SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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INDEX NO. 100466/2019

MELISSA SMITH,

Plaintiff,

MOTION SEQ. NO. 004

- v -

GLENWOOD MANAGEMENT CORPORATION and EAST 39TH REALTY LLC,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action commenced by plaintiff Melissa Smith, defendant Glenwood Management Corporation ("GMC") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on April 2, 2016 in which plaintiff was allegedly injured inside of her home, located at 240 East 39th Street, Apt. 9C in Manhattan ("the premises" or "the apartment"), due to dangerous "drug fumes" emanated by her neighbors. Plaintiff, then pro se, commenced this action by filing a summons and complaint against GMC, the managing agent of the premises, in April 2019. Doc. 1. In the complaint, plaintiff alleged that she was injured due to the negligence of GMC. Doc. 3.

In August 2020, plaintiff filed an amended complaint, without court leave, against GMC as well as against East 39th Realty LLC ("East 39th"), the owner of the premises. Doc. 6. Plaintiff then moved (mot. seq. 002) to amend the complaint to name East 39th as a defendant. Docs. 8-12. By order entered January 8, 2021, this Court denied the motion, and thus GMS is the sole defendant herein. Doc. 27. GMC joined issue by its answer filed March 10, 2021. Doc. 29.

In her bill of particulars dated April 25, 2022, plaintiff alleged, after retaining counsel, that she was injured due to the "acts or omissions" of GMS in their control, operation, management, and maintenance of the premises. Doc. 50. Plaintiff claimed that GMC "failed to take steps to evict tenants dealing and manufacturing drugs at the subject building; and in failing to take steps to prevent drug fumes from travelling into plaintiff's apartment despite notice of the recurrence of same." Doc. 50 at par. 15.

GMC now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Docs. 46-53. It maintains that it cannot be liable for the nonfeasance alleged unless it was in complete and exclusive control of the premises which, according to the terms of its management agreement, it was not. Doc. 48. Specifically, it asserts that the management agreement, dated January 1, 2002, and in effect as of April 2016, provided, inter alia, that East 39th would have "exclusive jurisdiction and responsibility" for "repairs and maintenance" (Doc. 51 at Art. II[f]) and that GMC could hire and fire employees, but only with East 39th's approval (Doc. 51 at Art. II[g]).

Plaintiff's counsel opposes the motion, arguing that it must be denied as premature given that no depositions have been conducted. Additionally, plaintiff maintains in an affidavit in opposition to the application that the motion must be denied pursuant to *Espinal v Melville Snow*

Contrs., 98 NY2d 136 (2002) since she relied on the representations of Ivan Santos, the building manager and an employee of GMC, that he would attempt to rectify the problem with the fumes. Doc. 56.

In reply, GMC argues, inter alia, that plaintiff could not have relied on any representations by Santos to rectify the problem since GMC did not have the duty to address the fumes pursuant to the management agreement.

LEGAL CONCLUSIONS

It is well settled that a party moving for summary judgment pursuant to CPLR 3212 "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]). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324).

Here, GMC has established its prima facie entitlement to summary judgment by establishing that, as managing agent for East 39th, it was not liable to plaintiff, a third party to the management agreement, for nonfeasance (*See Caldwell v Two Columbus Ave. Condominium,* 92 AD3d 441, 442 [1st Dept 2012] citing *Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 11-12 [2006]). Additionally, GMC demonstrated that the management agreement clearly was not so "comprehensive and exclusive" as to entirely displace the obligation of East 39th to maintain and repair the premises and to hire and fire employees (*See Caldwell v Two Columbus Ave.*

Condominium, 92 AD3d at 442 citing *Clark v Kaplan*, 47 AD3d 462 [2008], *lv denied* 11 NY3d 701 [2008]).

However, contrary to GMC's contention, plaintiff raises an issue of fact regarding whether GMC may be liable pursuant to *Espinal v Melville Snow Contrs*., *supra*. In that case, the Court of Appeals held that a contractor cannot be found to have a duty to a non-contracting third party unless the contractor "launches a force or instrument of harm"; "plaintiff detrimentally relies on the continued performance of the contracting party's duties"; or "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal v Melville Snow Contrs*., 98 NY2d at 141 [citations omitted]). Plaintiff does not assert that GMC launched a force or instrument of harm or that it completely displaced the duty of East 39th to keep the premises safe. However, since she asserts in her affidavit that she relied on Santos' representations that he would address the problem posed by the fumes, she has raised an issue of fact regarding whether GMC was negligent (*cf., Vushaj v Insignia Residential Group, Inc*., 50 AD3d 393 [1st Dept 2008] [no evidence of any reliance by plaintiff on contractor's involvement with building maintenance]).

Despite urging that addressing the fumes was not within the scope of its duties pursuant to the management agreement, GMC overlooks Article IV of the said contract, which provides that "[GMC] is clothed with such other general authority and powers as may be necessary or advisable to carry out the spirit and intent of this Agreement." Doc. 51 at Art. IV. Given the extremely broad language of this provision, this Court cannot conclude as a matter of law that GMC's duties could not have encompassed addressing plaintiff's complaints about the fumes.

Finally, this Court agrees with plaintiff that GMC's motion is premature insofar as depositions have not been conducted and "facts essential to justify opposition may exist but

cannot [yet] be stated [by plaintiff].” (CPLR 3212[f]). Depositions may also shed additional light on plaintiff’s reliance on Santos and/or GMC, and thus whether GMC’s acts fall within the detrimental reliance exception set forth in *Espinal*.

Accordingly, it is hereby:

ORDERED that the motion by defendant Glenwood Management Corporation seeking summary judgment dismissing the complaint pursuant to CPLR 3212 is denied; and it is further

ORDERED that the parties are to appear for a preliminary conference on January 24, 2023 at 12:00 noon at 71 Thomas Street, Room 305, unless the parties first email a completed preliminary conference form (available on this Court’s website) to the Part 58 Clerk at sfc-part58-clerk@nycourts.gov by 3:00 p.m. on January 23, 2023.

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12/8/2022
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE