

Brackman v Hewlett Park Apt. Owners

2008 NY Slip Op 31849(U)

June 12, 2008

Supreme Court, Nassau County

Docket Number: 0474-07/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

ROSALIND BRACKMAN,

Plaintiff,

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 20474/07

- against -

Motion Sequence No. 001, 002

HEWLETT PARK APARTMENT OWNERS,
ESTHER BOGEN-BECKER, ALEXANDER
HOLDINGS, LLC d/b/a BATH FITTERS MARK
STEPHENS,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3, 4, 5</u>
Replying Affidavits	<u>6</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendant Alexander Holdings, LLC d/b/a Bath Fitters moves for an order pursuant to CPLR 602 consolidating this case for all pretrial purposes with the case of Esther Bogen-Becker v. Alexander Holding, LLC d/b/a Bath Fitters, Nassau County Supreme Court index number 21761/07 under the present index number of the present case; prospectively consolidating for all pretrial purposes all future cases arising out of the subject occurrence, under the index number of the present case; and pursuant to CPLR 3101 allowing intrusive testing of the item specified in this motion. The plaintiff opposes

this motion solely as to allowing intrusive testing of a metal pipe attached to a shower fitting on the ground the defendant Alexander Holdings, LLC d/b/a Bath Fitters has failed to provide in the moving papers for the scheduling of the exchange of reports, photographs, electronic recordings of any type, and all documentation in connection with the planned intrusive testing. The claimant Greater New York Mutual Insurance Company a/s/o Hewlett Apartment Owners, Inc. partially opposes this motion indicating it has no objection to joining matters for discovery and calendar purposes, however, as Hewlett Apartment Owners, Inc. is a defendant in the main action, and is the plaintiff's insured for the Greater New York Mutual Insurance Company a/s/o Hewlett Apartment Owners, Inc. action to be commenced, a straight/full consolidation would be inappropriate, as Hewlett Apartment Owners, Inc. would be a plaintiff and defendant in the same action. The defendant Esther Bogen-Becker does not object to the consolidation of this case for pretrial purposes subject to each action maintain its separate index number and caption, and permitting intrusive testing upon the terms agreed by the parties.

The plaintiff moves, without opposition, for an order seeking a default judgment against Hewlett Park Apartment Owners pursuant to CPLR 3215, and an immediate assessment of damages. The underlying action seeks to recover money for fire and smoke damages allegedly caused by the defendants to the plaintiff's apartment, to wit apartment A24, 1379 Broadway, Hewlett, New York, on January 2, 2007.

The attorney for the defendant Alexander Holdings, LLC d/b/a Bath Fitters states, in a supporting affirmation dated February 27, 2008, testing was set for January 23 and 24,

2008, after scheduling was agreed by all of the parties and nonparty claimants, with a month notice, but only to be objected at the last moment by plaintiff's counsel making necessary the instant motion. The attorney for the defendant Alexander Holdings, LLC d/b/a Bath Fitters states this instant action is one of several cases arising from the January 2, 2007 fire where the Fire Marshall opined the fire was caused by the use of a torch to repair a bathroom in the subject apartment. The attorney for the defendant Alexander Holdings, LLC d/b/a Bath Fitters asserts consolidation is indicated because the same fire caused the alleged damage in both actions, and the nonparty claimants allege damage due the same fire. The attorney for the defendant Alexander Holdings, LLC d/b/a Bath Fitters contends there may be other prospective actions as a result of the fire.

The attorney for the defendant Alexander Holdings, LLC d/b/a Bath Fitters also points to an affidavit dated February 22, 2008, by Joseph P. Crosson, a principal of Lucius Pitkin, Inc. and a New York State licensed professional engineer. The attorney for the defendant Alexander Holdings, LLC d/b/a Bath Fitters states their metallurgical expert reviewed the Fire Marshall's report, which is attached to the moving papers, to determine if the copper pipe was in fact exposed to a torch, and if so, the extent and direction of any heating caused. The attorney for the defendant Alexander Holdings, LLC d/b/a Bath Fitters points out the Lucius Pitkin, Inc. engineers looked at the pipe, but non-intrusive testing did not answer these issues, so intrusive testing is necessary, as shown in Crosson's description of the cuts to be done to expose the inner surface, and allow microscopic examination. The attorney for the defendant Alexander Holdings, LLC d/b/a

Bath Fitters points out most of the metal pipe elbow will be unaffected by the testing as shown in the detailed testing protocol advanced by Crosson. The attorney for the defendant Alexander Holdings, LLC d/b/a Bath Fitters notes all parties and non-parties will have an opportunity to photograph the pipe elbow and have their own experts present before and during the testing to be done at the laboratory of Lucius Pitkin, Inc., 308 Hudson Street, New York, New York. The attorney for the defendant Alexander Holdings, LLC d/b/a Bath Fitters also indicates notice was given to counsel for the plaintiff by letter dated December 19, 2007, but the plaintiff's attorney waited until January 17, 2008, six days before the scheduled testing before objecting to it.

