[* 1]

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

PRESENT: PART 10

0126968/2002

DAITCH, LAWRENCE
vs
NAMAN, ALF

SEQ 3

SUMMARY JUDGMENT

EX NO. _____

ION DATE 5/12/05

ION SEQ. NO. _____

ION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
JUL - 8 2005
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: JUN 30 2005

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Supreme Court of the State of New York
County of New York: Part 10

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Lawrence Daitch,

Plaintiff,

-against-

Alf Naman, Kizner Associates & Edson USA, Inc.,

Defendants.

----------x

DECISION/ORDER
Index No.: 126968/02
Seq. No.: 003

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs Naman & Kizner's Amended Notice of Motion w/AR affirm, exh . . .	1
Def Edson X-motion w/ HLC affirm, HMS affid, exh	2
Pl's Affirm (BJO) in opp w/exhs	3
Def Naman & Kizner's Reply Affirm (AR)	4
Def Edson's Reply Affirm (HLC)	5

Gische, J.

Upon the foregoing papers, the decision and order of the court is as follows:

Defendants Alf Naman and Kizner Associates move for summary judgment dismissing plaintiff's complaint. Defendant Edson USA Inc., separately cross moves for summary judgment dismissing plaintiff's complaint and, as a consequence, the cross claims asserted against it by the other two defendants. Plaintiff opposes both the motion and cross motion in all respects.

The note of issue was filed in this case on November 19, 2004, and the motion and cross motion were brought within the timed allowed under the CPLR. CPLR §3212; Brill v. City of New York, 2 NY3rd 648 (2004). Since they are timely, they will be considered on the merits, and the court's decision follows.

Discussion

Plaintiff Lawrence Daitch is a rent stabilized tenant in a townhouse located at 709 Park Avenue in Manhattan [hereinafter "building"] which is owned by defendant Alf Naman [hereinafter "owner"]. Defendant Kizner Associates [hereinafter "managing agent"] manages the building. The owner hired defendant Edson USA Inc.[hereinafter "contractor"]. to clean, restore, point and otherwise make repairs to the façade of the building.

Though defendants are separately represented, and there are cross claims between them (contribution and indemnification), they are very closely united in their arguments as to why summary judgment dismissing the complaint in chief is warranted in this case. In addition to the dismissal of the complaint, the contractor also seeks dismissal of the cross claims against it.

As the proponents of summary judgment, defendants bear the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle them to judgment in their favor, without the need for a trial. CPLR §3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if they meet this burden, will it then shift to the party opposing summary judgment (here, plaintiff) who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponents fail to make out their *prima facie* case for summary judgment, however, then their motions must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993).

Granting the motions for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977).

The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film , 3 NY2d 395 (1957).

Plaintiff seeks money damages for personal injuries he allegedly sustained as a result of defendant's failure to maintain the building in a reasonably safe condition. He alleges that as a result of the restoration and other work done at the building, hazardous particles and mold containing debris penetrated his apartment. He claims that such materials made him ill.

A landowner is under a duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party. Perez v. Bronx Park South, 285 AD2d 402 (1st dept 2001). This common law duty is tempered by a requirement that a plaintiff seeking recovery must establish that the landlord created or had actual or constructive notice of the hazardous condition which precipitated the injury. Pappalardo v. Health & Racquet Club, 279 AD2d 134 (1st dept. 2000). To constitute constructive notice, a defect must be visible and apparent, and it must have existed for a sufficient length of time prior to the accident for the owner to have discovered the defect and remedied it. Pappalardo, *supra*. Where, however, there are statutory violations, there is no need to separately establish notice. Pappalardo, *supra*. In order to prevail against a landowner, a plaintiff is also required to prove that the negligent condition was a proximate cause of the injuries sustained. Lynn v. Lynn, 216 AD2d 194 (1st dept, 1995).

