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Marcia Spalma, Plaintiff, against Lawrence Towers Apartments, LLC, and AMA, INC., Defendants

11311/07

SUPREME COURT OF NEW YORK, KINGS COUNTY

22 Misc. 3d 1109(A); 880 N.Y.S.2d 227; 2008 N.Y. Misc. LEXIS 7352; 2008 NY Slip Op 52618(U)

November 25, 2008, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

HEADNOTES

[**227] [*1109A] Limitation of Actions--Three-Year Statute of Limitations. Release--Scope of Release.

COUNSEL: [***1] For Plaintiff: McCallon & Associates, New York, NY.

For Defendant: Arthur P. Xanthos, New York, NY.

JUDGES: Francois A. Rivera, J.

OPINION BY: Francois A. Rivera

OPINION

Francois A. Rivera, J.

Defendants Lawrence Towers Apartments, LLC., and AMA, INC. hereinafter the movants) move for summary judgment dismissing plaintiffs' complaint pursuant to CPLR §§3211(a)(5), 3212, 203, and 214-c because the claims are barred by the applicable statute of limitations. In the alternative, the movants seek dismissal pursuant to CPLR §§3211 and 3212 because the plaintiff allegedly released the defendants from liability for her injuries. In the alternative the movants seek dismissal of the complaint because the plaintiff's alleged injuries are not proximately caused by exposure to mold or other toxic substances. In the alternative the movants seek a hearing pursuant to *Frye v. United States* to contest the scientific basis of plaintiff's claim of causation of her alleged injury. Plaintiff opposes the motion.

PLEADINGS

On April 3, 2007, plaintiff commenced the instant action by filing a summons and complaint alleging the following salient facts. The defendants own and manage

a residential apartment building located at 3310 Norstrand Avenue [***2] (hereinafter the subject property). In April of 2003, plaintiff moved from apartment L4 in a building located at 3280 Nostrand Avenue to apartment 211 in the subject property. Sometime after April of 2003, plaintiff moved from apartment 211 to apartment 109 in the subject property. While residing in apartment 109 (hereinafter the subject apartment), plaintiff was exposed to mold and other toxic substances resulting in personal injuries. Plaintiff's injuries as set forth in her verified bill of particulars are aggravation of her chronic obstructive pulmonary disease, obstructive airway disease, and bronchial asthma, as well as, extreme difficulty breathing, coughing, aggravated psoriasis, and anxiety and mental anguish.

Plaintiff's instant complaint states that she brought a prior lawsuit in Kings County Supreme Court under index number 3303/03 (hereinafter the prior litigation) against the same defendants for personal injuries caused by exposure to substances while residing in apartment L4 at 3280 Nostrand Avenue. The prior litigation was against the movants based on their alleged ownership and management of that building. The complaint further states that in May of 2006 the prior [***3] litigation was settled. On May 25, 2007, issue was joined in the instant action when defendants served their verified answer.

MOTION PAPERS

The movants papers consist of their attorney's affirmation, an affidavit from the manager of the subject property, an affirmation of the physician who conducted plaintiff's independent medical examination and eight exhibits marked A through H. Exhibit A is plaintiff's summons and complaint. Exhibit B is defendants' verified answer. Exhibit C is a document from the King's County Clerk's office showing that the index number of the instant case was assigned on April 3, 2007. Exhibit D is a copy of a release signed by the plaintiff on May 31, 2006 which released defendants Lawrence Towers Apartments, LLC., AMA, Inc., and Robert Trump for all claims arising out of the prior litigation. Exhibit E are excerpts from an examination before trial of the plaintiff. Exhibit F is a copy of the plaintiff's bill of particulars in the prior litigation. Exhibit G is a copy of the plaintiff's bill of particulars in the instant action. Exhibit H is a copy of the bargain and sale deed of the premise described as 3280-3310 Nostrand Avenue, Brooklyn, New York.

