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

PRESENT: JUDGE SHIRLEY WERNER KORNREICH _____ PART 54

Justice

Index Number : 103256/2005

FRASER, COLIN

vs.

GERALD J. PICASO INC.

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 3/15/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 7/5/07

HON. SHIRLEY WERNER KORNREICH

_____ 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 54

----------X

COLIN FRASER, PAMELA FRASER and ALEXANDRA FRASER, an Infant by her Parent and Natural Guardian, Pamela Fraser,

Plaintiffs,

-against-

GERARD J. PICASO, INC., ARCO METRO MANAGEMENT CORP., ARCO WENTWORTH MANAGEMENT CORPORATION, ARCO GOLD MANAGEMENT CO., INC., ARCO MANAGEMENT CORP., MARVIN GOLD MANAGEMENT CO., INC., MASCON RESTORATION, INC. and BLUE STONE PARTNERS, LTD.,

Defendants.

----------X

Index No.: 103256/05

DECISION & ORDER

KORNREICH, SHIRLEY WERNER, J.:

In this action seeking damages for personal injury, property damage, loss of income, breach of contract, breach of implied warranty of habitability (Real Property Law §235-b), breach of warranty of habitability and breach of warranty of quiet enjoyment, defendants move for summary judgment dismissing the complaint.[1] The gravamen of the action is that plaintiffs allegedly were exposed to mold in their residential cooperative apartment. The grounds for the motion are that defendants, as managing agents, owed no contractual duty to plaintiffs, that plaintiffs are collaterally estopped from suing for personal injuries, that plaintiffs' claims are barred by the statute of limitations, and that defendants cannot be sued for breach of warranties of habitability or quiet enjoyment because they are not owners or lessors of the premises.

[1] The moving defendants ("defendants") are those named in the caption, except Mascon Restoration, Inc., and Blue Stone Partners, Ltd., against whom the court previously granted a default judgment.

Plaintiffs were tenants in apartment LA ("Apartment") in the building located at 301 East 52nd St., New York, New York ("Building") during the period 1996 through December 2002, when they moved out. The complaint alleges that all of the defendants managed the Building from approximately 1995 to 2001. The Building was owned by 301-52 Townhouse Corp. ("Owner"). The plaintiffs brought a previous action in this court entitled *Fraser v. 301-52 Townhouse Corp.*, Sup. Ct. N.Y. Co., Index No. 113586/02 ("Fraser I"), seeking damages from the Owner for personal injuries due to mold in the Apartment, the same personal injuries that are at issue in this action.

The defendants are the present and former managing agents of the Building. As of December 1, 2000, the present managing agent, Gerard J. Picaso, Inc. ("Picaso"), entered into a contract with the Owner to manage and maintain the Building ("Management Contract"). The remaining defendants, whose names all begin with Arco, managed the Building prior to Picaso. The Management Contract provides that "[t]he Owner and tenant-shareholders shall not look to the Agent ["Picaso"] for Indemnity for any loss or damage to the Building or any unit therein." The Management Contract also requires the Owner to: 1) defend and indemnify Picaso in any action for personal injury, breach of contract or property damage arising out of Picaso's actions under the Management Contract; and 2) obtain liability insurance naming Picaso as an additional insured.

The complaint in this action alleges that "[t]his case is brought in addition to claims made in a prior action [Fraser I]." By decision and order of this court, dated September 27, 2006, plaintiffs' causes of action in for personal injuries were dismissed with prejudice in Fraser I, after a Frye hearing.

Discussion

A. Personal Injury

The court agrees that plaintiffs are collaterally estopped as a result of the dismissal of their personal injury claims in Fraser I from pursuing claims for personal injuries in this action. Collateral estoppel bars relitigation of a claim where there is an identity of issues and the party against whom estoppel is sought had a full and fair opportunity to contest the issue. *Schwartz v Public Administrator*, 24 NY2d 65 (1969).

Fraser I determined after a hearing, where plaintiffs were represented by counsel and had a full and fair opportunity to present evidence, that plaintiffs could not prove that the mold in their apartment was the proximate cause of their claims for personal injuries. Accordingly, that determination is binding on plaintiffs in this action and their claims for personal injuries are dismissed as against the moving defendants.

B. Breach of Warranty of Habitability and Quiet Enjoyment

Real Property Law §235-b provides that:

> In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions, which would be dangerous, hazardous or detrimental to their life, health or safety.

The applicability of the statute requires a contractual agreement or a landlord-tenant relationship. *McCarthy v. Board of Mgrs. of Bromley Condominium*, 271 AD2d 247 (1st Dept. 2000). Similarly, a landlord-tenant relationship or a contractual agreement is required to enforce the covenant of quiet enjoyment. *Wright v. Catcendix Corp.*, 248 AD2d 186 (1st Dept. 1998).

It is undisputed that the moving defendants did not have a contractual agreement or a landlord-tenant relationship with plaintiffs and, therefore, plaintiff's causes of action for breach of warranty of habitability, breach of implied warranty of habitability and breach of covenant of quiet enjoyment must be dismissed as against all of the moving defendants.

