

<b>Shackman v 400 E. 85th St. Realty Corp.</b>
2017 NY Slip Op 30618(U)
March 30, 2017
Supreme Court, New York County
Docket Number: 160778/14
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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BARRIE SHACKMAN and STEVEN SHACKMAN,

Plaintiffs

Index No. 160778/14

v

DECISION AND ORDER

400 EAST 85TH STREET REALTY CORP.

MOT SEQ 002

Defendants.

-----X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, inter alia, to recover damages for negligence, trespass, private nuisance, and partial constructive eviction arising from several incidents of water leakage into the plaintiffs' cooperative apartment, the plaintiffs move for summary judgment on the complaint. The defendant cooperative corporation opposes the motion. The motion is granted to the extent that the plaintiffs are awarded summary judgment on the fourth cause of action and on the issue of liability on those portions of the first, third, and fifth causes of action which are premised on a leak occurring during June and July 2014, and the motion is otherwise denied.

II. BACKGROUND

The plaintiffs are tenant-shareholders of the defendant

cooperative housing corporation, which owns a cooperative apartment building at 400 East 85th Street in Manhattan. The plaintiffs reside in a sixth-floor apartment in the building. They allege that, on July 31, 2009, May 6, 2010, and again sometime during June and July 2014, significant amounts of water began to leak from pipes installed in their apartment walls that are connected to a wall-mounted heating, ventilation, and air-conditioning (HVAC) unit permanently installed as part of a building-wide central air-conditioning system.

The plaintiffs assert that, as a consequence, they sustained injury to property, expenses in remediating the water damage, a diminution in the value of their shares in the cooperative corporation, a consequent diminution in the resale value of their apartment, and an inability to live in or make full use of substantial portions of their apartment for significant periods of time, thus necessitating expenses for temporary housing accommodations. The plaintiffs allege that the leaks were caused by ongoing, systemic, building-wide problems caused by the defendant's failure to remediate clogs in and deterioration of the pipes comprising the building's interior plumbing system located inside the building's walls. They further assert that, on numerous occasions between 2009 and 2014, the defendant circulated memoranda acknowledging the condition of the HVAC and plumbing systems, but took no steps to rectify any problems.

The complaint alleges that the defendant negligently maintained the premises (first cause of action), committed trespass by permitting unwanted water to infiltrate from common areas into the plaintiffs' living spaces (second cause of action), and created a private nuisance that rendered living spaces unusable (third cause of action). It further alleges that the plaintiffs have a right to a rent abatement under both RPL 235(b) and the terms of the proprietary lease (fourth cause of action), and that the defendant constructively evicted the plaintiffs from those portions of their apartment that were rendered unusable (fifth cause of action), and seeks an award of an attorney's fee (sixth cause of action) and treble damages for willful misconduct.

In support of their summary judgment motion, the plaintiffs submit the complaint, which was verified by the plaintiff Barrie Shackman, the answer, affidavits from both of the plaintiffs describing the incidents of flooding, their need to vacate the apartment and the limitations on their use and enjoyment thereof, and authenticating numerous documents. They also submit an attorney's affirmation, the affidavit of retained licensed architect Alan Chasan, the affidavit of retained realtor David Chi, photographs of flood damage, floor plans, incident reports generated by the defendant, a report generated by the engineers retained by the plaintiffs' casualty insurer, memoranda

circulated by the defendant notifying tenant-shareholders of ongoing plumbing problems in the building, transcripts of the parties' depositions, discovery requests and responses, correspondence between the parties, an appraisal of the plaintiffs' apartment, a copy of excerpts of the governing proprietary lease, maintenance bills, and invoices for repair, hotel, and incidental costs arising from the leaks.

In opposition, the defendant submits the affidavit of its retained professional engineer Peter Chen, an affidavit of professional appraiser Eric Haims, manuals for the pumping systems employed by the HVAC units installed in the defendant's building, and an attorney's affirmation. The defendant also relies on the submissions made by the plaintiffs.

### III. DISCUSSION

#### A. Summary Judgment

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidentiary proof in admissible form to eliminate any material issues of fact from the case. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposition papers. See

Winegrad v New York Univ. Med. Ctr., supra, at 853. Only where the movant establishes his or her prima facie entitlement does the burden shift to the opponent to raise a triable issue of fact in order to defeat summary judgment. See id.

