

Carlson v Chelsea Hotel Owner, LLC

2021 NY Slip Op 31014(U)

March 24, 2021

Supreme Court, New York County

Docket Number: 157608/2020

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

GRETCHEN CARLSON et al.

INDEX NO. 157608/2020

- v -

MOT. DATE

MOT. SEQ. NO. 001

CHELSEA HOTEL OWNER, LLC et al.

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). _____

Defendants Chelsea Hotel Owner, LLC, SIR Chelsea LLC and Ira Drukier (defendants) move pursuant to CPLR 3211(a)(1) and (7) to dismiss plaintiffs' Gretchen Carlson and Philip Taaffe (plaintiffs, Carlson or Taaffe) complaint. Plaintiffs oppose the motion. Since 2019, plaintiffs' attorneys have filed 5 lawsuits on behalf of different plaintiffs all containing similar allegations and causes of action against the same defendants. See generally Martin v. Chelsea Hotel Owner, LLC, No. 150594/19, 2020 WL 2494862 (N.Y. Sup. Ct. May 14, 2020) (Kotler, J.) (granting summary judgment against each of plaintiffs' claims); Jobe v. Chelsea Hotel Owner, LLC, No. 161445/19, 2020 WL 6321747 (N.Y. Sup. Ct. Oct. 28, 2020) (Kotler, J.) (dismissing all claims); Barros v. Chelsea Hotel Owner, LLC, No. 162120/19, 2020 WL 6450495 (N.Y. Sup. Ct. Nov. 2, 2020) (Kotler, J.) (dismissing all claims but granting leave to replead a single cause of action) and Berg v. Chelsea Hotel Owner, LLC, No. 654748/20 (N.Y. Sup. Ct. Mar. 16, 2021). For the reasons that follow, defendants' motion to dismiss is granted.

FACTS

The following facts are alleged in the complaint filed on September 18, 2020. Plaintiffs are rent stabilized tenants in apartments 916, 920 and 924 in the building located at 222 West 23rd Street, New York, New York (the Building), which is the Hotel Chelsea. Plaintiffs do not reside in the building (see complaint para.37, 50) and do not allege when they began to reside full-time in the "alternative housing". Defendants Chelsea Hotel Owner (CHO) and SIR Chelsea LLC (SIR) and are the owners of the Building that is located at 222 West 23rd Street in New York City and Defendant Ira Drukier (Drukier) is a principal of CHO.

Plaintiffs allege that "at all times relevant hereto, defendants have engaged in deliberate and continuing acts of harassment and vandalism in the apartments that have destroyed plaintiffs' residence, rendering

Dated: 3/24/21

[Signature]
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [X] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

it uninhabitable by plaintiff and their family, and leaving it through the present with the following deleterious conditions.” Plaintiffs’ laundry list of “deleterious conditions” includes no electricity for two years, no running water, no heat, waste supply lines running through the apartment, lack of ventilation, holes drilled into the ceiling, water leakage and a sealed entrance door. Plaintiffs claim that defendants were fully aware of the conditions in the building based on verbal and written notifications of these conditions.

Plaintiffs further claim that in the guise of renovations, defendants “have engaged in a campaign of deliberate, systematic and malicious harassment of plaintiffs, repeatedly involving interruptions and/or discontinuance of essential services for extended duration, of such significance as to impair the habitability of the apartments...”. Plaintiffs allege that defendants have “seriously impaired and continue to seriously impair plaintiffs’ use and enjoyment of the apartments, constituting a private nuisance...” and that “plaintiffs have had to relocate their family and utilize full-time alternative housing...”. Plaintiffs further allege that defendants have “deliberately, systematically and maliciously harassed plaintiffs so as to injure them in their capacity as the tenants of the apartments, and have thereby engaged in extreme and outrageous conduct, with intent to cause, or with disregard of substantial probability of causing, severe emotional distress” and “that this harassment of plaintiffs by defendants has caused plaintiff-Carlson to suffer severe emotional distress, including chronic stress and anxiety and plaintiff uterine fibroid symptoms, headache, and acute period of fear, desperation, vulnerability, depression, hopelessness, and sleeplessness”. Finally, plaintiffs contend that defendants have allowed “deleterious conditions, conduct and occurrences dating back through and including October 2017...constituting a breach of the warranty of habitability...” and that due to those conditions, “the amount of the rent abatement should be increased, in that, since and including October 2017...plaintiffs have had to relocate their family to alternative housing and not been able to reside in the apartments with their children”.

Plaintiffs assert four causes of action against the defendants: [1] harassment; [2] private nuisance; [3] intentional infliction of emotional distress; and [4] breach of warranty of habitability.

Defendants move to dismiss plaintiffs’ claims for failure to state a cause of action pursuant to CPLR § 3211[a][7] and based upon documentary evidence pursuant to CPLR § 3211[a][1]. Plaintiffs oppose the motion and argue that “each of the four claims in the complaint states a cognizable cause of action under law.

Discussion

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.” *Catti 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.*

Under CPLR § 3211(a)(1), “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v. Martinez, supra* at 88).

Harassment

Plaintiffs contend that defendants “engaged in deliberate, systematic and malicious harassment of plaintiffs, repeatedly involving interruptions and/or discontinuance of essential services...” and that their claim for harassment is based on the NYC Administrative Code sections 27-2005(d) and 27-2004(a)(48).

Defendants argue that the first cause of action alleging harassment should be dismissed because New York does not recognize a common-law cause of action for harassment and plaintiffs concede that point in their opposition. Defendants further contend that “to the extent plaintiffs’ claim could be construed as one for tenant harassment under N.Y.C. Admin. Code Sec. 27-2005(d), it still must be dismissed. Section 27-2115(h) of the Administrative Code creates a private right of action for violation of Sec. 27-2005(d), but provides that tenant plaintiffs’ must “individually or jointly apply **to the housing part** for an order directing the owner and the department to appear before the Court”. NYC Admin. Code Sec. 27-2115(h)(1) (emphasis added). Finally, defendants argue that plaintiffs’ harassment claim still fails because if there is a claim of harassment under the NYC Administrative Code, “**such allegation must be based at least in part on one or more violations of record issued by the [HPD] or any other agency.**” NYC Admin. Code Sec. 27-2115(h)(2)(i) (emphasis added).

The court agrees with the defendants. “New York does not recognize a common-law cause of action for harassment”. *Edelstein v. Farber*, 27 AD3d 202 [1st Dept 2006]. Next, plaintiffs argument that they can bring their harassment claim in the Housing Part in addition to Supreme Court is rejected. As this court previously held in *Berg v. Chelsea Hotel Owner, LLC, et al.*, Index Number 654748/20, on March 16, 2021, “[t]his court is not the proper forum for tenant harassment claims. Section 27-2115(h)(1) of the Housing Maintenance Code provides in pertinent part that ‘if there is a claim of harassment pursuant to subdivision d of section 27-2005,’ tenant ‘may individually or jointly apply to the housing part for an order directing the owner and the department to appear before the court’”.

Moreover, if plaintiff’s claims of harassment are based on “hazardous or immediately hazardous violations of the Housing Maintenance Code in the Chelsea and plaintiffs’ apartments”, 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. Plaintiffs’ argument based on section 27-2115(m) of the New York City Administrative Code that this court should “find that Class C immediately hazardous conditions existed” is also rejected.

Accordingly, plaintiffs’ 1st cause of action for harassment is 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 person's interest in the use and enjoyment of land (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 “defendants have conducted constant construction throughout the building, “for purposes of returning the Chelsea to transient and hotel use *** in violation of *** Amended Order and Determinations issued by DHCR in January 2017, with retroactive effect to 2014, which reclassified the Chelsea from hotel to apartment building status, pursuant to Rent Stabilization Law sec. 26-506(b) ***” (Comp. par. 18) and that “defendants have committed private nuisance against plaintiffs, including chronic disregard of dangerous sand unfixed conditions ***as part of this constant construction (Comp.

par.35) throughout the building” and “deprivation of essential services, for years...”. This course of conduct includes defendants’ “refusal and failure for years, through the present, to restore electricity, running water, heat, ventilation and working windows within the apartments, and to rectify, cure and eliminate these conditions***” and that “the conduct of defendants was intentional and unreasonable, or reckless or grossly negligent, in causing substantial interferences with the comfort and safety of plaintiffs in their apartments...”. Plaintiff further argues that the portion of the motion that seeks to strike the demand for punitive damages must be denied.

The court rejects plaintiffs’ arguments. As defendants correctly point out, the complaint offers a “laundry list of purported deleterious conditions” “without reference to any dates (or even years) or factual details or specific conduct by any of the defendants”, and further, is silent on the impact that these conditions, defects and deficiencies had on plaintiffs use and enjoyment of the apartments and that the conditions have “seriously impaired and continue to seriously impair plaintiffs’ use and enjoyment. Plaintiffs’ reliance on *Giacobbe v. 115 Millberry LLC* that prolonged construction can constitute a nuisance is misplaced as *Giacobbe* is factually distinguishable from this case. Moreover, plaintiffs do not reside at 222 W. 23rd Street since at least October 2017 and therefore they “cannot feasibly claim that they experienced substantial interferences with their physical comfort” while they resided in alternative housing. Furthermore, plaintiffs’ allegations that the lack of opening windows, water leakage, dust, ceiling damage, plaster in the bathtub, drilling and installation of pipe “substantially interfere with their comfort and safety” may be annoyances, inconveniences, or even unpleasant, but do not constitute a private nuisance without further, sufficient allegations. Likewise, plaintiffs’ conclusory allegations of nuisance that defendants’ actions were “reckless” or “gross neglect” without factual basis fails to rise to the level of willful acts and omissions required for punitive damages.

Based on the foregoing, plaintiffs’ 2nd cause of action is severed and dismissed

Intentional infliction of emotional distress

Defendants argue that plaintiffs’ allegations are “insufficient to sustain an IIED cause of action on behalf of Carlson” and that “plaintiffs merely allege that CHO, SIR and/or Drukier have accused them severe emotional distress by not correcting certain conditions at the Hotel”. Defendants further argue that plaintiffs fail to adequately plead the intent and causation elements of IIED and instead rely on vague and conclusory allegations that defendants “engaged in extreme and outrageous conduct, with intent to cause...severe emotional distress” and “maliciously harassed [her] so as to injure [her] in [her] capacity as a tenant”. Defendants contend that plaintiffs’ claim for punitive damages in connection with this cause of action fails for these same reasons. Defendants further assert that plaintiff “Carlson fails to plead the required elements of IIED because the complaint alleges no ‘extreme and outrageous conduct’ by [d]efendants beyond a series of conclusory allegations”.

Plaintiffs oppose the motion and claim that the “allege extreme and outrageous conduct by defendants, in the form of a longstanding campaign of deliberate, systematic and malicious harassment of plaintiffs...”, and “that defendants engaged in this course of conduct with the intent to cause or with disregard of substantial probability of causing, severe emotional distress”. Plaintiffs maintain that Carlson’s emotional distress is detailed in paragraphs 13, 26, 37 and 42 of the complaint.

In order to assert a valid claim for IIED pursuant to New York law, a plaintiff must demonstrate the following elements: (i) extreme and outrageous conduct, (ii) an intent to cause, or disregard of substantial probability of causing, severe emotional distress, (iii) a causal connection between the conduct and the injury, and (iv) the resultant severe emotional distress. *Howell v. New York Post Co.*, 81 N.Y.2d 115, 121, 596 N.Y.S.2d 350 (N.Y. 1993). IIED claims are only viable when the plaintiff establishes that they were subjected to conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 303, 461 N.Y.S.2d 232 (N.Y. 1986)

Plaintiffs' claim for intentional infliction of emotional distress fails. Here, plaintiffs' conclusory allegations that defendants failed to correct conditions at the Hotel over the course of years does not rise to the level of conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community". *Fischer v. Maloney*, 43 NY2d 553, 557 [1978], quoting Restatement [Second] of Torts Sec. 46, comment d. The limited number of IIED claims that have been upheld were almost always supported by "allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff." See *Seltzer v. Bayer*, 272 A.D.2d 263, 709 N.Y.S.2d 21, 23 (1st Dep't 2000). Because plaintiffs use the magic buzz words "longstanding campaign of deliberate, systematic and malicious harassment of the plaintiffs" does not mean that plaintiffs have adequately pled a cause of action for IIED. Here, there are no facts to establish a course of conduct or substantiate the "longstanding campaign" by defendants but rather plaintiffs rely on vague and conclusory allegations which are insufficient. Finally, plaintiffs' claim for punitive damages on behalf of plaintiff Carlson fails for the reasons set forth above.

Based on the foregoing, plaintiffs' 3rd cause of action is severed and dismissed.

Warranty of habitability

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

Defendants argue that plaintiffs' claims for breach of warranty of habitability and related demand for punitive damages fail to state a valid cause of action and should be dismissed because plaintiff does not allege the basic facts to give rise to a breach of warranty of habitability much less punitive damages. Defendants contend that plaintiffs only had a lease agreement with defendant CHO and that no landlord-tenant relationship existed with defendants SIR and Drukier and therefore their breach of warranty of habitability against SIR and Drukier should be dismissed. Defendants argue that under a stipulation of settlement executed between plaintiffs and CHO dated October 17, 2017, plaintiffs have been granted a 35% rent abatement compensating them for any purported breach of warranty of habitability as a result of the ongoing renovation work being conducted at the Hotel and that plaintiffs fail to specify precisely what conditions occurred after that date or how they exceeded what was contemplated in the original abatement. Defendants further argue that plaintiffs cannot recover damages for breach of warranty of habitability because they do not reside at the Hotel Chelsea as alleged in their complaint, which is fatal to their claim. Finally, defendants contend that plaintiffs fail to adequately plead that the apartment conditions threaten their life, health or safety or that they provided notice of the conditions to them with reasonable time to cure.

Plaintiffs claim that because they paid "all rent due and owing to CHO, SIR and/or Drukier" that these allegations are adequate to plead a landlord-tenant relationship and privity between plaintiffs and defendants is outright rejected. There is no evidence in this record to establish/show that either SIR or Drukier are in privity with plaintiffs. Therefore, plaintiffs breach of warranty of habitability claims against defendants SIR and Drukier are dismissed.

Plaintiffs contend that the rent abatement stipulation providing "a continuing rent abatement of 35% of the legal regulated rent, commencing October 2017, and continuing until such time as all construction and repairs are finished..." does not bar plaintiffs from gaining a greater abatement for the period beginning October 2017 onward. And finally, plaintiffs argue that there is no basis to strike their claim for punitive damages.

As per the October 16, 2017 Stipulation of Settlement between plaintiffs and CHO it provides in part, "in full and complete satisfaction of all claims" arising from breach of warranty of habitability through the

date hereof and all claims by respondents for constructive eviction through the date hereof..." at the premises.

Here, plaintiffs fail to specify precisely what conditions occurred after the October 2017 date or how these conditions go beyond what was contemplated in the stipulation of settlement. However, plaintiffs cannot assert a warranty of habitability claim since they admit in their complaint that they do not reside in the apartment. See, *Genson v. Sixty Sutton Corp.*, 74 AD3d 560, 905 NYS2d 24 [1st Dept. 2010]. It is unknown on this record during when and/or what time period/frame plaintiffs did not reside in the apartments. To the extent that plaintiffs claim that they have experienced various conditions during the Hotel's renovations they fail to plead any facts alleging that these "deleterious" conditions are "dangerous, hazardous or detrimental to life, health or safety", when these alleged conditions occurred and whether they even resided in the Hotel after they executed the October 16, 2017 Stipulation. Finally, plaintiffs' complaint asserts in a vague and conclusory manner that "on numerous occasions, plaintiff Carlson provided verbal and written notification of these deleterious conditions..." These allegations are insufficient to provide defendants with adequate notice of alleged defects or that defendants were given a reasonable time to repair.

However, the court will, grant plaintiffs' leave to replead their breach of warranty claims that they did not expressly settle and are therefore barred from asserting in this action within 30 days. Plaintiffs' new pleading must plainly allege a breach of warranty of habitability that arose from conditions that developed due to either interruptions and/or discontinuance of services or complications from the landlord's contemplated work since the parties entered into the stipulation, or some other claim that was not expressly settled vis-à-vis the stipulation. In light of this result, the court declines to address the balance of the parties' arguments as to these claims, which defendants may again raise on a motion to dismiss as per the CPLR in response to plaintiffs' amended complaint, if any, and/or their answer.

Conclusion

Accordingly, it is hereby

ORDERED that the motion is granted to the extent that the 1st, 2nd and 3rd causes of action are severed and dismissed; and it is further

ORDERED that plaintiffs' 4th cause of action is dismissed with leave to replead their claims that plaintiffs did not expressly settle and are therefore barred from asserting in this action within 30 days; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

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: 3/24/21
New York, New York

So Ordered:



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