

**Wiesel v 310 E. 46 LLC**

2007 NY Slip Op 32081(U)

July 3, 2007

Supreme Court, New York County

Docket Number: 0111890/2004

Judge: Barbara Kapnick

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

PRESENT: **BARBARA R. KAPNICK**  
*Justice*

PART 12

Index Number : 111890/2004  
**WIESEL, ERIKA**  
VS.  
**310 EAST 46**  
SEQUENCE NUMBER : 002  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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 IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

**FILED**  
JUL 11 2007  
NEW YORK  
COUNTY CLERK

Dated: 7/3/07

  
**BARBARA R. KAPNICK** J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 12

-----X

ERICA WIESEL,  
  
Plaintiff,

DECISION/ORDER  
Index No. 111890/04  
Motion Seq. No. 002

-against-

310 EAST 46 LLC,  
  
Defendant.

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BARBARA R. KAPNICK, J.:

**FILED**  
JUL 11 2007  
NEW YORK  
COUNTY CLERK

In this action, plaintiff Erika Wiesel seeks to recover damages for personal injuries she allegedly sustained as a result of exposure to various types of mold and fungi during her tenancy at apartment units 16H and 3F in the building located at 310 East 46th Street in Manhattan. Defendant 310 East 46 LLC is the owner and landlord of the building.

The Complaint sets forth causes of action sounding in negligence for damage to personal property (first cause of action) and for personal injuries (second cause of action), seeking punitive damages for 'malicious intent, and/or intentional disregard, and/or reckless conduct' in failing to take any steps to remedy the situation and/or notify plaintiff of the dangers that the conditions posed (third cause of action), and breach of the warranty of habitability (fourth cause of action).

[\* 3]

Defendant now moves for an order pursuant to CPLR § 3211(a)(5) dismissing the Complaint filed on August 18, 2004 on the ground that plaintiff's claims are barred by the applicable statute of limitations. See, CPLR § 214-c(2) which provides, in relevant part, that

the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.

Defendant contends that plaintiff failed to commence this action within three years of the discovery of her injuries which occurred, at the latest, in or around December 1999 when plaintiff claims she began to experience difficulty breathing and developed other medical conditions.

Plaintiff argues in opposition that defendant should be equitably estopped from asserting the statute of limitations as a defense herein because she reasonably relied on, and was induced to delay bringing this action as a result of, a stipulation entered into on January 31, 2001 in a Housing Court holdover proceeding which provided, in relevant part, that "Tenant alleges mold in her 2nd hallway closet and a non-functioning air conditioner and

Landlord shall inspect and repair as required by law." Plaintiff claims that defendant totally disregarded this agreement.

However, "[t]he extraordinary remedy of equitable estoppel may be invoked to bar the affirmative defense of the statute of limitations only where the defendant's affirmative wrongdoing contributed to the delay between accrual of the cause of action and commencement of the legal proceeding" and plaintiff can "demonstrate reasonable reliance on the defendant's misrepresentations, and plaintiff's due diligence in ascertaining the facts and commencing the action". Walker v. New York City Health and Hospitals Corp., 36 A.D.3d 509 (1st Dep't 2007).

Based on the papers submitted and the oral argument held on the record on May 2, 2007, this Court finds that the January 31, 2001 Stipulation entered into in the Housing Court proceeding does not constitute an affirmative wrongdoing designed to prevent plaintiff from bringing suit, and that any reliance on the representations contained therein was unreasonable as a matter of law.

Accordingly, there is no basis for asserting the remedy equitable estoppel in this case. The first and second causes of action are, therefore, time barred.

This Court further finds that the third cause of action, in which plaintiff seeks punitive damages, is likewise governed by the three-year statute of limitations (see, CPLR § 214-C[2]), and is accordingly, time barred.

Although the fourth cause of action is governed by the six-year statute of limitations applicable to contract claims and is thus timely asserted, plaintiff has not made any showing nor sufficiently alleged in her Bill of Particulars that she sustained any economic damage as a result of the purported breach of the warranty of habitability.

Accordingly, defendant's motion to dismiss this action is granted in its entirety.

The Clerk may enter judgment dismissing plaintiff's Complaint with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Dated: July 3, 2007

  
Barbara R. Kapnick  
J.S.C.

**FILED**  
JUL 11 2007  
NEW YORK  
COUNTY CLERK'S OFF.

**BARBARA R. KAPNICK**  
J.S.C.