

Pomerantz v C. True Bldg. Corp.

2007 NY Slip Op 32204(U)

July 18, 2007

Supreme Court, New York County

Docket Number: 0603914/2004

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON
J.S.C.
Justice

PART 55

Index Number : 603914/2004

POMERANTZ, MATTHEW

vs

C. TRUE BUILDING

Sequence Number : 004

DISMISS

1

INDEX NO. _____

MOTION DATE 2/5/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-5

6

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with the attached memorandum decision and order.

N.B. -- Pre-trial conference is scheduled for August 27, 2007 at 2 PM.

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JUL 20 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7-18-07

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

-----X

MATTHEW POMERANTZ and BONNIE POMERANTZ,

Plaintiffs,

-against-

C. TRUE BUILDING CORP., MARY CRONQUIST,
ESTATE OF DONALD H. FRIEDLAND,
P.E., deceased, BONE/LEVINE ARCHITECTS,
P.C., THE CORCORAN GROUP and BARRIE
MANDEL,

Defendants.

-----X

JANE S. SOLOMON, J.

Defendant Bone/Levine Architects, P.C. ("Architect")

moves to dismiss the complaint based on documentary evidence pursuant to CPLR 3211(a)(1) and for summary judgment, or, in the alternative, to strike the note of issue. The motion is denied for the reasons below.

Plaintiffs purchased a unit ("Unit") in a cooperative apartment building in Tribeca on April 28, 2004 for \$1,065,000. They purchased from the building sponsor and owner, defendant C. True Building Corp. ("Sponsor"). In 1997, Sponsor hired Architect in connection with building-wide renovations of three buildings, including the one in which the Unit is located. They executed separate contracts for interior and exterior work. The interior work involved upgrading systems required for certificate of occupancy compliance in the buildings; the exterior work

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JUL 20 2007
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appears to have been a general renovation and upgrade of the facade, roof and sidewalk. The contracts state that Architect will provide contract administration and inspection of contractor's work "as it progresses through completion of the project." Notice of Motion, Exhibits K and L. The contract for exterior work states that Architect will execute all "project close-out documents including the preparation and administration of warranty papers." Exhibit L, at paragraph II(7). It is not clear when all work under the contracts was completed, but there is a change order dated February 6, 2003 that indicates that work in the change order would be substantially completed on June 30, 2003.

Sponsor also hired an engineer, George Friedland ("Friedland"), for the project. In June 2000, Friedland prepared a description of the property and building condition report ("Report") in connection with the condominium/cooperative offering plan submitted by the Sponsor to the New York State Attorney General's office. Friedland died soon thereafter. In January 2001, Sponsor asked Architect to re-certify the Report. Architect issued an amended and re-certified report ("Amended Report") on April 11, 2001. The Amended Report states that the ceilings are "either metal or exposed wood joists and decking (all sprinklers) and in good to fair condition." The offering plan, including the Amended Report, was accepted for filing on

June 4, 2002. A temporary certificate of occupancy for the project was issued on February 13, 2004, and a final certificate of occupancy was issued on August 15, 2005.

Plaintiffs allege that they were in the market for a loft apartment in 2003, which they hoped would feature high wood-beamed ceilings. They were shown photographs of the Unit, which featured a low drop-ceiling, but were assured that the Unit had high wood-beamed ceilings that would be revealed if they performed a renovation. They allege that Sponsor's selling agent showed them photographs of what was represented to be exposed wood beams in the Unit; as it turns out, the photographs were taken in a different apartment. Marketing materials given to plaintiffs emphasized the Unit's suitability for a renovation to expose its timbered beams and columns.

Allegedly in reliance upon the photographs, marketing material and the Amended Report, plaintiffs entered into a subscription agreement with the Sponsor to purchase the Unit on May 1, 2003, and closed on the Unit on April 28, 2004. When they removed the drop-ceiling in the process of renovating, plaintiffs learned that the ceiling had sustained severe fire damage. The wood beams were charred and extensively pitted, and were not only cosmetically unsuitable but also were structurally unsound. Some fire damaged beams had been replaced in connection with the

renovation supervised by Architect.¹

Plaintiffs commenced this action in November 2004 against the broker, the Sponsor, the Sponsor's president, Friedland's estate and Architect. The defendants asserted cross-claims against one another. Plaintiffs have settled with all parties but Architect.

