

430 Owners Corp. v King Sha Group, Inc.

2007 NY Slip Op 33675(U)

November 13, 2007

Supreme Court, New York County

Docket Number: 0110598/2006

Judge: Walter Tolub

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

PRESENT: _____

PART 5

Index Number : 110598/2006

430 OWNERS

vs

KING SHA GROUP

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ papers, numbered 1 to _____ were read on this motion 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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

NOV 15 2007

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 11/13/07

Walter B. Tolub

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: I.A.S. PART 15

-----X
 430 OWNERS CORP.,

Plaintiff,

Index No.: 110598/06

-against-

KING SHA GROUP, INC., CERTIFIED TESTING
 LABORATORIES, INC., GOLDEN VALE
 CONSTRUCTION CORP. and S.T.A. PARKING CORP.,

Defendants.

FILED
 NOV 15 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

-----X
TOLUB, J.:

In this action, plaintiff 430 Owners Corp. alleges that its building had its structural integrity compromised and received extensive damage from an excavation project for a parking garage on an adjacent lot. Plaintiff moves, pursuant to CPLR 3212, for an order granting partial summary judgment on liability against defendants King Sha Group, Inc. (King Sha), Certified Testing Laboratories, Inc. (CTL), and STA Parking Corp. (STA), and setting the matter down for a hearing on damages. Plaintiff contends that strict liability attaches for faulty underpinning work to the property owner, the general contractor and the engineer that worked on the project.

Plaintiff also moves to dismiss defendant STA's first and second counterclaims. Defendant STA's first counterclaim alleges it is entitled to damages from a water leak originating from plaintiff's property which damaged STA's parking garage and caused STA to incur increased construction costs. STA's second counterclaim alleges that plaintiff committed fraud by representing to the New York City Department of Buildings that construction being performed by STA caused damage to the facade of plaintiff's building, when construction had not yet begun

in the area.

Defendants King Sha, CTL, and STA oppose the motion and argue summary judgment should be denied as they are not strictly liable under the Administrative Code of the City of New York and because questions of fact exist as to the proximate cause of the damages.

FACTUAL ALLEGATIONS

430 Owners Corp. is a residential apartment cooperation which owns the land and building located at 430 East 77th Street, New York, New York (the plaintiff's building). The cooperative is a seven-story apartment building consisting of 42 apartments, that was built in the late 1800's. STA owns a multi-story parking garage for motor vehicles adjacent to the plaintiff's building, known as 433 East 76th Street/434 East 77th Street (the STA Garage). The STA Garage spans the block from East 76th Street to East 77th Street and there are garage entrances at each street providing vehicle access. The STA Garage directly abuts four other buildings on the east and west sides. The northwest section of the STA Garage abuts the plaintiff's building, but the two buildings do not share a common wall or foundation.

On October 23, 2003, STA entered into a written agreement with defendant CTL, a professional engineering company for a construction project to expand the STA Garage by creating a sub-basement six feet below the existing basement. Richard Zaloum, the chief engineer of CTL, drafted the structural drawings used by STA for the project. The structural drawings required excavation and underpinning of the STA Garage's foundation and, if necessary, the foundations of any neighboring buildings. The structural drawings also directed that controlled inspections be conducted of the subgrade and for any underpinning performed for the project. Besides drafting the structural drawings, CTL was to perform all controlled

inspections, provide STA with day-to-day guidance and aid STA by confirming the amount of work completed by the general contractor.

On October 25, 2004, STA entered into a contract with King Sha. Pursuant to the contract, King Sha was to serve as the general contractor of the project. STA and King Sha also executed a proposal on the same date which established an itemization of various prices for King Sha's work. The contract and proposal required that the work be performed pursuant to the structural drawings provided by CTL.

On October 27, 2004, King Sha entered into a written proposal whereby the underpinning and concrete work would be subcontracted to defendant Golden Vale. King Sha's scope of work, which it contends was performed by Golden Vale, included demolition of the basement cement slab, excavation, and underpinning the STA Garage's foundation.¹

King Sha commenced work on the STA Garage pursuant to the structural drawings in early November of 2004. Excavation and underpinning work began on the East 76th Street side of the STA Garage and advanced northward. In December of 2004, plaintiff filed a complaint with New York City's Department of Buildings alleging that a large crack on its buildings' facade was caused by the project. However, STA alleges at the time which plaintiff filed the complaint, the underpinning had not yet reached the area near plaintiff's building.

On January 17, 2005, the Department of Buildings issued a stop work order of the STA Garage project due to alleged damage to 435 East 76th Street, a different building adjoining the STA Garage to the southeast. The stop work order states that there was a failure to protect an

¹ King Sha contends that Golden Vale was hired and paid directly by STA to underpin adjacent buildings including plaintiff's building. Golden Vale has not responded to the allegation that it was the prime contractor as it is not a party to this motion.

adjoining structure during excavation operations and noticeable horizontal cracks at the rear wall of the STA Garage.

Work on the STA Garage ceased until February 15, 2005. STA alleges that the stop order was lifted after it was determined that the damage was a result of faulty construction previously performed at 435 East 76th Street, while plaintiff alleges that it was lifted after STA negligently misrepresented to the Department of Buildings that the underpinning had been properly performed.

King Sha and Golden Vale left the project at the end of March of 2005 and did not return, thereafter abandoning the project. STA alleges that at no time prior to March 2005 did CTL or King Sha advise STA that the underpinning operations were performed incorrectly, deviated from the plans, or were not in compliance with the code requirements of New York City.

On March 28, 2005, the Department of Buildings issued a notice of violation finding structural step and horizontal cracks ranging from 1/8" to 2" wide at apartments 7E, 7F, 6E, 6F, 5E, 5F, 1F of plaintiff's building as well as the southeast corner of the roof due to construction done in the basement and/or cellar of the STA Garage. The Department of Buildings also issued a notice of violation dated March 31, 2005 finding additional damage at apartment 3-E due to construction performed in the basement of the STA Garage.

A second stop work order was issued on July 8, 2005 in which plaintiff alleges that the Department of Buildings declared that the construction activities of defendants had been misrepresented and did not comply with the New York City Building Code or the project plans

and contract drawings.²

Plaintiff alleges that there was no subterranean support while performing construction at the STA Garage, thereby compromising the structural integrity and causing extensive property damage to the plaintiff's building. Plaintiff states that as a result of defendants' construction, the soil beneath the foundation became loosened which caused the foundation to settle three inches and that the settlement of the foundation caused differential settlement of the building's east foundation wall and superstructure causing extensive property damage. Plaintiff alleges that defendants caused the building damages including but not limited to cracks in the exterior bricks and masonry columns, the shifting of apartment doors, sagging and misaligned windows, separation of windows from the bulging framing, cracks in interior ceilings and walls, sloping floors, and dislodging of tiles from the bathroom floors.

DISCUSSION

Summary judgment is a drastic remedy, which is granted only when the party seeking summary judgment has established that there are no triable issues of fact. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006). "In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion." *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997).

Plaintiff argues that its building has rights to lateral and subjacent support pursuant to

² Although Crisci's affidavit refers to the notice of violation as exhibit I, such exhibit is not attached to the papers.

both the common law and local ordinances and that strict liability attaches to the property owner and the contractor involved in the excavation. Section 27-1031(b)(1) of the Administrative Code of the City of New York discusses liability regarding excavation. Section 27-1031(b)(1) states:

(b) Support of adjoining structures.

(1) EXCAVATION DEPTH MORE THAN TEN FEET. When an excavation is carried to a depth more than ten feet below the legally established curb level the person who causes such excavation to be made shall, at all times and at his or her expense, preserve and protect from injury any adjoining structures, the safety of which may be affected by such part of the excavation as exceeds ten feet below the legally established curb level provided such person is afforded a license to enter and inspect the adjoining buildings and property.

a. Such person shall support the vertical load of adjoining structure by proper foundations, underpinning, or other equivalent means where the level of the foundations of the adjoining structure is at or above the level of the bottom of the new excavation (emphasis added).

