389 N.Y.S.2d 756

88 Misc.2d 1042
District Court, Nassau County, New York,
Third District.

John KEKLLAS and Helen Kekllas, Petitioners,
v.
Frederick SADDY, Respondent.

Dec. 7, 1976.

Landlord commenced summary proceeding to recover possession of one-family residence, and tenant counterclaimed for breach of warranty of habitability. The District Court, Harold Fertig, J., held that odor of cat urine in premises breached landlord's warranty of habitability; that tenant could not recover cost to remove the odor, which was excessive in comparison to the rent, where tenant had not notified landlord of the specific problem; that tenant should receive damages measured by the difference between the agreed rental and the actual market rental value of the premises; that only nominal damages would be awarded where tenant failed to prove the amount of such difference; and that landlord's default did not cause loss of all right to recover, but entry of judgment would be stayed pending elimination of the condition, provided tenant gave landlord access to the premises for that purpose.

Judgment accordingly.

West Headnotes (6)

[1] **Landlord and Tenant**
Warranty of habitability

Odor of cat urine in one-family residence, which permeated the premises and was stronger in certain areas than others, breached provision of the Real Property Law, and resulted in default in landlord's warranty of habitability as set forth therein, in that continued habitation of the premises was thereby rendered detrimental to the health and safety of the occupants. Real Property Law § 235–b.

2 Cases that cite this headnote

[2] **Landlord and Tenant**
Right of tenant to maintain or repair at landlord's cost

One item of damage recognized for the breach of an implied warranty of habitability is the reasonable and actual cost incurred by tenant to undertake repair of the premises himself, but such claim for repairs should be preceded by notice to the landlord giving him a reasonable opportunity to repair.

1 Cases that cite this headnote

[3] **Landlord and Tenant**
Right of tenant to maintain or repair at landlord's cost

Upon breach of landlord's warranty of habitability by reason of odor of cat urine in premises, tenant could not recover cost of removing the odor, which was excessive in comparison with the rent, where landlord was not notified of the specific problem, and thus was prevented from taking advantage of the guarantee of exterminator who had previously deodorized the premises.

1 Cases that cite this headnote

[4] **Landlord and Tenant**
Damages and costs

In case in which there was breach of landlord's warranty of habitability by reason of odor of cat urine in premises but tenant did not vacate the premises, tenant should receive damages measured by the difference between the agreed rental of the premises and the actual market rental value of the premises, and would be awarded nominal damages of six cents where there was no proof as to the amount of such difference. Real Property Law § 235–b.

Cases that cite this headnote

[5] **Landlord and Tenant**
Weight and Sufficiency

Though tenant's proof of difference between agreed rental of premises and actual market rental value of the premises by reason of landlord's breach of warranty of habitability did not have to be by expert witnesses, tenant could not secure award of abatement of rent, beyond nominal damages, without testimony by the tenant or any witness, professional or otherwise, so that award would be purely conjecture and speculative. Real Property Law § 235–b.

Cases that cite this headnote

[6] **Landlord and Tenant**
Other specific conditions

Landlord's default consisting of breach of warranty of habitability by reason of odor of cat urine in premises was not such as would cause him to lose all right to recover rent, and upon deposit of rent by the tenants, who had not vacated the premises, less nominal damages awarded to the tenants, entry of judgment would be stayed pending elimination of the condition, provided tenant gave landlord access for that purpose, and upon compliance by landlord, payment would be made to landlord, while if tenant failed to make deposit or to give landlord access, judgment could be entered for possession and for rent, less the nominal damages. Real Property Law § 235–b; Real Property Actions and Proceedings Law §§ 755, 755, subd. 1(b, c), 2.

Cases that cite this headnote

Attorneys and Law Firms

***1043** ****757** Murray Berger, Flushing, for petitioners.

Murray Seeman, Great Neck, for respondent.

DECISION AFTER TRIAL

HAROLD FERTIG, Judge.

