

Bour v 259 Bleecker LLC

2011 NY Slip Op 32593(U)

October 3, 2011

Supreme Court, New York County

Docket Number: 101313/2009

Judge: Solomon

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 101313/2009
BOUR, ELIZABETH
 VS.
259 BLEECKER LLC
 SEQUENCE NUMBER : 003
 PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 9/4/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3
4-8
9-11

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 decided, together with motion 05, in accordance with the general memorandum decision and order.*


N.B. -- pre-trial conf. scheduled for 10/3/11 @ 2 PM.

FILED

OCT 04 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/3/11



 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

FILED

OCT 04 2011

-----X

ELIZABETH BOUR,

Plaintiff,

Index No. 101313/09
NEW YORK

COUNTY CLERK'S OFFICE

-against-

DECISION and ORDER

259 BLEECKER LLC,

Defendant.

-----X

Jane S. Solomon, J.:

Defendant moves for partial summary judgment dismissing plaintiff's claims for personal injury and for punitive damages and to strike plaintiff's jury demand. Plaintiff cross-moves for summary judgment, to compel discovery and for leave to serve an amended bill of particulars. Defendant separately moves to quash two subpoenas, each dated May 11, 2011, served by plaintiff on Broadway Exterminating Co. (Broadway) and Metro Pest Control, Inc. (Metro). The motions and cross motion are consolidated for disposition and decided as noted below.

Parties

Plaintiff is the former tenant of apartment 22 (the Apartment) of a building (the Building) located at 259 Bleecker Street, New York, N.Y. pursuant to a residential lease dated April 7, 2008 (the Lease). Defendant is the owner of the Building. Plaintiff alleges that she suffered from a bedbug infestation, incurred while she lived at the Apartment, causing

her physical injury and property damage (bill of particulars, item 9). Plaintiff filed a note of issue on January 31, 2011, contending that, except for post-deposition document requests, discovery was complete, that medical reports were not required to be exchanged and that a physical examination of the plaintiff was not required.

Parties' Contentions

Plaintiff alleges that she moved into the Apartment on April 7, 2008 (plaintiff EBT, at 41), pursuant to the Lease (*id.* at 10), and that she lived there until July 20, 2008. She asserts that, in mid-May, she noticed "very large red itchy welts all over [her] body", that she initially thought that they were mosquito bites, but that after researching on the Internet, she came to believe that the bites were the result of bedbugs (*id.* at 21-23). She further states that she called the landlord's office and that the building superintendent, Nick Iberhysaj (Nick), came over and sprayed the Apartment, but that she does not know what chemicals he used (*id.* at 24-27).

Plaintiff contends that the infestation recurred and that Nick sprayed the Apartment again, but that when she had a house guest over, she observed a bedbug crawling on her friend and later saw about 15 bedbugs (*id.* at 32-33). She states that she contacted defendant, advising it of the condition and that she

moved out of the Building (*id.* at 36-41), and she had her possessions (the Property) removed and destroyed, due to her concern that the property might be infested.

Plaintiff states that she did not seek any medical attention and has no residual physical injury (*id.* at 44, 56). She further states that she used over-the-counter topical ointments and has not seen any mental health professional (*id.* at 44, 46, 57).

Plaintiff hired an entomologist, Richard Cooper (Cooper), to examine the Apartment (*id.* at 47). Cooper alleges that he went to the Apartment on October 29, 2008 and that the Apartment was infested with bedbugs, which he believes predated plaintiff's entry into the Apartment in April 2008 (Cooper affidavit, ¶¶ 3, 6). In his report, Cooper stated that he observed numerous bedbugs throughout the Apartment, mainly in the living room and bedroom, near hot water risers. He inferred from these observations that the bedbugs had originated from other apartments in the Building and come through the pipes, rather from plaintiff's Property, which had fewer bedbugs.

