[* 1]

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

ALASDAIR MCMULLAN and KATRINA CARDEN,

Plaintiffs,

- v -

HRH CONSTRUCTION, LLC., 371 FIRST AVENUE CORP., 155 WEST 21ST STREET HOLDINGS, LLC, ABRAHAM DANIELS REAL ESTATE INVESTORS, INC, LALEZARIAN DEVELOPERS, INC., AURASH CONSTRUCTION CORP., FMC ASSOCIATES CONSULTING ENGINEERS a/k/a FMC ASSOCIATES, INC., E.A.S. MECHANICAL, INC., ADAM DANIELS, ABRAHAM DANIELS, KEVIN LALEZARIAN, ALEX PAPADOPOULOS, ANTHONY RAFANIELLO, AMERICAN INTERNATIONAL GROUP, INC, A.I.G. CLAIM SERVICES, INC., JOHN DOE #1-5 and JD COMPANY,

Defendants.

INDEX NO. 106432/06

MOTION DATE 10/31/06

MOTION SEQ. NO. 003

MOTION CAL. NO. 91

The following papers, numbered 1 to 6 were read on this motion to dismiss and cross motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibit A	1-2
Notice of Cross Motion— Answering Affidavits — Exhibits A-BB	3-4
Replying Affidavits	5-6

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
APR 17 2007
COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN
J.S.C.

Dated: 4/11/07

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
DATED:

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

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

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ALASDAIR MCMULLAN and KATRINA CARDEN,

Plaintiffs,

Index No. **106432/06**

- against -

Decision and Order

HRH CONSTRUCTION, LLC., 371 FIRST AVENUE CORP., 155 WEST 21ST STREET HOLDINGS, LLC, ABRAHAM DANIELS REAL ESTATE INVESTORS, INC, LALEZARIAN DEVELOPERS, INC., AURASH CONSTRUCTION CORP., FMC ASSOCIATES CONSULTING ENGINEERS a/k/a FMC ASSOCIATES, INC., E.A.S. MECHANICAL, INC., ADAM DANIELS, ABRAHAM DANIELS, KEVIN LALEZARIAN, ALEX PAPADOPOULOS, ANTHONY RAFANIELLO, AMERICAN INTERNATIONAL GROUP, INC, A.I.G. CLAIM SERVICES, INC., JOHN DOE #1-5 and JD COMPANY#1-5,

Defendants.
----------X

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiffs allege that construction workers on the property adjoining their apartment building have trespassed onto their property, and that the construction work caused injuries and property damage. Defendants move to dismiss the complaint as against the individual defendants, Adam Daniels, Abraham Daniels, Kevin Lalezarian, Alex Papadopoulos, and Anthony Rafaniello. Plaintiffs cross-move for summary judgment in their favor on four of the eleven causes of action of the complaint, and for a default judgment against Defendant Aurash Construction Corp.

BACKGROUND

Plaintiff Alasdair McMullan leased a "Garden Floor with Basement" apartment located at 153 West 21st Street in Manhattan, pursuant to a lease with E.B.W. LLC, which was the original

owner of the building. In January 2006, the building was sold to Extell 21st Street LLC (Extell). Plaintiff Katrina Carden allegedly resided with McMullan in the apartment, and both moved out of the apartment by 2007.

Since 2004, construction of a high-rise apartment building was taking place on the property at 155 West 21 Street, adjacent to plaintiffs' building. 155 West 21st Street LLC allegedly owns the adjacent property. Defendant HRH Construction LLC (HRH) is the alleged construction manager for the project, and defendants Alex Papadopoulos and Anthony Rafaniello are HRH employees.

Plaintiffs allege that, in April 2005, construction workers knocked down a fence separating the two properties, and that the construction workers then began using their garden/backyard as a staging and storage area for the construction. Plaintiffs maintain that construction workers regularly came into the garden/backyard without their permission, and that the construction work caused damage to their apartment and personal property.

On May 31, 2005, plaintiffs executed an access agreement with defendant 155 West 21st LLC, signed by defendant Kevin Lalezarian. The access agreement provides that, in exchange for access, A.D. Real Estate Investors, Inc. and 155 West 21st Street LLC will, among other things, pay McMullan the amount of his full monthly rent until completion of work on the walkway and in the backyard. On behalf of 155 West 21st LLC, defendant Abraham Daniels executed a separate access agreement with E.B.W., LLC, which granted a temporary license for 120 days from May 24, 2005.

On June 24, 2005, Carden allegedly observed water and mud flowing through the basement ceiling of the apartment and accumulating onto the floor below, damaging plaintiffs' possessions. The flow of mud and water allegedly began to slow down after Papadopoulos turned off an outdoor water spigot in the backyard that construction workers allegedly used. On July 22, 2005, a backhoe

allegedly broke through the exterior and interior apartment wall, causing Carden injuries and property damage. Plaintiffs also maintain that, after expiration of the access agreement with E.B.W. LLC, construction workers repeatedly came onto the premises between March 1 and May 2, 2006, and refused to leave even after plaintiffs told the construction workers to go.

On May 11, 2006, plaintiffs commenced this action against 155 West 21st Street LLC a/k/a 155 West 21st Street Holdings LLC (155 West 21st Street); HRH and its employees, Papadopoulos and Rafaniello; Adam Daniels Real Estate Investors, Inc. (ADRI), and its alleged principals, Adam Daniels and Abraham Daniels; Lalezarian Developers, Inc. (LDI) and its alleged managing member, Kevin Lalezarian; Aurash Construction Corp. (Aurash), an alleged subcontractor, and others. The complaint alleges eleven causes of action, with theories sounding in negligence, trespass, harassment, intentional infliction of emotional distress, prima facie tort, breach of contract, and tortious interference with a contract. Plaintiffs filed an amended complaint on July 28, 2006.

By order dated June 6, 2006, the Court (Soto, J.) granted plaintiffs' motion for a preliminary injunction prohibiting defendants from (1) entering onto plaintiffs' premises, including the basement, ground floor, and backyard areas, and (2) bringing or leaving their equipment, material and/or debris onto the premises. The Appellate Division, First Department recently upheld the preliminary injunction. McMullan v HRH Construction, LLC, 2007 NY Slip Op 1772 (1st Dept, Mar 1, 2007).

DISCUSSION

Defendants' Motion to Dismiss

Defendants move to dismiss the complaint as to Adam Daniels and Abraham Daniels, which they contend have no individual liability because they are officers of a corporation. Defendants argue that Papadopoulos and Anthony Rafaniello have no individual liability because of principles

of respondeat superior.

Defendants' motion to dismiss the complaint is denied without prejudice. Plaintiffs amended the complaint after defendants' motion to dismiss was made, and defendants did not elect to direct their motion to the amended complaint. See Sage Realty Corp. v Proskauer Rose L.L.P., 251 A.D.2d 35, 38 (1st Dept 1998). Therefore, the Court does not reach the merits, if any, of defendants' arguments.

Plaintiffs' Cross Motion

Plaintiffs cross-move for summary judgment in their favor on the first, second, fourth and ninth causes of action of the complaint against 155 West 21st Street Holdings, LLC, HRH, ADRI, and LDI. The standards for summary judgment are well settled.

> "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. 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 material issues of fact which require a trial of the action."

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)(internal citations omitted).

A. First Cause of Action (Negligence)

Plaintiffs allege that construction workers left an outdoor water spigot running on June 24, 2005, causing flooding in the basement. On that day, Carden observed water and mud flowing into the basement, and the flow of mud and water began to slow down when she saw Papadopolous turn off the outdoor water spigot. Carden Aff. ¶ 17. Carden had seen construction workers using the outdoor water spigot in plaintiffs' backyard on previous occasions. Papadopoulos allegedly told

Carden that Aurash was responsible for the flooding. Id. ¶ 17. He allegedly told McMullan that Aurash workers had turned on the spigot, left it running, and blocked the end of the water hose, letting water back up and flood into plaintiffs' basement. Sheindlin Affirm., Ex Y [McMullan Aff. ¶ 2].