Petitioner commenced this summary proceeding to recover possession of a one-family residence from the respondent-tenant and asks for judgment for the rent for the months of September and October, 1976. On September 6, 1976, the parties entered into a lease wherein John Kekllas and Helen Kekllas, as landlord, leased to Mr. Fred Saddy, as tenant, the premises known as 61 George Street, Manhasset, New York. The term of the lease was to commence on September 7, 1976, and end on May 7, 1977, and the monthly rent was to be $575. The landlord had purchased the premises in the beginning of July, 1976. At the time of the purchase, the premises were in disrepair, and there were strong odors of cats and cat urine in the garage, the basement of the ****758** premises and in and about a dinette area of the kitchen. During the summer, the landlord made substantial repairs to the premises including his decorating by painting and wallpapering. Prior to the wallpapering and painting, the landlord contracted with Checkmate Exterminators to treat the premises for the odor of cat urine, which work was done by the exterminator and for which the landlord received a guarantee for a period of three months that the odor would not reoccur. During the month of August, on several occasions the tenant visited the premises, sometimes with his wife and at times without his wife, to examine the premises and he subsequently entered into the lease referred to above. Two days prior to the execution of the lease, the tenant delivered to the landlord a check in the amount of $1150 in payment for the first month's rent and for security in the amount of ***1044** $575. Payment on that check was stopped by the tenant and no money has been received by the landlord from the inception of the lease until this hearing, although the landlord has made repeated demand. After the tenant moved into the premises, it was discovered that there was a gas leak due to a high pilot light on the stove that went out.

This was remedied by the gas company. There was a leak in the hot water tank due to a defective valve, which had been repaired. Water coming out of the hot water faucet showed evidence of rust in the hot water system.

[1] The tenant had moved into the premises on September 8, and on September 10 Mrs. Saddy left the premises due to complaints, which she had of nausea and burning eyes. The odor of cat's urine, which was on the premises in July and which was treated by the exterminator, returned in September, which odor became offensive to the tenant. Evidence was presented to show that the prior owners, a mother of approximately 75 years of age and a daughter in her mid 50's, resided in the house for several years and that during that period of time they housed anywhere from two to four cats. One apparently was kept in the garage, one in the basement and one or two in the remaining portions of the house. There is no question that the odor of cat urine was present at the time the petitioner purchased these premises, and this Court finds that although that odor was treated, it did return to the premises. The tenant claims that the odor in question and the other conditions such as rust in the water, leaks and windows which were stuck, apparently from new paint on them, was sufficient for the Court to find that the landlord defaulted in its warranty of habitability as set forth in Section 235—b of the Real Property Law.

This Court finds that the odor which permeated the premises and which was stronger in certain areas of the premises did breach the provisions of Section 235—b of the Real Property Law in that it has subjected the occupants of the premises to conditions which would be dangerous, hazardous or detrimental to their life, health or safety (Tonetti v. Penati, 48 A.D.2d 25, 367 N.Y.S.2d 804). In that case, there was an odor of dogs which the plaintiff said could be fumigated and which persisted notwithstanding the efforts of a cleaning service retained by the plaintiff to rid the area of that odor. Those facts are analogous to the facts in this case where although the plaintiff made an effort to rid the premises of the odor of cat's urine by the hiring of an ***1045** exterminator, that odor persisted, or in the very least returned, making the continued habitation of the premises detrimental to the health and safety of the occupants. Section 235—b of the Real Property Law codified the principles set forth in the Tonetti case, and for the purposes of that Section, any breach would be considered a breach of contract and the damages resulting from such a breach are determined by the same principle of law applicable to a breach of any contract.

[2] [3] Unlike the Tonetti case, this defendant has not vacated the premises and this Court is faced with a question of what damages have been proven by the defendant to recover on its counterclaim for the breach of contract between the parties. There is no question that the plaintiff has ****759** made out its prima facie case that the defendant has occupied the premises for the months of September and October and that the rental for those two months equals $1150 in accordance with the terms of the lease. The tenant has counterclaimed for a total of $2,309.75 and it has been determined that a landlord's violation of a warranty of fitness for use may result in damages in excess of the amount of rent sought in nonpayment eviction proceeding (Amanuensis Ltd. v. Brown, 65 Misc.2d 15, 318 N.Y.S.2d 11). One item of damage recognized for the breach of such an implied warranty of habitability would be the reasonable and actual costs incurred by a tenant who undertakes the repair of the premises himself, (Marini v. Ireland, 56 N.J. 130, 265 A.2d 526; Garcia v. Freeland Realty, 63 Misc.2d 937, 314 N.Y.S.2d 215) but such claim for repairs should be preceded by a notice to the landlord giving him a reasonable opportunity to repair (Pantalis v. Archer, 87 Misc.2d 205, 384 N.Y.S.2d 678). In this case, no opportunity was given the landlord to remedy the defect. The petitioner on August 4, 1976, received a guarantee from the exterminator who deodorized the area that that odor would not return. That guarantee was good until November 4, 1976, and would have been available to the petitioner had the petitioner been informed of the specific problem.

