

Walls v Prestige Mgt., Inc.

2009 NY Slip Op 31013(U)

April 30, 2009

Supreme Court, New York County

Docket Number: 108867/2007

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

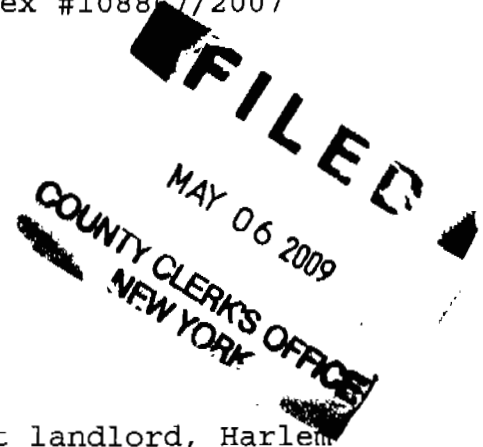
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VANESSA WALLS, individually and on
behalf of DAVON WALLS, her son, an
infant under 18 years of age,

Plaintiffs, Index #108867/2007

-against-
PRESTIGE MANAGEMENT, INC. and HARLEM
PHOENIX ASSOCIATES

Defendants.

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YORK, J.:

In this action asserting that defendant landlord, Harlem
Phoenix Associates, and codefendant managing agent, Prestige
Management, Inc., failed to maintain the habitability of tenant
plaintiff Vanessa Walls' (Walls) apartment, which she shared with
her son and coplaintiff, Davon, thereby allegedly causing them
both to sustain personal injuries, plaintiffs move for an order
granting them leave to amend the complaint to assert a negligence
cause of action on behalf of each of them arising from the
presence of noxious mold, caused by leaks, which were allegedly
neglected. Defendants oppose the motion to amend on the ground
that the proposed claim of negligence is time-barred pursuant to
CPLR 214-c. In addition, Prestige Management, Inc. cross moves to

dismiss the complaint as to it on the ground of "res judicata/claim preclusion," and both defendants seek dismissal on "collateral estoppel/issue preclusion grounds" of all claims arising out of any leaks or defective conditions existing before January 5, 2004.

Background

Walls, in October 2003, commenced a proceeding against Harlem Phoenix Associates in the Housing Part of the Civil Court for a compliance hearing and an assessment of civil penalties ("H.P. proceeding") arising out the alleged failure to correct violations, including various leaks and the presence of rodents in her apartment. See aff. in further support, exh. C. That proceeding was resolved on January 16, 2004 when it was dismissed by Judge McClanahan, who found that all repairs were completed and that at that time no current leaks "seem[ed] to exist," which latter conclusion accorded with an inspection conducted by the court's resource assistant on January 5, 2004. See Cross motion, exh. E.

On July 29, 2004 Walls, the sole named plaintiff in the complaint, acting *pro se*, commenced an action in the Civil Court, naming only Prestige Management, Inc. as a defendant. The

complaint recited that the nature of the cause of action was the failure to provide repairs and services and further stated that, "SINCE 1995 MY APARTMENT HAS HAD UNSAFE HEALTH CONDITION DUE TO ROOF LEAKING INTO MY APARTMENT AND RODENTS NESTING IN THE WALLS OF MY APARTMENT. STILL TO THIS PRESENT TIME NOTHING DONE." Aff. in further support, exh. D. That complaint indicated that if the defendant defaulted, judgment would be taken for \$10,000. It appears that Walls moved by order to show cause to add Harlem Phoenix Associates as a defendant in the Civil Court action. See Cross motion, exh. B. By cross motion, Prestige Management, Inc. sought to have that action dismissed as to it on the ground that it was not the building's owner or Walls' landlord, but was instead, merely Harlem Phoenix Associates' managing agent, and as such, it could not be held liable for any of the complaint's allegations. On August 15, 2005, Prestige Management, Inc.'s application was granted, according to plaintiffs' counsel in the present action, on default. The decision dismissing the action as to Prestige Management, Inc. was "so ordered." Cross motion, exh. D. Evidently the application to add Harlem Phoenix Associates as a party defendant in the Civil Court action was also granted.

Meanwhile, on June 26, 2007 plaintiffs, represented by

counsel, commenced the instant action, which in essence alleged that defendants breached the warranty of habitability, despite their knowledge of the apartment's unhealthful conditions, and refused to make the apartment habitable, thereby causing the plaintiffs to suffer personal injury in the total amount of \$2,000,000. See Amended Notice of Motion, exh. A. A bill of particulars was served in the instant action, which alleges that there were leaks throughout Walls' apartment, causing mold to grow, that both defendants had notice of the leaks from the prior Civil Court actions, that plaintiff informed both defendants on numerous occasions about the existence of mold, and that both defendants failed to remedy the problem. Cross motion, exh. A. It was further alleged that the defendants knew of the unhealthful conditions before that, "potentially as early as 1995." *Id.* at ¶ 6. The bill of particulars also alleged that the leaks contributed to the presence of rodents and vermin. Walls allegedly suffered from asthmatic bronchitis as a result of the mold and her degenerative arthritis was allegedly exacerbated by the apartment's condition. Davon's allergic rhinitis and asthma were allegedly caused by and/or exacerbated by the apartment's condition.

Walls served a bill of particulars in that case complaining about leaks, chipping lead paint, mold and mildew, rodents, termites, a lack of ventilation, falling sheet rock, a falling window frame, and what appeared to her to be falling asbestos in her apartment. Cross motion, exh. C. At least some of these conditions were present for 10 to 13 years. She further alleged that she and her son suffered from sinus breathing problems, and that she suffered from back and spinal disc problems. She further averred to have suffered from headaches, memory loss and stress. Walls claimed that the landlord's code violations caused "health condition to [her] and [her] son from January 3, 2000 to the present. While it is difficult to fully comprehend the bill of particulars, which has not been provided, it appears that the disc problem was first diagnosed in 2000. Walls claimed that the conditions of her apartment were due to her landlord's negligence which was a cause of her illness. She also blamed "management."

Shortly after commencing the instant action, Walls moved to consolidate it with the Civil Court action. That application also sought a stay of the Civil Court action and the defendants' cross motion in the Supreme Court action, which was allegedly the same as the cross motion now before me. During the pendency of that

application, defendants served an answer in the Supreme Court action, which did not assert any defenses based on res judicata, collateral estoppel or claim preclusion. The application to consolidate was granted by Justice Acosta's decision and order filed on January 2, 2008, which, although reciting that there was an application to stay the cross motion, did not specifically address that application. Justice Acosta, in consolidating the actions, observed that both cases involved alleged injuries suffered by Vanessa and Davon Walls as a result of hazardous conditions created by "defendants." The Appellate Division, First Department, affirmed the consolidation, holding that the two actions "present[ed] an identity of issues and common questions of law and fact." *Walls v Prestige Management, Inc.*, 59 AD3d 311 (2009). Justice Acosta's decision recited that both defendants in the Civil Court action had executed a stipulation of settlement in that case on December 12, 2007, which was subsequently vacated after Walls retained counsel. It is unclear on the papers presented on the instant application why Prestige Management, Inc. would execute a stipulation of settlement, since the Civil Court action had been dismissed as to it, as previously indicated. There is no indication here that the decision dismissing the

action as to Prestige Management, Inc. had been vacated or that Walls in the Civil Court action was granted leave to amend the complaint to add back Prestige Management, Inc. as a defendant and plaintiffs' counsel, who inspected the file in the Civil Court action, acknowledged that the Civil Court action was dismissed as to Prestige Management, Inc.

