

<b>Chetrit v Medusa 64 LLC</b>
2019 NY Slip Op 31522(U)
May 24, 2019
Supreme Court, New York County
Docket Number: 653228/2018
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM**

*Justice*

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JOSEPH CHETRIT,

Plaintiff,

- v -

MEDUSA 64 LLC and THOMAS SANDELL,

Defendants.

INDEX NO. 653228/2018

MOTION DATE 08/24/2018

MOTION SEQ. NO. 002

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 50, 51, 54, 55, 56, 57, 58, 60

were read on this motion to DISMISS.

Upon the foregoing documents, it is hereby ordered that defendants' motion to dismiss is denied.

Background

Defendant Medusa 64 LLC ("Medusa") is the owner of 6-story single family townhouse located at 5 East 64<sup>th</sup> Street, New York (hereafter, the "Townhouse"). Defendant Thomas Sandell is the sole member of Medusa 64 LLC. Pursuant to a lease dated August 11, 2016, which the parties renewed on May 10, 2017, Medusa rented the Townhouse to plaintiff, Joseph Chetrit, at a rate of \$65,000.00 per month. The term of the lease ended on August 31, 2018.

Chetrit alleges that almost immediately upon taking possession of the Townhouse, he and his family experienced a rodent infestation throughout the Townhouse. Chetrit further alleges that defendants hid pervasive structural and plumbing issues from him and failed to make necessary repairs, including remediating serious mold contamination and fixing flooding caused by plumbing defects. Although Chetrit asserts that there were problems with the Townhouse immediately upon taking possession, he and his wife, Nancy Cohen, allege that the most pervasive problems became apparent two months after they renewed their lease in May of 2017, alleging that Medusa's inadequate remediation attempts caused toxic mold to accumulate on the permeable, unfinished floorboards. In April 2018, Chetrit ceased paying rent.

Chetrit commenced this action on June 27, 2018, alleging the following causes of action: (1) breach of contract as against Medusa; (2) beach of implied warranty of habitability as against Medusa; (3) breach of quiet enjoyment as against Medusa; (4) fraudulent concealment as against both defendants; (5) negligence as against Medusa; (6) partial actual eviction as against Medusa; (7) partial constructive eviction as against Medusa; and (8) injunctive relief as against both defendants.

Shortly thereafter, on July 13, 2018, Medusa commenced a nonpayment action against plaintiff in the Civil Court of the City of New York, Housing Part, seeking \$195,000.00 in unpaid rent.

Defendants now move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the first, third, fourth, fifth, seventh, and eighth causes of action.

#### Discussion

The law on the dismissal of a complaint pursuant to CPLR 3211 is clear and well-settled. Dismissal pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dept 2013) (“[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law”). Dismissal pursuant to CPLR 3211(a)(7) is warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, *supra*, 84 NY2d at 87-88; see also EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) (“[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus” in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties “notice” of what is intended to be proved and the material elements of a cause of action. CPLR 3013.

#### First Cause of Action—Breach of Contract

Defendants assert that the cause of action for breach of contract should be dismissed as it is duplicative of the cause of action for breach of the implied warranty of habitability and breach of the covenant of quiet enjoyment. The Court finds this argument unpersuasive, particularly on a motion to dismiss under CPLR 3211. Winick Realty Grp. LLC v Austin & Assocs. 51 AD3d 408 (2008) (holding that because plaintiff is entitled to plead inconsistent causes of action in the alternative, the quasi-contractual claims are not precluded by the pleading of a cause of action for breach of an oral agreement). Accordingly, plaintiff’s cause of action for breach of contract survives a motion to dismiss under CPLR 3211.

#### Third Cause of Action—Breach of Covenant of Quiet Enjoyment

Defendants assert that plaintiff’s claim for breach of the covenant of quiet enjoyment should be dismissed as a matter of law because plaintiff ceased paying rent in April of 2018. However, while nonpayment of rent may preclude recovery for damages for the period following April of 2018, plaintiff may still pursue a claim for the breach of covenant of quiet enjoyment for the period before he stopped paying rent, from August 2016 through March 2018. Accordingly, defendants’ request to dismiss the third cause of action under CPLR 3211 is denied.

#### Fourth Cause of Action—Fraudulent Concealment

Defendants assert that plaintiff’s claim for fraudulent concealment must be dismissed because plaintiff did not plead its fraud claims with the particularity that CPLR 3016(b) requires. This Court disagrees. CPLR 3016(b) states that “[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful [*sic*] default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.”

‘The purpose of section 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of,’ thus, ‘[w]e have cautioned that section 3016(b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud.’ What is ‘[c]ritical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action[.]’ ... ‘Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct[.]’

Sargiss v Magarelli, 12 NY3d 527, 530-31 (2009) (citations omitted). This Court finds that plaintiff’s complaint sufficiently alleges a claim for fraudulent concealment.

However, New York Courts have long held that breaching a contract is not a tort unless the promisor violates a legal duty independent of the contract itself. E.g. Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 389 (1987) (mere breach of contract is not negligence). This is true of fraud claims. Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A., 84 AD3d 588 (1st Dep’t 2011) (“the fraud claim, which arose from the same facts, sought identical damages and did not allege a breach of any duty collateral to or independent of the parties’ agreements, was redundant of the contract claim”). Nevertheless, “if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also gave rise to the plaintiff’s breach of contract claim.” First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287, 291-92 (1<sup>st</sup> Dep’t 1999).

Here, plaintiff has alleged facts sufficient to survive a motion to dismiss under CPLR 3211, mainly—that “Plaintiff justifiably relied on Defendants [sic] representation that the Premises was [sic] and Plaintiff’s willingness to enter into the Lease would have been substantially altered had Defendants disclosed the structural and plumbing defects, mold, and the rampant rodent infestation.” Complaint, ¶ 70. Accordingly, defendants’ request to dismiss the fourth cause of action is denied.

#### Fifth Cause of Action—Negligence

As discussed *supra*, generally a breach of a contract will not give rise to a tort claim unless the promisor violates a legal duty independent of the contract itself. Here, plaintiff alleges negligence that took place after the signing of the lease by claiming that defendants’ remediation attempts were negligent. Accordingly, plaintiff’s cause of action for negligence survives a motion to dismiss under CPLR 3211.

#### Seventh Cause of Action—Partial Constructive Eviction

Defendants argue that plaintiff’s claim for partial constructive eviction should be dismissed because it is duplicative of plaintiff’s claims for breach of the covenant of quiet enjoyment and breach of the implied warranty of habitability. As discussed *supra*, plaintiff is entitled to plead theories in the alternative.

A constructive eviction occurs where “the landlord’s wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises.” Johnson v Cabrera, 246 AD2d 578, 579 (2d Dep’t 1998). Plaintiff has sufficiently pled a cause of action that plaintiff was deprived of the beneficial use and enjoyment of a portion of the Townhouse. Bernard v 345 E. 73<sup>rd</sup> Owners Corp., 181 AD2d 543, 544 (1<sup>st</sup> Dep’t 1992). Accordingly, defendants’ request to dismiss the seventh cause of action is denied.

Eighth Cause of Action—Mandatory Injunction

Plaintiff asserts a separate cause of action entitled “mandatory injunction” that seeks to compel defendants to provide plaintiff with copies of all documentation related to health hazards at the premises, including but not limited to all air-quality reports detailing observations and findings based on data collected by environmental consultants on March 2017, November 2017, December 2017 and March 2018. Plaintiff seeks a mandatory injunction as relief for its claims of breach of the implied warranty of habitability and breach of the covenant of quiet enjoyment. As both of these causes of action survive this CPLR 3211 motion, so too does plaintiff’s eighth cause of action. Hauptman v Grand Manor Health Related Facility, Inc., 121 AD2d 151 (1st Dep’t 1986).

Conclusion

For the reasons set forth herein, defendants’ motion is denied.  
*A preliminary conference has been scheduled for July 9, 2019 in Room 418 at 60 Centre Street.*

*(Signature)*

<u>5/24/2019</u>					<u>ARTHUR F. ENGORON, J.S.C.</u>
DATE					
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	