CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 87

----------X

ALEXANDRA GEIS,

Plaintiff,

-against-

PENNY LANE OWNERS CORP. and MAXWELL KATES, INC.,

Defendants.

----------X

DECISION/ORDER

Index No.: 300286/10

Present:
Hon. Lynn R. Kotler
J.C.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltf's mot, SSL affirm, AG, SS affid, exhs	1
APX opp affirm, KC affid, exhs	2

This action arises from property damage caused by flooding at the plaintiff's residential cooperative unit. Plaintiff moves for partial summary judgment as to liability against defendants Penny Lane Owners Corp. ("Penny Lane") and Maxwell Kates, Inc. ("MKI") on her first, third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth and thirteenth causes of action. Defendants oppose the motion.

The relevant facts are largely undisputed. The building known as Penny Lane is located at 215 East 24th Street, New York, New York (the "building"). The building was built in 1976 and has 179 mixed owner-occupied and rental units. At all relevant times, Penny Lane was managed by MKI.

In July 1999, plaintiff purchased 1,150 shares of Penny Lane, representing the right for plaintiff to occupy Apartment 624, a duplex apartment ("Unit 624" or "the apartment"). Water leaked from the ceiling in or about August 1999. The ceiling was subsequently repaired. In February 2000, plaintiff notified defendants of continuing water damage from the ceiling on both levels of Unit 624. MKI informed plaintiff that exterior roof repair work could not begin until the spring. Plaintiff states

in her affidavit that "[a]lthough there was continuous leaking whenever there was wet or otherwise inclement weather, the leaking from the ceiling in Unit 624 worsened in May 2002, especially on the lower level east side of the ceiling of Unit 624." Despite notice, no action was taken until October 2003.

According to plaintiff, in or about October 2003, the superintendent of the building, "entered Unit 624 and cut a three foot by six foot hole in the ceiling, covered it with plastic and sealed it with tape. Each time it rained, the plastic would become filled with water and have to be emptied." The leaks continued, and after a hurricane in September 2004, Penny Lane's Board of Directors offered to relocate plaintiff and her daughter into several apartments in the Building. Plaintiff refused, she claims, because the apartments were "unsuitable." One of the proposed apartments allegedly had water leaks.

In or about late September or early October, Penny Lane agreed to relocate plaintiff and her daughter to Unit 610, an apartment across the hall from Unit 624; plaintiff was to pay $200 per month "towards living expenses" while the source of the leaks in Unit 624 was being remedied. MKI retained Ronald Erickson of FRE Engineering "to identify the source of the leak and to develop a plan that would fix the leak." Plaintiff claims that she was told in October 2004 that it would take 2 months to "investigate[]" the problem.

In or about November 5, 2004, Leighton Associates Environmental Health and Safety Consultants ("Leighton") was retained by defendants to test for mold in Unit 624. Leighton found high counts of mold spores, including black mold, throughout the apartment. In or about February 8, 2005, defendant retained Decon Mold Remediator, and the mold was remediated. During this time, structural damage to the wood joists was discovered. Plaintiff claims that the joists cracked due to excessive weight from a cement block and ventilation apparatus located on the upper terrace level outside of the apartment.

In May 2005, plaintiff purchased shares of Penny Lane appurtenant to Unit 625, which is

adjacent to Unit 624. Plaintiff and her daughter were still living in Unit 610 at this time. Plaintiff explains that she made this purchase based upon the good faith belief that defendants were finally remedying the water leaks in Unit 624. Plaintiff planned to expand her apartment to provide a bedroom for her daughter. Based upon the affidavit of Kenneth Castronuovo, who was a member of the Board of Directors since 2002, served as President from 2008 through 2010 and currently serves as the Vice President, plaintiff's belief that the water incursions had been fixed may well have been founded, "Penny Lane spent approximately $150,000 to fix the leaks in Unit 624".

Plaintiff asked defendants to remediate any mold in Unit 625 as well as test the joists above Unit 625. The defendants "ignored" plaintiff's request. On June 8, 2005, plaintiff hired Leighton to test for mold in Unit 625. In a report dated June 13, 2005, Leighton found that the mold spore count in Unit 625 was in fact greater than it had been in Unit 624. In late June 2005, defendants reimbursed plaintiff for the mold testing and hired United Mold Remediators to remediate the mold in Unit 625.

In or about June 2005, plaintiff had to relocate from Unit 610, because the owner was selling the apartment. Plaintiff moved to Unit 606, and was required to pay $300 a month. After the move, Maxwell offered plaintiff what she describes as "a mere $2,000 to cover a three (3) month housing credit, the fee to restore Units 624 and 625 to its pre-water and mold damage condition... and to offset maintenance on [the] uninhabitable apartment(s)." In July 2005, because of damage, the structural joists in Unit 625 were replaced by Titan, a roofing company.