B. Negligence

To succeed on the cause of action sounding in negligence, the plaintiffs must establish that the defendant owed them a duty of care, that it breached that duty, and that the breach of duty proximately caused damage to their property. Katz v United Synagogue of Conservative Judaism, 135 AD3d 458 (1<sup>st</sup> Dept. 2016). In moving for summary judgment on the issue of liability on the negligence cause of action, that plaintiffs were required to establish, prima facie, not only that the defendant was negligent, but that they were themselves free from comparative fault. See Rodriguez v City of New York, 142 AD3d 778, 778 (1<sup>st</sup> Dept. 2016).

The defendant's obligation to repair and maintain the HVAC system, if any, rests upon the language of the proprietary lease (see Rapid Electric Co. v Rowe Holding Corp., 47 AD2d 615 [1<sup>st</sup> Dept. 1975]), although that duty may also be imposed by a course of conduct. See Nina W. v NDI King Ltd. Partnership, 112 AD3d 460 (1<sup>st</sup> Dept. 2013). Here, paragraph 2 of the propriety lease provides that:

"[t]he Lessor shall at its expense keep in good repair all of the building including all of the apartments, the sidewalks and courts surrounding the same, and its equipment and apparatus except those portions the maintenance and repair of which are expressly stated to be the responsibility of the Lessee pursuant to Paragraph 18 hereof."

Paragraph 18(a), in turn, provides that:

"[t]he lessee shall keep in the interior of the apartment including interior walls, floors and ceilings ... in good repair ... and shall be solely responsible for the maintenance, repair and replacement of plumbing, gas and heating fixtures and equipment and such ... removable and through-the-wall air conditioners ... as may be in the apartment. Plumbing, gas and heating fixtures as used herein ... shall not include gas, steam, water or other pipes or conduits within the walls, ceilings or floors or air conditioning or heating equipment which is part of the standard building equipment." (emphasis added).

Moreover, memos written by the defendant's management indicated that it would be assuming the obligation of "snaking" the convection risers in order to alleviate condensation and prevent flooding problems.

The construction of an unambiguous contract is an issue of

law, to be decided by the court, as is the issue of whether the terms of the contract are ambiguous in the first instance. NFL Enters. LLC v Comcast Cable Communications, LLC, 51 AD3d 52 (1<sup>st</sup> Dept. 2008). The question of whether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence. See Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78 (1<sup>st</sup> Dept. 2013); Schmidt v Magnetic Head Corp., 97 AD2d 151 (2<sup>nd</sup> Dept. 1983). Where language is ambiguous, however, any ambiguity must be construed against the drafter, here, the defendant (see Commercial Tenant Servs., Inc. v Northern Leasing Sys., Inc., 131 AD3d 895 [1<sup>st</sup> Dept. 2015]), and the court may resort to extrinsic evidence to glean the intent of the parties. See GEM Holdco, LLC v Changing World Tech., L.P., 127 AD3d 598 (1<sup>st</sup> Dept. 2015).

The plaintiffs established that the plumbing appurtenances connected to their HVAC unit were installed as an element of standard building equipment, and that the pipes complained of were installed within their walls. The defendants submissions did not contradict that showing. To the extent that there is any ambiguity between the lease provision making the plaintiffs responsible for removable and through-the-wall air conditioners, and relieving them of responsibility for air conditioning or heating equipment which is part of the standard building equipment, that ambiguity must be resolved in their favor, and

extrinsic evidence, consisting of the defendant's memoranda indicating its responsibility for the permanent HVAC units and connected plumbing installed inside the walls of the building, supports the plaintiffs' contention as well. Thus, the documentary evidence here completely negates the defendant's contention that it was the plaintiffs' obligation to maintain the HVAC units and the embedded plumbing system that supported those units.

The plaintiffs' retained architect opined that the several leaks were caused by the manner in which condensation pipes were installed, as well as the deterioration and clogging of pipes and conduits within the walls that served the HVAC units. The report of the engineer retained by the plaintiffs' casualty insurer was, by its terms, created in the regular course of the businesses of both the engineer and insurer. The document is thus self-authenticating (see generally Elkaim v Elkaim, 176 AD2d 116 [1<sup>st</sup> Dept. 1991]) and, contrary to the defendant's contention, constitutes proof in admissible form. See CPLR 4518(a); Regent Corp., U.S.A. v Azmat Bangladesh, 253 AD2d 134 (1<sup>st</sup> Dept. 1999). In any event, that report agreed with the conclusions of the architect that the cause of the leakage was the deterioration of pipes inside the walls of the plaintiffs' apartments, thus leading to blockages. The plaintiffs' own affidavits also establish, prima facie, that they were free from comparative

fault, inasmuch as they assert that they did not install the HVAC unit or any piping, never attempted to make alterations to the HVAC unit or the piping, and frequently brought the leakage problems to the defendant's attention.

Although the defendant's engineer disagreed with the conclusion of the plaintiffs' architect that routine snaking of the lines would have prevented the leaks, and instead suggested hydraulic or pneumatic pressure to "blow the clog out with air," he opined that one HVAC unit in the apartment had a "tortuous path in the legacy piping when attempting to drain to the a/c condensate line," while the drain line for that unit and one other unit within the apartment "could not be measured or verified without excavation of the wall." After boring into the wall and inspecting the equipment, that engineer reported that two of the HVAC units shared one drain line. He concluded that "the installation and plumbing of the drain line for the middle unit was the likely cause of the issues of drain condensate overflow," and since the drain line was installed with "insufficient pitch" and along a "tortuous path," algae and flora likely grew in the moist environment within the pipes and may have caused clogging or blockage. The defendant's engineer suggested that the drain pipe serving the middle HVAC unit be "repaired, removed, replaced, and/or rerouted," and should not serve more than one HVAC unit within the apartment.

One who assumes a contractual obligation to maintain a safe condition may be answerable in damages for liability resulting from injuries sustained as a consequence of the obligor's breach. See Zinn v Jefferson Towers, Inc., 14 AD3d 398 (1<sup>st</sup> Dept. 2005). The plaintiffs' affidavits, along with their experts' affidavits, the proprietary lease, and the memoranda provided by the defendant to tenant-shareholders, established that the defendant assumed such an obligation in connection with both the HVAC system permanently installed throughout the building and the plumbing appurtenances necessary to operate it. These submissions further demonstrated, prima facie, that the defendant negligently maintained the HVAC system inasmuch as it knew that the improper installation and deterioration of HVAC pipes, coupled with its own admitted failure to perform any routine maintenance to unclog those pipes despite its promise to do so, led to frequent, recurring leaks in several apartments, including the plaintiffs' apartment. In opposition to the plaintiffs' prima facie showing in this regard, the defendants' submissions failed to raise a triable issue of fact with respect to the leak that occurred in June and July 2014, since they did not negate the plaintiffs' showing that HVAC units were part of the standard equipment installed in the building, that the defective piping was not the plaintiffs' responsibility, or that the plaintiffs did not make any physical alterations to the system that caused

or contributed to the 2014 leakage. Moreover, its own expert conceded that the 2014 leakage occurred because of the manner in which the pipes in the wall were installed and configured, the consequential growth of algae and flora and the likely clogging or blockage within the pipes, and the absence of any attempts to unclog them.

The plaintiffs also made a prima facie showing that the 2014 leakage proximately caused significant damage to their personal property and diminished the resale value of the shares assigned to their apartment. Contrary to the defendant's contention, the licensed real estate broker who was retained by the plaintiffs was sufficiently qualified by "skill, training, education, knowledge, or experience to render a reliable opinion" (Riccio v NHT Owners, LLC, 79 AD3d 998, 1000 [2<sup>nd</sup> Dept. 2010]) as to the valuation of the apartment before and after the subject leakage, even though he is not a certified appraiser. See Moyal v Moyal, 85 AD3d 614 (1<sup>st</sup> Dept. 2011); Sharlow v Sharlow, 77 AD3d 1430 (4<sup>th</sup> Dept. 2010); see also Lelakakis v Kamamis, 103 AD3d 693 (2<sup>nd</sup> Dept. 2013). Nonetheless, the defendant raised a triable issue of fact as to the precise valuation of the apartment and the diminution in value arising from the water damage that occurred in 2014.

