

Brown v Roth

2007 NY Slip Op 30688(U)

April 10, 2007

Supreme Court, New York County

Docket Number: 0102434/2005

Judge: Leland G. DeGrasse

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

PRESENT: **HON. LELAND DEGRASSE**

PART 25

Justice 1

Index Number : 102434/2005

BROWN, BRIDGET

vs

ROTH, HERMAN

Sequence Number : 001

 SUMMARY JUDGMENT

INDEX NO. 102434/05

NOTION DATE 1/22/07

NOTION SEQ. NO. 001

NOTION CAL. NO. 12

T _____ tion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

FILED

APR 13 2007

NEW YORK
COUNTY CLERK'S OFFICE

APR 10 2007

Dated: _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

-----X
BRIDGET BROWN, an infant under the age of 18 years, :
by her mother and natural guardian, SIMONA BROWN, :
CLAUDIA BROWN, an infant under the age of 18 years, :
by her mother and natural guardian, SIMONA BROWN, :
SIMONA BROWN, individually, and ERIC BROWN :
:
Plaintiffs, :
:
-against- :

Index No.: 102434/05
Cal. No. 12 of 1/22/07

HERMAN ROTH and HALSTEAD PROPERTIES, LLC, :
:
Defendants. :

-----X
HALSTEAD PROPERTIES, LLC, :
:
Third-Party Plaintiff, :
:
-against- :

Index No.: 590292/06:

FRED SMITH PLUMBING, :
:
Third-Party Defendant. :
-----X

FILED
APR 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

DeGRASSE, J.:

In this personal injury action, third-party defendant, Fred Smith Plumbing (“FSP”), moves pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint brought against it by defendant/third-party plaintiff Halstead Properties, LLC (“HPL”). FSP also moves, pursuant to 22 NYCRR § 130-1.1, for an award of costs and/or sanctions against HPL and its attorney for commencing a frivolous lawsuit.

FACTS

In the main action, filed on February 18, 2005, plaintiffs seek to recover for personal injuries allegedly sustained as a result of a toxic mold condition in the condominium apartment they resided in at 160 West 86th Street in Manhattan pursuant to a sublease with defendant Herman Roth. HPL was the managing agent of the building. The complaint alleges that plaintiffs became aware of the presence of a mold condition in their apartment in January 2004, when building maintenance broke open the wall between the living room area and the children's room to repair a leaking pipe. Thereafter, plaintiffs hired an environmental company who inspected the apartment and determined that a hazardous mold condition existed. It is alleged that although defendants were notified about the mold growth in plaintiffs' apartment by letter dated February 18, 2004, defendants did not remedy the unsafe condition until November 2004, approximately eleven months later. It is further alleged that because defendants failed to timely remedy the hazardous condition, plaintiffs "were caused to suffer physical injuries, increased risk of future respiratory ailments, and diminished enjoyment of life."

On March 27, 2006, HPL commenced a third-party action sounding in negligence, breach of contract, and common law indemnification and/or contribution against FSP, who was hired by HPL to perform certain plumbing repairs at the subject apartment. By their third-party complaint, HPL alleges that FSP's repair work was not performed "in a proper manner [and] caused further damage to the subject premises."

DISCUSSION

It is well settled that the proponent of a summary judgment motion must make a prima facie case showing entitlement to judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

FSP now moves for summary judgment dismissing the third-party complaint on the ground that no triable issue of fact exists because HPL cannot establish that the mold condition in plaintiffs' apartment occurred as a result of the plumbing repairs made by FSP, or that FSP had any duty to locate the mold or advise anyone of its presence. Specifically, FSP argues that its only connection to the subject apartment was to perform plumbing services which included (1) repairing a leak in January 2004, "some weeks before plaintiffs advised defendants of the alleged existence of mold" in their apartment, and (2) "adding some steel piping to the [p]remises approximately 10 months later in November 2004."

In support of its motion, FSP submits the affidavit of its vice president, David London. In his affidavit, London states that he is a licensed master plumber, and that FSP is engaged in the business of installing, maintaining and repairing plumbing. London further states that in January 2004, HPL hired FSP to repair a leaky pipe inside one of the wall's of plaintiffs' apartment. Annexed to the moving papers are copies of: (1) a work order, dated January 15, 2004, and signed

by HPL's employee, Santo Delgado; (2) a work ticket indicating that the mechanic on the job was Stanley Rzonca, and that he had to open up the wall between the living room and the children's room to locate the leak; and (3) an invoice, dated January 26, 2004, addressed to HPL for \$663.75 stating that on January 16, 2004, FSP "[f]ound [thc] source of [thc] leak to be due to [a] leaking flanged connection" and that repairs were made "to said flanged connection using all new parts and material as required and tested."

London further states that in late October 2004, HPL hired FSP to repair a steam leak behind a wall in plaintiffs' apartment. Annexed to the moving papers are copies of: (1) a work order, dated October 29, 2004, and signed by HPL's employee Luis G. Morales, indicating that there was a steam leak in the "bedroom on the west side fa[c]ing south" of plaintiffs' apartment; (2) a work ticket, dated October 29, 2004, and signed by Morales, indicating that Kupo Dervisevic was the mechanic on the job, that he brokc open the wall, and that he was going to replace the expansion joint on the following Monday; (3) a work order, dated November 1, 2004, and signed by Morales, indicating that an old steam expansion had to be removed; (4) a work ticket, dated November 1, 2004, and signed by Morales, indicating that Dervisevic had replaced the expansion joint with a new one because the old one "was not good"; and (5) an invoice, dated November 10, 2004, addressed to HPL for \$2,419.95 stating that on November 1, 2004, FSP "installed one (1) new 3" expansion joint using all new 3" black steel pipe, fittings and material as required and tested."

FSP next submits a copy of plaintiffs' response to HPL's demand for a bill of particulars. Plaintiffs' bill of particulars states that the hazardous condition occurred because "a steam pipe located in the wall separating the living room and children's bedroom of the apartment ... was leaking. The prolonged leak caused mold and spores to grow on the sheetrock walls." The bill of

particulars further states that “actual notice of the condition was given to [d]efendant on February 18, 2004.”

Finally, FSP submits a copy of the February 18, 2004 letter by which plaintiffs’ attorney notified HPL and Roth about the mold condition in plaintiffs’ apartment. In his letter, plaintiffs’ attorney stated that “[i]t is my understanding that the building broke open a wall in the [plaintiffs’] apartment in the latter part of January to repair some water damage. However, it appears that the mold condition existed before that time and continues. In view of the fact that the mold condition (which is in the wall between the living room and [thc] children’s bedroom) can cause breathing problems for their children and can pose a health hazard, the [plaintiffs] retained an environmental company (Future Environmental Designs Inc. in Syosset, NY) to examine the problem.”

Here, the evidence tendered by FSP in support of the motion is sufficient to establish a *prima facie* case entitling it to summary judgment, thus shifting the burden to HPL to show facts sufficient to require a trial of any material issue of fact (*see Zuckerman*, 49 NY2d at 562).

In opposition, HPL states that the motion is premature because “depositions have not yet been held, and therefore the extent of the work performed and the circumstances surrounding the work performed by [FSP] has not yet been fully explored.” As such, HPL claims that the motion should be denied because issues of fact exist as to whether the hazardous mold condition was caused by water that entered the wall of plaintiffs’ apartment due to FSP’s negligence in performing its repair work on January 15, 2004, and whether the work performed by FSP on October 29 and November 1, 2004 was in the same location as the work it performed on January 15, 2004. HPL also claims that an issue of fact exists as to “when the mold first started to appear in the subject location.”

HPL fails to rebut FSP's *prima facie* showing that its plumbing repair work did not cause the hazardous mold condition in plaintiffs' apartment. The submissions reflect that the mold condition existed before FSP performed its repair work at the subject apartment. Also without merit, is the argument that outstanding discovery renders summary judgment premature. HPL fails to show that any facts essential to oppose the motion are in FSP's exclusive knowledge and possession, and could not be obtained by discovery (*see* CPLR 3212 [f]; *see also* *Perez v Brux Cab Corp.*, 251 AD2d 157, 160 [1998] ["summary judgment motion may not be defeated by a claim of unconducted discovery unless the opponent has made a showing of reasonable attempts at discovery and that discoverable facts would give rise to a triable issue"]). Mere hope and speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient (*see* *Ordonez v Levy*, 19 AD3d 385, 386 [2005]; *Mazzafarro v Barterama Corp.*, 218 AD2d 643, 644 [1995]). HPL contends that since the "exact circumstances of the work performed is not known," it should be allowed to depose FSP's two mechanics, Stanley Rzonca and Kupo Dervisevic. HPL, however, has failed to establish that it could not have deposed those nonparties during the almost one year between the commencement of the third-party action and the instant motion herein (*see* *Santangelo v Fluor Constructors Intl.*, 266 AD2d 893, 894 [1999]). "Where the party opposing a motion for summary judgment claims that a defense depends upon knowledge in the possession of the moving party, the motion will still be granted if the party opposing the motion has failed to ascertain the facts due to its own voluntary inaction" (*Twining, Nemia & Hill v Read Mem. Hosp.*, 89 AD2d 432, 434 [1982]).

Here, the motion is opposed only by the affirmation of HPL's counsel, who does not have personal knowledge of the facts, and whose speculation that discovery might uncover evidence sufficient to raise a triable issue of fact regarding FSP's' alleged negligence is insufficient to defeat

FSP's *prima facie* showing of entitlement to summary judgment (*see Gomez v Sammy's Transp., Inc.*, 19 AD3d 544 [2005]). Furthermore, in view of the fact that HPL had personal knowledge of the relevant facts underlying the incident, since its two employees Santo Delgado and Luis Morales approved the plumbing repairs by signing FSP's work orders and work tickets, HPL's purported need to conduct discovery does not warrant denial of the motion (*see Emil Norsic & Son, Inc. v I.P. Transp., Inc.*, 30 AD3d 368 [2006]). Thus, HPL has failed to demonstrate an evidentiary basis to suggest that additional disclosure might lead to relevant evidence. Accordingly, FSP's motion for summary judgment dismissing the third-party complaint is granted.

The branch of the motion by which FSP seeks an award of costs and/or sanctions against HPL and its attorney pursuant to 22 NYCRR 130-1.1 is denied. The commencement of the third-party action does not appear to be frivolous inasmuch as plaintiffs allege in the complaint and bill of particulars that they were injured due to "inadequate repairs" presumably made by FSP. FSP has failed to set forth any basis to conclude that HPL or its attorney's actions warrant the imposition of such an award (*see generally Navin v Mosquera*, 30 AD3d 883 [2006]).

CONCLUSION

Based on the foregoing, FSP's motion for summary judgment is granted to the extent that the third-party complaint is dismissed. The branch of the motion by which FSP seeks an award of costs and/or sanctions pursuant to 22 NYCRR 130-1.1 is denied. The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: APR 10 2007

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HON. LELAND DeGRAZIA