Unfortunately, on or about August 19, 2005, water leaked into the upstairs level of Unit 624 during and/or after a rain storm. Plaintiff claims that the problem was pinpointed to the external west wall which was constructed of interior sheetrock materials. According to plaintiff, defendants instructed the roofing company to fix the external flashings on the terrace doors for both Units 624 and 625, to install five steel posts on the terrace level and to level the uneven terrace surface. Plaintiff claims that to date, the steel posts have not been installed and the terrace surface remains uneven.

In or about January 2006, defendants informed plaintiff that all repair work had been

completed and that they would no longer pay for plaintiff's housing. Plaintiff claims that water leaks continued to occur in both Unit 624 and 625 in April 2006. Plaintiff was given a six week housing credit ending in July 1, 2006. On or about July 15, 2006, renovation work in Units 624 and 625 began. Plaintiff finally moved into the units in January 2007. Thereafter, the roof of the building was replaced. Plaintiff claims that the roofing company caused major damage to her sliding glass door and frame on the upper level of Unit 624. Plaintiff also complains about excessive noise due to the exhaust fans outside the terrace of Units 624 and 625 (the "roof fans"). The noise from the fans resulted in two separate DEP/EPA violations, and despite years of notice, engineer's reports, etc., the problem has not been resolved. Plaintiff states that she has not used her terrace in over six years and the upper level of Unit 624 and 625, where her daughter's bedroom is located, remains vacant.

According to Mr. Castronuovo, all of plaintiff's complaints "were addressed and ultimately cured": her terrace drain was unclogged, the mold in Unit 625 was remediated, and noise issues with the roof fans were solved. Mr. Castronuovo details the efforts made by defendants to address the roof fan issue, such as replacing belts, consulting with a "vent fan specialist", controlling the timing of fans and encasing the fans in an enclosure in the summer of 2009.

Plaintiff has also provided the affidavit of Stuart Sokoloff, a registered professional engineer. Mr. Sokoloff was retained by plaintiff in 2012 to review defendants' documents and inspect the premises. Mr. Sokoloff opines that the "pervasive leaking was the result of poor/substandard engineering or construction, or both, of the roof" and "lack of maintenance of the building and the roof." Mr. Sokoloff inspected the building and Units 624/625 to observe the current condition. Mr. Sokoloff states that he "observed two potential areas for water infiltration: one at the exterior window where the side of the window was seen to have peeling and cracking paint as well as discoloration; the other was in the 6th floor bedroom ceiling where an approximate 2.5 inch square area was observed to be bulging downward, swelling and discolored.

Mr. Sokoloff observed the roof fans and provided a photograph to the Court as it appeared on

the day of his visit. He claims that there is "a loud albeit somewhat muffled constant hum and significant vibration which increases to loud a thud (sic) when the unit changes operations modes. The unit was set on a concrete pad without vibration isolators at its support."

Mr. Sokoloff also observed that a small section of the roofing has an approximate 1/8th inch depression where water ponds when it rains. A photograph of this observation has also been provided. Mr. Sokoloff further observed that the roof above plaintiff's upper level "is not uniformly sloped towards the two roof drains and that rain water had pooled and accumulated over large and multiple areas of the roof. Rain freely falls onto the roof from the spaces between the platform's metal slat flooring above. The top of the drain, approximately above plaintiff's apartment, was higher that (sic) the roof itself so it would be impossible to properly drain water from the roof." Photographs of these observations by Mr. Sokoloff have also been provided. Mr. Sokoloff also took issue with the drain cover.

Mr. Sokoloff's ultimate conclusion is that the work done in 2004-2006 was either not performed properly or additional work needs to be done to prevent future water infiltration. Mr. Sokoloff has detailed what additional work should be done.

Plaintiff moves for summary judgment on the following causes of action: (1st COA) breach of the proprietary lease by failing to keep the building in good repair (paragraph 2) and make repairs (paragraph 4, 18[a]) as a result of water incursions and mold; (3rd COA) negligence; (4th COA) breach of warranty of habitability; (5th COA) breach of warranty of quiet enjoyment; (6th COA) permanent injunction; (7th COA) breach of the proprietary lease by failing to keep the building in good repair (paragraph 2) due to the noise and vibrations from the roof fans; (9th COA) negligence; (10th COA) breach of warranty of habitability; (11th COA) breach of warranty of quiet enjoyment; (12th COA) partial constructive eviction; and (13th COA) attorneys' fees.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth

evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR § 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]); *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action (*Zuckerman v. City of New York, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing (*Hindes v. Weisz*, 303 AD2d 459 [2d Dept 2003]).

