SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: GEORGE J. SILVER J.S.C. PART 10

Justice

Index Number : 115275/2009
ABRAMS, ALEX
vs
RELATED, L.P.
Sequence Number : 003
SUMMARY JUDGMENT

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 6/11/15

George J. Silver J.S.C.
GEORGE J. SILVER
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 10

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ALEX ABRAMS,

Plaintiff,

-against-

RELATED, L.P., KBF RELATED AMSTERDAM PARTNERS, L.P. and FERNANDEZ FLOORS,

Defendants.

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KBF RELATED AMSTERDAM PARTNERS, L.P.,

Petitioner,

-against-

ALEX ABRAMS,

Respondent.

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Index No. 115275-2009

DECISION/ORDER

Motion Sequence 003

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion, Affirmation, Affidavits & Collective Exhibits Annexed, Memorandum of Law	1 - 8
Affidavits in Opposition, Affirmations in Opposition & Memorandum of Law	9 -13
Reply Affirmation, Affidavit in Further Support of Motion, Memorandum of Law	14 -16

In this consolidated toxic tort action/summary proceeding for non-payment of rent, defendants Related, L.P. (Related), KBF Related Amsterdam Partners, L.P. (KBF) and Fernandez Floors, Inc (Fernandez) (collectively defendants) move pursuant to CPLR § 3212 for an order granting them summary judgment dismissing the complaint of plaintiff Alex Abrams (plaintiff). KBF also moves for summary judgment against plaintiff/respondent on its claims for unpaid rent

and legal fees. Plaintiff opposes the portion of the motion seeking dismissal of his complaint.

Plaintiff alleges in his verified bill of particulars that he was exposed to toxic and foul fumes from July 22, 2009 through August 14, 2009. Plaintiff claims that the fumes from toxic glue utilized by defendants in order to seal floor tiles within the apartment adjacent to plaintiff's apartment was caused to and did seep and emanate into plaintiff's apartment. Plaintiff claims that as a result of his exposure to the allegedly toxic glue he developed hypersensitivity to chemicals resulting in immediate, persistent, and often severe sinus pain and pressure, sinus headaches and right side face and gum pain.

Rosario Lopez (Lopez) testified on behalf of Fernandez. Lopez testified that she is the owner of Fernandez and that Fernandez performed flooring work in unit 16L on July 22, 2009. Fernandez, who did not perform the work herself, testified that the work was performed by one worker ad was completed in 2 hours or less. The work consisted of repairing a 20 square foot section of the floor that had been damaged due to a water leak. According to Lopez, the repair was done by removing the damages floor and placing DriTac 6200 adhesive on the concrete subfloor with a trowel specifically designed to be used with DriTac 6200. The DriTac 6200 was allowed to stand for 15 minutes and then wooden floor tiles were placed on top of the adhesive. Lopez testified that she inspected the work after it had been completed and that she did not smell an odor in unit 16L.

Elizabeth Serrano Rodriguez, a senior resident service specialist, testified on behalf of Related. Rodriguez testified that Fernandez was hired by Related to do work to the floor of the apartment 16L, the apartment adjacent to plaintiff's apartment. Serrano Rodriguez testified that after Fernandez completed its work in unit 16L she saw that a fan had been placed inside unit 16L and a second fan had been placed in the corridor.

In support of the motion, defendants submit an affidavit from Robert Hoyle (Hoyle, Related's vice president for engineering. According to Hoyle, from July 2009 through the sale of the building in March 2011, air conditioning units were located in each apartment and the air conditioning units were individual to each apartment and did not share any components with other apartments. Each room of each apartment had a through wall package terminal air condition unit, or PTAC, tat vented directly to the exterior of the building. Each PTAC provided air conditioning through a heat pump specific to each apartment while heating was provided through a common steam distribution system. The speed of the fan for the air conditioning or heat was controlled by a switch located on each PTAC. Hoyle also claims that each kitchen and bathroom had exhaust fans and each kitchen and bathroom vent was connected to a vertical ventilation shaft. Each vent had a louvered opening to draw air out from the particular room to the roof and air was extracted from the apartments through the vents out into the atmosphere at building's roof level. Air was supplied to te hallways of the building from a rooftop heating and cooling mechanical unit. Rooftop air from the mechanical unit was drawn down by vertical risers into the hallways resulting in a positive pressure in the building's hallways. Supply registers in each hallway discharged the air from the vertical risers. Hoyle claims that the combination of mechanical systems created a negative pressure in each individual apartment unit so that "make-up" air was drawn in from the common hallways under the entrance door of each apartment, replacing the air exhausted from the apartments and that the combination of mechanical systems prevented air from one apartment from entering other apartments. Hoyle

also claims there were no direct openings between plaintiff's apartment and apartment 16L and that there were two PTAC units and two vents in plaintiff's apartment and three PTAC units and three vents in apartment 16L.

Defendants also submit an affidavit from Sheldon H. Rabinovitz (Rabinovitz), a certified industrial hygienist and toxicologist. According to Rabinovitz, 93.5% of the solvent used in DriTac 6200 is water while the remaining 6.5% is composed of about one half xylene, an aromatic solvent, with the other half being composed of aliphatic hydrocarbons. Rabinovitz claims that if all of solvents in the glue evaporated immediately after the glue was applied and then mixed in the air within the apartment without any of the vapor exiting through the open windows or the mechanical exhaust of the ventilation system in the apartment, the airborne concentration of the combined solvents, excluding the water, would have been 313.7mg/M^3. Rabinovitz claims that the current National Institute for Occupational Safety and Health (NIOSH) recommended exposure limit for xylene would be 435 mg/M^3. Because the NIOSH limit is based upon a worker's exposure over the course of eight hours a day, five days per week for a working lifetime, Rabinovitz claims plaintiff's alleged exposure in his apartment over a matter of weeks did not begin to approach the working lifetime limits set by NOISH. Rabinovitz further contends that it would have taken weeks for all of the solvent in the glue to vaporize into the air because the rate of vaporization would have been slowed by the floor tiles acting as a barrier to the solvents and because some of the vaporized solvents would have exited the apartment through the open windows and the mechanical exhaust. Rabinovitz also contends that the natural exchange of air in the apartment with outdoor air, which occurs in any residence at all times, would have resulted in a one quarter or 25% change per hour in the air in the apartment. Moreover, Rabinovitz contends, based upon his review of Hoyle's affidavit, that plaintiff's building was designed to have a negative pressure in the apartment units. Air exhausted from the units to the exterior of the building through open windows and PTAC was replaced by air from the hallways. Based upon the air supply from the hallway entering the apartment, the open windows in the apartment and the operation of the PTAC unit, Rabinovitz concludes that the concentration of solvent vapor in the air could not have reached 313.7 mg/M^3 at any point when the work on the flooring was being performed because vapor was leaving the unit as it was being generated. Rabinovitz also claims that because Serrano Rodriguez testified that she did not smell any odor in the apartment the actual concentration of xylene in the apartment was well below the 60 mg/M^3 odor threshold for xylene. Rabinovitz opines that any air that entered plaintiff's apartment would most likely have come from the hallway on the 16th floor, not apartment 16L, because there were no direct opening between th apartments, they did not share ventilation systems, and the hallway was under positive pressure with respect to the individual apartments. Even if air from 16L did enter plaintiff's apartment, Rabinovitz claims the amount would have been minuscule and any concentration of solvents in 16K would have been a fraction on the concentration in 16L.

