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Modular Capital LLC v Foster
2020 NY Slip Op 50007(U) [66 Misc 3d 1206(A)]
Decided on January 3, 2020
Civil Court Of The City Of New York, Kings County
Kennedy, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
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Decided on January 3, 2020

Civil Court of the City of New York, Kings County

Modular Capital LLC, Plaintiff,

against

Desiree Foster, Defendant.

CV-4060-17

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Odessa Kennedy, J.

After trial of an action to recover rent arrears for a residential premises, the Court finds as follows:

Plaintiff landlord commenced the instant action against defendant tenant for rent arrears in the sum of \$20,934.25 plus interest, costs and disbursements. Tenant claims landlord breached the warranty of habitability as a result of which she was forced to vacate the premises.

Tenant entered into a residential lease with landlord agreeing to rent an apartment in a building from March 1, 2013 through February 28, 2014 in the sum of \$1500 per month. Landlord alleges that the tenant defaulted on rent from August of 2013 through September of 2014. Tenant claims that the landlord breached the warranty of habitability causing her to vacate and surrender the premises in August of 2013.

As its witness, the plaintiff landlord produced its principal owner/manager at trial. He testified that the tenant never informed him she had vacated the premises or had any intentions to leave the apartment. It was not until August or September of 2014 when, not having heard from the tenant for months, that the landlord entered the apartment through a window and discovered that the tenant had moved out. The tenant never surrendered the keys to the landlord.

He further testified that the tenant's claim of having vacated the premises in August of 2013 is erroneous because in June of 2014 the tenant was personally served at the leased [*2]apartment with a Petition which the plaintiff had filed against her in Housing Court.

The witness contended that he was the manager of the subject building and that the building did not have a superintendent. If tenants had a complaint regarding the condition of the leased premises, they were required to specify the condition on a form which he had provided to them and submit the completed form directly to him. The witness denied having received any complaints from the

defendant in writing or orally.

Contrary to the owner's initial testimony that the building lacked a superintendent, the tenant testified that there was a super who lived nearby and worked daily at the subject building. Tenant claims to have paid the super rent at the owner's direction and that "every time" she delivered the rent she complained to the super regarding the conditions of the building. Tenant has never seen the owner in the building and denied having been provided with a form to convey her complaints.

Tenant testified that within two weeks after she moved in water began to leak from the kitchen ceiling. She complained of the leak to the super who stated that he would inform the landlord and repair the condition. Yet the leak was not repaired. Within six weeks, the leak created a "big hole" directly above the stove. Water gushed down daily through the hole into the kitchen preventing the tenant from cooking. Water also leaked into the bathroom walls causing the wall next to the shower to collapse. As a result, water pipes which had been covered by the shower wall located immediately next to the showerhead became exposed. In addition, the tenant testified that the front door lock of the building would not lock. Consequently, strangers would enter the building and sleep on the floor which made her feel unsafe. Tenant further testified that there were "a lot of mice" in the apartment. She claims to have complained to the super regarding all of the above conditions, which she deemed dangerous especially to the children residing with her. The super responded that he would inform the landlord and repair the conditions, but never made any repairs. Finally, in August of 2013, the tenant returned the keys to the super and vacated the premises.

Tenant submitted photographs which depicted the exposed shower pipes and leakage in the kitchen ceiling into evidence. In rebuttal, the owner testified again and denied that the tenant's unit sustained the damage shown in the photographs. He further testified that the apartment was not repaired after the tenant moved out because there was no condition needing repair.

Since each party controverts the other's testimony as to material facts, their credibility is paramount in the Court's determination of the matter. Landlord denied that the apartment had vermin, leak or disrepair, that the tenant vacated the apartment in August of 2013 or made any complaints regarding its condition or provided notice of her vacatur or intention to vacate. He further had testified on direct that the building did not have a super so that it would be the owner to whom the tenants would complain. In contrast, the tenant testified that there was a super present at the building who collected rent on behalf of the owner, and to whom she repeatedly complained of the unsafe conditions and surrendered the keys when she vacated the premises in August of 2013.

The issue of whether there was a superintendent at the building is crucial in determining the parties' credibility as the super could provide information as to the facts underlying their conflicting testimony regarding the condition of the apartment, the date of tenant's vacatur and her surrendering of the keys. The court notes while the owner had initially denied that there was a super in the building, he eventually admitted that a "maintenance man" who he also described [*3] as his "super" for the past "12 or 13 years" in fact performed work at the subject premises during defendant's residency.

The court deems the owner's initial denial that there was a super who worked at the building misleading. The owner's mischaracterization was underscored by his stark omission that the "maintenance man" he has employed as a "super" for over a decade, performed work at the subject building.

The owner's credibility was further undermined by his failure to produce his employee, the super as a witness during trial. The owner testified that the reason he did not produce the super at trial during his case in chief was his belief that the super would not have any relevant information. However, the owner's explanation is meritless. Tenant raised the defense of breach of warranty of habitability which placed plaintiff on notice that tenant claims she was absolved to pay rent because of the inadequate condition of the premises. Tenant further claimed that it was the super who collected rent, had direct knowledge of the condition of the premises, the date of the tenant's vacatur and surrender, all of which are material issues.

