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

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
*Justice*

PART 57

Index Number : 602813/2007
KOSOVSKY, PETER
vs.
PARK SOUTH TENANTS CORP.
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT cal. # 57

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED

APR 29 2014

COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 4-17-14
APR 17 2014

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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PETER KOSOVSKY, M.D.,

Plaintiff,

-against-

PARK SOUTH TENANTS CORP., BOARD OF DIRECTORS of PARK SOUTH TENANTS CORPORATION, ROSE ASSOCIATES, INC., AM&G WATERPROOFING, LLC and ELISEO ASSOCIATES, PLLC,

Defendants.

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Index No. 602813/07

DECISION/ORDER



HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

| PAPERS | NUMBERED |
|---|---|
| NOTICE OF MOTION, AFFIDAVITS AND EXHIBITS ANNEXED..... | 1,2(Exs. A-M),3 |
| ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED..... | ..... |
| ANSWERING AFFIDAVITS..... | .....4..... |
| REPLYING AFFIDAVITS..... | .....5,6..... |
| STIPULATIONS..... | ..... |
| OTHER.....(memos of law)..... | .....7,8,9..... |

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiff Peter Kosovsky, M.D. moves, pursuant to CPLR 3212, for summary judgment on his claim for breach of contract against defendants Park South Tenants Corp., Board of Directors of Park South Tenants Corporation, and Rose Associates (hereinafter collectively "Park South"). Park South opposes the motion. After oral argument and a review of the papers presented and all relevant statutes and case law, this Court **denies** the motion.

**Factual And Procedural Background**:

This action arises from construction work performed on the balconies and facade of an apartment building located at 200 Central Park South in Manhattan. Park South Tenants Corp. is a cooperative corporation which owns the premises. The Board of Directors of Park South Tenants Corporation ("the Board") and Rose Associates, Inc. ("Rose") operate and manage the premises, respectively. Defendant AM&G Waterproofing LLC ("AM&G") performed waterproofing and other construction services at the premises and defendant Eliseo Associates PLLC ("Eliseo") performed supervisory and design services there.

In 2001, plaintiff assumed a leasehold interest to apartment 21D of the premises via a proprietary lease ("the lease"). [1] Paragraph 2 of the lease required Park South to keep the premises "in good repair." Ex. 1 to Plaintiff's Aff. In Opp. Paragraph 4 of the lease required Park South to "repair or replace" damage to the premises, "including the walls." *Id.* Paragraph 7 of the lease allowed the plaintiff "exclusive use of the terrace or balcony" of his apartment. *Id.* Paragraph 18(b) of the lease provided, inter alia, that the plaintiff "shall not permit unreasonable cooking or other odors to escape into the building" or interfere with the rights of other lessees by making "unreasonable noise" or causing other annoyances. *Id.* Paragraph 24 of the lease imposed a duty of cooperation on plaintiff, requiring that he "shall always in good faith endeavor to observe and promote the cooperative purposes for the accomplishment of which [Park South] is incorporated." *Id.* Paragraph 25 of the lease permitted Park South to enter plaintiff's apartment, "upon notice," to

[1]The lease is annexed to the affidavit of plaintiff in support of his summary judgment motion as Exhibit 1. Unless otherwise noted, other references are to the exhibits annexed to the affirmation of Robert S. Bernstein, Esq. submitted in support of plaintiff's motion.

make necessary repairs. Plaintiff resided in the apartment through March of 2006, when Park South commenced renovations of the premises. In 2006, the Board decided to replace roof and balcony railings. Additionally, the terrace floors, which had been made of terrazzo, were to be replaced with concrete pavers covered with a waterproof substance.

Rose hired AM&G to perform the waterproofing, re-grading and restoration of the balconies and terraces during the renovation process. Rose also hired Eliseo to provide architectural and engineering services connected to building "envelope" repairs, including work on the facade and balconies of the building. During the renovation, plaintiff made several complaints to Park South. He complained that a great deal of dust had infiltrated his apartment; that a pervasive and offensive odor had permeated his entire apartment due to openings in the building created during the project; and that cracks had begun to appear on his walls, ceilings and windows, which he assumed were caused by the continuous vibration of the loading and unloading of heavy materials, roof removal and jack hammering.

In 2006, Park South informed plaintiff that the original windows in his apartment had been improperly installed. Plaintiff was advised that his original windows had not been attached to the structure of the building and that, as a result of this detachment, the apartment could not be properly sealed, thereby allowing the entry of dust and other particles. Park South also alleges that when they urged plaintiff to contact the contractor who installed the windows to correct this defect, he refused to do so. It should be noted that the actual work done on the windows was done by the previous tenant, not the plaintiff.

After the exterior brickwork had been completed and the terrazzo flooring was removed from the terraces of the building, the waterproofing process was commenced. This process consisted of

applying the substance decothane to the structural concrete which remained after the removal of the terrazzo flooring. At some point, subsequent to plaintiff's complaints of a persistent odor, Eliseo went to plaintiff's apartment to investigate. Eliseo ultimately determined that the odor was emanating from the pooling of water on the balconies. Eliseo determined that to correct this problem, the balconies would have to be re-pitched to allow proper drainage of the stagnating water. Ultimately, this problem was resolved and the use of the decothane was discontinued.

In 2007, plaintiff commenced an action against Park South alleging that, as a result of the aforementioned conditions, he had to move out of his apartment. Ex. A. In his second amended complaint, plaintiff asserted claims for constructive eviction, breach of contract, negligence, and breach of warranty of habitability. Ex. A. In his breach of contract claim, plaintiff alleged that defendants' work at the premises deprived him of the use of his balcony in violation of paragraph 7 of the lease and permitted noise and dust and debris to infiltrate his apartment in violation of paragraph 18(b) of the lease. Ex. A, at pars. 89-103.

In November of 2011, plaintiff made an official complaint to the New York City Department of Buildings ("DOB"). On November 23, 2011, the DOB issued a "Notice of Violation and Hearing" ("NOV") against Park South Tenants Corp. for a "failure to maintain." It also found an existing defect, stating "Brick and stone work below interior of window has deteriorated and top of window is leaning outward approximately one inch in apartment 21D." Ex. C. The DOB established set a "cure date" of January 9, 2012. When Park South failed to "cure," a hearing was held before the New York City Environmental Control Board ("ECB") on January 19, 2012, at which time Park South had the right to be represented by counsel but declined to put forward a case and was fined $200.00 by the ECB. Ex. D. During this period, counsel for Park South had assured this Court at a conference

that it was intent on repairing the defective conditions listed in the violation. On November 13, 2012, this Court ruled that the decision of the ECB was law of the case. Ex. E.

In November of 2011, Eliseo moved to preclude the results of certain testing that had been conducted on the wall of plaintiff's apartment by plaintiff's experts. Plaintiff's experts found, inter alia, that the wall needed to be rebuilt. Eliseo requested the right to perform its own testing, arguing that, for it to determine that the wall required re-building, it would need to do destructive testing. Plaintiff refused Eliseo entrance to his apartment at that time, based on the fact that the notice of trial had already been filed. This Court decided that the pending repair work that needed to be done to remedy the violation that was issued by the ECB,would afford all parties the opportunity to observe the interior condition of the wall and directed all parties to be present with their respective experts when the repair work was scheduled to commence. Nevertheless, on March 14, 2012, without plaintiff's, Eliseo's or AM&G's knowledge, Park South obtained access to plaintiff's apartment by having a locksmith drill through the locks on his door. Park South then conducted repair work without plaintiff's or Eliseo's knowledge or consent and in contradiction to the Court's order. Plaintiff maintained that the apartment was "broken into," even though he was present in the building at the time and could have been notified that entrance was needed. Plaintiff as a result, cross-moved to strike Park South's answer based on its spoliation of evidence. As a result of Park South's actions, this Court, by order dated January 22, 2013, granted Eliseo's motion to the extent of striking Park South's cross-claims arising out of the quality of Eliseo's work. Ex. F. This court also granted plaintiff's cross-motion to the extent of precluding Park South from introducing any evidence or testimony that either plaintiff or his predecessor in title was responsible for the deterioration of the subject wall. Ex. F. In the order, this Court also noted that "the dust issue was never fully resolved"

because plaintiff allegedly refused to permit entry to anyone to clean the dust and did not clean it himself.

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment on liability and Park South opposes the motion. In support of his motion, plaintiff submits an affidavit annexing his lease and photographs of the wall in his apartment. His attorney submits an affirmation annexing, inter alia, the second amended complaint, the DOB's NOV, the ECB's order fining Park South, the January 22, 2013 order of this Court, minutes of construction meetings held at the premises, and portions of the deposition testimony of David San Inocencio of AM&G and Frank Eliseo. Plaintiff also submits a memorandum of law and reply memorandum of law in support of the motion.

In opposition to the motion, Park South submits, inter alia, the notice of trial, this Court's order of January 22, 2013, portions of the deposition testimony of San Inocencio and Eliseo, a 2006 letter from Eliseo to plaintiff advising that problems with plaintiff's windows were caused by faulty installation, and documents reflecting that plaintiff had failed to pay maintenance charges. Park South also submits a memorandum of law in opposition to the motion.

**Positions of the Parties**:

Plaintiff argues that he is entitled to summary judgment on his breach of contract claim because Park South failed to maintain the apartment as required by paragraphs 2 and 4 of the lease. He asserts that, since the DOB and ECB found that Park South failed to maintain the premises, he can bear no liability and is thus entitled to judgment as a matter of law.

Although plaintiff acknowledges that his breach of contract claim does not specifically allege a failure to maintain his wall and window, he asserts that this Court should sua sponte allow the

complaint to be amended to assert this claim or allow plaintiff the opportunity to amend the complaint and then "immediately renew" this motion for summary judgment.

Plaintiff further asserts that, because this Court precluded Park South from introducing any evidence that he or his predecessor in interest was responsible for the deterioration of the wall, this Court "removed any defense that Park South may have had with respect to Park South's 'failure to maintain' the [a]partment as required by the [p]roprietary [l]ease." Plaintiff's Memo of Law in Supp. at 15.

Further, plaintiff asserts that Park South's liability is established by the deposition testimony of San Inocencio of AM&G and Eliseo, Park South's architect, who admitted that plaintiff's windows became displaced during construction work at the premises.

In opposition to the motion, Park South argues that plaintiff's motion is untimely because it was made more than 120 days after the notice of trial was filed in 2010, prior to the transfer of this matter to Supreme Court from Civil Court.

Park South further asserts that the motion must be denied since plaintiff seeks summary judgment based on paragraphs 2 and 4 of the proprietary lease, and not paragraphs 7 and 18(b) of the lease, as alleged in the second amended complaint.

Further, Park South argues that this Court's spoliation order of January 22, 2013 did not operate as an award of partial summary judgment dismissing its defenses. Next, it asserts that plaintiff's motion fails to set forth any evidence of a duty on the part of Park South to maintain the wall of plaintiff's apartment. Park South further asserts that the business judgment rule protects it from plaintiff's breach of contract claim. Finally, Park South asserts that plaintiff is not entitled to summary judgment on his breach of contract claim because he failed to pay maintenance and therefore

failed to perform his obligations under the proprietary lease.

In reply, plaintiff asserts, inter alia, that he could not have based his breach of contract claim on the DOB and ECB decisions because they were issued in 2012, after the amended complaint was served in 2007. Thus, urges plaintiff, his breach of contract claim should not be limited to violations of paragraphs 7 and 18(b) of the proprietary lease. Alternatively, plaintiff argues that this Court should allow amendment of the complaint sua sponte to reflect violations of paragraphs 2 and 4 of the lease.

**Conclusions of Law**:

It is well-settled that the proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). As discussed below, plaintiff failed to meet this burden and thus his motion for summary judgment must be denied without even considering Park South's opposition papers.

As a threshold matter, plaintiff's motion is timely. Although Park South correctly asserts that this motion was filed more than 120 days after the notice of trial was filed in 2010, while this matter was still pending in Civil Court, New York County, this Court granted plaintiff permission to bring the instant motion. Therefore, the motion is not denied as untimely.

Plaintiff's motion must be denied on procedural grounds, however, since he failed to annex all of the pleadings in this case to his motion. "It is well settled that the failure to attach all of the pleadings is a fatal procedural defect requiring the denial of a motion for summary judgment."

*Weinstein v Gindi*, 92 AD3d 526, 527 (1st Dept 2012) (*citations omitted*); CPLR 3212(b). Although plaintiff seeks summary judgment on his breach of contract claim against Park South, he fails to submit a copy of Park South's answer. Thus, this Court cannot grant summary judgment to plaintiff.

In any event, plaintiff's motion for summary judgment on his breach of contract claim must be denied on other grounds. To establish a breach of contract claim, plaintiff must prove the existence of an agreement, his own performance under the agreement, breach by the defendants, and damages. *See Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145, 150 (1st Dept 2013). Plaintiff has failed to meet this test.

Plaintiff alleges that he is entitled to summary judgment on his breach of contract claim because the finding of a violation by the ECB, which was based on the NOV issued by the DOB (Exs. B, C) is law of the case. The DOB found that defendants' "failure to maintain" resulted in the deterioration of the brickwork beneath his window which caused the window to lean outward. Ex. C. However, in his breach of contract claim, plaintiff alleges that defendants' work at the premises deprived him of his use of his balcony in violation of paragraph 7 of the lease and allowed noise and dust and debris to infiltrate his apartment in violation of paragraph 18(b) of the lease. Ex. A, at pars. 89-103. Although the findings of the DOB and ECB may be law of the case as to certain other aspects of plaintiff's claim, they are not law of the case as to these claims. First, the DOB and ECB findings do not address the plaintiff's terrace or balcony referred to in paragraph 7 and are thus not binding as to any claims regarding those areas. Further, it is evident from the plain language of paragraph 18(b) of the lease that this clause is intended to prevent plaintiff from annoying *other*

lessees and is not designed to protect him.[2]

In addition, despite, plaintiff's claim that Park South's work at the premises caused debris and odor to infiltrate his apartment, he submits no proof of this infiltration in support of his motion. Not even in his affidavit in support of the motion does he attest to the fact that such noise or debris occurred.

Similarly, the preclusion of Park South from "introducing any evidence or testimony that either plaintiff or his predecessor in title was responsible for the deterioration of the subject wall" (Ex. F) does not entitle plaintiff to summary judgment on his breach of contract claim. As set forth above, the breach of contract claim was limited to plaintiff's claim regarding his terrace/balcony, as set forth in paragraph 7, and paragraph 18(b) is not a clause running in plaintiff's favor.

Also without merit is plaintiff's contention that he is entitled to summary judgment on his breach of contract claim based on the admissions by Eliseo and San Inocencio at their depositions that the window in his bedroom became displaced as a result of the construction work performed at the premises. Since the excerpts of the deposition testimony submitted are neither signed nor certified (Exs. L and M), they are not in admissible form and cannot be considered in determining whether plaintiff established his prima facie entitlement to summary judgment. *See Pavane v Marte*, 109 AD3d 970 (2d Dept 2013). Therefore, plaintiff is not entitled to summary judgment as a matter of

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[2]As noted above, plaintiff contends that, because his cause of action for breach of contract is limited to his inability to use his balcony/terrace and damages caused by the infiltration of noise and dust, and does not include the construction or maintenance of his wall or window, he claims that this Court should, sua sponte, allow him to amend his complaint to include the window and wall in the breach of contract claim. However, given plaintiff's failure to explain why he waited until nearly two years after the DOB's findings to set forth such an allegation, or why such an amendment would not be prejudicial at this late juncture, this Court declines to exercise its discretion in granting such an amendment in connection with this application. *See* CPLR 3025(b).

law on his breach of contract claim. *See Harrington v City of New York,* 79 AD3d 945 (1st Dept 2010); *Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755 (2d Dept 2009).[3]

Additionally, as noted above, plaintiff allegedly failed to cooperate by allowing workers into his apartment to clean the debris which allegedly entered his home. Thus, to the extent he claims a breach of paragraph 18(b) of the lease arising from debris entering his apartment, issues of fact exist regarding whether remediation could have cured the debris issue had he cooperated with Park South, whether his failure to allow Park South to enter the apartment violated the cooperation clause set forth in paragraph 24 of the lease, and whether his actions could have lessened the amount of damages he now seeks.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion for summary judgment is denied; and it is further,

ORDERED that the parties are to appear for a settlement conference on April 29, 2014 at 80 Centre Street, Room 280, at 2:30 p.m., and it is further,

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[3]This Court further notes that the two photographs annexed to plaintiff's Affidavit in Support of his motion as Exhibit B do not support his entitlement to summary judgment. Although he represents that the photographs "depict the condition of the wall of [his] apartment in 2006" and the "purported 2006 repair" by Park South, he does not identify which photograph is which or how or why they support his argument. Since the photographs are devoid of any probative value, they are not a basis upon which to grant plaintiff's motion. *See* CPLR 3212(b).

ORDERED that this constitutes the decision and order of the Court.

DATED: April 17, 2014

APR 17 2014

ENTER:

Hon. Kathryn E. Freed,
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED

APR 29 2014

COUNTY CLERK'S OFFICE
NEW YORK