SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36

Index No.: 15066/2010

JESSICA BENTON CASTILLA and
ADOLFO MUNGUIA CASTILLA,

Plaintiff(s),

-against-

80 CRANBERRY STREET, LLC a/k/a
SOL GOLDMAN INVESTMENTS LLC,
Defendant(s).

DECISION

Present:
Hon. Judge Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: Reargue

Papers	Numbered
Notice of Motion and Affidavits Annexed..............................	1,2
Order to Show cause and Affidavits Annexed.........................	
Answering Affidavits.......	3
Replying Affidavits..	4
Exhibits...	
Other: ______________	

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Decision:

Defendant 80 Cranberry Street LLC a/k/a Sol Goldman Investments LLC ("80 Cranberry") has brought a motion to reargue a decision of this Court dated February 13, 2014, pursuant to CPLR sec. 5221. Defendant seeks to reargue this Court's decision and, upon reargument, (i) clarify that plaintiffs' cause of action for retaliation has been dismissed; and (ii) grant the defendant's request for dismissal of plaintiffs' bodily injury claims.

Plaintiffs, Jessica Benton Castilla ("Benton") and Adolfo Munguia Castilla ("Castilla"), by their attorney, oppose that part of the motion which seeks to dismiss the plaintiffs' bodily injury claims. Plaintiffs, by their attorney, primarily argue that CPLR sec. 3101(d) does not require the disclosure of the plaintiffs' expert or require an affidavit to be submitted on behalf of a doctor or other expert at any specific time. Plaintiffs also seek sanctions against the defendant for bringing

a frivolous motion in violation of 22 NYCRR sec. 130-1.1. Argument was heard in Part 36 before the undersigned on April 11, 2014.

Background

The captioned matter was brought by plaintiffs who are tenants in apartment 7M at 80 Cranberry Street, Brooklyn, New York, (the "subject apartment") against their landlord, the defendant herein, 80 Cranberry. The summons and complaint which was filed by plaintiffs' attorney recited several causes of action against the defendant. In addition to the alleged cause of action for bodily injury as a result of defendant's negligence (plaintiffs' third cause of action), the plaintiffs have alleged causes of action for breach of contract (first and second causes of action); violation of covenant of good faith and fair dealing (fourth cause of action); gross negligence (fifth cause of action); trespass (sixth cause of action); retaliation (seventh cause of action); harassment (eighth cause of action); assault (ninth cause of action); and intentional infliction of emotional distress (tenth cause of action).

A motion for summary judgment was brought by defendant, 80 Cranberry Street, on or about June 7, 2013, to dismiss the various causes of action contained in the plaintiffs' complaint. Defendant also moved to dismiss the plaintiffs' complaint pursuant to CPLR sec. 3211 for failure to state a cause of action and for other relief.

In this Court's decision dated February 13, 2014 (the "February 13, 2014 decision") several of plaintiffs' causes of action were dismissed including the claims for gross negligence, violation of good faith and fair dealing, trespass, harassment, and intentional infliction of emotional distress.

In addition, although the dismissal was not included in the "conclusion" paragraph, the cause of action for retaliation was dismissed by the Court upon a finding that the defendant had not acted to evict the plaintiffs nor had defendant assessed any fees or penalties against the plaintiffs as an act of retaliation.

Questions of facts were found to exist regarding the bodily injury claims made by plaintiffs allegedly due to the exposure to mold within the apartment. Summary judgment was also denied to the alleged breach of warrant of habitability due to the existence of questions of fact as to that cause of action.

As to the allegations of bodily injuries stemming from the existence of mold at the subject apartment the Court had reviewed evidence related to the water leaks into the apartment and the findings of the Special Referee and the environmental report submitted by the plaintiffs. The Court noted the findings made by a Special Referee, Maxine L. Archer, that mold was present in the apartment and Special Referee Archer had ordered the defendant to remove the mold in an expeditious manner at the defendant's sole cost and expense. (See decision of Special Referee Archer dated October 3, 2011).

This Court also reviewed the deposition transcript of the plaintiffs who alleged to have suffered physical ailments including burning eyes due to irritation and experiencing "floaters" in her eye (Jessica Benton) and wheezing and difficulty breathing (Adolfo Manguia Castilla).

The plaintiffs had testified at their depositions that they had received treatment for the above conditions. Ms. Benton has apparently recovered from her symptoms and Mr. Castilla claims to suffer from asthma as a result of exposure to mold.

Discussion

That portion of the motion which seeks to clarify this Court's decision of February 13, 2014, (as to the retaliation claim) is granted. As set forth above, the claim was in fact dismissed by the earlier decision.

The defendant moves to reargue that portion of the February 13, 2014 decision, which found a question of fact as to whether the actions of the defendant landlord in maintaining the building led to the presence of black mold at the subject apartment (the plaintiffs' third cause of action) and whether the existence of mold was the proximate cause of the alleged injuries suffered by the plaintiffs.

As to the issue of causation, defendant by its attorney, argues that the Court erred in not dismissing the plaintiffs bodily injury claims because plaintiff had not submitted an affidavit of a doctor or other scientific expert, citing *Parker v Mobil Oil Corp.* 7 NY3d 434 (2006); and *Clarke v Helene Curtis, Inc.* 293 AD2d 701 (2d Dept. 2002). The defendant also cites a recent case by the Court of Appeals involving a toxic tort allegation. The Court of Appeals in *Cornell v 300 West 51st Realty, LLC*, found that no cause of action existed for injuries allegedly attributed to the presence of mold in a residential apartment. In that particular case it is worth noting that the plaintiff had submitted an affidavit by a medical expert attesting to the causal link between the plaintiff's injuries and the presence mold. (See *Cornell v 300 West 51st Realty, LLC*, 2014 Slip Op. 02096 [2014]).

Plaintiffs, by their attorney, oppose the motion to dismiss the claim of bodily injury by focusing on sec. 3101 (d) of the CPLR. Counsel for plaintiffs strongly argues that sec. 3101(d), which requires the disclosure of experts expected to testify at trial, does not require a plaintiff to reveal the identity of any particular expert at any specific time (See affidavit of Harriet N. Boxer in opposition to motion to reargue, par. 5). It is Ms. Boxer's contention that the identity of an anticipated expert can be made "after the note of issue is filed" (See Boxer Aff. Par. 5). In support of this position, plaintiffs' counsel cites *Rivers v Birnbaum*, 102 AD3d 26[2d Dept. 2012]).

Plaintiffs' counsel, Harriet N. Boxer, informs the Court that her clients are of modest means and it is financially difficult to retain an expert. Ms. Boxer states that plaintiffs were uncertain which causes of action would survive the motion for summary judgment and would plan to designate the expert at a later date (Boxer Aff. Par. 6).

Furthermore, Ms. Boxer relies on the fact that she would call the treating physicians for which CPLR sec. 3101 (d) disclosure notices are not necessary (Boxer Aff. Par. 8).

This Court is sympathetic to the fact that Ms Boxer's clients have modest resources and that retaining of an expert may pose a financial hardship. However, Ms. Boxer's argument that no expert disclosure is mandated as per the expert disclosure provisions of CPLR 3101(d) is inapposite to the instant case. In the summary judgment motion previously before the Court, a prima facie case for dismissal had been brought by the defendant. Having established a prima facie case for dismissal it is incumbent on the opponent to raise a triable question of fact by introducing admissible evidence (See *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1986]).

In the instant case the defendant has offered expert opinion by Dr. Stuart Young (Ex. "J" and "K" in support of the motion for summary judgment). Dr. Young examined both plaintiffs and the available environmental inspections and concluded that the presence of mold appears slightly elevated and that the mold even if present in the apartment "it would not be the cause of her alleged symptoms" (Dr. Young exam of Jessica Benton pg. 5).

In the case of Adolfo Manguia Castilla, Dr. Young similarly found no causal connection of his alleged symptoms to the presence of mold (Dr. Young exam of Adolfo Manguia Castilla pg. 4).

In response to the motion for summary judgment, the evidence offered by the plaintiffs to support the claims of bodily injury related to mold is the affidavit of plaintiff Jessica Benton, photographs of the apartment and an environmental report of GAC Environmental, Inc. While there are references to medical treatment being given to the plaintiffs in the bill of particulars and in the deposition transcripts, there is no affidavit submitted which supports the allegations of bodily injuries suffered by the plaintiffs.

The Court has further reviewed its decision of February 13, 2014 in the context of this motion to reargue, and it is the opinion of the Court that plaintiffs have failed to offer sufficient evidence to rebut the defendants prima facie argument that plaintiffs have not shown any

connection between the alleged injuries and the presence of mold in the apartment. It is not in dispute that plaintiffs have not offered any medical or scientific evidence to oppose the dismissal motion and, in light of the most recent case law in this area (see *Cornell v 360 West 51St Street Realty LLC*, 2014 Slip Op. 02096 [Ct. of Appeals, 2014]) the Court is constrained to grant the motion to reargue, and upon reargument find that the plaintiffs' third cause of action for bodily injury as a result of the presence of mold must be dismissed.

In light of the determination reached by the Court in this decision, the application by plaintiffs for sanctions against the defendant for filing of a "frivolous motion" is denied.

The remaining causes of action (Plaintiffs' First and Second Causes of Action) for breach of warrant of habitability and breach of covenant of quiet enjoyment shall proceed to trial.

This shall constitute the decision and order of this Court.

Dated: June 3, 2014

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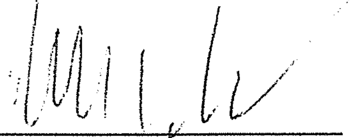

Hon. Bernard J. Graham, Justice
Supreme Court, Kings County