

Clark v Beacon Capital Partners, LLC

2011 NY Slip Op 30920(U)

April 12, 2011

Supreme Court, New York County

Docket Number: 107455/2008

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 25

Index Number : 107455/2008

CLARK, JANE

VS.

BEACON CAPITAL PARTNERS

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, It is ordered that this motion

APR 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence 004 is decided in accordance with the accompanying Memorandum Decision.
It is hereby

ORDERED that the motion of defendants Beacon Capital Partners, LLC , 1211 6th Avenue Property Owner LLC and 1211 6th Avenue Property Management LLC, Cushman & Wakefield, Inc., Cushman & Wakefield of New York, Inc., and Triangle Services, Inc. and cross-motion for summary judgment are granted and the complaint of plaintiffs Jane Clark and Stuart Clark is dismissed in its entirety.

The Clerk is directed to enter judgment accordingly.

Dated: 4/11/11

[Signature]
J.S.C.

HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 35

----- X

JANE CLARK and STUART CLARK,

Plaintiffs,

INDEX NO.
107455/2008

-against-

BEACON CAPITAL PARTNERS, LLC, 1211 6TH AVENUE
PROPERTY OWNER LLC, 1211 6TH AVENUE PROPERTY
MANAGEMENT LLC, CUSHMAN & WAKEFIELD, INC.,
CUSHMAN & WAKEFIELD OF NEW YORK, INC.,
TRIANGLE SERVICES, INC., and AMERICAN QUALITY
CLEANING CORP.,

Defendants.

----- X

FILED

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NEW YORK
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CAROL EDMEAD, J.:

Defendants Beacon Capital Partners, LLC ("Beacon"), 1211 6th Avenue Property
Owner LLC ("1211 Owner") and 1211 6th Avenue Property Management LLC ("1211
Management"), Cushman & Wakefield, Inc. ("Cushman"; collectively, the "property
defendants"), Cushman & Wakefield of New York, Inc., and Triangle Services, Inc. ("Triangle")
move for summary judgment dismissing plaintiffs' complaint.

Plaintiffs do not oppose the motion with respect to Beacon and Cushman & Wakefield
of New York, Inc., and are discontinuing the action against those two defendants.

Defendant American Quality Cleaning Corp. ("American") cross-moves pursuant to
CPLR 3212 for summary judgment dismissing all claims and cross-claims against it.

This action, which has been the subject of more than a little press (see, e.g., "Bedbugs
at Fox News," *New York Times*, March 18, 2008, at movants' exhibit V; "Fox News Worker Files

Bedbugs Lawsuit," *ABC News*, May 30, 2008), is premised on plaintiffs' contention that due to defendants' negligence, plaintiff Jane Clark ("plaintiff") was bitten by bedbugs during the course of her employment with Fox News, which had its offices and studio at 1211 Avenue of the Americas in Manhattan (the "building").

Parties

At all relevant times, the building was owned by 1211 Owner and managed by 1211 Management. Various areas of the building were leased by News America Incorporated ("News America"), a subsidiary of News Corp., and an affiliate of Fox News and other media entities housed in the building. Cushman was the property manager hired by 1211 Management to service and take care of the building, and to monitor the tenants' compliance with their leases (see Management Agreement, ¶ 2.2[1], at movants' exhibit D). Triangle was the cleaning service hired by Cushman to maintain the common areas of the building. American was the company hired by News America to provide janitorial services in the premises leased by it, including the space occupied by Fox News. Non-party Pest Elimination Technologies, Inc. ("Pest Elimination") was the exterminating company hired by Cushman to provide regular, routine services for the building's common areas. Pest Elimination was also hired, through Triangle, by various individual tenants including Fox News to do the monthly exterminations required of them by their leases (see Toland affidavit ¶ 9, annexed to moving papers; see lease § 19.05, at movants' exhibit F).

Factual Background

It has been widely reported that for the last few years New York City has been in the throes of a bed bug epidemic which is proving particularly obdurate since the pesticide DDT,

which eradicated bed bugs in the past, has been banned by the Environmental Protection Agency (see, e.g., "Sleeping with the Enemy," *New York Times*, July 10, 2009; "Bed Bugs to Go," *New York Post*, Feb 27, 2009). Initially, the infestation occurred in homes and hotels, and various suits have been brought in this state by residential tenants and hotel guests who were bitten by bed bugs while they slept (see, e.g., *Zayas v Franklin Plaza*, 23 Misc 3d 1104(A) [Civ Ct, NY Co, Singh, J, 2009]; *Jeffers v Best Western International, Inc.*, 2010 WL 2572587 [Sup Ct, NY Co, York, J, 2010]). More recently, bed bugs, erstwhile strictly nocturnal vermin, have expanded their horizons: infestations have occurred in classrooms (see, e.g., "Bedbugs Invading Classrooms at Alarming Rate, but Education Dept. Says There's No Epidemic," *NY Daily News*, Nov 5, 2010), government agencies (see, e.g., "Brooklyn District Attorney's Office Infested with Bed Bugs," *NY Daily News*, Aug 13, 2010) and office buildings (see, e.g., "More Offices See Bedbug Infestations," *USA Today*, Aug 20, 2010).

According to plaintiff, in October 2007 she worked at the Fox News satellite desk, which was located on the C-1 level of the building. She was bitten by bed bugs in October and November 2007 while at work. Several Fox News employees including plaintiff complained about bed bugs on the C-1 level, and early in 2008 Fox moved its satellite desk to the 16th floor of the building. Despite this move, plaintiff was again bitten at work in April 2008. As a result of these bites, plaintiff allegedly sustained physical and psychic injuries, including post-traumatic stress disorder, which necessitated medical treatment.

When Fox News became aware of the bed bug problem in its C-1 studio, it called on Pest Elimination to address the situation. According to Jason DiTonno ("DiTonno"), the Pest Elimination employee who worked on the Fox News space, he put insect monitors in the C-1

level in October 2007 (see DiTonno EBT, pp 62-63, at plaintiffs' exhibit F), and began chemical treatments for bed bugs on December 1, 2007 (see *id.*, pp 50-51). The treatment was repeated several times in December 2007 (see *id.*, pp 52-58) and continued in 2008 even after Fox News moved its studio to the 16th floor of the building (see *id.*, pp 70-72, 76). Bed-sniffing dogs were then used to confirm the presence of bed bugs in the Fox News studio (see *id.*, p 83). In February 2008, Pest Elimination began doing bed bug inspections at the homes of employees who worked at the satellite desk in the C-1 level, sometimes accompanied by one of the dogs (see *id.*, pp 81-82, 87-89).

When these efforts failed to completely solve the problem, Pest Elimination hired Louis N. Sorkin ("Sorkin"), a Board certified entomologist employed by the American Museum of Natural History, who had special expertise in bed bug detection and eradication. According to Sorkin, Pest Elimination "used all of the commonly used methods," including applying the freezing agent Cryonite, steam-treating the carpeting, and using vacuums to collect any bed bugs found (Sorkin affidavit, ¶¶ 1, 23-24, annexed to moving papers). On March 5, 2008, DiTonno and Sorkin inspected the home of Shawn Burns, a Fox News employee who worked at the satellite desk. The source of the Fox News bed bug infestation became obvious to Sorkin, who could

see bugs of different sizes crawling up and down the shelving. A review of the sofa disclosed thousands of eggs in the seam between the two cushions, a horizontal seam. Closer examination disclosed thousands of younger bedbugs that are quite small, about a millimeter or so. Examination of the desk chair showed many sizes of bedbugs on the chair especially at one side of the chair in the recessed screw hole, and the chair was made of extruded plastic. The wall hangings in that room had bedbugs on them and behind them. The linoleum floor in that living room was in torn-out layers, and there were many bedbugs between all the layers and also on the wooden furniture, like, a table in front of the couch.

The shelving, I pulled some CDs out, and there were certain German cockroaches in there plus droppings plus many stages of bedbugs including eggs. Examination of the kitchen, lifting up a few things off the counter, many cockroaches ran off. [Burns'] bedroom, which was next to the living room, I pulled back the bed covers and sheets a little bit, and there were a lot of bedbugs crawling on the headboard of his bed, which was actually a wide headboard, and he had a little stereo system and speakers, and the bugs were crawling on the stereo system speakers, crawling on some wall hangings, crawling on the bed. He had some plastic bagged clothing in the closets in that bedroom, and there were spiderwebs there, and there were dead eaten bedbugs in the spiderwebs. Actually I forgot the stereo system in the living room had a lot of spiderwebs and dead bedbugs in the spiderwebs and droppings from the spiders. Around the door frame of the front door, there were bedbugs living in the cracks and crevices and spiders living around there too. It also had dead bedbugs in the spiderwebs, so the spiders were eating all of them. There were bedbugs on a cap that was on the wall when you first came in the living room, and that was on a hook on the wall, and there were other clothes up there that had some bedbugs. In fact, when [Burns] spoke to us when we first arrived and we were in his apartment, he had some bedbugs crawling on himself, and he really didn't notice it.... There were basically hundreds of thousands of bedbugs throughout the whole apartment of various sizes"