After a substantial exchange of documents, plaintiff Matthew Pomerantz was deposed for three days. Plaintiff Bonnie Pomerantz offered to be deposed as well, but the deposition was never scheduled. However, she provided a fifteen page affidavit in opposition to a previous motion for summary judgment, which motion was subsequently withdrawn (the movant apparently settled before the motion was fully submitted). In January 2006, Architect demanded documents from plaintiffs regarding their contractor, ZAP Contracting. In February 2006, it served a subpoena duces tecum on ZAP demanding the appearance of a witness and the production of documents regarding ZAP's work in plaintiffs' apartment. ZAP never responded, but plaintiffs' counsel told Architect's counsel that he would get the material demanded, and plaintiffs' provided the ZAP contracts and invoices

¹ Plaintiffs' counsel alleges that Sponsor's contractors, under Architect's supervision, did a "patch job" on the ceiling beams, replacing some beams but leaving most of the ceiling in a damaged condition. Plaintiff's affidavit opposing the motion is silent on the issue. The degree to which the Sponsor renovation penetrated the ceiling is not made clear.

on or about September 6, 2006. Architect did not object to the adequacy of the production. Plaintiffs filed the note of issue on October 31, 2006.

DISCUSSION

Architect's motion to dismiss relies on the argument that this action is barred by a three year statute of limitations. CPLR 214(6). The premise for this argument is that the only obligation Architect owed to disclose conditions in the Pomerantz apartment to the Sponsor arose from its preparation of the Amended Report, and the statute of limitations had expired even before plaintiffs purchased the Unit. However, Architect draws its duty to the Sponsor, and to plaintiffs as third-party beneficiaries, too narrowly. There is evidence that Architects supervised the renovation of the Unit, and were aware, or should have been, that the ceiling joists were damaged and structurally unsound. Whether in the context of the Amended Report, or in its supervision of work in the Unit and efforts to obtain a certificate of occupancy, Architect was obligated to refrain from inaccurately reporting the condition of the joists.

There is no factual dispute that Architect worked under its contract with the Sponsor until at least June 30, 2003, and it did not terminate its relationship until 2004 at the latest. The contracts provide that Architect would continue to inspect contractor's work through completion of the project, which

arguably is the date the final certificate of occupancy was filed on August 15, 2005. Since this lawsuit was commenced in November 2004, plaintiffs' malpractice claim is timely. City School Dist. Of Newburgh v Hugh Stubbins & Assoc., Inc., 85 NY2d 535 (1995).

In its reply, Architect contends that plaintiffs failed to support their negligence claim with an expert opinion showing that there was a departure from accepted professional standards that proximately caused an injury. Since the basis for Architect's motion is that the claim is barred by the statute of limitations, and not that plaintiffs are unable to prove malpractice, Architect's reply goes beyond the scope of the motion and opposition, and plaintiffs' failure to include an affidavit from an expert is not fatal to their lawsuit.

With respect to Architect's motion to strike the note of issue, it is denied because plaintiffs substantially complied with all discovery demands. Architect now claims that it requires more documents from ZAP, but it did not seek to enforce its subpoena, nor did it object to the adequacy of the material plaintiffs provided. Architect argues that plaintiffs "promised" that ZAP would comply with the subpoena, but plaintiffs are in no position to make such a promise, and in any event, Architect accepted the material provided without complaint.

With respect to its demand for the deposition of Bonnie Pomerantz, she was made available for deposition but defense

counsel refused to schedule a date. In light of Architect's conduct, it has not established that plaintiffs failed to provide discovery. Plaintiffs contend that her testimony would be duplicative in any event; however, she provided a fifteen page affidavit (which is not included in the papers submitted on this motion) in opposition to a prior motion, so it would appear that she has something to say. Accordingly, she shall be made available for deposition before the pre-trial conference scheduled below.

It hereby is

ORDERED that Architect's motion to dismiss and for summary judgment is denied; and it further is

ORDERED that the branch of the motion seeking to strike the note of issue is denied, except that Bonnie Pomerantz shall be made available for deposition on or before August 17, 2007, failing which she shall be deposed in the Part 55 jury room at 10 AM on August 27, 2007; and it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55 on August 27, 2007 at 2 PM or at the conclusion of the EBT.

Dated: July 18, 2007

ENTER:



J.S.C.

JANE S. SOLOMON
J.S.C.

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