The defendant also raised a triable issue of fact as to whether so much of the negligence cause of action as is premised

on the 2009 and 2010 leaks is time-barred. An obligor's negligent performance of a contractual obligation may constitute a breach of contract, and a cause of action seeking recovery under that theory is subject to the six-year limitations period of CPLR 213(2). See Parker v Leonard, 24 AD3d 1255 (4<sup>th</sup> Dept. 2005); Manhattanville Coll. v James John Romeo Consulting Engr., P.C., 5 AD3d 637 (2<sup>nd</sup> Dept. 2004); City of Niagara Falls v Rudolph, 97 AD2d 971 (4<sup>th</sup> Dept. 1983). The complaint does not, however, by its terms, set forth a cause of action to recover for injury to property based on breach of contract, but is limited to causes of action seeking recovery for that injury under other theories, including negligence. The court may not rewrite the complaint to imply a breach of contract cause of action or read such a cause of action into the complaint. See Purvin v Grey, 294 NY 282 (1945); Halkedis v Two East End Ave. Apartment Corp., 137 AD2d 452 (1<sup>st</sup> Dept. 1988). Inasmuch as the negligence cause of action is subject to a three-year limitations period (see CPLR 214[4]), the defendant raised a triable issue of fact as to whether that statute bars the negligence cause of action as it pertains to the 2009 and 2010 leaks.

### C. Trespass

Proof of trespass in the context of the instant dispute requires a showing that the defendant caused water to be

deposited into the plaintiffs' apartment, without any right to do so. See Duane Reade v Reva Holding Corp., 30 AD3d 229 (1<sup>st</sup> Dept. 2006); Stewart v State of New York, 248 AD2d 761 (3<sup>rd</sup> Dept. 1998), citing 104 NY Jur 2d, Trespass § 12. The plaintiffs' submissions, including the affidavit of their expert architect and the written admissions of the defendant as to the source of the leaks, established, prima facie, that the defendant committed a trespass. Since the air conditioner condensate originated in pipes within the walls of the apartment building, the plaintiffs showed that the defendant caused this water to be deposited and had no right to do so. In opposition to this showing, the defendant's submissions did not contradict the plaintiffs as to the manner in which the leaks were generated or their source. Nonetheless, since a cause of action sounding in trespass is subject to the three-year limitations period of CPLR 214(4) (see Barklee 94 LLC v Oliver, 124 AD3d 459 [1<sup>st</sup> Dept. 2015]), the defendant raised a triable issue of fact as to whether so much of the trespass cause of action as is premised on the 2009 and 2010 incidents is time-barred.

#### D. Private Nuisance

A cause of action to recover for the creation of a private nuisance must be supported by evidence sufficient to demonstrate a "recurrence of objectionable conduct." Domen Holding Co. v

Aranovich, 1 NY3d 117, 124 (2003), quoting Frank v Park Summit Realty Corp., 175 AD2d 33, 34 (1<sup>st</sup> Dept. 1991), mod on other grounds 79 NY2d 789 (1991); see Duane Reade v Reva Holding Corp., supra. Since the complaint references only one incident of leakage within the three-year limitations period applicable to claims based on private nuisance (see Barklee 94 LLC v Oliver, supra), the plaintiffs failed to make a prima facie showing of any recurrence. Since the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law in connection with this cause of action, that branch of its motion which is for summary judgment thereon must be denied, regardless of the sufficiency of the defendant's opposition papers. Even if the plaintiffs made such a prima facie showing, however, the defendants raised a triable issue of fact as to whether so much of this cause of action as is premised on the 2009 and 2010 incidents is time-barred.

E. Rent Abatement Under RPL 235(b) and Proprietary Lease

As explained above, the plaintiffs did not assert a cause of action to recover for breach of contract insofar as they seek compensation for injury to property. Nonetheless, the fourth cause of action seeks to enforce so much of the proprietary lease as imposes an obligation on the defendant to proportionally abate the rent of any tenant-shareholder whose apartment has been

rendered partly or wholly untenable by virtue of damage to the building's structure or other damage caused by the failure of the defendant to maintain the premises. The plaintiffs established their prima facie entitlement to the enforcement of this provision with their affidavits describing the several leaks, the damage to their apartment, their inability to reside in the apartment for several periods of time, their need to secure alternative housing during those periods, and their inability to make use of portions of the apartment even when they remained there. The defendant's submissions did not directly address those contentions involving the plaintiffs' need to vacate the apartment or their limited use of the apartment for various periods of time, and to the extent that they did, they were not based on personal knowledge of the plaintiffs' circumstances. Nor could the defendant show that any portion of this contract-based claim was time-barred, since it was interposed within six years of all of the incidents complained of. Thus, the defendant failed to raise a triable issue of fact.

