

Robinson v Canniff

2004 NY Slip Op 30283(U)

June 29, 2004

Supreme Court, New York County

Docket Number: 120495/03

Judge: Diane A. Lebedeff

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

PRESENT: **DIANE L. LEBEDEFF**

PART 8

012049512003

ROBINSON, III E.C.

VS
CANNIFF, BRYAN

SEQ 2

AMEND SUPPLEMENT PLEADINGS

INDEX NO.

MOTION DATE

4/22/04

MOTION SEQ. NO.

MOTION CAL. NO.

83

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

Notice of Motion/ ~~Order to Show Cause~~ - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3

Cross-Motion: Yes No

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

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

JUL - 6 2004

NEW YORK
COUNTY CLERK'S OFFICE

JUN 29 2004

Dated: _____

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

J.S.C.

Check if appropriate: DONOTPOST

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

SUPREME COURT OF **THE** STATE OF NEW YORK
NEW YORK **COUNTY** : I.A.S.PART 8

-----X

E.C. ROBINSON, III,

Plaintiff,

-against-

Index No. 120495/03

Mot. Seq. No. 002

BRYAN CANNIFF, DENISE CANNIFF and
THOMAS A. POLLACK,

Defendants.

-----X

E.C. ROBINSON, III,

Plaintiff,

-against-

FRIEDMAN MANAGEMENT CORP.,
281 WEST 11TH OWNERS CORP. ,
PENMARR REALTY CORPORATION,
JUDITH BLOOMFIELD, Individually and
as a Partner of **SIRA PROPERTIES, ADELE**
COHEN, Individually and **as** a Partner of **SIRA**
PROPERTIES, MAY Z. COHEN, Individually
and **as** a Partner of **SIRA PROPERTIES, and**
SIRA PROPERTIES, and Unincorporated Business
Entity,

Defendants.

-----X

FRIEDMAN MANAGEMENT COMPANY,
281 WEST 11TH OWNERS CORP.,
PENMARK REALTY CORPORATION, and

SIRA PROPERTIES, and Unincorporated Business Entity,

Third-party Plaintiffs,

-against-

Index No. 590815/03

THOMAS A. POLLAK,

Third-party Defendant.

-----X

THOMAS A. POLLAK,

Third-party Counterclaiming Defendant,

-against-

FRIEDMAN MANAGEMENT COMPANY, SIRA PROPERTIES, 281 WEST 11TH OWNERS CORP., PENMARK REALTY CORPORATION and ATLANTIC MUTUAL INSURANCE COMPANY,

Defendants and Additional Counterclaim Defendants.

-----X

DIANE A. LEBEDEFF, J.:

Plaintiff E.C. Robinson moves for leave to serve an amended complaint correcting the deficiencies in the original complaint as to defendant Thomas A Pollak.

The decision whether to permit an amendment to the complaint is committed to the discretion of the trial court (CPLR 3025 [b]), and leave to amend shall be freely granted absent a showing of prejudice or unfair surprise (*Fahey v. County of Ontario*, 44 N.Y.2d 934,935 [1978]; *Mallory Factor, Inc. v. Schwartz*, 146 A.D.2d 465,467 [1st Dept. 1989]).

The court must also examine whether the facts alleged are legally sufficient to establish a

prima facie cause of action consistent with the legal theory, and scrutinize any alleged insufficiency or **lack** of merit (*Danielsv. Empire Orr*, 151 A.D.2d 370,371 [1st Dept. 1989]).

Reviewing the proposed complaint and supporting papers under this standard, the court finds plaintiff's proposed amended complaint cures the deficiencies identified in the original complaint sufficiently to state a negligence cause of action. The proposed amended complaint alleges that Pollak negligently conducted construction and demolition work in apartment L-C in such a way that dust and "toxins" traveled through the building's ventilation system, causing personal and property damage to plaintiff (see exhibit B, paras. 74-84).

Defendant challenges the allegations that dust traveled from apartment L-C to plaintiff's apartment because they are located in different lines, **and** argues that it was not foreseeable that dust would travel to plaintiff's apartment. Plaintiff submits evidence that Pollak was paid for the work in early December of 2000, at or about the time dust **and** toxins allegedly entered plaintiff's apartment (motion, exhibits C, D and E). He further avers that an engineering report supports the allegations that ducts in the building pass both apartment L-C and plaintiff's apartment, so that it **was** possible the dust originated in apartment L-C. The questions of causation and foreseeability are issues of fact that cannot be resolved adverse to plaintiff in the context of this motion.

Defendant Pollak also argues that, as a matter of law, his alleged negligent performance of a contractual obligation, cannot render him liable in tort to plaintiff, a non-contracting third party (*Palka v. Servicemaster Management Services Corp.*, 83 N.Y.2d

579, 588 [1994], as a general rule that, “‘a contractual obligation, standing alone’ in the ‘ordinary case’ will not extend duties beyond the contracting parties”). An exception to the general rule arises where the defendant, “while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk” or “negligently creates or exacerbates a dangerous condition” causing injury (*Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 139-141 [2002], citing *H. R. Moch Company, Inc. v. Rensselaer Water Company*, 247 N.Y. 160, 167-68 [1928], which describes that conduct as “launch[ing] a force or instrument of harm”).

The amended complaint (**para. 80**), comes within the exception by alleging that Pollak negligently created a dangerous condition and permitted neighboring apartments to become contaminated by dust, debris and noxious materials by, among other things, failing to “properly protect ..., maintain and clean the ventilation systems,” failing to close off vents during renovations, and failing to notify other tenants of work on ventilation systems. Pollak’s contention that he had no duty with respect to the ventilation exhaust system is similarly a factual argument which may be asserted following discovery in a summary judgment motion (see *Hunter v. Lehrer McGovern Bovis, Inc.*, 299 A.D.2d 175 [1st Dept. 2002], lv. denied 100 N.Y.2d 509 [2003], granting **summary** judgment where defendant contractor and subcontractor showed plaintiff’s employer was party responsible for cleaning ducts, and that they had advised the employer to clean them out).

Accordingly, the motion for leave to amend to assert a cause of action against defendant Pollak is granted. The amended complaint, in the proposed form annexed to the

Reply Affidavit as Exhibit A, shall be **deemed served** upon **service** of a copy of this order with notice of entry thereof.

This decision **constitutes** the order of the court.

Dated: June 29, 2004



J.S.C.

FILED
JUL - 6 2004
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