The plaintiff's attorney states, in an opposing affirmation dated April 21, 2008, to the motion by the defendant Alexander Holdings, LLC d/b/a Bath Fitters, the plaintiff opposes this motion to allow intrusive testing because the moving papers are inadequate. The plaintiff's attorney states Crosson failed to provide an objective explanation for further testing. The plaintiff's attorney remarks Crosson's statement that visual inspection was inconclusive is not a reasonably specific justification for destructive testing. The plaintiff's attorney points out there is no production of photographs, documentation nor reports in connection with Crosson's reference to the November 16, 2007 visual inspection by the Lucius Pitkin, Inc. professional engineer. The plaintiff's attorney asserts, however the plaintiff is willing to withdraw this opposition to the motion for an allowing intrusive testing if the movant consents to provide to the plaintiff's counsel: (1) copies of all reports, photographs, electronic recordings of any type, and all

documentation in connection with the intrusive testing; and (2) copies of all reports, photographs, electronic recordings of any type, and all documentation in connection with the November 16, 2007 visual inspection by the Lucius Pitkin, Inc. professional engineer to be provided to the plaintiff's counsel at least 15 days prior to conducting the intrusive testing. The plaintiff's attorney avers, should the movant not consent to these requests, and if the Court allows the intrusive testing, the plaintiff seeks an order from the Court that: (1) within 30 days after the completion of the intrusive testing, all parties and non-parties, that are joined, exchange reports, photographs, electronic recordings of any type, and all documentation in connection with the intrusive testing; and (2) copies of all reports, photographs, electronic recordings of any type, and all documentation in connection with the November 16, 2007 visual inspection by the Lucius Pitkin, Inc. professional engineer be exchanged by the parties and non-parties, that are joined, at least 15 days prior to conducting the intrusive testing.

The attorney for the defendant Esther Bogen-Becker states, in an affirmation dated April 14, 2008, in partial opposition to the motion by the defendant Alexander Holdings, LLC d/b/a Bath Fitters, the actions may not be consolidated for trial since the defendant Esther Bogen-Becker is a plaintiff in one action and a defendant in the other, and the defendant Alexander Holdings, LLC d/b/a Bath Fitters does not request the actions be consolidated for trial. The attorney for the defendant Esther Bogen-Becker also states, while appropriate intrusive testing should be permitted, it should be upon the time and conditions as agreed by the parties. The attorney for the defendant Esther Bogen-Becker

notes a special concern for providing all parties with adequate notice, so they may retain appropriate experts, however this defendant does not object to the consolidation nor to intrusive testing upon agreed terms by the parties.

The attorney for the claimant Greater New York Mutual Insurance Company a/s/o Hewlett Apartment Owners, Inc. states, in an opposing affirmation dated April 8, 2008, in partial opposition to the motion by the defendant Alexander Holdings, LLC d/b/a Bath Fitters, the claimant Greater New York Mutual Insurance Company a/s/o Hewlett Apartment Owners, Inc. has no opposition to this motion, as well as prospectively consolidating these actions with all future actions arising from the subject occurrence, and permitting intrusive testing of evidence. The attorney for the claimant Greater New York Mutual Insurance Company a/s/o Hewlett Apartment Owners, Inc. states each action, however must maintain a separate caption and index number, but joined for discovery. The attorney for the claimant Greater New York Mutual Insurance Company a/s/o Hewlett Apartment Owners, Inc. urges, as some claimants, including the claimant Greater New York Mutual Insurance Company a/s/o Hewlett Apartment Owners, Inc. have not yet commenced suit, the actions to be commenced must not be deprived of adequate time to conduct pre-note of issue discovery, despite the fact prior actions were commenced, so the Court should consider, in any decision on this motion, a provision for additional and appropriate discovery proceedings for future possible actions. The attorney for the claimant Greater New York Mutual Insurance Company a/s/o Hewlett Apartment Owners, Inc. states this claimant has no objection to intrusive testing, as long as all parties are on

notice of it, and a protocol is agreed by all of the parties.

The attorney for the defendant Alexander Holdings, LLC d/b/a Bath Fitters points out, in a reply affirmation dated April 25, 2008, the non-party Greater New York Mutual Insurance Company a/s/o Hewlett Apartment Owners, Inc. and the defendant Esther Bogen-Becker do not object to pretrial consolidation, so long as separate captions are preserved, and adequate time is given for discovery for each action. The attorney for the defendant Alexander Holdings, LLC d/b/a Bath Fitters states the defendant Alexander Holdings, LLC d/b/a Bath Fitters has no objection to that request. The attorney for the defendant Alexander Holdings, LLC d/b/a Bath Fitters points out also notes the non-party Greater New York Mutual Insurance Company a/s/o Hewlett Apartment Owners, Inc. and the defendant Esther Bogen-Becker do not object to the testing protocol as set forth in the required detail by Crosson, and the plaintiff will withdraw opposition to the motion, so long as the the defendant Alexander Holdings, LLC d/b/a Bath Fitters provides all photographs, recordings, and reports regarding the subject pipe elbow from before and after the testing. The attorney for the defendant Alexander Holdings, LLC d/b/a Bath Fitters states the defendant Alexander Holdings, LLC d/b/a Bath Fitters has no objection to producing visual records of the pipe, and the testing, such as photographs and videotapes, but do object to producing any reports. The attorney for the defendant Alexander Holdings, LLC d/b/a Bath Fitters states the defendant Alexander Holdings, LLC d/b/a Bath Fitters concede a convenient time and place for the testing in the presence of all parties, non-parties and their experts, including permitting photographing and

videotaping the testing, but the request for Crosson's reports, continuing Crosson's expert opinions, is improper, as a matter of law.

The plaintiff's attorney states, in a supporting affirmation dated March 27, 2007 [sic], to the plaintiff's motion, Hewlett Park Apartment Owners failed to answer the summons and complaint served on November 29, 2007. The plaintiff's attorney states counsel for the plaintiff sent a letter to Hewlett Park Apartment Owners indicating the complaint necessitated an answer. The plaintiff's attorney points to the affidavit dated March 24, 2008, by the plaintiff where the plaintiff indicates the cause of action for negligence against Hewlett Park Apartment Owners includes an allegation that the defendant Mark Stephens failed to work and use the subject tools in the apartment in a reasonable and safe manner proximately causing the fire, and the resulting damages to the plaintiff's premises and other property. The plaintiff claims Hewlett Park Apartment Owners is liable for the negligent acts and omissions of its contractor and employee Mark Stephens and Alexander Holdings, LLC d/b/a Bath Fitters. The plaintiff's attorney asserts Hewlett Park Apartment Owners has failed to file an answer or receive an extension of time to answer the complaint, and the time to do so has expired.

This Court has carefully reviewed and considered all of the papers submitted with regard to these motions. A motion for consolidation or joint trial pursuant to CPLR 602 (a) rests in the sound discretion of the court. Where common questions of law or fact exist, the motion should be granted absent a showing of prejudice to a substantial right by a party opposing the motion (see, **Gadelov v. Shure**, 274 A.D.2d 375). All of the parties

and the claimant agreed to consolidation, and there is no showing of prejudice to a substantial right by anyone. This Court orders a joint trial for both actions in the interest of judicial economy. Each action shall maintain its separate index number and separate caption. Joint discovery is also ordered for both actions. This Court also orders the intrusive testing protocol as set forth in the required detail by the expert retained by the defendant Alexander Holdings, LLC d/b/a Bath Fitters within 30 days after service of a copy of this order with notice of entry. The Court directs the defendant Alexander Holdings, LLC d/b/a Bath Fitters to produce visual records of the pipe, and the testing, such as photographs and videotapes.

This Court, upon reading and filing the plaintiff's notice of motion for a default judgment against Hewlett Park Apartment Owners; the sworn statements dated March 24 and 27, 2008, respectively in support of the motion; the summons and verified complaint served here, with proof of service; and Hewlett Park Apartment Owners having failed to answer, partial summary judgment is granted to the plaintiff against Hewlett Park Apartment Owners on the issue of liability. An inquest is ordered on the issue of damages. A copy of this order shall be served and accompany the note of issue when filed to add this matter to the Calendar Control Part of this court for that inquest on the issue damages. Entry of judgment is stayed pending a determination of damages.


The motion by the defendant Alexander Holdings, LLC d/b/a Bath Fitters is granted to the following extent. A joint trial and joint discovery is ordered with the matter of Esther Borgen-Becker v Alexander Holding LLC d/b/a Bath Fitters pending under

Index No. 21761/07, Nassau County Supreme Court. The motion for an order to prospectively consolidate all future cases arising out of the subject occurrence with this action is denied as premature. The motion for an order allowing intrusive testing of the metal pipe elbow is granted. The defendant shall provide to the plaintiff photographs, test results and factual data in connection with the intrusive testing and the previous visual inspection of the metal pipe elbow within 30 days of completion of the intrusive testing. The disclosure shall not include the opinions, if any, of defendant's expert (*see Castro v Alden Leeds, Inc.*, 116 A.D. 549)

So ordered.

Dated: **June 12, 2008**

ENTER:



 J. S. C.
 HON. ANTONIO I. BRANDVEIN

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED
 JUN 25 2008
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE