Barros v Chelsea Hotel Owner, LLC
2021 NY Slip Op 31366(U)
April 22, 2021
Supreme Court, New York County
Docket Number: 162120/2019
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

RITA BARROS

- v -

CHELSEA HOTEL OWNER, LLC et al.

INDEX NO. 162120/2019

MOT. DATE

MOT. SEQ. NO. 002

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)._____

Previously, defendants moved pre-answer pursuant to CPLR 3211(a)(7) to dismiss plaintiff Rita Barros' (plaintiff or Barros) verified complaint. The court granted defendants' motion in a decision/order dated November 2, 2020 and dismissed all causes of action with leave to replead the breach of warranty cause of action within 30 days from entry of the decision/order. In the November 2, 2020 order, the court directed that "Plaintiff's new pleading must plainly allege a breach of warranty of habitability that arose from conditions that developed due to either prolonged cut offs 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".

Defendants Chelsea Hotel Owner, LLC, SIR Chelsea LLC and Ira Drukier (defendants) now move pre-answer pursuant to CPLR 3211(a)(7) to dismiss plaintiff's verified amended complaint. Plaintiff opposes the motion. The facts set forth in the November 2, 2020 Order are herein incorporated by reference. The court's decision is as follows.

As an initial matter, in plaintiff's opposition papers, more specifically in Footnote 2, she concedes that she mistakenly referenced February 1, 2016 rather than April 29, 2016, the date of the stipulation of settlement between plaintiff and defendants, in her amended complaint.

In support of the motion, defendants argue that plaintiff's claim for breach of warranty of habitability should be dismissed because the amended complaint fails to allege facts constituting a breach of warranty of habitability that are outside of the scope of the Stipulation's release and it also does not set forth any facts suggesting that the purportedly adverse conditions allegedly created by the renovation of the Hotel are dangerous, hazardous, or detrimental to plaintiff's life, health or safety. Defendants further contend that plaintiff is not in privity with defendants Drukier and SIR Chelsea and that "the Amended Complaint fails to allege and specifically identify the Defendants with whom Plaintiff had a

Dated: 4/22/21

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**

lease agreement or landlord-tenant relationship". Finally, defendants argue that the allegations do not support an award of punitive damages.

Plaintiff opposes the motion and argues that the defendants' argument fails because "it disregards the two categories of excluded conditions under the Stipulation as to which plaintiff "reserve[d] [her] rights to assert claims for breach of warranty or other claims if such conditions develop at the building" …during ongoing construction at the premises and that these categories are "complications from landlord's contemplated work," and "prolonged cut offs of other basis services". Plaintiff further argues that as permitted by the stipulation's exclusion for "complications from the landlord's continued work" and "prolonged cutoffs of basic services" the allegations set forth in the amended complaint are sufficient. Plaintiff contends that there are sufficient allegations of a landlord-tenant relationship between plaintiff and SIR and plaintiff and Drukier because "SIR has been in direct control and domination of the policies, activities and business practices of CHO at the Chelsea," and that SIR used this "domination and control *** in a campaign of deliberate, systematic and malicious harassment of plaintiff, to commit wrongs against plaintiff, and to cause plaintiff to suffer damages". The same allegation is stated separately against Drukier.

In reply, defendants argue that the absence of privity between plaintiff and defendants Drukier and SIR Chelsea is fatal to plaintiff's breach of warranty of habitability claim against them and plaintiff's amended complaint offers no basis to pierce the corporate veil of her landlord, CHO. Defendants further contend that plaintiff failed to replead facts that fall within the exceptions as set forth in the stipulation.

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*.

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

When the court issued its November 2, 2020 order, it granted Plaintiff permission to replead her breach of warranty of habitability claim, it directed the following: "Plaintiff's new pleading must plainly allege a breach of warranty of habitability that arose from conditions that developed due to either prolonged cut offs 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." A review of plaintiff's amended complaint reveals the addition of paragraph 51 regarding the stipulation of settlement and minor substantive changes and conclusory language to the amended complaint in paragraphs 52 and 54:

> 52) That the above-described conditions, conduct, occurrences and loss and cut off of basic services, dating back through and including February 1, 2016, including but not limited to flooding and water penetration into the 10th floor east corri-

> dor, and the kitchen and other areas of Apt. 1008 that abut the 10th floor east corridor, public hallway, shafts and stairwells, developed at the Chelsea, and constitute a breach of the warranty of habitability by CHO, SIR and/or Drukier that is pervasive and of long duration, and of which CHO, SIR and/or Drukier and/or their agents, servants, and/or employees were on notice and have unreasonably, consciously, willfully, wantonly, recklessly and/or deliberately failed to rectify, in disregard of the rights and interests of plaintiff.
>
> 54) That the above-described conditions, conduct, occurrences and loss and cut off of basic services, dating back through and including February 1, 2016, including but not limited to flooding and water penetration into the kitchen and other areas of Apt. 1008 that abut the 10th floor east corridor, public hallway, shafts and stairwells, are rent-impairing, and breach the warranty of habitability

Here, plaintiff's amended complaint contains conclusory language that she experienced the "loss and cut off of basic services…" and the catch -all phrase "including, but not limited to flooding and water penetration into the living and other areas of Apt. 1008…". These amendments fail to comply with the court's directives. There are no new factual allegations in the amended complaint that provide specifics to delineate between the claims resolved under the stipulation of settlement in April 2016 or some other claim not expressly resolved vis-à-vis the stipulation. Moreover, plaintiff's argument that paragraphs 25 and 29 of the amended complaint contain detailed allegations for a breach of warranty of habitability is outright rejected. These are the exact same paragraphs in the original complaint. While plaintiff's amended complaint contains allegations to interruptions to prolonged service cutoffs, plaintiff relies on excerpts of her emails that provide no context and only contain sporadic interruptions to basic services. The amended complaint is silent as to when these alleged service interruptions occurred and for the length of time. Plaintiff's contention that the duration for these conditions occurred between 1/23/17 to 12/9/19 does not satisfy the court order dated 11/2/2020. Moreover, the amended complaint is devoid of any allegations of "complications from landlord's work" such as "pipes bursting, ceiling collapses or similar occurrences." For example, plaintiff's allegation that she has a "feeling the ceiling will collapse" is insufficient to rise to a breach of warranty of habitability. Further, plaintiff's amended complaint fails to detail how these alleged defects have impacted her life, health and safety. Because plaintiff has failed to replead basic facts to give rise to a breach of warranty of habitability, her claim for punitive damages also fails.

Next, plaintiff argues that there are sufficient allegations of a landlord – tenant relationship between plaintiff and SIR and Drukier to sustain the fourth cause of action against them is rejected.

To pierce the corporate veil plaintiff must show that: (1) "the owners exercised complete domination of the corporation in respect to the transaction attacked," and (2) "such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Matter of Morris v. NYS Dept. of Taxation & Fin.,* 82 NY2d 135 [1993].

Here, the plaintiff's amended complaint alleges in conclusory statements that SIR Chelsea and Drukier "used [their] domination and control" of CHO to engage "in a campaign of deliberate, systematic and malicious harassment" against Plaintiff. Such "purely conclusory". assertions of domination are "insufficient to warrant consideration." *Savage v. Galaxy Media & Mktg. Corp*., No. 11 CIV. 6791 NRB, 2012 WL 2681423 [S.D.N.Y. July 5, 2012].

"Factors to be considered in determining whether the owner has abused the privilege of doing business in the corporate form include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use." *D'Mel & Assocs. v. Athco, Inc.,* 105 A.D.3d 451 [1st Dep't 2013] (quoting *E. Hampton Union Free Sch. Dist. v. Sandpebble Builders, Inc.,* 66 A.D.3d 122, 127 (2d Dep't 2009) (collecting cases), aff'd, 16 N.Y.3d 775 (2011)).

Plaintiff's threadbare amended complaint fails to allege that defendant CHO failed to observe corporate formalities, that the corporation was a sham entity, that it was inadequately capitalized and/or that defendants SIR or Drukier commingled assets and used corporate funds for their personal use. Because the amended complaint contains the magic buzz words "domination and control in a campaign of deliberate, systematic and malicious harassment of plaintiff, to commit wrongs against plaintiff, and to cause plaintiff to suffer damages" is insufficient to pierce the corporate veil. Moreover, plaintiff concedes that her lease renewal is with defendant CHO and no other named defendant. Further, plaintiff's allegations that Drukier identified himself as the "owner" of the building and/or that plaintiff paid rent to any one of the three defendants is likewise insufficient for the court to pierce the corporate veil and hold Drukier and/or SIR liable. Accordingly, plaintiff's breach of warranty claims against defendants SIR Chelsea and Drukier must be severed and dismissed.

Based on the foregoing, plaintiff's amended complaint is dismissed.

Accordingly, it is hereby

ORDERED that plaintiff's amended complaint is dismissed, and the Clerk of the Court is to enter judgement 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: 4/22/21
New York, New York

So Ordered:

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