SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON **PART** IAS MOTION 42EFM

Justice

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TOP OF THE LOFTS, INC.,

Plaintiff,

- v -

ROBERT TOPOL, MICHAEL TROTTA, JUDY GEIB (COUNTER-CLAIM DEFENDANT), IWASUBURO KOHSO (COUNTER-CLAIM DEFENDANT)

Defendant.

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INDEX NO. 650282/2013

MOTION DATE 08/10/2018

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 116, 117, 118, 119, 120

were read on this motion to/for DISMISS COUNTERCLAIMS .

Plaintiff Top of the Lofts, Inc., (TOL), a residential cooperative corporation, commenced this action seeking to compel defendants/counterclaim plaintiffs Robert Topol and Michael Trotta to provide access to their apartment unit, 8B, located at 129 West 22nd Street in Manhattan, and allow construction of a corridor to bring the building into compliance with the New York City Building Code (the Code). The residents of apartment unit 8A, counterclaim-defendants Judy Geib and Iwasaburo Kohso (the CDs), had only one means of egress from the building, in apparent violation of the Code, necessitating construction of a second means of egress, or corridor. By order dated August 28, 2017, the CDs were granted leave to amend their answer to add counterclaims (MOT SEQ 002). The plaintiff now moves to dismiss the added sixth, seventh, and eighth counterclaims, alleging breach of the warranty of habitability, the issuance of a permanent injunction, and for attorneys' fees and costs, respectively, pursuant to CPLR 3211(a)(1), a defense founded upon documentary evidence, (a)(5), law of the case or collateral estoppel, and (a)(7), failure to state a cause of action. The CDs oppose the motion.

As a preliminary matter, the court notes that the seventh counterclaim seeks a permanent injunction compelling TOL to erect and/or restore the corridor in Apartment 8B.

Based upon affirmations filed by both parties in December 2017 and January 2018, counsel appears in agreement that construction of the corridor was completed on or before December 21, 2017. Indeed, in the order dated August 28, 2017, the court noted that it had previously directed that the corridor construction be completed by December 2017, which rendered academic the counterclaim defendants' request for injunctive relief. Further, in his January 2018 affirmation, plaintiff's counsel seeks dismissal only of the sixth and the eighth counterclaims. Therefore, the court deems the branch of the motion to dismiss the seventh counterclaim to be withdrawn as moot. The remainder of the plaintiff's motion is denied.

In permitting the counterclaim defendants to add the sixth and eighth counterclaims, the court found that the claims were not palpably insufficient or patently devoid of merit (see McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp., 59 NY2d 755 [1983]; 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552 [1st Dept. 2011]) and that they had stated a cause of action for the relief sought. While the counterclaim defendants may not ultimately succeed on their claims, the instant motion provides no further basis for dismissal at this juncture.

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002). That is not the case here. The plaintiff relies in large part upon an affidavit by John B. Horgan, TOL's attorney. It is well settled that affidavits do not constitute documentary evidence for the purposes of CPLR 3211(a)(1). See Amsterdam Hosp. Group, LLC v Marshall-Alan Assocs., Inc., 120 AD3d 431 (1st Dept. 2014); Kappa Dev. Corp. v Queens College Point Holdings, LLC, 95 AD3d 1178 (2nd Dept. 2012); Fontanetta v Doe, 73 AD3d 78 (2nd Dept. 2010). Furthermore, to the extent plaintiff's counsel claims no personal knowledge of the underlying facts, the contents of his affirmation are without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010). The other submissions, including certain e-mail correspondence and the report of the plaintiff's professional engineer, dated July 29, 2013, recommending a second means of egress, fall far short of conclusively establish a defense to either counterclaim. Therefore, dismissal of the counterclaims under CPLR 3211(a)(1) is not warranted.

Nor is dismissal under CPLR 3211(a)(5) warranted. TOL claims that the CDs are estopped, by the doctrine of law of the case, from bringing their claims for breach of the warranty of habitability and for related attorney's fees and costs. "The doctrine of law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (Martin v City of Cohoes, 37 NY2d 162, 165). The doctrine "applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision" (Baldasano v Bank of N.Y., 199 AD2d 184; see Gay v Farella, 5 AD3d 540; D'Amato v Access Mfg., 305 AD2d 447) "and to the same questions presented in the same case." (RPG Consulting, Inc. v Zormati, 82 AD3d 739, *citing* People v Evans, 94 NY2d 499, 502; see Matter of McGrath v Gold, 36 NY2d 406, 413; Erickson v Cross Ready Mix, Inc., 98 AD3d 717)." Ramanthan v Aharon, 109 AD3d 529, 530 (2nd Dept. 2013).

In so arguing, the plaintiff relies upon a previous order of this court (Scarpulla, J.), dated March 6, 2013, which summarily denies its motion for a preliminary injunction, and argues that the court also decided the issue of whether the lack of the corridor constituted a breach of the warranty of habitability since the court found that the plaintiff failed to show "immediate, irreparable harm." The plaintiff's argument is simply erroneous. Among other reasons, the plaintiff does not demonstrate that the CDs were parties at the time the preliminary injunction was litigated such that the likelihood of "immediate and irreparable harm" to them was assessed. Moreover, it appears from the submissions that the plaintiff is falsely equating "irreparable harm" with a condition that is "dangerous, hazardous or detrimental to the life, health or safety." See Real Property Law § 235-b. It can not be disputed that the showing necessary to prevail on a preliminary injunction motion is not identical to the showing necessary to defeat a motion to dismiss a claim for breach of warranty of habitability pursuant to CPLR 3211(a).

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within

any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026. "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977). Applying these standards, the CDs counterclaims sufficiently states a cause of action for warranty of habitability and attorney's fees.

To establish a breach of the warranty of habitability, there must be a written or oral lease or rental agreement, and either 1) a condition that makes the premises unfit for human habitation, or 2) any conditions which would be dangerous, hazardous or detrimental to the life, health or safety of the tenant. See Real Property Law § 235-b; Park W. Mgmt. Corp. v. Mitchell, 47 NY2d 316, 328 (1979).. In this case, there is no dispute as to the existence of a proprietary lease between the parties and the CDs allege that the lack of a second egress was a dangerous or hazardous condition that threatened their life, health and safety. That allegation is supported by the apparent Building Code violation arising from the lack of egress corridor. While the CDs success at trial is not certain, particularly in light of the difficulty of establishing damages on such a claim, the allegations of the counterclaim are sufficient to defeat the plaintiff's motion.

To establish a cause of action for attorney's fees there must be a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept 1976). The subject lease contains a provision authorizing TOL to recover reasonable attorney's fees for proceedings related to the lessee's default on obligations under the lease and, as provided for under Real Property Law § 234, a reciprocal right to attorney's fees is provided to the counterclaim-defendants as lessees. As such, the CDs claim for attorneys' fees arising from the plaintiff's alleged default under the lease for breach of the warranty of habitability is a cognizable claim such that dismissal of the counterclaim is not warranted.

In light of the above, only the sixth and eighth counterclaims remain for trial.

Accordingly, and upon the foregoing papers, it is,

ORDERED that the branch of the plaintiff's motion which is to dismiss the seventh counterclaim of the counterclaim-defendants Judy Geib and Iwasaburo Kohso is deemed withdrawn as moot, and it is further,

ORDERED that the branch of the plaintiff's motion which is to dismiss the sixth and eighth counterclaims is denied.

This constitutes the Decision and Order of the Court.

10/4/2019
DATE

NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE