[* 1]

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

PRESENT: MARCY S. FRIEDMAN PART 57

Index Number : 100826/2008
AMERICAN INTN'L INS. CO.
vs
A. STEINMAN PLUMBING & HEATING
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion ~~to~~/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
APR 18 2011
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.

Dated: 4-15-11

MARCY S. FRIEDMAN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

AMERICAN INTERNATIONAL INSURANCE COMPANY as subrogee of MORTIMER ZUCKERMAN,

Plaintiff(s),

- against -

A. STEINMAN PLUMBING & HEATING CORP. and 950 FIFTH AVENUE CORPORATION,

Defendant(s).

Index No.: 100826/08

DECISION/ORDER

In this subrogation action, plaintiff American International Insurance Company (American International) seeks reimbursement for claims paid to its insured, Mortimer Zuckerman, for property damage sustained by him as a result of the alleged negligence of the building's board, defendant 950 Fifth Avenue Corporation (950 Fifth). 950 Fifth moves for summary judgment dismissing plaintiff's complaint against it.

The following material facts are undisputed: On July 4, 2005, the water tank on the roof of 950 Fifth's premises overflowed, causing substantial damage to Mr. Zuckerman's apartment. Defendant A. Steinman Plumbing and Heating Corp. (Steinman) was 950 Fifth's plumbing contractor.[1] American International and 950 Fifth dispute the cause of the overflow of the water tank.

The standards for summary judgment are well settled. The movant must tender evidence,

---

[1] The action against Steinman was discontinued pursuant to the parties' stipulation dated May 28, 2010.

by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

It is well settled that in order to prove negligence, a plaintiff must demonstrate that "the defendant created a dangerous condition or had actual or constructive notice of it." (Frank v Time Equities, Inc., 292 AD2d 186 [1st Dept 2002]; Arnold v New York City Hous. Auth., 296 AD2d 355 [1st Dept 2002]; Gordon v American Museum of Natural History, 67 NY2d 836 [1986].) "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." (Gordon, 67 NY2d at 837.) However, it is further settled that "[c]onstructive notice will not be imputed where the defect is latent, i.e., where . . . the defect is of such a nature that it would not be discoverable even upon a reasonable inspection." (Bean v Ruppert Towers Hous. Co., Inc., 274 AD2d 305 [1st Dept 2000] quoting Ferris v County of Suffolk, 174 AD2d 70, 76 [2d Dept 1992]. See also Barrerra v New York City Tr. Auth., 61 AD3d 425 [1st Dept 2009]; Giaccio v 179 Tenants Corp., 45 AD3d 454 [1st Dept 2007]; Lal v Ching Po Ng, 33 AD3d 668 [2d Dept 2006]; Curiale v Sharrots Woods, Inc., 9 AD3d 473 [2d Dept 2004].)

In moving for summary judgment, 950 Fifth contends that it cannot be found negligent as

a matter of law because it did not have actual or constructive notice of the latent defect that caused the water tank to overflow. Specifically, it argues that the water tank contained both a float and a high/low water level alarm system (alarm system) that would sound and alert building staff if the water level in the tank became too high or too low. It further alleges that on the date of the occurrence, the alarm system failed and did not ring, and that this failure was a latent defect for which it cannot be found to have constructive notice.

In support of these contentions, 950 Fifth submits the deposition of its doorman on duty at the time of the occurrence, Timothy Fleming, in which he testified that he could hear the alarm in the basement from his doorman station in the lobby. (See Fleming Dep. at 34, 39-40.) On the date of the occurrence, he testified that he did not hear an alarm, and he first thought something was wrong when he discovered low water pressure in the sink in the basement. (Id. at 34, 29.)

It is undisputed that the water tank was last inspected prior to the occurrence in November 2004, and that it was inspected and cleaned yearly from 2001 to 2004. (See Dep. of David Nechamkin [Steinman's President], at 26-31.) 950 Fifth received no complaints or reports about either the float or the alarm system at any time prior to the occurrence. (Dep. of Michael Mitrovich [950 Fifth's Resident Manager], at 176-177.) Mitrovich further testified that he tested the alarm every week, and never experienced any problems with the alarm system. (Id. at 79-82.) He testified that he understood that the float and alarm system were expected to last for the lifetime of the water tank. (Id. at 38.) Steinman's David Nechamkin testified that there were no records of a malfunctioning float or alarm system. Significantly, he testified that the float and alarm are not ordinarily replaced until they stop working well. (Nechamkin Dep. at 131-132, 155.) He also testified that after the occurrence, his "pump company guy" went to repair the

water tank at 950 Fifth, and reported that the float switch and alarm switch were broken, and that they were replaced. (Id. 45-46.) Plaintiff subrogor's own engineer, Peter Fischer, testified that there is no preventive maintenance for float systems and that "they work until they do not work." (Fischer Dep. at 28.)

On this record, 950 Fifth makes a prima facie showing that the alarm did not sound on the date of the occurrence, and that a defect in the float and/or the alarm system would not have been discovered through reasonable inspection. 950 Fifth therefore cannot be found to have had constructive notice of the condition that was a proximate cause of the water overflow. (See Curiale, 9 AD3d at 475.)

In opposition, American International does not argue that 950 Fifth had constructive notice of the defects in the water tank. Rather, it argues that 950 Fifth created the defective condition that caused the damage. Specifically, American International contends that the alarm system was operational on the date of the occurrence, but that because of its location in the basement, it could not be heard by the doorman in the lobby. It further argues that 950 Fifth was understaffed and failed to adequately monitor the alarm. (See Smith Aff. In Opp. at 1-2.)

American International fails to raise a triable issue of fact on this claim which is premised on the opinion of Keith Kallberg, a professional engineer whom American International retained to investigate the cause of the water loss. It is well settled that the opinion of an expert should be given no probative force where "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation." (Diaz v New York Downtown Hosp., 99 NY2d 542, 544 [2002]; Amatulli v Delhi Constr. Corp., 77 NY2d 525, 533 n2 [1991].) Kallberg merely assumes that the alarm system was operational on the day of the incident. (Kallberg Aff., ¶ 12.) Even crediting

this assumption for purposes of this motion,[2] Kallberg further concludes, without any factual basis or support in the record, that the doorman could have heard the alarm only "if he were perfectly positioned in the lobby," and not if he were out in the street or if there were street noises. (Id., ¶ 9.) Kallberg then further opines: "If the building had been properly manned on a twenty-four hour basis at the time of the occurrence and someone stationed in the basement on a continual basis, the water overflow from the roof water tank would have been discovered when the high water alarm activated in the basement. Since no one was stationed in the basement on the date of the occurrence the alarm was not heard." (Id., ¶ 13.) "[T]he system installed by the defendant was inadequate under the circumstances as it required constant supervision so that the pumps could be turned off with speed and efficiency. In this case the system was not properly monitored nor was there an operational plan that addressed how one should respond to the alarm. It is therefore my conclusion that these failures were the direct and proximate cause of the loss." (Id., ¶ 17.) Kallberg does not cite any industry standards or custom regarding the proper placement and monitoring of water tank alarm systems. As his opinion is speculative and not based on facts in the record, it is incompetent to raise a triable issue of fact as to whether 950 Fifth's acts were the cause of the loss.

The court also rejects American International's assertion that triable issues of fact exist due to conflicting testimony as to how the water leak was discovered on the date of the

---

[2]American International claims that Mitrovich, the resident manager, testified that the alarm was working after the incident. (Smith Aff. In Opp. at 6.) In fact, Mitrovich testified that when he tested the alarm on the panel in the basement, the alarm sounded as though it was working. (Mitrovich Dep. at 103-104.) He further testified, however, that he was informed by the pump company that worked on the tank after the overflow that although the panel was testing as though everything was working, there was a problem with the relay, and the entire system was rewired. (Id. at 107-110.) On this motion, American International does not dispute that this rewiring was performed.

occurrence. Mr. Zuckerman's live-in cook, Dora Pompey, testified that she discovered the leak and immediately notified the doorman. (See Pompey Dep. at 23, 31-32.) As noted above, Mr. Fleming testified that he discovered it after noticing a drop in water pressure. (See Fleming Dep. at 29.) Regardless of how the leak was discovered, there is simply no evidence in this record that the alarm system was improperly located or monitored or that any employee of 950 Fifth failed to take appropriate steps to stop the overflow either before or after the leak occurred. Accordingly, American International fails to raise a triable issue of fact as to 950 Fifth's negligence.

Finally, American International claims that prior to the commencement of the instant action, 950 Fifth destroyed key evidence – namely, the float and alarm systems – that American International requires to prosecute the action, and that 950 Fifth's answer should be stricken as a sanction for its spoliation of evidence. It is well settled that spoliation sanctions may be applied to both intentional and negligent destruction of evidence. (See Kirkland v New York City Hous. Auth., 236 AD2d 170, 173 [1st Dept 1997].) "While the striking of a pleading may be justified where a party destroys key physical evidence such that its opponents are prejudicially bereft of appropriate means to [either present or] confront a claim with incisive evidence, outright dismissal remains a drastic remedy and is appropriate only where less severe sanctions have been ruled out." (Tommy Hilfiger, USA, Inc. v Commonwealth Trucking, Inc., 300 AD2d 58, 60 [1st Dept 2002] [internal citations and quotation marks omitted] [brackets in original].)

Here, sanctions are not appropriate. It is undisputed that Steinman's subcontractor repaired the tank the day after the occurrence, removing and replacing the float system. (See Mitrovich Dep. at 128.) The alarm system was replaced in September 2005. (Id. at 135-136.) Clearly, this is not a case in which the parts were intentionally destroyed but, rather, is one in

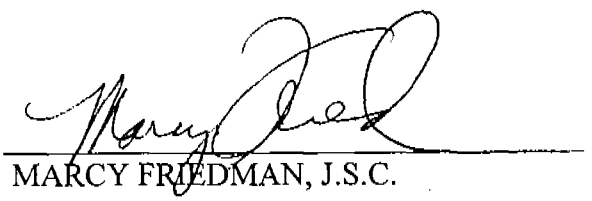
which the tank was necessarily repaired and the parts were replaced on an emergency basis due to the nature of the occurrence. Moreover, American International makes no showing that it requested that 950 Fifth retain the parts before the repairs were performed. The assertion in its counsel's opposition to the instant motion that "requests were made for the parts shortly after the incident" (Smith Aff. In Opp. at 7) is both wholly conclusory and without probative value. In any event, Mitrovich testified that he requested that Steinman retain the float and switch but that Steinman could not locate them. (Mitrovich Dep. at 112.) American International also fails to show that 950 Fifth should be held responsible for loss of evidence by a contractor who made an emergency repair.

Finally, American International fails to show that the disassembled parts, if available, would have enabled it to determine whether the alarm failed at the time of the overflow. American International's expert fails to give any detail as to how examining the "remnants" of the alarm system would have enabled him to determine if the system had failed. (See Kallberg Aff., ¶ 14.) Spoliation sanctions are unavailable where, as here, "plaintiff failed to establish that without the evidence [it] would be unable to prove [its] case." (Melcher, 52 AD3d at 245.)

It is accordingly hereby ORDERED that defendant's motion is granted to the extent that the complaint is dismissed, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
April 15, 2011



MARCY FRIEDMAN, J.S.C.