

Chang v Morton St. Assoc., LLC

2011 NY Slip Op 32786(U)

October 24, 2011

Supreme Court, New York County

Docket Number: 116521/2008

Judge: Eileen A. Rakower

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

Index Number : 116521/2008

PART 15

CHANG, CHUN H.

vs
MORTON STREET ASSOCIATES, LLC

INDEX NO. _____

Sequence Number : 002

MOTION DATE _____

SUMMARY JUDGMENT

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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


**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

OCT 26 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/24/11


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
CHUN H. CHANG,

Index No.
116521/08

Plaintiff,

**DECISION
and ORDER**

- against -

MORTON STREET ASSOCIATES, LLC
and R.A. COHEN & ASSOC., INC.,

FILED Mt. Seq.
002

OCT 26 2011

Defendants.

HON. EILEEN A. RAKOWER

NEW YORK
COUNTY CLERK'S OFFICE

Chun H. Chang ("Plaintiff") was the tenant of Apartment 6A ("the apartment") at 10 Morton Street in New York County ("the building"), which is owned by Morton Street Associates and operated by R.A. Cohen & Assoc., Inc. (collectively "Defendants"). Plaintiff alleges in her complaint that "while said tenancy was in full force and effect [she] became seriously ill and suffered multiple physical effects from mold, within her apartment." Plaintiff alleges that Defendants caused and allowed water damage to affect the building, and more specifically her apartment, and failed to take reasonable measures to rectify the condition, leading to her illnesses.

Plaintiff did not specify the actual dates and times of her alleged exposure in her complaint, and her bill of particulars merely states that she "has sustained acute mold exposure for several years up until and including the date of this bill of particulars," which is dated June 15, 2009. She alleges in her bill of particulars that she suffered the following symptoms from her exposure to mold: "A rash on her entire body; Pursitis; Swelling of all joints, more particularly swelling of the wrist; Chest pains; Sensation of choking; Difficulty in breathing, including wheezing; Interference with the ability to smell; Aggravation and exacerbation of rheumatoid arthritis; Various general pain throughout the entire body; Vertigo and dizziness."

Plaintiff testified at her deposition that she has lived in the apartment since October 1, 1997, and continues to reside there. She testified that "In the year 2005,

all over my apartment I smelled some strange odor, molding, odor of molds and I also – I felt moisture.” Plaintiff explained that she would feel moisture when she touched the walls throughout her apartment – “[a]ll the apartment, all three rooms, inclusive of the bathroom,” as well as the hallway. She also observed “signs all over of water stains.” Plaintiff testified that she verbally told the building superintendent about the conditions in her apartment, and had her neighbor Lucille write a note to the landlord for her (due to her imperfect command of the English language) in November of 2005. She told the superintendent that “I got a lot of problems in the apartment,” but did not initially elaborate as to what the problems were. The superintendent told her that he would “go have a look,” but nobody came to her apartment. Plaintiff testified that between 2005 and 2007, she had made several verbal complaints to the superintendent, and each time he would say something to the effect of “Yes, we are going to fix it for you.” However, Defendants did not make any repairs, and the condition continued unabated.

Plaintiff testified that she began to suffer health problems in 2007. She testified that she “started to get short of breath and there was one occasion where it became so serious that [she] thought [she] was going to die because [she] could no longer catch [her] breath.” She wrote another letter to Defendants with the assistance of Lucille in 2007. She eventually contacted the New York State Department of Housing and Community Renewal (“DHCR”) after receiving no response from Defendants. After performing inspections of Plaintiff’s apartment, DHCR ordered Defendants to fix the walls in Plaintiff’s apartment in June or July of 2007. Defendants performed the ordered repairs, which lasted through October of 2009. Plaintiff stated that the work was performed poorly, and that DHCR made Defendants redo the repairs several times. Plaintiff testified that, due to Defendant’s poorly-done renovations, the condition has not been fully ameliorated, and that the odor still remains in the apartment.

Plaintiff testified that she has had rheumatoid arthritis for over ten years.¹ She stated that she had the rheumatoid arthritis “pretty much all over my body, I have pains all over my body.” In addition to pain, Plaintiff testified that “Like my leg, it’s swollen. So I don’t walk on balance. And for my hands, the shape changed. I couldn’t move my hands like a normal person would.”

¹Plaintiff’s deposition was held in April 2010.

Defendants now move for summary judgment pursuant to CPLR §3212. Defendants assert that Plaintiff has failed to present adequate evidence demonstrating, beyond mere speculation, that her injuries were caused by mold exposure. Defendants submit the report of Allan Gibofsky, M.D., F.A.C.P., who examined Plaintiff on December 9, 2010. The report states, *inter alia*, as follows:

Impression: The patient has seronegative rheumatoid arthritis, with multiple and fixed joint deformities. Of note, laboratory tests for acute inflammation (ESR, CRP) have been negative when measured on multiple occasions, including on January 31, 2008, the date closest to her evaluation for mold exposure. As such, there is no relationship between her report of mold exposure and her disease activity; most of her fixed deformities seem to antedate her [Bellevue Hospital] visit of December 11, 2007 as they are documented on that visit. As such, it is my opinion to a reasonable degree of medical certainty that the environmental exposure to mold reported by the patient was neither the cause of her rheumatoid arthritis, nor does it seem to have increased the activity of the disease.

Defendants also submit the affidavit of Dr. Stuart H. Young. Young states that he is a Diplomate in Allergy and Immunology and is on the staff of the Mount Sinai Medical Center and is on the teaching faculty in its medical school's Department of Allergy and Immunology. Young states that he examined Plaintiff and reviewed, *inter alia*, her bill of particulars, her deposition testimony, and 2008 records of the New York City Department of Environmental Protection and her medical chart from Bellevue Hospital. Young observes that "Plaintiff's pre-existing history is significant for rheumatoid arthritis, which she testified existed for more than ten years and is noted to have existed for thirteen years in the records of Bellevue Hospital." "This is significant," Dr. Young continues, "because many of plaintiff's complaints and symptoms are consistent with symptoms that can develop with rheumatoid arthritis and because plaintiff testified that her exposure to mold began in 2005, long after her being diagnosed with rheumatoid arthritis."

Young further states that he

[* 5] .

[has] been presented with no evidence of plaintiff being exposed to airborne mold or any mold in her indoor environment even though she testified to water leaks and wet conditions and discoloration in walls and ceilings that she suggests were mold. Although there may be evidence of mold that plaintiff may possess or which was not available for my review, I am unaware of any have not seen any evidence of her inhaling mold spores or having any significant exposure with respect to her indoor environment. I have also seen no documentation or evidence to show that her claimed exposure indoors in her apartment even exceeds the exposure she may have to outdoor fungal spores, which one may typically encounter.

Young is referring to a Mold Survey Report obtained by Plaintiff in December 2010 which demonstrated that the highest level of fungal spores detected inside the apartment was 360 FS/m³ (fungal spores/cubic meter), while the survey detected 400 FS/m³ outside the building at the time.²

Young further noted that Plaintiff “has mild lower and upper respiratory findings that are non-specific as to causation (in some case[s] rheumatoid arthritis can effect [sic] lung function because it is an autoimmune disease that results in inflammation, primarily to joints, but can affect organs including lungs.” He also opined that Plaintiff’s claims of dry skin and rash “are similarly non specific and can be symptoms of arthritis or other causes. It is uncertain the cause of her COPD and respiratory claims and rash, but [it] can by no medical certainty be shown to be caused by mold exposure.” In addition, Young noted that “[b]y [Plaintiff’s] own history, her alleged illnesses did not abate after her apartment went through remediation and her alleged exposure was removed or significantly diminished”

Based upon all of the foregoing, Young concluded “to a reasonable degree of medical certainty that ... there is no basis to associate [Plaintiff’s alleged illnesses] with mold exposure, as there is no evidence of actual inhalation of fungal spores and

² Significantly, the Mold Survey Report, prepared by Niche Analysis, Inc. adopted a threshold of 10,000 spores/m³, meaning that an area where the level of fungal spores exceeds 10,000 per cubic meter “can be considered as a ‘potential problem area’.”

no evidence that her state of health could be caused or exacerbated by any alleged exposure to mold.”

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). “[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, ‘the facts must be viewed in the light most favorable to the nonmoving party’” (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

“It is well established that an opinion on causation should set forth a plaintiff’s exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)” (*Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 448 [2006]) (citations omitted). In order for the moving party to make a prima facie showing of entitlement to judgment as a matter of law, it must “demonstrate, through expert evidence based on a scientifically-reliable methodology, that there was no causal link between [Plaintiff’s] alleged injuries and [her] exposure to mold” (*Cabral v. 570 West Realty, LLC*, 2010 NY Slip Op 3859, *1 [2nd Dept. 2010]).

Based on the record as set forth above, the court finds that Defendants have made a prima facie showing of entitlement to judgment as a matter of law. Accordingly, in order to defeat Defendant’s motion, Plaintiff must sufficiently demonstrate, through competent proof, the existence of an issue of material fact. Plaintiff fails to do so. The only medical opinion submitted by Plaintiff regarding the cause of her illnesses is a notarized letter from Denise Harrison, M.D. of Bellevue Hospital Center. In that letter, Harrison notes that “Exposure to damp and moldy indoor environments may cause a variety of health effects, *or none at all. Some*

people are sensitive to molds. [Plaintiff's] symptoms *may* occur as a result of mold exposure" (emphasis added). Harrison further notes Plaintiff's "history of severe rheumatoid arthritis ..." Nowhere in Harrison's letter, or in any other evidence submitted by Plaintiff, does Plaintiff demonstrate the amount of mold that she was exposed to, much less that she was exposed to a level of mold which, to a reasonable degree of medical certainty, caused Plaintiff to suffer the illnesses alleged herein.

Wherefore it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: October 24, 2011



EILEEN A. RAKOWER, J.S.C.

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