

Carman Realty, LLC v Ju Cheri Yoon

2007 NY Slip Op 34136(U)

March 12, 2007

Supreme Court, Albany County

Docket Number: 0064422/0061

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

CARMAN REALTY, LLC,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 6442-06
RJI NO. 01-07-087992

JU CHERL YOON and SUN CHA FAIN,
SUPER SERVICE CLEANERS, INC.,
JOON BEOM KIM, and JOON'S INC.,

Defendants.

Supreme Court Albany County All Purpose Term, February 16, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Gregory J. Sanda, Esq.
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Latham, NY 12110

James P. Lagios, Esq.
Iseman, Cunningham, Riester and Hyde, L.L.P.
Attorney for Defendants Joon Beom Kim and Joon's Inc.
9 Thurlow Terrace
Albany, NY 12203

TERESI, J.:

Plaintiff seeks an Order from this Court granting Plaintiff summary judgment pursuant to CPLR § 3212. Defendant Joon and Joon's Inc. ("Joon's Defendants") oppose the motion.

Defendants Ju Cheryl Yoon, Sun Cha Fain, and Super Service Cleaners, Inc. (“Defendants Yoon, Fain and Super Service”) oppose the motion and cross-move for an Order from this Court granting dismissal of Plaintiff’s complaint pursuant to CPLR § 3211(a)(7). This court has received no opposition to Defendants Yoon, Fain and Super Service’s cross-motion.

Plaintiff commenced this action against Defendants for damages in the amount of the clean-up costs associated with the clean-up of tetrachloroethene (PERC), consultant’s fees and attorney’s fees.

After Plaintiff discovered PERC in the ground water and in vapor in the soil at Carman Plaza, Plaintiff notified the New York State Department of Environmental Conservation. Plaintiff claims that as part of Plaintiff’s remediation efforts, Plaintiff conducted further testing and monitoring of the ground water. Additionally, Plaintiff claims to have undertaken the cleanup of the PERC, including PERC container removal and soil remediation. Plaintiff claims that a variety of reasons support its claim for damages, but provides no evidence beyond the fact that Defendants used PERC to support its claim that Defendants caused the contamination.

Defendants Yoon and Fain operated the dry-cleaning business, Super Service Cleaners, Inc., at Carman Plaza from 2001 to 2002, at which time Defendants Yoon and Fain sold their dry-cleaning equipment and assigned their lease to Defendants Joon and Joon’s Inc., which have operated the dry-cleaning business since 2002. In consideration of Plaintiff’s acceptance of the Assignment of Lease, Defendants Yoon, Fain and Joon executed a Guaranty, under which those Defendants jointly and severally guaranteed the payment of liabilities and performance of obligations.

Defendants' Opposition to Summary Judgment

Joon's Defendants contend that, among other responses to Plaintiff's claims, Plaintiff's motion for summary judgment fails to include any admissible evidence that Defendants leaked, spilled, or in any way released the PERC that was allegedly detected in the groundwater and the vapor in the soil beneath the building.

Defendants Yoon, Fain and Super Service also contend that Plaintiff has failed to demonstrate the presence of PERC in the property and the source of the PERC and, therefore, has failed to demonstrate that the Defendants are liable to Plaintiff for an actionable wrong.

"Summary judgment is a drastic remedy and 'should not be granted where there is any doubt as to the existence of a triable issue.'" Napierski v. Finn 229 A.D.2d 869, 870 (3d Dept. 1996) (quoting Moskowitz v Garlock, 23 A.D.2d 943, 944 (1965)). In deciding whether summary judgment is warranted, the court's primary function is issue identification, not issue determination. See Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law by establishing the nonexistence of material issues of fact. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y. 2d 851, 853 (1985). The evidence must be construed in a light most favorable to the party opposing the motion. See Dykstra v. Winridge Condominium One, 175 A.D.2d 482, 483 (3d Dept. 1991). In order to defeat a motion for summary judgment, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

After a full review of the record, the Court finds that triable issues of fact, sufficient to

warrant a dismissal of Plaintiff's summary judgment motion, have been presented. Triable issues of fact exist surrounding the cause of the PERC contamination as well as the existence of actual costs Plaintiff claims must be paid. Therefore, Defendant's summary judgment motion is denied.

Defendant's Yoon, Fain and Super Service's Cross-Motion for Summary Judgment

In support of Defendants Yoon, Fain and Super Service's cross-motion for dismissal of Plaintiff's complaint, Defendants Yoon, Fain and Super Service contend Plaintiff's complaint does not contain a demand for relief as required by CPLR § 3017(a), as it fails to state the grounds on which Plaintiff relies for demanding damages, apart from indemnification or guarantee and Article 12 of the New York State Navigation Law. Additionally, Defendants Yoon, Fain and Super Service note that Plaintiff's complaint does not contain the amount to which the Plaintiff deems itself entitled.

As Plaintiff has pointed out, any recovery on the theory of indemnification is premature, as Plaintiff has incurred no loss for which it needs to be indemnified, nor have Defendants Yoon, Fain and Super Service been called upon to pay any claim or just due debt, the payment of which any of the Defendants have guaranteed.

Further, by enacting Article 12 of the New York State Navigation Law, entitled "Oil Spill Prevention, Control, and Compensation," the state legislature intended to exercise control over petroleum transport and storage and to require clean-up and removal of petroleum. PERC, an organic compound that functions as a solvent, is not petroleum and, therefore, Article 12 of the New York State Navigation Law is entirely inapplicable Plaintiff's complaint.

After a full review of the record, which the court notes lacks any opposition by Plaintiff to Defendants Yoon, Fain and Super Service's cross-motion for dismissal of Plaintiff's

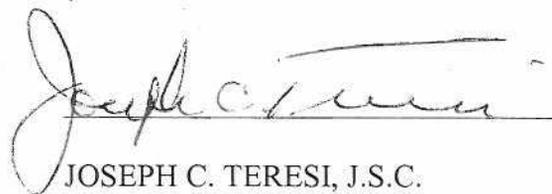
complaint, the court grants Defendants Yoon, Fain and Super Service's cross-motion for dismissal of Plaintiff's complaint as to Defendants Yoon, Fain and Super Service.

All papers, including this Decision and Order, are being returned to the attorney for the Defendants Yoon, Fain and Super Service. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So ordered.

Dated: March 7, 2007

Albany, NY



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion for Summary Judgment dated January 3, 2007 with Attached Affidavit in Support of Motion for Summary Judgment of David Fusco, Esq. dated January 3, 2007 and Attached Exhibits A-C.
2. Affirmation in Support of Motion for Summary Judgment of Gregory J. Sanda, Esq. Dated January 2, 2007.
3. Affirmation in Opposition to Motion for Summary Judgment of James P. Lagios, Esq. dated February 13, 2007 with Attached Affidavit in Opposition to Motion for Summary Judgment of Joon Boem Kim dated February 13, 2007 and Attached Exhibits A - I.
4. Notice of Cross-Motion for Summary Judgment dated January 25, 2007 with Attached Affidavit in Opposition to Motion for Summary Judgment and in Support of Cross-Motion for Dismissal of Gary A. Lefkowitz, Esq. dated January 25, 2007 with Attached Exhibits A-B.
5. Affidavit in Opposition to Motion for Summary Judgment of Ju Cheryl Yoon dated January 25, 2007.