Even if the owner had doubts prior to trial of the relevancy of the super's testimony, the tenant's testimony demonstrated that the super would have crucial information as to whether he collected rent, witnessed the condition of the tenant's premises, had knowledge of the date of the tenant's vacatur and surrender. At the very least, plaintiff could have produced the super instead of recalling the owner as a witness during rebuttal. Plaintiff's failure to produce the super as a witness suggests that the super's testimony would likely have been inconsistent with the owner's assertions, especial in view of the owner's initial denial that a super was present at the building.

Further unavailing is the owner's argument that personal service of the Petition on the tenant in June of 2014 at the subject premises proved that the tenant had not, despite her claim, vacated the premises in August of 2013. Plaintiff did not submit or attempt to submit any evidence including the affidavit of service of the Petition to establish that the tenant was personally served at the subject premises.

The court further finds the owner's denial of leaks, vermin, and broken lock at the subject premises, or any complaints from the tenant regarding said conditions an unlikely. Tenant testified that the owner never saw the apartment during her tenancy, nor has she ever made any complaints to him as she has never seen him in the building. Tenant stated she complained to the super. Apparently the person with personal knowledge of the tenant's complaints and veracity was the "maintenance man" or landlord's "super" of over ten years who did not testify.

Plaintiff also submitted photographs of the subject premises in its case in chief which did not show a leak or any disrepair. However, upon further inquiry, the owner clarified that he took those photographs before the tenant had moved into the apartment, which rendered them patently irrelevant as to the tenant's subsequent complaints after she moved in.

The owner further claimed that he specifically recalled inspecting the apartment after tenant's vacatur in August or September of 2014 finding no damage or disrepair. He further testified that he had the full file for the subject premises with him in court. Yet the owner additionally claimed that he did not bring with him, at trial, photographs which showed the condition of the apartment when he inspected after tenant's vacatur, which undermined his credibility regarding the condition of the apartment shown in those photographs. Owner claimed he did not bring the photographs with him to court because they were irrelevant, which further undermined his credibility because the photos which purportedly showed the condition of the leased premises following tenant's vacatur were material. In contrast, the kitchen leak as well as [*4]the exposed pipes in the bathroom following the shower wall's collapse were visible in the photographs submitted by tenant who testified they were fair and accurate depictions of the premises.

Furthermore, the owner admitted that the tenant's photographs showed water damage. However, he categorically denied the photos depicted the tenant's apartment. Yet, the record is devoid of any evidence that the tenant had falsified the photographs or that she was untruthful that they depicted her leased residence. While the tenant's photographs which were in black and white would have been clearer in color, their clarity was sufficient to show the water leak and the exposed shower pipes. The photographs in conjunction with the tenant's testimony that they fairly represented the condition of the premises sufficiently supported tenant's allegations of disrepair.

The owner's testimony contained material omissions and inconsistencies. He further failed to produce essential evidence in support of his allegations during plaintiff's case in chief and rebuttal, which include the photographs which he took after he inspected the premises following the tenant's vacatur, affidavit of personal service of the Petition on the tenant at the subject premises in June of

2014, and the failure to produce the super as a witness.

Section 235-b of the Real Property Law deems a warrantee of habitability to be in each residential lease and requires that the leased premises " 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." A vermin infestation has been held to breach the warrantee of habitability ([see, e.g., Hillside Place, LLC v Lewis, 29 Misc 3d 139](#) [App. Term, 2nd Dept, 2d, 11th & 13th Jud. Dists., 2010]), as have water leaks ([see, e.g., Greenwich Realty Co. v Meltzer, 18 Misc 3d 133](#)[A] [App Term, 1st Dept 2008]).

Based upon the evidence and testimony adduced at trial, the court finds that the plaintiff breached the warranty of habitability to the extent that the defendant was constructively evicted. Tenant's complaints of vermin infestation, water pouring down on the stove daily from the kitchen ceiling, the leak in the bathroom, the collapse of the shower wall exposing water pipes immediately next to the showerhead, and defective front door lock are conditions that deprived tenant of proper use of her kitchen and bathroom, and further endangered the occupants of the premises, especially the children who would shower next to exposed water pipes, rendering the premises uninhabitable. Tenant accordingly does not owe any rent for the time period after she surrendered the premises. *See, e.g., Mayourian v Tanaka*, 188 Misc 2d 278 [App Term, 2d Dept 2001].

Plaintiff's Complaint also contained a cause of action for account stated. The elements of an account stated are that plaintiff generated statements for the defendant in the regular course of business and mailed those statements to the defendant and that defendant accepted these account statements and retained them without objection for more than one year prior to the commencement of the action. [See, Am. Express Centurion Bank v Williams, 24 AD3d 577](#) [2d Dept 2005]. As plaintiff failed to produce any evidence that it generated statements, mailed them or that they were accepted or retained, it failed to prove any element of this cause of action.

Based on the foregoing, the action is hereby dismissed.

Dated: January 3, 2020

Hon. Odessa Kennedy

Judge of the Civil Court

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