Plaintiff's [***4] affirmation in opposition consists of an attorney's affirmation and seven exhibits marked 1 through 7. Exhibit 1 is a copy of the summons and complaint from the prior litigation. Exhibit 2 is a handwritten letter, dated July 28, 2006, signed by Dr. Prabhat Soni, plaintiff's treating internist. Exhibit 3 is a report prepared by Olmsted Environmental Services, Inc., dated November 5, 2005. Exhibit 4 is another report prepared by Olmsted Environmental Services, Inc., dated July 21, 2006. Exhibit 5 purports to be a copy of a medical laboratory report of the plaintiff. Exhibit 6 purports to be copies of medical records of the plaintiff. Exhibit 7 is a copy of a handwritten note on the prescription pad of Doctor Johanning stating that plaintiff should relocate to a clean apartment. The note shows a partial date of December 16 with the year cut off.

Plaintiff submitted separately another affidavit that she signed on June 13, 2008 and an affidavit of Dr. Prabhat Soni signed on September 11, 2008. Dr. Soni's affidavit annexes the same note marked as exhibit 2.

Defendants' reply contained an attorney's affirmation, a physician's affirmation and two exhibits consisting of excerpts of plaintiff's [***5] examination before trial.

APPLICABLE LAW

CPLR Rule 3211(a)(5), in pertinent part, permits a party to move for judgment dismissing one or more causes of action asserted against the moving party on the ground that the cause of action may not be maintained because of release and because of statute of limitations.

CPLR 2214 (c) provides, in pertinent part, that each party shall furnish to the court all papers served by him. The moving party shall furnish at the hearing all other papers not already in the possession of the court necessary to the consideration of the questions involved.

CPLR 3212 permits a party to move for summary judgment in any action, after issue has been joined. The motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of

action or defense shall be established sufficiently to warrant [***6] the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

CPLR § 203(a) and (c) provides that the time within which an action must be commenced shall be computed from the time the cause of action accrued to the time the claim is interposed. In an action which is commenced by filing, a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced.

CPLR § 214-c pertains to certain types of injury caused by latent effects to exposure from substances and provides as follows: Certain actions to be commenced within three years of discovery. 1. In this section: "exposure" means direct or indirect exposure by absorption, contact, ingestion, inhalation, implantation or injection. 2. Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, [***7] upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.

DISCUSSION

Dismissal based on the statute of limitations

A defendant who seeks dismissal of a complaint pursuant to CPLR §§ 3211 (a) (5) and 3212 on the grounds that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to commence an action has expired. The burden then shifts to the plaintiff to aver evidentiary facts establishing that his or her cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies (*LaRocca v. DeRicco*, 39 AD3d 486-487, 833 N.Y.S.2d 213 [2nd Dept 2007]). In order to make a prima facie showing, the defendant must establish, inter alia, when the cause of action accrued (see, *Swift v. New York Medical Coll.*, 25 AD3d 686, 808 N.Y.S.2d 731 [2nd Dept 2006]).

The movants correctly cite CPLR § 214-c as the applicable statute of limitations based on plaintiff's claim of injury caused [***8] by latent effects to exposure from substances. CPLR § 214-c provides that an action must be commenced within three years from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier. The issue as to when the statute of limitations begins to run under CPLR §214(c)(2) has recently been decided by the Court of Appeals in *Wetherill v. Eli Lilly & Co.*, 89 NY2d 506, 513, 678 N.E.2d 474, 655 N.Y.S.2d 862 where it was held that the statutory language, "discovery of the injury", "was intended to mean discovery of the condition on which the claim was based and nothing more". The court, in adopting this interpretation, explicitly rejected plaintiff's "complex concept" that "discovery of the injury" (*Wetherill, supra* at 514) involves both the discovery of the condition and the non-organic etiology of that condition.

Plaintiff commenced the instant action on April 3, 2007. The movants use the excerpts of plaintiff's examination before trial to show that at various times prior to April of 2004, plaintiff was aware of or had discovered that she had various ailments. The movants contend that [***9] the instant action was commenced more than three years after discovery of these various ailments and is therefore untimely.

Plaintiff's complaint alleges that in April of 2003, she moved to apartment 211 in the subject property and that sometime thereafter she moved to the subject apartment number 109. There is nothing in the complaint or plaintiff's opposition papers which sets forth the date plaintiff moved to the subject apartment from apartment 211. Nevertheless, the complaint does state that the plaintiff's exposure to mold and toxic substances occurred after moving into apartment 109.

On the other hand, the affirmation of defendants's counsel alleges that plaintiff moved into apartment 109 in July of 2003. The affirmation, however, demonstrates no personal knowledge of this or any other germane facts and therefore has no intrinsic evidentiary value (*Morales v. Coram Materials Corp.*, 51 AD3d 86, 96, 853 N.Y.S.2d 611 [2nd Dept 2008]). There is nothing in the defendants' papers which support July 2003 as the time of the move.

