

Colon v Shalom Aleichem LLC
2023 NY Slip Op 35144(U)
July 19, 2023
Supreme Court, Bronx County
Docket Number: Index No. 23968/2020E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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DAVID COLON,

Plaintiff,

DECISION & ORDER

-against-

Motion Sequence No. 1

SHALOM ALEICHEM LLC and CHESTNUT
HOLDINGS OF NEW YORK, INC.,

Index No.: 23968/2020E

Defendants.

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GUZMAN, J.

This action arises out of an alleged bed bug infestation in Plaintiff David Colon's apartment at 68 West 238th Street, Bronx, New York. Plaintiff alleges that he was injured as a result of bedbug bites in January 2019. The verified bill of particulars alleges, *inter alia*, that Defendants "were negligent in the ownership, maintenance and repair of their premises when they permitted bed bugs to exist in 68 West 238th Street, Bronx, New York 10463, in all of the apartments, as well as in apartment F22; failed to exterminate bed bugs; failed to have an action plan in place when an infestation of bed bugs could occur; and failed to warn tenants of procedures to prevent bed bugs. *See* NYSCEF Doc. No. 5.

The complaint alleges causes of action for (1) negligence; (2) intentional infliction of emotional distress; (3) negligent infliction of emotional distress; (4) "reckless cause of action of prior notice;" (5) nuisance; (6) constructive eviction; (7) violation of Real Property Law 235-b; (8) breach of the implied warranty of habitability; and (9) breach of contract. Plaintiff also seeks punitive damages and recovery of attorneys' fees. Plaintiff's bill of particulars also alleges various statutory and code violations. *See* NYCSEF Doc. No. 5. On this motion, Defendants Shalom Aleichem LLC and Chestnut Holdings of New York, Inc., the managing agent of Shalom Aleichem. Inc., move for an Order pursuant to CPLR § 3212 dismissing Plaintiff's complaint. *See* NYCSEF Doc. No. 14.

Preliminarily, the Court notes that Plaintiff has withdrawn his claims for intentional infliction of emotional distress, nuisance, and constructive eviction, and does not oppose Defendants' motion insofar as it seeks dismissal of claim for punitive damage and attorneys' fees. Additionally, there is no cognizable cause of action for "reckless cause of action of prior

notice.” Accordingly, the only remaining causes of action at issue on this motion are Plaintiff’s claims for negligence, negligent infliction of emotional distress, violation of Real Property Law § 235-b, breach of implied warranty of habitability, and breach of contract.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact. *Friends of Thayer Lake LLC v. Brown*, 27 N.Y.3d 1039, 1043, 33 N.Y.S.3d 853 (2016); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). If the moving party meets its burden, the burden shifts to the nonmoving party to establish, through admissible evidence, the existence of disputed issues of material facts for trial. CPLR § 3212 (b); *Zuckerman v. New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1980). Because summary judgment is a “drastic remedy,” it should only be employed “when there is *no doubt* as to the absence of triable issues.” *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131 (1974) (emphasis added). Issue-finding, not issue-determination, is the role of the court on a motion for summary judgment. *Lebedev v. Blavatnik*, 193 A.D.3d 175, 142 N.Y.S.3d 511 (1st Dep’t 2021). Additionally, the court views the evidence in the light most favorable to the non-moving party and gives the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13 (2012).

Defendants argue, correctly, that recovery for emotional distress or psychological harm predicated on an alleged bed bug infestation is not permitted under New York law. *See Davila v. Sleepy’s, LLC*, 142 A.D.3d 851, 37 N.Y.S.3d 525 (1st Dep’t 2016) (dismissing portion of complaint in bed bug action seeking recovery for alleged psychological injury); *Bour v. 259 Bleeker, LLC*, 104 A.D.3d 454, 961 N.Y.S.2d 98 (1st Dep’t 2013) (dismissing portion of complaint in bed bug action seeking recovery for alleged emotional distress). Additionally, “extreme and outrageous conduct is an essential element of a cause of action alleging the negligent infliction of emotional distress.” *Holmes v. City of New York*, 178 A.D.3d 496, 111 N.Y.S.3d 856, 857 (1st Dep’t 2019). None of the facts alleged by Plaintiff rise to the level of “extreme and outrageous conduct.” *Id.* This cause of action is therefore dismissed.

With respect to Plaintiff’s claim predicated on New York Real Property Law § 235-b, this statute imbues all residential leases with an implied warranty of habitability. The presence of bed bugs in an apartment may constitute a breach of the warranty of habitability pursuant to Real

Property Law § 235-b. *See Kane v. SDM Enterprises Inc.*, 2014 N.Y. Misc. LEXIS 6145, 2014 WL 11342732 (Sup. Ct. Kings Co. 2014), *aff'd* 125 A.D.3d 939, 5 N.Y.S.3d 182 (2d Dep't 2015). It is noted, however, that damages for personal injuries and pain and suffering are not recoverable under Real Property Law § 235-b. *See Walls v. Prestige Management, Inc.*, 73 A.D.3d 636, 900 N.Y.S.2d 867 (1st Dep't 2010).

