SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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WEST 189, LLC,

Plaintiff,

INDEX NO. 452578/14

-against-

LUTHER LOUIS-JEUNE and SAUNDRA RAYMOND,

Defendants.

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JOAN A. MADDEN, J.:

In two related actions involving an alleged bed bug infestation, defendant/tenant Luther Louis-Jeune moves in the instant action (Action No. 2) to dismiss the landlord's complaint in its entirety, and for partial summary judgment and an inquest as to damages with respect to his counterclaim for breach of the warranty of habitability, and an un-pleaded counterclaim for anticipatory repudiation of the lease.[1] The plaintiff/landlord opposes the motion.

The following facts are not disputed unless otherwise noted. By lease dated December 10, 2010, Louis-Jeune and Saundra Raymond rented an apartment in the building located at 479 West 146th Street, Apt. 2F, New York, New York, which is owned by West 189, LLC and managed by Sassouni Management, Inc. The lease provided for a term of one year and 17 days, commencing on December 15, 2010 and ending on December 31, 2011. According to his

[1]Louis-Jeune also seeks an extension of time to move for summary judgment, but such relief is not necessary since note of issue has not been filed in this action. Although note of issue was filed in the other action (Action No. 1, Louis-Jeune v. Sassouni Management, Inc and West 189, LLC, Index No. 113897/11) in December 2014, note of issue has not been filed in the instant action. Justice Tingling's order transferring the instant action from Civil Court and consolidating the two actions for joint trial, clearly provides for a separate note of issue in each action.

affidavit and deposition testimony, Louis-Jeune first experienced itching and bites on his legs and arms "sometime" in February 2011 and first observed an actual bed bug "on the bed" in March 2011, when he complained to building management.

On March 29, 2011, the managing agent for the building sent a Work Order to the building's exterminator, Esquire Exterminating Services, Inc. ("Esquire"), identifying the "problem" in Louis-Jeune's apartment as "Bed Bugs." On April 1, 2011, Esquire treated the apartment for bed bugs, which according to Louis-Jeune consisted of setting off foggers in the living room and bedroom, and placing a "powdered substance" on the bed frame. According to Louis-Jeune, the bedbug infestation only "worsened," as he continued to experience itching and "swelling welts" and observed bed bugs throughout the apartment, including in his son's bassinet.

At 3:39 in the morning on May 3, 2011, Louis-Jeune sent an email to the building manager, Allen Harris, that he had discovered "two more bedbugs in our apartment last night" and included "pictures of Saundra's face after having being bitten repeatedly." The email expressed his frustration with the bedbug infestation, described the measures he had taken to protect his clothing and furniture, and advised that "we would simply like to leave the building." The same day, the managing agent faxed a work order to Esquire regarding Louis-Jeune's apartment, stating: "Bed Bugs. You were here before. Nice kids still have them – they want out of lease – Please arrange ASAP!!!"

The landlord submits an affidavit from the exterminator, Anthony Forlenza, stating that in or around March 28, 2011, Louis-Jeune "claimed he had bed bugs in his apartment" and a work

order was forwarded to the attention of Esquire. Forlenza states that he "went to the apartment on April 1, 2011 and "treated the apartment to ensure that there were no bed bugs and/or the problem would be eradicated." He further states: "A month later I was advised that the Tenant in Apt. 2F still complained of bedbugs. I went back to Apt 2S [sic] on May 12, 2011, and the Tenant was not home, however, as per the attached Service Report, I placed bait stations for mice. No sign of bedbugs were present." The record includes an invoice from Esquire for the following services performed at the building on May 12, 2011: "Bedbug Insection [sic] Performed For Apt 2A"; "Pest Management Services Rendered For General Pest Control"; and " Placed 8 Bait Stations for Mice for Apt. #2F."

On May 16, 2011, Louis-Jeune sent Harris a letter and/or email advising that he had arranged for Terminix to inspect his apartment "this past Tuesday after finding another bed bug in the seating area of the apartment," and "[a]fter performing a thorough examination of each room and closet, the Terminix inspector provided an evaluation of what needed to be done to permanently rid the apartment of the bedbugs and any eggs that may have already been laid." Louis-Jeune detailed Terminix's recommended "steps" and noted that the "inspector was quite appalled after leaning about the steps that have been taken thus far," explaining that a "fogger does nothing to the bed bugs." Louis-Jeune also advised that Tony from Esquire "was scheduled to show up Thursday to check the monitors he'd set up Thursday the week prior and instead we learned he showed up unannounced on Friday when no one was at the apartment." He concluded by stating, "Please let me know what you can do about taking these steps to rid us of the problem once and for all." Harris responded the same day, as follows: "I wanted to confirm receipt of your letter. I forwarded it to Tony at Esquire Exterminating Services, He will contact you for

another appointment if you elect to have one. We are quite comfortable with his service and the success he has had handling our properties with bed bugs. I am reluctant to take the advice of yet another company as to how to handle this as Tony has been 100% spot on since the City had the bed bug outbreak. So, please schedule with him and he'll take care of the problem."

It is unclear what happened next, if anything, but on May 31, 2011, Saundra Raymond wrote a letter to the managing agent, Sassouni Management, advising that she and Louis-Jeune were vacating the apartment as of that day, as "the apartment is uninhabitable in its present condition, namely, the bedbug infestation."

In June 2011, the landlord commenced the instant action in Civil Court against Louis Jeune and Raymond, seeking unpaid rent, broker's fees and attorney's fees (Action No. 2). Louis-Jeune and Raymond answered asserting affirmative defenses of payment, the apartment has been re-rented, breach of warranty of habitability and constructive eviction, and counterclaims for breach of warranty of habitability, rent abatement, quantum meruit (reimbursement for moving expenses and supplies for treating bedbug condition), unjust enrichment (return of $1,500 security deposit), and attorney's fees.

In December 2011, Louis-Jeune individually and on behalf of his infant son commenced a separate action in this court (Action No. 1) against the landlord and managing agent, seeking compensatory and punitive damages for personal injuries and property loss based on the bed-bug infestation in the apartment (Luther Louis-Jeune as Natural Parent and Guardian of Infant, Kwabena Luke Louis-Jeune and Luther Louis -Jeune, Individually v. Sassouni Management, Inc and West 189, LLC, Index No. 113897/11). The complaint asserts claims for negligence,

nuisance, breach of warranty of habitability and attorney's fees. By order dated March 22, 2012, the Hon. Milton Tingling removed the instant action from Civil Court to this Court and consolidated the two actions for joint trial.[2]

As defendants in Action No. 1, the landlord and managing agent moved for summary judgment dismissing the tenants' complaint. On July 9, 2014, Justice Tingling issued an order granting the motion to the extent of dismissing "the minor plaintiff's claims" and "the personal injury causes of action," but denied dismissal of the property damage claims, finding that the tenants' opposition raises "triable issues of fact in dispute concerning property damage/loss."

As plaintiff in Action No. 1, Louis-Jeune moved for partial summary judgment on his negligence claim for property damages, and the landlord and managing agent cross-moved for summary judgment dismissing the property damage claims.[3] By a decision and order dated July 17, 2015, this Court denied the motion and cross-motion, determining that Louis-Jeune failed to submit competent evidence that the owner or managing agent caused or created, or had actual or constructive notice of the bed bug condition in his apartment. This Court also found that the owner and managing agent failed to make a prima facie showing that they properly maintained and provided adequate extermination services for the apartment, and that receipts were not required for Louis-Jeune to establish his damages claim for personal property. However, at oral

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[2]The actions are not consolidated for all purposes, so they are separate and have separate index numbers.

[3]The parties also sought relief in Action No. 2, as Louis-Jeune moved to dismiss the complaint in Action No. 2 and for partial summary judgment on his constructive eviction counterclaim, and the landlord cross-moved to dismiss the constructive eviction counterclaim. Those portions of the motion and cross-motion were denied without prejudice to renewal in Action No. 2.

argument on the instant motion and cross-motion, the parties agreed to settle Louis-Jeune's property damage claims for $7,500.

