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

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MARK ROBERT GORDON,

Plaintiff,

-against- Index No.

ROL REALTY COMPANY, ERR AGENCY, and SHMUEL BERGSTEIN, 157456/13

Defendants.

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DONNA MILLS, J. :

Defendants ROL Realty Company (ROL), ERR Agency (ERR) and Shmuel Bergstein (Bergstein) move for dismissal of the complaint.

Plaintiff is the former tenant of an apartment building owned by ROL, located at 359 West 54th Street, New York, New York. ERR is the managing agent of ROL. Bergstein is the manager of ERR. In his complaint, plaintiff alleges that defendants are liable for personal injury, property damage, intentional infliction of emotional distress and breach of contract.

Plaintiff alleges that defendants were responsible for exposing him to a toxic mold resulting from water leakage in his apartment and causing serious physical illness. According to plaintiff, defendants' failure to remedy defects in the water system resulted in the build-up of toxic mold, subsequently discovered by a state-certified environmental inspector, exposing him to contamination. Plaintiff also alleges that defendants' failure to make repairs in the apartment directly caused damage to his personal property, including his photocopier, his antique furniture pieces, his printer, his fax machine and his television set. Plaintiff alleges that, due to defendants' improper electrical wiring, he suffered injuries when a light bulb in his bathroom exploded in his presence. Finally, plaintiff alleges that defendants breached a contract among the

parties by failing or refusing to remove an air conditioner from plaintiff's apartment.

Defendants bring a pre-answer motion to dismiss the complaint. Specifically, they assert that the complaint should be dismissed against ERR because ERR acted solely as the managing agent for ROL, and such an agent for a disclosed principal is not subject to the liabilities alleged in the complaint. They assert that the complaint should be dismissed against Bergstein because he is not subject to liability in his individual capacity, since he acted solely in his representative capacity as a manager of a limited liability company. They assert that the complaint be dismissed against ROL because plaintiff's claims are untimely; because the claims are not pleaded adequately; because they are barred by the doctrines of res judicata and release; and because they are precluded by plaintiff's spoliation of critical evidence.

Defendants state that plaintiff was the rent-stabilized tenant of apartment 4FS in ROL's apartment building from April 1, 1994 until September 14, 2011. In April 2009, ROL commenced a non-primary residence holdover proceeding against plaintiff in Civil Court, New York County, Index No. L&T 66752/09. On July 7, 2011, the parties entered into a global settlement agreement (Settlement), which was subsequently accepted by the Civil Court Judge. The Settlement provided that plaintiff agreed to vacate and surrender possession of his apartment on or before September 14, 2011; that as forgiveness of plaintiff's counterclaims in the Civil Court proceeding, ROL would pay to plaintiff the sum of $67,250; upon surrender and payment, the proceeding and all extant claims and counterclaims would be deemed dismissed with prejudice; that in the event plaintiff timely surrendered his possession of the apartment, ROL would waive and release plaintiff from any and all claims related to the proceeding; and that in the event ROL pays the aforesaid sum, plaintiff would waive and release ROL from any claims

he brought against it. Defendants contend that upon plaintiff's surrender of the apartment, ROL intended to renovate the apartment so that it would be eventually re-leased exempt from the rules provided for rent stabilization. For this reason, plaintiff and ROL allegedly agreed that no further repairs would be made in that apartment prior to plaintiff's surrender. Plaintiff surrendered his lease pursuant to the Settlement on September 14, 2011.

Defendants claim that ERR and Bergstein cannot be held liable in their individual capacities, and argue that the landlord is not liable for several reasons. First, they argue that the first cause of action, personal injury in the form of exposure to a toxic substance, should be dismissed against ROL because it is time-barred. The statute of limitations for a personal injury claim is three years, commencing at the time the source of the injury was discovered or should have been discovered. CPLR 214 (5). Defendants state that plaintiff has admitted that his injuries caused by exposure to the toxic mold was known to him over three years before he commenced this suit. They refer to allegations made in his complaint indicating that he had felt the effects of a sinus infection on March 6, 2009, due to exposure to a substance "which might be mold." (Section 23 of the complaint). Other examples, according to defendants, include an email sent by plaintiff's counsel to ROL's counsel on June 28, 2010, which asserted that plaintiff had discovered mold and was concerned about the physical consequences he might endure from exposure to it; a counterclaim included in plaintiff's verified answer during the 2009 non-primary residence proceeding, where plaintiff claimed to have informed ROL of his reactions to the mold in his apartment; and an affidavit sworn by plaintiff on October 26, 2000, in support of a motion he made in a holdover proceeding, where he stated that his health was being impaired by mold in his apartment. Defendants aver that these documents demonstrate that plaintiff was aware of the

mold condition and his reactions to it prior to August 15, 2010, three years before the date of the commencement of this action. Thus, defendants contend that the first cause of action must be dismissed as time-barred.

Defendants also seek dismissal of the second cause of action, property damage, on the ground of untimeliness. The statute of limitations for this claim is three years. CPLR 214 (4). Defendants argue that plaintiff admitted that there was damage to his personal property prior to August 15, 2010. Documents submitted by defendants to allegedly verify this include plaintiff's verified answer during the non-primary residence proceeding, which contains a counterclaim for damages to his personal property due to ROL's negligence; plaintiff's deposition testimony, dated September 28, 2006, conducted for a personal injury suit commenced against ROL by plaintiff in 2006, where his counsel publically stated that plaintiff was amending his complaint to include damage to his computer, photocopier and other property in his possession; a claim plaintiff asserted against ROL's insurance carrier, dated October 7, 1996, where plaintiff alleged that on October 3, 1996, a piece of ceiling fell in his apartment and damaged his sofa, computer, television set, table and other property. Although the complaint sets no date for the occurrence of the damage, defendants argue that plaintiff clearly identifies the cause of damage to be water leaks, and falling plaster and debris from the ceiling, which is similar to the cause of damage alleged in property damage claims occurring prior to the limitations period. Defendants contend that there is sufficient documentary proof to dismiss the second cause of action as time-barred.

Defendants seek dismissal of the fourth cause of action, intentional infliction of emotional distress, on the ground of untimeliness. The statute of limitations for intentional torts like this one is one year. CPLR 215 (3). Defendants state that plaintiff had interposed a similar

claim on May 22, 2009, in response to the non-primary residence proceeding. Moreover, as plaintiff has been out of possession of his apartment since September 14, 2011, defendants contend that plaintiff has had no contact with ROL after the surrender.

Along with untimeliness, defendants seek dismissal of the first cause of action on the grounds of release and res judicata. They refer to the Settlement between plaintiff and ROL, which allegedly provided for the withdrawal of claims related to the non-primary residence proceeding with prejudice and barred the renewal of any claims based upon the same issues. Defendants argue that plaintiff has attempted to renew old claims in this action, in the form of the personal injury-toxic mold claim. Defendants insist that the Settlement be legally upheld as a release from the first cause of action, and that the Settlement has a res judicata effect as well.

Defendants seek dismissal of the second cause of action on the ground that it is not pled with sufficient particularity. Specifically, they argue that the complaint is insufficiently descriptive about the items of personal property allegedly damaged by ROL, and fails to describe the value and extent of the damage, as well as the cost of possible repair. According to defendants, the alleged lack of specificity leaves ROL with little notice as to what comprises the property damage, and gives it an inadequate way of defending itself. In addition, defendants contend that plaintiff has previously asserted claims for damage to similar property for which he was compensated. Defendants claim that plaintiff is seeking an unwarranted recovery here.

Defendants seek dismissal of the third cause of action, personal injury with respect to the exploding light bulb, on the ground that plaintiff has previously spoliated significant evidence related to this claim. It is alleged that this spoliation has a prejudicial impact in this case, whereas defendants never had the opportunity to observe or examine this evidence and cannot

present an adequate defense. As proof of spoliation, defendants claim that after the accident occurred, plaintiff failed to provide ROL with any information about his injuries, or the allegedly defective wiring said to be the cause of the explosion. Defendants aver that plaintiff waited after he surrendered the apartment to sue ROL, which only learned belatedly of the accident and the destruction of evidence by plaintiff. Defendants also seek dismissal of this cause of action on the ground that there is an insufficient pleading of prima facie elements of negligence. According to defendants, ROL lacked notice of a defective condition and an opportunity to make repairs. Defendants also question whether ROL had a duty to plaintiff in this situation or that any duty was breached.

Defendants seek dismissal of the fifth cause of action, breach of contract, on the ground that the elements of a breach of contract have not been pled. Defendants contend that ROL did not have a contractual duty to remove the air conditioning unit in plaintiff's apartment. In the absence of any such duty provided in the lease or in any other written agreement, defendants argue that the fifth cause of action should be dismissed.

In his opposition paper, plaintiff apparently treats defendants' motion as one for summary judgment, arguing that disputed issues of fact preclude the granting of this motion. Plaintiff states that he has suffered actual damages as a result of the toxic mold allegedly caused by a defective water system in his apartment. He claims that defendants have not denied the existence of the toxic mold.

Plaintiff denies that the Settlement covered such matters as the exploding light bulb or the failure to remove the air conditioner, which occurred after the execution of the Settlement. He avers that there is an issue as to whether the Settlement bars his claim for property damage.

With respect to the exploding light bulb, plaintiff states that he was under no obligation to give notice to ROL of any defective lighting or of his injuries. He claims to have notified his superintendent about the matter and that defendants had prior notice from the "HPD" of a defective electrical condition.

Plaintiff contends that there is merit in his emotional distress claim and that it is not barred by the Settlement. He claims that ROL had a contractual duty to remove the air conditioner and that ROL received a written waiver from him agreeing to hold it harmless from claims related to the removal. Plaintiff asserts that, subsequently, ROL did not accept the waiver, but he claims that this did not render the contractual duty void.

In reply, defendants contend that plaintiff has failed to address many of their arguments, including ERR and Bergstein's lack of personal liability, the statute of limitations, the spoliation of evidence, and the lack of specificity in the pleadings. Defendants note that plaintiff is treating this motion as one for summary judgment, which is subject to a legal standard different from one for dismissal.

Defendants seeks dismissal of the complaint pursuant to CPLR 3211 (a) (1) (defense based upon documentary evidence); (a) (5) (release and/or statute of limitations); and (a) (7) (failure to state a cause of action). They argue that ERR and Bergstein are not liable because ERR is a managing agent of ROL, a disclosed principal, and Bergstein is a member of a limited liability company, ERR. Since plaintiff has made no attempt to challenge or oppose the arguments raised by defendants, the court will assume that plaintiff accepts these arguments, which are meritorious. Therefore, the court shall dismiss ERR and Bergstein from this action.

Defendants seek the dismissal of plaintiff's first personal injury claim, his property

damage claim, and his emotional distress claim on the ground of untimeliness. The emotional distress claim is an intentional tort and is subject to the 1 year statute of limitations. *See Misek-Falkoff v Intl. Bus. Machines Corp.*, 162 AD2d 211 (1st Dept 1990). Defendants contend that plaintiff has not had any communications with ROL since he surrendered his lease on September 14, 2011, over a year before he commenced this suit. Plaintiff, in his opposition paper, has not responded to this assertion. The court assumes that he has accepted this assertion and shall dismiss the emotional distress claim as untimely.

The personal injury claim, which alleges that plaintiff suffered physical damages as a result of exposure to a toxic mold, a substance created by ROL's negligence, is subject to the three year statute of limitations. CPLR 214-c provides that the limitation period commences at the earlier of when the injury was discovered or should have been discovered. In this statute, exposure means direct or indirect exposure by absorption, contact, ingestion, inhalation, implantation or injection. Defendants refer to *Matter of New York County DES Litigation* (89 NY2d 506, 514 [1997]). There, the Court of Appeals determined the issue of when the statute begins to run under this law. Accordingly, the term "discovery of the injury" was intended to mean discovery of the condition on which the claim was based, and not the "non-organic etiology" of the physical condition. Defendants claim that the same determination would be applicable when injuries arise from an exposure to mold or other toxic substances. *See Martin v West 80 Street Corp.*, 3 AD3d 439 (1st Dept 2004) (statute of limitations in toxic mold complaint).

To confirm their argument, defendants submit documents indicating that plaintiff had notice of the toxic mold substance and was conscious of its potential health risks as early as

2000. In opposition, plaintiff does not address the evidence or the issue itself. Plaintiff simply argues that his illness from the exposure is genuine and that ROL does not deny the existence of the mold in his apartment. The court shall dismiss this cause of action as time-barred.

The next cause of action, property damage caused by ROL's negligence, is also subject to a three-year statute of limitations. Defendants submit more documents indicating that plaintiff knew of the damage over three years before the commencement of this action. For example, plaintiff referred in his May 22, 2009 answer, submitted during the non-primary residence proceeding brought by ROL, to damage to his televison, art work and photocopier allegedly caused by ROL's alleged negligence. In his complaint, plaintiff specifies the damaged property as his photocopier, art poster, antique furniture, printer, fax machine and television. Elsewhere, he refers to property which he disposed, including a bed, a mattress, furniture and clothing, but fails to specifically label them as damaged property. Defendants' evidence clearly shows that plaintiff had notice of most of the damaged property prior to the three year period. However, within these documents, there is no reference to the "damaged" printer or fax machine alleged in the complaint, and the complaint does not say when these items were damaged. While defendants also contend that plaintiff has failed to satisfy requisite pleading requirements with this claim, the court finds that the pleading here is adequate in describing the aforesaid items of property.

Plaintiff has not responded to defendants' arguments based on untimeliness of this claim or the lack of specificity. The court assumes that plaintiff does not dispute the untimeliness of the claim, as he did not specify the time of the property damage in the complaint. For that reason, the court shall dismiss this cause of action as time-barred.

The second personal injury claim alleges the exploding light bulb, allegedly caused by ROL's negligence in handling the electrical system, resulted in physical injuries to plaintiff. Defendants seek dismissal on the grounds that the plaintiff's alleged spoliation of the evidence without their notice has created a prejudicial impact, and that plaintiff has failed to make out a claim for negligence. In his opposition, plaintiff contends that his giving notice to ROL was not necessary and that ROL was sufficiently on notice of a defective condition before the accident occurred. Plaintiff does not address the spoilation allegation.

"When a party alters, loses or damages key evidence before it can be examined by the other party's expert, the court should dismiss the pleading of the party responsible for the spoilation." *Squtieri v City of New York,* 248 AD2d 201, 202 (1st Dept 1998). The action can be intentional or negligent. *See Kirkland v New York City Housing Authority,* 236 AD2d 170, 173 (1st Dept 1997). According to defendants, ROL was never notified by plaintiff about the faulty electrical wiring, the accident or his injuries. After plaintiff left the apartment, ROL started its plan to totally renovate the apartment in order to lease it in the open market. In the process, ROL removed the allegedly faulty wiring and light fixtures in order to replace them. Had it been aware of the dangerous condition which plaintiff alleges, ROL would allegedly not have removed or discarded the material, as it would have served as key evidence in a suit. Defendants claim that ROL only received the appropriate notice upon the commencement of this action.

"A landlord may be liable for failing 'to repair a dangerous condition, of which it has notice, on leased premises if the landlord assumes a duty to make repairs and reserves the right to enter in order to inspect or to make such repairs (citation omitted).'" *Litwack v Plaza Realty Invs., Inc.,* 11 NY3d 820, 821 (2008). "Plaintiff bears the burden of proving that the landlord

had notice of the dangerous condition and a reasonable opportunity to repair it." *Id.*

Plaintiff contends that ROL had notice of the defective electrical system prior to the accident. However, his proof of notice is vague and conclusory. He refers to "HPD" giving notice to ROL, but he is not clear as to whether ROL received a complaint or a violation or if any proceeding had ever occurred. His opposition paper contains no documentary or other evidence to confirm his assertions. Therefore, plaintiff has not made out a sufficient case for negligence.

Moreover, the evidence that has been spoliated is significant in the exploding light bulb claim, as it would have been crucial in determining ROL's liability. As ROL has lost an opportunity to inspect the material, the court finds it consistent with elemental fairness that this personal injury cause of action be dismissed.

The last claim, breach of contract, refers to ROL's failure to remove plaintiff's air conditioner prior to his surrender of the lease. Defendants state that ROL had no contractual duty to remove the unit, contrary to plaintiff's allegation. Neither side refers to a specific contract, written or oral, that provides this duty. The lease, submitted by defendants in their motion papers, makes no such provision, and plaintiff does not refer to the lease as the subject contract. In the absence of a specific alleged agreement, along with plaintiff's failure to properly plead the elements constituting a breach of contract, the court shall dismiss this cause of action. *See Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 (1st Dept 2010).

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted; and it is further

ORDERED that the complaint is dismissed in its entirety as against them, with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: 7/28/14

ENTER:

DONNA M. MILLS, J.S.C.

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