SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ PART 55

Justice

Brett Morrison

- v -

The Grand Chelsea Condominium

INDEX NO. 103194/09

MOTION DATE _____

MOTION SEQ. NO. 07

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision.

Dated: 7/25/12

_____ J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

BRET MORRISON,

Plaintiff,

-against-

THE GRAND CHELSEA CONDOMINIUM, THE BOARD OF MANAGERS OF THE GRAND CHELSEA CONDOMINIUM, ROSE ASSOCIATES and THE ARGO CORP.,

Defendants.

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Index No. 103194/09

DECISION/ORDER

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

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1, 2
Notice of Cross Motion and Answering Affidavits.....	3
Affirmations in Opposition to the Cross-Motion.....	
Replying Affidavits.....	4,5
Exhibits.....	6

Plaintiff Bret Morrison commenced the instant action seeking monetary damages for damage caused to his apartment by water leaks and equitable relief seeking repair of the damage. Defendants now move for summary judgment dismissing plaintiff's complaint. For the reasons set forth more fully below, defendants' motion is granted in part and denied in part.

The relevant facts are as follows. Plaintiff alleges that defendants negligently allowed a water leak to exist in his apartment, which resulted in a mold condition which allegedly caused him to sustain bodily injuries and damage to his personal property. Plaintiff owns condominium

unit Apartment 7G at 270 West 17th St. in Manhattan. He purchased the apartment in June 2001. The exterior and common areas of the building are owned by defendant The Grand Chelsea Condominium and are controlled, managed, maintained and supervised by defendant the Board of Managers of The Grand Chelsea Condominium. Defendant Rose Associates was the building's management agent until late 2007. It was replaced by defendant The Argo Group in February 2008.

There appear to have been two separate leaks in plaintiff's apartment, one of which plaintiff noticed immediately upon moving in, in June 2001 and is not the subject of this action, and one which began in 2006, which is the subject herein. On August 7, 2006, plaintiff's frequent houseguest Loren Veccio notified the front desk concierge that there was water damage on the bathroom ceiling that appeared to be the result of a leak. At some point thereafter, Manny Dias, the building superintendent, went to the bathroom and observed a bubble on the ceiling as "big as a softball." Mr. Dias testified that at some unspecified point in time he also saw water leaking from the bathroom into the bedroom and "off white" discoloration on the wall in the bedroom. It was suggested that the toilet seal in the apartment above, 8G, was the cause of the leak. The owner of that apartment, Mr. Thomas Kidwell testified that in September 2006 he paid to have the toilet seal replaced but he later learned that the job had not been done. Mr. Kidwell also testified that in October or November 2006, he paid Mr. Dias to scrape and paint plaintiff's bathroom ceiling. It is unclear from the testimony whether this work was done and, if it was, who did it and when. Ivan Iglesias, the building handyman, denies ever having done the work. Nonetheless, by May 2007, dampness and a water bubble reappeared in the same place. Nothing was done until October 2007, when the toilet seal in apartment 8G was finally replaced. Ms.

Veccio testified that she complained about the leak and water damage repeatedly during this time period.

Sometime in October 2007 plaintiff contacted Olmsted Environmental Services, Inc., concerned that mold was developing in his apartment because of the dampness. Mr. Olmsted tested the apartment on October 22, 2007 and issued a report dated November 14, 2007. In the report, Mr. Olmsted found the apartment did contain mold. Plaintiff, who is HIV positive, vacated the apartment on November 28, 2007 on the advice of Mr. Olmsted and his doctor, Dr. Frechette. On November 27, 2007, plaintiff sent defendants a copy of the Olmsted Report by certified mail. Subsequently, plaintiff retained a licensed professional engineer, Carl Borsari, who inspected the apartment on December 15, 2007. He found that the bathroom ceiling still felt damp to the touch.

In September 2008, defendants retained an environmental firm, AMG Environmental, to perform "mold remediation services" in plaintiff's apartment. AMG recommended that the sheetrock be removed down to the underlying studs to locate the source of the leak. Defendants did not do this. Mr. Olmsted inspected the apartment again in October 2008 and again found mold. Plaintiff alleges that the leaks continued. A new leak apparently began sometime in September 2009 into the bathrooms of apartment 8G and 7G. On October 21, 2009, Mr. Olmsted again found water damage, mold, and active leaks. On October 13, 2009, defendants hired Wynn Plumbing to inspect the bathroom of 8G and found a leak coming from the shower of 9G. That shower was replaced on October 19, 2009. Nevertheless, on February 3, 2010, Mr. Borsari found water actually dripping from the ceiling of the bathroom in 7G. On February 4, Wynn Plumbing found a leak from the 8G shower into 7G. That shower was replaced on

February 9, 2010. Wynn also inspected 9G on February 5, 2010 and found another defect causing another leak. They fixed the defect on February 8, 2010. Thereafter, the leaks stopped.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

Defendants have made a motion for summary judgment dismissing plaintiff's claim for personal injuries on the ground that the undisputed facts establish that the mold in the apartment did not cause plaintiff's injuries. The First Department addressed the issue of whether mold can cause illness in *Fraser v 301-52 Townhouse Corp.*, 57 A.D.3d 416 (1st Dept 2008). In *Fraser*, the court held that, while a plaintiff may be able to raise a triable issue of fact as to whether mold causes illness, the plaintiffs in that particular case failed to do so because their expert failed to establish that the scientific community general accepts that mold can cause disease. *See id.* However, the *Fraser* court explicitly stated that, "We stress that our holding does not set forth any general rule that dampness and mold can never be considered the cause of disease, only that such causation has not been demonstrated by the evidence presented by plaintiffs here." *Id.* at 418. The First Department later expounded on this very statement in *Cornell v 260 West 51st Street Realty, LLC*, 95 A.D.3d 50, 60 (1st Dept 2012), in which it held that, in that case, plaintiff

had presented enough evidence to raise a triable issue of fact as to whether mold had caused her symptoms. In *Cornell*, the First Department made it clear that defendant must first meet his burden of establishing that mold did not cause plaintiff's illness, which he may do by submitting an expert affidavit. The burden then shifts to plaintiff to raise a question of fact as to whether the mold did in fact cause his symptoms. Plaintiff may meet that burden by submitting an expert affidavit in turn. If plaintiff meets his burden, then the issue goes to the jury.

In *Cornell*, the court found that defendants met their burden by submitting an expert affidavit. That expert did not examine plaintiff but concluded after reviewing her medical records that her symptoms had not been caused by mold (although he did concede that mold could cause various illnesses). The burden then shifted to the plaintiff. Plaintiff met her burden by submitting the affidavit of her treating physician who reached the opposite conclusion and cited a variety of studies regarding mold, as well as plaintiff's own medical tests, in support thereof. The *Cornell* court found that the affidavit of plaintiff's treating physician raised an issue of fact as to whether mold had caused her symptoms and that the lower court should have denied defendants' motion for summary judgment.

In the instant case, defendants have met their initial burden of establishing that the mold did not cause plaintiff's condition by submitting the affirmation of Dr. Stuart H. Young, a certified allergist, who examined plaintiff on April 1, 2010. Just like the defendants' expert in *Cornell*, Dr. Young concludes that, based on plaintiff's medical records and medical history (but not his examination of plaintiff), plaintiff's alleged symptoms are not the result of any exposure to mold or bacteria. Dr. Young also states that current medical science does not support the conclusion that mold can ever cause the symptoms allegedly experienced by plaintiff. This

affidavit is sufficient, as in *Cornell*, to establish defendants' prima facie case regarding a lack of causation. The burden then shifts to plaintiff to raise a triable issue of fact regarding causation. However, plaintiff fails to meet this burden. He does not submit the affirmation or affidavit of an examining or treating physician or of any expert on the issue of causation. He therefore fails to raise an issue of triable fact. Accordingly, defendants' motion to dismiss plaintiff's cause of action for personal injuries based on negligence is granted.

Defendants' motion for summary judgment dismissing plaintiff's negligence claim for property damage on the ground that the claim is time barred is denied. They assert that plaintiff testified that his property was damaged solely from the 2001 leak but this is a mischaracterization of plaintiff's testimony. Plaintiff testified that his books, artwork, furniture and other personal property were damaged by the mold but he does not specifically state exactly when the damage occurred. Therefore, the timing of the damage, whether the mold caused the damage and the extent of the damage are questions for the jury.

Defendants' motion for sanctions for spoliation is also denied. The party requesting sanctions must establish that the other party disposed of the subject item "intentionally or negligently" and leaves the other party "without a means to defend the action." *Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 A.D.3d 717 (2nd Dept 2009). Defendants have failed to establish any intent or bad faith and the loss of the spoliated items does not affect their ability to defend the action but rather plaintiff's ability to prove damages. Because the disposal of the allegedly damaged items does not prejudice defendants, this court exercises its discretion in declining to impose sanctions.

The court now turns to defendants' motion for summary judgment dismissing plaintiff's

nuisance claim. The elements of a claim for a private nuisance are "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failing to act." *Berenger v 261 West LLC*, 93 A.D.3d 175, 182 (1st Dept 2012). "... [A] cooperative's failure to take action may constitute a nuisance in some cases..." *George v Board of Directors of One West 64th Street, Inc.*, 2011 NY Slip Op 32325U (Sup. Ct., New York Cty August 24, 2011).

In the instant case, there are numerous disputed issues of fact as to whether defendants substantially and intentionally interfered with plaintiff's use and enjoyment of his property by failing to remedy the water and mold condition after being notified of these conditions. There are clearly disputed issues of fact as to whether their failure to promptly remedy the water leak in plaintiff's apartment (it was over a year from the time of the first complaint until the first attempt at remedying the condition, replacing the toilet seal in 8G, was made) did not cause the mold. Therefore, their motion for summary judgment dismissing plaintiff's nuisance claim is denied.

Finally, defendants state that they are seeking summary judgment dismissing plaintiff's constructive eviction claim but give no legal or factual basis for that motion. In fact, they do not address that cause of action in their moving papers at all. That portion of defendants' motion is therefore denied.

Accordingly, defendants' motion for summary judgment is granted in part and denied in part. Plaintiff's negligence cause of action is dismissed insofar as it alleges personal injuries but it remains insofar as it alleges property damage. Defendants' motion for summary judgment dismissing plaintiff's claims for constructive eviction and nuisance are denied. This constitutes the decision and order of the court.

Dated: 7/25/12

Enter: _____
J.S.C.

FILED

JUL 30 2012

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