RPL 235(b) similarly implies a warranty of habitability into every lease of residential real property, pursuant to which the owner is deemed to covenant that the subject premises "shall not be subjected to any conditions which would be dangerous, hazardous or detrimental" to the tenants' "life, health or safety." A breach of that implied warranty may arise where flooding caused by landlord's failure to make repairs renders an

apartment uninhabitable (Goldstone v Gracie Terrace Apt. Corp., 73 AD3d 506 [1<sup>st</sup> Dept. 2010]), and entitles a tenant to an abatement of rent, which is all that the plaintiffs seek under this cause of action here. See Halkedis v Two E. End Ave. Apt. Corp., 161 AD2d 281 (1<sup>st</sup> Dept. 1990); 40 Eastco v Fischman, 155 AD2d 231 (1<sup>st</sup> Dept. 1989). A claim for breach of the warranty of habitability is subject to a six-year limitations period. See Sprague v Luna Park Co-op, 83 AD2d 877 (2<sup>nd</sup> Dept. 1981). For the same reasons as apply to the claim for rent abatement under the proprietary lease, the plaintiffs established their prima facie entitlement to judgment as a matter of law on this claim, and the defendant failed to raise a triable issue of fact as to whether the plaintiffs were entitled to a rent abatement or the amount of rent that should be abated.

#### F. Constructive Eviction

A constructive eviction occurs when a tenant, though not physically barred from the area in question, is unable to use the area for the purpose intended. See Dinicu v Groff Studios Corp., 257 AD2d 218, 224 (1<sup>st</sup> Dept. 1999); Oresky v Azzouni, 232 AD2d 463 (2<sup>nd</sup> Dept. 1996). A landlord's failure to make repairs in accordance with a lease, thus depriving tenant of the use or enjoyment of an apartment, will give rise to a cause of action based on constructive eviction. Shapiro v 350 E. 78th St. Tenants Corp., 85 AD3d 601 (1<sup>st</sup> Dept. 2011). "It is well settled

that a cause of action for constructive eviction is governed by a one-year statute of limitations." Kent v 534 E. 11th St., 80 AD3d 106, 111 (1<sup>st</sup> Dept. 2010); see CPLR 215; Jones v City of New York, 161 AD2d 518 (1<sup>st</sup> Dept 1990).

The plaintiffs established their prima facie entitlement to judgment as a matter of law in connection with this cause of action with their affidavits, in which they describe how they were unable to live in the apartment for certain periods of time, and unable to use substantial portions of the apartment during other periods of time. The defendant fails to raise a triable issue of fact in opposition to that branch of the plaintiffs' motion which is for summary judgment on this cause of action insofar as it relates to the 2014 incident, since none of its submissions are sufficient to show that it had no obligation to make repairs or that the plaintiffs were able to use the entirety of their apartment during the months immediately succeeding the 2014 incident. The defendants, however, raised a triable issue of fact with respect to whether the constructive eviction cause of action is time-barred as to the 2009 and 2010 incidents, and also raised a triable issue of fact as to the measure of damages to which the plaintiffs are entitled in connection with the cause of action alleging constructive eviction.

#### G. Attorney's Fees and Treble Damages

The plaintiffs failed to demonstrate that the defendant's

omissions and failures to act were willful, as opposed to merely negligent. The plaintiffs do not make a claim that they were overcharged for maintenance or rent, which might entitle them to treble damages, and their submissions do not make clear any statutory basis for their claim to treble damages. Hence, they have not shown at this juncture that they are entitled to treble damages.

Moreover, since the plaintiffs are prevailing on some causes of action, and portions of others, while the defendant is prevailing on at least one cause of action, and the measure of damages on several of the causes of action must await trial, the court declines to award an attorney's fee at this juncture. Rather, the determination of whether an attorney's fee will be awarded, and the extent of the award, must await the trial on the issue of damages. See Paik Constr., Inc. v Porven Real Estate, Inc., 2017 NY Slip Op 30103(U), 2017 NY Misc LEXIS 174 (Sup Ct., N.Y. County 2017) (Bannon, J.).

#### IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the plaintiffs' motion for summary judgment is granted to the extent that they are awarded summary judgment on the fourth cause of action and on the issue of liability on those portions of the first, third, and fifth causes of action which are premised on the leak occurring during June and July 2014, and

the motion is otherwise denied.

This constitutes the Decision and Order of the court.

**Dated: March 30, 2017**

ENTER:

  
A handwritten signature in black ink, appearing to read 'NMB', is written over a horizontal line. Below the signature, the letters 'J.S.C.' are printed.

**HON. NANCY M. BANNON**