905 5th Assoc., Inc. v 907 Corp.
2007 NY Slip Op 31254(U)
May 10, 2007
Supreme Court, New York County
Docket Number: 0100662/2006
Judge: Michael D. Stallman
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SCANNED ON 5/21/2007

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. MICHAEL D. STALLMAN PART 7

905 5th ASSOCIATES and PAMELA LIPKIN, M.D.,
Plaintiffs,

- v -

907 CORPORATION, RICHARD and LIANE WEINTRAUB, BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC, and MY HOME REMODELING, INC.,
Defendants.

INDEX NO. 100662/06

MOTION DATE 1/3/07

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

The following papers, numbered 1 to 9 were read on this order to show cause for renewal and cross motion for summary judgment

	PAPERS NUMBERED
Order to Show Cause — Affidavits — Exhibits A-L	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits	5
Sur-Reply Affirmation	6
Notice of Cross Motion— Affidavits — Exhibits 1-6	7-8
Answering Affidavits — Exhibits	9
Replying Affidavits	10

Cross-Motion: X Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

FILED
MAY 21 2007
NEW YORK COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 5/10/07

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ J.S.C.
DATED: _____

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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905 5th ASSOCIATES, INC. and PAMELA LIPKIN, M.D.,

Plaintiffs,

Index No. **100662/06**

- against -

907 CORPORATION, RICHARD and LIANE WEINTRAUB, BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC, and MY HOME REMODELING, INC.,

Decision and Order

FILED
MAY 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

Defendant.

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HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff Pamela Lipkin, a plastic surgeon, seeks to recover for damage to her medical office and for disruption to her medical practice, allegedly arising from the renovation of a cooperative apartment unit located above her medical office, owned by defendants Richard and Liane Weintraub.

Plaintiffs allege that demolition, construction, and renovation work to the Weintraubs' apartment created large, excessive, and unreasonable amounts of noise, vibration, dust and other forms of environmental pollutants in Lipkin's office. Notably, large chunks of ceiling tiles inside Lipkin's office have allegedly loosened and fallen, causing large holes in the ceiling. According to plaintiffs, the renovation work undermined the structural stability of a concrete slab between Lipkin's office and the Weintraubs' apartment. The complaint alleges causes of action sounding in negligence, constructive eviction, and tortious interference with contract against the cooperative, 907 Corporation; its managing agent, Brown Harris Stevens Residential Management, LLC; the Weintraubs; and their contractor, My Home Remodeling, Inc.

Meanwhile, 907 Corp. commenced a non-payment proceeding in Civil Court against Lipkin for maintenance arrears. In her answer, Lipkin raised constructive eviction as an affirmative defense, among other defenses.

By decision on the record on July 5, 2006, the court (Soto, J.), granted 907 Corp. and its managing agent's motion (and cross motion) for summary judgment dismissing the complaint. The court stated: "The Court finds that the management company has no duty or obligation in law or in fact. There has been no breach of any contractual duty in this case and there is no duty under negligence. So their motion will be completely granted and they are out the door."

By order to show cause, plaintiffs move for renewal of Justice Soto's prior decision and for consolidation of this action with the non-payment proceeding (Motion Seq. No. 005). 907 Corp. and its managing agent cross-move for summary judgment against plaintiffs for the maintenance arrears. My Home Remodeling, Inc. (My Home) also moves for renewal of Justice Soto's prior decision (Motion Seq. No. 006). This decision addresses both motions and the cross motion.

Plaintiffs and MyHome argue that renewal should be granted because, after Justice Soto's decision, the Weintraubs' expert issued a report dated August 24, 2006, which determined that "the existing cinder concrete structural slab . . . had been previously compromised due to an embedded cast-iron plumbing system which was installed reportedly in 1972, prior to Weintraub's recent occupancy." Rose Affirm., Ex H.

As 907 Corp. and its managing agent indicate, plaintiffs conducted site inspections on January 30, 2006, March 6, 2006, and June 7, 2006. In March 2006, plaintiffs' own expert, a professional engineer, stressed that "[a]s required by the DOB [Department of Buildings] to lift the current SWO [Stop Work Order], a thorough inspection of the 2nd floor structural concrete slab by

a Professional Engineer . . . needs to be performed to evaluate whether the slab's integrity has been compromised and whether it can safely support its intended design loads." Pillinger Opp. Affirm., Ex E. Thus, before the original motion for summary judgment was submitted, plaintiffs were aware that the structural integrity of the slab might not have complied with building codes. However, plaintiffs' expert states only that he did not consider conformance to code during his prior inspections. Adams Reply Affirm., Ex C. Thus, to the extent that possible building code violations, based on the condition of the concrete slab, constitute newly discovered evidence, plaintiffs do not offer a reasonable justification for not presenting such evidence with the prior motion. Marrone v Klein, 33 AD3d 546 (1st Dept 2006); CLP Leasing Co., LP v Nessen, 27 AD3d 291, 292 (1st Dept 2006); Cuccia v City of New York, 306 AD2d 2, 3 (1st Dept 2003).

In any event, the Court would be constrained to adhere to the original decision if renewal were granted. The unsworn letter of 907 Corp.'s expert is not competent evidence sufficient to raise an issue of fact warranting denial of summary judgment. Although the party opposing summary judgment may offer an excuse for the failure to produce evidence in admissible form (Friends of Animals, Inc. v Associated Fur Mfrs., 46 NY2d 1065, 1067-1068 [1979]), the fact that this evidence comes from 907 Corp.'s expert only underscores the fact that plaintiffs did not previously meet their burden in opposing summary judgment.

Plaintiffs submit no evidence that 907 Corp. or its managing agent had notice that the condition of the concrete slab following installation of plumbing pipes in 1972 constituted a dangerous condition. It would not be sufficient for plaintiffs to show only that 907 Corp. was aware that pipes were being imbedded into the slab. Thus, the purportedly newly discovered evidence is not sufficient to establish that 907 Corp. breached a duty to plaintiffs to maintain the common

elements of the cooperative apartment building in a reasonably safe condition.

The branch of plaintiffs' motion for consolidation of this action with the non-payment proceeding is denied. Plaintiffs sought consolidation or a stay only if the Court granted renewal and denied the motion for summary judgment by 907 Corp. and its managing agent.

The cross motion for summary judgment by 907 Corp. and its managing agent against plaintiffs is denied as academic.

Accordingly, it is hereby

ORDERED that plaintiffs' motion (Motion Seq. No. 005) and defendant My Home Remodeling, Inc.'s motion for renewal (Motion Seq. No. 006) are denied; and it is further

ORDERED that the cross motion for summary judgment by 907 Corporation and Brown Harris Stevens Residential Managment, LLC is denied; and it is further

ORDERED that the action shall continue.

This opinion constitutes the decision and order of the Court.

Dated: 5/10/07
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

FILED
MAY 21 2007
COUNTY C... NEW YO...