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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 107489/2002
PIERCE, ELIZABETH
VS
ORSID REALTY
Sequence Number : 006
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION 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 and cross motion are decided per attached

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

FILED
AUG 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/13/07

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------x

ELIZABETH PIERCE, individually,

Plaintiff,

–against-

Index No. 107489/02

ORSID REALTY CORPORATION, 186 RIVERSIDE CORPORATION, LAWRENCE PROPERTIES, INC., BASONAS CONSTRUCTION CORPORATION and ISSEKS BROS., INC.,

Defendants.

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EMILY JANE GOODMAN, J.S.C.:

Motion sequence numbers 006 and 007 are hereby consolidated for disposition.

In this action, plaintiff alleges that her cooperative apartment became infected with toxic mold following a water incursion on June 24, 2001 caused by an overflow of the building's rooftop water tank and from a leaking wastewater pipe in the apartment above hers, causing personal injuries and property damage. She sues the cooperative corporation owner of the building, 186 Riverside Corporation (186 Riverside) and the managing agent, Orsid Realty Corporation (Orsid Realty), for negligence. Also named as defendants are the company that was performing work on the roof of the building at the time of the water incursion, Basonas Construction Corporation (Basonas), and the company that last cleaned and serviced the water tank, defendant Isseks Bros., Inc. (Isseks).

All defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint, arguing that they are not responsible, as a matter of law for any mold condition in

plaintiff's apartment.[1] For the reasons set forth herein, summary judgment is denied as to Orsid Realty, 186 Riverside and Basonas, because there are triable issues of fact as to whether their negligence contributed to the injuries and property damage allegedly sustained by plaintiff. Summary judgment, however, is granted to Isseks, because the record is devoid of any evidence, save pure speculation, that any work this company performed on the building's water tank in June 2000 caused or contributed to the overflow incident one year later.

The building is a 15-story building constructed circa 1927. In 1997, plaintiff purchased the shares to apartment number 14A and resided therein up until July 2001 without incident. Plaintiff alleges that on the morning of June 24, 2001, water began to pour through her apartment's hallway bathroom's west side window when the water tower on the roof of the building overflowed. That same day, more water allegedly came through the ceiling of one of the master bedroom closets on the west side of her apartment. Plaintiff alleges she complained immediately to the doorman of the building. She recalls talking to the building's handyman, who told her that there was some work being done on the roof of the building and the water had something to do with that. Plaintiff testified that the superintendent of the building, Randy Vera (Vera), came to her apartment that day and inspected the hallway bathroom and the bedroom closet. He allegedly told plaintiff that the water was traveling from the exterior walls to the light fixtures.

It is undisputed that on the morning of June 24, 2001, the water tank on the roof of the building overflowed. Plaintiff alleges that this occurred because Basonas, who was performing

[1]Defendant Lawrence Properties, Inc. was the managing agent for 186 Riverside prior to Orsid Realty being hired in the Spring of 2001 (Ginsberg Dep. at 204-05). No appearance has been made on its behalf.

roof repair work at the building during this period of time, damaged the water tank's electrical conduit which controls the "float ball" in the tank, which, in turn, regulates the amount of water that is pumped into the water tank from the basement.

A couple of days after June 24th, plaintiff alleges she started noticing a very noxious, foul-smelling odor in the hallway bathroom. She testified it smelled like "mold and sulfur and sewer." Pierce Dep. at 94. Plaintiff told the superintendent about the odor immediately, and spoke to him several times over the course of the next several weeks about the odor. She cleaned the entire bathroom with bleach. The cleaning, however, abated the smell for less than 24 hours and then it returned in full force. Vera's only response was to "just air it out, open the windows, open the doors." Id. at 95. Plaintiff followed that advice and did everything he suggested, but the odor continued to persist and continued to worsen. Plaintiff alleges she started to feel ill after about two weeks, which she described as severe pounding headaches, flu-like symptoms, nausea, fatigue, sore throats, nosebleeds. She continued to go to work every day and continued to complaint to Vera that the odor was not getting any better. She also began to smell the noxious odor coming from the hallway closet and kitchen pantry, both of which share the same wall as the hallway bathroom, and began to notice brown water marks on the walls and ceilings of the hallway bathroom.

