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

PRESENT: HON. CAROL EDMEAD Justice PART 35

Nussbaum

INDEX NO. 101126/09

MOTION DATE 8/19/09

-v- MOTION SEQ. NO. 001

150 West End MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for dismiss

	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

FILED
AUG 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Defendant 150 West End Avenue Owners Corp. ("150") moves pursuant to CPLR 3211(a) (1) dismissing the complaint based on documentary evidence, and pursuant to CPLR 3212 granting summary dismissing the complaint of plaintiffs James Nussbaum and Elana Nussbaum ("plaintiffs") arguing that it is not a proper party and the complaint fails to state a cause of action as to 150.

The matter arises from an accident in which Mr. Nussbaum alleges that he sustained personal injuries on April 3, 2008 when the glass shower door in the bathroom of his cooperative unit broke.

After reading of the parties' submissions, analysis of the relevant case law, and oral argument, and in accordance with the "So Ordered" transcript (Ms. DeCrescenzo, Reporter), it is hereby

ORDERED that the motion of defendant 150 West End Avenue Owners Corp. is granted, and all claims against 150 West End Avenue Owners Corp. are severed and dismissed pursuant to CPLR 3211(a)(1). The Clerk of the Court is directed to enter judgment accordingly.

Dated: _____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Analysis

CPLR 3211 [a] [1]: Defense is founded upon documentary evidence

Pursuant to CPLR 3211 [a] [l], a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Thus, where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]). The test on a CPLR 3211 [a][1] motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" *(Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

Where documentary evidence and undisputed facts negate or dispose of the claims in the complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211[a][1] (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1st Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1st Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]).

CPLR 3212: Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for

his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; Zuckerman, *supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Insufficient Discovery

It is well settled that an argument opposing summary judgment on the grounds of insufficient discovery "is unavailing where the nonmoving party has failed to 'produce some evidence indicating that further discovery will yield material and relevant evidence'" (*Heritage Hills Soc., Ltd. v Heritage Development Group, Inc.*, 56 AD3d 426, 427 [2d Dept 2008], *quoting Fleischman v Peacock Water Co., Inc.*, 51 AD3d 1203, 1205 [3d Dept 2008]); *Hayden v City of New York*, 809 NYS2d 75, 76 [1st Dept 2006] ["In addition, plaintiff failed to show that the representatives already deposed had insufficient knowledge or were otherwise inadequate, or that further discovery was warranted by reason of a substantial likelihood that additional persons sought for deposition possessed information material and necessary to oppose the motion"]; *Prestige Decorating and Wallcovering, Inc. v U.S. Fire Ins. Co.*, 49 AD3d 406, 407 [1st Dept 2008] ["Based on the record, the discovery that has already taken place, and the lack of a showing of what further evidence might be unearthed, the asserted need for further discovery reduces itself to a 'mere hope,' which is insufficient to defeat summary judgment"]; *Steinberg v Abdul*, 230 AD2d 633, 633 [1st Dept 1996] ["We add that the mere hope, expressed by plaintiffs, that evidence sufficient to establish defendants' assumption of a duty to plaintiffs' decedent may be obtained during discovery does not fulfill their obligation to demonstrate the likelihood of such disclosure (CPLR 3212[f]) and, thus, is insufficient to defeat defendants' motions for summary judgment"]; *Frierson v Concourse Plaza Associates*, 189 AD2d 609, 610 [1st Dept 1993] ["Neither can [defendants] avoid summary judgment by claiming a need for discovery. The 'mere hope' of defendants that evidence sufficient to defeat such a motion may be uncovered during the discovery process is not enough . . . . Defendants were bound to show there was a likelihood of discovery leading to such evidence, *i.e.*, that facts "may" exist but cannot be stated at that time (CPLR 3212[f]). This they failed to do"]; *Pro Brokerage, Inc. v Home Ins. Co.*, 472 NYS2d 661, 662 [1st Dept 1984] ["The plaintiff's later assertion that further discovery was necessary, not only was set forth in mere conclusory terms, but no attempt was made to explain what further discovery was necessary and to what extent such further discovery would overcome the legal insufficiency of the complaint."]).

In the instant case, plaintiffs have provided insufficient evidentiary basis in its opposition papers indicating that further discovery will yield material and relevant evidence. Therefore, plaintiffs' argument lacks merit. And, plaintiffs have failed to raise an issue of fact

that would override 150's entitlement to summary judgment.

It is uncontested that 150 is a New York corporation that owns the right, title and interest in the building known as 150 West End Avenue, New York, New York.

It is also uncontested that the Proprietary Lease governs the relationship between the parties in this case.

In the instant case, being the title owner of the building and the lessor under the Proprietary Lease does not make 150 liable pursuant to Multiple Dwelling Law § 78.

Plaintiffs correctly state that on October 9, 1986 150 West End Avenue Associates ("Associates") transferred its entire ownership interest (excepting certain spaces) to 150. However, on May 1, 1987, **Associates,** the cooperative sponsor, owned the 471 shares allocated to Unit 2M and the lessee of same. At that time, **Associates** was responsible for the interior of the unit in accordance with the terms of the Proprietary Lease.

On or about **June 4, 1999, Associates** assigned its Proprietary Lease for Apartment 2M to Marc D. Angel, Gilda Angel and Elena Angel Nussbaum, thereby transferring responsibility for the interior of the unit from **Associates** to Angel/Nussbaum.

The Proprietary Lease required plaintiffs to maintain and repair the interior of the unit. Paragraph 2 of the Proprietary Lease provides that the lessor/150 was not required to do those portions of the repairs which "under paragraph 18 of the lease is to be performed by the lessee/Angel/Nussbaums.

Therefore, dismissal of the Complaint against **150 West End Avenue Owners Corp.** is warranted. And it is further

ORDERED that the cross-motion is moot.

This constitutes the decision and order of the Court.

FILED
AUG 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated 8/19/09 **ENTER:** _____, J.S.C.

HON. CAROL EDMEAD

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**