented the Coop from conducting mold remediation during this period (Sweeney aff, ¶¶ 14-16).

II. The Proprietary Lease

The Coop has granted Hersh protections that overlap with the statutory warranty of habitability, as the proprietary lease provides for an abatement should the apartment become “untenable”:

“In case the damage resulting from fire or other cause shall be so extensive as to render the apartment partly or wholly untenable, or if the means of access thereto shall be destroyed, the rent hereunder shall proportionately abate until the apartment shall again be rendered wholly tenantable or the means of access restored; but if said damage shall be caused by the act or negligence of the Lessee or the agents, employees, guests or members of the family of the Lessee or any occupant of the apartment, such rental shall abate only to the extent of the rental value insurance, if any, collected by the Lessor with respect to the Apartment”

(Proprietary Lease, 4 [b]).

This language overlaps with RPL § 235-b (1) to such a degree that it is clear that the analysis as to breach of the proprietary lease is coextensive with the analysis of breach of the warranty of habitability. Thus, plaintiff is entitled, for the reasons elaborated above, to summary judgment as to her claim of breach of the proprietary lease only for the period of September 18, 2012 to June 2015. As a corollary, the branch of the Coop’s cross motion that seeks dismissal of plaintiff’s claim for breach of the proprietary lease is denied.

The parties dispute the appropriate remedies for a breach of the proprietary lease. First, it is without question that, had Hersh paid maintenance fees during this period, which she did not, she would be entitled to a reimbursement. However, she did pay monthly assessment fees during this period and she is entitled to a reimbursement of these fees (*see Granirer*, 54 AD3d at 270

[rejecting the “contention that plaintiffs’ abatement should not include their contribution to the cooperative’s tax and mortgage obligations”]).

As for who is to bear the costs of repairs, Hersh and the Coop interpret paragraph 4 (a) of the proprietary lease differently:

“If the apartment or the means of access thereto . . . shall be damaged by fire or other cause covered by the multiperil policies commonly carried by corporations owning ‘cooperative apartment hotels’ in New York City (any other damage to be repaired by the Lessor or Lessee pursuant to Paragraph 2 and 18, as the case may be), the lessor shall at its own cost and expense, with reasonable dispatch after receipt of notice of said damage, repair or replace or cause to be repaired or replaced . . . the apartment and the means of access thereto, including the walls, floors, ceilings, pipes, wiring and conduits in the apartment, with materials of a kind and quality then customary in the hotel. Anything in this Paragraph or Paragraph 2 to the contrary notwithstanding, the Lessor shall not be required to repair or replace, or cause to be repaired or replaced, equipment, fixtures, furniture, furnishings or decorations installed by the Lessee or any previous proprietary lessee of the apartment, nor shall the Lessor be obligated to repaint or replace wallpaper or other decorations in the apartment or to refinish floors located therein.”

Here, the Coop gives a strained reading of this provision that limits its duty to repair to original components. That is, the Coop argues, if Hersh or a previous proprietary lessee installed a new wall, floor or ceiling, that component is not covered by its duty to repair. This reading contradicts the plain meaning of paragraph 4 (a) which reserves the duty of repair for structural items, such as floors, ceilings and walls to the Coop. Thus, the Coop may not, as it argues, charge Hersh back for any repairs it has done to these structural items, as it bears the cost of repairing structural components of Hersh’s apartment that were damaged by the leaks that are the subject of this case. Indeed, it would owe reimbursement to plaintiff for remedial work on structural items such as floors, ceilings and walls necessitated by the leaks that made her apartment uninhabitable.

CONCLUSION

Accordingly, it is

ORDERED that the branch of plaintiff's motion that seeks summary judgment as to liability on her claim for breach of the statutory warranty of liability under Real Property Law (RPL) § 235-b (1) is granted only for the period of September 18, 2012 to June 1, 2015; and it is further

ORDERED that the branch of plaintiff's motion that seeks summary judgment as to liability on her claim for breach of the proprietary lease is granted only for the period of September 18, 2012 to June 1, 2015; and it is further

ORDERED that defendant One Fifth Avenue Apartment Corp.'s cross motion to dismiss plaintiff's claims for breach of the warranty of habitability and breach of the proprietary lease is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 5, 2016

ENTER:



Hon. CAROL R. EDMED, J.S.C.

HON. CAROL R. EDMED
J.S.C.