Finally, after approximately three weeks, Vera discovered a wastewater pipe leaking from apartment 15A into plaintiff's apartment. This is not a disputed fact. Vera testified at his deposition that he made this discovery after plaintiff's continued complaints convinced him to get his moisture meter to take some readings in her apartment a couple of weeks after the water tank overflow. The ceiling and west and north walls of the hallway bathroom as well as of the

west and south walls of the pantry closet all tested wet, showing 100% on his moisture meter. Plaintiff claims that Vera told plaintiff that the wastewater pipe had been leaking into the walls of plaintiff's apartment, but that it had been fixed and that she should continue to "air out" the apartment. Pierce Dep. at 97. Vera, however, denies ever noticing any water or unusual wetness in plaintiff's apartment, and did not detect any odor in plaintiff's apartment.

Plaintiff went away for the weekend and returned to the apartment on the afternoon of Sunday, July 22, 2001. That day she claims to have discovered black mold spores on the plaster walls in the pantry closet. Plaintiff immediately called Vera, but he was not on the premises. Vera came up to her apartment on Monday morning. Plaintiff showed him the mold spores, said it was very serious and needed to be addressed immediately. She claims she told him: "I believe this is why I am ill. I am going to leave. The plaster probably has to come off the walls; something has to be done right away." Pierce Dep. at 109. When she got to work, she called Harvey Ginsberg at Orsid Realty, and asked if Vera had, as promised, called him about the situation in her apartment. When Ginsberg said he was unaware of any situation, but had gotten a message from Vera that morning, plaintiff advised Ginsberg about the water leak, finding the black mold spores, that she was ill, leaving the apartment and something needed to be done immediately to address the problem. "I though they needed to take down the plaster walls at the very least. He assured me that something would be done and I said okay." Id. at 110. Harvery Ginsberg testified at his deposition that he does not recall ever speaking to the plaintiff. Ginsberg Dep. at 116.

Vera testified a little differently. He claimed that about a week after the June 24th water incursion, plaintiff pointed out the pantry closet claiming that there was mold on the wall, and

complained again about the smell in the bathroom. Vera testified that he saw black spots on the wall in the pantry, but did not know what it was. He claims that plaintiff instructed him not to touch the black spots, did not ask him to do anything about them, and so he left the apartment. After another week or two, he returned to plaintiff's apartment at her request because she was still complaining of a smell in the bathroom. It was at this point that he tested the apartment for moisture, using his water meter and discovered the leaking waste pipe in the upstairs apartment and he called a plumber.

Plaintiff moved out of the apartment the day after she found the mold spores, staying at a nearby hotel. She claims she stopped by the apartment the next couple of days before work to see if anything was being done in her apartment, but the only thing ever done was the medicine cabinet was removed from the wall. At that point plaintiff called her insurance company, because she felt that neither the building or its managing agent were being responsive to the mold contamination in her apartment. In the Fall of 2001, the building claimed that they solved the problem, but plaintiff claims that the work they did only consisted of repainting the bathroom and cleaning the mold spores off the pantry wall and painting over them. This work was allegedly not sufficient, because environmental reports showed that the apartment was still contaminated with mold. Plaintiff claims she was forced to sell her apartment in 2004 because of the toxic mold condition, which was disclosed to all potential buyers. As a result, she claims that her apartment sold for less than its full market value as many potential buyers would not even consider making an offer due to her disclosures.

Plaintiff had the apartment tested on July 31, 2001 by Edward A. Olmstead Environmental Services. He observed visible mold growth on the wall in the kitchen pantry, and

water-damaged walls in the hallway bathroom. From his visual inspection and bulk, wipe and air samples, he concluded that "the leaks in the bathroom and kitchen have caused mold colonization of the water-damaged walls." Sutton Affirm., Exh. D. He further reported that "the leaks in the master bedroom may also have caused growth of mold in the walls. The levels of airborne mold spore exposure in the apartment are quite high and are probably linked to the health problems" reported by plaintiff. Id.

Additional microbial evaluation and sampling was performed by Christina A. Starkbaum. a Certified Industrial Hygienst of Clayton Group Services on August 6, 2001. Ms. Starkbaum observed "heavy suspect mold contamination on the ceiling, walls, and shelves of the pantry," "water damage" and "a strong musty odor" in the pantry. Sutton Affirm., Exh. E. In the hallway bathroom, she observed "suspect mold contamination on the ceiling and on the wall to the right of the sink" and a "strong musty odor." Id. The laboratory results of her samplings confirmed the presence of fungal growth on the walls in the pantry and the hallway bathroom, as well as in the kitchen pantry closet. She concluded from the pattern of water damage she observed that these mold contamination sites were related to the recent water incursion events.

Plaintiff's insurance company also sent Thomas R. Parisi, P.E. to inspect the apartment on three occasions -- October 4, 2001, November 28, 2001 and January 16, 2002. On his first visit to the apartment, he visually observed "[h]eavy moisture damage and mold in the dining room, closet, hall bath and first master bedroom closets, along the perimeter wall of the apartment." Sutton Affirm., Exh. F. He used a calibrated moisture meter to detect moisture levels in the areas where he noted water damage. One area of the bathroom had 100% moisture levels, "indicating excessive moisture behind the wall." Id. He concluded that the moisture

problem had not been corrected at that point in time, and that further work was needed to remediate the source of the water infiltration, which was supporting mold growth.

On Parisi's second visit to the apartment, he detected "four new areas in the [hall] bathroom that now have higher moisture level readings and mold is reappearing behind some of the painted areas." Sutton Affirm., Exh. F. He concluded that the work completed to date was "mostly cosmetic" and that "[l]ittle or no attempt was made to rectify any underlying deficiencies or problems with previous water damages other than to paint over them." Id.

On his third and final visit on January 16, 2002, Mr. Parisi performed a visual inspection to examine the finished repair work which reportedly corrected the water infiltration problems in the hallway bathroom and master bathroom. Moisture level readings in the hallway bathroom were between 70-90%, indicating that there was still active moisture present behind the wall, above the level that supports mold growth.

Defendants 186 Riverside and Orsid Realty contend that summary judgment in their favor must be granted because plaintiff cannot, as a matter of law, establish that they either created or had actual or constructive notice of the hazardous mold condition in her apartment which precipitated the personal injuries she alleges, relying on Beck v J.J.A. Holding Corp., 12 AD3d 238, 240 (1st Dept 2004), lv denied 4 NY3d 705 (2005).

In Beck, the plaintiff's apartment was flooded in September 1998, severely damaging its flooring and walls. At plaintiff's request, the landlord repaired and repainted the apartment and she replaced the carpeting. A month or so later, plaintiff asked for more painting to cover certain "brown spots" and the landlord complied. In November 1998, plaintiff began experiencing breathing problems. In November of the following year, a hospital report revealed mold spores

in dust samples taken from plaintiff's apartment. The report was then sent to plaintiff's landlord by plaintiff's son. Plaintiff moved from her apartment less than one month later, after which her condition improved. She sued her landlord for personal injuries she allegedly sustained from its negligence in not testing for mold following the flooding in her apartment. The First Department granted summary judgment to the landlord on the ground that plaintiff did not make out a prima facie case of negligence, because she has not shown the landlord had either actual or constructive notice of the mold condition in her apartment with sufficient time to remedy the condition. Plaintiff argued that the landlord's knowledge of water damage and discoloration of the walls should have placed the defendant landlord on constructive notice of the likelihood of mold growth. The First Department affirmed dismissal, finding that the landlord did not have an ongoing duty to monitor the plaintiff's apartment for the possible development of environmental hazards.

While the landlord in Beck was not notified of any problems with the apartment until over a year after the flooding, there is no dispute in this case that the plaintiff complained to the superintendent of her building about a noxious, foul-smelling odor in her apartment, starting shortly after the first water incursion on June 24, 2001 and repeatedly over the next several weeks. There is also no dispute that the superintendent visited the apartment several times in the ensuing three weeks, was shown the "black spots" in the pantry closet and subsequently discovered a water leak in the upstairs apartment. While he denies seeing any evidence of water damage or smelling any odors, accepting plaintiff's deposition testimony as true, there was a foul smell in the apartment and brown water marks on the walls and ceilings of the hallway bathroom began to appear. Finally, plaintiff testified that she advised both the building's superintendent

and managing agent of feeling ill on or about July 23rd, and that it was serious enough for her to vacate the apartment. Thus, there is a triable issue of fact as to whether the owner and managing agent had constructive notice of the alleged mold hazard in plaintiff's apartment. See Daitch v Naman, 25 AD2d 458 (1st Dept 2006) (repeated complaints to owner about entry of water and dust into their apartment enough to raise a triable issue of fact as to notice of alleged mold hazard).

Next, defendants 186 Riverside and Orsid Realty contend that there is no evidence that mold was present in the apartment during the three-week period that plaintiff continued to live in the apartment after the June 24, 2001 water incursion and that even if mold was present, her maximum three-week exposure is not enough to cause the physical injuries she claims. Defendants fail to offer any expert evidence to support this latter contention, and there is a triable issue of fact as to whether mold was present in the apartment during the time that plaintiff continued to reside therein. In addition to the "black spots" observed by both plaintiff and the superintendent, there is evidence of a foul smell in the apartment and excessive moisture. Finally, testing performed as early as July 31, 2001 confirmed the presence of mold in the apartment.

Defendants 186 Riverside and Orsid Realty contend that any property damage that plaintiff suffered was due to her decision to bar 186 Riverside from entering her apartment to conduct tests and any remediation efforts that would have been performed pursuant to the results of those tests. However, this argument is based solely on Harvey Ginsburg's testimony, who claimed that plaintiff had instructed the superintendent and the handyman that nobody from the building is to go into the apartment. Ginsberg Dep. at 113-14. He testified that she gave this

instruction "within a week of when the flood was or something like that, give or take some days. But very soon thereafter . . " Id. at 113. However, this testimony is inconsistent, at the very least, with the superintendent's deposition testimony that he was repeatedly called to inspect the plaintiff's apartment at her request weeks after the water tank incident (see Vera Dep. at 80, 88-89, 91-92, 97, 100); the testimony of plaintiff that Ginsburg promised, in mid-July, that something would be done to fix her apartment (see Pierce Dep. at 110); and the evidence that repairs were subsequently made by the building sometime in the Fall of 2001 (see Parisi Report: Sutton Affirm., Exh. F; see also Ginsberg Dep. at 171-72; Pierce Dep. at 160).

Finally, defendants 186 Riverside and Orsid Realty argue that in plaintiff's affidavit submitted in opposition to these motions for summary judgment, plaintiff makes numerous factual errors and statements in contradiction to her deposition testimony. While it is true that a party's affidavit that contradicts her prior deposition testimony is insufficient to defeat a properly supported summary judgment motion (Burkoski v Structure Tone, Inc., 40 AD3d 378, 282-83 [1st Dept 2007]), the court has read all the deposition testimony in case and does not find that the plaintiff's affidavit runs afoul of her prior deposition testimony. For example, plaintiff testified at her deposition that the superintendent came to her apartment shortly after the water incursion and she showed him her bedroom closet and he said that "[t]he water had somehow come in through the exterior wall and traveled in through the light fixtures and poured in from the closet through the light fixture;" and that it had something to do with the roof. Pierce Dep. at 66-67. Thus, this claim was not raised for the first time in her affidavit as defendants argue to this court.

In addition, defendants argue on reply that a wastewater pipe was never broken in the apartment above plaintiff's as she states in her affidavit, and that the actual broken pipe "would

not contain any substance that would produce the odor plaintiff claimed to have smelled in her apartment." Koster Reply Affirm., at ¶ 9. This is curious since the building superintendent described it as a "waste line" to the upstairs bathroom sink both in his October 10, 2002 affidavit and at his later deposition (see Vera Dep. at 107-08). Nor do defendants offer any evidentiary support for their counsel's claim that this plumbing leak could not create odors in plaintiff's apartment.

For these reasons, summary judgment is denied as to defendants 186 Riverside and Orsid Realty.

Defendant Basonas was hired to perform facade repairs and partial roof replacement at the building. Basonas contends that it is entitled to summary judgment, because there is no evidence that the work it performed on the roof of the building caused or contributed to the mold condition in plaintiff's apartment, and further contends that the expert testimony in this case is that the cause of the mold was leaking pipes inside the walls of her apartment, not the water incursion from the overflow of the water tank.

The fact that Basonas was not working on the day of the overflow incident (a Sunday), did not perform any repairs to the building's water tank and that the tank is physically located 20 to 30 feet above the roof of the building is not dispositive. Michael Hochhauser, testifying for Isseks, reported that, at the building's request, Isseks sent their shop foreman, Joe Chiappi, to investigate the overflow incident and he reported back that it was caused by an "electrical failure." Hochauser Dep. at 50-51. He further testified that Chiappi reportedly observed breaks in the electrical conduit connecting the electrical switch in the top of the water tank to the pump in the basement, causing the pump to stay on and not shut off. Id. at 50-55. Hochhauser testified

that the conduit had been "mangled" (id., at 54, 63), that the conduit was just laying on the floor of the roof, and that "it previously had been attached to the parapet wall that was no longer there on the building" (id. at 54). There is further testimony from Harvey Ginsberg that he had been informed by the superintendent, Randy Vera, that the water came into plaintiff's apartment "over the parapet wall, which was no longer there at the time," that a tarp was covering the opening of the wall (Ginsberg Dep. at 111), and testimony of Vera that the west parapet wall had been removed due to the repairs and that the area had been covered by a tarp by Basonas (Vera Dep. at 73-76). Thus, there is a triable issue of fact as to whether Basonas' work caused or contributed to the water damage in plaintiff's apartment.

There is also a triable issue of fact as to whether the water entering plaintiff's apartment from the water tank overflow caused or contributed to a mold condition in her apartment. Michael Kravitz, a consulting engineer retained by Basonas' original attorneys to inspect plaintiff's apartment, placed the sole cause of the mold condition on leaking interior pipes inside the walls of the apartment. However, this is contradictory to the affidavit of plaintiff's expert, Carl Borsari, a consulting engineer in property management, who opines that there was a dangerously unhealthy moisture condition in plaintiff's apartment both from the June 24th water tank overflow and the leaking wastewater pipe which were never professionally and adequately addressed by the defendants resulting in the growth of mold in her apartment.

Finally, summary judgment in Isseks' favor is warranted. Isseks owed no duty to the plaintiff, because it was not hired to maintain the water tower, and the only thing it did was sanitize the water tower in or about June 2000. While there is evidence that part of the cleaning process is a visual inspection of the water tank, including the float ball, to see if there are any

issues or problems (see Hochauser Dep. at 26-28; Vera Dep. at 26), there is no evidence that any mechanical or electrical problems existed in June 2000 that could or should have been discovered by Isseks. Indeed, plaintiff herself contends that the overflow occurred when Basonas' workmen severed the electrical wiring controlling the float ball in the water tank. The evidence is undisputed that Basonas commenced this work well after Isseks inspected and cleaned the water tank in June 2000. Although plaintiff notes that Isseks would owe her a duty of care if Isseks' failure to exercise due care in the performance of its contract with 186 Riverside launched an instrument of harm, creating an unreasonable risk of harm to plaintiff (see Daitch v Naman, 25 AD2d 458 [1st Dept 2006] [issue of fact existed as to whether contractor owed a duty to tenant who suffered from mold conditions based on the allegation that the contractor failed to exercise due care in the performance of its contract with the owner, creating an unreasonable risk of harm to plaintiff]; see also Church v Callanan Indus., 99 NY2d 104, 111-12 [2002]; Vega v S.S.A. Properties, Inc., 13 AD3d 298 [1st Dept 2004]), there is no evidence that Isseks launched an instrument of harm.

For the foregoing reasons, it is hereby

ORDERED that the defendant Basonas Construction Corporation's motion for summary judgment (seq. no. 006) is denied; and it is further

ORDERED that defendant Isseks Bros., Inc.'s cross motion for summary judgment is granted, and the Clerk of the Court is directed to sever the claims against this defendant and enter judgment dismissing the complaint and all cross claims against defendant Isseks Bros., Inc. with costs and disbursements; and it is further

ORDERED that the motion of defendants Orsid Realty Corporation and 186 Riverside

Corporation for summary judgment (seq. no. 007) is denied.

This Constitutes the Decision and Order of the Court.

Dated: August 13, 2007

ENTER:

J.S.C.

EMILY JANE GOODMAN