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| Rosen v MF Assoc. of N.Y. LLC |
| 2022 NY Slip Op 30881(U) |
| March 21, 2022 |
| Supreme Court, Nassau County |
| Docket Number: Index No. 612348/2020 |
| Judge: Helen Voutsinas |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 14
Present: Hon. Helen Voutsinas, J.S.C.

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GENE ROSEN,
on behalf of himself and all those similarly situated,

Plaintiff,

Index No.: 612348/2020
Motion Sequence No.: 002

-against-

MF ASSOCIATES OF NEW YORK LLC and OGDEN
CAP PROPERTIES, LLC,

Short Form Order

Defendants.
-----X

The following papers were read on this motion:

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| Notice of Motion, Affirmation in Support, Exhibits and Memorandum of Law in Support..... | 1 |
| Affirmation and Affidavit in Opposition, Exhibit..... | 2 |
| Reply Affirmation..... | 3 |

Upon the foregoing papers, defendants MF Associates of New York LLC (“MF Associates”) and Ogen Cap Properties, LLC (“Ogden”) move for an Order pursuant to CPLR § 3211[a][7], dismissing plaintiff’s amended complaint for failure to state a cause of action. The motion is determined as hereinafter provided.

Factual and Procedural Background

This is an action seeking recovery for breach of the warranty of habitability and pertains to four (4) high rise residential buildings located at 205 East 95th Street, New York, New York 10128 (“205”), 215 East 95th Street, New York, New York 10128 (“215”), 225 East 95th Street, New York, New York 10128 (“225”), and 235 East 95th Street, New York, New York 10128 (“235”). The 5, and 235 being hereinafter referred to separately as the “Normandie Court Buildings” and collectively as “Normandie Court”. 205, 215, 225 and 235 are situated together in a complex known as Normandie Court.

In his amended complaint, plaintiff alleges, on behalf of himself and others similarly situated, that defendants MF Associates and Ogden, as owner and manager, respectively, of the Normandie Court buildings, breached the warranty of habitability on rentals/leases in those buildings by depriving tenants of the use of elevators during a modernization project from

approximately August of 2014 to July of 2015. Plaintiff brought this case as a class action on behalf of himself, a former resident of one of the buildings during the time of the elevator outages, as well as as-yet unnamed other residents during that time who suffered from the non-functioning elevators in their buildings. Plaintiff alleges that during the modernization project, there were times the residential tenants suffered inadequate, unreliable, and on at least one occasion, no elevator service.

Defendants move to dismiss the amended complaint pursuant to CPLR 3211[a][7], arguing that plaintiff fails to state a valid cause of action for breach of the warranty of habitability. Defendants argue that plaintiff only generally allege delays in elevator service caused by the modernization project and otherwise allege, in conclusory form, that defendants breached the implied warranty of habitability. In opposition, plaintiff argues that he has adequately pled the claim for breach of the warranty of habitability based upon the inadequate elevator service at the Normandie Court buildings.

Discussion and Ruling

When deciding a motion to dismiss pursuant to CPLR §3211[a][7], the court must afford the complaint a liberal construction, accepting all facts as alleged in the complaint to be true, and according the plaintiff the benefit of every favorable inference (see *Marcantonio v Picozzi III*, 70 AD3d 655 [2d Dept 2010]). The sole criterion on a motion to dismiss is “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cognizable action at law a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 N.Y.2d 268, 275 [1977]; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Hense v Baxter*, 79 A.D.3d 814, 815 [2d Dept 2010]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

“CPLR 3211[a][7] dismissals merely address the adequacy of the pleading, and do not reach the substantive merits of a [party's] cause of action . . .” (*Hendrickson v. Philbor Motors, Inc.*, 102 AD3d 251, 255 [2d Dept 2012]). Therefore, whether a pleading will later survive a motion for summary judgment, or whether the party will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss (*Tooma v. Grossbarth*, 121 A.D.3d 1093, 1095-1096 [2d Dept 2014]; *Endless Ocean, LLC v. Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 A.D.3d 587, 589 [2d Dept 2014]. *Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 38 [2d Dept 2006]).

“In assessing a motion to dismiss under CPLR §3211 [a][7] . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint” (*Leon v. Martinez*, 84 NY2d 893 [1984]).

The test to be applied is whether the complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action

known to our law can be discerned from the factual averments. (See *Treeline 990 Stewart Partners, LLC v. MIT Atria, LLC*, 107 AD3d 788 [2d Dept 2013]).

Real Property Law (“RPL”) § 235-b, the implied warranty of habitability statute, provides in pertinent part, that:

In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. . . . (emphasis added)

Defendants argue that RPL § 235-b does not apply to the facts alleged at bar, citing to *Solow v. Wellner*, 86 NY2d 582 [1995] for the general proposition that the warranty of habitability does not require that premises be maintained in accordance with reasonable expectations of tenants, but rather sets forth minimum standards to protect tenants against conditions that render the residential premises uninhabitable. Defendants also cite to *Park W. Mgmt. Corp. v. Mitchell*, 47 NY2d 316, 328 [1979], where the Court held that the “test is whether or not the defects ‘deprived the tenant of those essential functions which a residence is expected to provide’ as viewed by the eyes of a reasonable person.”

In *Solow*, relied upon by defendants, the Court of Appeals actually addressed the issue of whether deprivation of elevator access can constitute a breach of the warranty of habitability pursuant to RPL § 235-b:

[T]he statutory reference to “uses reasonably intended by the parties” . . . reflects the Legislature’s concern that tenants be provided with premises suitable for residential habitation, in other words, living quarters having “those essential functions which a residence is expected to provide” [citing to *Park W. Mgmt. Corp.*, supra, 47 NY2d at 328]). This prong of the warranty therefore protects against conditions that, while they do not render an apartment unsafe or uninhabitable, constitute deficiencies that prevent the premises from serving their intended function of residential occupation. Thus, for example, *Appellate Term correctly concluded that operable elevator service is an essential attribute of a high-rise residential apartment building because a reasonable person could find that it is indispensable to the use of the demised premises.* [emphasis added]

(*Solow*, supra, 86 NY2d at 589).

In *Solow*, the Court of Appeals affirmed the First Department (*Solow v. Wellner*, 205 AD2d 239 [1st Dept 1994]), which had in turn affirmed the Appellate Term (*Solow v. Wellner*, 154 Misc 2d 737, 741 [App Term 1992]). The Appellate Term had held, in relevant part :

[O]nly one of the tenants' building-wide complaints - that relating to elevator service - warrants a rent abatement under the statutory warranty of habitability. The voluminous trial record can support a finding that a significant decrease in the required elevator service in the high-rise apartment building did occur in or about May 1987. In this regard the tenants testified consistently and credibly that by no later than that date the elevator service, while operational, had become slow and unreliable, with at times prolonged and unexplained delays, and the "skipping" of floors. These conditions may reasonably be viewed by a fact finder as having materially affected the habitability of the building premises and, to our view, justify a 5% rent abatement for the relevant period commencing May 1987.

(*Solow*, supra, 154 Misc 2d at 741).

In his amended complaint, plaintiff alleges, inter alia, that each of the Normandie Court buildings is 34 stories and has over 300 apartments; that each building had three elevators, but that during the modernization project, one elevator was taken out of service; that one of the two remaining elevators would frequently break down, leaving the 34 story building with one working elevator; and that on at least one occasion, all elevators had broken down in one of the buildings. Plaintiff alleges that delays were exacerbated during scheduled moves when one elevator would be taken out of service to accommodate the move at the expense of all other elevator users in the building. Plaintiff alleges further that the delays caused by the elevator outages "were far more than an inconvenience" and referenced an article about the modernization project whose headline referred to tenants' concerns that the broken elevators are a safety hazard.

Plaintiff also submits an affidavit to supplement his pleadings. In the affidavit, plaintiff attests that it would typically require a wait in excess of 45 minutes to get an elevator to go downstairs to leave the building in the morning; after waiting 10 to 15 minutes for an elevator, one would arrive, only to be packed full of people, leaving no space for any additional passengers to get on; the wait for an elevator to return to one's apartment in the evening was a similarly miserable experience; the elevators frequently broke down leaving passengers trapped inside to wait for help.

After carefully reviewing plaintiff's complaint, as supplemented by plaintiff's affidavit, the Court determines that plaintiff adequately pleads a claim for breach of the implied warranty of habitability, sufficient to survive dismissal during the pleading stage.

Defendants' reliance on cases such as *Marz Realty Inc. v Reichman*, 2003 NY Slip Op 50700(U) [App Term, 2d Dept, 2d and 11th Jud Dists 2003] and *Gramatan Realty Corp. v Morrell*, 59 Misc 3d 1217[A], 2018 NY Slip Op 50597[U] [City Ct, Mount Vernon 2018], both nonpayment summary proceedings, is misplaced. *Marz Realty Inc.*, was an appeal of a judgment entered after

trial, and *Gramatan Realty Corp.*, was a trial decision. Neither case involved an analysis of the pleadings.

Here, whether plaintiff's claim will later survive a motion for summary judgment, or whether the plaintiff will ultimately prevail on his claim, is not relevant on a pre-discovery motion to dismiss (*Tooma v. Grossbarth*, 121 A.D.3d 1093, 1095-1096 [2d Dept 2014]).

Accordingly, based upon all of the foregoing, it is hereby

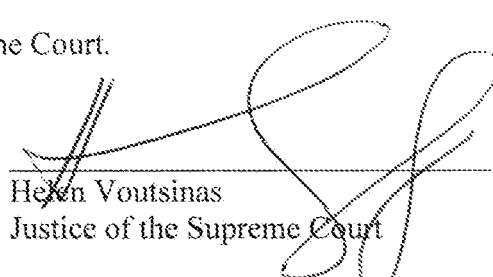
ORDERED, that defendants' motion to dismiss plaintiff's amended complaint is **DENIED**; and it is further

ORDERED, that defendants shall file an answer to the amended complaint within twenty (20) days of the date of entry of this Order; and it is further

ORDERED, that a Preliminary Conference shall be held in this matter on April 18 2022, virtually. Prior to the scheduled conference date, counsel shall confer and complete a proposed Preliminary Conference Stipulation and Order, which is available on the Court's website together with instructions on how to complete it and how to return it to the Court, at <http://ww2.nycourts.gov/COURTS/10JD/nassau/cicgeneralforms.shtml>.

This constitutes the Decision and Order of the Court.

Dated: March 21, 2022
Mineola, NY


Helen Voutsinas
Justice of the Supreme Court

ENTERED

Mar 25 2022

NASSAU COUNTY
COUNTY CLERK'S OFFICE