As defendant in Action No. 2, Louis-Jeune is now moving to dismiss the landlord's complaint in its entirety and for partial summary judgment in his favor. According to his attorney's Affirmation in Support, his motion for partial summary judgment against the landlord, is limited to two specific grounds: his counterclaim for breach of warranty of habitability under RPL §235-b, and a new theory of liability based on "anticipatory repudiation of the lease agreement," which is not among the defenses or counterclaims pleaded in his answer. Contrary to the landlord's assertions, the issue of constructive eviction is not before the Court at this time, as Louis-Jeune is not seeking partial summary judgment on his constructive eviction affirmative defense or counterclaim, and landlord is not cross-moving for any relief with respect that defense or counterclaim.

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 demonstrate the absence of any material issues of fact. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986); see also Winegrad v. New York University Medical Center, 64 NY2d 851, 852 (1985). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. See Alvarez v. Prospect Hospital, supra at 324.

Louis-Jeune has made a sufficient prima facie showing as to liability on is counterclaim for breach of the warranty of habitability. Many courts have held that the presence of bed bugs in

an apartment constitutes a breach of the warranty of habitability pursuant to Real Property Law §235-b. See Kane v. SDM Enterprises Inc, 2014 WL 11342732 (Sup Ct, Kings Co 2014), aff'd 125 AD3d 939 (2nd Dept 2015); Valoma v. G-Way Management, LLC, 29 Misc3d 1222(A) (Civ Ct, Kings Co 2010); Bender v. Green, 24 Misc3d 174 (Civ Ct, NY Co 2009); Zayas v. Franklin Plaza, 23 Misc3d 1104(A) (Civ Ct, NY Co 2009); Ludlow Properties, LLC v. Young, 4 Misc3d 515 (Civ Ct, NY Co 2004). The measure of damages for breach of the warranty of habitability is limited to a rent abatement, which is based on the difference between the rent reserved in the lease and the fair market rent value during the period of the breach. See Park West Management Corp v. Mitchell, 47 NY2d 316, cert denied 444 US 992 (1979); Walls v. Prestige Management, Inc, 73 AD3d 636 (1st Dept 2010); Elkman v. Southgate Owners Corp, 233 AD2d 104 (1st Dept 1996). "Loss or diminution in value of personal property as well as personal injuries and pain and suffering are not recoverable under Real Property Law § 235-b." Id at 105.

Here, the undisputed record establishes that beg bugs were present in Louis-Jeune's apartment, and based on the authorities cited above the presence of bed bugs constitutes a breach of the warranty of habitability. As explained above, at his deposition and in his affidavit, Louis-Jeune stated that he was first bitten in February 2011 and saw the first bed bug "on the bed" in March 2011, when he contacted the managing agent, who sent a work order to the exterminator identifying the "problem" as "Bed-Bugs." On April 1, 2011, the exterminator treated the apartment for bedbugs, which according to Louis-Jeune consisted of setting off foggers in the living and bed rooms, and placing a "powered substance" on the bed frame. Louis-Jeune testified that the bed bug subsequently worsened, as he had itching and "swelling welts," and observed bed bugs throughout the apartment, including his son's bassinet. On May 3, 2011,

Louis-Jeune emailed the managing agent that he had discovered more bed bugs in the apartment that night and included photographs of his wife's face "after have been bitten repeatedly." Although the managing agent immediately faxed a work order to the exterminator advising that the tenants "still have" bed bugs and "want out of lease," and "Please arrange ASAP," the exterminator did not treat the apartment for bed bugs when he went back to the apartment on May 12, 2011.

