2011 NY Slip Op 50054
Upper East Lease Associates, LLC, Plaintiff(s)
v.
Danielle Cannon, Defendant(s)
44409/09
District Court Of the State of New York
Nassau County
Decided on January 20, 2011

Maidenbaum & Associates, PLLC, Attorney for Plaintiff

Danielle Cannon, Defendant Pro se

Michael A. Ciaffa, J.

In modern high-rise apartment settings, a tenant's home is *not* the tenant's castle. Landlords of such dwellings have a corresponding duty to prevent one tenant's habits from materially interfering with another tenant's right to quiet enjoyment. When a tenant's smoking results in an intrusion of second-hand smoke into another tenant's apartment, and that tenant complains repeatedly, the landlord runs a financial risk if it fails to take appropriate action. This case involves such a situation. As explained below, the landlord's failure to take appropriate action, over a period of several months, to rectify a second-hand smoke nuisance, justifies a rent abatement, and excuses the tenant from any obligation to pay rent after her constructive eviction.

Plaintiff, Upper East Lease Associates, LLC, commenced this action against defendant Danielle Cannon seeking monetary damages for breach of a residential apartment lease. Defendant's answer and counterclaims include allegations that plaintiff "violated the warranty of habitability owed to defendant" (first affirmative defense), that plaintiff "fail[ed] to address... unsafe and intolerable conditions..." (second affirmative defense), and that plaintiff deprived her of "the beneficial use and enjoyment of the leased premises" (id). As a consequence, defendant alleges that she was "forced to abandon the premises" and that she was "constructively evicted" (id). Defendant also asserts that plaintiff's wrongful acts and omissions "caused an intolerable nuisance to defendant" and breached her "right to quiet enjoyment of the premises" (third affirmative defense).

Defendant's counterclaims include allegations that plaintiff's breach of the warranty of habitability entitles her "to recover the rent already paid on the lease" (first counterclaim). A second counterclaim, specifically alleging a breach of the lease concerning second-hand smoke, seeks "thousands in dollars in damages to her property" (second counterclaim).

Trial of the action was held on January 7, 2011. An employee of building management, Shanique Sealy, gave testimony in support of plaintiff's claim for unpaid rent, late charges, and legal fees. Danielle Cannon testified regarding her defenses and counterclaims. Plaintiff's property manager, Joe Kross, was called as a rebuttal witness by plaintiff. Documentary exhibits were introduced by both sides.

Based upon the testimony and evidence submitted, the Court makes the following findings of fact and conclusions of law:

1.Pursuant to a written lease, defendant occupied apartment 18N at 215 East 96th Street between May 7, 2008, and February 4, 2009. The lease carried an expiration date of May 31, 2009. Monthly rent, due "on the first day of each month," was $2,825.00.

2.In an addendum to the lease, headed "APARTMENT STANDARDS," the lease addressed the subject of "Second Hand Smoke." It provides, in part, as follows:

Tenant acknowledges and understands that the State and City of New York have enacted legislation specifically recognizing the health dangers inherent in environmental tobacco smoke, commonly known as "second-hand smoke". Tenant further acknowledges and understands that causing the infiltration of second-hand smoke into the common areas of the Building and/or into other apartments in the Building, may constitute a nuisance and health hazard and be a material infringement on the quiet enjoyment of the other tenants in the Building. For the foregoing reasons, Tenant acknowledges and agrees that the prevention by Tenant, its invitees and guests, of the infiltration of second-hand smoke into the common areas of the Building and/or into to other apartments in the Building is OF THE ESSENCE to this Lease, and Tenant covenants and agrees to take all measures necessary to minimize second-hand smoke from emanating from Tenant's apartment and infiltrating the common areas of the Building and/or into other apartments in the building.

3.The apartment immediately beneath defendant's apartment became occupied by a new tenant in September 2008. The new tenant's lease included the Second Hand Smoke addendum. The following month, defendant began complaining about second-hand smoke.

4.According to defendant's credible testimony, representatives of plaintiff confirmed and admitted that the new tenant was a smoker. The new tenant also had a guest who was a smoker.

5.The extent of the second-hand smoke problem varied from time to time.

Sometimes it was sporadic, sometimes it was consistent. All in all, it was troublesome enough to constitute a "nuisance" within the meaning of the second-hand smoke addendum.

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6.Nevertheless, plaintiff's witnesses gave credible testimony that they initially tried, in good faith, to rectify the nuisance. Plaintiff's actions included attempts at caulking and sealing around vents that may have been conductors of cigarette smoke from the apartment below.

7.By November 2008, it was apparent to both plaintiff and defendant that these measures were ineffective. Defendant requested a different apartment. Aided by a leasing representative of the plaintiff (Nancy Bordan), defendant continued to press for an apartment transfer.

8.Plaintiff's rebuttal witness, Joe Kross, acknowledged at trial that apartment transfers could be approved "as necessary." However, according to defendant's credible testimony, the parties were not able to agree on the terms of the transfer. Defendant requested one month free rent. Plaintiff responded by seeking defendant's agreement to a new one year lease. Once the negotiations broke down, plaintiff withdrew its consent to the transfer. When December's rent came due, defendant paid it "under protest."

9.In the meantime, the second-hand smoke problem continued, unabated.

Defendant did not pay January's rent.

10.Defendant continued to complain to building management. Sometime in January, representatives of the landlord visited defendant's apartment one morning, but they smelled nothing at the time. When no further action by the landlord appeared to be forthcoming, defendant decided to leave. She failed to pay the rent due on February 1, and she vacated her apartment on February 4, 2009. Defendant gave plaintiff very little prior notice before departing.

11.Under the circumstances presented, the parties' rights and obligations are governed by the provisions of the lease, judged together with the statutory implied warranty of habitability (RPL §235-b). Recent caselaw, which the Court finds persuasive, recognizes that second-hand smoke "qualifies as a condition that invokes the protections of RPL §235-b under the proper circumstances." *Poyck v. Bryant*, 13 Misc 3d 699, 702 (Civ Ct NY Co. 2006). "As such, it is axiomatic that second-hand smoke can be grounds for a constructive eviction." Id.

12.While proof of a "single occurrance" plainly will not suffice, the key question typically will revolve around "whether or not the second-hand smoke was so pervasive as to actually breach the implied warranty of habitability and/or cause a constructive eviction." Id. The Court's answer necessarily is fact-sensitive.

13.In addition to considering how the second-hand smoke condition affected the tenant's right to quiet enjoyment, the Court properly considers the actions or inaction of the landlord. *Poyck v. Bryant*, *supra*, 13 Misc 3d at 705-6. Although a landlord may lack direct control over the actions of another tenant, courts have often applied the implied warranty of habitability to conditions beyond the landlord's direct control. *Id*. at 705. As recognized on

Poyck, a tenant's smoking habits may give rise to a duty to act, to prevent "unreasonable interference" with the rights of other tenants. *Id*. at 706.

14.The foregoing logic applies, with even more force, to circumstances, like those presented, where the landlord's standard lease contains language recognizing the potential "nuisance" of second-hand smoke. There can be no doubt, under the language of the Addendum, that preventing infiltration of second-hand smoke into another tenant's apartment "IS OF THE ESSENCE of this Lease," and toward that end, the landlord had the power and duty to protect its tenants, when necessary, from second-hand smoke constituting "a nuisance," or a "health hazard."

15.No evidence was presented by defendant to the effect that her neighbor's smoking constituted a "health hazard." Nevertheless, it was enough of a "nuisance" to warrant action by the landlord. Without doubt, the landlord, at least initially, took generally appropriate actions to try to abate the nuisance. However, when those initial actions proved ineffective, the landlord was obligated to take further steps to alleviate the condition, or to accommodate defendant in a different apartment.

16.Under the totality of the circumstances, the Court finds that plaintiff failed to fully meet its obligations, and that such a breach resulted in a constructive eviction of defendant as of February 4, 2009. The efforts plaintiff made to solve the problem were either too little, too late, or included unacceptable conditions. By reason thereof, plaintiff lost the right to pursue a claim for rent that accrued after defendant's departure. *See Mayourian v. Tanaka*, 188 Misc 2d 278 (App Term, 2d Dept 2001); *US Bronsville II v. Nelson*, 2004 NY Slip Op 50466 (Civ Ct Kings Co.).

17.Furthermore, for the period of time defendant occupied the apartment while enduring the neighbor's second-hand smoke, an abatement of rent is warranted. *See Park West Management Corp. v.*

Mitchell, 47 NY2d 316 (1979). As Judge Fairgrieve has noted: "The duty of the tenant to pay rent is coextensive with the landlord's duty to maintain the premises in habitable condition and the proper measure of damages for breach of the warranty is the difference between the fair market value of the premises if they had been as warranted... and the value of the premises during the period of the breach." *Amerifirst Mortg. Corp. v. Green*, 2005 NY Slip Op 50805 (Dist Ct Nassau Co.), *citing Park West Mgmt. Corp. v. Mitchell*, *supra*; *accord Regensburg v. Rzonca*, 2007 NY Slip Op 50109 (Dist Ct Suffolk Co.). "The damage award may take the form of a percentage reduction of the contracted-for rent..." *Regensburg v. Rzonca*, *supra*. The fact that damages "are not susceptible to precise determination does not insulate the landlord from liability." *Park West Mgmt. Corp. v. Mitchell*, *supra*, 47 NY2d at 329. Moreover, in ascertaining damages, "the finder of fact must weigh the severity of the violation and duration of the conditions giving rise to the breach, as well as the effectiveness of steps taken by the landlord to abate those condition." *Regensburg v. Rzonca*, *supra*.

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18.Application of these factors leads the Court to the following conclusion:

beginning in October, 2008, the second-hand smoke nuisance warrants an increasing rent abatement percentage, from month to month. The Court finds that a 10% rent abatement for October 2008 ($282.50) would fairly compensate defendant for the nuisance she initially suffered. But as time went on, and the condition persisted, it became apparent that the problem was continuing and could not easily be cured, thus warranting a 20% abatement for November 2008 ($565.00), a 30% abatement for December 2008 ($847.50), and a 40% abatement for January 2009 ($1,130.00).

19.The Court accordingly finds that defendant proved her entitlement to rent offsets totaling $2,825.00 as of the date of her departure. However, since defendant did not pay the rent that was due for January and February, 2009 (totaling $5,750.00), the offsets left an indebtedness, for unpaid rent as of the date defendant departed, of $2,825.00. Plaintiff having duly applied defendant's security deposit ($2,825.00) to the claimed deficiency, the end result is that neither party owes the other anything under the lease.

20.Finally, defendant's remaining counterclaim for property damage was properly dismissed at trial and is found to be legally meritless. To the extent such damages involved clothing she intended to sell on eBay, any damage to that business is not recoverable under the circumstances presented. In any event, a breach of the warranty of habitability does not permit a tenant to recover damages to personal property. *See Couri v. Westchester Country Club*, 186 AD2d 712 (2d Dept 1992).

21.Accordingly, except to the extent indicated above, all claims and counterclaims are DISMISSED, without costs and disbursements to either side.

SO ORDERED:

DISTRICT COURT JUDGE

Dated: January 20, 2011

CC: Maidenbaum & Associates, PLLC

Danielle Cannon, Pro se

MAC: ju 1/7/11