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

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GARY STRUM,

Plaintiff,

- against -

RAYMOND SPIELBERG, SEWARD PARK HOUSING CORPORATION and CHARLES H. GREENTHAL & CO.,

Defendants.

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Index No. 150952/2012

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER

This is an action for damages commenced by plaintiff Gary Strum, as a cooperative unit owner and proprietary lessee, against the corporation Seward Park Housing Corporation ("Seward Park"), managing agent Charles H. Greenthal & Co. ("Greenthal"), and shareholder Raymond Spielberg ("Spielberg"). The action arises out of allegations from Spielberg's alleged wrongful and negligent act of periodically pouring urine onto the outside of Plaintiff's window, which caused an odor to permeate in his apartment. Plaintiff's Complaint alleges the following causes: private nuisance against all Defendant, negligent infliction of emotional harm against Spielberg, breach of real property law 235(b) against Seward Park, breach of contract against Seward Park and Greenthal, negligence and gross negligence against all defendants, and attorneys' fees.

Plaintiff moves for an Order for summary judgment. Alternatively, Plaintiff moves to dismiss pursuant to CPLR § 3126, preclude, or compel, to dismiss Defendants' affirmative defenses pursuant to CPLR for summary judgment. Alternatively, Plaintiff moves to dismiss pursuant to CPLR § 3211 and for a hearing to determine attorneys' fees.

Plaintiff submits the affidavit of Gary Strum, which annexes, among other documents, a copy of the pleadings, discovery demands, emails exchanged

between Plaintiff and the general manager of Greenthal Management, pictures from a video Plaintiff took "while observing Spielberg pouring urine out of his apartment window on March 20, 2010," a copy of the Plaintiff's proprietary Lease and House Rules.

Plaintiff avers that he and Spielberg are both residents of the 20 story building located at 212 East Broadway, New York, New York ("the Building") and both are parties to lease agreements in the Building. Plaintiff resides in apartment G-403 of the Building. Spielberg resides in apartment G-1203 of the Building, eight stories directly above Plaintiff's apartment and is also a proprietary lessee and shareholder of Seward Park. Greenthal was the company hired by Seward Park to manage and maintain the Building.

Strum avers that in 2000, he became aware of a urine odor permeating his apartment and possessions, over time the odor permeated his clothes, furniture, and other belongings, and that he could not eliminate the odor. Strum avers that on October 19, 2009, he notified Frank Durant, the general manager of Greenthal, of the condition, and Mr. Durant stated that an investigation would be commenced. Strum avers that on November 22, 2009, he notified Greenthal that he found urine on a platform he had secured outside his window and on November 28, 2009, presented Greenthal with a video clip of urine falling outside the window. Strum alleges that Greenthal did noting to try to identify the source and the situation continued and that Strum conducted an investigation and concluded in March 2010 defendant Spielberg was the source.

Plaintiff contends that there are "no disputed facts or triable issues concerning the fact that Defendant Spielberg created a private nuisance by pouring urine out of his window in breach of his lease for several years causing a urine odor to infiltrate Plaintiff's apartment. The odor caused property damage and interfered with Plaintiff's use and enjoyment of this apartment."

Plaintiff further contends that there are "no disputed facts or triable issues concerning the fact that Defendants SPHC and Greenthal & Co. breached the lease and the warranty of habitability by failing to properly address the condition after being put on notice in October of 2009."

Plaintiff further contends that Defendants have failed to respond to its

discovery demands.

Defendants oppose.

Defendant Spielberg submits the attorney affirmation of Martin Cohen, which states that Spielberg has now responded to all of Plaintiff's outstanding discovery and appends the affidavit of Spielberg. Spielberg avers that he is not the cause of "Plaintiff Strum's problems." Furthermore, Spielberg contends that discovery is needed.

With respect to Plaintiff's motion concerning outstanding discovery, Defendants Seward Park and Greenthal submit the attorney affirmation of Patricia C. Wik, which states that to date, defendants have complied with all of Plaintiff's discovery demands and the Preliminary Conference Order dated September 16, 2013, and have served responses to Plaintiff's Demand for a Bill of Particulars as to Affirmative Defenses and responses to Plaintiff's First Demand for Discovery and Inspection.

With respect to Plaintiff's motion for summary judgment, Defendants contend that the motion is premature pursuant to CPLR 3212(f) as depositions of all parties to this action remain outstanding. Specifically, Defendants state that the deposition of Seward Park Housing Corporation and Charles H. Greenthal & Co., and of co-defendant Raymond Spielberg are necessary to defend their claims "since it is exclusively within their knowledge the facts regarding the cause of the occurrence alleged in plaintiff's Complaint, whether the defendants were ever put on notice of the occurrence and what steps were taken to remedy the occurrence."

Furthermore, Defendants assert that there are material issues of fact that preclude summary judgment.

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, 559 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 259 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-52 [1st Dept. 1989]).

CPLR §3212(f) provides that, "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

Here, in light of the outstanding discovery and specifically the deposition demands sought by Defendants, Plaintiff's motion is denied as premature.

Wherefore it is hereby

ORDERED that plaintiff's motion for summary judgment is denied as premature.

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

DATED: FEBRUARY 24, 2014

EILEEN A. RAKOWER, J.S.C.