SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. Justice PART _____

Index Number : 151207/2013
SYLLA-BA, KHADIDIATOU
vs
COLTON CONDOMINIUM
Sequence Number : 003
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 6/19/13

CYNTHIA S. KERN J.S.C.
_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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KHADIDATOU SYLLA-BA,

Index No. 151207/2013

Plaintiff,

-against-

DECISION/ORDER

THE COLTON CONDOMINIUM CORPORATION d/b/a THE COLTON CONDOMINIUM, SLJ MANAGEMENT LLC and LAWRENCE ENVIRONMENTAL GROUP, LLC

Defendants.

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HON. CYNTHIA 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
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action seeking to recover for damages stemming from alleged leaks and mold within plaintiff's apartment. Defendant Lawrence Environmental Group, LLC ("Lawrence") now moves for an order pursuant to CPLR § 3211(a)(1) and (7) dismissing plaintiff's complaint on the ground that it fails to state a cause of action against Lawrence. For the reasons set forth below, Lawrence's motion to dismiss is granted.

The relevant facts are as follows. Plaintiff resides in an apartment owned and operated by defendants The Colton Condominium Corporation ("Colton") and SLJ Managment LLC ("SLJ").

Plaintiff alleges in her complaint that on or about December 2010, water began leaking in her apartment, which caused mold to develop and plaintiff, who is allegedly allergic to mold, became sick and was eventually forced to move out of her bedroom.

On or about May 2, 2012, non-party Prime Aire Mold Services, Inc. ("Prime Aire") inspected plaintiff's apartment for mold. Upon discovering the presence of mold, on or about May 16, 2012, it undertook remediation work to remove the mold. Thereafter, Prime Aire inspected the apartment and concluded that the "mold remediation treatment process was performed successfully " and "[c]learance testing performed confirmed the proper elimination of mold, revealing the lowest possible spore count from the air sample taken from the bedroom."

On or about August 10, 2010, SLJ retained Lawrence to conduct a "Mold/Moisture Intrusion Survey" in plaintiff's apartment. According to Lawrence's survey report: "The purpose of the survey was to identify the extent of water damage and potential mold growth associated with a water intrusion event into the apartment's southwest bedroom." *See* Aff. of Christopher T. Scanlon, Ex. E. Upon surveying the apartment, Lawrence concluded that: "No mold growth was observed on any surfaces in the southwest bedroom and all surfaces were found to be dry when tested with the moisture meter. [and n]o active water instruction was occurring at the time of the survey." *Id.* Thus, Lawrence recommend "no further actions." *Id.*

On or about February 7, 2013, plaintiff commenced the instant action against defendants to recover damages stemming from the alleged mold infestation in her apartment. Specifically, plaintiff asserted two causes of action against Lawrence for its alleged negligence in "failing to properly inspect plaintiff's premises; in failing to take proper remedial measures; in seeking to cover up the situation; in failing to have efficient and sufficient personnel; in failing to perform

proper testing; in failing to remediate the mold; in violating applicable laws, rules and regulations." The second cause of action, first against Lawrence, seeks damages relating to property damage, while the third cause of action, second against Lawrence, seeks damages relating to personal injuries; however, both causes of action sound in negligence. Lawrence now moves to dismiss plaintiff's complaint on the grounds that plaintiff has failed to adequately state a cause of action and/or the facts plead by plaintiff are contradicted by documentary evidence. Plaintiff opposes the motion on the ground that in construing the facts plead in a light most favorable to the plaintiff, she has adequately stated a claim for negligence against Lawrence to overcome a motion to dismiss.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). "[A] complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). However, "'[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference.'" *Morgenthow & Latham v. Bank of New York Company, Inc.*, 305 A.D.2d 74, 78 (1st Dept 2003) *(quoting Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dept 1999), *aff'd*, N.Y.2d 659 (2000)). In such cases, "the criterion becomes whether the proponent has a cause of action, not whether he has stated one." *Id.* (internal quotations removed).

In the present case, Lawrence's motion for an order dismissing plaintiff's complaint is granted as plaintiff has failed to state a cause of action against Lawrence. To sufficiently plead a

claim for negligence, a plaintiff must allege: (1) a duty owed by the defendant to the plaintiff; (2) a breach thereof; and (3) injury proximately resulting therefrom. *Solomon by Solomon v. City of New York*, 499 N.Y.S.2d 392 (1985). "Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party." *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138 (2002). "[A]bsent such duty, as we have said before, there can be no breach of duty, and without breach of duty there can be no liability." *Kimbar v. Estis,* 1 N.Y.2d 399, 405 (1956).

In general, "a contractual obligation standing alone, will generally not give rise to tort liability in favor a third party." *Espinal,* 98 N.Y.2d at 138. However, the Court of Appeals has identified three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care and could face potential liability in tort to a third party: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm;' (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely." *Id.* at 140. (internal citations omitted).

Here, plaintiff fails to allege any duty owed to plaintiff by Lawrence in order to state a claim for negligence. While plaintiff alleges in her complaint that co-defendants Colton and SLJ "hired defendant Lawrence who performed an inspection" on plaintiff's apartment, she fails to allege any facts relating to one of the three situations identified by the court in *Espinal* wherein Lawrence could be held liable to plaintiff pursuant to its contract with SLJ. Indeed, plaintiff's bare-bones complaint is completely devoid of any facts relating to Lawrence's duty to plaintiff.

Accordingly, as plaintiff failed to allege a duty owed to her by Lawrence, she has failed to state a claim for negligence against Lawrence as a matter of law.

Based on the foregoing, Lawrence's motion is granted and plaintiff's complaint is hereby dismissed as to defendant Lawrence. The Clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: 6/19/13

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.