2023-05-31

Boswell v. 706 Condominium

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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CANDACE BOSWELL, BARBARA ANNE MARIE MARTIN, DEBBIE CHARLES SANDERS, THOMAS BROWN, BEVERLY BROWN, CYNTHIA FOULKS, NATALIE WARD, KAREN FLANAGAN, ASHLEY FLANAGAN-BROWN, KIM POWELL, WILLIAM POWELL, RYLONA WATSON, RABIYA WATSON, DENISE PRESCOD, KYEREWAH BONSU-ANANE, MARIA SANTIAGO, ISAAC SANTIAGO, ETHEL MCCALL

Plaintiff,

- v -

THE 706 CONDOMINIUM, NEWPORT MANAGEMENT, LLC,MORDECHAI EISENBERG, RIVERSITE APARTMENTS, LLC,ISRAEL SPIRA, BOARD OF MANAGERS 706 CONDOMINIUM, 706 DRIVE, LLC,

Defendant.

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INDEX NO. 157018/2021

MOTION DATE 02/02/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 65

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and after oral argument, which took place on April 11, 2023, where Robin LoGuidice, Esq. appeared for all Plaintiffs, and Jacqueline Aiello, Esq. appeared for Defendants Riversite Apartments, LLC ("Riversite") and 706 Drive LLC ("Drive") (collectively "Moving Defendants"), the Moving Defendants' motion to dismiss pursuant to CPLR § 3211(a)(1) and (7) is granted in part and denied in part.

I. Background

Plaintiffs initiated this actin via a summons on July 28, 2021 (NYSCEF Doc. 1). On September 2, 2021, there was a motion to dismiss made by Defendants The 706 Condominium, NewPort Management, LLC, Mordechai Eisenberg, Riversite, Israel Spira, and the Board of

Managers 706 Condominium pursuant to CPLR § 3012(b) (NYSCEF Doc. 12). In response, on September 13, 2021, the Complaint was filed (NYSCEF Doc. 23). The motion was ultimately denied by Decision and Order of this Court dated November 4, 2022 (NYSCEF Doc. 33).

The Complaint alleges that all Plaintiffs live in apartments located at 706 Riverside Drive, New York, NY (the "Subject Building") (NYSCEF Doc. 23 at ¶¶ 1-19). Allegedly, all Plaintiffs are rent regulated tenants (*id.* at ¶ 19). Plaintiffs alleged that Defendant Riversite is the owner and/or co-owner of Plaintiffs' apartments (*id.* at ¶ 27). It is alleged that Defendant Drive is responsible for collecting Plaintiffs' rent through Defendant Newport (*id.* at ¶ 32). Defendant Eisenberg is the individual managing agent of the Subject Building, and Defendant Spira is an agent and/or principal of Defendants Newport, Riversite, and Drive (*id.* at ¶¶24-25 and 28-29).

It is alleged "Plaintiffs represent a minority ethnic group in the Subject Building" and that "many of the Plaintiffs are elderly and/or disabled" (*id.* at ¶¶ 37-38). Plaintiffs further alleged that the Defendants, acting in concern, have reduced and denied services to Plaintiffs in violation of the Multiple Dwelling Law ("MDL"), warranty of habitability, the New York City Human Rights Law ("NYCHRL"), the Housing Protection and Tenant Stability Act ("HSTPA"), and the Americans with Disabilities Act ("ADA") amongst other laws (*id.* at ¶¶ 39-40).

Specifically, Plaintiffs allege that essential services, such as telephone lines, were cut during construction in the building (*id.* at ¶ 45). Plaintiffs allege that the construction was done in public areas without notice and to harass Plaintiffs. They also allege that intercom service was cut, there is no longer any extermination service, and there has been a reduction in the size of the freight elevator such that it is no longer ADA compliant (*id.* at ¶¶ 51-52). There was allegedly a dedicated porter on staff six days per week to assist tenants, but this service has been removed (*id.* at ¶ 54).

Allegedly, the condition of the roof and façade have deteriorated to the point that leaks are causing the ceiling to collapse in Plaintiffs' apartments and in the public areas, and mold conditions have festered in Plaintiffs' apartments (*id.* at ¶¶ 70-71). It is alleged that Defendants have failed to comply with the Rent Stabilization Law by refusing to register accurate rent histories, acknowledge succession rights, and by refusing to renew Plaintiffs' leases (*id.* at ¶¶ 78-80).

Plaintiffs seek declaratory judgment and injunctive relief (*id.* at ¶ 88). Plaintiffs also allege violation of the ADA and intentional infliction of emotional distress (*id.* at ¶¶ 89-101). The third cause of action alleges breach of the warranty of habitability (*id.* at ¶¶ 102-111). The fourth cause of action alleges property damages (*id.* at ¶¶ 112-114). The fifth cause of action seeks declaratory judgment and injunctive relief mandating accurate rent invoices, revised rents registered with DHCR, renewal leases, and compliance with the ADA, amongst other things (*id. at* ¶¶ 115-123). The sixth cause of action seeks declaratory judgment stating that Defendants "must provide the same accommodations and serves to Plaintiffs as are provided to other residents in the Subject Building" (*id.* at ¶¶ 124-126). The seventh cause of action alleges violation of General Business Law ("GBL") § 349 (*id.* at ¶¶ 127-133). Finally, the eighth cause of action seeks attorneys' fees (*id.* at ¶¶ 134-137).

On February 1, 2023, Defendants Riversite and Drive filed the instant motion to dismiss (NYSCEF Doc. 47). The Moving Defendants allege the ADA claim must be dismissed because the ADA does not cover private residential apartments. The Moving Defendants argue that the NYCHRL claims fail to state a claim as it is not explicitly mentioned what protective classes the Plaintiffs each belong to, nor are there allegations that the lack of services was based on discrimination, since the Complaint specifically alleges the lack of services was building wide. Moving Defendants also assert that the intentional infliction of emotional distress claim must be

dismissed since the alleged actions do not rise to the level of an actionable intentional infliction of emotional distress claim. Moving Defendants argue that the GBL § 349 must be dismissed because private disputes between landlords and tenants are not the consumer-oriented conduct aimed at the public at large as required to bring a GBL § 349 claim.

Moving Defendants claim that the "harassment" claim, which is improperly disguised as breaches of the warranty of habitability and violations of the Rent Stabilization Act, should not be heard in this forum but instead be heard in housing court. Moving Defendants argue that to the extent all other claims fail, so too must the First and Eighth causes of action, as they are duplicative or rely on the existence of other claims. Finally, Moving Defendants also argue that Riversite is not in privity with Plaintiffs, and therefore all claims against Riversite must be dismissed.

On February 28, 2023, Plaintiffs submitted opposition (NYSCEF Doc. 49). Plaintiffs argue that the documentary evidence submitted by Moving Defendants, namely leases, is not dispositive of the numerous causes of action contained in the Complaint. Plaintiffs also argue that discovery is required to definitively ascertain the relationship between Riversite and the Plaintiffs. Notably, Plaintiffs failed to address several of Moving Defendants' arguments, including dismissal of the ADA, intentional infliction of emotional distress, and GBL claims.

However, Plaintiffs did submit the affidavit of Kim Powell ("Powell"), who is a named Plaintiff and tenant of Apartment 7E in the Subject Building (NYSCEF Doc. 50). Powell has lived in the Subject Building for 45 years and is a tenant leader and organizer (*id.* at ¶¶ 1-5). Powell argues privity does exist between Riversite and Plaintiffs because on rent registrations for Powell's own apartment, Riversite is listed as the "Owner/Managing Agent". Moreover, Riversite has paid real estate taxes on each of the apartments which are at issue in this litigation. Powell also clarified that each of the Plaintiffs are senior citizens or disabled, and those are the Plaintiffs' protected

classes. The only Plaintiffs who are not senior citizens or disabled are (1) Ashley Flanagan Brown, who is Karen Flanagan's daughter and lives in Karen Flanagan's apartment; (2) Rabiya Watson who is Plaintiff Rylona Watson's daughter and lives in Rylona Watson's apartment; (3) Kyerewah Bonsu-Anane who is Plaintiff Denise Prescod's sister and lives in the same apartment as Denise Prescod, and (4) Isaac Santiago who is the son of Maria Santiago and lives in the same apartment as Maria Santiago. Powell also states that all Plaintiffs are of African American or Latino descent.

Powell further amplified the discrimination allegations by stating that the Complaint does not allege "building wide discrimination" but rather that Plaintiffs "have all suffered from direct discriminatory actions, including demanding access for repairs with no notice, and then failing to correct the source of the repair conditions."

