

<b>Ain v Tenth St. Holdings, LLC</b>
2019 NY Slip Op 31213(U)
May 2, 2019
Supreme Court, New York County
Docket Number: 159909/17
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY -- PART 2

EILEEN AIN,

Plaintiff,

- against -

TENTH STREET HOLDINGS, LLC,

Defendant.

**DECISION AND ORDER**

Index Number: 159909/17

Mot. Seq. No. 001

**HON. KATHRYN E. FREED, J.S.C. :**

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION, AFFIRMATION AND AFFIDAVIT IN SUPPORT AND EXHIBITS .....	NYSCEF Doc. Nos. 6-8
NOTICE OF CROSS MOTION, AFFIRMATION AND AFFIDAVIT IN OPPOSITION TO MOTION AND IN SUPPORT OF CROSS MOTION AND EXHIBITS .....	NYSCEF Doc. Nos. 12-23
AFFIRMATION AND AFFIDAVIT IN REPLY AND EXHIBITS.....	NYSCEF Doc. Nos. 25-29
DEFENDANT REPLY AFFIRMATION AND EXHIBITS....	NYSCEF Doc. Nos. 30-33

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action, plaintiff Eileen Ain (Ain) sues her landlord for damages, injunctive relief and a declaratory judgment, alleging that defendant Tenth Street Holdings, LLC (Tenth St. or landlord) failed to comply with an agreement to perform repairs and renovations to her apartment. The complaint alleges causes of action for breach of the warranty of habitability, constructive eviction, breach of the covenant of quiet enjoyment, a declaratory judgment, injunctive relief, and attorneys' fees. Plaintiff now moves for an order permitting her "to make

final stipulated renovations/repairs” and to claim damages for making such repairs. *See* Notice of Motion, NYSCEF Doc. No. 6. Defendant opposes the motion and cross-moves, pursuant to CPLR 3126, for sanctions against plaintiff for failing to produce discovery.

**FACTUAL AND PROCEDURAL BACKGROUND:**

Plaintiff has been a rent-stabilized tenant for more than 22 years in a building owned by defendant Tenth St., located at 28 East 10<sup>th</sup> Street, New York, New York (the building). Plaintiff resided in Apartment 12-G (Apt. 12G or former apartment) from about 1996 to July 2017, when she moved to Apartment 7-G (Apt. 7G or the apartment) pursuant to a Permanent Relocation Agreement (Agreement) she entered into with defendant in December 2016. *See* Agreement, NYSCEF Doc. No. 15. The Agreement provided that, in exchange for a cash payment, moving expenses paid by the landlord, a three-month rent abatement, and renovations and repairs to be completed and paid for by the landlord, plaintiff would surrender her lease to Apt. 12G and move into Apt. 7G at a monthly rent equivalent to what she had been paying for the former apartment. The Agreement identified the work to be done in Apt. 7G (*see* Scope of Work, Exhibit A to the Agreement), and provided that the landlord “shall perform the work . . . at its sole cost and expense, in good and workmanlike manner.” Agreement, ¶ 2. Under the terms of the Agreement, upon substantial completion of the landlord’s work, the landlord was to issue a notice that work was completed, after which plaintiff could inspect the apartment and, within five days thereafter, notify the landlord of any work she claimed was not completed in accordance with the Agreement. *Id.*, ¶ 3.

As set out in the Agreement, the scope of work to be done in the bathroom, kitchen, and

throughout the apartment included installing a medicine cabinet, sink and light fixture, and regrouting and repairing tiles, in the bathroom; installing new appliances, cabinets, and tile floor in the kitchen; cleaning and painting the apartment, installing new outlets and switches, installing closet shelves, sanding and staining existing wood floors; and remediating residual smoke odors throughout the apartment. The landlord performed the work specified in the Agreement and sent a work completion notice to plaintiff's attorney on or about June 20, 2017. *See* Landlord Work Completion Notice, NYSCEF Doc. No. 22. Plaintiff then inspected the apartment and created a "punch list" of remaining or additional items of work to be done, which were addressed at a meeting in early July 2017 attended by plaintiff and her daughter, defendant, and both parties' attorneys. *See* Punch List, NYSCEF Doc. No. 23. Plaintiff moved into Apt. 7G on or about July 12, 2017. Plaintiff alleges that she informed the landlord throughout the summer of 2017 that conditions in the apartment continued to require repair and renovation, but the landlord did not respond. Verified Complaint (Complaint), NYSCEF Doc. No. 1, ¶ 11.

Plaintiff commenced this action in November 2017, alleging that defendant made some renovations and repairs pursuant to the Agreement, but inadequately addressed or ignored "outstanding conditions affecting the use and enjoyment of the subject premises." *Id.*, ¶ 10. More particularly, plaintiff alleges defendant needs to replace the new lock it installed on the apartment door with a more secure lock she retrieved from the former apartment; she cannot use the dishwasher because the water in the kitchen continues to be discolored after the lack of hot water was remediated; the bathroom is filthy and has cracked floor and wall tiles and permanent grime; problems remain with the bathroom sink, which was taken from Apt. 12G to replace the existing sink in Apt. 7G; the bathtub needs regrouting and reglazing; the temperature of the

shower water fluctuates erratically from scalding to freezing; rust exists in the bathroom; room separators are filthy; and there is no doorbell. *Id.*, ¶¶ 10, 13. In addition, plaintiff alleges that “imbedded nicotine” in the bathroom walls and intercom cord have not been adequately remediated. *Id.*, ¶ 12. Plaintiff now moves for an order permitting her to hire her own contractor to address the above issues and setting the matter down for a hearing on damages for the cost of making such repairs. *See* Zekaria Affirmation in Support of Motion, NYSCEF Doc. No. 7, ¶¶ 5-7.

Defendant answered the Complaint, asserting that it complied with its obligations under the Agreement and served discovery demands on plaintiff, to which plaintiff has not responded. To date, no preliminary conference has been held. Defendant’s cross motion seeks sanctions, including striking the Complaint, for failure to produce discovery.

### **LEGAL CONCLUSIONS:**

At the outset, defendant argues in its opposition papers that plaintiff’s motion is, in essence a motion for summary judgment, which should be denied because there are triable issues of fact. While plaintiff claims that she is not moving for summary judgment, the relief she seeks is a “declaratory judgment that the Permanent Relocation Agreement be enforced” (Zekaria Reply Affirmation, NYSCEF Doc. No. 25, at 4-5), the ultimate relief sought on her declaratory judgment claim. Based on her representations, plaintiff thus appears to be moving for partial summary judgment, limited to the fourth cause of action, and the court will treat the motion as such, without addressing the other causes of action.

It is well settled that, on a summary judgment motion, the moving party must make a

prima facie showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to demonstrate the absence of any material issues of fact. See CPLR 3212 (b); *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). If such showing is made, the opposing party then must demonstrate “the existence of material issues of fact which require a trial of the action.” *Alvarez*, 68 NY2d at 324; see CPLR 3212 (b); *Jacobsen*, 22 NY3d at 833; *Zuckerman*, 49 NY2d at 562.

The evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; see *Jacobsen*, 22 NY3d at 833), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact, or if the issue is arguable. See *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 442 (1968); *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1<sup>st</sup> Dept 2013). Further, “[i]t is not the court's function on a motion for summary judgment to assess credibility.” *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997); see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 (2012). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions.” *Asabor*, 102 AD3d at 527, quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 (1986).

In support of her motion, plaintiff argues that defendant has not complied with the terms of the Agreement and that she is entitled to a declaratory judgment to that effect, as well as an order permitting her to make repairs to her apartment and be reimbursed for the costs of making

such repairs. In the affidavit she submits with her moving papers, plaintiff attests that she does not have clean, usable water in the kitchen, is forced to buy bottled water for drinking and cleaning dishes, and cannot use the dishwasher or ice maker due to dirty water. An Affidavit in Support of Motion, NYSCEF Doc. No. 8, ¶¶ 2-5. She attests that the cold water in her bathroom sink remains tepid and the hot water faucet is broken, the shower water remains discolored and the water temperature changes suddenly and cannot be adjusted, forcing her to jump out. *Id.*, ¶ 6. Plaintiff also attests that the bathroom floor tiles are cracked and have permanent grime, the wall tiles have cracks and contain nicotine and harmful chemicals, and small yellow balls have formed on the bathroom ceiling, which she believes are the result of residual nicotine from a prior tenant who smoked. *Id.*, ¶¶ 7-9. Further, plaintiff attests, the saddles of the doors between the rooms in the apartment have built-up black grit creating a filthy condition around the door areas. *Id.*, ¶ 11. As plaintiff's counsel asserts, "[t]he main priorities are ensuring Plaintiff and her daughter have clean water in the apartment, that the water pressure be stabilized, and that the third-party smoke from the previous tenant is effectively removed." Zekaria Affirmation in Support of Motion, NYSCEF Doc. No. 7, ¶ 5. However, plaintiff submits no evidence with her moving papers regarding what objectionable conditions exist in the apartment, and makes no showing that defendant has been unresponsive to her complaints and requests.

In opposition, defendant submits an affidavit of Jay Solinsky, an agent for the landlord, who attests that defendant completed the work required under the Agreement, sent a notice to that effect to plaintiff, and worked with plaintiff to address and complete additional work requested by plaintiff; and that plaintiff moved into the current apartment after agreeing that work was completed. Solinsky Affidavit in Opposition to Motion, NYSCEF Doc. No. 14, ¶¶ 6,

7, 9. He also attests that the landlord addressed subsequent complaints from plaintiff after she took possession of Apt. 7G, to the extent that items were under its control and when access was provided. *Id.*, ¶ 8. Defendant also submits documents, including the Agreement's Scope of Work, defendant's notice of completion, the punch list of items to be addressed, and emails between plaintiff or her attorney and Solinsky regarding work to be completed in Apt. 7G before plaintiff took occupancy of the apartment. *See* Emails, NYSCEF Doc. No. 20.

In a reply affidavit, plaintiff attests that, after she filed the instant motion, problems in the apartment continued, and she reported issues to New York City's 311 Call Center, which led to an inspection of the apartment by the Department of Housing and Preservation (HPD) inspectors on March 29, 2018. Plaintiff's Reply Affidavit, NYSCEF Doc. No. 26. Plaintiff submits copies of four violations issued by HPD against the landlord for conditions in the bathroom of Apt. 7G, directing defendant to repair leaky and/or defective faucets in the bathroom sink, repair broken or defective plaster of the west wall and paint the east wall and ceiling of the bathroom, and replace the medicine cabinet. *See* HPD Report, NYSCEF Doc. No. 27. Plaintiff also attests that problems with dirty water and fluctuating water temperature continue, and she intends to have the water tested and to have the walls tested for nicotine, and she submits photographs showing brown spots on the bathroom ceiling and dirty water in a cup. Plaintiff's Reply Affidavit, ¶¶ 4-5, 7; Photographs, NYSCEF Doc. No. 29. She also represents that she hired a contractor to provide her with a proposal for work to remediate the problems, and attaches a copy of the proposal. *See* Work Proposal, NYSCEF Doc. No. 28.

In response, defendant submits evidence that, in early April 2018, it retained an environmental firm to conduct nicotine testing in Apt. 7G, and that the results indicated no

nicotine or tobacco smoke was detected. *See* Advanced Environmental Corp. Test Results, NYSCEF Doc. No. 32. Defendant also submits evidence that, following the nicotine testing, it attempted to schedule dates for access to Apt. 7G to address the HPD violations. *See* Letter, NYSCEF Doc. No. 33.

Although plaintiff's initial affidavit reflects that she may not have been satisfied with the work that was done by defendant, and has continuing complaints about conditions discovered after she moved into the apartment, she fails to establish her entitlement to summary judgment on her claim for a declaratory judgment even assuming, without deciding, that declaratory relief may be sought in this action.<sup>1</sup> Rather, the evidence before the court, including documents and other evidence submitted by defendant, and plaintiff in reply, demonstrates that there are triable issues of fact as to whether the repairs plaintiff seeks fall within the scope of work set forth in the Agreement, whether defendant has fully complied with the terms of the Agreement to repair and renovate Apt. 7G, and whether conditions as described by plaintiff exist or have been addressed by defendant or are the responsibility of defendant.

To the extent that plaintiff relies on the HPD violations to argue that defendant did not

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<sup>1</sup>Although defendant argues that plaintiff cannot seek a declaratory judgment or injunctive relief in this case because an adequate remedy is available in the Housing Part of the Civil Court, this Court does not reach that issue on this motion as defendant did not move or cross move to dismiss the Complaint except as a CPLR 3126 sanction for non-compliance with discovery demands. This Court notes, moreover, that it has the discretion to keep such an action even if landlord-tenant issues could be appropriately resolved in Civil Court, particularly where there is no pending Civil Court proceeding. *See Extell Belnord LLC v Uppman*, 113 AD3d 1, 13 (1<sup>st</sup> Dept 2013) (although court has “discretion [to] decline to review an action it considers appropriately brought in Civil Court, it is not required to do so” [citation omitted]); *but see also Brecker v 295 Cent. Park W., Inc.*, 71 AD3d 564, 565 (1<sup>st</sup> Dept 2010) (“Once a summary proceeding has been commenced in Civil Court where complete relief can be afforded to the tenant, there is no further basis for invoking the equitable jurisdiction of the Supreme Court,” absent special circumstances.)

comply with the Agreement, such violations, as defendant points out, were issued after plaintiff made this motion, address issues in the bathroom only and do not reflect the complaints made by plaintiff in the Complaint or in her initial moving papers. Defendant also has indicated its willingness to address those violations when plaintiff grants access to her apartment, and plaintiff has not established that she must seek an outside contractor to correct those violations or to make needed repairs to the bathroom.

With respect to defendant's cross motion seeking sanctions for plaintiff's failure to respond to discovery demands, plaintiff does not dispute that she has not responded, but argues that penalties under CPLR 3126 would be improper because no preliminary conference has been held and no court order has issued directing her to produce any discovery. She argues, moreover, that "[p]laintiff does not need further litigation to protect her rights . . . [and] [t]o wait another year or more depending on discovery deadlines . . . is simply not feasible." Zekaria Reply Affirmation, NYSCEF Doc. No. 25, ¶¶ 14, 13.

Contrary to plaintiff's contention, "CPLR 3126 permits a court to impose sanctions where warranted when a notice of disclosure is ignored" (*Infinity Records, Inc. v Pathe News, Inc.*, 89 AD2d 423, 426 [1<sup>st</sup> Dept 1982] [citation omitted]), and does not necessarily require a court order prior to seeking such sanctions. See *Coffey v Orbachs, Inc.*, 22 AD2d 317 (1<sup>st</sup> Dept 1964). Under the circumstances here, however, where plaintiff failed to respond to one set of demands, and defendant neither requested a preliminary conference to address discovery issues nor moved to compel responses, and no preliminary conference has yet been held, this Court will not impose sanctions as sought by defendant, but instead directs plaintiff to respond to defendant's demands by a date certain.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendant's motion is granted solely to the extent that plaintiff is directed to respond to defendant's Combined Demands dated January 12, 2018, within 30 days of the date of entry of this decision and order; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Part 2 on June 4, 2019, at 2:15 pm, which is an earlier date from the previously scheduled conference in July, at which time all outstanding discovery, including depositions, will be addressed and scheduled; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: May 2, 2019

ENTER:

  
HON. KATHRYN E. FREED, J.S.C.