

Kent v 534 E. 11th St.

2009 NY Slip Op 30641(U)

March 19, 2009

Supreme Court, New York County

Docket Number: 107528/08

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB

PART 15

Index Number : 107528/2008
KENT, GILL
vs.
534 EAST 11TH
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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 is consolidated with motion
Seq. 002 and decided in accordance with the memorandum
decision.

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

FILED
MAR 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/19/09

WALTER B. TOLUB 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 15

-----x

GILL KENT

Plaintiff,

-against-

534 EAST 11th STREET, HOUSING DEVELOPMENT
FUND CORPORATION, CAROLE FERRARA ASSOCIATES,
INC., and CAROLE FERRARA

Defendants.

Index No. 107528/08
Mtn Seq. 001,002

-----x

534 EAST 11th STREET, HOUSING DEVELOPMENT
FUND CORPORATION, CAROLE FERRARA ASSOCIATES,
INC., and CAROLE FERRARA

Third-Party Plaintiffs,

-against-

SND CONTRACTING CORP.,

Third-Party Defendant.

-----x

Index No. 590748/08

FILED
MAR 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

WALTER B. TOLUB, J.:

Motion sequence 001 and sequence 002 are consolidated for disposition and decided in accordance with the following memorandum decision.

By motion sequence 001, Defendants/Third-Party Plaintiffs (hereinafter "Defendants") move for an order granting, inter alia, summary judgment pursuant to CPLR 3212 or an order striking the "scandalous and prejudicial" allegations asserted within the complaint and compelling Plaintiff to submit to a physical examination. Defendants also seek sanctions due to Plaintiff's

counsel's frivolous conduct.

By motion sequence 002, Plaintiff seeks an order,, striking Defendants' Reply in motion sequence 001or permission to submit a Sur-Reply and time to conduct further discovery.

Facts

Plaintiff owns shares in the 534 East 11th Street Housing Development Fund Corporation (HDFC) and is a tenant of apartment 27/28 (Premises) pursuant to a proprietary lease.

HDFC is the owner of the building known as 534 East 11th Street, New York, New York (building) and the lessor under Plaintiff's lease for the Premises.

Carole Ferrara Associates, Inc., was hired as the managing agent for the building.

Plaintiff claims that in 2002, Defendants retained a contracting company to work on the roof the building. The contractors were hired to demolish the parapets on the roof and remove the roof of the building. Work commenced and a scaffold was set up outside of Plaintiff's livingroom window. At the end of each day the workers would throw rubble off the roof into the alley leading to the backyard.

Plaintiff claims that clouds of dust would enter the Premises on a regular basis causing health problems¹. Plaintiff

¹Given that part of Defendants' motion is to exclude language relating to Plaintiff's health and that this is not a personal injury action, the Court excludes the specific ailments Plaintiff complains of.

further claims that the roof was taken off the building without adequate protection causing a flood on the Premises which became damp and moldy.

In 2006, four years after work was commenced at the building, Plaintiff hired JLC Environmental Consultants (JLC) to study and report on the physical conditions of the Premises. JLC conducted an investigation from July 2006 through August 2006. On September 5, 2006 JLC issued its "final" report. The report stated that the Premises contained heavy metals but that the source of the metals was unclear. The JLC recommended that Plaintiff test the bricks demolished during the roof work and conduct mold testing. By October 2006, Plaintiff hired a company to clean the apartment. JLC tested the apartment again and in its report dated October 19, 2006, it found that levels of heavy metal concentration were lower than the previous tests and that generally levels were below the detection limit.

Plaintiff then commenced this action in May of 2008. Plaintiff's Complaint states causes of action for: (1) Nuisance; (2) money damages; (3) negligence; and (4) constructive eviction. Plaintiff claims that the negligent work on the roof contaminated her apartment with toxins, constructively evicted her from her apartment and prevented her from working because Plaintiff works from home. Although there is no personal injury claim, Plaintiff's Complaint is filled with ailments she claims to have

suffered as a result of the work performed and the toxins left behind.

Defendants then filed this motion seeking summary judgment dismissing the Complaint or an order compelling Plaintiff to provide initial environmental testing results and submit to a physical examination. Defendants also seek an order striking Plaintiff's health complaints as this is not an action for personal injuries.

By motion sequence 002, Plaintiff seeks an order permitting it to serve a Sur-Reply to motion sequence 001 or strike Defendants' Reply and permit time to conduct further discovery.

Discussion

As with any motion for summary judgment, success is wholly dependent on whether the proponent of either of the respective motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]). A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law. This means that none of the material elements of the claim or defense are in dispute (*Barr, Atlman, Lipshie, Gerstman, New York Civil Practice Before*

Trial, [James Publishing 2006] §37:180).

On defendant's motion for summary judgment, defendant may demonstrate the lack of several prima facie elements of plaintiff's case, however, to prevail, defendant only needs to demonstrate the absence of a single element (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:182). Once defendant presents evidence showing the absence of facts necessary to establish a prima facie case, the burden shifts to the plaintiff (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing] §37:190).

Initially, on a motion for summary judgment, parties must lay bare their proofs in non-hearsay form (Jonson v. Phillips, 261 AD2d 269 [1st Dept 1999]). Courts have long adhered to the rule that the party opposing the motion must submit sufficient evidence, in admissible form, to establish that there is a triable issue or to explain why a proper tender of proof is not being made (*Id.* *internal citations omitted*). These requirements are not satisfied here. The unsworn reports of JLC's Evan Browne, the inspector taking environmental tests two years after work was commenced on the building, have no probative weight and cannot raise a triable issue of fact. The JLC reports are insufficient to sustain causes of action for damages stemming from toxic contamination. Plaintiff has not submitted any

admissible evidence that she was subjected to toxins in the apartment. Moreover, Plaintiff has not submitted any evidence that if the toxins existed that they were caused by work performed on the building.

Plaintiff's remaining arguments in both motion sequence 001 and 002 have been considered and the courts find them to be unavailing.

Accordingly, it is


ORDERED that Defendants' motion for summary judgment dismissing the Complaint (sequence 001) is granted; and it is further

ORDERED that Plaintiff's motion (sequence 002) is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/19/09


HON. WALTER B. TOLUB, J.S.C.

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