Williams v Sol Graf & Lenbrook Condominium
2014 NY Slip Op 30896(U)
March 28, 2014
Supreme Court, New York County
Docket Number: 111935/2009
Judge: Lucy Billings
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[* 1]

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

PRESENT: LUCY BILLINGS J.S.C. PART 46

Justice

Index Number : 111935/2009
WILLIAMS, SARA L.
vs
GRAF, SOL
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered ~~that this motion~~ and adjudged that:

The court grants third party defendant's motion for summary judgment dismissing all claims against third party defendant, pursuant to the accompanying decision. C.P.L.R. § 3212(b).

FILED

APR 09 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/28/14

Lucy Billings

LUCY BILLINGS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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 46

----------x

SARA L. WILLIAMS, Index No. 111935/2009

Plaintiff

- against -

SOL GRAF and LENBROOK CONDOMINIUM,

Defendants

----------x
----------x

SOL GRAF, Index No. 591055/2010

Third Party Plaintiff

- against -

149-151 EAST 62ND STREET REALTY CO.,

Third Party Defendant

----------x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for personal injuries caused by toxic mold in unit 3B, which she rented during 2004 to 2009 from its owner defendant Graf, and which was below unit 4B owned by third party defendant 149-151 East 62nd Street Realty Co. in a condominium building at 151 East 62nd Street, New York County, where defendant Lenbrook Condominium was the condominium association. In a third party action, Graf seeks contribution and indemnification from third party defendant. It moves for summary judgment dismissing the third party complaint. C.P.L.R. § 3212(b). Graf and Lenbrook Condominium separately moved for

summary judgment dismissing the complaint and any cross-claims against defendants. In a stipulation dated September 11, 2012, however, plaintiff discontinued her action against Lenbrook Condominium rendering its summary judgment motion against her academic. At oral argument February 26, 2013, Graf discontinued his cross-claim for indemnification against Lenbrook Condominium, leaving its motion seeking dismissal of only his cross-claim for contribution to be determined, which now would be converted to a third party claim. For the reasons explained below, the court grants third party defendant's motion, grants the remainder of Lenbrook Condominium's motion, and grants Graf's motion in part.

II. SUMMARY JUDGMENT STANDARDS

The moving parties, to obtain summary judgment, must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If the moving parties satisfy this standard, the burden shifts to the opposing parties to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of the parties' motions, the court

construes the evidence in the light most favorable to the opponents. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

III. DEFENDANT GRAF'S AND THIRD PARTY DEFENDANT'S LIABILITY

Premises owners owe a duty to maintain their premises in a reasonably safe condition. Bucholz v. Trump 767 Fifth Ave., LLC, 5 N.Y.3d 1, 8 (2005); Hasley v. Abels, 84 A.D.3d 480, 482 (1st Dep't 2011); Alexander v. New York City Tr., 34 A.D.3d 312, 313 (1st Dep't 2006). To hold defendant and third party defendant liable for an unsafe condition on their premises due to their negligence, plaintiff and third party plaintiff must demonstrate that defendant and third party defendant created the condition or received actual or constructive notice of the condition. Hasley v. Abels, 84 A.D.3d at 482; Alexander v. New York City Tr., 34 A.D.3d at 313; Mandel v. 370 Lexington Ave., LLC, 32 A.D.3d 302, 303 (1st Dep't 2006); Mitchell v. City of New York, 29 A.D.3d 372, 374 (1st Dep't 2006).

A. Plaintiff's Claims Against Graf

Since plaintiff does not claim in her complaint or bill of particulars that defendant Graf created the mold condition, Graf's liability depends on his notice of the condition. While plaintiff testified at her deposition that water leaked into unit 3B as early as 2005, she did not testify when she reported the leakage to Graf. The parties do not dispute, however, that she wrote a letter dated November 24, 2006, to Graf complaining of

several problems in the unit, including the bedroom ceiling leaking water during heavy rainfalls and the possible development of mold in the ceiling because of brown stains there, and requesting testing for mold and remediation of any mold discovered.

Notice of a mold condition nonetheless requires indicia other than wetness, such as musty or moldy odors or entry of particulates in the premises. Litwack v. Plaza Realty Invs., Inc., 11 N.Y.3d 820, 822 (2008); Lark v. Leon B. Dematteis Assoc., LLC, 48 A.D.3d 354, 355 (1st Dep't 2008); Daitch v. Naman, 25 A.D.3d 458, 459 (1st Dep't 2006); Beck v. J.J.A. Holding Corp., 12 A.D.3d 238, 240 (1st Dep't 2004). Plaintiff's letter indicates only leakage and brown stains.