C. Breach of Contract

Plaintiffs' posit their breach of contract claims on two theories: that they were third-party beneficiaries of the management agreements and that defendants have a relationship "approximating privity" with plaintiffs. Defendants argue that an agent for a disclosed principal is not liable unless the agent evinces an intention to add or substitute his liability to that of the principal, citing *Matter of Jevremov v. Crisci*, 129 AD2d 174 (1st Dept. 1987) and *Jones v. Archibald*, 45 AD2d 532 (4th Dept. 1974). This is a correct statement of applicable precedent. The Management Contract demonstrates that Picaso did not intend to add or substitute its liability for that of the Owner. The opposite is true. The terms of the Management Contract make clear that the Owner was to indemnify and purchase insurance for the benefit of Picaso.

The terms of the Management Contract belie plaintiffs' claim that they are third-party beneficiaries thereunder with respect to claims for property damage. An intended beneficiary of a contract may enforce it where he demonstrates: 1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost. *Alicea v. New York*, 145 A.D.2d 315, 317 (1st 1988). In addition, the contract must "evince a discernible intent to allow recovery for the specific damages to the third party that result from a breach thereof before a

cause of action is stated." *Id.* The best evidence of whether third-party beneficiary status was intended to be conferred is the terms of the contract. *Id.*

Here, the Management Contract explicitly states that "tenant-shareholders shall not look to the Agent ["Picaso"] for Indemnity for any loss or damage to the Building or any unit therein." This contradicts plaintiffs' claim that it was intended that they could recover from Picaso for property damage. Consequently, plaintiffs cannot demonstrate that they were intended beneficiaries of the Management Contract with respect to claims for property damage.

The cases cited by plaintiffs for the proposition that their relationship to Picaso approximated privity are not on point. In *Ossining Union Free School Dist. v. Anderson,* 73 N.Y.2d 417 (1989), the court held that the school district could sue engineering consultants, who were subcontractor of the architect on the project, for negligent misrepresentations contained in their reports. The relationship approximating privity in that case was the knowledge by the professional engineers that the school district would rely upon their reports. The other cases cited by plaintiffs also are distinguishable from this one. In *Board of Managers of the Alfred Condo. v. Carol Mgmt.*, 214 A.D.2d 380 (1st Dept. 1995), the plaintiff condominium was the successor in interest to the sponsor of the condominium, which had entered into the contract, which was expressly enforceable by the sponsors successors and assigns. Similarly, in *Board of Managers of Astor Terrace Condominium v. Schuman, Lichtenstein, Claman & Efron*, 183 A.D.2d 488 (1st Dept. 1992), the Court held that the plaintiffs were third-party beneficiaries under the express language of the contract. Here, plaintiffs did not justifiably rely on a representation, they are not seeking to enforce a contract as a successor or assignee of a party in privity and they are not express third-party beneficiaries.

Therefore, plaintiffs do not have a relationship approximating privity with Picaso and are not third-party beneficiaries of the Management Contract. As a result, their claims for breach of contract must be dismissed.

D. Statute of Limitations

In addition, all of plaintiffs' property damage and personal injury claims that accrued prior to March 9, 2002, would be barred by the three-year statute of limitations contained in CPLR §214, as the complaint in this action was filed on March 9, 2005. As Picaso was the only moving defendant who managed the Building on or after March 9, 2002, plaintiffs' claims must be dismissed against the defendants other than Picaso.

The doctrine of relation back, pursuant to CPLR §203(b), does not apply here. A three part test determines whether relation back to an earlier pleading is appropriate for the purposes of adding a new party. *Buran v. Coupal*, 87 N.Y.2d 173, 178 (1995). The pleader must show that:

> (1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well.

Id. Where the pleader knows the identity of the party within the limitations period, but chooses not to name him, relation back is inappropriate. *Buran v. Coupal*, 87 N.Y.2d 173 (1995)(when party intentionally decides not to assert claim against party known to be potentially liable, there has been no mistake and statute of limitations should not be extended). *See also, Leylegian v. Federal Paper Bd. Co.*, 251 A.D.2d 60, 61 (1st Dept. 1998).

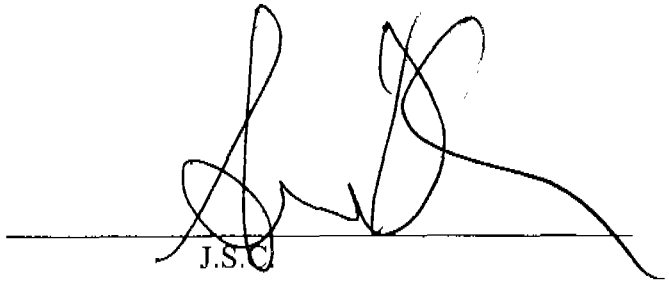
Here, plaintiffs cannot meet the third prong of the test because they were aware that the

Owner had managing agents, to whom they made their complaints according to their deposition testimony, but they intentionally asserted claims only against the Owner and the President of the cooperative in Fraser I. *DeLuca v. Baybridge*, 5 AD3d 533 (2nd Dept. 2004), is distinguishable because in that case the plaintiffs failed to properly serve a ***named party*** in the first action and the Court held that the complaint in the second action could relate back to filing of the first action. In this case, plaintiffs did not name the moving defendants in Fraser I.

The remaining contentions of the parties, including plaintiffs' claim that they need further disclosure to oppose the summary judgment motion, have been considered and found to be without merit. Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted, the complaint is dismissed with prejudice against all of the moving defendants and, upon service upon him of a copy of this order with notice of entry, the Clerk is directed to enter judgment accordingly.

Dated: July 5, 2007



J.S.C.