Relying on the decision of the Appellate Division first department in Beck v. JJA Holding Corp, 12 AD3d 238 (1st Dept. 2004), defendants argue that the owner neither created the dangerous condition nor had notice (actual or constructive) of it. Therefore, they argue that they are entitled to have this complaint dismissed as against the owner and its agents. Alternatively, defendants claim that they can prove that the alleged dangerous condition and plaintiff's injuries are not causally related and plaintiff cannot

prove the contrary, through admissible evidence. Defendants contend that the lack of causation presents an independent basis on which to grant them summary judgment, and dismiss the complaint.

Beck, *supra*, also involved a personal injury action by a tenant against a landlord for personal injuries due to elevated mold levels in her apartment following a flood. The First Department upheld the dismissal of the complaint based upon a finding that the landlord had neither created, nor had, actual or constructive notice of the condition alleged. The indisputable facts in that case were that the first and only piece of evidence regarding the presence of mold was a report from Johns Hopkins dated November 16, 1999. Ms. Beck moved out less than a month thereafter. The court rejected arguments by plaintiff that the landlord was on constructive notice that mold could be present and growing in the apartment simply because the landlord knew about the flood a year earlier.

Defendants argue that this case presents an analogous situation. They claim that, as a matter of law, they cannot be held to have notice of mold or a dangerous condition at the premises because they were never notified about any contaminants until July 31, 2002, and by then plaintiff had already remedied the problem. They further contend that reasonable amount of time had not accrued between the time of discovery and notification for them to have an opportunity to remedy the condition alleged. Beck v. J.J.A. Holding Corp., supra. The defendants also deny having any constructive notice of the condition either because mold is not visible and apparent. Gordon v. American Museum of Natural History, 67 NY2d 836 (1986).

Plaintiff contends the facts of this case, and his injuries are distinguishable from Beck and more closely resemble those of Litwack v. Plaza Investors Inc., NYLJ, 12/1/04, p. 23 (Sup Ct., N.Y. Co., Shafer J). He claims that unlike plaintiff Beck, he regularly complained to the defendants about the ongoing, daily incursions of dirt,

debris and "particulate matter" into his apartment. Plaintiff argues that because of these regular complaints to the defendants, they were on notice that the restoration work had created an unsafe condition at the premises.

Plaintiff claims he first started noticing dust, debris and other matter coming into his apartment at about the time the owner began restoration work at the premises. It is undisputed that plaintiff (and other tenants) regularly complained about how the restoration was being performed. In fact, these complaints were an ongoing source of friction between the landlord and the plaintiff, and even prompted the owner to warn his employees that the tenants should be "pampered" because they were complainers.

After water came into his apartment through the windows in November 2001, plaintiff notified the owner and told him to come to the apartment. There is a factual dispute about whether he did visit, but Mr. Naman admits he knew about the incident. At that time plaintiff also notified "Louie," an Edson employee. Plaintiff cleaned up the mess with a dishtowel which he then stored away in a plastic bag. He also cites other instances in which he and the owner discussed air purifiers arose. The owner agrees these conversations took place.

In April 2002, after another incursion of debris into his apartment, plaintiff notified the owner he was taking him to court. In this letter he identified the debris as "toxic" and said it was affecting his health. It is undisputed that the owner did not have the apartment tested after he received this letter, but responded that he did not think there was any kind of hazardous condition at the premises.

In May 2002, plaintiff hired Laurence B. Molloy to test the environmental condition of his apartment. He prepared a report after testing plaintiff's apartment, and other areas at the premises that plaintiff has access to. He also tested the dishtowel that plaintiff had saved. Mr. Molloy reported that there were "unacceptable levels of biological contaminants . . ." in the apartment, including spores and mold. He opined

that these contaminants were causing various symptoms that plaintiff had been experiencing (sore throats, etc.) for some time. Plaintiff did not send a copy of this report to the defendants.

Upon receiving the Molloy report in mid-May 2002, plaintiff immediately hired a remediation company to clean his apartment. He did not notify the owner that he had done so, but paid for the cleanup himself. He also went to see a doctor (Dr. Ira Feingold, M.D.) who did blood testes. Dr. Feingold concluded that plaintiff "has been exposed to and is suffering from molds present in his environment which appear by history to have occurred as a result of the building renovations." He prescribed various medications, including antihistamines. Plaintiff did not send this report to the defendants either.

There is a factual dispute about whether the defendants had notice of the dangerous condition that plaintiff claims existed in his apartment. Under the particular facts of Beck v. J.J.A. Holding Corp. the defendants were able to establish their prima facie case because the plaintiff never notified them anything was wrong. Here, however, plaintiff notified the defendants on numerous occasions that he thought the restoration process was being performed sloppily. He specifically told the defendants that debris, particles, dirt and water were coming into his apartment. He notified the defendants that his air conditioner was at times improperly covered, letting in even more particulate matter.

Though defendants urge the court to find that Beck requires a plaintiff to first identify mold, and then notify the defendant that he's discovered mold in the premises, this is far too crabbed a reading of that decision. The appellate division did not abrogate the landlord's duty to maintain his property in a "reasonably safe condition . . ." Beck v. J.J.A Holding Corp., *supra* at 240. Rather it clarified that a material element of plaintiff's prima facie case is to establish that the landlord had created, or had actual or

constructive notice, of the dangerous condition. Unlike the plaintiff in Beck, the plaintiff in this case regularly complained about substances permeating his apartment. Thus, whether this was notice, and the defendants failed to maintain the property in a reasonably safe condition is a dispute that must be decided after trial. Defendants have failed to prove the absence of notice which is an element of negligence. While, at trial, plaintiff will have to prove notice, on a defendant's motion for summary judgment the burden is on the defendant to prove the lack of notice (actual or constructive), as a matter of law. Moreira v. City of New York, 4 AD3d 311 (1st Dept. 2004); Carrillo v. P.M. Realty Group, 16 AD3d 611 (2nd Dept 2005); Guck v. Palozzi, 269 AD2d 777 (4th Dept. 2000). Defendants have not met their burden.

The defendants separately claim they are entitled to summary judgment on the issue of proximate cause. They maintain that plaintiff cannot prove his case which is that there was mold at the premises, and that it was the proximate cause of his injuries. They challenge the conclusions in the Molloy report by providing the affirmation of their own expert, Dr. Howard M. Sandler, M.D. Dr. Sandler opines that "virtually none of the testing by Immunosciences Lab even suggests actual allergic response to the alleged mold exposures." Dr. Sandler also avers that "[s]kin testing is recognized as diagnostic of allergy . . ." He concludes that since no skin testing was performed on the plaintiff, the evidence plaintiff provides (i.e. the Molloy report) is of no probative value. Alternatively, the defendants contend that the results are inconclusive, and that the "elevations" that Mr. Molloy found are not elevations at all, but within acceptable levels.

As the movant seeking summary judgment, defendants cannot met their burden of proving there are factual issues to be resolved by simply identifying claimed deficiencies in the plaintiff's proof. Sterling v. Town of Hempstead, 26 AD2d 628 (2nd Dept 1999). Moreover, all defendants have done is provide the affirmation of an expert with a different opinion. Although the defendants contend that plaintiff's evidence is

inadmissible because it is "junk science" this point is not proved through Dr. Sandler since he has not cited any scientific periodicals or legal authority that shows excludes methodologies employed by either Dr. Feingold or Mr. Molloy. Frye v. United States, 293 F. Supp 1013 (1923). The conflicting expert opinions present factual disputes about whether there was a dangerous condition at the premises and whether such condition was the proximate cause of the injuries plaintiff claims.

Edson separately asserts in its cross motion that it is entitled to summary judgment dismissing the complaint against it because as an independent contractor, it had no duty to plaintiff. Edson maintains that it is simply an independent contractor who performed the work it was hired to do, and therefore it had no contractual privity with the plaintiff. Conversely, the owner and managing agent oppose the cross motion, contending they are not responsible for Edson's actions precisely because it is an independent contractor, and it did not control the methods it used to execute its obligations under the contract.