Inasmuch as plaintiff's instant cause of action is based on exposure to toxic substance sometime after April 2003, when she moved to the subject apartment, the fact that she may [***10] have discovered that she had some ailments prior to the move clearly has no bearing on the timeliness of her current action. The salient question is when did the plaintiff discover any symptoms caused by her exposure to toxic substance emanating from apartment the subject apartment. The fact that the plaintiff may have discovered some ailments prior to moving to the subject may be relevant to the issue of causation , it is irrelevant to the issue of timeliness of the claim.

The movants do not demonstrate the date the plaintiff discovered or should have discovered her injury caused by the exposure to toxic substance present in the subject apartment and therefore do not established when plaintiff's instant cause of action accrued. Without showing the date of accrual, the movants cannot establish that the plaintiff's complaint is time barred.

Dismissal based on the plaintiff's release

The movants seek dismissal of the complaint on the alternative basis that the plaintiff has released the defendants for the claims she is currently suing them for. The meaning and coverage of a general release depends on the controversy being settled and upon the purpose for which the release was actually given; [***11] a release may not be read to cover matters which the parties did not desire or intend to dispose of (*Ofman v. Campos*, 12 AD3d 581, 788 N.Y.S.2d 115 [2nd Dept 2004], citing *Lefrak SBN Assocs. v. Kennedy Galleries*, 203 AD2d 256, 257, 609 N.Y.S.2d 651 [2nd Dept 1994]).

The movants rely on the release executed by the plaintiff on May 31, 2006 which they annexed to their motion as exhibit D. The unequivocal language of the release limited its coverage to all claims encompassed by the suit commenced in the prior litigation under index number 3303/03. The defendants, however, did not annex a copy of the complaint of the prior litigation. Without it, the defendants cannot show that the alleged transactions or occurrences of defendants' conduct in the prior litigation and the instant action are the same.

Under either the procedural vehicle of CPLR §§ 3211 or 3212, the court may properly deny the motion without prejudice based on the failure to annex the prior complaint.

CPLR § 2214(c), permits the denial of the motion based on the movants failure to include a document necessary to the consideration of the question. CPLR § 3212 permits denial of the motion for the movants failure to make a prima facie showing without regard to the [***12] sufficiency of plaintiff's opposition papers (*see Greene v. Wood*, 6 AD3d 976, 775 N.Y.S.2d 192 [3rd Dept 2004]).

However, pursuant to CPLR §3211, the court may review plaintiff's opposition papers to fill the technical deficiency. The plaintiff's opposition papers annexes as exhibit 1 a copy of the complaint in the prior litigation. Judicial economy would be better served by deciding the issue on the merits. A comparison of the instant complaint and the prior litigation complaint demonstrates that the alleged claims are factually different. The prior action was for injury caused by exposure to toxic substances in apartment L4 at 3280 Nostrand Avenue during the period of November of 2001 until the time that plaintiff left in April of 2003. The instant action is for injury caused by exposure to toxic substances in apartment 109 at 3310 Nostrand Avenue from sometime after April 2003 until at least 2006.

Therefore, plaintiff's release in the prior litigation does not bar the instant action.

Dismissal based on lack of causation

It is well established that to obtain summary judgment, a movant must come forward with admissible evidence establishing the lack of merit to his opponent's cause of action (*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966, 520 N.E.2d 512, 525 N.Y.S.2d 793 [1988]. [***13] Once the moving party has made a prima facie showing of entitlement to summary judgment, the burden shifts to the opponent to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which requires a trial (*Gilbert Frank Corp. v. Federal Ins. Co., supra*). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose (*Zuckerman v. City of New York*, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]).

For this branch of the motion, the movants submitted an affirmation of Dr. Stuart H. Young, an allergist who conducted plaintiff's independent medical examination on behalf of the movants. Dr. Young's affirmation, referenced and adopted his annexed curriculum vitae and

his report. The report encompassed his medical examination of the plaintiff conducted on March 12 and May 5, 2008. Dr Young is the director of allergy fellows' clinical education in the department of internal medicine of Mount Sinai School of Medicine. Dr. Young took a medical and environmental history from the plaintiff. He then reviewed her verified bill of particulars, Dr. Eckardt Johanning medical records, laboratory reports of plaintiff's [***14] allergy tests, and records of fourteen hospital admissions and two emergency room visits by the plaintiff at the New York Community Hospital.

Dr. Young noted that plaintiff was admitted to New York Community Hospital on twelve separate occasions prior to April 2003, for chronic obstructive pulmonary disease, uncontrolled diabetes and hypertension. All of these admissions occurred prior to her move to apartment 109. He found that the plaintiff had no allergy to mold or any other substance based on her normal test results to six distinct allergy test panels conducted by IBT laboratory since 2005. Four of the six tests were Hypersensitivity Pnemontis EIA Panel tests, the other two were building related Illness Panel II studies. All of the results were contained in the medical records of Dr. Eckardt Johanning, her treating physician. Dr. Young offered the following opinion to a reasonable degree a medical certainty. First, he found that plaintiff's alleged injuries, as set forth in her bill of particulars, are not and could not be caused by exposure to mold or any other substance found in apartment 109 because plaintiff has been tested and found to have no allergy to mold or any another [***15] substance. He opined that if plaintiff's symptoms and injuries were due to exposure to latent substances in apartment 109, she would have experienced improvements of her symptoms after leaving from apartment 109 to a mold free environment. Dr. Young further opined that plaintiff's reported history of continued and persistent symptoms after leaving apartment 109 to an environment free of mold and toxic substances gave further support to his claim of no causation. He also found that plaintiff's claimed injuries were due to long standing respiratory and pulmonary issues that existed long before her move to apartment 109 in the subject property. It is noted that, Dr. Young's opinion did not depend on the existence or lack of existence of mold or toxic substances in apartment 109.

The movants have made a prima facie showing that plaintiff's alleged injuries were not caused by exposure to mold or any other substance at the subject property. The movants' showing has shifted the burden to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which requires a trial.

For the reasons set forth below, plaintiff's opposition [***16] papers are insufficient to raise an issue of fact. As previously indicated, the affirmation of plaintiff's counsel, demonstrates no personal knowledge of this or any other germane facts and therefore has no intrinsic evidentiary value (*Morales v. Coram Materials Corp.*, 51 AD3d 86, 96, 853 N.Y.S.2d 611 [2nd Dept 2008]). However, the affirmation of an attorney, even if he has no personal knowledge of the facts, may of course, serve as a vehicle for the submission of acceptable attachment which do provide evidentiary proof in admissible form e.g. documents, transcripts (*Worldwide Assets Publishing LLC v. Karafotias*, 9 Misc 3d 390 at 395, 801 N.Y.S.2d 721 [Civ.Ct., Kings County 2005, citing *Zuckerman v. City of New York*, 49 NY2d 557, 563, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]. The following exhibits in plaintiff's opposition papers are unsworn and therefore inadmissible. Dr. Prabhat's handwritten letter annexed as Exhibit 2; the reports prepared by Olmsted Environmental Services, Inc., dated November 5, 2005 and July 21, 2006, annexed as Exhibit 3 and Exhibit 4; the medical laboratory reports annexed as Exhibit 5, the medical records annexed as Exhibit 6, and the handwritten note on the prescription pad of Doctor Johanning. Plaintiff also submitted separately [***17] another affidavit that she signed on June 13, 2008 and an affidavit of Dr. Prabhat Soni signed on September 11, 2008. Plaintiff's June 13, 2008, affidavit only addresses the issue of the timeliness of her action. Dr. Soni's September 11, 2008 affidavit references as annexed exhibit the handwritten that was annexed to the plaintiff's opposition papers as Exhibit 2. Dr. Soni affidavit states her conclusion that plaintiff's deteriorated health condition is due to mold in apartment 109. She basis the opinion on her review of plaintiff's medical records and the unaffirmed environmental reports of Olmstead Environmental. Dr. Soni does not address Dr. Young's contention that the plaintiff has no allergy to mold or any other substance. Dr. Soni's conclusory assertions are insufficient to raise a triable issue of fact on the lack of causation of plaintiff's injuries to exposure to mold or any other substance in apartment 109.

The movants motion for summary judgment is granted and the plaintiff's complaint is dismissed.

The foregoing constitutes the decision and order of this court.