

**Richardson-Wells v New York City Hous. Auth.**

2016 NY Slip Op 32076(U)

September 30, 2016

Supreme Court, Queens County

Docket Number: 6235/16

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE

IA PART 6

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CLAIRE RICHARDSON-WELLS,

Index No: 6235/16

Plaintiff,

Motion Date: September 8, 2016

-against-

Motion Cal. No. 128

NEW YORK CITY HOUSING AUTHORITY,

Motion Seq. No. 1

Defendant.

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The following papers read on this motion by self represented plaintiff Claire Richardson-Wells for an order compelling defendant New York City Housing Authority (NYCHA) to issue a Section 8 housing voucher immediately, pay her moving costs and relocate her to another apartment; cancelling all back rent owed and enjoining her future rent; and compelling the Authority to analyze an asbestos report prepared by an entity hired by plaintiff.

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Upon the foregoing papers the motion is determined as follows:

Plaintiff Claire Richardson-Wells is a tenant of an apartment in the Bailey Park Houses, a public housing development operated by NYCHA. On February 17, 2016, plaintiff served a Notice of Claim on NYCHA alleging a breach of the warranty of habitability and negligence led to personal injuries, including blurred vision. She alleged that the construction dust from asbestos abatement was causing burning and blurring of her eyes, causing inflamed conjunctivitis; that her dog also has inflamed eyes; and that

her two (2) new air conditioning units were filled with construction debris, and seeks to recover money damages. Plaintiff testified at a hearing held on July 25, 2016, pursuant to Public Housing Law §157.

Plaintiff commenced the within action on May 26, 2016, and alleges in her complaint and notice of claim that her apartment is contaminated by dust caused by asbestos remediation work performed by NYCHA's contractors in 2015. She alleges that she has resided in her current apartment since 2004, and previously resided in another apartment in the same development since 1980; that she is 64 years old; and that she has been on disability since 1994. Plaintiff alleges that in 2015 asbestos abatement was performed in her building and that in the Fall 2015 she had to withdraw from a college program due to blurred vision.

Plaintiff alleges that NYCHA failed to properly notify the tenants of the abatement project, in that the asbestos notification sign was placed at the back of the farthest building, and was not facing outwards. She alleges that during said project construction dust was left on the scaffold under her window over the summer months and that she could not open her windows, use the air conditioners or cook in her kitchen for the entire summer. Plaintiff alleges that she called the "city asbestos control bureau" who sent investigators and personnel to train the asbestos abatement workers.

Plaintiff alleges that on July 23, 2015, she went to the management office and complained of shortness of breath, and informed her of her health restrictions that were placed in her file in 1999. She alleges that the housing manager demanded that she present an updated letter, and that upon obtaining a letter from her pulmonary physician, two (2) cleaners were instructed to clean the dust away from her windows every day. She alleges that the cleaners did not sufficiently clean the area and that she obtained permission to clean the windows and scaffold herself; that she purchased a spray hose; and that she cleaned the windows and scaffold daily.

Plaintiff alleges that NYCHA violated provisions of the Federal and New York City Clean Air Act. She also alleges a breach of the warranty of habitability. Plaintiff alleges that her apartment was inspected by the Department of Health and Mental Hygiene on December 13, 2015, at which time the inspector observed three (3) dozen HEPA filters laden with construction dust captured over one year, and that she has retained the filters for the period of July 2015 to May 2016.

Plaintiff also alleges that NYCHA violated the American with Disabilities Act, in that she made numerous requests that she be allowed a reasonable accommodation and transfer to another apartment with clean air, and was turned down. She alleges that she is

suffering from inflamed and burning eyes, and that her dog David is also suffering from inflamed eyes; that in April 2016, she left the apartment seeking shelter elsewhere; and on April 14, 2016, she was injured in a motor vehicle accident when she was hit in the rear while stopped at a red light. Plaintiff seeks to recover damages for her present and future personal injuries and for injuries to her dog.

Defendant NYCHA served a verified answer on June 20, 2016, and interposed ten (10) affirmative defenses.

Prior to commencing the within action, plaintiff commenced an action in Civil Court, Queens County, Landlord Tenant Part, in which she alleged NYCHA had failed to plaster and paint her apartment, had failed to replace three (3) missing doors in the apartment, had failed to repair a broken air vent in the bathroom and had failed to repair her broken mailbox. Following an inspection of the apartment on September 4, 2015 by HPD, the parties entered into a “so ordered” stipulation of settlement on November 2, 2015, whereby NYCHA agreed to inspect and repair defective window latches, a defective door, missing closet doors, and to plaster and paint the apartment, including the kitchen and bathroom. Said stipulation stated that there was “[n]o violation for asbestos per petitioner’s independent report dated 10/30/15.” Ms. Richardson-Wells, pursuant to the stipulation, was to provide a medical letter stating oil based paint was bad for health and upon providing said letter, NYCHA would use water based paint. In response to an order to show cause brought by Ms. Richardson-Wells, the court, in an order dated January 25, 2016, directed Ms. Richardson-Wells to provide access to the apartment, and directed NYCHA to make repairs with respect to the defective door, the missing doors, to plaster and paint throughout the apartment, and found that Ms. Richardson-Wells has provided a letter from her doctor regarding the use of oil based paint.

In the within order to show cause, plaintiff seeks an order compelling defendant NYCHA to issue a Section 8 housing voucher immediately, pay her moving costs, and relocate her to another apartment; cancelling all back rent owed and enjoining her future rent; and compelling the Authority to analyze an asbestos report.