In opposition, the landlord fails to submit sufficient competent proof to raise an issue of fact as to the presence of bed bugs in the apartment. The exterminator's bare and conclusory affidavit is carefully drafted to avoid the issue. The exterminator fails to state specifically whether he inspected the apartment on April 1, 2011 and observed any bed bugs or evidence of bed bugs in the apartment, when, in response to the tenants' complaints of bedbugs, he came to the apartment for the sole reason of treating the bed bug condition. At that time, he clearly had an opportunity to inspect the apartment for bed bugs, but his affidavit includes only the vague statement that he "treated the apartment to ensure that there were no bed bugs and/or the problem would be eradicated." Although the exterminator returned to the apartment on May 12, 2011 in response to the tenants' continuing complaints of bed bugs, the exterminator acknowledges that the tenants were not at home, and states without explanation or supporting facts that "[n]o sign of bed bugs were [sic] present." Moreover, while the exterminator's invoice for the services provided on May 12, 2011, lists a charge for a "bed bugs inspection" of another apartment, Apt. 2A, it does not include a charge for a bed bug inspection of Louis-Jeune's apartment, Apt. 2F. The only charge for Apt. 2F is for mice bait. Under these circumstances, the exterminator's bare and conclusory affidavit is insufficient to raise an issue of fact as to whether bed bugs were

present in the apartment.

In opposition, the landlord also argues Louis-Jeune has elected his remedy by seeking damages and cites Frame v. Horiizons Wine & Cheese, 95 AD2d 514 (2nd Dept 1983) and 487 Elmwood Inc. v. Hassett, 107 AD2d 285 (4th Dept 1985). Those cases are inapplicable, as they apply the doctrine of election of remedies in instances where a tenant has asserted a claim or defense of actual or constructive eviction. As noted above, Louis-Jeune is not moving for any relief with respect his constructive eviction defense or counterclaim.

Turning to Louis-Jeune's new theory of liability, he alleges that the landlord's refusal "to correct a number of latent defects which created exposure or hiding places within the unit" and the landlord's "refusal to hire a different exterminator" constituted an anticipatory repudiation of the lease. In connection with his prior motion for summary judgment in Action No. 1, Louis-Jeune asserted the identical allegations to support his negligence claim against the landlord and managing agent. As noted above, in December 2015, Louis-Jeune executed a stipulation discontinuing that negligence claim with prejudice.

As noted, the theory of anticipatory repudiation is improperly asserted for the first time in Louis-Jeune's motion papers. However, even if it had been included in his original answer, he would have failed to state a viable claim anticipatory repudiation of the lease, since he has not alleged a definite, final and unequivocal communication by the landlord of its intention to forego all future performance of its obligations under the lease. See Jacobs Private Equity, LLC v. 450 Park LLC, 22 AD3d 347 (1st Dept 2005), lv app den 6 NY3d 703 (2006); New York Service Program for Older People, Inc v. 117 West 72nd Street LLC, 12 AD3d 157 (1st Dept 2004); Rachmani Corp v. 9 East 96th Street Apartment Corp, 211 AD2d 262 (1st Dept 1995).

Finally, the branch of the motion to dismiss the landlord's complaint in its entirety is denied, as Louis-Jeune has failed to provide a factual or legal basis for dismissing the landlord's claim for rent in its entirety, as a matter of law. Although Louis-Jeune has sufficiently established that the landlord breached the warranty of habitability based on the presence of bed bugs in his apartment, and given such breach, Louis-Jeune is entitled to a rent abatement, the determination as to the amount of such abatement is a factual issue. See e.g. Valoma v. G-Way Management, LLC, supra (50% abatement and return of security deposit awarded for bed bugs); Assoc. v. CW, 24 Misc3d 1225(A) (Sup Ct, Bronx Co 2009) (50% rent abatement for bed bugs); Bender v. Green, supra (12% rent abatement for bed bugs); Ludlow Properties, LLC v. Young, supra (45% rent abatement for bed bugs). Once a breach of warranty is established, the parties "must come forward with evidence concerning the extensiveness of the breach, the manner in which it impacted upon the health, safety or welfare of the tenants and the measures taken by the landlord to alleviate the violation." Park West Management Corp v. Mitchell, supra at 328.

Accordingly, it is

ORDERED that the motion by defendant Luther Louis-Jeune is granted only to the extent that he is awarded partial summary judgment on the issue of liability on his affirmative defense and counterclaim for breach of the warranty of habitability, and in all other respects the motion is denied; and it is further

ORDERED that the parties are directed to appear for a settlement conference on October 13, 2016 at 2:30 p.m., Part 11, Room 351, 60 Centre Street.

DATED: August 29, 2016

ENTER:

HON. JOAN A. MADDEN
J.S.C.