The relevant portions of the operative proprietary lease are as follows:

Paragraph 2:

> The lessor shall at its expense keep the building in good repair, including all of the apartments, the sidewalks and courts surrounding the same, and its equipment and apparatus except those portions of maintenance and repair of which are expressly stated to be the responsibility of the Lessee pursuant to Paragraph 18 hereof.

Paragraph 4:

> (a) If the apartment or the means of access thereto or the building shall be damaged by fire or other cause covered by multiperil policies commonly carried by cooperative corporations in New York City (and other damage to be repaired by Lessor or Lessee pursuant to Paragraphs 2 and 18, as the case may be), the Lessor shall at its own cost and expense, with

> reasonable dispatch after receipt of notice of said damage, repair or replace or cause to be repaired or replaced with materials of a kind and quality then customary in buildings of the type of the Building, the building the apartment and the means of access thereto, including the walls, floors, ceilings, pipes, wiring and conduits in the Apartment. Anything in this Paragraph or Paragraph 2 to the contrary notwithstanding, Lessor shall not be required to repair or replace, or cause to be repaired or replaced, equipment, fixtures, furniture, furnishings or decorations installed by Lessee or any of his predecessors in interest nor shall the Lessor be obligated to repaint or replace wallpaper or other decorations in the Apartment or to refinish floors located within.

Paragraph 18 (a):

> ...Subject to the provisions of Paragraph 4 above, the Lessee shall keep the interior of the apartment (including interior walls, floors and ceilings, but excluding windows, window panes, window frames, sashes, sills, entrance doors, frames and saddles) in good repair, shall do all of the painting and decorating required to his apartment, including the interior of window frames, sashes and sills, and shall be solely responsible for the maintenance, repair and replacement of plumbing, gas and heating fixtures and such refrigerators, dishwashers, removable and through-the-wall air conditioners, washing machines, ranges and other appliances, as may be in the apartment.

Plaintiff has failed to establish entitlement to judgment as a matter of law on her breach of contract, breach of warranty or negligence causes of action with respect to the claims arising from the water damage. Since a three year statute of limitations applies to these claims (CPLR 214[4]), even based upon plaintiff's own timeline from October 4, 2004, it remains an issue of fact as to whether defendants properly maintained the roof and exterior walls of the building, or whether defendants repaired the source of the water incursions within a reasonable period of time. Plaintiff points to several months-long gaps when the source of the leaks wasn't being repaired or mold wasn't being remediated. Yet between some of those gaps, repair work and mold testing/remediation was actually being performed. To the extent that there are gaps between the performance of repair work and/or remediation, there is a further triable issue of fact as to whether these gaps were reasonable in light of the circumstances, i.e. obtaining board approval and the timing of board meetings, weather conditions, defendants' exercise of discretion within the context of the business judgment rule, etc.

Indeed, plaintiff's purchase of Unit 625 lends credence to the notion that at least until mid-

2005, the repair work was being done with sufficient expediency from plaintiff's point of view. Indeed, plaintiff characterizes the repair work as a "great effort" on the defendants' part in a letter dated August 5, 2005 which she wrote to Penny Lane's Board of Directors: "[d]espite the Penny Lane Corp.'s great efforts over the past nine months, the work on my units 624 and 625 has not yet been completed." After that, there is no proof on this record which definitively resolves the issue of whether the repair work was unreasonably protracted or otherwise not performed.

As for the causes of action arising from the roof fans, while plaintiff has established that there was a noise issue, whether that noise issue was of such a nature that plaintiff can ultimately prevail on her claims is a triable issue of fact. Although plaintiff maintains that the noise and vibrations have rendered portions of the premises uninhabitable, a letter by John R. Hauenstein, president of JRH Acoustical Consulting, Inc. and dated November 2, 2009 which was provided by plaintiff indicates that the noise level from both roof fans when operating was within the NYC noise code requirement for exterior mechanical equipment. Moreover, there is no dispute that defendants took measures to address the noise emanating from the roof fans such as replacing belts, consulting with a "vent fan specialist", controlling the timing of fans and encasing the fans in an enclosure in the summer of 2009. Whether defendants' efforts were reasonable and whether the noise issue is currently ongoing or remained ongoing for an unreasonable period of time requires credibility determinations that are beyond the scope of the instant motion.

Based upon the same reasoning, plaintiff's motion as to the cause of action for partial constructive eviction must also be denied.

Accordingly, plaintiff's motion for partial summary judgment is denied in its entirety.

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: July 7, 2014
New York, New York

So Ordered:

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