Defendant, in opposition, asserts that the documentary evidence submitted by plaintiff demonstrates that she has a history of chronic allergic conjunctivitis and hyper-reactive airway disease as a result of toxic fume exposure during the course of her employment in 1994. Defendant argues that plaintiff is not entitled to an order directing it to issue a Section 8 housing voucher and relocate her to another apartment. Defendant states that Section 8 is a housing subsidy program that is administered by NYCHA, and is distinct from the public housing operated by NYCHA. It is asserted that plaintiff is a tenant in public housing operated by NYCHA and is not a Section 8 tenant. Defendant

asserts applicants for Section 8 vouchers must follow the procedures set forth in NYCHA's Housing Voucher Program Administrative Plan, and that plaintiff's submissions do not indicate that she ever submitted an application for the Section 8 program. It is further asserted that plaintiff's submissions demonstrate that plaintiff previously asked NYCHA for a transfer to another apartment in public housing, and apparently did not accept the transfer offered to her.

Defendant asserts that plaintiff's request for relief pertaining to asbestos in her apartment is barred by the doctrine of res judicata, as these allegations were dismissed in the Housing Court proceeding. As regards plaintiff's rent claims, defendant asserts that these claims are the subject of a separate proceeding in Housing Court, and that plaintiff has failed to establish that she is entitled to injunctive relief.

At the outset, as defendant failed to raise the affirmative defenses of collateral estoppel, res judicata and another action pending between the same parties, in a pre-answer motion or in its answer, these defenses have been waived (CPLR 3211[e]).

Plaintiff is not entitled to relief based upon unpled claims. Here, the complaint does allege a cause of action based upon a request for a Section 8 housing voucher and does not allege a cause of action based upon a request that NYCHA transfer or relocate her to another apartment, provide movers and pay her moving expenses. It appears from plaintiff's affidavit that she is seeking a Section 8 voucher in order to enable her to find and live in a rent stabilized apartment. Plaintiff has not established that she is a recipient of a Section 8 housing subsidy, or that she applied for and was denied a Section 8 housing subsidy, and has not established that NYCHA is required to relocate her to a rent stabilized apartment. Therefore, that branch of plaintiff's motion which seeks an order directing defendant to provide her with a Section 8 housing voucher, to provide movers and pay her moving expenses and to relocate her to another housing accommodation, is denied.

The court notes that the documentary evidence submitted demonstrates that plaintiff requested a transfer to another apartment in the same public housing development, based on the environmental conditions she claims exist in her apartment and the lack of an elevator in her building. Plaintiff also checked off boxes on the transfer form which are for transfer to a different NYCHA owned or managed development and indicated in writing that she sought to be in Queens at the Baisley Park Houses. On May 18, 2016, NYCHA granted the transfer request and offered her an apartment located in Manhattan. Plaintiff, however, raised no objections to the apartment offered to her, has not relocated to said apartment, and has not commenced an Article 78 proceeding seeking judicial review of NYCHA's determination.

Plaintiff seeks a preliminary injunction with respect to any back rent owed NYCHA and the payment of future rent, until final judgment in this action. The “purpose of a preliminary injunction is to preserve the status quo pending a trial” and “the remedy is considered a drastic one, which should be used sparingly.” (*Trump on the Ocean, LLC v Ash*, 81 AD3d 713[2nd Dept 2011].) “As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court.” (*Id.*; *Doe v Axelrod*, 73 NY2d 748 [1988].) “In exercising that discretion, the Supreme Court must determine if the moving party has established: (1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction.” (*Trump on the Ocean, LLC v Ash*, 81 AD3d 713, 715 [2nd Dept 2011]; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *W. T. Grant Co. v Srogi*, 52 NY2d 496[1981].)

Plaintiff in her complaint does not assert a claim pertaining to her rent and a non-payment proceeding is pending in the Civil Court. In her affidavit in support of the order to show cause, plaintiff states that her rent has not been corrected for the period of July 2015-December 2015, and that she has been overcharged in the sum of \$1,500 for the 2016 year. She states that she hired an attorney to represent her in court in the Landlord Tenant part, and that NYCHA has refused to make the correction. Plaintiff’s rent claims are the subject of the Civil Court action, and she has not established the likelihood of success on her claims in that action. Therefore, that branch of the motion which seeks a preliminary injunction, is denied.

Plaintiff raised her asbestos claims in the Civil Court action and in October 2015, hired an entity called Testor Technology to analyze the materials contained in two (2) HEPA filters that plaintiff maintained in her apartment. In a PLM bulk sample analysis report, performed on October 30, 2015, Testor Technology stated that there was no asbestos detected in the HEPA filters and that both filters had heterogeneous fibrous bulk material; that the material obtained from one HEPA filter consisted of synthetic fibers, 90% and non-fibrous 10% and that the material obtained from the other HEPA filter consisted of synthetic fibers 99% and non-fibrous 1%. Said Civil Court action was settled pursuant to the “so-ordered” stipulation dated November 2, 2015, which stated that there was no asbestos present in the plaintiff’s apartment. Plaintiff has failed to establish that any basis exists for requiring NYCHA to conduct an analysis of the report prepared by plaintiff’s own expert. Therefore that branch of the motion which seeks to compel defendant to conduct an analysis of said asbestos report, is denied.

In view of the foregoing, plaintiff’s motion is denied in its entirety.

Dated: September 30, 2016

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**Howard G. Lane, J.S.C.**