The Instant Motion and Cross Motion

Plaintiffs, submitting the complaint from the Supreme Court action, but no pleadings from the Civil Court action, now move to amend the complaint by adding, on behalf of each plaintiff, a negligence cause of action arising out of the same allegations as the breach of warranty of habitability causes of action set forth in the Supreme Court action complaint with the additional allegation that during the plaintiff's residency in the apartment, the defendants "negligently allowed the condition of the apartment to become and remain dangerously unhealthful, causing illness to the plaintiffs." In support of the application, Walls claims that the landlord had ignored complaints of leaks in her apartment for years, neglecting to make repairs, despite repeated requests, that the leaks caused mold to grow and caused her and her son to become ill, and that they discovered their illnesses "in or around 2001."

Defendants assert that the amendment should be denied because the proposed negligence cause of action is time-barred. Defendants maintain that the Civil Court action bill of particulars alleges that the injuries arose in 2000, making the action untimely pursuant to CPLR 214-c. Defendants also assert that since plaintiff alleged in her Civil Court complaint that the apartment had unsafe health conditions due to the leaks since 1995, any effect of the mold would have been discovered closer to 1995. Defendants additionally maintain that the 2001 date of discovery of the illnesses now asserted by plaintiffs is feigned, and that in any event it does not avail plaintiffs since the Supreme Court action was commenced in 2007, more than three years after the discovery of the plaintiffs' alleged illnesses.

Prestige Management, Inc. cross moves to dismiss the action on "res judicata/claim preclusion" grounds based on the dismissal of the 2004 Civil Court action as to it because it was an improper party to that action, since it was not the landlord or owner. Both defendants also seek dismissal of any claim based on any defective conditions that existed in the apartment before January 5, 2006, because that was the date on which the apartment was inspected by the Civil Court's resource assistant who found that at that time no leaks existed, as all repairs had been made.

Thus, defendants claim that the dismissal of the H.P. proceeding collaterally estops any allegations of leaks and/or defective conditions prior to the inspection date.

In response, plaintiff's counsel, Michael Mantell, submitted an affirmation in further support of the motion and in opposition to the cross motion, as well as a memorandum of law in opposition to the cross motion. Mantell indicated that he has inspected the file in the Civil Court action and has provided all relevant documents to the court. He asserted that the 2000 discovery of injury date set forth in the Civil Court action's bill of particulars only reflected the discovery of the mother's orthopedic injuries, rather than the injuries caused by the mold. His memorandum of law concedes that plaintiffs were aware of their injuries caused by the mold in 2001, but maintained that the plaintiffs' claims sought to be added relate back to July [sic] 2003, when Mantell states the claim was first interposed, evidently referring to the H.P. proceeding. It is not entirely clear whether Mantell is asserting that the claims also relate back to the Civil Court action commenced on July 29, 2004, because the dates on which in 2001 the plaintiffs discovered their injuries affect the determination of whether the claims relate back to the commencement of the 2004 action.

Mantell claims that, because Justice Acosta, in his decision

ordering consolidation, did not grant the defendants' cross motion to dismiss, he effectively denied it. Mantell, relying on CPLR 3211 (e), also maintains that defendants waived any basis for dismissal grounded on collateral estoppel and res judicata, by failing to assert such defenses in their answer or via a pre-answer motion to dismiss (See CPLR 3018 (b); CPLR 3211 (e)). Substantively, Mantell asserts that because the dismissal of the 2004 Civil Court action as to Prestige Management, Inc. was granted on default, it does not constitute a substantive determination, and that, in any event, res judicata only applies to judgments, not to orders on motions. Mantell further observes that, merely because a violation was corrected on a certain date, does not mean that the conditions did not exist before or after that date, and that therefore the inspection report and Judge McClanahan's is not dispositive of plaintiffs' claims.

