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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 105742/2011
FRANKEL, GLORIA Erich Frankel individually and as the Executor of the Estate of
vs
71ST STREET-LEXINGTON
Sequence Number : 003
DISMISS

PART 34

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2, Exh A-L
Answering Affidavits — Exhibits _____ | No(s). 3-5 & all exhibits
Replying Affidavits _____ | No(s). 6, Exh A-F

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED DECISION and the Clerk is directed to enter judgment accordingly

FILED
JAN 10 2019
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
JAN 09 '19
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: January 7, 2019

HON. CARMEN VICTORIA ST. GEORGE, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 34

ERIC FRANKEL, individually and as the Executor of the Estate of GLORIA FRANKEL,

Plaintiffs,

- against -

71ST STREET LEXINGTON CORP., 71ST STREET LEXINGTON CORPORATION,

Defendants.

Index No.: 105742/2011
Motion Sequence No.: 003

DECISION/ORDER
JUDGMENT

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

Currently defendants move to dismiss the complaint in its entirety under CPLR § 3211 or, alternatively, CPLR § 3212. Plaintiffs oppose the motion. The complaint, which plaintiffs filed in 2011, asserts six causes of action: 1) a declaration that the estate did not default on the proprietary lease; 2) an injunction preventing defendants from terminating or cancelling their proprietary lease and shares attributable to the apartment; 3) a declaration that defendants must transfer the lease and shares to Mr. Frankel; 4) a finding that defendants are liable for denying Mr. Frankel's rights in retaliation due to his litigation against them, along with damages; 5) attorney's fees as the prevailing party in a housing court action; and 6) breach of the warranty of habitability due to noise violations, along with damages. At oral argument, plaintiffs stated they have withdrawn the second and fifth causes of action, and that, as to their sixth cause of action, they seek damages through July 24, 2014. The Court heard argument, and it has read the papers and reviewed the transcript. For the reasons below, the Court grants the motion and dismisses the action in its entirety.

Eric Frankel (plaintiff) is the son of Gloria Frankel, who was the proprietary lessee of apartment 8C in 140 East 72nd Street in Manhattan (the building). Mr. Frankel died during the

summer of 2005. In 2008, plaintiff asked that the building transfer the proprietary lease to him. Defendants denied the request, but plaintiff remained in the apartment despite this denial. Defendants stress that they have not opposed plaintiff's ownership of the apartment, but instead have denied his right to reside there under a proprietary lease.

When, in April 2011 defendants served plaintiff with a notice of default due to his refusal to move out of the apartment, plaintiff commenced the instant litigation. Initially, the matter was before Justice Lucy Billings. Justice Billings held settlement conferences on April 12, 2013 and April 17, 2013 with the parties as well as their counsel present. The parties entered into a so-ordered stipulation of settlement on April 17. Plaintiff agreed to vacate the apartment by July 31, 2013 and to remove his property from the apartment by April 17, 2014. Plaintiff retained access to the apartment for the limited purposes of renovating and selling the unit. If plaintiff remained in the apartment beyond the agreed-upon date, defendants reserved the right to submit and order of ejectment and judgment to the Court. The parties reserved any other rights they had that were not covered by the agreement.

Plaintiff evacuated the apartment but did not remove his property by the April 17, 2014 deadline. On May 8, 2014, Justice Billings signed an order of ejectment. On that date, the judge also so-ordered a new stipulation, which the parties signed after additional mediation in court. The stipulation gave plaintiff until July 9, 2014 to remove his personal property from the apartment as well as access to the apartment – to him and his family – for this purpose. It additionally provided that cleaners and contractors could access the apartment to clean and renovate the premises, and it allowed for access to plaintiff when he showed the apartment to prospective buyers. Plaintiff finally stipulated that he would comply with the cooperative's rules and regulations and would submit an alteration agreement for the board's approval before he commenced any work.

After Justice Billings issued the May 8 order and so-ordered the May 8 stipulation, plaintiff filed a notice of appeal challenging the ejectment order. He applied for and received an extension until October 2015 to perfect the appeal, but he never did so. Thus, the May 8 order remains in effect.

In addition, plaintiff began a case in Housing Court against the current defendants as well as Sanford and Suzanne Potters, his upstairs neighbors. The basis of this litigation was that the Potters illegally renovated their apartment in a manner that resulted in violations, most significantly violations of the noise code. The Department of Buildings (DOB) and the Department of Environmental Protection (DEP) both inspected and performed tests of the Potters apartment as well as plaintiff's apartment. The DEP issued a report which found no noise code violations and the DOB report determined that the Potters' apartment did not create any defective, unsafe, or hazardous conditions in plaintiff's unit. In January 2012, following the issuance of these reports, Judge Peter Wendt of the Housing Court dismissed plaintiff's petition. In so doing, he additionally stated that there was no credible evidence supporting plaintiff's claims. The appellate term affirmed Judge Wendt's decision on March 4, 2015. Plaintiff also had filed a complaint before the Environmental Control Board challenging several aspects of the renovations to the Potters' apartment, and the administrative law judge dismissed these challenges.

Plaintiff no longer has personal property in the apartment and he has not resided there since his initial evacuation. He has neither retained contractors, commenced renovation work, nor attempted to sell the apartment. In addition, since 2014 plaintiff has not attempted to vacate the stipulations, and there has been no activity in this matter. Nonetheless, the case is still listed as active and on this Court's docket. Following a March 13, 2018 status conference and upon the direction of the Court, defendants brought this motion to dismiss.

Discussion

The remaining claims in the complaint are requests for: 1) a declaration that the estate did not default on the proprietary lease; 3) a declaration that defendants must transfer the lease and shares to Mr. Frankel; 4) a finding that defendants are liable for denying Mr. Frankel's rights in retaliation in retaliation for his prior litigation against them; and 6) breach of the warranty of habitability due to noise violations, along with damages, for the period ending July 24, 2014.

Defendants' motion asserts that the stipulations of April 2013 and May 2014 preclude the first, third, and fourth causes of action. Plaintiff released his claims over the proprietary lease when he agreed to move out of the apartment, remove his property from the apartment, and give up access except for the limited purposes described in the stipulation. They rely on CPLR 3211 (a) (1), stating that the stipulations and court orders conclusively establish the lack of merit to these claims; and on CPLR 3211 (a) (5), stating that the stipulations and orders in this and other cases have a res judicata and collateral estoppel effect, respectively. They state that the relief plaintiff requests, which would enable him to reside in the apartment, is inconsistent with the express terms of the two so-ordered stipulations and Justice Billings' order of ejectment. This would require vacatur of those orders, defendants state, but the time for seeking such relief has long since expired.

Furthermore, defendants state, the Housing Court resolved the issues pertaining to the purported noise violations, which comprise the sixth cause of action. They note that Judge Wendt's dismissal of the petition was affirmed by the Appellate Term. In addition, defendants point out, the ECB also found plaintiff's claimed code violations to be without merit. For the same legal reasons that this Court should dismiss the first, third, and fourth causes of action, the sixth must be dismissed as well.

In opposition, plaintiff states that neither the stipulations nor his evacuation from the apartment waived his claim to the proprietary lease. He claims that defendants breached the warranty of habitability while he resided in the apartment, and as a result during his residency he suffered from the "loud noises, waste water and non-waste water leakages, and damage to the ceiling and walls" (Frankel Aff., ¶ 10). According to plaintiff, the Court should deny the motion to the extent that it relies on CPLR § 3212 because defendants did not annex a copy of his answer to defendants' counterclaims. He states that his claim of retaliatory denial of his request for the proprietary lease has not been resolved and remains active. He claims he prevailed in the holdover proceeding due to defendants' discontinuance on March 29, 2011 and thus he has the right to attorney's fees. He claims that the reservation of rights in the April 17, 2013 stipulation allows him to litigate the first, third, fourth, and sixth causes of action. He suggests that his intent was not to waive any of the claims in the complaint when he signed the stipulations, and that his intent is the determinative factor. He says that although the Housing Court dismissed his claims relating to the alleged noise and other violations, and although ECB, DEP, and DOB all found that his noise complaints lacked merit, this "does not unequivocally establish that [his] claim of a breach of the warranty of habitability cannot proceed or succeed" (*id.*, ¶ 61 [citing *Park West Management Corp. v Mitchell*, 47 NY2d 316, 328 [1979] ["while certainly a factor in the measurement of the landlord's obligation, violation of a housing code or sanitary regulation is not the exclusive determinant of whether there has been a breach [of the warranty of habitability"]). He further submits the affidavits of an acoustical expert and an architect, which contradict some of the agency and judicial findings. He states that his complaint sets forth causes of action which the Court must consider as true under CPLR ¶ 3211, and the complaint is sufficient to withstand the prong of the motion seeking to dismiss under this statute.

The Court need not reiterate the well-known standards governing motions for summary judgment motions and motions to dismiss. Instead, the Court notes, as it stated at oral argument, that in light of the stipulations and the order of ejectment, plaintiff has no legal basis for maintaining the first four causes of action. "Stipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State*, 64 NY2d 224, 230 [1984]). Plaintiff was represented by counsel and the stipulation was the product of mediation before Justice Billings, and he has not shown a meritorious reason to vacate the stipulation (*see Kalimian v Bailey*, 142 Misc. 2d 974, 974 [App T 1st Dept 1984]). Thus, the agreement is enforceable (*see JMW 75 LLC v Debs*, 59 Misc 3d 32, 33 [App T 1st Dept 2018]). Contrary to plaintiff's position, moreover, the two so-ordered stipulations at issue here – in which plaintiff agreed to vacate the apartment, remove his property from the premises, and limit his access thereafter to renovating and selling the apartment – relinquish his right to a proprietary lease. Plaintiff's relinquishment has no time constraints, and thus he agreed to vacate the apartment permanently. It is disingenuous to argue that, given this broad and court-mediated agreement, during which plaintiff was represented by counsel, plaintiff reserved the right to claim the proprietary lease and move back in. As defendants note, they do not challenge his ownership of the apartment or his right to sell its shares.

There is another basis for dismissing the first four causes of action. The order of ejectment which Justice Billings signed in May 2014 also terminated plaintiff's rights to the apartment (*see Matter of Calvi v Knutson*, 195 AD2d 828, 830-31 [3rd Dept 1993] [explaining why ejectment was the proper procedure on the facts of the case, and noting the impact is the termination of a lease]). Plaintiff filed a notice of appeal and received an extension of time until October 2015 to perfect the appeal, but he did not file additional papers by that time and did not request a further

extension. Thus, the ejectment remains in effect. Plaintiff's purported reasons for missing the deadline by three years are of no avail.

The sixth cause of action is dismissed as well. Plaintiff is correct that, under *Park West* (47 NY2d 316 at 328), the "violation of a housing code or sanitary regulation is not the exclusive determinant of whether there has been a breach [of the warranty of habitability]." Judge Wendt, however, was aware of this distinction and ruled that plaintiff still did not show a breach of the warranty. "Absent the existence of violations," he wrote, "petitioner submits no other proof in support of any of his allegations of illegal renovations, construction, and excessive noise relating to Apartment 9C" (*Frankel v 71st Street-Lexington Corp.*, Civil Court, NY County, March 15, 2013, Wendt, J., Index No. HP 6021/12, p 5). In reaching this conclusion, the court expressly found that the Glass and Fierstein affidavits – the same parties on whose affidavits plaintiff relies here -- were of limited weight and were outweighed by the plethora of credible evidence submitted by defendants.

The Court rejects plaintiff's position that because of defendants' failure to annex a copy of plaintiff's answer to their counterclaims, the motion must be dismissed. The counterclaims relate to the denial of the proprietary lease and were rendered moot by the 2013 and 2014 stipulations as well as by Justice Billings' 2014 order.

Accordingly, it is

ORDERED that the motion is granted, and the action is dismissed.

Dated: January 7, 2019

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.