Defendant alleges that it sprayed apartments in the Building when necessary (Nick EBT, at 13) and, specifically, that Nick sprayed the Apartment twice, but never found any physical evidence of bedbugs there (*id.* at 31-32). It also states that it obtained the chemicals for spraying from Broadway, a licensed

exterminator (Vergara EBT, at 18) and that it had building-wide preventative spraying done in November and December 2007 by Metro, a licensed exterminator (*id.* at 30, 46).

**Proposed Amended Bill of Particulars and Post Note of Issue
Discovery**

Initially, plaintiff seeks to amend her bill of particulars. However, she has failed to annex a copy of a proposed bill of particulars and, therefore, the court cannot judge the merits of the proposed amended bill of particulars and, consequently, this portion of her cross motion is denied.

Plaintiff also seeks additional discovery in her cross motion, made on May 19, 2011, more than three and a half months after the note of issue was filed on January 31, 2011. Generally, post note of issue discovery is inappropriate (*Leon v Tchaika Renewal Co.*, 225 AD2d 390 [1st Dept 1996]; *Price v Bloomingdale's*, 166 AD2d 151 [1st Dept 1990]). Plaintiff had an adequate opportunity to obtain discovery, no unusual circumstances have been shown and the court declines to compel defendant to provide additional post note of issue discovery and denies that portion of plaintiff's cross motion.

Summary Judgment

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law

by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

Premises Liability

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Additionally, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition or constructive notice of it through the defect's visibility for a sufficient amount of time prior to the accident to enable a defendant to discover and remedy it

(*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Plaintiff contends that there was a bedbug infestation, that defendant knew or should have known of it, that its remedial and preventative spraying were inadequate and that, as a result of this condition, she suffered personal injury and damage to the Property and, therefore, she seeks summary judgment. However, defendant has contested the existence of the infestation in the Apartment and its extent in the Building as a whole (Nick EBT, at 17) and has asserted that its spraying was adequate. Since the court must accept the non-moving party's factual allegations as true for the purpose of deciding the motion, the degree of infestation and the adequacy of defendant's spraying are, at best, contested issues of material fact and the portion of plaintiff's cross motion that seeks summary judgement is denied.

Punitive Damages

Generally, a claim for punitive damages must show "much more than individually sustained wrong ... [rather , it must show] pervasive and grave misconduct affecting the public generally" (*Fabiano v Philip Morris Inc.*, 54 AD3d 146, 150 [1st Dept 2008], citing *Walker v Sheldon*, 10 NY2d 401, 406 [1961]; see also *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]).

Plaintiff has not presented evidence of pervasive or grave misconduct of a quasi-criminal nature aimed at the public in general sufficient to sustain a claim for punitive damages and, accordingly, the portion of defendant's motion that seeks to dismiss plaintiff's claim for punitive damages is granted (*Fabiano*, 54 AD3d at 150).

Personal Injury

A party places her physical and mental condition at issue by commencing an action and seeking compensation for damages for these injuries and must, therefore, provide appropriate authorizations for medical records and submit to a medical examination (*Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456-457 [1983]; *Hoenig v Westphal*, 52 NY2d 605 [1981]; *Abdalla v Mazl Taxi, Inc.*, 66 AD3d 803, 804 [2d Dept 2009]).

Plaintiff failed to supply any medical authorizations or to submit to any medical examination. She contends that since there was no medical treatment and no residual physical injury (plaintiff EBT, at 44, 46), such discovery is unnecessary. However, since plaintiff sought recovery for alleged emotional damages, her psychological condition was placed in issue (*Abdalla*, 66 AD3d at 804). To the extent that plaintiff has stated that there was no injury, she may not seek recovery. Therefore, the portion of defendant's motion that seeks dismissal

of plaintiff's claim for personal injury is granted.

Jury Waiver Clause

The Lease contains a jury waiver clause (the Jury Waiver Clause) that states as follows:

"24. Jury Trial and Counterclaims. Landlord and Tenant agree not to use their right to a Trial by Jury in any action or proceeding brought by either against the other, for any matter concerning this Lease or the Apartment. This does not include actions for personal injury or property damage." [bold in original]

Generally, "by written agreement parties may expressly waive their right to a jury trial on any claim" (*Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 34 AD3d 791, 791 [2d Dept 2006]). Moreover, joinder of legal claims, which are triable by jury, with equitable claims has been held to constitute a waiver of the right to demand a jury trial, if the claims arise from the same transaction (*id.* at 792; *Willis Re Inc. v Hudson*, 29 AD3d 489 [1st Dept 2006]).

However, in this action, while plaintiff has sought rescission, an equitable remedy (*Symphony Space v Pergola Props.*, 88 NY2d 466, 485 [1996]), the Jury Waiver Clause explicitly states that it "does not include actions for personal injury or property damage." The court should interpret a contract provision in accordance with its plain language (*W.W.W. Assoc. v*

Giancontieri, 77 NY2d 157, 162 [1990]). The plain language of the clause indicates the parties' intention not to waive a jury trial for personal injury or property damage. The court has previously dismissed the plaintiff's claim for personal injury damages. Accordingly, the portion of defendant's motion that seeks to strike plaintiff's demand for a trial by jury is granted to the extent of striking the jury demand except for plaintiff's claim for property damage.

Subpoenas

Plaintiff issued subpoenas to Metro and Broadway seeking the entire extermination file for the Building from January 1, 2007 through the present. Plaintiff asserts that it learned of Broadway at defendant's deposition on November 1, 2010 and states that defendant has not provided discovery as to records (*Sciangula* affirmation dated June 3, 2011, ¶¶ 10-11).

The subpoenas are overbroad (*Rodriguez v Crescent Contr. Corp.*, 305 AD2d 215 [1st Dept 2003]; *Grotallio v Soft Drink Leasing Corp.*, 97 AD2d 383 [1st Dept 1983]). In opposing the motion, plaintiff offers no explanation as to why it seeks extermination records from January 1, 2007 to the present, or the relevance of such records to plaintiff's complaint that her apartment was infested from April through July 2008. The subpoenas are being improperly used as a discovery device to

belatedly secure what plaintiff's counsel failed to obtain in pretrial disclosure (*Soho Generation of N.Y. v Tri-City Ins. Brokers*, 236 AD2d 276, 277 [1st Dept 1997]; *Mestel & Co. v Smythe Masterson & Judd*, 215 AD2d 329, 329-330 [1st Dept 1995]). It is neither the defendant's nor the court's role to "'cull the good from the bad'" (*Soho Generation*, 236 AD2d at 277, quoting *Grotallio*, 97 AD2d at 383). Consequently, defendant's motion to quash the subpoenas is granted.

It is, therefore,

ORDERED that the portion defendant's motion that seeks to dismiss plaintiff's claims for personal injury and punitive damages is granted; and it further is

ORDERED that the portion of defendant's motion that seeks to strike plaintiff's jury demand is granted to the extent of striking said demand except as to plaintiff's claim for property damage, and as to said claim, is denied; and it further is

ORDERED that plaintiff's cross motion for summary judgment, to compel discovery and to amend her bill of particulars is denied; and it further is

ORDERED that defendant's motion to quash a subpoena duces tecum dated May 11, 2011 returnable in this court and issued to Metro Pest Control, Inc. and a subpoena duces tecum dated May 11, 2011 returnable in this court and issued to Broadway

Exterminating Co. is granted; and it further is

ORDERED that counsel shall appear for a pre-trial conference
in Part 55 on October 31, 2011 at 2 PM.

Dated: *Oct 3*, 2011

ENTER:



J.S.C.

JANE S. SOLOMON

FILED

OCT 04 2011

NEW YORK
COUNTY CLERK'S OFFICE