Discussion

Initially, I note that since there is no application addressed to the substantive adequacy of the 2007 complaint which alleges that as a result of a breach of the warranty of habitability, plaintiffs suffered personal injuries, I do not address those causes of action. To the extent that plaintiffs seek to amend the complaint to assert a negligence cause of action as to Davon Walls, the motion is granted. As previously noted,

defendants do not attack the plaintiffs' showing of merit, and in any event it is adequate. In addition, Davon Walls, who was born on October 10, 1990, was an infant at the time that this action was commenced and did not turn 18 until October 10, 2008. Accordingly, regardless of when he learned of his injury, a negligence cause of action would not be time-barred under CPLR 314-c. See CPLR 208. Further, since the complaint in the Civil Court action did not name him as a party plaintiff, and since there is no claim that leave was ever granted to amend the complaint in that action to add him as a plaintiff, defendants' res judicata and collateral estoppel arguments fail. Thus to the extent that Prestige Management, Inc. cross moves to dismiss the complaint as to Davon Walls on res judicata grounds and that both defendants seek to dismiss his claims regarding conditions arising before January 5, 2004 on collateral estoppel grounds, those applications are denied.

This leaves the balance of the motion and cross motion as they relate to the mother. Defendants' cross motion to dismiss Prestige Management, Inc.'s claims against Walls on res judicata grounds and both defendants claims based on defective conditions existing before January 5, 2004 on collateral estoppel grounds are denied, because they were not raised by pre-answer motion or in defendants' answer. CPLR 3211 (e). Further, as to the collateral

estoppel argument that no leaks were present on one particular date does not mean that no mold was present on that date, and there is no indication that the violations, the subject of the H.P. proceeding, involved mold, which may or may not have been in plain view; nor does it mean that leaks were not present both before and after the inspection.

Regarding Walls' application to add a negligence cause of action, it is undisputed that the statute of limitations governing that proposed cause of action is set forth in CPLR 214-c. See also *Martin v 159 West 80 Street Corp.*, 3 AD3d 439 (1st Dept, 2004); *Harley v 135 East 83rd Owners Corp.*, 238 AD2d 136 (1st Dept, 1997). That section provides that "the three year period within which to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance ... 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 ... , whichever is earlier." While the injury, and hence the date of accrual, in such a case occurs when the toxic substance is introduced into the body (*MRI Broadway Rental, Inc. v United States Mineral Product Company*, 92 NY2d 421 [1998]), CPLR 214-c tolls the statute of limitations until the date the injured party discovers or should have discovered the injury (*Germantown Central School District v*

Clark, Clark, Millis & Gilson, 100 NY2d 202, 206 [2003]). On a motion for summary judgment, the defendant has the burden of prima facie establishing when the plaintiff discovered, or, through the exercise of reasonable diligence, should have discovered their injury. *D'Agostino v Town of Pound Ridge*, 41 AD3d 760 (2d Dept, 2007); *Thoma v Town of Schodack*, 6 AD3d 957 (3d Dept, 2004); *But cf. Massie v Crawford*, 78 NY2d 516, 519 (1991), rearg. den. 79 NY2d 978 (1992).

That leaks were present in the apartment since 1995 does not establish the date when the mold was first present and entered Walls' body so as to establish the accrual date. Nor, does it establish when Walls discovered or should have discovered her asthmatic bronchitis. In addition, the undated Civil Court bill of particulars, while establishing that the orthopedic injuries were discovered in 2000, does not specifically state when Walls discovered her asthmatic bronchitis as a result of the mold. That Walls alleged in her Civil Court action that there were unsafe conditions since 1995 due to a leaking roof and rodents, does not establish that the unsafe conditions to which she was then referring included the mold or that she was suffering from asthmatic bronchitis since 1995. As her Civil Court bill of particulars recited, some of the unhealthy conditions were sheet rock falling from her ceiling, chipping lead paint and rodents.

In light of the foregoing, defendants have failed to establish when the mold was present and when Walls discovered or reasonably should have discovered her asthmatic bronchitis.

However, as Mantell conceded in his memorandum of law that Walls was aware of her injuries on some unspecified date in 2001, which may or may not be within three years of the commencement of the Civil Court action on July 29, 2004. Assuming for arguments sake that it was, the negligence claims sought to be asserted now do not relate back to the complaint in that 2004 Civil Court action, because that pleading did not give notice of the occurrences to be proved pursuant to the proposed amended complaint. CPLR 203 (f). While the pleading requirements in the Civil Court are not as exacting as those in the Supreme Court, they still require "a statement of the nature and substance of the cause of action." CCA § 902 (a) (1).

The Civil Court complaint did not allege a claim for personal injuries. It merely alleged that there was a lack of services and repairs which created unsafe conditions in the apartment. There was no allegation that the unsafe conditions resulted in any injury to Walls. At best, it alleged a breach of the implied warranty of habitability, deemed to be part of Walls' lease, in which the landlord warranted that the premises would be "fit for human habitation," and that the premises' occupants would "not be

subject to any condition which would be dangerous, hazardous or detrimental to their life, health or safety." RPL §235-b. The mere breach of such warranty does not give rise to a claim for personal injury. *Joyner v Durant*, 277 AD2d 1014 (4th Dept, 2000); *Stone v Gordon*, 211 AD2d 881 (3d Dept, 1995); See also *Martin v 159 West 80 Street Corp.*, 3 AD3d 439, 440 (1st Dept, 2004).

Presumably, the Civil Court judge perceived that the complaint did not allege a personal injury claim, and therefore dismissed the action as to Prestige Management, Inc. on the ground that it was not a proper party since it was not the landlord. See *Paganuzzi v Primrose Management Company*, 268 AD2d 213 (1st Dept, 2000) (action properly dismissed against managing agent which acted as disclosed agent for landlord who breached lease's implied covenants).

Walls is not simply seeking to add a theory based on facts previously alleged in the Civil Court complaint. *Estrella v New York City Transit Authority*, 6 AD3d 305 (1st Dept, 2004); *Rogers v South Slope Holding Corp.*, 255 AD2d 898 (4th Dept, 1998); cf. *Fazio Masonry, Inc. v Barry, Bette & Led Duke, Inc.*, 23 AD3d 748 (3d Dept, 2005). Rather, she alleges a new theory, negligence, based on the additional factual assertions that she suffered personal injuries and seeks damages for those injuries. Nor, does the Civil Court bill of particulars avail her in her claim that the

proposed amendment relates back to the Civil Court complaint, since she has not demonstrated that the undated bill of particulars was served before the statute of limitations expired. See *Smith v Bessen*, 161 AD2d 847 (3d Dept, 1990). Also, Walls has not indicated that the Civil Court complaint was ever amended to assert a personal injury cause of action or, if it was, whether the Civil Court ever passed on the timeliness of such a cause of action. Nor, does she allege here that the statute of limitations defense for a negligence cause of action was waived in the Civil Court action. Mantell's additional claim that the proposed negligence cause of action relates back to the 2003 H.P. proceeding is without merit since that matter has been dismissed. In light of the foregoing, Walls has not established that the proposed negligence cause of action relates back, so as to be timely as to her. Therefore, her application to amend the complaint to add such a cause of action on her behalf is denied.

Accordingly, it is

ORDERED that Prestige Management, Inc. and Harlem Phoenix Associates' cross motion to dismiss is denied, and it is further

ORDERED that Vanessa Walls' application for leave to serve an amended complaint adding a negligence cause of action on behalf of Davon Walls against Prestige Management, Inc. and Harlem Phoenix Associates is granted, and it is further

ORDERED that Vanessa Walls' application for leave to serve an amended complaint to add a negligence cause of action on her behalf is denied.

Dated: 4/30/09

Levy

J.S.C.

LOUIS B. YORK
J.S.C.

FILED
MAY 06 2009
COUNTY CLERK'S OFFICE
NEW YORK