Moving Defendants filed their reply on March 17, 2023 (NYSCEF Doc. 65). Moving Defendants note that Plaintiffs' failure to rebut the ADA, GBL § 349, and intentional infliction of emotional distress arguments warrants dismissal of those causes of action. Moving Defendants also note that Plaintiffs have failed to submit a memorandum of law, let alone to cite to any case law. Regarding the NYCHRL claims, Moving Defendants again assert that Plaintiffs have failed to allege an inference of discrimination. Moving Defendants again assert the "harassment" claims must be brought in housing court. Moving Defendants also repeat their privity argument.

II. Discussion

A. Standard

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of

undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). Likewise, a Court need not accept as true factual claims that are either inherently incredible or totally contradicted by the documentary evidence (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). However, an inartfully plead Complaint may be amplified on a pre-answer motion to dismiss by affidavits and other evidence evidencing potentially meritorious claims (*Ninth Space LLC v Goldman*, 192 AD3d 594 [1st Dept 2021]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

B. ADA Claim

Plaintiffs' ADA claim is dismissed. It is well established that the ADA only applies to places of public accommodation (*see* 42 U.S.C. § 12182[a]). Residential facilities that are not public housing, such as the Subject Building, do not constitute public accommodations as covered

by the ADA (*see Noe v Ray Realty*, 2020 WL 506459 at *1 n. 1 [SDNY 2020] ["plaintiff's apartment did not constitute a 'place of public accommodation'"]; *Kneitel v Almarc Realty Corporation*, 2019 WL 2717106 at * 3 [EDNY 2019]; *Kitchen v Phipps Houses Group of Companies*, 2009 WL 290470 at *2 n. 3 [SDNY 2009]). Accordingly, Plaintiffs' ADA claim fails as a matter of law and is hereby dismissed.

C. Intentional Infliction of Emotional Distress Claim

Plaintiffs' intentional infliction of emotional distress claim is also dismissed. "In order to survive a motion to dismiss, a cause of action for intentional infliction of emotional distress must allege conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*164 Mulberry Street Corp. v Columbia University*, 4 AD3d 49 [1st Dept 2004]). Pleading an intentional infliction of emotional distress claim must meet an "exceedingly high legal standard" (*Russell v New York University*, 204 AD3d 577 [1st Dept 2022] quoting *Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 57 [2016]). The alleged conduct here is rather routine in landlord/tenant disputes and encompasses faulty repairs, falsely alleged arrears, alleged violations of the rent stabilization code, and an alleged lack of services. Even accepting all the allegations as true, they do not rise to the level of conduct that is so outrageous in character and so extreme in degree so as to go beyond all possible bounds of decency (*see Bour v 259 Bleecker LLC*, 104 AD3d 454 [1st Dept 2013] [Landlord leasing apartment to tenant while aware of bedbug history did not give rise to claim for intentional infliction of emotional distress]). Thus, the intentional infliction of emotional distress claim is dismissed.

D. Warranty of Habitability, Property Damage, Declaratory Judgment, and Attorneys' Fees

The breach of warranty of habitability, property damage, declaratory judgment related to HSTPA, and attorneys' fees claims (third, fourth, fifth, and eighth causes of action) survive. Moving Defendants fail to proffer any reason why these claims should be dismissed other than a vague argument that they should be heard in Housing Court. However, property damage claims are routinely heard in this Court. Moreover, the Court of Appeals in *Collazo v Netherland Property Assets LLC* has held that under the Housing Stability and Tenant Protection Act, the tenant's choice of forum in litigating a rent stabilization declaratory judgment claim controls (35 NY3d 987 [2020]). Further, there is no reason why the breach of warranty of habitability claim should be dismissed and heard in housing court where the interest of judicial efficiency warrants having it heard here in conjunction with the other causes of action. Indeed, housing court does not have the power to make declaratory judgments (*see Nuredin v Koufa Realty Corp.*, 72 Misc.3d 205, 208 [Civ. Ct., Queens Co. 2021]), and it would not make sense to split claims between two courts when this court may exercise jurisdiction over all claims. As the third, fourth, and fifth causes of action survive, there is adequate basis to also allow the claim for attorneys' fees to survive.

E. GBL § 349 and NYCHRL

Plaintiffs' GBL § 349 claim is dismissed. It is well established that GBL § 349 is not applicable to allegations of deceptive acts and practices alleged by tenants against landlords (*Aguaiza v Vantage Properties, LLC*, 69 AD3d 422 [1st Dept 2010]).

However, Plaintiffs' have sufficiently alleged a claim under the NYCHRL. Plaintiffs allege that based on their age, disability, and race, they are not being provided the same accommodations and services as other residents in the Subject Building. The provisions of the NYCHRL are to be construed liberally for the accomplishment of its uniquely broad and remedial purposes and are

decidedly more protective than comparable federal and New York State anti-discrimination legislation (*Mutual Apartments, Inc. v New York City Commission on Human Rights*, 203 AD3d 1154 [2nd Dept 2022]). It is illegal under the NYCHRL for any person or entity to refuse to make reasonable accommodations to afford a handicapped person an equal opportunity to use and enjoy a dwelling unit (*see* NYC Admin. Code § 8-107(15); *see also Espino v New York City Hous. Auth. Patterson Houses*, 60 Misc.3d 667 [Civ. Ct., Bronx Co. 2018]). The Court is mindful that whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11 [2005]). Therefore, as it relates to those tenants who allege they are disabled senior citizens who are being denied reasonable accommodations, their claims survive.[1]

The affidavit of Kim Powell further swears, under penalty of perjury, that all Plaintiffs are either African American or Latino, and appear to have been targeted by Defendants or agents of Defendants in granting access to apartments for repairs with no notice and then failing to actually repair the conditions (NYSCEF Doc. 50 at ¶¶ 39-40-41). It is also alleged that Defendants or Defendants' agents have cut all of the wires to Plaintiffs' telephones and cable service without notice. Granting the Plaintiffs' all favorable inferences on this motion to dismiss, and based on Powell's affidavit, which has amplified the Complaint, these alleged acts give rise to an inference of discrimination under the NYCHRL.[2] The NYCHRL claim survives.

F. First Cause of Action seeking Declaratory Judgment

The First Cause of Action, which vaguely alleges "Plaintiffs are entitled to declaratory judgment…declaring that Defendants' actions…are in violation of the law" is dismissed as

[1] The Court finds that the allegations in the Complaint, while perhaps defective on their own, have been amplified and remedied through the affidavit of Plaintiff Kim Powell (*see* NYSCEF Doc. 50).
[2] Again, as this is a motion to dismiss, this ruling has no bearing on the merits of any potential motion for summary judgment based on a more developed evidentiary record.

duplicative. Indeed, the Fifth Cause of Action, which seeks a declaration and injunctive relief related to the Rent Stabilization Laws, and the Sixth cause of action, which seeks declaratory judgment related to the NYCHRL, subsume the First Cause of Action. As these later pled causes of action are more specific and survive, the vague first cause of action is dismissed as duplicative (*see Upfront Megatainment, Inc. v Thiam*, 215 AD3d 576 [1st Dept 2023] [dismissing declaratory judgment claim which was duplicative]; *see also Nationstar Mortgage, LLC v Ocwen Loan Servicing, LLC*, 194 AD3d 490 [1st Dept 2021]).

G. Privity

The Moving Defendants' final argument is that there is no privity between Plaintiffs and Defendant Riversite, and therefore all claims against Riversite must be dismissed. However, this ignores the statutory mandate of the NYCHRL, which holds the owners of certain pieces of property liable for the allegedly discriminatory acts of the owners' agents. (*see generally,* NYC Admin. Code § 8-107 ["[i]t shall be an unlawful discriminatory practice for the owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease…or any agent or employee therof….to discriminate against such person or persons in the…rental or lease of any such housing accommodation"]). Moreover, the documentary evidence proffered by both sides in support and in opposition of this motion to dismiss raises an issue of fact as to the relationship between the multiple individual and corporate defendants in managing and owning the apartments at issue. Indeed, the leases provided by Moving Defendants are unclear as to who the "owner" signing the lease is. In fact, the signature is illegible. Also, there are only three leases provided, which raises an issue of fact as to who signed the other relevant leases. These issues must be flushed out in discovery prior to granting a remedy as drastic as dismissing Defendant Riversite. Thus, Riversite's motion to dismiss based on a lack of privity is denied.

Accordingly, it is hereby,

ORDERED that the Moving Defendants' motion to dismiss is granted in part and the first, second, and seventh causes of action of the complaint are dismissed; and it is further

ORDERED that the Moving Defendants' motion to dismiss is otherwise denied; and it is further

ORDERED that the Moving Defendants are directed to serve an Answer to what remains of Plaintiffs' Complaint within twenty days of entry of this Decision and Order; and it is further

ORDERED that within ten days of entry, counsel for Plaintiffs shall serve a copy of this Decision and Order, with notice of entry; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

5/31/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
		GRANTED		DENIED	x	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE