

Motichka v MP 1291 Trust
2020 NY Slip Op 31373(U)
May 15, 2020
Supreme Court, New York County
Docket Number: 160158/2013
Judge: James E. d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM

Justice

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JOANNE MOTICHKA,

Plaintiff,

- v -

MP 1291 TRUST, ELI'S BREAD (ELI ZABAR), INC. D/B/A
EAT, ELI'S ESSENTIALS

Defendant.

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INDEX NO. 160158/2013

MOTION DATE 05/08/2019

MOTION SEQ. NO. 004

**DECISION + ORDER
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 168, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 235, 236, 237, 238, 239, 240, 241

were read on this motion to/for PENDENTE LITE.

Upon the foregoing documents, the motion and cross-motion are resolved as follows:

Plaintiff-tenant Joanne Motichka (“tenant”) resides in a rent stabilized apartment located at 1291 Lexington Avenue in Manhattan (the “building”), which is owned by defendant-landlord MP 1291 Trust (“landlord”). Landlord moves for an order compelling tenant to pay use and occupancy for her apartment during the pendency of this action at the rent in effect during the last rental period, i.e., \$929.80 per month, as well as arrears in the aggregate amount of \$16,346.26. Tenant cross-moves for: (a) a temporary injunction barring defendant-commercial tenant Eli’s Bread (Eli Zabar), Inc. d/b/a EAT (“Eli’s Bread”) from using its cappuccino machine, steaming milk, using steam trays and tables, using electric stove tops, or using its toaster-oven food warmer; (b) leave to serve an amended complaint; and (c) an order compelling certain discovery. Eli’s Bread is located on the ground floor of the building directly beneath

tenant's apartment and sells a variety of foods, including soups and coffee, some of which is prepared, or at least warmed up, on site.

Use and Occupancy/Rental Arrears Against Tenant

Tenant alleges that landlord has left tenant's apartment in disrepair, which has been the subject of numerous complaints to the HPD. In particular, the tenant alleges, inter alia, that the floors are insufficiently insulated, that there is substantial mold throughout the apartment, and that the general poor condition of the apartment, compounded by the presence of Eli's Bread below, has attracted mice, rendered her ill and left her apartment uninhabitable. Tenant claims that as a result of these conditions, she has not paid any rent since 2017, and acknowledges that she paid rent only sporadically between 2013 and 2017. Landlord seeks an order for tenant to pay landlord for use and occupancy, as well as the outstanding rental arrears.

Tenant asserts that the remedy of an order to pay use and occupancy may be granted only in cases implicating eviction remedies in special proceedings governed by Article 7 of the RPAPL and therefore is not available in this plenary action. Tenant also asserts that between 2014 and 2018, her apartment was not registered with the New York State Division of Housing and Community Renewal (DHCR) and therefore, tenant's rent should be frozen at the amount registered in 2013, which was \$852.27.

As the Appellate Division, First Department made clear in *Levinson v. 390 West End Associates, LLC*, 22 A.D.3d 397, 403 (1st Dep't 2005), "[c]onsistent with Real Property Law section 220, it has long been held that a dispute concerning the amount of rent owed is no reason to allow a tenant to occupy the landlords real property gratis." See also, *Oxford Towers Co., LLC v Wagner*, 58 A.D.3d 422 (1st Dep't 2009); *Wasserman v. Gordon*, 24 A.D.3d 201 (1st Dep't 2005). Further, the court finds no authority supporting tenant's contention that the remedy

of an order to pay use and occupancy is available exclusively in a special proceeding and cannot be sought by a landlord in the context of this plenary action. *See, e.g., Dugan v London Terrace Gardens, LP*, 177 AD3d 1 (1st Dep't 2019) (use and occupancy granted in action challenging the deregulation of apartments).

While the issues raised by the tenant might ultimately permit certain mitigation, tenant is not entitled to live rent free. Accordingly, under the circumstances it is appropriate to order the tenant to pay, prospectively, monthly use and occupancy, commencing on the date as directed below in this order, in the amount of \$852.27 per month. The issue of whether tenant owes the greater rent (\$929.80), as landlord reports has now been registered with DCHR retroactively, can be addressed at trial.

The court is denying that portion of landlord's motion that seeks payment of rent arrears. Landlord could have requested use and occupancy at any time after this action was commenced in 2013. To require tenant, at this time, to pay a large lump sum, which may be found is not owed or should be mitigated, and which has grown large because of landlord's inaction, would be unjust.

Injunction Against Eli Bread

Tenant seeks an injunction against defendant Eli Bread, the commercial tenant occupying the space directly below tenant's apartment. Tenant previously requested injunctive relief against Eli Bread, which the Court declined to grant. NYSCEF Doc. No 71. The Appellate Division affirmed that decision. *Motichka v MP 1291 Trust*, 136 A.D.3d 445 (1st Dep't 2016). Despite certain differences in wording between the two applications, the injunction that tenant previously sought, like the one she seeks now, would, in effect, likely require Eli's Bread to shut down its business. “[A]n appellate court’s resolution of an issue on a prior appeal constitutes

the law of the case and is binding on the Supreme Court, as well as on the appellate court.”
Matter of *Brodsky v New York City Campaign Fin. Bd.*, 107 A.D.3d 544, 546 (1st Dep’t 2013),
quoting *Board of Mgrs. of the Charles St. Condominium v Seligson*, 106 A.D.3d 130, 135 (1st
Dep’t 2013); *see also, R.F. Shiffman Assoc., Inc. v Baker & Daniels LLP*, 171 A.D.3d 657, 657
(1st Dep’t 2019). Even if the decision on the prior motion was not the law of the case because of
some difference between the previous motion for injunctive relief and the current application, the
Court would still deny the injunctive relief sought as tenant has failed to show her entitlement for
such relief. Additionally, plaintiff’s counsel has acknowledged that the tenant would not likely
be able to post a bond in an amount that would reasonably compensate Eli’s Bread for the
negative impact on its business should she be granted the injunction preliminarily, but then
ultimately lose on the issue at trial.

Leave to Amend the Complaint

A motion for leave to amend a pleading may be made at any time (CPLR 3025 [b]), but it
will be denied where the proposed pleading “is palpably insufficient as a matter of law”
(*Aerolineas Galapagos, S.A. v Sundowner Alexandria, LLC*, 74 A.D.3d 652, 652 [1st Dep’t
2010]), or where the amendment would cause prejudice to the opposing party. *Global Liberty
Ins.Co. v Tyrrel*, 172 A.D.3d 499, 500 (1st Dep’t 2019).

Tenant’s initial complaint alleged six causes of action. Her proposed First Amended
Verified Complaint (the “proposed amended complaint”) alleges sixteen. In the Fourth cause of
action of the proposed amended complaint, apparently mis-titled as “Negligence,” tenant asserts
a breach of contract action against Eli’s Bread under a third-party beneficiary theory based on
the side letter of the lease between landlord and Eli’s Bread, which purportedly incorporates an
agreement between landlord and an earlier tenant of the space that Eli’s Bread currently

occupies. While this claim may ultimately fail, it is not “palpably insufficient” or “completely devoid of merit.” Tenant is granted leave to amend to the extent of including the proposed breach of contract claim against Eli’s Bread under a third-party beneficiary theory.

The Seventh cause of action seeks damages for breach of the covenant of quiet enjoyment. Inasmuch as tenant has withheld rent, she has elected her remedy and, therefore, can recover such damages only for the period commencing with her first payment of use and occupancy. *E-Z Eating Corp. v H.E. Newport, LLC*, 171 A.D.3d 415, 415 (1st Dep’t 2019); *Parker v Marglin*, 56 A.D.3d 374, 374 (1st Dep’t 2008). Accordingly, the Court will permit this proposed amended cause of action, but damages will be limited only to the period of time during which tenant has paid use and occupancy as ordered by the Court herein.

The proposed Eighth and Ninth causes of action for “Rent Abatement” are both duplicative of the existing Third cause of action for “Breach of Stipulation.” Both causes of action arise from an alleged breach of the stipulation of settlement and seek damages for landlord’s failure to control Eli Bread’s use of the premises. Indeed, the proposed Eighth cause of action has a subtitle that reads “Plaintiff is Entitled to a Full Rent Abatement: Breach of The Stipulation.” The Ninth cause of action is also duplicative of the sixth cause of action, “Breach of the Warranty of Habitability.” Thus, the proposed Eighth and Ninth causes of action are already pled in the Third and Sixth causes of action of the original complaint and would be duplicative. Moreover, whether plaintiff is entitled to a rent abatement is a form of mitigation on damages, not an independent cause of action theory of liability.

The Tenth cause of action, which alleges a rent overcharge, is based solely upon landlord’s failure to register the rent with DHCR, which landlord asserts has been remedied retroactively by way of registration with DHCR. Affidavit of Ann Gregory, NYSCEF Doc. No.

204. Landlord also asserts that the rent amount of \$929.80 is proper under the signed lease. *See*, NYSCEF Doc. No. 156. Notwithstanding the affidavit and documents provided by landlord, the Court will not, essentially, grant summary judgment on this claim at this time based on the representation of the landlord in this context and will allow a rent overcharge claim to be added to an amended complaint.

The Eleventh cause of action entitled “Damage to Personal Property” fails to state a cognizable independent cause of action and, in any event, is duplicative of several already existing causes of action that already seek such relief. Additionally, the proposed claim fails to link specific actions taken by the defendants to specific damages. Rather, the tenant merely states that “[a]s a result of the defendant’s breaches” tenant’s property was destroyed, and she had to “move” their property. *See*, NYSCEF doc. No. 192.

Causes of action Twelve (“Intentional Infliction of Emotional Distress”) and Thirteen (Negligent Infliction of Emotional Distress) are barred by the statute of limitations. The limitations period on a claim for intentional infliction of emotional distress (IIED) is one year from the date of injury [CPLR 214; *see also*, *Belissimo v. Mitchell*, 122 A.D.3d 560 (2nd Dep’t 2014)], and three years for a claim for negligent infliction of emotional distress (NIED) [CPLR 215; *see also*, *Yong Wen Mo v. Gee Ming Chan*, 17 A.D.3d 356 (2nd Dep’t 2005)]. Here, the tenant’s proposed claims for IIED and NIED are both time-barred as tenant alleges she sought treatment from a mental health care professional as early as 2013 until 2015 and tenant’s cross-motion for leave to assert an amended complaint was filed in 2019. Moreover, even if not time-barred, there are no facts alleged that would sufficiently give rise to claims for IIED or NIED. Additionally, the claims would be duplicative of the existing nuisance claim in terms of the availability of damages for emotional distress.

The Fourteenth cause of action, referenced as “Personal Injury”, seeks to recover for personal injuries allegedly arising from the alleged negligent acts of the landlord (the current Fifth cause of action) and the nuisance created by Eli’s Bread (the current Fourth cause of action). If a jury were to find the defendant liable for either or both of those causes of action, tenant would potentially recover for her personal injuries under those causes of action. The proposed Fourteenth cause of action is therefore disallowed as duplicative.

The proposed Fifteenth cause of action for punitive damages lacks any merit as a punitive damages claim cannot stand on its own as an independent cause of action for pleading purposes. *Fiesel v. Nanuet Properties Corp*, 125 A.D.2d 292 (2nd 1986); *Peter A. Brandenburg v. Blue Cross and Blue Shield of Greater New York*, 78 A.D.2d 534 (2nd Dep’t 1980); *Paul Sanfilippo v. Metropolitan Life Insurance Co.*, 74 A.D.2d 600 (2nd Dep’t 1980); *Louise Yates v. Chrysler Corporation and Chrysler Credit Corporation*, 79 A.D.2d 656 (2nd Dep’t 1980). Moreover, the Court sees no facts pled that would give rise to punitive damages so as to permit such damages claim to be added to the addendum.

The Sixteenth cause of action of the proposed amended complaint, which seeks an award for attorney’s fees, is duplicative of the sixth cause of action in the original complaint, which also seeks attorney’s fees. Additionally, recovery of attorney’s fees is a form of damages made available by contract or statute and not an independent cause of action or theory of liability. *See, Condominium v. Walker Street, LLC* 774 6 A.D.3d 279 (1st Dep’t 2004) (award of attorney’s fees permitted only if the moving party proffer an agreement or evidence of an agreement that stipulates for such an award).

Tenant's Motion to Compel Discovery

Tenant did not file an affirmation that her counsel has met with opposing counsel in an effort to resolve her issues pertaining to discovery. *See*, Uniform Rule 202.7. In any event, while the motion to compel is denied without prejudice, the Court orders a status conference by telephone on June 4, 2020 at 11:00am to discuss these and any other outstanding discovery disputes.

Accordingly, it is hereby

ORDERED, that the motion of defendant MP 1291 Trust is granted to the extent that plaintiff Joanne Motichka is directed to pay use and occupancy to tenant, at the rate of \$852.27 monthly, commencing on the first of the month immediately subsequent to defendant MP 1291 Trust's service upon plaintiff of a copy of this order with notice of entry, and each month by the first of the month thereafter; and it further

ORDERED, that the remainder of defendant MP 1291 motion is denied; and it further

ORDERED, that that the branch of plaintiff Joanne Motichka's cross-motion that seeks a preliminary injunction against defendants is denied; and it is further


ORDERED, that that the branch of plaintiff Joanne Motichka's cross-motion that seeks leave to amend her complaint is granted to the extent of granting plaintiff leave to include in a First Amended Verified Complaint the proposed Fourth, Seventh and Tenth causes of action to the extent consistent with the instant decision, upon condition that plaintiff file and serve the second amended complaint upon defendants within 60 days of this decision and order, along with a copy of this decision and order with notice of entry; and it is further

ORDERED, that the remainder of the branch of plaintiff Joanne Motichka's cross-motion seeking leave to amend her complaint is denied; and it is further

ORDERED, that the branch of plaintiff Joanne Motichka's cross-motion seeking to compel discovery is denied without prejudice; and it is further

ORDERED, that a status conference by telephone will be held on June 4, 2020 at 11:00am and that counsel will contact the Court via email at jszellan@nycourts.gov prior to that date to arrange the details of the conference call; and it is further

ORDERED, that all other relief sought by the parties not expressly granted herein is denied.

5/15/2020			
DATE			JAMES EDWARD D'AUGUSTE, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>
			DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>
			NON-FINAL DISPOSITION
			GRANTED IN PART
			OTHER
			SUBMIT ORDER
			FIDUCIARY APPOINTMENT
			REFERENCE