

**355 West 41st Tavern, Inc. v 351 West 41st Street**

2007 NY Slip Op 34201(U)

December 24, 2007

Supreme Court, New York County

Docket Number: 0117365/2004

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan  
Justice

PART 36

Index Number : 117365/2004

INDEX NO. \_\_\_\_\_

355 W. 41ST TAVERN

MOTION DATE \_\_\_\_\_

vs

351 WEST 41ST STREET

MOTION SEQ. NO. \_\_\_\_\_

Sequence Number : 003

MOTION CAL. NO. \_\_\_\_\_

SUMMARY JUDGMENT

motion to/for \_\_\_\_\_

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

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

1, 2

Replying Affidavits \_\_\_\_\_

3

4

Cross-Motion:  Yes  No

(for summary judgment)

Upon the foregoing papers, it is ordered that this motion <sup>by defendant CRP Imico</sup> 350 West 42nd St, LP, is granted in part & ~~denied~~ denied in part, in accordance with the attached memorandum decision.

**FILED**

JAN 02 2008

NEW YORK  
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: \_\_\_\_\_

*[Signature]*

*[Signature]*

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 36

-----X  
355 WEST 41<sup>st</sup> TAVERN, INC.,

Plaintiff,

Index No. 117365/04

-against-

Motion Seq. No.: 003

351 WEST 41<sup>st</sup> STREET ASSOCIATES, LLC and  
CRP/IMICO 350 WEST 42<sup>ND</sup> STREET, L.P.,

Defendants.

-----X

DORIS LING-COHAN, J.:

Defendant CRP IMICO 350 WEST 42<sup>ND</sup> Street, L.P., (CRP) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and all cross claims.

In this negligence action, plaintiff seeks to recover damages for property damage and loss of business profits, allegedly resulting from the demolition and construction of premises located at 351 West 41<sup>st</sup> Street, New York, New York (the Premises or The Orion).<sup>1</sup> Defendant 351 West 41<sup>st</sup> Street Associates LLC (41<sup>st</sup> Street Assocs.) is the owner of the Premises. CRP is the ground lessee of the Premises. Plaintiff operates a restaurant/bar (the bar), as a commercial tenant on the ground floor and basement of a five-story building located at 355 West 41<sup>st</sup> Street, New York, New York (the commercial building). The commercial building is adjacent to the Premises.

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<sup>1</sup>Prior to construction, the Premises was a five-story building. After construction, the Premises was rebuilt to a 58-story residential condominium (referred to as "The Orion").

Plaintiff alleges that, on or about August 2004, defendants commenced extensive demolition, excavation, and construction work on the Premises, which caused property damage to the interior of the bar and the commercial building. Plaintiff alleges that, as a result of defendants' negligence in the excavation and construction of the Premises, portions of plaintiff's property were destroyed, i.e., pipes were caused to break, cracking the walls, floors, and ceiling, and causing flooding. Plaintiff claims that a drain pipe from the roof servicing the commercial building lay between the two adjacent buildings; that in or about August 2004, as a result of the chipping away and demolition of the Premises, the drain pipe broke, flooding the entire bar, causing extensive floor and water damage and requiring the bar to close for a few days. Plaintiff further claims that, due to the installation of temporary heavy scaffolding by defendants' contractors on the commercial building, the roof was damaged, causing plaintiff's roof to constantly leak.

With regard to its claim that it was caused to sustain a substantial loss of business and profits, plaintiff claims that defendants blocked access and visibility to plaintiff's bar by parking two trailers, approximately 50 feet in length, with stairwells extending three feet outwards, directly in front of plaintiff's premises, and by placed scaffolding on the Premises. Although defendants did erect a temporary sidewalk redirecting pedestrian traffic to plaintiff's premises, plaintiff alleges that defendants parked and/or permitted others to park their vehicles

within the area, resulting in the blocking of access to plaintiff's premises.

CRP argues that the complaint should be dismissed because plaintiff has failed to demonstrate that it is entitled to sustain a claim for either lost profits or physical damage to its property. With regard to the property damage claim, defendant attaches an affidavit by its expert, Michael C. Simon (Simon), a professional engineer, who avers that, on December 1, 2006, he inspected the interior of plaintiff's bar, the basement and adjoining roof tops. He states that, based upon his inspection, review of weather reports for July and August 2004, and vibration analysis, plaintiff's claim that the construction and demolition of the Premises caused the drain pipe to fail and the roof to leak is unfounded. Simon opines that the age of the building in which the bar is located, the poor condition of the roof over the back room of the bar, and the poor maintenance of the commercial building caused the water leak and the drain pipe to break.

In opposition, plaintiff submits an affidavit by its expert, Benjamin Lavon (Lavon), a professional engineer. Lavon states that he and another employee of his firm, Carl J. Schoenberger (Schoenberger), initially visited and observed the conditions of the subject commercial building, including the bar.<sup>2</sup> On April 18, 2007, Lavon and Schoenberg re-visited the commercial building to perform a follow-up inspection of the commercial building, and to

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<sup>2</sup>Lavon fails to mention the date he initially visited the commercial building.

observe the new Orion building. He states that he observed various deficiencies in the flashing in The Orion wall and roof which could reasonably be the source for the reported water leaks suffered by plaintiff. Lavon disagrees with the observations made by Simon. He opines that it is reasonable to conclude that the activities associated with the demolition, construction, and excavation of The Orion caused vibrations and significant damage to the commercial building and bar occupied by the plaintiff.

It is well established that a defendant moving for summary judgment bears the burden of establishing that there are no material issues of fact in dispute, that plaintiff's cause of action has no merit, and that it is entitled to summary judgment as a matter of law (Affenito v PJC 90<sup>th</sup> Street LLC, 5 AD3d 243 [1<sup>st</sup> Dept 2004]). Even if the movant makes such a showing, the motion must be denied if the plaintiff "produce[s] evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he [or she] rests his [or her] claim" (Caprer v Nussbaum, 36 AD3d 176, 200 [2d Dept 2006] [citation and internal quotations omitted])

In order to establish a prima facie case of negligence, plaintiff must demonstrate a duty owed to it, breach of that duty, and that the breach was the proximate cause of the injury (Solomon v City of New York, 66 NY2d 1026, 1027 [1985]). A claim of negligence may be based "wholly on circumstantial evidence as long as he/she demonstrates the existence of 'facts and conditions from which the negligence of the defendant and the causation of the

accident by that negligence may be reasonably inferred.'"

(Affenito v PJC 90<sup>th</sup> Street LLC, 5 AD3d at 245, quoting Schneider v Kings Highway Hosp. Ctr., 67 NY2d 743, 744 [1986]). There is no requirement in the law that every other possible cause must be excluded but defendant's negligence (id. at 744).

Administrative Code of the City of New York § 27-1031 (b) (1) places responsibility for the safety of adjoining structures on "the person who causes such excavation to be made"<sup>3</sup> (See also Cohen v Lesbian & Gay Community Services Center, Inc., 20 AD3d 309, 310 [1<sup>st</sup> Dept 2005]). The conflicting affidavits of the parties' experts raise triable factual issues about whether defendants took adequate precautions to protect the adjoining commercial building and whether the construction operations proximately caused damage to plaintiff's property (id.; Coronet Properties Co. v L/M Second Avenue, Inc., 166 AD2d 242 [1<sup>st</sup> Dept 1990]). Accordingly, defendant's motion for summary judgment dismissing plaintiff's property damage claims is denied.

Defendant's motion to dismiss plaintiff's claims for lost profits is granted. Defendant argues, inter alia, that plaintiff's lost profits claim is too speculative and uncertain. In most cases, "economic loss from business interruption is not

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<sup>3</sup>The provision provides that: "[w]hen 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 own expense, preserve and protect from injury any adjoining structures . . . ." (see also Coronet Properties Co. v L/M Second Ave., Inc., 166 AD2d 242 [1<sup>st</sup> Dept 1990]).

recoverable in damages where the claim is based upon lost profits, revenues or labor productivity which are 'speculative' in nature" (Sanwep Restaurant Corp. v Consolidated Edison Company of N.Y., 204 AD2d 71 [1<sup>st</sup> Dept 1994]; Koch v Consolidated Edison of N.Y. Co., 62 NY2d 548, 561 [1984]; Grow Tunneling Corp. v Consolidated Edison Co of N.Y., 195 AD2d 325 [1<sup>st</sup> Dept 1993]). Plaintiff bears the heavy burden of establishing such a claim with certainty (Sanwep Restaurant Corp. v Consolidated Edison Company of N.Y., supra).

David Sheeran (Sheeran), plaintiff's president, testified at his deposition that he first opened a bar at the subject location in 2000 as a rock and roll bar with the name of "Tobacco." In or about January 2004, the bar's theme was changed to a gay bar with the name of "La Flores." La Flores closed down in August or September 2004, and re-opened in approximately January 2005, as a straight bar called "Port 41."

Plaintiff cannot establish a basis for any alleged loss in revenue, since the bar did not conduct a steady business over a substantial period of time (see e.g. Sanwep Restaurant Corp. v Consolidated Edison Company of N.Y., 204 AD2d 71, supra).

Further, plaintiff's claim that the bar lost profits due to defendants' alleged negligence in the construction of the Premises is speculative, since plaintiff cannot demonstrate that any lost revenue was not due to the change in the bar's themes. Moreover, a review of plaintiff's tax returns indicates that plaintiff did not suffer a decrease in profits during the period of

construction. Plaintiff is precluded from recovering any lost revenue since the proof of damages that it offers is speculative and uncertain (Grow Tunneling Corp. v Consolidated Edison Company of New York, 195 AD2d 325, supra).

Accordingly, it is

ORDERED that defendant CRP IMICO 350 West 42<sup>nd</sup> Street, LP's motion is granted to the extent of granting partial summary judgment dismissing plaintiff's claims for loss of business and profits asserted in the fifth cause of action; and it is further

ORDERED that the action shall continue as to the first through fourth causes of action; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

DATED:



Hon. Doris Ling-Conan, J.S.C.

**FILED**

JAN 02 2008

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