

<b>Rosado-Gonzalez v Mazal LLC</b>
2020 NY Slip Op 33703(U)
October 29, 2020
Supreme Court, Kings County
Docket Number: 527824/2019
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 9

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GLENDALIZ ROSADO-GONZALEZ,

Plaintiff,

-against-

MAZAL LLC and MAYLE REALTY GROUP, LLC,

Defendants.

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DECISION/ORDER

Index No. 527824/2019

Mot. Seq. No. 1 & 2

Dated Submitted:10/29/20

Recitation, as required by CPLR §2219(a), of the papers considered in the review of defendants' motion for summary judgment and plaintiff's motion to consolidate.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed .....	<u>6-10, 14-21</u>
Answering Affidavits .....	_____
Reply Affidavits .....	_____

**Upon the foregoing cited papers, the Decision/Order on these motions is as follows:**

Defendants move, in Mot. Seq. #2, for summary judgment dismissing all of the plaintiff's causes of action other than those for breach of the warranty of habitability and breach of contract.<sup>1</sup> This motion is not opposed. For the reasons which follow, the motion is granted. Plaintiff moves, in Mot. Seq. #1, for an order consolidating this action, in which she is the sole plaintiff, with a related action, 515807/2015, in which she

<sup>1</sup> In any event, the presence of bed bugs may constitute a breach of the warranty of habitability. See e.g. *Tafate v Gucciardo*, 2014 N.Y. Misc. LEXIS 536; *Valoma v G-Way Management, LLC*, 29 Misc3d 1222(A), 918 N.Y.S.2d 401 (Civ Ct, Kings Co 2010); *Bender . Green*, 24 Misc3d 174, 874 N.Y.S.2d 786 (Civ Ct, NY Co 2009); *Ludlow Properties, LLC v Young*, 4 Misc3d 515, 780 N.Y.S.2d 853 (Civ Ct, NY Co 2004).

is plaintiff solely in her capacity as parent and natural guardian for her two children. The motion is not opposed. Plaintiff's motion is granted to the extent that a separate order is issued simultaneously herewith granting a joint trial for the two actions. Consolidation for all purposes is not possible, as the children cannot sue for breach of contract, and their causes of action are not identical to those of their mother's, partly because the actions were brought four years apart.

With regard to plaintiff's first cause of action, for negligence, the motion is granted and this claim is dismissed. Defendants argue that this claim is barred by the statute of limitations, reading her complaint to say that she was bitten by bed bugs on January 28, 2015. However, the complaint states that the negligence took place "from January 28, 2015 to the present." To determine this branch of the motion, the court referred to E-file Documents 18 and 19, which are the transcripts of plaintiff's EBT in her children's suit. She testified that she called an exterminator and paid the company herself, that her furniture was thrown out, as were many other things, including her sofa, clothes and her children's stuffed animals, and she replaced the furniture, sometimes more than once. The exterminator came five times to treat the condition, as her landlord did not respond to her calls. The last "episode" of bed bugs was in February of 2016 [Doc 19 Page 8]. The last receipt for the exterminator was for a visit on May 20, 2016. She testified that at this visit, they used a different treatment. For the earlier treatments, plaintiff had asked for "organic" chemicals to be used, as she is asthmatic [Doc 18 Page 79]. Presumably this May 2016 treatment put an end to the problem, as there were no more exterminator visits. This action was commenced on December 23, 2019. As a claim for negligence has a three-year statute of limitations, it is time barred.

The next cause of action that defendants seek to dismiss is the Third, for “Reckless Cause of Action for Prior Notice.” Defendants claim this cause of action should be dismissed under CPLR 3211 (a) (5) and (a) (7) as it is both barred by the statute of limitations and fails to state a claim. The complaint states that the claim is that defendants “took no steps to remedy the condition, illegally delegated their duty to remedy the conditions to individual tenants, and acted recklessly in allowing the condition to spread throughout the building including Plaintiffs' apartment.” This does not state a claim recognized in New York law, or is part of the claim for breach of the warranty of habitability and not a separate claim. It is dismissed.

The next cause of action that defendants seek to dismiss is the Fourth, for constructive eviction. Defendants correctly aver that the statute of limitations for this cause of action is one year (See *Kent v 534 E. 11th St.*, 80 AD3d 106 [1st Dept 2010]). Further, it is duplicative of her breach of the implied warranty of habitability claim (see *Elkman v Southgate Owners Corp.*, 233 AD2d 104, 105, 649 N.Y.S.2d 138 [1st Dept 1996] [dismissing a claim for partial constructive eviction as duplicative of a cause of action for breach of implied warranty of habitability]). Moreover, the measure of damages for constructive eviction “is limited to rent abatement” (*Walls v Prestige Mgt., Inc.*, 73 AD3d 636, 636, 900 N.Y.S.2d 867 [1st Dept 2010]) rather than the damages plaintiff seeks. Finally, constructive eviction “may only be asserted defensively” (*Musk v 13-21 E. 22nd St. Residence Corp.*, 2012 NY Slip Op 33021[U], [Sup Ct, NY County 2012]). This cause of action is dismissed.

The next cause of action that defendants seek to dismiss is the Fifth, for intentional and/or negligent infliction of emotional distress. The statute of limitations for

intentional infliction of emotional distress is one year, and thus is time barred (See *James v Flynn*, 132 AD3d 1214 [3d Dept 2015]; *Benyo v Sikorjak*, 50 AD3d 1074 [2d Dept 2008]). In addition, the conduct alleged, here, inaction, cannot be said to “rise to the level of extreme and outrageous conduct” required for this cause of action (See *Nauheimer v Archdiocese of NY*, 260 AD2d 615 [2d Dept 1999]). The cases require conduct “so outrageous and extreme as to go beyond all possible bounds of decency, which can be regarded as atrocious and intolerable in a civilized society.” (*John Doe v Archbishop Stepinac High Sch.*, 286 AD2d 478, 479 [2d Dept 2001]).

The statute of limitations for negligent infliction of emotional distress is three years (*Delever v One Taste Inc.*, 2019 NY Slip Op 32311[U] [Sup Ct, NY County 2019]). As the last instance of such alleged infliction was in the spring of 2016, it too is time-barred. Further, a cause of action for negligent infliction of emotional distress requires evidence that the conduct complained of unreasonably endangered the plaintiff's physical safety, or caused her to fear for her safety (see, *Johnson v New York City Bd. of Educ.*, 270 AD2d 310; *Perry v Valley Cottage Animal Hosp.*, 261 AD2d 522; *Davies v County of Nassau*, 260 AD2d 531). These elements are not present here. (*E.B. v Liberation Pubs., Inc.*, 7 AD3d 566 [2d Dept 2004]).

The next cause of action that defendants seek to dismiss is the Sixth, for nuisance. The statute of limitations for nuisance claims is three years (*Hernandez v Medina*, 2012 NY Slip Op 31468[U] [Sup Ct, Queens County 2012]). Thus, this claim must also be dismissed.

The foregoing shall constitute the Decision and Order of the Court.

Dated: October 29, 2020

ENTER:



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Hon. Debra Silber, J.S.C.