Defendants also submit an affidavit from Dr. Howard Sandler (Sandler), a physician licensed in the state of Maryland. According to Sandler, MCS is not a medical condition recognized by the general medical or scientific community. Sandler contends that MSC theories of multiple and changing chemicals at any dose causing a single or multiple disease entities that vary in symptomatology and clinical complaints run counter to the generally accepted and

validated tenet of toxicology that exposure to specific chemicals produces specific adverse health effects at specific exposure levels. Sandler claims that groups such as the California Medical Association, the American Academy of Allergy, Asthma and Environmental Medicine, American College of Physicians, the American Medical Association, Council on Scientific Affairs, the American College of Occupational and Environmental Medicine and the National Research Council have all issued statements that MCS has not been scientifically demonstrated to exist. Sandler further contends that all of plaintiff's complaints are subjective in nature as plaintiff has no evidence of objective testing and no scientific or medical opinions from any physician or expert establishing a causal relationship between his complaints and the environment at the building resulting from the flooring work performed on July 22, 2009. Sandler also claims that plaintiff's alleged symptoms predate his alleged exposure to DriTec 6200 and, therefore, plaintiff cannot establish the temporality aspect of causation. Finally, Sandler claims that there are alternative etiologies for plaintiff's alleged symptoms, including acid reflux, deviated septum and allergies to dust mites and psychiatric disorders.

In opposition to the motion, plaintiff avers that on July 22, 2009 at 11:00 a.m he awoke in the bedroom of his rental apartment in Related building known as the Sagamore to the smell of overpowering toxic fumes. Plaintiff ascertained that work was being done in the apartment adjacent to his and that some type of glue or adhesive with toxins had been used to install a new floor in the adjacent apartment. Plaintiff claims that he did not receive any notice or warning prior to July 22, 2009 that toxins would be used in the work. Plaintiff contends that following the July 22, 2009 exposure, he developed significant new onset medical issue including headaches, nausea and sinonasal congestion, Plaintiff claims he was advised on July 29, 2009 by his internist, Dr. Kruger, that his new condition was likely related to the toxic exposure plaintiff suffered on July 22, 2009. An ENT diagnosed plaintiff's headaches as secondary to the exposure to the toxic adhesive and advised plaintiff to do everything possible to the avoid the noxious stimuli resulting from the exposure, including staying out of the apartment. As a result of the ENT's recommendation, plaintiff began to seek alternative living arrangements so as to avoid any additional toxic exposure. Plaintiff vacated the apartment on August 14, 2009 and moved into a hotel. Plaintiff then obtained permanent housing on or about September 22, 2009. Plaintiff claims that as result of his exposure to the flooring toxins he suffered intense and unceasing pain for the first several months following the exposure and also developed a severe ongoing sensitivity to a wide range of chemicals. Plaintiff also claims to have sustained significant housing expenses as a result of his exposure on July 22, 2009.

Plaintiff also submits an affirmation from Dr. Robert Mittman (Mittman), a doctor specializing in the treatment of allergic disorders and environmentally triggered illnesses. Mittman examined plaintiff on December 14, 2010. According to Mittman, plaintiff, by history, suffered an exposure to toxic fumes in July and August 2009. Mitmman contends that the chemicals used in DriTac include volatile organic compounds (VOCs) which are well known toxins and known in the medical community to be possible sources of health problems. Specifically, Mittman claism VOCs may cause increased chemical sensitivity, especially in persons with an underlying sensitivity. Mittman found on his examination of plaintiff that plaintiff was still exhibiting signs and symptoms of a past toxic exposure and plaintiff continues to suffer daily reactions to a wide range of chemicals with said reactions causing head pain and

sunis pain, mostly on the right side, with occasional nausea, swelling of the lips, burning of the tongue and a metallic taste in the mouth. Mittman contends that plaintiff's July 22, 2009 exposure resulted in an exacerbation of plaintiff's underlying chemical sensitivity. Mittman also claims plaintiff had underlying chemical sensitivities which were triggered by plaintiff's exposure to the flooring adhesive. Mittman's diagnosis is chronic rhinitis, deviated nasal septum, chemical sensitivities and TILT. According to Mittman, TILT, or toxicant induced loss of tolerance, is breakdown in tolerance caused by exposure to a toxicant. Mittman contends that plaintiff meets the criteria established for a diagnosis of TILT, which include an identifiable chemical exposure, a major change on health, new onset symptoms and problems from chemical exposures that were previously tolerated. Mittman opines that plaintiff's TILT and increased chemical sensitivity was caused by plaintiff's exposure to VOCs contained in the DriTac and that, but for this exposure, plaintiff would not now have the ongoing and chronic problems he faces on a daily basis.

Plaintiff also submits an affirmation from Dr. Mahyar Eidgah (Eidgah), who also specializes in treating patients with allergies and environmentally-triggered illnesses. Eidgah examined plaintiff on December 12, 2014. Eidgah's affirmation is a nearly verbatim copy of Mittman's affirmation and as such need not be summarized.

Plaintiff next submits an affidavit from Michael Charitou (Charitou), a general contractor and home builder who was trained as an engineer in England and the United States. According to Charitou, all adhesives require a lengthy period of time up to several hours to fully dry, or become tacky, before wood can be securely placed. Charitou argues that because of factors such as temperature, humidity and air flow, drying time will vary and without detailed factual information about the characteristics of a particular space where adhesive is being applied, it si difficult to estimate drying time. Charitou, therefore, claims that Rabinovitz's opinions regarding the drying time of DriTac 2600 in apartment 16L have no rational basis and are unreliable. Charitou also opines that the description of the installation and drying process set forth in DriTac 6200 installation instructions is accurate. Charitou claims that the manufacturer's instructions advise an installer that DriTac 6200 takes between 45 minutes and 1 hour to become tacky ans that Rabinovitz's claim that the installation of the floor in apartment 16L took only 15 minutes flies in the face of the DriTac instructions as well as good and accepted floor installation practices. Charitou further claims that a failure to provide safety equipment to workers or to warn installers or other people in the vicinity of where chemical substances are being used is a violation of accepted contracting protocols and Fernandez and Related had a duty to warn both the installer and the residents of the dangers associated with the use of DriTac 6200. Charitou claims that such dangers include inhalation and skin contact dangers. Finally, Charitou contends that, based upon his many years in the construction business, vapors or fumes from adhesives such as DriTac 6200 in one apartment leak into other apartments and areas adjacent to the installation through a variety of portals, including porous plasterboard walls, electrical outlets, windows and doors. Charitou contends that because there was no effort by Fernandez or Related to seal the installation area, there was in fact leakage of DriTac fumes from apartment 16L to plaintiff's apartment and into his bedroom. Charitou claims Fernandez and Related committed multiple acts of unreasonable contracting and engineering conduct by failing to properly install the floor, by failing to properly secure apartment 16L and by failing to warn residents of te use of

toxins found in DriTac 6200.

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]; *Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 [b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717, 497 NE2d 680, 506 NYS2d 313 [1986]; *Zuckerman*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, 49 NY2d at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned, since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Stewart M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 385 NE2d 1238, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 386 NE2d 258, 413 NYS2d 650 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

It is well established that in a toxic tort case such as this, an opinion on causation should set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular illness (general causation), and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation) (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 857 NE2d 1114, 824 NYS2d 584 [2006]). To obtain summary judgment dismissing the complaint, defendants must demonstrate that there was no causal link between plaintiff's alleged injuries and his alleged exposure (*Keggah v City of New York*, 113 AD3d 512 [1st Dept 2014]). Defendants met this burden by establishing a lack of specific causation, i.e., that plaintiff was not exposed to sufficient levels of toxins in the DriTac 6200 to cause his alleged illness. Specifically, defendants established that the airborne concentration in plaintiff's apartment of the xylene

contained in the DriTac 6200 was, at most, 313.7mg/M^3, well below NIOSH's recommended exposure limit of 435 mg/M^3 over a working lifetime. Defendants also established that MCS is not a scientifically or medically recognized condition and therefore, plaintiff's alleged exposure to DriTac 6200 was not capable of causing plaintiff's particular illness (general causation).

In opposition to defendants' prima facie showing, plaintiff fails to establish a causal relationship between his claimed illness and his alleged exposure to DriTac 6200. Accepting as true plaintiff's claim that he was exposed to a toxin in the overpowering fumes he awoke to on the day of the alleged exposure and that those overpowering toxic fumes emanated from the DriTac 6200 that was used in the apartment adjacent to plaintiff's, plaintiff's experts have not specified the threshold level of exposure to DriTac 6200 that would cause an exacerbation of plaintiff's pre-existing health problems or cause him to suffer from TILT (specific causation). Plaintiff's experts have not offered any quantification whatsoever of the level of plaintiff's toxin exposure, nor have they employed any of the available methods for reasonably estimating it, such as mathematical modeling or comparing plaintiff's exposure level to those of study subjects whose exposure levels were precisely determined (*Todman v Yoshida*, 63 AD3d 606 [1st Dept 2009]). *Parker* explains that "precise quantification" or a "dose-response relationship" or "an exact numerical value" is not required to make a showing of specific causation (*Parker*, 7 NY3d at 448). *Parker* did not, however, dispense with a plaintiff's burden to establish sufficient exposure to a substance to cause the claimed adverse health effect (*Cornell v 360 W. 51st St. Realty, LLC,* 22 NY3d 762, 9 NE3d 884, 986 NYS2d 389 [2014]). Simply put, plaintiff has not offered any evidence concerning the level of toxins present in his apartment on July 22, 2009. Plaintiff's purported expert general contractor/engineer only claims that there was leakage of DriTac fumes into plaintiff's apartment but offers no quantification or even an estimate how much leakage occurred. The only method plaintiff's experts used to establish specific causation was to accept as true plaintiff's allegations that he was exposed to the smell of overpowering toxic fumes from the DriTac 6200 that was used in apartment 16L (*Cleghorne v City of New York*, 99 AD3d 443 [1st Dept 2012]). Plaintiff's experts also failed to posit the level of exposure to DriTac 6200 necessary for the causation of plaintiff's injuries. Plaintiff experts do not specify what level of toxins from DriTac 6200 would cause an exacerbation of plaintiff's pre-existing health conditions or his TILT diagnosis (*id.*). Rather, plaintiff's doctors merely opine in conclusory fashion that plaintiff's TILT and increased chemical sensitivity were caused by his exposure to some unknown quantity of VOCs. Because plaintiff's experts have not offered even a "scientific expression" of plaintiff's exposure (*Parker*, 7 NY3d at 449), defendants' motion for summary judgment is granted. The court need not reach the issue of whether MCS is a condition recognized by the medical and scientific community and whether exposure to DriTac 6200 causes MCS (general causation).

Petitioner KBF is also entitled to summary judgment on its claim for unpaid rent for the months of August 2009 and September 2009 and legal fees. Plaintiff concedes in an affidavit dated November 30, 2009 that he was unable to remain in apartment 16K following the July 22, 2009 work and that he formally surrendered possession of the apartment to KBF on or about September 26, 2009. Plaintiff has not submitted any opposition to this branch of the motion for summary judgment. To the extent plaintiff's affidavits can be read to assert a defense of constructive eviction, the affidavits do not establish that the landlord's wrongful acts

substantially and materially deprived plaintiff of the beneficial use and enjoyment of apartment 16K and that plaintiff actually abandoned possession of apartment 16K (*Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, 256 NE2d 707, 308 NYS2d 649).

In accordance with the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment dismissing plaintiff's complaint in its entirety is granted and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that petitioner KBF Related Amsterdam Partners, L.P.'s motion for summary judgment on its claim for unpaid rent is granted against respondent in the amount of $7,428.45, together with interest from September 1, 2009; and it is further

ORDERED that the parties to the summary non-payment proceeding are to appear on September 29, 2015 in Part 10, room 422 of the courthouse located at 60 Centre Street, New York, New York 10007 at 2:30 p.m. for a hearing to determine the amount of legal fees to which petitioner KBF Related Amsterdam Partners, L.P. is entitled; and it is further

ORDERED that defendants/petitioner, as movants, are to serve a copy of this order, with notice of entry upon plaintiff within 20 days of entry

George J. Silver, J.S.C.

Dated: 6/11/15
New York County

GEORGE J. SILVER
J.S.C.