“The duty under the statute is intended to apply to the activities during the excavation process and to any damages suffered by the adjoining owner proximately resulting from the excavator's failure to take adequate precautions to protect adjoining structures during the excavation.” *Cohen v Lesbian & Gay Community Servs. Ctr., Inc.*, 20 AD3d 309, 310 (1st Dept 2005).

While section 27-1031 of the Administrative Code has been held to impose absolute liability upon both the owner and contractor who perform the excavation, plaintiff must still prove that the defendants' activities, regardless of the legal basis relied upon, proximately caused damage to the plaintiff's building. *Coronett Props. Co. v L/M Second Avenue, Inc.*, 166 AD2d 242 (1st Dept 1990). In *Coronett Props. Co.*, the Appellate Division affirmed the Supreme Court's decision to deny the plaintiff's motion for summary judgment because factual issues,

together with evidence of the poor condition of the allegedly damaged buildings and of other possible causes of the damage, precluded summary judgment. *Id.* at 243.

CTL argues that it cannot be held strictly liable under section 27-1031(b)(1) of the Administrative Code as it applies only to “the person who causes such excavation to be made.” CTL contends that it was hired only to perform controlled inspections and it did not cause the excavation to be made as it is not the owner or excavator. “[W]here the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used.” *Patrolmen’s Benevolent Assn. v City of New York*, 41 NY2d 205, 208 (1976). Here, by following the plain meaning of the statute, CTL was not the party who caused the excavation to be made, thereby preventing CTL from being held strictly liable under the Administrative Code.

CTL also argues that there is ample evidence of the poor condition of plaintiff’s building and its role in causation of the damages to raise issues of fact as to the proximate cause of the damage. Richard Zaloum, an officer of CTL, states that based upon calculations he prepared after the loss was determined in July of 2005, the rear foundation where most of the damage occurred was inadequate to support the full load of the structure of the plaintiff’s building.

Zaloum’s memorandum from July 18, 2005 states:

[M]ost probably 430 East 77th Street has been relying on support from the west wall of the garage at 434 East 77th Street all these years. Our project only exposed their original deficiency. Even MRCE³ indicates the footing should be four feet wide. Also, there is documented reports of steam leaks, water leaks and other problems.

³ The engineering firm of Mueser Rutledge Consulting Engineer (MRCE) was engaged by the insurance carrier for plaintiff to conduct a forensic analysis of the damage to plaintiff’s building.

(Zaloum Aff., ex. 4). Zaloum also notes in his affidavit that there were sources of water under the foundation of both buildings, including an underground stream, which may have been causative of the nature and extent of the loss.

CTL retained Nicholas Mazzaferro, a professional engineer, to review the project documentation and render an opinion regarding the underpinning operation. Mazzaferro states that in March of 2005, the east wall of plaintiff's building settled causing damage to the structure and may have been partially instigated by the underpinning operation occurring at the adjacent wall of the STA Garage. He further states that the inadequate underpinning was a major factor in the failure but there were other contributory factors including inadequate footing/foundation size of the new extension,⁴ loss of foundation support prior to construction activity at the STA Garage and disturbance of the soil capacity due to leaking steam pipes which may have caused the failure.

Mazzaferro concludes that the foundation and the capacity of the underlying soil of the plaintiff's building may have been previously compromised prior to the construction and that there was no evidence that damage occurred in the building during construction operations prior to the commencement of the underpinning work. Mazzaferro states that the carrying capacity of the soil may have been reduced when it was disturbed and was amplified by underground plumbing leaks in the rear of the building.

After reviewing the project documentation, Mazzaferro made the following conclusions. He stated:

⁴ According to the affidavit of Richard Zaloum, in the 1960's, an extension of approximately 20 feet was added to the rear of the plaintiff's building.

There is evidence from two sources that plumbing work was performed under the floor of the 430 building to correct steam leaks. The location of steam pipes is verified by the MRCE [the insurers for plaintiff] test pits. Steam pipe leaks are condensed water and the water would have reacted with the silty-clay soil reducing the bearing capability. If the soil had been weakened by the leaks, the underpinning operation would have only been a partial factor in the soil failure and resulting settlement. The fact that the leaking pipe was reported to be at the rear of the building further validates the fact that the extension was not adequate.

Mazzaferro Aff., ¶ 12.

Both STA and King Sha argue that they also cannot be held strictly liable because questions of fact exist as to the proximate cause of the damage. STA alleges in its first counterclaim that leaks from the plaintiff's building were interfering with the project causing damage to the STA Garage and causing it to incur increased construction costs due to work and delays. STA notified plaintiff of a leak several times as documented by the submitted letters and e-mails sent on behalf of STA. On November 17, 2005, Chris Gerogoulis, an attorney for STA, sent a letter to Jack Lepper, an attorney for plaintiff, advising that a leak was discovered at the site and appeared not to be ground water, but coming from plaintiff's building. (Zacharias Aff., Ex. 2). This letter was followed up by e-mails dated December 9, 2005 and December 14, 2005 from Russell Wolfson, another attorney representing STA.

Defendant King Sha argues that there is no evidence that it was the proximate cause of plaintiff's damages. Although King Sha did not submit its own expert report, it relies on Mazzaferro's findings. King Sha also denies that it is the party responsible for the excavation. King Sha contends that STA hired and paid Golden Vale as the prime contractor to perform the underpinning of adjacent properties. STA disputes this allegation and contends that King Sha was in fact the general contractor and subcontracted the concrete and underpinning work to

Golden Vale.

In support of plaintiff's motion for summary judgment, plaintiff submits the affidavit of Vincent Crisci, president of the cooperative. Crisci contends that the plaintiff's building had no structural problems requiring repair prior to the excavation and that the damage to the plaintiff's building did not preexist the construction. Crisci contends that any water leaks were de minimus in nature, were caused by STA's own construction and excavation activities, and have no bearing on whether defendants are held strictly liable.⁵ Plaintiff also contends that CTL admitted that plaintiff's building had not been properly underpinned in accordance with the project plans and contract drawings as per a report conducted by an engineer hired by plaintiff's insurance carrier.⁶

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor and he must do so by tender of evidentiary proof in admissible form." *Zuckerman v New York*, 49 NY2d 557, 562 (1980) (citations and quotations omitted). There is no doubt that plaintiff makes a strong showing in support of its request for summary judgment, i.e., the undisputed allegations of the Crisci affidavit outlining the damage, none of which pre-dated the construction; the two violation notices from the Department of Buildings blaming the damage on the STA

⁵ Plaintiff had Louis Silbert, P.E., investigate the cause of the leak at the plaintiff's building in 2005. In a memorandum dated April 4, 2005, Silbert stated that the water leak at the site was rainwater entering at several locations from the joint between the newly-placed underpinning and the original footing of the STA Garage (Zacharias Aff., ex. 4).

⁶ Crisci notes that Mueser Rutledge Consulting Engineer issued a report determining that inadequate or insufficient underpinning had been completed along a portion of the west foundation wall of the plaintiff's building. The report is not attached to the plaintiff's papers, nor is there any affidavit from either of its authors.

Garage work, the conclusion of CTL's engineer, Nicholas Mazzaferro, that inadequate underpinning was a "major factor" in causing the damage; and CTL's July 25, 2005 inspection report which states that "[t]he adjacent property at 430 East 77th Street had not been properly underpinned in accordance with the project plans and contract drawings," (Crisci Aff., ex. H). However, plaintiff fails to submit an expert report which discusses, confirms, or contradicts whether the steam pipe leaks or any pre-existing factors contributed to or caused any of the problems which occurred at the plaintiff's building, as defendants maintain.

Plaintiff relies on CTL's July 25, 2005 inspection report which states that "[t]he adjacent property at 430 East 77th Street had not been properly underpinned in accordance with the project plans and contract drawings" and that the underpinning of plaintiff's building must be completed before any additional work may be done on the garage (Crisci aff., ex. H). While CTL confirmed that the underpinning had not been installed in accordance with the project plans and specifications, CTL did not admit liability or state that it was negligent.

Plaintiff also relies on two notices of violation which were issued by the Department of Buildings. Plaintiff argues that the Department of Buildings concluded that the defendants' construction of the STA Garage did not comply with the New York City Building Code, the project plans, or the contract drawings. Although plaintiff relies on the violations as conclusive evidence of STA's liability, STA contends that at no time prior to March of 2005 did CTL or King Sha advise STA that underpinning operations were performed incorrectly, deviated from the underpinning plans, or were not in compliance with New York City code requirements and the court notes that these notices are addressed to plaintiff, not to any of the defendants. STA also contends that it did not have any independent knowledge at that time that any of the work

being performed on the STA Garage project failed to conform with the structural drawings.

Plaintiff also argues that the “[d]efendants allege only general denials in their Answer, and make conclusory affirmative defenses in response to the Complaint, none of which are sufficient to withstand this motion for summary judgment.” (Plaintiff’s Memo, at 3). While “[g]eneral denials in an answer are insufficient to raise triable issue” (*Iandoli v Lange*, 35 AD2d 793 [1st Dept 1970]), here, defendants through the submission of an expert report and affidavits, have raised issues of fact sufficient to defeat summary judgment.

Defendants also argue that summary judgment should not be granted as there are documents and information in plaintiff’s sole control which are necessary in the determination of how the damage occurred. On September 8, 2006, STA served on plaintiff’s counsel a first demand for discovery and inspection, interrogatories, combined demands and deposition notice. STA requests information and documents relative to the damages alleged by plaintiff, the water leak, the preexisting crack in the facade, records of maintenance and repairs and records concerning the foundation of plaintiff’s building. Plaintiff has also not responded to any of STA’s discovery demands and has not appeared for a deposition. “Summary judgment is not justified where the existence of essential facts depend upon knowledge exclusively within the possession of the moving party and which might well be disclosed by cross-examination or examination before trial.” *Baldasano v The Bank of New York*, 199 AD2d 184, 185 (1st Dept 1993).

As questions of fact exist as to whether the steam pipe leaks or any pre-existing factors contributed to or caused any of the problems which occurred at the plaintiff’s building and as discovery is not complete, summary judgment in plaintiff’s favor is denied. Also, as there is a

question of fact as to whether a leak from the plaintiff's building caused damage to the STA Garage, dismissal of the first counterclaim is denied.

STA alleges in its second counterclaim that plaintiff made fraudulent misrepresentations to the Department of Buildings in January of 2005 when it complained that construction being performed by STA caused a large crack in the facade of plaintiff's building. Although plaintiff argues that a lack of underpinning caused the problem, STA argues that at the time of the complaint, construction had not yet commenced in the area. STA contends that it believes that the plaintiff's building made the complaint in an attempt to wrongfully compel STA to pay for the cost of repairing the crack or in retaliation after STA covered several lot line windows and rendered them unusable during a previous construction project.

According to the affidavit of Mazzaferro, the cracks on the plaintiff's building were "later confirmed to be pre-existing cracks on the street side facade." (Mazzaferro Aff., ¶ 4). Zaloum also states that he advised the Department of Buildings that the building was damaged prior to the commencement of the work. On January 19, 2005, Zaloum sent the Department of Building a letter which states that the cracking on the plaintiff's building pre-existed the project for many years (Crisci aff., ex. G). As there is a question of fact as to whether the alleged cracking existed prior to STA's work, the second counterclaim cannot be dismissed.


CONCLUSION AND ORDER

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment and for dismissal of the first and second counterclaims is denied.

Counsel for the parties are directed to appear for a conference on January 11, 2008 at 11:00 am in room 335 at 60 Centre Street.

Dated: November 13, 2007



WALTER B. TOLUB J.S.C.

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