

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: ~~JUSTICE~~ ~~REYNOLDS~~
Justice

PART 44

EMMA GREENWOOD

INDEX NO. 104357/2012

-v-
240-242 WEST 10TH STREET CORP,
AND JUREAN WITTING

MOTION DATE 4/29/13

MOTION SEQ. NO. 1

The following papers, numbered 1 to 3, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) _____

Answering Affidavits — Exhibits _____ No(s) _____

Replying Affidavits _____ No(s) _____

Upon the foregoing papers, it is ordered that this motion is DECIDED IN ACCORDANCE
WITH THE ANNEXED DECISION. Conference on
September 30, 2013.

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

FILED

JUL 29 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/11/13

Mat 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

PRESENT: HON. MILTON A. TINGLING

PART 44

EMMA GREENWOOD

INDEX NO. 104357/2012

PLAINTIFF,

-v-

240-242 WEST 10th STREET Corp., AND JULIAN WHITING

DEFENDANTS

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Upon the foregoing papers, it is ordered that the motion to dismiss is granted.

Defendants move the court to grant a motion dismiss pursuant to CPLR 3211(a)(7).

Defendants seek a judgment that the New York State Soldiers' and Sailors' Civil Relief Act, Military Law § 309 is not applicable as a matter of law, and therefore should be dismissed.

On December 3, 2012, Emma Greenwood ("Plaintiff") brought this action to 240-242 West 10th Street Corp., and Julian Whiting ("Defendants") seeking to remedy harassment in violation of N.Y.C. Admin. Code SEC 27-2005(d), breach of warranty of habitability in violation of Real Property Law SEC 235-b, retaliation of Real Property Law § 223-b, and the New York State Soldiers' and Sailors' Civil Relief Act, Military Law § 309.

On or about November 18, 2011, the apartment allegedly suffered water damage from a leak emanating from the apartment above. Plaintiff alleges she was forced to vacate her rent stabilized apartment when Defendants, the landlord, refused to

promptly fix her apartment. Plaintiff concedes she vacated the premises on February 15, 2012.

Defendants move for a motion to dismiss Plaintiff's fourth and fifth causes of action. Upon Defendant's motion to dismiss, Plaintiff withdraws the fourth cause of action for retaliation under the Real Property Law § 223-b.

Defendants contend there is no legal foundation for Plaintiff's claim for violation of the New York State Soldiers and Sailors' Civil Relief Act, Military Law § 309. The statute was enacted to preclude the entry of a default judgment in an eviction proceeding against the individuals serving in the military and their dependents. However, Defendants did not commence an eviction proceeding against Plaintiff.

Plaintiff argues that the New York State and Sailors Civil Relief Act protects service members and their dependents from being constructively evicted.

Defendants' motion to dismiss the fifth cause of action is granted. A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of action. CPLR 3211(a)(7).

There is no evidence to suggest that Defendants violated section 309 of the Military Act. The plain language of the statute clearly indicates that the term "eviction" does not encompass constructive eviction, as evidenced by § 309(1):

No eviction or distress shall be made during the period of military service... except upon leave of the court granted application therefor or granted in any action proceeding affecting the right of possession.

Defendants have not commenced any eviction proceedings to be culpable under the statute. Also, as Defendants' argue, the statute does not create a private right of action. Section 309 is limited to punitive ramifications – a misdemeanor punishable by imprisonment and/or a fine. Consequently, the motion to dismiss the claim for violation of the New York State Soldiers and Sailors' Civil Relief Act, Military Law § 309 is granted.

Date:

met

J.S.C.
HON. MILTON A. THORNTON
J.S.C.

FILED

JUL 29 2013

NEW YORK
COUNTY CLERK'S OFFICE