

Mitchell v Yonkers Contr. Co.
2014 NY Slip Op 32877(U)
October 8, 2014
Sup Ct, Westchester County
Docket Number: 5251/11
Judge: Robert M. DiBella
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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED
AND
ENTERED
ON Oct 9, 2014
WESTCHESTER
COUNTY CLERK

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
STEPHENA MITCHELL,

FILED
Plaintiff,

-against-

OCT 09 2014
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

DECISION AND ORDER
Motion Seq. No. 004

YONKERS CONTRACTING CO., INC. and
DRAGADOS USA, INC.,

INDEX NO. 5251/11

Defendants.
-----X

DIBELLA, J.

The following papers have been read and considered on this motion by defendants for summary judgment dismissing plaintiff's complaint or, in the alternative, to preclude plaintiff from offering certain evidence at trial as to matters of which discovery has been sought but not provided and/or compel plaintiff to supply all outstanding discovery:

- 1) Notice of Motion; Affirmation in Support of Joelle Y. Reboh, Esq.; Exhibits A-N;
- 2) Affirmation in Opposition of Jonathan B. Van Dina, Esq.; Exhibits 1-22; and
- 3) Affirmation in Reply of Joelle Y. Reboh, Esq.; Exhibits A-D.

In this personal injury and property damage case, defendants move for summary judgment dismissing plaintiff's complaint or, in the alternative, to preclude plaintiff from offering certain evidence at trial as to matters of which discovery has been sought but not provided and/or compel plaintiff to supply all outstanding discovery.¹ Plaintiff opposes the motion. For the reasons set forth below, the motion is granted in part and denied in part.

¹ Subsequent to the filing of this motion, defendants made a motion before the Compliance Part seeking to vacate the note of issue, preclude plaintiff from offering certain evidence at the trial, compel plaintiff to provide outstanding discovery and to stay the trial. The issues raised in the within motion regarding outstanding discovery and whether plaintiff should be precluded from offering certain evidence at trial were decided by Decision and Order of the Court (Lefkowitz, J.) dated November 4, 2013.

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Plaintiff commenced this action on February 23, 2011 to recover for personal injuries and property damage allegedly sustained as a result of continuous and ongoing exposure to airborne debris resulting from defendants' construction work on Interstate 287 between Exits 6 and 8W. Plaintiff claims that the construction resulted in debris encroaching onto her property and caused property damage to her house and caused her health issues including pulmonary problems, cough, and sinus problems. The construction project included rock cutting, blasting and drilling, all of which, plaintiff alleges, created dust and debris which became airborne and was deposited in and around her home. Plaintiff claims that as the result of the construction on I-287, her house sustained a significant amount of damage including interior and exterior cracking to the walls necessitating repairs and that due to dust and dirt, she needed to replace all the carpets in the house. With regard to her health problems, plaintiff testified that she has spots on her lungs, severe pain in her chest, she suffered colds, coughing, headaches, she had breathing problems and sinus problems, she could not sleep and she had to drain her ears. Although plaintiff had some pre-existing conditions, she alleges that defendants' conduct exacerbated those medical conditions.

Defendants contend that summary judgment should be granted dismissing the complaint in its entirety based on the lack of proximate cause and Statute of Limitations grounds. Defendants argue that the one-year Statute of Limitations for intentional torts has expired and the three-year Statute of Limitations for negligence actions has also run. In addition, defendants contend that plaintiff has failed to state causes of action for punitive

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damages, alleged depreciation in the value of plaintiff's property and Labor Law § 402. Further, defendants contend that the court lacks subject matter jurisdiction as to the alleged violations of certain federal statutes.

In opposition, plaintiff contends that defendants' motion should be denied in its entirety. Plaintiff contends there are issues of fact as to whether defendants' actions were the proximate cause of plaintiff's injuries, and submits an expert affirmation of Lisa Youkeles, M.D. As to the Statute of Limitations defense, plaintiff argues that the discovery rule applies to the within action and that this action was commenced within three years of plaintiff discovering the damages. Further, plaintiff contends that it has sufficiently stated all her causes of action.

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). However, it should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v. City of New York*, 49 NY2d 557, 560 (1980). "Moreover, the motion court should draw all reasonable inferences in favor of the nonmoving party in determining whether to grant summary judgment." *F. Garofalo Elec. Co. v. New York Univ.*, 300 AD2d 186, 188 (1st Dep't 2002). In deciding such a motion, the court's role is "issue-finding, rather than issue-determination." *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted).

As to defendants' Statute of Limitations defense, they argue that the medical

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records and plaintiff's own testimony support their position that she experienced symptoms beginning in 2006 and/or 2007 and that plaintiff's failure to commence the action within 3 years of that time warrants dismissal of the action. The work on the project began in July of 2006. According to defendant Yonkers Contracting Co., Inc.'s witness Timothy Caufield, blasting occurred on or about September 2006 and in 2008 there was some blasting by Grant Avenue. Plaintiff alleged in her Verified Bill of Particulars that the negligent acts of defendants occurred during construction and that her injuries arose as a result of defendants' construction activities. Plaintiff testified in her deposition that she first noticed construction in 2006/2007 and that her symptoms arose when construction began. Defendants argue that all injuries that occurred prior to February 23, 2008 are barred by the Statute of Limitations. Plaintiff, on the other hand, contends that she first became aware of her damages in 2008.

CPLR 214-c(2) provides:

"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, upon or within the body or upon or within the 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."

As to plaintiff's fifth cause of action which alleges an intentional tort, it is dismissed, as the Statute of Limitations regarding this claim has run. However, as to the remaining claims, there is an issue of fact as to when plaintiff discovered the damages and thus,

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when the Statute of Limitations period began. As to when plaintiff was first aware of her damages as a result of defendants' alleged conduct, there is an issue of fact, especially since plaintiff did have pre-existing conditions that she had seen her doctor about.

Defendants' next argument is that the alleged wrongful conduct by defendants did not cause plaintiff's alleged injuries. Defendants submitted expert affirmations of Michael Mendel, M.D. and Alvin Katz, M.D. who opined to a reasonable degree of medical certainty that plaintiff's personal injuries and/or any exacerbation of them was not caused by defendants' conduct of blasting and drilling. In opposition, plaintiff submits her expert affirmation of her treating pulmonologist, Lisa Youkeles, M.D., who opined to a reasonable degree of medical certainty that plaintiff's decrease in lung function from 2008 to 2013 is a result of plaintiff's continuous and ongoing exposure to the construction debris caused by defendant. To what extent, if any, plaintiff's injuries or exacerbations were caused by defendants' conduct is an issue of fact to be determined by the jury.

As to defendants' request to dismiss plaintiff's demand of punitive damages, it is granted. "Even where there is gross negligence, punitive damages are awarded only in 'singularly rare cases' such as cases involving an improper state of mind or malice or cases involving wrongdoing to the public." *Anonymous v. Streitferdt*, 172 AD2d 440 (1st Dep't 1991). As stated by the Appellate Division, Second Department: "Punitive damages are available to vindicate a public right only where the actions of the alleged tortfeasor constitute either gross recklessness or intentional, wanton or malicious conduct aimed at the public generally, or were activated by evil or reprehensible motives." *Rodgers v. Duffy*,

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95 AD3d 864, 866 (2d Dep't 2012). This matter is not one of those "rare cases" wherein an award of punitive damages would be appropriate because plaintiff has not demonstrated, in opposition to defendants' motion, that defendants engaged in intentional, malicious conduct or involved such gross and wanton conduct.

As to the portion of defendants' motion which seeks to dismiss plaintiff's third cause of action, it is also granted. Plaintiff's third cause of action is premised on two federal statutes—the Clean Air Act, 42 USCA § 7412 *et seq.* and the Toxic Substance and Control Act, 15 USCA § 2605 *et seq.* Both statutes provide that the district courts of the United States shall have jurisdiction. See 42 USCA § 7604(a) and 15 USCA § 2606(a). Pursuant to the language set forth in the statutes provided, the third cause of action is dismissed for lack of subject matter jurisdiction.

Defendants' motion to dismiss plaintiff's eighth cause of action alleging a violation of Labor Law § 402 is also granted. Labor Law § 402 provides: "When explosives are used in a mine, tunnel or quarry, the manner of storing, keeping, moving, charging and firing, or in any manner using such explosives, shall be in accordance with the rules prescribed by the board." This section of the Labor Law was enacted to protect workers and does not apply to plaintiff herein. See *Korycka v. Healy Co.*, 15 Misc 2d 852 (Sup Ct, Kings County 1958), *aff'd in part, rev'd in part* 9 AD2d 938 (2d Dep't 1959), *aff'd* 8 NY2d 968 (1960).

Section 402 of the Labor Law was designed to comprehensively protect workers, particularly where, as here, the rules promulgated pursuant to it afford broad coverage. It must be borne in mind that the statute created absolute liability for the protection of a specific class of persons of which this plaintiff was a member.

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Id. at 855.

Lastly, the portion of defendants' motion to dismiss plaintiff's claim for alleged diminution in the value of her property is denied. Defendants argue that plaintiff should not be allowed to recover both the costs of repairs to restore the property and the diminution of value of the property. That statement, while correct, is not sufficient to dismiss any claim for alleged diminution in the value of the property at this juncture.

Real property losses incurred as a result of a defendant's negligence may be measured in different ways. . . . [W]hen the reasonable cost of repairing the injury, or the cost of restoring the land to its former condition is less than what is shown to be the diminution in the market value of the whole property by reason of the injury, such cost of restoration is the proper measure of damages. On the other hand, when the cost of restoring is more than such diminution, the latter is generally the true measure of damages.

Fisher v. Qualico Contracting Corp., 98 NY2d 534, 539 (2002) (internal quotations and citations omitted). The burden of demonstrating that the other measure of damages is appropriate to sufficiently compensate the plaintiff falls on the defendant. See *Jenkins v. Etlinger*, 55 NY2d 35, 39 (1982). Here, defendant has not sufficiently satisfied their burden at this stage that damages under a diminution in value theory is inappropriate. The appropriate measure of damages is left to be determined at trial.

Accordingly, it is

ORDERED that defendants' motion is granted to the extent that plaintiff's third cause of action, fifth cause of action and plaintiff's demand for punitive damages are dismissed, and the motion is otherwise denied; and it is further

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ORDERED that counsel are directed to appear for a settlement conference on November 18, 2014 at 9:15 AM in Courtroom 1600 of the Westchester County Courthouse in White Plains, New York; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon defendants within 30 days.

This is the Decision and Order of the Court.

Dated: October 8, 2014
White Plains, New York


Hon. Robert DiBella, JSC

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