Plaintiff's cause of action for breach of contract is based on Defendants' duty to make timely repairs to the premises, including extermination of bed bugs. This claim is duplicative of Plaintiff's claim for negligence. In order to plead a claim of negligence, a plaintiff must demonstrate (1) the defendant owed the plaintiff a cognizable duty of care as a matter of law; (2) the defendant breached that duty; and (3) plaintiff suffered damage as a proximate result of that breach. *Keene v. Rosas*, 215 A.D.3d 938, 187 N.Y.S.3d 752 (2d Dep't 2023). Any duty to perform a contract must be separate from the duty of care owed in negligence claims. *See Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653 (1987). Claims are duplicative when both arise from the same facts and seek the identical damages for each alleged breach. *See Deer Park Enters., LLC v. Ail Sys., Inc.*, 57 A.D.3d 711, 870 N.Y.S.2d 89, 90 (2d Dep't 2008). Plaintiff's cause of action for breach of contract is therefore dismissed.

The record before the Court is sufficiently muddled to preclude summary judgment dismissing Plaintiff's negligence claim. A defendant moving for summary judgment in a premises liability case has the initial burden of demonstrating, *prima facie*, that it neither created nor had actual or constructive notice of the existence of the allegedly hazardous condition for a sufficient length of time to discover and remedy it. *Del Marte v. Leka Realty LLC*, 156 A.D.3d 453, 67 N.Y.S.3d 16 (1st Dep't 2017). Here, Defendants contend that since Plaintiff did not make any complaints of bed bugs prior to the date that Plaintiff identified the bedbugs, they lacked notice of the condition. At his deposition, however, Plaintiff was unable to recall the date on which he discovered the bed bugs in his apartment.¹ By Plaintiff's own testimony, he first became aware that there were bed bugs in his apartment on a date in January 2019 after visiting Urgent Care with complaints of bites and itching. *See* NYSCEF Doc. No. 20 at 33-36. That same day, he notified the building manager, who called the superintendent. The superintendent, Geraldo, went to Plaintiff's apartment and confirmed the existence of bed bugs. *Id.* at 28-30.

¹ Plaintiff's bill of particulars states that Defendants were notified of the bed bug infestation prior to January 10, 2019. *See* NYSCEF Doc. No. 5.

According to Plaintiff, an exterminator came a few days later to exterminate the entire apartment. *Id.* at 43-44. Plaintiff testified that after the extermination, he still believed that there were bed bugs in his apartment. He testified that he was still being bit, but he also testified that he didn't have any new bites. *Id.* at 47. Plaintiff states that he told the superintendent a few days after his apartment had been exterminated that he believed there were still bed bugs, however there was never a second extermination. *Id.* at 48.

In support of their motion, Defendants also submit an affidavit from Zohar Yaish, a Senior Field Supervisor employed by Chestnut Holdings. Yaish states that on January 18, [2019], Plaintiff filed an "HPD" complaint for a bed bug infestation within his apartment; upon receipt of the complaint; the superintendent inspected Plaintiff's apartment; Defendants retained an exterminating service to exterminate Plaintiff's apartment on January 19, [2019]; and on January 22, 2019, Plaintiff filed a second complaint regarding bed bugs within his apartment, but did not file any additional complaints regarding bed bugs for the remainder of the time that he resided in the building. *See* NYSCEF Doc. No. 25. However, inasmuch as Defendants have also submitted Plaintiff's deposition testimony on their motion, the Court finds that Defendants have not established, *prima facie*, that they lacked notice of the condition inside of Plaintiff's apartment. Accordingly, it is hereby:

ORDERED AND ADJUDGED that the motion for summary judgment filed by Defendants Shalom Aleichem LLC and Chestnut Holdings of New York, Inc., is granted to the extent that Plaintiff's claims for intentional infliction of emotional distress (second cause of action), negligent infliction of emotional distress (third cause of action); "reckless cause of action of prior notice" (fourth cause of action), nuisance (fifth cause of action), and breach of contract (ninth cause of action) are DISMISSED; and it is hereby

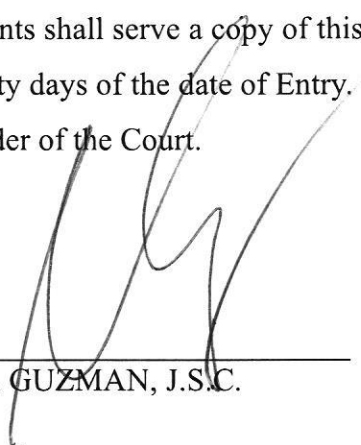
ORDERED AND ADJUDGED that Plaintiff's claims for punitive damages and recovery of attorneys' fees are DISMISSED; and it is further

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ORDERED AND ADJUDGED that the motion is otherwise denied; and it is further
ORDERED AND ADJUDGED that Defendants shall serve a copy of this Decision &
Order with Notice of Entry upon Plaintiff within thirty days of the date of Entry.

The foregoing constitutes the Decision & Order of the Court.

Dated: Bronx, New York
July 19, 2023



HON. WILMA GUZMAN, J.S.C.