Insofar as the other items of the counterclaim were concerned, the rust in the hot water substantially disappeared and the windows which were difficult to open and close were substantially remedied.

The only other measure of damages which the Court can consider is the possibility of an abatement of rent in which the measure of damages would be for the difference between the contract price, that is, the agreed rental of the premises ***1046** and the actual market value of these

premises in its deteriorated condition at the time of the breach (New York v. Pike Realty Corp., 247 N.Y. 245, 160 N.E. 359; Todd v. Gamble, 148 N.Y. 382, 42 N.E. 982; Faust v. Guzman, N.Y.L.J. Dec. 27, 1973, p. 14 col. 7, 33 N.Y.Jur. 417 Seq. 109). In some cases the Courts have granted a total abatement on the ground that the premises are totally worthless (Amanuensis Ltd. v. Brown, 65 Misc.2d 15, 318 N.Y.S.2d 11; Mannie Joseph, Inc. v. Stewart, 71 Misc.2d 160, 335 N.Y.S.2d 709), but in this case the premises were not worthless and the tenant continues to occupy them with his children although his wife has left. In 1974, in the case of Steinberg v. Carreras, 77 Misc.2d 774, 357 N.Y.S.2d 369, the Appellate Term in the First Department determined that since there was no adequate proof by the testimony of an expert as to what the reduced value of the premises in question was, the Court could not grant such an abatement. In 1976, the legislature added a provision to Section 235—b of the Real Property Law which provided that the tenant could prove damages without the necessity of having expert testimony. In B.L.H. Realty Corp. v. Cruz, 87 Misc.2d 258, 383 N.Y.S.2d 781, decided in May, 1975, the Court found that by reason of the landlord's violation of the warranty of habitability, and based upon the same proof that made out the landlord's breach, the tenant suffered damages equal to 50 percent of the rental which was deposited in Court by the tenant.

[4] **[5]** In this proceeding, there was evidence of the cost to remove the odor, which was excessive in comparison with the rent, but the tenant cannot recover such cost for the reasons set forth above (See also 28 A.L.R.2d 484 Sec. 26). Here the tenant should receive damages measured by the difference in rental value. However, although the tenant's proof need not be by expert witnesses, (R.P.L. 235—b; B.L.H. Realty Corp. v. Cruz, surpa) that does not mean that there need not be any proof of such damages and there was no evidence of any kind as to the reduced rental value of the premises due to the existence of the odor. Any award of an abatement of rent, without testimony by the tenants or any witness, professional or otherwise, would be purely conjecture and is speculative (Goldner v. Doknovitch; Goldner v. Lupu, Sup., 388 N.Y.S.2d 504; ****760** Electronic Corporation of America v. Famous Realty, Sup., 87 N.Y.S.2d 169, aff'd, 275 App.Div., 859, 89 N.Y.S.2d 23; Steinberg v. Carreras, 77 Misc.2d 774, 357 N.Y.S.2d 369). Under the circumstances, the tenant is entitled to recover at least nominal damages and is accordingly awarded nominal damages of six cents.

***1047** **[6]** The landlord's default under their contract has not been such as would cause them to lose all right to recover.

Since it is the opinion of this Court that the continued odor on the premises is a violation of the landlord's warranty of habitability as being dangerous to the tenant's life and health, the proceedings to dispossess are stayed (R.P.A.P.L. Sec. 755 subd. 1(b)) until an order shall be made vacating such stay pursuant to R.P.A.P.L. Sec. 755, subd. 1(c). The tenant shall deposit with the Clerk of the Court the sum of $1150 less six cents, now due for the rent for the months of September and October, 1976, pursuant to R.P.A.P.L. 755(2).

Upon failure of tenant to make such a deposit, the stay may be vacated pursuant to R.P.A.P.L. Sec. 755 and the petitioners may enter judgment awarding them possession of the premises, together with a judgment for $1150 less six cents.

Upon deposit of $1149.94, the entry of judgment shall be stayed pending the elimination of the condition, provided tenant gives the landlord access to the premises for that purpose, and upon such compliance, payment shall be made to the petitioner. In the event respondent fails to give petitioner access to the premises for the purposes set forth herein, petitioner may apply to the Court to vacate the stay pursuant to Section 755(2) and may enter judgment for possession and for payment to be made to petitioners of the sum deposited.

In all other respects, respondent's counterclaims are dismissed and neither party is awarded the legal fees requested.

All Citations

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