

Estate of Alamo v Stein
2013 NY Slip Op 33516(U)
November 12, 2013
Supreme Court, New York County
Docket Number: 109081/11
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

ESTATE OF JULIO ALAMO, et al.,

INDEX NO. 109081/11

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 001

ALLEN STEIN and 317 WEST 35TH STREET REALTY, LLC,

Defendants.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for summary judgment.

FILED

PAPERS NUMBERED

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

12

NOV 14 2013

Answering Affidavits- Exhibits _____

34

NEW YORK
COUNTY CLERKS OFFICE

Replying Affidavits _____

56

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 11/12/13

DM Mills

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

_____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

INDEX NO.
109081/11

ESTATE OF JULIO ALAMO, ALBERTO
ALAMO, Administrator, and ALBERTO
ALAMO,

Plaintiffs,

- against -

ALLEN STEIN and 317 WEST 35TH STREET
REALTY, LLC,

FILED

DECISION/ORDER

Defendants.

NOV 14 2013

DONNA M. MILLS, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Alberto Alamo ("Plaintiff") commenced this action on behalf of the Estate of Julio Alamo. Plaintiff contends that his father Julio Alamo suffered a heart attack on March 20th, 2009, which was caused by the lack of heat in the apartment they shared together. Plaintiff claims that the defendants Allen Stein ("Stein") and 317 West 35th Street Realty, LLC ("Realty") intentionally shut off the heat from March 13, 2009 through March 20, 2009. Defendants now move for summary judgment dismissing Plaintiff's complaint pursuant to CPLR §3212.

In March 2009 Realty owned the residential apartment building located at 317 West 35th Street in the County of New York, and Stein was a member of Realty. Plaintiff claims that he and his father resided in apartment 1RW since March, 1997. Plaintiff alleges the defendants intentionally instructed their building superintendent Justino Hernandez ("Hernandez") to shut off the heat to plaintiffs' apartment and for negligently allowing a lack of heat in their apartment. Plaintiff claims that Stein is personally liable for his commission of a tort by personally instructing the superintendent Hernandez to turn off the heat in the days prior to the incident (March 13th to March 20th), and that he and his father complained about the lack of heat to

Hernandez. Stein and Realty deny that heat was turned off in the building at any time between March 13th and March 20th.

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

It is undisputed that Stein was a member of Realty, a duly formed and organized New York State Limited Liability Company. Stein and Realty deny that heat was turned off in the building at any time between March 13th and March 20th. Stein in his deposition denied instructing Hernandez to turn off heat to the Plaintiffs' apartment. Moreover, Stein maintains that the heating equipment services the entire building and it

would be impossible to shut heat off in a single apartment.

Plaintiff's opposition does not provide any non-hearsay evidence to support the claim alleged that defendants' shut the heat off to their apartment, such as an affidavit from Hernandez. Although hearsay evidence may be considered in opposition to a motion on summary judgment, it is insufficient to bar summary judgment if it is the only evidence submitted (see Stock v. Otis Elevator Co., 52 AD3d 816, 861 N.Y.S.2d 722 (2d Dept.2008)). Plaintiff has failed to provide any admissible evidence establishing any conduct on the part of the defendants that they shut off heat to the subject apartment. Thus, there is no support beyond speculation and hearsay for Plaintiff's claim that Stein instructed Hernandez to turn off the heat to the apartment. Plaintiff's case relies solely upon hearsay that Hernandez apparently told him that he shut the heat off at the direction of Stein. Moreover, there is no documentary proof in support of Plaintiff's claim that heat was off and Hernandez was directed to turn it off. There are no written complaints or violations relating to any of Plaintiff's claims.

The Court has considered plaintiff's remaining contentions and find them unavailing.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants 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.

Dated: 11/12/13

ENTER:


J.S.C.

DONNA M. MILLS, J.S.C.

FILED

NOV 14 2013
NEW YORK
COUNTY CLERK'S OFFICE