

**Kowal v Cornerstone Propane, L.P.**

2007 NY Slip Op 32302(U)

July 24, 2007

Supreme Court, Suffolk County

Docket Number: 0005815/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**P R E S E N T :**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 4/30/07 (#004)  
MOTION DATE 5/14/07 (#005)  
MOTION DATE 6/11/07 (#006 & #007)  
ADJ. DATE 6/11/07  
Mot. Seq. #004 - MD  
Mot. Seq. #005 - MotD  
Mot. Seq. #006 - XMD  
Mot. Seq. #007 - XMD

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JOHN NIEVES KOWAL,	:	JOHN L. JULIANO, P.C.
	:	Attorney for Plaintiff
Plaintiff,	:	39 Doyle Court
	:	East Northport, New York 11731
- against -	:	
	:	TAYLOR, COLICCHIO & SILVERMAN, LLP
CORNERSTONE PROPANE, L.P. d/b/a	:	Attorney for Defendant Cornerstone Propane
BENNETT-SYNERGY OF WESTHAMPTON,	:	655 Third Avenue, Suite 1400
NEW YORK, BREFFNI MEDCALF and "JOHN	:	New York, New York 10017
DOE" 1-10, the names being fictitious but	:	
intended to be the people who maintained the	:	JOHN T. RYAN & ASSOC.
propane tank located at 59A Baycrest Avenue,	:	Attorney for Defendant Medcalf
West Hampton, New York,	:	633 East Main Street, Suite 3
	:	Riverhead, New York 11901
Defendants.	:	
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Upon the following papers numbered 1 to 61 read on this motion to dismiss, and this motion and cross motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-19; 20-34; Notice of Cross Motion and supporting papers 35-50; 51-53; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers 54-57; 58; 59-60; 61; Other defendant Cornerstone Propane's memorandum of law; defendant Cornerstone Propane's reply memorandum of law; plaintiff's motion brief (#006); plaintiff's motion brief (#007); (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by defendant Cornerstone Propane, L.P. d/b/a Bennett-Synergy of Westhampton, New York (Mot. Seq. #004) for an order dismissing the complaint for failing to comply with this Court's prior orders or, in the alternative, granting summary judgment in its favor, the motion by defendant Breffni Medcalf (Mot. Seq. #005) for an order pursuant to CPLR 3212 granting summary judgment "dismissing plaintiff's complaint and the co-defendant's cross claim," the cross motion by plaintiff (Mot. Seq. #006) for an order pursuant to CPLR 3212 granting summary judgment in his favor

and against defendant Cornerstone Propane, L.P. d/b/a Bennett-Synergy of Westhampton, New York on the issue of liability, and the cross motion by plaintiff (Mot. Seq. #007) for an order pursuant to CPLR 3212 granting summary judgment in his favor and against defendant Breffni Medcalf on the issue of liability, are hereby consolidated for purposes of this determination; and it is further

**ORDERED** that the motion by defendant Cornerstone Propane, L.P. d/b/a Bennett-Synergy of Westhampton, New York (Mot. Seq. #004) is denied; and it is further

**ORDERED** that the motion by defendant Breffni Medcalf (Mot. Seq. #005) is granted to the extent of granting summary judgment dismissing the complaint against her, and is otherwise denied; and it is further

**ORDERED** that the cross motions by plaintiff (Mot. Seq. #006 & #007) are denied as untimely.

This is an action to recover damages for personal injuries and property damage allegedly sustained by the plaintiff at approximately 4:05 p.m. on June 17, 2002 when a propane tank exploded at 59A Baycrest Avenue, Westhampton, New York, a rental cottage at which the plaintiff resided. Defendant Breffni Medcalf ("Medcalf") was the owner of the premises. Pursuant to the parties' lease agreement,<sup>1</sup> the tenant was obligated to pay for certain utilities and services, including gas (paragraph 6), and to keep the premises and all appliances, equipment, and other personal property in good order and repair (paragraph 8), although the landlord retained the right to enter the premises "to examine" and "to make repairs" (paragraph 9).

According to the plaintiff, on or about June 7, 2002, the plaintiff called defendant Cornerstone Propane, L.P. d/b/a Bennett-Synergy of Westhampton, New York ("Cornerstone") and scheduled an appointment to fill an empty 100 lb tank on the premises.<sup>2</sup> Cornerstone made the delivery on June 14, 2002. At approximately 3 p.m. on June 17, 2002, the plaintiff noticed a "spraying sound" outside the house, followed soon after by "a strong smell of gas." The plaintiff promptly contacted Cornerstone. When the Cornerstone serviceman arrived, he checked the tank and advised the plaintiff that there was a hole in the bottom of the tank, and that he would have to disconnect it and take it back "to the yard." The serviceman proceeded to disconnect the tank but did not remove it from the premises. When the plaintiff asked if it was safe to go inside the cottage, the serviceman replied that it was and that the plaintiff should open the windows. Shortly thereafter, both the plaintiff and the serviceman entered the cottage, the plaintiff opened a bathroom window, and the cottage "exploded."

Following the explosion, The Town of Southampton Department of Fire Prevention conducted an investigation in which it was concluded that the cause of the explosion was a leak in the tank. The

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<sup>1</sup>Although the lease actually expired by its terms two days prior to the date of the explosion, it appears that the parties had previously agreed to execute a new lease for the summer months and that, on June 17, the plaintiff continued to occupy the premises as a holdover tenant under the terms of the original lease.

<sup>2</sup>It is undisputed that Cornerstone owned the subject tank and was solely responsible for its maintenance and repair.

investigation report noted that the lower portion of the tank was “heavily corroded.” The report also noted that, according to the date stamps on the tank, the tank had not been inspected at any time within the 12-year period ending April 1998 as required under National Fire Protection Association (NFPA) guidelines and, therefore, should not have been considered “serviceable” and should not have been refilled. The Town subsequently charged Cornerstone with four violations of Southampton Town Code provisions adopting the NFPA guidelines. After a trial in the Southampton Town Justice Court, the Town Justice found Cornerstone guilty on three counts, *i.e.*, filling a tank which had not been properly requalified, filling a tank which was not suitable for continued service due to rust and corrosion, and failing to position the tank on noncombustible supports.

The plaintiff alleges in this action that Cornerstone was negligent in failing to repair or replace the tank, in filling it notwithstanding that it was corroded and had not been properly requalified, and in allowing it to remain on the premises. The plaintiff also alleges that Medcalf was negligent in failing to remedy the dangerous condition. According to the plaintiff’s bill of particulars, the plaintiff sustained numerous physical injuries as a result of the explosion, including a torn medial meniscus of the left knee, tinnitus, 30% hearing loss, post traumatic stress disorder, aggravation and exacerbation of lumbar degenerative disc disease, and head trauma. The plaintiff also claims emotional and psychological injury, property damage, and loss of earnings.

The plaintiff filed a note of issue on December 14, 2006, certifying that discovery was complete.

Cornerstone now moves, ostensibly pursuant to CPLR 3126, to dismiss the complaint based on the plaintiff’s failure to comply with Court-ordered discovery, including failure to provide documents or authorizations relating to his tax and income records and returns and employment records, an itemization of claimed injuries and other damages, and all medical records and other documents establishing such injuries and damages. However, by not having timely moved to vacate the note of issue (Uniform Rules for Trial Cts [22 NYCRR] § 202.21 [e]), Cornerstone waived its right to seek sanctions based on the alleged failure to disclose (*see, Brown v Veterans Transp. Co.*, 170 AD2d 638, 567 NYS2d 65 [1991]; *Jones v Hercules Constr. Co.*, 14 Misc 3d 1212[A], 836 NYS2d 486 [2006]). To the extent Cornerstone seeks summary judgment based on the plaintiff’s failure to produce evidentiary proof that the explosion proximately caused him any actual injury or damage, the Court notes that Cornerstone has failed to support its motion with copies of the pleadings (*see, CPLR 3212 [b]*); in any event, a defendant may not satisfy its burden on a summary judgment motion by demonstrating the perceived insufficiency of the plaintiff’s proof, but must affirmatively demonstrate the merits of its defense (*Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 585 NYS2d 894 [1992]). Cornerstone’s motion is, therefore, denied.

Medcalf also moves for summary judgment, alleging that she owed no legal duty to the plaintiff with respect to the condition of the tank.

Generally, an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair unsafe conditions (*e.g., Lindquist v C & C Landscape Contrs.*, 38 AD3d 616, 831 NYS2d 523 [2007]). Reservation of the right to enter the premises for the purpose of inspection and repair may constitute sufficient retention of control to permit a finding that the landlord had constructive notice of a defective

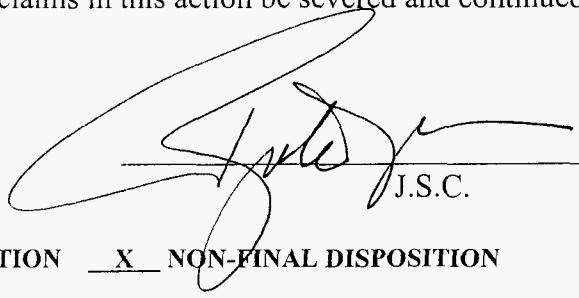
condition only if a specific statutory violation exists and there is a significant structural or design defect (*Thompson v Port Auth. of N.Y. & N.J.*, 305 AD2d 581, 761 NYS2d 75 [2003]).

The Court finds that Medcalf established her prima facie entitlement to summary judgment dismissing the complaint by demonstrating that she relinquished control of the leased premises and that she was not obligated under the lease to repair or maintain the leased premises. Although Medcalf did retain the right to enter the premises to inspect and make repairs, the plaintiff failed to demonstrate that Medcalf violated a specific statutory provision or to establish the existence of any structural or design defect which proximately caused the explosion (*see, Khan v Bangla Motor & Body Shop*, 27 AD3d 526, 813 NYS2d 126, *lv dismissed* 7 NY3d 864, 824 NYS2d 608 [2006]; *Sangiorgio v Ace Towing & Recovery*, 13 AD3d 433, 787 NYS2d 51 [2004]). The plaintiff having failed to raise a triable issue of fact in opposition to Medcalf's showing, summary judgment is granted dismissing the complaint against Medcalf. As to the remaining branch of the motion, however, the Court notes that Cornerstone has pleaded four separate cross claims, not all of which are necessarily defeated by the dismissal of the complaint.<sup>3</sup> Since the Court is unable, upon review of the moving papers, to determine the precise nature and scope of the relief demanded, the Court is constrained to deny the motion to the extent it seeks summary judgment dismissing the "cross claim."

Finally, as for the cross motions, the Court notes that they were made more than 120 days after the filing of the note of issue without any showing of good cause for the delay (*see, CPLR 3212 [a]; Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]).

The Court directs that all remaining claims in this action be severed and continued.

Dated:           JUL 24 2007          

  
\_\_\_\_\_  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION

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<sup>3</sup>The fourth cross claim, e.g., alleges failure to procure insurance coverage.