One issue presented by Edson's motion is whether any duty ran from Edson to the plaintiff, since Edson's restoration contract was with the property owner. Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136 (2002). A contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party. Espinal v. Melville Snow Contractors Inc., supra at 138. However, under certain circumstances, a party who enters into a contract to render services may be said to have assumed a "duty of care--and thus be potentially liable in tort--to third persons." Id. at 138. Liability is imposed, for example, where the contracting party fails to exercise reasonable care in the performance of its duties thereby launching a "force or instrument of harm". Id. Liability can also be imposed where the contractor entirely displaces the owner's duty to maintain the premises safely. Id. at 140.

Edson maintains that exercised due care in executing its contract, and that even if there was an incursion of water into plaintiff's apartment, this did not "launch a force of harm." Edson's principal, Mr. Caputo, testified that plastic sheeting was used with silicone caulking at the edges. He also testified that employees would check windows to make sure they were closed before turning on the power hoses. He testified that such "hermetic" sealing was so that water would not seep in. Despite such measures, however, plaintiff claims water, debris, and other 'particulars' still seeped in.

It is not for the court to resolve factual disputes, but to identify that they exist and must be decided at trial. Thus, whether Edson was negligent must be tried along with the related issues of whether there was an incursion of water, debris and other matter into plaintiff's apartment, and whether such incursion launched a "force of harm" that was the proximate cause of plaintiff's injuries. Edson's cross motion must be denied since it has not proved the absence of negligence. Liptort v. Theater at Madison Square Garden, 281 AD2d 398 (2nd Dept. 2001); Wilson v. Proctors Theater, 223 AD2d 826 (3rd Dept. 1996).

Defendants' arguments in opposition to Edson's cross motion, and further support of their own motion for summary judgment, that they are not liable for Edson's negligent acts also fails. As a general rule, an employer who hires an independent contractor is not liable for the independent contractor's negligent acts. Rosenberg v. Equitable Life Assurance, 79 NY2d 663 (1992). However, under the Multiple Dwelling Law, real property owners have a nondelegable duty to maintain their premises in a reasonably clean and safe condition. MDL §78. Consequently, a party who is injured because the owner fails to fulfill those duties "may recover damages from the owner despite the fact that the duty of maintenance has been delegated to another." Mas v. Two Bridges Assoc., 75 NY2d 680 at 687 (1990). Although the owner only has to insure that the premises are "reasonably safe," the defendants have failed to proved

they met that standard. While claiming that seepage of water and incursion of dust into the tenants' apartment fall outside the scope of MDL §78's protection, they have not proved their case as a matter of law.

The court has also considered the defendants' remaining arguments about plaintiff's "true" motivation for bringing this lawsuit. While it is undisputed that plaintiff and the owner have been involved in nonstop litigation since Mr. Naman bought the townhouse, these motions address whether a trial is necessary, not whether plaintiff is being vindictive, or the owner abusive. Thus, plaintiff's "motivation," as that term is loosely used by the defendants, is simply interchangeable with "credibility." *Compare*: Curiano v. Suozzi, 63 NY2d 113 (1984) [malicious prosecution]. Issues of credibility are for the trier of fact to decide after the trial, and cannot be decided by the court on a flat record.

Conclusion

Defendant Naman and Kizner Associates Inc.'s motion for summary judgment is denied, as is defendant Edson USA Inc.'s cross motion for summary judgment. None of the defendants have proved their prima facie case, and there are material issues of fact that must be tried.

Since this case is trial ready, it is respectfully referred to the Administrative Coordinating Part (Part 40) so that it can be scheduled and assigned for trial.

Any relief not expressly addressed herein has been nonetheless been considered by the court and is denied.

This shall constitute the Decision and Order of the Court.

Dated: New York, New York
June 30, 2005

So Ordered:

J.S.C.
HON. JUDITH J. GISCHE