

<b>Friedman v Broeksmit</b>
2008 NY Slip Op 32292(U)
August 15, 2008
Supreme Court, New York County
Docket Number: 0104486/2006
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number CO 104486/2008  
**FRIDMAN, SIGMUND**  
 vs.  
**BROEKSMIT, WILLIAM**  
 SEQUENCE NUMBER : 001  
 SUMMARY JUDGMENT

**FILED**  
 AUG 20 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK

INDEX NO. \_\_\_\_\_  
 MOTION DATE 6/30/08  
 MOTION SEQ. NO. 001  
 MOTION CAL. NO. \_\_\_\_\_

In this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...  
 Answering Affidavits - Exhibits \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

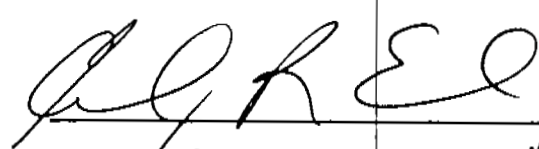
Upon the foregoing papers, it is ordered that this motion The annexed motion and cross motion are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that defendants' motion is granted to the extent of granting partial summary judgment dismissing that portion of plaintiffs' complaint seeking punitive damages; and it is further

ORDERED that defendants' and plaintiffs' motions for summary judgment in all other respects is denied; and it is further

ORDERED that the action shall continue as to the first cause of action.

Dated: 8/15/08

  
 \_\_\_\_\_  
 HON. CAROL EDMEAD 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):

[\* 2 ]  
SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----x  
SIGMUNDO AND HANNA FRIDMAN,

Plaintiffs,

Index No.: 104486/06

-against-

DECISION AND JUDGMENT

WILLIAM AND ALLA BROEKSMIT AND  
SILVERLINING INTERIORS, INC.,

Defendants.

-----x  
EDMEAD, J.

#### BACKGROUND

This case involves property damage to plaintiffs' apartment allegedly caused by renovation work performed in defendants Broeksmit's apartment by defendant Silverlining Interiors, Inc. (Silverlining). The Broeksmits live directly above plaintiffs.

The Broeksmits had renovation work performed in their bedroom and bathroom by Silverling that was completed in June, 2003. One and a half years later, on December 9, 2004, plaintiffs suffered water damage to their bedroom, and continued to have leaks through February, 2005. As a result, plaintiffs are suing the Broeksmits and Silverling for both consequential and punitive damages.

Silverling has moved for summary judgment, pursuant to CPLR 3212, or, in the alternative, an order granting partial summary judgment to dismiss that portion of the complaint seeking

punitive damages.

Both plaintiffs and the Broeksmit's have requested leave to file motions for summary judgments late, and the court has agreed to accept plaintiffs' papers as opposition to the instant motion, and to accept the Broeksmit's papers along with Silverlining's motion.

In support of its motion, Silverlining has submitted the examination before trial of one of its principals, who stated that he observed the leakage in plaintiffs' apartment, but could not specifically state the cause of the leak. He opined that the leak could have emanated from the Broeksmit's apartment, building steam pipe leakage, or from leaks from the apartment above the Broeksmit's.

Silverlining also submitted the affidavit of a licensed professional engineer, who stated that the cause of the leak could not be determined until the sheetrock and plaster was removed from the walls and ceiling to trace the exact path of the leak. This expert searched the New York City Department of Building records that indicate that the building was having masonry repair work performed during the period in which plaintiffs suffered the leaks, which also may have been a source of the problem.

In opposition, plaintiffs have submitted the affidavit of a licensed professional engineer, who stated that it was his belief

that the source of the leaks to plaintiffs' apartment was the Broeksmit's apartment.

The Broeksmit's have adopted Silverlining's arguments for summary judgment, and have also opposed plaintiffs' motion as against them, stating that there is no evidence or testimony to indicate that they were in any way liable for the leaks or responsible for the actions of Silverlining, who is an independent contractor.

#### DISCUSSION

Summary judgment is appropriate when the movant establishes a prima facie entitlement to judgment as a matter of law by the submission of competent evidence. See *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Summary judgment is warranted where there are no genuine issues of material fact and, therefore, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Therefore, summary judgment must be precluded if, upon the papers submitted, there remains a question in the mind of the court.

In the instant matter, all of the parties' motions for summary judgment must be denied. The parties' conflicting expert affidavits raise issues of fact (*Frobose v Weiner*, 19 AD3d 258 [1<sup>st</sup> Dept 2005]), and "[w]hen experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution." *Shields v Baktidy*, 11 AD3d 671, 672 (2d Dept 2004).

"[T]he weight to be afforded the conflicting testimony of experts is a matter within the province of the jury [internal quotation marks and citation omitted]." *Gleeson-Casey v Otis Elevator Company*, 268 AD2d 406, 407 (2d Dept 2000).

Additionally, since one and a half years separated the work performed in the Broeksmits' apartment and the first leaks appearing in plaintiffs' apartment, there remains a question of fact as to the exact cause of the leaks.

With respect to the claim for punitive damages, as stated by the court in *Swersky v Dreyer and Traub* (219 AD2d 321, 328 [1<sup>st</sup> Dept 1996]),

"[p]unitive damages are available in a tort action where the wrongdoing is intentional or deliberate, has circumstances of aggravation or outrage, has a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed wilful and wanton (citations omitted)."

Further, "[p]unitive damages are not to compensate the injured party but rather to punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the same conduct in the future (citations omitted)." *Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 489 (2007). The basis of this action is a claim of negligence, and from the record it cannot be concluded that defendants' actions were either intentional or "motivated by malice so as to warrant punitive damages, or that these damages would deter future reprehensible conduct ... ." *Id.* at 491. Consequently, Silverlining's motion

with respect to dismissing the claim for punitive damages, as adopted by the Broeksmits, is granted.

**CONCLUSION**

Based on the foregoing, it is

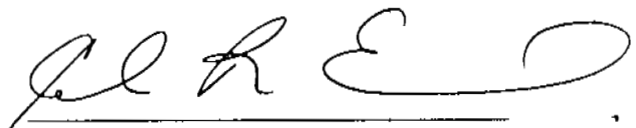
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Dated: August 15, 2008

ENTER:



Carol R. Edmead, J.S.C.