935 N.Y.S.2d 176, 2011 N.Y. Slip Op. 09054

90 A.D.3d 1257
Supreme Court, Appellate Division,
Third Department, New York.

Lisa M. NEWKIRK, Respondent,
v.
William J. SCALA, Appellant.

Dec. 15, 2011.

Synopsis

Background: Tenant brought action against landlord, alleging breach of warranty of habitability implied in lease. Following nonjury trial, the Supreme Court, Ulster County, Work, J., awarded tenant $10,100 in damages, plus interest, costs and disbursements. Landlord appealed.

Holdings: The Supreme Court, Appellate Division, Mercure, Acting P.J., held that:

[1] landlord breached implied warranty of habitability in lease, and

[2] evidence supported fifty percent reduction in rental value of home for months during which landlord breached implied warranty of habitability.

Affirmed.

West Headnotes (4)

[1] Landlord and Tenant
Statutory regulations in general

The implied warranty of habitability in a lease is implicated if the premises are unfit for human occupancy and contain conditions that materially affect the health and safety of tenants or deficiencies that in the eyes of a reasonable person deprive the tenant of those essential functions which a residence is expected to provide. McKinney's Real Property Law § 235–b.

1 Cases that cite this headnote

[2] Landlord and Tenant
Warranty of habitability

Landlord breached implied warranty of habitability in lease; tenant testified that home's tap water had a sickening smell that prevented its use for any purpose, water's stench was so extreme that it made tenant and her children nauseous, ruined clothes washed in it, and forced them to launder clothes, bathe, and eat elsewhere, certified water specialist who first installed water treatment system investigated situation and agreed that water had a "horrible smell," akin to burnt rotting eggs, and advised landlord that odor could be corrected by replacing part of the water treatment system, and landlord failed to act. McKinney's Real Property Law § 235–b.

Cases that cite this headnote

[3] Landlord and Tenant
Damages and costs

Evidence supported fifty percent reduction in rental value of home for months during which landlord breached implied warranty of habitability; breach was severe and plumbing issues and water odor persisted throughout tenant's occupancy due to landlord's inaction. McKinney's Real Property Law § 235–b.

1 Cases that cite this headnote

[4] Landlord and Tenant
Damages and costs

The proper measure of damages for breach of the implied warranty of habitability in a lease is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during

the period of the breach. McKinney's Real Property Law § 235–b.

1 Cases that cite this headnote

Attorneys and Law Firms

****177** Marshall A. Courtney, Kingston, for appellant.

Rusk, Wadlin, Heppner & Martuscello, L.L.P., Kingston (Daniel G. Heppner of counsel), for respondent.

Before: MERCURE, Acting P.J., MALONE JR., STEIN, McCARTHY and EGAN JR., JJ.

Opinion

MERCURE, Acting P.J.

***1257** Appeal from a judgment of the Supreme Court (Work, J.), entered April 23, 2010 in Ulster County, upon a verdict rendered in favor of plaintiff.

Plaintiff entered into a lease to rent a residence owned by defendant for the period of December 2003 to December 2004. She paid nine months' rent and made a security deposit at the time of the lease's execution. The home's tap water had an overpowering odor from the outset and, following defendant's prolonged failure to correct the problem, plaintiff and her children moved out in June 2004. Plaintiff then commenced this action, alleging that defendant breached the warranty of habitability implied in the lease (*see* Real Property Law § 235–b [1]). Following a nonjury trial, Supreme Court agreed, and awarded plaintiff $10,100 in damages, plus interest, costs and disbursements. Defendant appeals and we now affirm.

Supreme Court rendered its decision following a bench trial and, thus, "we independently review the weight of the evidence and may grant the judgment warranted by the record, while according due deference to the trial judge's factual findings particularly where, as here, they rest largely upon credibility assessments" (*Martin v. Fitzpatrick,* 19 A.D.3d 954, 957, 799 N.Y.S.2d 285 [2005]; *see Ash v. Bollman,* 80 A.D.3d 1115, 1117, 916 N.Y.S.2d 266 [2011]). Here, we perceive no reason to disturb Supreme Court's findings and accordingly affirm.