Plaintiffs have not met their burden of establishing these defendants' negligence for the flooding that allegedly occurred on June 24, 2005. First, a property owner ordinarily is not responsible for the negligence of an independent contractor retained to work upon its property. Rosenberg v Equitable Life Assur. Socy. of U.S., 79 NY2d 663, 668 (1992). Plaintiffs have offered no legal or factual theory on this motion to hold 155 West 21st Holdings, LLC liable for the alleged negligent acts of the construction workers. Neither do plaintiffs show a basis for liability against ADRI and LDI, which are not owners of the premises, and which were not parties to the contract with HRH. Assuming that Aurash was, in fact, responsible for causing the flooding, plaintiffs have not shown that HRH had negligently supervised Aurash. Finally, summary judgment on this cause of action is premature because plaintiffs' and Papadopoulos's depositions have not yet been conducted. Schachat v Bell Atl. Corp., 282 AD2d 329, 330 (1st Dept 2001); McGlynn v Palace Co., 262 AD2d 116, 117 (1st Dept 1999). Therefore, summary judgment as to this cause of action is denied.

B. Second Cause of Action (Negligence)

Plaintiffs allege that a backhoe broke through plaintiffs' apartment wall on July 22, 2005. Carden was close to the west wall where the backhoe broke through, and suffered a laceration to her foot. Carden Aff. ¶ 19. An unidentified construction worker allegedly told McMullan, in substance, "I lost control of the backhoe when it was on the mound." McMullan Aff. ¶ 3. Papadopoulos

allegedly told McMullan that Aurash was operating the backhoe. Ibid.

Plaintiffs have not met their burden for summary judgment for the same reasons discussed with respect to the first cause of action. Although plaintiffs invoke the doctrine of res ipsa loquitur (see Morjeon v Rais Constr. Co., 7 NY3d 203 [2006]), plaintiffs have not shown that any of these defendants had exclusive control of the backhoe, which appears to have been in Aurash's control. Summary judgment is also premature, because depositions are outstanding, and the construction worker who spoke to McMullan has not yet been identified.

C. Fourth Cause of Action (Trespass)

Plaintiffs maintain that construction workers came onto their leased premises without their permission from March 1 through May 2, 2006. McMullan allegedly told Papadopolous on March 1, 2006 to cease any further entry or activity on his property. Sheindlin Affirm., Ex H [McMullan Emergency Aff.] ¶ 21. Plaintiffs submit printouts of a series of emails allegedly sent to Papadopolous informing him that construction workers were coming into their garden without permission, and that they should leave. Sheindlin Affirm., Ex T.

Plaintiffs have established a prima facie case for summary judgment as to liability against 155 West 21st Street LLC, HRH and LDI for trespassing. See Long Is. Gynecological Services, PC v Murphy, 298 AD2d 504 (2d Dept 2002). In affidavits that defendants submitted in opposition to plaintiffs' motion for a preliminary injunction, HRH and/or its subcontractors admittedly "have returned to the 153 Property to make certain corrective repairs," due to a violation that the Environmental Control Board had issued. Sheindlin Affirm., Ex N [Papadopolous Opp. Aff.] ¶ 6. HRH and LDI determined that "the violation . . . demanded that corrrective action be immediately taken." Ibid. On May 2, 2006, a masonry subcontractor also went onto plaintiffs' premises to

commence work on the facade of the adjoining building. Ibid.

Defendants do not deny that HRH and/or its subcontractors intended, and did in fact, enter upon the garden/backyard area. Defendants contend that this area was not in plaintiffs' possession, because this area is not set forth in McMullan's lease. Assuming that McMullan had exclusive possession of this area, defendants argue that issues of fact remain as to who may have trespassed onto the property.

These arguments are unavailing. The Appellate Division, First Department stated, "in this regard, we note that defendants' claim -- which was and is central to their opposition to the motion -- that plaintiff McMullan's lease does not include the backyard garden area borders on the frivolous." McMullan v HRH Constr., LLC, 2007 NY Slip Op 01772, *1, supra. The persons who entered upon McMullan's premises need not be identified to hold 155 West 21st Street LLC, HRH and LDI liable for trespass. Liability is sufficient if defendants caused the intrusion by a third person, such as an independent contractor. Gracey v Van Camp, 299 AD2d 837 (4th Dept 2002). "Property owners are not protected from liability for a trespass committed by an independent contractor if they directed the trespass or such trespass was necessary to complete the contract. Axtell v Kurey, 222 AD2d 804 (3d Dept 1995). Defendants admit that "development of the 155 Property–includes construction work which requires that the workers perform certain tasks from the garden/courtyard area of the 153 Property." Scheindlin Affirm., Ex C [Ledy Gurren Opp. Aff.] ¶ 5 (internal citation omitted); see also Scheindlin Affirm., Ex V [Petition ¶ 11]. Defendants do not argue that their entry upon plaintiffs' premises was privileged in any way.