(Sorkin EBT, pp 19-22, at plaintiffs' exhibit G). Sorkin determined that Pest Elimination's treatments were working, but the problem lingered because as soon as Pest Elimination made the premises bed-bug free, new ones were brought in by Burns, who was apparently unaware of the massive bed bug infestation that existed alongside the roaches in his home (Sorkin affidavit, ¶¶ 25-26). Plaintiffs do not dispute that Burns was the source of the bed bugs at Fox News.

After May 12, 2008, plaintiff stopped working and began receiving Workers' Compensation benefits from Fox News, which is not a party to this action (see WCL § 11 - workers compensation is exclusive remedy available to an employee injured in the course of his employment; *DiSpigna v Lutheran Medical Center Parking*, 170 AD2d 645 [2d Dept 1991]).

Two weeks later, plaintiffs commenced this action.

To the best of the court's knowledge, this is the first lawsuit brought by a tenant's employee against a commercial landlord and its agents.

Applicable Law

Plaintiff alleges that defendants were negligent because they allowed the leased premises to become infected with bed bugs, failed to warn her of the infestation, and failed to remedy the problem (see complaint ¶ 23, bill of particulars ¶ "10-88").

In order to set forth a *prima facie* case of negligence, the plaintiff must establish by competent evidence: (1) the existence of a duty on defendants' part as to plaintiff; (2) a breach of that duty; and (3) that such breach was the proximate cause of plaintiff's injury (see *Palsgraf v Long Island R.R. Co.*, 248 NY 339, 342 [1928]; *Salvador v New York Botanical Gardens*, 71 AD3d 422 [1st Dept 2010]). "Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm" (*532 Madison Avenue Gourmet Foods, Inc. v Finlandia Center, Inc.*, 96 NY2d 280, 289 [2001], rearg den 96 NY2d 938 [2001]). Furthermore, even assuming, *arguendo*, that the property defendants owed a duty to plaintiff, it is necessary to determine the scope of such duty before it can be ascertained whether it was breached. The existence and nature of a duty are matters of law to be determined by the court (see *Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]).

Plaintiff contends that the property defendants had a nondelegable duty to her to keep the building free of bed bugs. In essence, plaintiffs are urging this court to find that a commercial landlord has an absolute liability for any and all injuries sustained in the building by its tenants' employees regardless of the cause. Unfortunately for plaintiffs, the court finds their contention to be inconsistent with both the law.

Generally, an out-of-possession landlord is not liable for any injuries sustained in the leased premises. Where those premises are open to the public, as most commercial premises

generally are, the owner does owe a nondelegable duty to members of the public, which includes its tenants' employees (*Logiudice v Silverstein Properties, Inc.*, 48 AD3d 286, 287 [1st Dept 2008]). However, that duty is simply to provide the public "with reasonably safe means of ingress and egress" (*ibid.*; see also *Backiel v Citibank, N.A.*, 299 AD2d 504, 504-508 [2d Dept 2002]). Since plaintiff alleges that her injuries were sustained while inside the building, not while she was entering or leaving it, the property defendants' duty to the public is immaterial to the facts at hand.

Where, as here, the tenant contractually assumes total control of the leased premises and the owner retains only a limited right of re-entry to address emergency situations and to effect certain repairs if the tenant fails to perform them, the landlord may be held liable for injuries which occur on those premises if the "liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Reyes v Morton Williams Associated Supermarkets, Inc.*, 50 AD3d 496, 497 [1st Dept 2008]). No such safety provision has been evoked by plaintiffs.

Statutes Evoked by Plaintiffs

In their verified bill of particulars (movants' exhibit C), plaintiffs allege that the property defendants are statutorily liable because they violated 24 RCNY §§ 151.03 and 151.05 (¶ 89-100). These two sections of the New York City Health Code, since repealed, have nothing to do with structural or design defects. At the times relevant to the situation at bar they provided as follows:

Section 151.03 (in pertinent part):

(a) All buildings, lots, premises or commercial vehicles shall be kept free from rodents, insects and other pests, and from any condition conducive to rodent or insect and other pest life. The person in control shall not allow the accumulation of water, garbage or any other waste material in any part of the building, lot, premises or commercial vehicle. All garbage shall be deposited in tightly covered, watertight metal cans.

(b) When any building, lot, premises or commercial vehicle is subject to infestation by rodents or insects and other pests, the person in control shall apply continuous eradication measures.

Section 151.05:

All building material, lumber, boxes, cartons, barrels, containers, machinery, raw material, fabricated goods, junk, food, animal feed and any other substance which may afford harborage or provide food for rodents or insects and other pests shall be kept, stored or handled in such manner as the Department, or with respect to residential premises, the Department or the Department of Buildings, may require. Structural harborages which cannot be eliminated shall be periodically uncovered and inspected.

Section 151.05 is clearly inapplicable since it speaks of accumulated debris, which is irrelevant to the underlying facts. Section 151.03 required "the person in control" of premises to keep those premises free of pests by (a) as a preventive measure, avoiding accumulations of debris which would attract pests, and (b) once the infestation occurred, applying "continuous eradication measures." As described above, non-party Fox News, the "person in control" of the infected area, did take eradication measures. While relevant to bed bug infestations, neither of these two Health Code provisions involves the kind of structural building infirmity which is required to make the property defendants liable for plaintiff's injuries.

Plaintiffs also assert in their bill of particulars (§ "89-100") that defendants violated "all the applicable laws, rules, statutes and ordinances" that "the court will take judicial notice of" at "the time of the trial of the action." The court declines plaintiffs' invitation. It is plaintiffs'

responsibility, not the court's, to find what – if any – "laws, rules, statutes and ordinances" will bolster plaintiff's claims.

In their memorandum of law in opposition to the motion for summary judgment, plaintiffs rely on two new local regulations: 24 RCNY § 151.02, which requires "the person in control" of premises to "take such measures as may be necessary to prevent and control the harborage and free movement of rodents, insects and other pests," and § 27-2018 of what plaintiffs refer to as the New York City "Building Code."

The thrust of § 151.02 is prevention – it requires that premises be kept free of conditions which are conducive to insect and vermin congregation and proliferation. As averred by Sorkin and unrefuted by plaintiffs, bed bugs are different from other vermin in that they are not attracted by unsanitary conditions but rather brought into otherwise clean and sanitary premises by people in their clothing and belongings, and there is no product available for purchase capable of preventing bed bug infestations (Sorkin affidavit, ¶¶ 12-14, 19). Since compliance with this regulation is impossible with respect to bed bugs, defendants cannot be said to have violated it.

Section 27-2018 provides as follows:

Rodent and insect eradication; mandatory extermination.

a. The owner or occupant in control of a dwelling shall keep the premises free from rodents, and from infestations of insects and other pests, and from any condition conducive to rodent or insect and other pest life.

b. When any premises are subject to infestation by rodents or insects and other pests, the owner or occupant in control shall apply continuous eradication measures.

The problem is that this provision is not contained in the City's Building Code, as plaintiffs' counsel would have the court believe, but in the City's Housing Maintenance Code. The

Building Code, which regulates "building construction in the city of New York in the interest of public safety, health and welfare" (NYC Admin Code § 27-102), contains the kind of safety regulations on which an out-of-possession owner's liability may be premised. The Housing Maintenance Code, on the other hand, promotes "the enforcement of minimum standards of health and safety, fire protection, light and ventilation, cleanliness, repair and maintenance, and occupancy in dwellings ... necessary to protect the people of the city against the consequences of urban blight" (NYC Admin Code § 27-2002), and applies only to "dwellings," defined as "any building or structure or portion thereof which is occupied in whole or in part as the home, residence or sleeping place of one or more human beings" (NYC Admin Code § 27-2004[3]). A commercial building is not a "dwelling."

Discussion

Here, the property defendants could not have taken any measures beyond those taken by its tenant. As opposed to defaulting on its contractual obligation to properly maintain the leased premises, which would have triggered the property defendants' right of re-entry, Fox News took extraordinary measures to combat the bed bug infestation. After an extensive investigation, which included sending extermination experts accompanied by bed bug-smelling dogs to inspect the homes – and even some second homes – of employees who worked on the C-1 level, the source of the bed bug infestation was determined to be a Fox News employee with whom plaintiff shared her desk. Thus, all attempts at eradicating the bed bug infestation were fruitless because the space kept getting re-infected every time the employee entered the premises (see Sorkin affidavit, ¶¶ 9, 19).