[1] Every residential lease contains an implied warranty of habitability covenanting: "(1) that the premises are 'fit for human habitation,' (2) that the premises are fit for 'the uses reasonably intended by the parties,' and (3) that the occupants will not be subjected to conditions that are 'dangerous, hazardous or detrimental to ****178** their life, health or safety' " (*Solow v. Wellner,* 86 N.Y.2d 582, 587–588, 635 N.Y.S.2d 132, 658 N.E.2d 1005 [1995], quoting Real Property Law § 235–b). The warranty is implicated if the premises are unfit for human ***1258** occupancy and contain "conditions that materially affect the health and safety of tenants or deficiencies that 'in the eyes of a *reasonable person* ... deprive the tenant of those *essential functions* which a residence is expected to provide' " (*Solow v. Wellner,* 86 N.Y.2d at 588, 635 N.Y.S.2d 132, 658 N.E.2d 1005, quoting *Park W. Mgt. Corp. v. Mitchell,* 47 N.Y.2d 316, 328, 418 N.Y.S.2d 310, 391 N.E.2d 1288 [1979], *cert. denied* 444 U.S. 992, 100 S.Ct. 523, 62 L.Ed.2d 421 [1979]). Inadequate plumbing and overpowering odors not only prevent a tenant from making reasonable use of a residence but, indeed, materially affect his or her health and safety (*see Park W. Mgt. Corp. v. Mitchell,* 47 N.Y.2d at 328, 418 N.Y.S.2d 310, 391 N.E.2d 1288; *Tonetti v. Penati,* 48 A.D.2d 25, 27, 367 N.Y.S.2d 804 [1975]; *Mayourian v. Tanaka,* 188 Misc.2d 278, 279, 727 N.Y.S.2d 865 [2001]; *Kekllas v. Saddy,* 88 Misc.2d 1042, 1044–1045, 389 N.Y.S.2d 756 [1976]).

[2] **[3]** Plaintiff testified that the home's tap water had a sickening smell that prevented its use for any purpose. Indeed, the water's stench was so extreme that it made her and her children nauseous, ruined clothes washed in it, and forced them not only to launder clothes, but to bathe and eat, elsewhere. The certified water specialist who first installed the water treatment system at the residence, Bruce Leighton, investigated the situation at defendant's request and agreed that the water had a "horrible smell," akin to burnt rotting eggs. Leighton advised defendant that the odor could be corrected by replacing part of the water treatment system; notwithstanding that knowledge and plaintiff's repeated pleas, however, defendant failed to act (*cf. Matter of Moskowitz v. Jorden,* 27 A.D.3d 305, 306, 812 N.Y.S.2d 48 [2006], *lvs. dismissed* 7 N.Y.3d 771, 819 N.Y.S.2d 868, 853 N.E.2d 238, 7 N.Y.3d 783,

820 N.Y.S.2d 545, 853 N.E.2d 1113 [2006]). Giving deference to Supreme Court's assessment of credibility, we conclude that the foregoing amply supports the court's finding that defendant breached the implied warranty of habitability (*see Mayourian v. Tanaka,* 188 Misc.2d at 279, 727 N.Y.S.2d 865; *Kekllas v. Saddy,* 88 Misc.2d at 1044–1045, 389 N.Y.S.2d 756).

[4] Turning to the amount of damages awarded, "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, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach" (*Park W. Mgt. Corp. v. Mitchell,* 47 N.Y.2d at 329, 418 N.Y.S.2d 310, 391 N.E.2d 1288; *accord Stone v. Gordon,* 211 A.D.2d 881, 881–882, 621 N.Y.S.2d 220 [1995]). There is no dispute as to the rent charged under the lease and, inasmuch as the breach was severe and persisted throughout plaintiff's occupancy due to defendant's inaction, Supreme Court properly determined that the rental value of the premises was halved (*see Park W. Mgt. Corp. v. Mitchell,* 47 N.Y.2d at 329, 418 N.Y.S.2d 310, 391 N.E.2d 1288; *Matter of Nostrand Gardens Co–Op v. Howard,* 221 A.D.2d 637, 638, 634 N.Y.S.2d 505 [1995]; *H & R Bernstein v. Barrett,* 101 Misc.2d 611, 614, 421 N.Y.S.2d 511 [1979]).

***1259** ORDERED that the judgment is affirmed, with costs.

MALONE JR., STEIN, McCARTHY and EGAN JR., JJ., concur.

All Citations

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