Therefore, plaintiffs' motion for summary judgment is granted as to liability on the fourth cause of action against 155 West 21st Street LLC, HRH and LDI, with damages to be determined at

the time of trial. Liability for trespass here is based on defendants' admitted intrusions upon the backyard premises for the corrective repairs due to an ECB violation and for the masonry work on May 2, 2006. For all other alleged incidents of trespass, summary judgment is premature because depositions have not been completed.

D. Ninth Cause of Action (Breach of Contract)

Plaintiffs allege that 155 West 21st Street Holdings LLC breached the access agreement with McMullan. The McMullan access agreement, states, in pertinent part:

> "1. ADR and 155 W 21st LLC (collectively, "ADR") will pay Tenants' full rent of $3,200 per month retroactive to April, 2005. ADR will continue to pay Tenant's full rent until completion of whatever work they need to do on the walkway and garden and return of that area to substantially the condition it was in before they knocked down the fence in April.
> 4. The work on the walkway and in the backyard will be undertaken with utmost care. ADR will undertake good faith efforts to make the remaining area of the backyard safe during the course of their construction activities. At the earliest possible time, ADR will set new footings, replace the fence and restore the walk and garden. However, ADR's payment of rent will continue until the garden is substantially restored to its original condition; ADR will not be obligated to pay the full rent if only minor work remains to be done.
> 5. ADR will undertake all future work in a safe manner.
>
> [in manuscript:] ADR's continued payment of monthly rental is contingent that [sic] the Garden and walkway is part of Tenant's Leased Area"

Sheindlin Affirm., Ex L. Plaintiffs contend that 155 West 21st Street Holdings LLC ceased paying plaintiffs' monthly rent as of August 2005, and that the backhoe incident is evidence that work was not undertaken in a safe manner. 155 West 21st Street Holdings LLC admits that payments ceased in September 2005, because its temporary license with E.B.W. LLC had expired. See Sheindlin Affirm., Ex P [Lalezarian Aff. ¶6]. It also contends that, pursuant to the contingency paragraph in the McMullan access agreement, it never had an obligation to make any payment, because McMullan

has no property interest in the garden and walkway. Ibid. Freudenberg Affirm. ¶ 28.

To the extent that the breach of contract is based on 155 West 21st Street LLC's failure to pay plaintiffs' monthly rent, plaintiffs have established a prima facie case for summary judgment. As discussed above, the Appellate Division, First Department rejected the argument that McMullan's lease did not include the backyard garden area. Defendants have not shown that the expiration of the access agreement with E.B.W. LLC, or that the claim that access was no longer needed, are valid defenses to the admitted failure to pay. The obligation to pay plaintiffs' monthly rent continues until the backyard/garden area is substantially returned to the condition it was " before they knocked down the fence in April." Therefore, plaintiffs' motion for summary judgment is granted as to liability on the ninth cause of action as against defendant 155 West 21st Street LLC, for unpaid amount of plaintiffs' monthly rent, with the date of breach and damages to be determined at the time of trial.

To the extent that the breach of contract is based on the backhoe incident, summary judgment is premature. Discovery as to the circumstances of the incident is necessary.

Finally, the branch of plaintiffs' cross motion seeking a default judgment against Aurash is denied as moot. The parties have agreed to an extension of time for Aurash to answer the amended complaint.

CONCLUSION

Accordingly it is hereby

ORDERED that defendants' motion to dismiss is denied without prejudice; and it is further

ORDERED that plaintiffs' motion for summary judgment is granted only to the extent that summary judgment is granted in plaintiffs' favor as to liability only: 1) on the fourth cause of action against defendants 155 West 21st Street LLC, HRH Construction, LLC, Lalezarian Developers, Inc.,

and 2) on the ninth cause of action against defendant 155 West 21st Street LLC, and the motion is otherwise denied.

This opinion constitutes the decision and order of the Court.

Dated: April 11, 2007
New York, New York

ENTER:

J.S.C.