

Bergman v EQR160 Riverside A, LLC

2015 NY Slip Op 30661(U)

April 24, 2015

Supreme Court, New York County

Docket Number: 104496/2009

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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4/28/15
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

JACOB BERGMAN,

Plaintiff,

- v -

Index No.: 104496/2009

Motion Date: _____

Motion Seq. No.: 005

EQR 160 RIVERSIDE A, LLC, EQR 160 RIVERSIDE B, LLC, EQR 160 RIVERSIDE C, LLC, EQR 160 RIVERSIDE D, LLC, EQR 160 RIVERSIDE E, LLC, EQR 160 RIVERSIDE F, LLC, EQR 160 RIVERSIDE G, LLC, EQR 160 RIVERSIDE H, LLC, EQR 160 RIVERSIDE I, LLC, JOHN DOE # 1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4, ABC CORP #1, ABC CORP #2, ABC CORP #3, ABC CORP #4, ABC CORP #5, ABC CORP #6, ABC CORP #7, and ABC CORP #8,

Defendants.

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NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 6 were read on this motion.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No (s) .	1-4
Answering Affidavits - Exhibits	No (s) .	5
Replying Affidavits - Exhibits	No (s) .	6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is resolved in accordance with the attached Memorandum Decision and Order.

This is the decision and order of the court.

Dated: April 24, 2015

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.

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

- 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

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

-----X
JACOB BERGMAN,

Plaintiff,

-against-

Index No. 104496/09

EQR 160 RIVERSIDE A, LLC, EQR 160 RIVERSIDE
B, LLC, EQR 160 RIVERSIDE C, LLC, EQR 160
RIVERSIDE D, LLC, EQR 160 RIVERSIDE E, LLC,
EQR 160 RIVERSIDE F, LLC, EQR 160 RIVER-
SIDE G, LLC, EQR 160 RIVERSIDE H, LLC,
EQR 160 RIVERSIDE I, LLC, JOHN DOE # 1, JOHN
DOE #2, JOHN DOE #3, JOHN DOE #4, ABC CORP
#1, ABC CORP #2, ABC CORP #3, ABC CORP #4,
ABC CORP #5, ABC CORP #6, ABC CORP #7,
and ABC CORP #8,

Defendants.

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COUNTY CLERK'S OFFICE

-----X
DEBRA A. JAMES, J.:

Defendants (collectively, EQR) move, pursuant to CPLR 3212
(a), for summary judgment dismissing the complaint. In addition,
EQR seeks summary judgment on its counterclaims for unpaid rent
and attorney's fees, expended in prosecuting two summary holdover
proceedings in New York City Civil Court.

In April 2006, pursuant to a lease entered into with
defendant Equity Residential Management, LLC (ERM), s/h/a ABC
Corp #1, plaintiff Jacob Bergman became the tenant of record of
apartment 4P (Apartment) in the building located at 160 Riverside
Drive in Manhattan.

In May 2008, by agreement with ERM, he moved, with no

increase in rent, to a larger apartment, 927 in the building located at 140 Riverside Drive, pending remediation of a mold problem in the Apartment. After remediation was completed, ERM offered plaintiff the choice of returning to the Apartment, or remaining in apartment 927 at a higher rent.

Plaintiff remained in apartment 927, until he moved out, pursuant to a stipulation that he entered into in a holdover proceeding in which he was the respondent.

Prior to moving to apartment 927, plaintiff hired microecologies inc. (MI) to inspect the Apartment.

The May 19, 2008 MI report states that the air testing involved taking samples and conducting a comparison of indoor and outdoor levels of viable and non-viable fungal spores and structural fragments, to determine if the indoor flora "contains significantly higher levels of any genus/species related to water damage conditions and/or occupant health complaints than are present in the outdoor air." It found only trace levels of airborne fungi in plaintiff's bedroom at the time of testing, and that, on a scale of "acceptable," "inconclusive," "unacceptable," the indoor air quality in the bedroom was acceptable.

The report also found, that after the molding on the western half of the north wall of plaintiff's bedroom was pried back,

highly elevated levels of Stachybotrys, commonly referred to as "black mold," and Ulocladium fungi were found on the sheetrock. MI found highly elevated levels of the same two molds on ceiling tiles in the hallway outside the Apartment. MI opined

While there is currently insufficient epidemiological evidence to conclude that environmental molds cause toxic health effects by inhalation of airborne mold spores, our experience strongly suggests that such an association may exist. The symptoms that you are experiencing are consistent with those reported by our clients who have been exposed to Stachybotrys and with the symptoms described in the available scientific literature concerning Stachybotrys-related health effects.

The MI report concluded that

Based upon your reported symptoms and our observation and confirmation of the presence of severely elevated levels of Stachybotrys type fungi in the bedroom, we recommend that occupancy of this room be suspended until the following mold remediation work has been properly performed in the bedroom and post mediation testing confirms that levels of airborne fungi are within the normal and acceptable range.

In his complaint, plaintiff alleges negligence, gross negligence, and breach of the warranty of habitability with respect to the presence of toxic mold in the Apartment, resulting in his becoming severely ill.

With respect to defendants burden on their motion for summary judgment--"An expert opinion on causation should set

forth a plaintiff's exposure to a toxin, whether the toxin is capable of causing the particular illness (general causation) and whether the plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)." Cabral v 570 W. Realty, LLC, 73 AD3d 674, 675 (2d Dept 2010), citing Parker v Mobil Oil Corp., 7 NY3d 434, 448 (2006); see also Cornell v 360 W. 51st St. Realty, LLC, 22 NY3d 762, 769 (2014).

Defendants offer the affirmations of Dr. Carl B. Friedman and Dr. Adam Bender in support of their prima facie defense to those elements, as well as the affidavit of Robert C. Herrington, an environmental health and safety expert.

Dr. Friedman recites plaintiff's extensive medical history and health conditions that pre-existed his alleged exposure to toxic mold. He opines that plaintiff's various ailments and the medications prescribed account for his physical ailments and that mold on the wall would not result in symptoms as it did not enter plaintiff's system. He concludes that "the cause of [plaintiff's ill]s] is unrelated to his exposure to mold while residing [in the Apartment]."

Likewise, Dr. Bender recites plaintiff's medical history, and notes that no physician who treated plaintiff linked plaintiff's mold exposure to any of his symptoms. Dr. Bender

states also that "there is no objective evidence of any . . . neurological problem that would explain [plaintiff's] persistent subjective complaints."

In the his affidavit Robert C. Harrington, senior project manager for Cardno ATC, a company that provides support services in environmental health and safety testing, opines, with a reasonable degree of certainty in the field of environmental and health sciences, that plaintiff was not exposed to the mold that was growing behind the molding in his bedroom, and cites the MI report that the airborne level of fungi in the Apartment was "acceptable." He cited the lab results of the MI report that described the trace levels of mold in the air as "Smuts/Periconia/Myxomycetes" (EMLAB ID: 419725), which are not the "genus/species related to water damage and/or occupant health complaints ("marker fungi") Aspergillus/Penicillium and Stachybotrys that were found on the sheetrock.

While the affirmations of Dr. Bender and Friedman are conclusory and insufficient to establish a prima facie defense, the affidavit of Harrington negates an essential element of plaintiff's toxic tort claim, i.e. that he was exposed to mold.

In opposition, plaintiff submits both the MI report and a letter from Dr. John P. Salerno, plaintiff's current treating

physician. Dr. Salerno's letter states that he began consulting with plaintiff on December 31, 2008, when plaintiff presented with Parkinson's like symptoms, and tested positive for very severe mold reaction to Penicillin and Rhizopus Nigricans. In addition, plaintiff attaches a June 2008 report from Quest Diagnostics, which states that plaintiff's antibodies show that he was exposed to high levels of Aspergillus fumigatus and Penicillium notatum. The MI report found Aspergillus fumigatus and Penicillium inside the sheetrock of the Apartment, but no indication of Rhizopus Nigricans anywhere in the Apartment. In any event, Dr. Salerno's additional statement, that "[m]old reaction is a common medical condition which can cause all of the symptoms that [plaintiff] has exhibited," is, at most, a statement of general causation. As such opinion neither identifies the specific disease-causing agent to which plaintiff was allegedly exposed nor quantifies plaintiff's exposure, let alone provides a differential diagnosis, it does not raise a triable issue as to specific causation. See Cornell, 22 NY3d at 783-786.

That part of EQR's motion that pertains to unpaid rent and legal fees shall be denied as EQR provides no evidentiary support therefor.

Accordingly, it is hereby

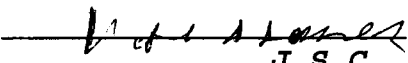
ORDERED that the motion of EQR 160 Riverside A, LLC, et al. for summary judgment is granted to the extent that the complaint is dismissed, and it is otherwise denied; and it is further

ORDERED that the counterclaim shall continue; and it is further

ORDERED that the parties are directed to attend a pre-trial conference in IAS Part 59, Room 103, 71 Thomas Street, New York, New York 10013, on June 16, 2015 at 2:30 P.M. to set a trial date.

Dated: April 24, 2015

ENTER:


DEBRA A. JAMES J.S.C.

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