

Dietrick v Gutman

2008 NY Slip Op 30051(U)

January 8, 2008

Supreme Court, New York County

Docket Number: 0121369/2003

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 121369/2003
DIETRICK, WILLIAM
vs
GUTMAN, JUDITH
Sequence Number : 004
DISMISS COMPLAINT

INDEX NO. _____
MOTION DATE 11/15/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

is motion to/for _____

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

PAPERS NUMBERED
<u>1-7</u>
4-6 <u>4-7</u>
<u>8-9</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

~~ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 1/15/08 BY SP-10/BJA/STP~~
REDACTED

FILED
JAN 11 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1-8-08


JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----- X

WILLIAM DIETRICK,

Plaintiff,

- against -

JUDITH GUTMAN, MERCER SQUARE OWNERS
CORP. and INSIGNIA RESIDENTIAL GROUP, INC.,

Defendants.

JANE S. SOLOMON, J.:

DECISION AND ORDER

Index No. 121369/03

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff William Dietrick, as a subtenant of an apartment, sued his lessor, the apartment building's owner, and the managing agent of the building, for injuries allegedly caused by exposure to toxic mold.

The building's owner (defendant Mercer Square Owners Corp.) and the managing agent (defendant Insignia Residential Group, Inc.) now move, pursuant to CPLR 3211, for dismissal of the complaint as against them, on the ground that the claim against it is time-barred. The owner-lessor of the apartment (defendant Judith Gutman) cross-moves, pursuant to CPLR 3025 (b), for leave to amend her answer to interpose a statute of limitations defense, and, upon amendment, for dismissal of the complaint on this ground.

For the reasons discussed below, the court grants the motion by Mercer and Insignia, as well as the portion of Gutman's cross motion that seeks leave to amend her answer and to dismiss the property damage claim.

Mercer is the owner of an apartment building located at 250 Mercer Street, New York, New York (Building). Insignia is the Building's managing agent. In May 1999, plaintiff moved

into apartment C-215 in the Building, which was owned by Julio Jove. After two years, Jove sold his apartment, obligating plaintiff to move. In May 2001, plaintiff relocated into Apartment B-1505, which is owned by Gutman. Plaintiff alleges that exposure to toxic mold in both apartments caused him to suffer severe personal injuries and damaged his personal property.

This action was commenced on December 12, 2003. Mercer and Insignia argue that because plaintiff's symptoms began in 1999, this action is time-barred by virtue of the three year statute of limitations for his claim. Gutman argues that the claim against her also is time-barred.

Plaintiff submitted an opposition affidavit wherein he states: "Before 1999, I suffered from asthma and allergies. I was also subject to frequent respiratory infections caused by bacteria; I was told that my lungs were more susceptible to these because of the asthma. Symptoms of these problems . . . included fever, fatigue, aching joints, burning/itching eyes, and some digestive problems" (Affidavit in opposition to motion and cross-motion by William Dietrick [Dietrick Aff.], paragraphs 2 and 3).

He further states that from May through July 1999, he again experienced these symptoms, and doctors treated him for a bacterial infection (*id.*, paragraphs 5-6). While he lived in the Jove apartment, his symptoms gradually worsened (*id.*, paragraph 6). After moving into the Gutman apartment in May 2001, he was hospitalized for these symptoms, and a mold infection was found in his blood (*id.*, paragraph 8). He did not know that the Building was a source of the mold (*id.*, paragraph 8). He hired a professional cleaning service to clean the Gutman apartment, and it reported to him that it found mold in the apartment (*id.*, paragraph 9), and he moved out soon thereafter.

The property damage claim is not specifically referred to in the complaint. The bill of

particulars states that his property was exposed to and contaminated by “a variety of fungal organisms, spores and microorganisms which were hazardous to his health” (Exhibit C to Smith Aff., paragraphs 4-5), and that he was “forced ... to clean and ultimately discard [sic] most of his furnishing and clothing, furniture and household items” (*id.*, at paragraph 12). Dietrick makes no mention of the property damage claim in his opposing affidavit; however, it appears that he feared that the property may be contaminated and could present a health hazard if he kept it in his home.

Plaintiff testified at his deposition that the symptoms upon which the complaint is based started in May 1999, as did the damage to his property damage claim (*see* Exhibit F, at 198-199, 309-311 Smith Aff.). Plaintiff also testified that he donated to charity some of the allegedly damaged property for which he is claiming a loss (Exhibit F, at 325-327). In addition, the record contains a letter from plaintiff to a medical doctor, dated April 11, 2001, stating that he had symptoms “for over a year now,” including frequent lung infections, night sweats, shortness of breath, bladder, urinary tract and prostate pain and burning, fatigue, abdominal pain, pain in the right hip joint, bowel pain and irritation, painful glands in the neck, armpits, and groin, and burning in the eyes and mouth (*see* Exhibit I to Smith Aff.). These symptoms are among the injuries upon which this action is based (*see* plaintiff’s Verified Bill of Particulars, Exhibit C to Smith Aff.).

The applicable statute of limitations period for a claim of exposure to toxic mold is three years, as set forth in CPLR 214-c, which provides, in relevant part:

“2. Notwithstanding the provisions of section 214, 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.”

Pursuant to this subdivision, the time for bringing the action began to run when plaintiff discovered the primary condition upon which the claim is based (*Matter of New York County DES Litig.*, 89 NY2d 506 [1997]; *Matter of Goffredo v City of New York*, 33 AD3d 346 [1st Dept 2006]).

Plaintiff experienced the symptoms from the toxic substance as early as 1999, and no later than April 2000, and commenced this action more than three years later, on December 12, 2003. Therefore, movants have established entitlement to summary judgment on this ground. The burden then shifted to plaintiff to demonstrate the existence of a genuine, material issue of fact so as to defeat the motion. Plaintiff has not meet his burden.

Plaintiff argues that the health problems that he experienced in 1999 and 2000 were repetitions of prior problems. He contends that he was unaware of a new injury, and unaware that it was caused by mold. However, the symptoms that plaintiff stated he experienced in 1999 are so similar to those he alleges to have been caused by movants' negligence as to start the running of the statute (*Martin v 159 W. 80th St. Corp.*, 3 AD3d 439 [1st Dept 2004]; cf. *O'Halloran v 345 Park Co.*, 251 AD2d 260 [1st Dept] [the early symptoms were too isolated or inconsequential to trigger the running of the statute of limitations under CPLR 214-c (2), *lv dismissed* 92 NY2d 1026 [1998]). The fact that symptoms may have worsened does not extend the statute of limitations (*Chavious v Tritec Asset Mgt.*, 284 AD2d 362 [2d Dept 2001]).

As for Gutman, the complaint is not entirely time-barred. As a general rule, accrual of a cause of action for personal injury occurs when the claim becomes enforceable, i.e., when all the

elements of the tort can be truthfully alleged in a complaint (*Barrell v Glen Oaks Vil. Owners, Inc.*, 29 AD3d 612 [2d Dept 2006]). Although CPLR 214-c provides that the three-year period is “computed from the date of discovery of the injury by the plaintiff,” vis-à-vis Gutman, plaintiff had no basis to assert a claim against her until he moved into her apartment in May 2001. With respect to his personal property damage claims, Dietrick alleged that the damage occurred before he moved into the Gutman apartment (*see* Exhibit F, at 309-311, to Smith Aff.), and offers no evidence of additional harm incurred afterwards, so that part of the complaint seeking to recover property damage from Gutman is dismissed. At trial, he will have the burden of proving physical injuries caused by exposure to mold in the Gutman apartment alone. It is not clear from the record that his later complaints are solely attributable to pre-May 2001 exposure, and evidence in these motions do not resolve this fact question as a matter of law.

Accordingly, it is

ORDERED that the motion by defendants Mercer Square Owners Corp. and Insignia Residential Group, Inc. for dismissal of plaintiff’s action based on the statute of limitations is granted, and, as against these defendants, the complaint is dismissed, with costs and disbursements to defendants as taxed by the Clerk of the Court; and it further is

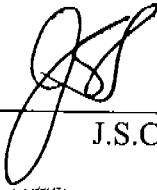
ORDERED that the cross motion by defendant Judith Gutman is granted only to the extent of granting her leave to amend her answer to interpose a statute of limitations defense, and dismissing that part of plaintiff’s claim relating to damage to personal property, and otherwise is denied; and it further is

ORDERED that the Clerk is directed to enter judgment accordingly; and it further is

ORDERED plaintiff's time to file a Note of Issue is extended to February 15, 2008.

Dated: January 8, 2008

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
JAN 11 2008
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