

Getty v Goh
2020 NY Slip Op 35082(U)
March 3, 2020
Supreme Court, Westchester County
Docket Number: Index No. 60345/2018
Judge: Charles D. Wood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
RICHARD GETTY,

Plaintiff,

DECISION & ORDER
INDEX NO. 60345/2018
SEQ NOS. 6&7

CHARLES GOH, ILIANA MALDONADO,
EDWARD P. CONE, 35 SUMMIT AVENUE OWNERS LTD.
and PATRIOT MANAGEMENT CORPORATION,

Defendants.
-----X

WOOD, J.

New York State Courts Electronic Filing (“NYSCEF”) Documents Numbers 229-232, 236-255, were read for the remaining defendants’ (“defendants”) motion for summary judgment (Seq 6), and plaintiff’s motion for summary judgment (Seq 7)

The owner of Unit 3J, a residence at 35 Summit Avenue (“the Unit”) in Port Chester brings this action to seek to recover damages for purported personal and property injuries caused by mold in the Unit. Plaintiff claims that due entirely to defendants’ retaliation, fraud and continuing gross negligence against him, he cannot sell his property, which is a health hazard not only to plaintiff, but to other residents at 35 Summit Avenue.

Based upon the foregoing, the motions are decided as follows:

It is well-settled that a proponent of a summary judgment motion must make “a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hosp. 68 NY2d 320,

324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte 37 AD3d 684, 686-687 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol 128 AD2d 492 [2d Dept 1987]). A party opposing a summary judgment motion may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly 254 AD2d 463 [2d Dept 1998]). In deciding a summary judgment motion, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp. 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652, 661-662 [2d Dept 1994]). Summary judgment is a drastic remedy, not to be granted where there is any doubt as to existence of a triable issue (Álvarez v Prospect Hosp., 68 NY2d 320, 32 [1986]). CPLR 3212(b) specifically provides that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact". The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). A defendant's showing on a motion for summary judgment is governed by the

allegations of liability made by the plaintiff in the pleadings (Bader v River Edge at Hastings Owners Corp., 159 AD3d 780, 781 [2d Dept], leave to appeal denied, 31 NY3d 913 [2018])

This is not the first action brought by plaintiff for his alleged injuries from mold in the Unit. On February 18, 2015, plaintiff as a pro se litigant, commenced the first of three lawsuits arising from the alleged water intrusion of his Unit under Index Number 52528/2015, against 35/37 Summit Avenue Owners Ltd. Board of Directors and Patriot Management. On December 14, 2015, the Supreme Court (DiBella, J.), dismissed plaintiff's breach of contract cause of action, but allowed plaintiff's negligence claim to survive. The court (Bellantoni, J.) also found no basis to the renewal and reargument motion of that decision. On May 31, 2018, this court granted Summit and Patriot's motion dismissing the complaint, finding that there is no contractual relationship between plaintiff and Patriot; and also dismissing plaintiff's negligence claim against Summit and Patriot.

Plaintiff was represented by counsel in the Second lawsuit on May 30, 2018, against Summit and Patriot under Index Number 58601/2018, and by amended complaint that alleges that Goh is the president of Patriot and Maldonado is the CEO of Summit. The Amended Complaint alleges negligence and breach of contract and implied warranty of habitability. Patriot and Summit's motions to dismiss on the grounds of collateral estoppel and res judicata was denied by this court; and the branch of motion to dismiss all causes of action as against the individual corporate defendants, Charles Goh and Iliana Maldonado was granted.

In the instant lawsuit, plaintiff returned to pro se status. Here, in connection with the purported mold in plaintiff's Unit, plaintiff alleged causes of action based upon fraud, defamation, violation of the right to privacy, and violation of New York States Human Rights

Law, the Complaint now seeks \$8,225,000 in damages.

As a procedural matter, contrary to plaintiff's contentions, defendants' instant motion is timely, and the court will consider it. Plaintiff filed his Note of Issue on October 3, 2019, and pursuant to the Westchester Supreme Court DCM Protocol Part Rules, summary judgment motions are due 45 days later, in this case on or before November 17, 2019, a Sunday.

Defendant's motion was filed on the following business day, which is timely pursuant to General Obligations Law 25-a.

Turning to defendants' motion for summary judgment, the only remaining cause of Action sounds in fraud. The Complaint alleges that defendants instructed or conspired with their legal representative and/or contractors to deceive a court of law in a civil case brought by plaintiff against Summit and Patriot in the First Lawsuit by submitting two invoices from 2012, as part of the prior summary judgment motion, which resulted in a dismissal of the First Lawsuit. One invoice is from K.P.G. Services, Inc. dated March 1, 2012, and one is from Peak Restorations Inc., dated April 18, 2012, and they indicate several small repairs were performed in the Unit in 2012. Plaintiff asserts that the work reflected in these invoices was never performed in the Unit in 2012, and that they were forged. Plaintiff alleges that he recognized them as fraudulent when defendants' counsel presented them during a deposition and alerted this fact to Audrey D. Medd, Esq. of Lynch Schwab & Gasparini PLLC.

The elements of a cause of action to recover damages for fraud are: (1) a false representation of fact, (2) knowledge of the falsity, (3) intent to induce reliance, (4) justifiable reliance, and (5) damages (Doukas v Ballard, 135 AD3d 896, 898 [2d Dept 2016]). There is no such evidence here. According to plaintiff, the alleged repairs inside plaintiff's Unit never took

place in 2012. Rather, repairs only occurred in 2015 and only after defendants were forced to comply with orders by the Village Code Enforcement Department and Port Chester Justice Court. By defendants allegedly fabricating documents in and out of court, plaintiff claims that the clear intention of defendants was to induce plaintiff into relying on the documents, hide their negligence, extort funds from plaintiff and discredit plaintiff's legal claims.

Defendants argue that plaintiff's contention that these invoices are fraud is baseless given that a witnesses's failure to recall a specific event over 6 years ago does not establish that defendants falsified any document or that this witness did not indeed prepare this document.

Defendants also contend that the fact that defendants are in Port Chester Village Court for violations issued in August 2018; defendants' plea of guilty to building code violations in 2017, with the property being brought into compliance as certified by the Village of Port Chester, has no relation to plaintiff's allegations for fraud for work performed, and documents created in 2012.

In light of the foregoing, and taking into consideration defendants reasoning, the court finds that plaintiff's submissions fail to meet his prima facie burden of establishing the elements of fraud.

For these reasons, it is hereby

ORDERED, that defendants' motion for summary judgment (Seq 6) is **granted**, and the complaint is dismissed; and it is further

ORDERED, that plaintiff's motion for summary judgment (Seq 7) is **denied**.

The Clerk shall mark his records accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: March 3, 2020
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF