Jobe v Chelsea Hotel Owner, LLC
2020 NY Slip Op 33588(U)
October 28, 2020
Supreme Court, New York County
Docket Number: 161445/19
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 8

LINDA JOBE, et al

INDEX NO. 161445/19

MOT. DATE

- v -

MOT. SEQ. NO. 001

CHELSEA HOTEL OWNER, LLC

The following papers were read on this motion to/for dismiss

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).________
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).________
Replying Affidavits NYSCEF DOC No(s).________

Defendant Chelsea Hotel Owner, LLC (CHO or defendant) moves pursuant to CPLR § 3211(a)(2) and (7) to dismiss plaintiffs Linda Jobe's (Jobe) and Thomas Poss' (Poss) (collectively Plaintiffs) verified complaint. Plaintiffs oppose the motion. The court's decision is as follows.

FACTS

The following facts are alleged in the verified complaint. Plaintiffs Jobe and Poss are rent stabilized tenants in apartments 1A and 1B, respectively, at 229 West 22nd Street, New York, New York (the Building). Defendant Chelsea Hotel Owner is the owner and landlord of the Building that is located at 222 West 23rd Street in Manhattan. The Building is residential and contains eight apartments. There is an underground tunnel that runs from the Hotel Chelsea at 222 West 23rd Street into the basement of the Building that provides central steam heating and hot water to the apartments in the Building. Defendant has undertaken to upgrade the heating system in the Building and the Hotel Chelsea, which involves replacing the steam heating with metered electric heating in the Building which is charged to the individual apartments. Plaintiffs allege that their residential lease requires that "steam heat" be furnished to their respective apartments without charge. Plaintiffs claim that when the steam heat was cut off by defendant, plaintiffs were provided with "hazardous electric space heaters".

Plaintiff alleges that CHO is "required to gain a certificate of no harassment (CONH) from HPD prior to obtaining permits from DOB for work involving full or partial demolition of the building, application for a new or amended certificate of occupancy or for the removal of a central heating system and replacement with an individually metered heating system at this building".

Plaintiffs further allege that defendant has caused the building "to be damaged and severely distressed" and has failed to provide basic services. Specifically, plaintiffs' complaint of "chronic rodent and moth and other insect infestation…", "chronic waste-line failures and back-ups…", "…keeping windows in va

Dated: 10/28/20

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☒**GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

cant apartments…open, causing freezing conditions…, "chronic loss of fire safety…including failure to adequately maintain, inspect and pressure test the building's residential sprinkler system, failure to maintain smoke and carbon monoxide detecting devices, cutting off central steam heat….and offering hazardous electric space heaters", elimination of central steam heat…installing unsafe and inadequate electric heating throughout the building".; chronic failure to clean and maintain the public areas of the building", chronic failure to provide extermination service at the building", "chronic failure to provide notice of water and electrical shutoffs", "chronic security and safety hazard at the entrance to the 22nd street building", "chronic storing of garbage…in the underground tunnel, directly under the Jobe and Poss apartment…", "chronic lighting outages…", and "chronic use of the basement…as a smoking area by CHO staff…"

In their verified complaint, plaintiffs assert six causes of action against the defendant: [1] injunctive relief based on the leases for plaintiffs' respective apartments; [2] breach of warranty of habitability on behalf of Jobe and Poss; [3] private nuisance on behalf of Jobe and Poss and [4] harassment on behalf of Jobe and/or Poss.

Defendant moves to dismiss plaintiffs' claims for 1) injunctive relief because plaintiffs failed to exhaust their administrative remedies; 2) failure to state a claim for breach of warranty of habitability; 3) failure to adequately plead claims for private nuisance; and 4) failure to state a claim for harassment. Plaintiffs oppose the motion and argue that the six causes of action in the verified complaint state a cause of action cognizable at law.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]. The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]). A motion to dismiss the complaint for failure to state a cause of action "will generally depend upon whether or not there was substantial compliance with CPLR 3013." *Catli v Lindenman*, 40 AD2d 714, 337 NYS2d 46 [2d Dep't 1972] If the allegations are not "sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved and the material elements of each cause of action", the cause of action will be dismissed. *Id*.

CPLR 3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

Injunctive Relief

First, defendant argues that plaintiffs' failure to exhaust their administrative remedies is fatal to their claim for injunctive relief and therefore must be dismissed. Defendant further argues that whether it is required to obtain a certificate of no harassment, an amended certificate of occupancy or proper permits, these matters are squarely within the jurisdiction of HPD and DOB, not this court.

Plaintiffs' opposition asserts that the facts as alleged within "the four corners of the Verified Complaint fall well within a cognizable claim for injunctive relief". Plaintiffs further argue that defendant's plan to replace the steam heat with electric metered space heaters is in violation of the leases, that a favorable inference must be drawn as to the immediate and irreparable harm of fire and as alleged in paragraph 43 of the verified complaint, of sewage and waste line freeze-ups, resulting waste back-ups, water lines freezing, and wood floors freeze, which threatens plaintiffs in defendant's attempt to substitute the steam heat for electric heat. Otherwise, plaintiffs contend that defendant is required to obtain a certificate of no harassment or a waiver and that defendant carried out the repairs without applying for an amended certificate of occupancy.

In reply, defendant maintains that "plaintiffs do not contend that they have exhausted administrative remedies, thus conceding the point" and instead "seek to reframe their claim as 'rooted in contract' and therefore allegedly exempt from DOB's jurisdiction." Defendant argues that even plaintiffs' claims for injunctive relief are not subject to the exhaustion requirement, they should still be dismissed because plaintiffs fail to allege several necessary elements to obtain such relief, including that the equities tip in their favor and that they are likely to succeed on the merits.

Plaintiffs' request for injunctive relief fails as a matter of law. To sustain a claim for injunctive relief plaintiff must demonstrate a likelihood of success on the merits, irreparable injury absent the granting of the preliminary injunction, and a balancing of the equities in their favor. *Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]; *see also 1234 Broadway LLC v. West Side SRO Law Project*, 86 AD3d 18 [1st Dept 2011].

Plaintiffs argue that their claim for injunctive relief is based upon their leases and that DOB has no jurisdiction to reform the terms of the leases between landlord and tenant. Thus, they assert that a favorable inference must be drawn for their probability of success on the contract claim. These arguments are rejected. Plaintiffs have failed to explain why/how the equities tip in their favor and are completely silent as to their likelihood of success. Moreover, DOB records show that DOB issued at least three work permits to the Building between August 2019 and November 2019 that authorized "general wiring" and "service work" projects, such as "electrical circuits and heaters for floors 1-4 and for apts" including plaintiffs, and "installing power for electric hot water tank and control valve". Publicly filed DOB records show that there were four complaints filed in November 2019 immediately prior to the filing of the instant action which complaints alleged "construction work…without a permit", "work being done on the steam heat pipe" in violation of a "stop work order", removal of "the steam heating plant" and "violation of a certificate of non-harassment". The evidence submitted vis a vis the permits and complaints show that inspections were conducted and that there was "no violation warranted for complaint at the time of inspection".

Plaintiffs are required to avail themselves of agency process and exhaust their administrative remedies before requesting relief from this court. *See, Queens Neighborhood United v. New York City Dep't of Buildings,* 62 Misc. 3d 1210(A) [Sup. Ct. N.Y. City 2019] If plaintiffs believe that HPD and/or DOB have erred vis a vis a CONH and/or an amended CO, plaintiffs' recourse is to challenge those agencies' actions rather than commence a plenary action. This court does not sit appellate to HPD or DOB. Otherwise, plaintiff's opposition is completely silent on the exhaustion of remedies and instead plaintiffs feebly argument that their claims for injunctive relief are "rooted in contract". No matter how plaintiffs' couch their claims, they are not excused from exhausting their administrative remedies before commencing an action in this court.

Based on the foregoing, plaintiffs' 1st cause of action is severed and dismissed.

Warranty of Habitability

Next, defendant argues that plaintiffs' claims for breach of warranty of habitability fails to state a claim, not only for being vague and conclusory, but also because plaintiffs do not allege how the purported poor conditions of the Building substantially impact their health and safety or that defendant had notice of the alleged issues.

Plaintiffs claim that their complaint contains "fifteen (15) subparagraphs of specific allegations of detrimental, dangerous and chronic conditions…" as outlined in paragraph 58 of their complaint. Plaintiffs list issues such as rodent, moth and insect infestation, waste line failures and back-ups in the Poss apartment and in the Building, windows in vacant apartments left open, chronic loss of fire safety in the building and in Poss and Job apartments including failure to inspect and maintain the sprinkler system, failure to maintain smoke detectors, cutting off steam heat in October 2019, elimination of steam heat and installing unsafe and inadequate electric heat, failure to clean public areas of the building, failure to

provide extermination services, failure to notify of water and electric shut offs and front door of building does not close or lock properly.

To prove a claim for breach of the warranty of habitability, plaintiffs must show the extensiveness of the breach, the manner in which it affected the health, welfare or safety of the tenants, and the measures taken by the landlord to alleviate the violation. *See, Park W. Mgt. Corp.v. Mitchell,* 47 NY2d 316, 418 NYS2d 310[1979]. "A landlord is not required to ensure that the premises are in perfect or even aesthetically pleasing condition". *Id* at 328

Here, plaintiffs provide a laundry list of building issues that allegedly deprive them of essential functions and claim they have impacted their health, safety and/or welfare. On its face, the list of issues is concerning to anyone's health and safety. However, the laundry list of alleged "chronic failures" lack any factual support and are therefore too vague and conclusory to apprise the defendant of the specific nature of plaintiff's claims so it can properly mount a defense.

Plaintiffs claim for an abatement of rent since 2013 and the allegations that defendant has behaved unreasonably, consciously, willfully, wantonly, recklessly and/or deliberately is rejected. Here, not only do plaintiffs fail to provide any specificity for the claim for damages, but also have failed to plead how defendant's behavior rises to a sufficiently egregious level thereby warranting punitive damages. Since plaintiffs have not stated claims for breach of warranty of habilitation, their claims for a rent abatement and punitive damages also fails.

Finally, plaintiffs' claims that defendant had actual and/or constructive notice of the alleged conditions in need of repair in the building is rejected. In addition to the reasons set forth above, plaintiffs' allegations concerning "chronic" conditions over "years" are too vague and unparticularized as to the alleged conditions and there are insufficient facts to establish defendants' notice of the alleged issues.

Based on the foregoing, plaintiffs 2nd and 3rd causes of action are also severed and dismissed.

PRIVATE NUISANCE.

To prove private nuisance, plaintiff must allege "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act". *61 W. 62 Owners Corp. v. CGM EMP LLC*, 77 AD3d 330 [1st Dept. 2010] *aff'd as modified and remanded*, 16 NY3d 822 [2011].

To constitute a nuisance, the use of property must interfere with a plaintiffs' interest in the use and enjoyment of their leasehold (*see* Restatement [Second] of Torts § 821D; *see also Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169 [1977]). The term "use and enjoyment" encompasses the pleasure and comfort derived from the occupancy of land and the freedom from annoyance (*see* Restatement [Second] of Torts § 821D, Comment b; *see also Nussbaum v Lacopo*, 27 N.Y.2d 311, 315, 317 N.Y.S.2d 347 [1970] However, not every annoyance will constitute a nuisance (*see* 2 Dolan, Rasch's Landlord and Tenant--Summary Proceedings § 30:60, at 465 [4th ed]). Nuisance imports a continuous invasion of rights--"a pattern of continuity or recurrence of objectionable conduct" *Frank v Park Summit Realty Corp.*, 175 A.D.2d 33, 34, 573 N.Y.S.2d 655 [1st Dept 1991], *mod on other grounds,* 79 N.Y.2d 789, 579 N.Y.S.2d 649 [1991]).

Here plaintiffs argue that they have set forth sufficient factual allegations pertaining to "defendant's persistent and recurring course of conduct of harassing plaintiffs, including defendant's numerous failures to act, in a "chronic" invasion of plaintiff's right to use and enjoy the premises as a tenant of her apartment". Plaintiffs further argue that the Building is "kept by CHO in a dilapidated, unclean, vermin-infested , and distressed condition", the Building has been cited for numerous pending violations by different municipal agencies arising from the owner's "failure to adequately maintain, inspect and pressure test the Building's residential sprinkler system", that the Building is categorized by HPD as "a building in

a high level of physical stress that steam heat was cut off in the Fall of 2019 without notice, etc. and that these allegations including those in the complaint are amply pled to withstand a motion to dismiss.

The court disagrees. As defendant correctly points out, the complaint offers a "laundry list of purported defects but is silent on the impact that these defects had on Plaintiffs use and enjoyment of the building". These conclusory allegations, without more, are insufficient to state a claim for private nuisance. Plaintiffs regurgitate the same vague and conclusory allegations for each cause of action in the complaint which fails to satisfy the basic pleading requirement.

Based on the foregoing, plaintiffs' 4th and 5th causes of action are severed and dismissed.

HARASSMENT

Finally, plaintiffs argue that they stated a claim for harassment because "on or about September 25, 2017, defendant attempted to physically take the garden area of the Poss apartment for its own commercial use…, that "CHO has substantially interfered with the comfort and safety of Jobe and Poss…", caused "repeated interruptions or discontinuances of essential services", failed to correct hazardous or immediately hazardous violations…" and "failed to properly maintain, inspect and pressure test the sprinkler system…".

Defendants argue that plaintiffs sixth cause of action for harassment should be dismissed because New York does not recognize a common-law cause of action for harassment. Defendant further contends that plaintiffs "vague and conclusory allegations that Defendant 'has engaged in a course of conduct that is intended to harass tenants and occupants are insufficient to state a claim for harassment" and that plaintiffs have not pled any facts showing that defendant's alleged acts or omissions either caused or intended to cause plaintiffs to vacate their apartments.

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The court agrees with defendant. "New York does not recognize a common-law cause of action for harassment". *Edelstein v. Farber,* 27 AD3d 202 [1st Dept 2006] To the extent that any of the allegations of harassment are based on "physical conditions of a dwelling or dwelling unit, such allegations must be based in part on one or more violations of record issued by the department [DHPD] or any other agency." NYC Administrative Code §27-2115(h)(2)(i). It is undisputed that the complaint does not allege that the Building has any violations of record. Therefore, plaintiffs' claims for harassment fail.

Based on the foregoing, plaintiffs' 6th cause of action for harassment is also severed and dismissed.

Accordingly, it is hereby

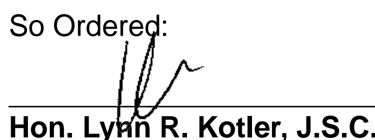
ORDERED that defendant's motion to dismiss is granted and plaintiffs' complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 10/28/20
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.