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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48
Justice

PAT STEIR,

Plaintiff,

- v -

601 WEST ASSOCIATES, LLC et al.,

Defendants.

INDEX NO. 104587/04

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 002 and 003 are consolidated herein for decision. In this action, the plaintiff seeks monetary compensation for the damage to three of her paintings caused by water which flooded her art studio in a commercial building owned by defendant 601 West Associates, LLC that is located on West 26th Street in Manhattan. The water emanated from a water-cooled air conditioner located on premises directly above the plaintiff's studio which 601 leased to defendant Tomar Studios, Inc. and which was occupied by a related company, defendant Hudson Studios, Inc., pursuant to a management agreement with Tomar. In motion sequence number 002, Tomar has now moved for summary judgment dismissing the complaint as against it. Hudson and 601 have cross-moved for the same relief with respect to the claims asserted against them.

As a threshold matter, the court agrees that the complaint and all cross claims should be dismissed as against the owner, 601. There is no evidence that 601 was responsible for the maintenance of the air conditioner in question, which was located within the leased premises. Although one of the owner's employees participated in the defendants' efforts to control the flood and repair the air conditioner, such actions do not even suggest, much less establish, a duty to maintain the air conditioner. There is no merit to the plaintiff's argument that 601's liability may be based on its retention under the lease with Tomar of a general right of reentry to inspect the premises and repair any defects. It is well settled that an out-of-possession lessor which retains such a right is not liable for injuries or damages that occur on the premises due to general maintenance defects, but may be liable if the injuries or damages were proximately caused by structural failures or breaches of specific statutory provisions such as provisions under the New York City Building Code. *See Hausmann v. UMK, Inc.*, 296 AD2d 404 (1st Dept 2002); *Raynor v. 666 Fifth Ave. Ltd. Partnership*, 232 AD2d 226 (1st Dept 1996). Since the failure of the air conditioner was neither structural nor attributable to the breach of a statutory provision, 601 cannot be liable for the damages to the plaintiff caused by the flood. Its motion for summary judgment must therefore be granted.

As to Hudson and Tomar, they argue that dismissal is appropriate because there is no evidence that they had actual or constructive notice of the defective condition which caused the air conditioner to leak. In support, they cite to the deposition testimony of the HVAC technician who repaired the leak, Lahcene Goudjil. Mr. Goudjil testified that the leak was caused by a rusty steel plug which had corroded to such an extent that water pressure from the machine forced it out of the hole where it had been sitting. He testified that the plug was located in an area of the unit where it was difficult to see. According to Mr. Goudjil, the plug rusted because it was made of steel rather than brass. On the basis of this testimony, the defendants contend that they were unaware of, and had no reason to be aware of, the defective condition which caused water to escape and flood plaintiff's art studio.

However, at his deposition, Mr. Goudjil also testified that he had repaired the same air conditioner three weeks earlier for yet another leak which he found was caused by a defect in an entirely different part of the unit, the condensate pump. He testified that he did not, at that time, notice that a plug had rusted and was about to come out of the hole where it was sitting since he was not under a service contract with Hudson and/or Tomar and did not therefore fully inspect the entire unit. He testified that a few years earlier he had discussed such a contract with Tomar and/or Hudson but was told that it was too expensive. In fact, neither Hudson nor Tomar ever entered into a service contract for their water-cooled air conditioning system. They clearly determined that rather than have the system regularly inspected and maintained, they would simply have the machine repaired whenever it failed.

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 [the owner's] employees to discover and remedy it." *Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 (1986). In this respect, Mr. Gouldjil testified that when he examined the air conditioner for the cause of the leak which allegedly damaged plaintiff's paintings, he observed that, in addition to the rusted plug which had been dislodged from its seat, there were eight other plugs which were rusted and in need of replacement. As such, this testimony indicates that the plugs had been deteriorating over time and that a full inspection of the air conditioner prior to the accident would likely have identified the need to replace the plugs, thereby preventing the flood from occurring. Thus, there is a triable issue of fact as to whether Tomar and Hudson negligently failed to fully inspect the air conditioner or have the air conditioner fully inspected at any time prior to the accident in question and whether any such negligence was a proximate cause of the plaintiff's damages. Their respective motions for summary judgment must therefore be denied.

In motion sequence number 003, 601 has moved dismiss the complaint as against it on the ground of spoliation of evidence. In view of this court's dismissal of all claims against 601, its motion is denied as moot.

Hudson and Tomar have cross-moved to dismiss all claims against them pertaining to two of the three paintings which were allegedly damaged. These motions, which are also based on spoliation of evidence, are frivolous. Although Hudson and Tomar complain that plaintiff has destroyed two of the three paintings for which she seeks damages herein, they fail to even note that they both had all three paintings inspected, photographed and appraised prior to the destruction. Despite such opportunity, Tomar and Hudson nevertheless argue that their defense has been compromised by their inability to have the jury observe the actual paintings in the courtroom. Hudson and Tomar have not, however, cited any case where sanctions for spoliation of evidence have been imposed under such circumstances. The only case on which they rely, *Kirkland v. New York City Housing Auth.*, 236 AD2d 170, 175 (1st Dept 1997), involved the destruction and removal of a stove without having given the defendant the opportunity to inspect. Although the court in *Kirkland* cited language from a Massachusetts state court decision to the effect that "'the physical items themselves.....may be far more instructive and persuasive to a jury than oral or photographic descriptions", *id.* at 175 (quoting from *Nally v. Volkswagen of Am.*, 405 Mass 191, 198 [1989]), the Massachusetts court was merely referring therein to the need to give the defendant's expert an opportunity to inspect rather than rely on the photographs and descriptions made by the plaintiff's expert. In any event, Hudson and Tomar have not even provided an expert affidavit which supports their suggestion that the damage to the paintings appears more substantial in photographs than in person. Nor have they indicated that, after they completed inspecting, photographing and appraising the paintings, they advised the plaintiff that they wished to have the pieces preserved for the trial. Their respective spoliation motions must therefore be denied.

Accordingly, in motion sequence number 002, Tomar's motion and Hudson's cross-motion for summary judgment are hereby denied. 601's cross-motion for summary judgment is granted and all claims against it are hereby dismissed. In motion sequence number 003, the motion and two cross-motions to dismiss are denied.

The remaining parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on May 29, at 10:00 a.m. to pick a trial date.

ENTER ORDER

Dated: 5/7/07

MGD

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [] FINAL DISPOSITION

[X] NON-FINAL DISPOSITION