Plaintiff also presents a report dated May 7, 2009, of mold testing she performed with a home test kit and relies on a report from Envirocheck Inc. dated May 26, 2009, on which Graf relies. Both reports demonstrate mold in unit 3B, but the home test report is unsworn and thus inadmissible. E.g., Arcara v. Metro-North R.R., 103 A.D.3d 589 (1st Dep't 2013). Although the witness who attests to the Envirocheck report did not perform the tests reported, and no evidence demonstrates his competence in the scientific measurement of the levels of allergens or toxins in the apartment, Rivera v. Crotona Park E. Bristow Elsmere, 107 A.D.3d 550, 551 (1st Dep't 2013); Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership, 50 A.D.3d 503, 504 (1st Dep't 2008), since Graf relies on the report from Envirocheck to support his

motion, plaintiff may rely on it in opposition. Mitchell v. Calle, 90 A.D.3d 584, 585 (1st Dep't 2011); Ayala v. Douglas, 57 A.D.3d 266, 267 (1st Dep't 2008); Navedo v. Jaime, 32 A.D.3d 788, 789-90 (1st Dep't 2006); Thompson v. Abbasi, 15 A.D.3d 95, 97 (1st Dep't 2005). See Joseph v. Board of Educ. of the City of N.Y., 91 A.D.3d 528, 529 (1st Dep't 2012); Dembele v. Cambisaca, 59 A.D.3d 352 (1st Dep't 2009); Hernandez v. Almanzar, 32 A.D.3d 360, 361 (1st Dep't 2006). Even if the court considers both reports, they still establish mold in the unit only as of May 2009, after plaintiff moved out of the unit. Other than these reports, plaintiff presents no evidence of mold in the apartment. Rivera v. Crotona Park E. Bristow Elsmere, 107 A.D.3d at 551; Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership, 50 A.D.3d at 504; Beck v. J.J.A. Holding Corp., 12 A.D.3d at 239.

Since no evidence supports the mold condition before May 2009, Graf received no actual notice of a mold condition before then. A mere possibility of discovering a condition, as suggested by plaintiff's November 2006 letter, does not amount to actual notice of that condition. Branham v. Loews Orpheum Cinemas, Inc., 31 A.D.3d 319, 326 (1st Dep't 2006), aff'd, 8 N.Y.3d 931 (2007). See Plaza v. New York Health & Hosps. Corp. (Jacobi Med. Ctr.), 97 A.D.3d 466, 468 (1st Dep't 2012), aff'd, 21 N.Y.3d 983 (2013). A finding that her November 2006 letter provided actual notice to Graf of a mold condition would require facts not supported by the record: his awareness of a recognized sign of mold. See Plaza v. New York Health & Hosps. Corp.,

(Jacobi Med. Ctr.), 97 A.D.3d at 469, aff'd, 21 N.Y.3d 983; Branham v. Loews Orpheum Cinemas, Inc., 31 A.D.3d at 325, aff'd, 8 N.Y.3d 931.

Regarding constructive notice, Graf testified at his deposition that he did not observe any leaks, stains, or other evidence of leaks or detect any signs of mold in his unit before plaintiff's tenancy. When he inspected the unit during her tenancy before the repair of the terrace for unit 4B, he observed small water stains only in the bedroom closet ceiling and no signs of mold. The undisputed evidence establishes that by the spring of 2007 and continuing after the repair of third party defendant's terrace, plaintiff no longer complained of water leaking through her bedroom ceiling, further water stains in her unit, or particulates, odors, or other signs of mold. Based on this evidence and plaintiff's testimony that her symptoms of exposure to mold did not manifest until the spring of 2007, as well as her testimony conceding that her November 2006 letter merely speculated about a mold condition, Graf met his initial burden to demonstrate lack of constructive notice. Pintor v. 122 Water Realty, LLC, 90 A.D.3d 449, 451 (1st Dep't 2011); Lance v. Den-Lyn Realty Corp., 84 A.D.3d 470 (1st Dep't 2011); Rodriguez v. 705-7 E. 179th St. Hous. Dev. Fund Corp., 79 A.D.3d 518, 519-20 (1st Dep't 2010); Early v. Hilton Hotels Corp., 73 A.D.3d 559, 561-62 (1st Dep't 2010) See Ross v. Betty G. Reader Revocable Trust, 86 A.D.3d 419, 421 (1st Dep't 2011).

Even if there was mold in unit 3B when in 2007 plaintiff

began to exhibit the symptoms she attributes to mold exposure, both she and Graf testified that they did not observe any signs of mold, demonstrating that it was not visible or apparent. Pintor v. 122 Water Realty, LLC, 90 A.D.3d at 451; Lance v. Den-Lyn Realty Corp., 84 A.D.3d 470. Absent evidence even suggesting that the water leaks were causing mold before the leaks were remedied, and absent evidence that mold had developed before May 2009, when plaintiff had moved out of unit 3B, the record lacks evidence of any mold condition long enough for Graf to remedy it before plaintiff moved out and thus any basis to charge Graf with constructive notice. Pintor v. 122 Water Realty, LLC, 90 A.D.3d at 451; Rodriguez v. 705-7 E. 179th St. Hous. Dev. Fund Corp., 79 A.D.3d at 521; Early v. Hilton Hotels Corp., 73 A.D.3d at 561.

Plaintiff also claims damage to her personal property due to Graf's negligence. She relies on evidence of mold spores on her clothing, furniture, and other personal property. Since Graf lacked notice of a mold condition, however, plaintiff's property damage claim fails equally with her personal injury claim based on Graf's negligence. Lark v. Leon B. Dematteis Assoc., LLC, 48 A.D.3d 354, 355 (1st Dep't 2008); Merkin v. Hildes, 34 A.D.3d 255, 256 (1st Dep't 2006).

While Graf moved for summary judgment dismissing the complaint, he presented no evidence and claimed no defense as to plaintiff's claims that, as her landlord, he breached the warranty of habitability, N.Y. Real Prop. Law (RPL) § 235-b, and the covenant of quiet enjoyment of her rental unit. Therefore

the court denies Graf's motion for summary judgment insofar as it seeks dismissal of those two claims. Ruiz v. RHQ Assoc., LLC, 92 A.D.3d 410 (1st Dep't 2012); Jones v. 550 Realty Hgts., LLC, 89 A.D.3d 609 (1st Dep't 2011); Ruth B. v. Whitehall Apt. Co., LLC, 56 A.D.3d 273, 274 (1st Dep't 2008); Perez v. Hilarion, 36 A.D.3d 536, 537 (1st Dep't 2007).

B. Graf's Claims Against Third Party Defendant

Graf seeks contribution and indemnification against third party defendant on the grounds that it caused any water infiltration that led to plaintiff's personal injury and property damage. The third party complaint does not allege that third party defendant created the condition. While third party defendant, as the owner of the unit above Graf's unit 3B that plaintiff rented, would be liable for damages caused by negligently allowing water to infiltrate her unit, Liberman v. Cayre Synergy 73rd LLC, 108 A.D.3d 426, 427 (1st Dep't 2013), plaintiff claims damages from her exposure to mold and from mold spores on her personal property, not from water.

Although plaintiff complained of the leak in unit 3B to only Graf and Arnold Pohl, a Lenbrook Condominium employee, third party defendant, a partnership, does not dispute that Pohl notified Leonard Gartner, a general partner in third party defendant, of the water leakage caused by unit 4B's terrace. Gartner testified that the only complaint of the water leakage he received, however, related to an outdoor carpet on unit 4B's terrace and not to mold anywhere. Just as the evidence does not

demonstrate Graf's actual notice of mold, third party defendant's actual notice of a water leak emanating in its unit 4B does not amount to actual notice of a mold condition in unit 3B. While third party defendant, as the owner, may not escape liability by simply ignoring conditions in unit 4B causing damage to another unit, Gartner's testimony that he visited the building only once or twice per year for meetings and never visited the partnership's unit provides no grounds to infer constructive notice of a mold condition in unit 3B below. See Sawchuk v. 335 Realty 58 Assoc., 44 A.D.3d 532 (1st Dep't 2007). Thus, just as the record lacks the necessary evidentiary support for plaintiff's negligence claim against Graf, the record demonstrates no negligence by third party defendant. Aiello v. Burns Intl. Sec. Servs. Corp., 110 A.D.3d 234, 248 (1st Dep't 2013); Matthews v. Trump 767 Fifth Ave., LLC, 50 A.D.3d 486, 487 (1st Dep't 2008); Reilly v. DiGiacomo & Son, 261 A.D.2d 318 (1st Dep't 1999). Nor is there any landlord-tenant or other contractual relationship between third party defendant and any party. Structure Tone, Inc. v. Universal Servs. Group, Ltd., 87 A.D.3d 909, 912 (1st Dep't 2011); Katz v. Board of Mgrs., One Union Sq. E. Condominium, N.Y., N.Y., 83 A.D.3d 501, 502 (1st Dep't 2011); McCarthy v. Board of Mgrs. of Bromley Condominium, 271 A.D.2d 247 (1st Dep't 2000); Wright v. Catcendix Corp., 248 A.D.2d 186 (1st Dep't 1998).

Graf has established his lack of negligence, but plaintiff still may prevail against him on her statutory claim for breach

of the warranty of habitability, RPL § 235-b(1), and her contractual claim for breach of the covenant of quiet enjoyment. E.g., Granirer v. Bakery, Inc., 54 A.D.3d 269, 270 (1st Dep't 2008); Edge Mgt. Consulting, Inc. v. Blank, 25 A.D.3d 364, 366-67 (1st Dep't 2006); Dumbadze v. Saxon Hall Owner, LLC, 93 A.D.3d 756, 757 (2d Dep't 2012); Newkirk v. Scala, 90 A.D.3d 1257, 1258 (3d Dep't 2011). Even though RPL § 235-b(1) embodies the warranty of habitability, like the covenant of quiet enjoyment, the warranty of habitability is based on plaintiff's landlord-tenant relationship with Graf and thus is considered contractual in nature. Elkman v. Southgate Owners Corp., 246 A.D.2d 314 (1st Dep't 1998). See Katz v. Board of Mgrs., One Union Sq. E. Condominium, N.Y., N.Y., 83 A.D.3d at 502; McCarthy v. Board of Mgrs. of Bromley Condominium, 271 A.D.2d 247; Wright v. Catcendix Corp., 248 A.D.2d 186. The statute itself presupposes a residential lease and implies a warranty in the lease covenanting that the leased premises are fit for human habitation and for the uses reasonably intended by the parties to the lease and will not subject occupants to hazardous conditions. RPL § 235-b(1); Solow v. Wellner, 86 N.Y.2d 582, 587-88 (1995); Sykes v. Roth, 101 A.D.3d 1673, 1674 (4th Dep't 2012); Newkirk v. Scala, 90 A.D.3d 1257.

Thus, even if Graf established that third party defendant breached either a contractual duty or an independent duty of care to plaintiff to prevent foreseeable harm, his own liability under the statute as well as the parties' lease is based on his own

wrongdoing, rather than any vicarious liability imposed by the statute for third party defendant's culpable conduct. Therefore Graf is not entitled to implied indemnification from third party defendant for any liability based on the statutory or contractual claims. Aiello v. Burns Intl. Sec. Servs. Corp., 110 A.D.3d at 247; Structure Tone, Inc. v. Universal Servs. Group, Ltd., 87 A.D.3d at 912; Esteva v. Nash, 55 A.D.3d 474, 475 (1st Dep't 2008); Edge Mgt. Consulting, Inc. v. Blank, 25 A.D.3d at 366-67. See Matthews v. Trump 767 Fifth Ave., LLC, 50 A.D.3d at 487; Gap, Inc. v. Fisher Dev., Inc., 27 A.D.3d 209, 212 (1st Dep't 2006); Garofalo Elec. Co. v. New York Univ., 270 A.D.2d 76, 80 (1st Dep't 2000); Reilly v. DiGiacomo & Son, 261 A.D.2d 318.

Graf is not entitled to contribution from third party defendant for similar reasons. He may claim contribution only if "two or more persons . . . are subject to liability for the same personal injury [or] injury to property." C.P.L.R. § 1401. First, as discussed above, the evidence fails to reveal a basis for subjecting third party defendant to liability for plaintiff's claimed personal injury or injury to her personal property. Second, Graf himself is subject to liability based not on negligence, but based only on breaches of the warranty of habitability or the covenant of quiet enjoyment, which are both contractual in nature, and which permit recovery only for economic losses, distinct from "personal injury [or] injury to property." C.P.L.R. § 1401; Structure Tone, Inc. v. Universal Servs. Group, Ltd., 87 A.D.3d at 911. See Abetta Boiler &

Welding Serv., Inc. v. American Intl. Specialty Lines Ins. Co., 76 A.D.3d 412, 414 (1st Dep't 2010); Walls v. Prestige Mgt., Inc., 73 A.D.3d 636, 637 (1st Dep't 2010); Mastrangelo v. Five Riverside Corp., 262 A.D.2d 218 (1st Dep't 1999); Elkman v. Southgate Owners Corp., 233 A.D.2d 104, 105 (1st Dep't 1996).

Most fundamentally, Graf's third party claims for both indemnification and contribution depend on third party defendant breaching either a contractual duty or an independent duty of care to plaintiff to prevent foreseeable harm, all of which are lacking. Aiello v. Burns Intl. Sec. Servs. Corp., 110 A.D.3d at 248; Gap, Inc. v. Fisher Dev., Inc., 27 A.D.3d at 212; Edge Mgt. Consulting, Inc. v. Blank, 25 A.D.3d at 369-70; Garofalo Elec. Co. v. New York Univ., 270 A.D.2d at 80. See DeJesus v. 888 Seventh Ave. LLC, 114 A.D.3d 587, 588 (1st Dep't 2014); Betancur v. Lincoln Ctr. for the Performing Arts, Inc., 101 A.D.3d 429, 430 (1st Dep't 2012); Wing Wang Realty Corp. v. Flintlock Constr. Servs., LLC, 95 A.D.3d 709 (1st Dep't 2012). Therefore both Graf's claims against third party defendant must be dismissed.

IV. GRAF'S CLAIM AGAINST LENBROOK CONDOMINIUM

Graf's contribution claim against Lenbrook Condominium fails similarly. Again, Graf is subject to liability only for economic losses and not for "personal injury [or] injury to property." C.P.L.R. § 1401; Structure Tone, Inc. v. Universal Servs. Group, Ltd., 87 A.D.3d at 911. See Abetta Boiler & Welding Serv., Inc. v. American Intl. Specialty Lines Ins. Co., 76 A.D.3d at 414 (1st Dep't 2010); Walls v. Prestige Mgt., Inc., 73 A.D.3d at 637;

Mastrangelo v. Five Riverside Corp., 262 A.D.2d 218; Elkman v. Southgate Owners Corp., 233 A.D.2d at 105. Also lacking is the evidence necessary to support Lenbrook Condominium's liability for plaintiff's personal injury or injury to her personal property.

Pursuant to the Declaration of the Lenbrook Condominium § 8, Lenbrook Condominium was responsible only for "maintenance, repair, replacement and restoration of the Common Elements." Aff. of Arnold Pohl Ex. B (Mar. 1, 2013). The definition of "Common Elements" in § 1(e) of the Declaration does not include any component of a condominium unit involved in the conditions complained of here. Nor does any evidence suggest that Lenbrook Condominium actually exercised any responsibility that extended beyond the duties under the Declaration, involved unit maintenance or repair rather than building-wide conditions, and contributed to plaintiff's alleged injuries. Since the leakage involved units 3B and 4B, and Lenbrook was responsible only for maintenance and repair of common elements, Lenbrook Condominium owed no duty to plaintiff or to Graf regarding either of the units on which the condominium association's liability may be based. See Onetti v. Gatsby Condominium, 11 A.D.3d 496, 497 (1st Dep't 2013); Fayolle v. East W. Manhattan Portfolio L.P., 108 A.D.3d 476 (1st Dep't 2013); Araujo v. Mercer Sq. Owners Corp., 95 A.D.3d 624 (1st Dep't 2012).

Again, Graf shows no breach by Lenbrook Condominium of either a contractual duty or an independent duty of care to

plaintiff to prevent foreseeable harm. Aiello v. Burns Intl. Sec. Servs. Corp., 110 A.D.3d at 248; Gap, Inc. v. Fisher Dev., Inc., 27 A.D.3d at 212; Edge Mgt. Consulting, Inc. v. Blank, 25 A.D.3d at 369-70; Garofalo Elec. Co. v. New York Univ., 270 A.D.2d at 80. Therefore Graf's claim against Lenbrook Condominium also must be dismissed.

V. CONCLUSION

In sum, the court grants third party defendant's motion for summary judgment and dismisses the third party complaint, grants defendant Lenbrook Condominium's motion for summary judgment and dismisses Graf's claim for contribution against Lenbrook Condominium, and grants defendant Graf's motion summary judgment only to the extent of dismissing plaintiff's negligence claim against him. C.P.L.R. § 3212(b) and (e). Graf's cross-claim for indemnification is discontinued. C.P.L.R. § 3217(b). This decision constitutes the court's order and judgment dismissing the third party complaint, dismissing and discontinuing defendant Graf's cross-claims, and dismissing plaintiff's negligence claim. Plaintiff and defendant Graf shall appear for a pre-trial conference May 29, 2014, at 3:30 p.m. in Part 46.

DATED: March 28, 2014

LUCY BILLINGS, J.S.C.