In this context, the court notes that plaintiffs do not suggest any measure which

defendants could have taken which would have produced better results. Movants posit that since there are no effective prophylactic measures against bed bugs, the only thing they could do to prevent bed bugs would be to subject all persons entering the building and their possessions to a thorough search by specially trained dogs and human inspectors which would be much more intrusive than the searches now conducted at airports (see Toland affidavit, ¶¶ 10-11, annexed to moving papers) – a practical impossibility since more than 6,000 people a day go into the building (see Clarke supporting affirmation, ¶ 3).

It is uncontroverted that the bed bug infestation was not caused by any of the defendants. As discussed above, the property defendants had no statutory or contractual duty to exterminate the space leased to Fox News (see *Reddy v 369 Lexington Ave. Co., L.P.*, 31 AD3d 732, 733 [2d Dept 2006]).

Plaintiffs also rely on a series of judicial decisions holding property owners liable for the presence of bed bugs in their buildings (see *Grogan v Gamber Corporation*, 19 Misc 3d 798 [Sup Ct, NY Co, Gische, J, 2008]; *Martin v The Olnick Organization, Inc.*, n.o.r., 2008 WL 5427236 [Sup Ct, NY Co, Ling-Cohan, J, 2008]; *Zayas v Franklin Plaza, supra*, at exhibits A, B and C, respectively, to plaintiffs' memorandum of law). These too are unavailing to plaintiffs, since they involve different situations than the one at bar.

In *Grogan*, a mother and daughter were bitten by bed bugs while staying in a hotel. The court found that their relationship to the hotel was that of lessee to lessor. In *Martin*, the plaintiff was bitten while staying in a condominium unit at an extended stay hotel. The court found that a hotel keeper has a duty to take reasonable measures to ensure the safety of hotel guests, and safeguard even from dangers not attributable to the hotel keeper. In *Zayas*, the tenant

in a Mitchell-Lama cooperative development sued her landlord to recover for personal injuries and property damage arising from a bed bug infestation. The court found that the cooperative corporation had breached its non-delegable duty under section 78(1) of the Multiple Dwelling Law (applicable only to residential buildings) to maintain the building in good repair because there was a building-wide bed bug infestation.

In short, the plaintiffs in the foregoing cases were either tenants or hotel guests who had a direct contractual relationship to the owners of property subject to various protective laws. By contrast, plaintiff herein had no contractual relationship with the property defendants or property interest in the building, and the only statute which specifically protected her is the Workers Compensation Law, the remedy provided under our system of laws for injuries suffered in the workplace.

Triangle

With respect to Triangle, the cleaning service hired by Cushman, plaintiffs premise liability on two arguments: (i) Triangle had actual notice of the infestation because it was the party which, at Fox News' request, contacted Pest Elimination and arranged for it to exterminate the studio space; and (ii) since Triangle's contracts with Cushman and Fox News have not been fully produced in discovery, it is for the jury to decide if Triangle assumed the obligation to keep plaintiff's work area in a safe, bug-free condition.

Triangle's supervisor denied that Triangle had any knowledge of bed bugs prior to May 28, 2008 (Altshuler affidavit ¶ 2, annexed to moving papers). According to the affiant, pursuant to a contract with Cushman Triangle provided general cleaning services to the common areas of

the building and in the 16th floor space occupied by Fox News; Triangle did no work on the C-1 level (*id.*, ¶¶ 3-5). Triangle was retained by Fox News "to facilitate and coordinate extermination services on a monthly basis with Pest Elimination" but that arrangement concluded at the end of 2007 and thereafter Fox News dealt directly with Pest Elimination (*id.*, ¶ 7).

At any rate, Triangle's knowledge of the infestation, even if true, does not serve to impose liability on it, since it was merely a contractor, not a building owner or manager with the burden of remedying known problems. A claim of negligence based on nothing more than speculation cannot survive a motion for summary judgment (see *Cruz v 850 Third Avenue Limited Partnership*, 186 AD2d 4 [1st Dept 1992]).

Finally, American has cross-moved for summary judgment dismissing all claims and cross-claims against it. Neither plaintiffs nor the other defendants have opposed this cross-motion.

Accordingly, defendants' motion and cross-motion for summary judgment are granted and the complaint is dismissed in its entirety. The Clerk is directed to enter judgment accordingly.

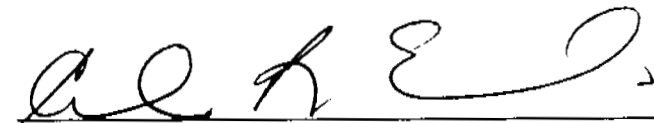
This decision constitutes the order of the court.

DATED: April 11, 2011

FILED

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NEW YORK
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Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD