Caution
As of: Dec 26, 2013

[**2] JOANNE PAYSON, Plaintiff, -against- 50 SUTTON PLACE SOUTH OWNERS, INC. AND BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC, Defendant. Index No. 114357/09

114357/09

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2012 N.Y. Misc. LEXIS 4755; 2012 NY Slip Op 32526(U)

September 27, 2012, Decided
October 3, 2012, Filed

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

SUBSEQUENT HISTORY: Reargument denied by, Modified by Payson v. 50 Sutton Place S. Owners, Inc., 2012 N.Y. Misc. LEXIS 6157 (N.Y. Sup. Ct., Dec. 13, 2012)
Affirmed by Payson v. 50 Sutton Place S. Owners, Inc., 107 A.D.3d 506, 967 N.Y.S.2d 66, 2013 N.Y. App. Div. LEXIS 4347 (N.Y. App. Div. 1st Dep't, 2013)

JUDGES: [*1] HON. CYNTHIA S. KERN, J.S.C.

OPINION BY: Cynthia S. Kern

OPINION

DECISION/ORDER

HON. CYNTHIA S. KERN, J.S.C.

Plaintiff, who owns a cooperative apartment in the building located at 50 Sutton Place, has commenced this action against the cooperative and building manager to recover damages based on alleged water damage and mold contamination in her apartment. She has brought two separate claims. One claim is for damages which her insurance company has not paid her for and the other claim is a claim that was assigned to her by her insurance carrier. Defendants have brought the present motion for summary judgment dismissing plaintiff's complaint on the grounds that the complaint is barred by the statute of limitations and that plaintiff has waived her [**3] right to bring the assigned claim. Plaintiff has brought a cross-motion for summary judgment on her claims for breach of the warranty of habitability, breach of the proprietary lease, negligence and attorneys' fees. For the reasons stated below, defendants' motion for summary judgment to dismiss on the ground of the statute of limitations is granted solely to the extent that plaintiff's claims for monetary damages are limited to any alleged damages that occurred [*2] within three years of the

commencement of the instant action. Their motion to dismiss the assigned claim on the ground that plaintiff has waived the right to bring this claim is granted. Plaintiff's cross-motion for summary judgment is denied in its entirety.

On or about September 27, 2006, plaintiff reported a loss to her property insurance carrier consisting of property damage arising from leaks and molds in her cooperative apartment. Plaintiff first noticed the leaks in 2005 and the mold condition in June of 2006. After plaintiff reported the loss in September 2006, the insurance company paid out insurance proceeds to the plaintiff for relocation expenses and for costs incurred in restoring the apartment. On October 14, 2009, plaintiff commenced the present action seeking money damages for items that had not been reimbursed by her insurance carrier. Subsequent to the commencement of the action, plaintiff obtained an assignment form her insurance company of its subrogation claim and subsequently amended the complaint to assert this subrogation claim, which was interposed in September 2011.

The proprietary lease contains the following provision:

> In the event that the Lessee suffers loss [*3] or damage for which the Lessor would be liable, and the Lessee carries insurance which covers such loss or damage and such insurance policy or policies contain a waiver of subrogation against the Lessor then in such event the Lessee releases the Lessor from any liability with respect to such loss or damage.

[**4] The insurance policy which was issued to plaintiff lessee by Vigilant Insurance Company provides as follows:

> All of your rights of recovery will become our rights to the extent of any payment we make under this policy. A covered person will do everything necessary to secure such rights: and do nothing after a loss to prejudice such rights. However, you may waive any rights of recovery from another person or organization for a covered loss in writing before the loss occurs.
>
> Condominiums: We waive any rights of recovery against the corporation or association of property owners of the condominium where the residence is located.

The first issue which the court will address is whether the plaintiff and her assignor have waived the right of subrogation against the defendants pursuant to the foregoing provisions of the proprietary lease and insurance policy. This issue was addressed by the [*4] First Department in *Continental Ins. Co. v 115-123 W. 29th St. Owners Corp.*, 275 A.D.2d 604, 713 N.Y.S.2d 38 (1st Dep't 2000). The issue in that case was whether the insurance company had waived its right of subrogation pursuant to the waiver of subrogation clause in the proprietary lease and the language of the insurance policy. The proprietary lease in that case contained the same language as the proprietary lease in the present case, specifically providing that there would be a release of liability if "such insurance policy or policies contain a waiver of subrogation against the landlord." The insurance policy in that case did "not 'contain a waiver of subrogation against the Landlord' which would trigger" the release. *Id.* Rather, the insurance policy authorized the lessee to waive any rights of recovery against another for a covered loss but did not actually effect a waiver of subrogation against the landlord. *Id*

In the present case, unlike *Continental*, the court finds that there has been an explicit waiver of the right of subrogation based on the language in the insurance policy referring to [**5] condominiums. The insurance policy unambiguously provides that the insurance company waives any rights [*5] of recovery against condominiums. This language is an explicit waiver of the insurance company's rights to seek subrogation as against a condominium. Although the building in question is a cooperative, rather than a condominium, the court finds that this waiver clause does apply based on the court's reading of the entire insurance policy. The policy specifically identifies the property that is insured under it as the "Condominium at 50 Sutton Place South, New York, New York." The policy identifies the type of coverage that it affords as "Deluxe Condominium Coverage." The policy also contains a promise to pay

losses that occur at and to the covered condominium at 50 Sutton Place South. Because the policy in question clearly refers to the apartment that is insured as a condominium and because the policy clearly provides that the insurance company waives any subrogation claims that it has against a condominium, it was clearly the intent of the drafter of the insurance policy that any subrogation claims or rights of recovery were being waived as against the apartment in question even though it is a cooperative, There is no other way for the policy to be interpreted consistently and harmoniously. [*6] Moreover, to the extent that the waiver of subrogation provision is ambiguous, the ambiguity should be construed as against the insurance company which drafted the policy. *See Gould Investors v Travelers Casualty & Surety*, 83 A.D.3d 660, 920 N.Y.S.2d 395 (2d Dept 2011).

Defendants' motion to dismiss plaintiff's complaint on the ground that it is barred by the statute of limitations is granted solely to the extent that plaintiff's claim is limited to any damages that occurred within three years of the commencement of the instant action. CPLR section 214 (4) provides that "an action to recover damages for an injury to property" shall be commenced within three years. The courts have clearly held that a claim for damages based on [**6] the failure of a cooperative or condominium to repair leaks which cause water damage "is limited by CPLR 214(4) to my alleged damage that occurred within three years of the commencement of the ... action." *King v 870 Riverside Dr. Hous. Dev, Fund Corp.*, 74 A.D.3d 494, 902 N.Y.S.2d 86 (1st Dep't 2010); *Kaymakcian v Board of managers of Charles House Condominium*, 49 A.D. 3d 407, 854 N.Y.S.2d 52 (1st Dep't 2008). As long as any of the property damage occurred within the three year period prior to the commencement [*7] of the action, plaintiff is not time barred from bringing the claim as the failure to fix a recurring leak constitutes a continuing wrong that "is not referable exclusively to the day the original wrong was committed." *Kaymakcian*, 49 A.D.3d at 407, *King*, 74 A.D.3d at 496.

In the present case, plaintiff is not time barred from asserting any claims for damages that she claimed occurred within three years prior to the commencement of the action but she is time barred from bringing any claims based on damage that occurred more than three years prior to the commencement of the action. Since she has clearly alleged that she has incurred water damage to her property within three years prior to the commencement of this action and defendants' have failed to establish as a matter of law that there was no damage to her apartment within the three years prior to the commencement of the action, plaintiff is not time barred from bringing the present action. Plaintiff therefore can proceed to recover for any damages that she claims occurred three years prior to the commencement of the action.

Plaintiff's cross-motion for summary judgment on her claims for breach of the proprietary lease, breach of the [*8] warranty of habitability, negligence and attorneys' fees is also denied as there are numerous disputed issues of fact regarding these claims which cannot be summarily resolved. To support her motion for summary judgment on these claims, which are all based on her [**7] allegation that defendants have failed to keep the building in good repair and have failed to repair the water leaks and remediate the mold in her apartment, plaintiff submits her own affidavit and unauthenticated expert reports which she has attached as exhibits to her moving papers. In opposition to the motion, the defendants have submitted the affidavit of the property manager assigned to manage the cooperative building in which plaintiff resides. Based on this court's review of the affidavits submitted by both sides, the court finds that there are numerous disputed factual issues as to when or whether the apartment became uninhabitable and as to whether plaintiff allowed defendants access to the apartment to both make repairs and to assess the situation to determine what repairs were required to be made. Moreover, the unauthenticated expert reports which plaintiff has attached to her motion papers are not admissible for [*9] purposes of supporting her request for summary judgment. *See Vozdik v Frederick*, 146 A.D.2d 898, 536 N.Y.S.2d 599 (3rd Dep't 1989) (unsworn investigative reports should not be considered in support of summary judgment motion). Based on the foregoing, plaintiff's cross-motion for summary judgment is denied.

This court need not reach defendants' argument that the cross motion should not be considered on the ground that it is untimely as the motion is being denied on the merits. However, the court notes that the stipulation entered into between the parties and so ordered by the court provides that any dispositive motion must be made by June 1 ,2012 and "either party may cross-move for dispositive relief." Pursuant to the foregoing language,

the court finds that the cross-motion for summary judgment is timely since the stipulation specifically provides for a cross-motion to be made in response to a motion made by June 1, 2012.

Based on the foregoing, the motion for summary judgment dismissing the complaint on [**8] the ground that it is barred by the statute of limitations is granted to the extent that plaintiff's claim for money damages is limited to the period three years prior to the commencement of the action [*10] and the motion for summary judgment dismissing the subrogation claim is granted and that claim is dismissed. The cross-motion are denied in its entirety. This constitutes the decision, order and judgment of the court.

Dated: 9/27/12

/s/ Cynthia S. Kern

J.S.C.