

Fridman v Broeksmit
2008 NY Slip Op 32429(U)
September 2, 2008
Supreme Court, New York County
Docket Number: 0104486/2006
Judge: Carol R. Edmead
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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-

**AMENDED
DECISION AND JUDGMENT**

WILLIAM AND ALLA BROEKSMIT AND
SILVERLINING INTERIORS, INC.,

FILED 1

Defendants.
-----x

SEP 05 2008

EDMEAD, J.

**COUNTY CLERK'S OFFICE
NEW YORK**

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 Silverlining 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 Silverlining for both consequential and punitive damages.

The Broeksmit's have 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 Silverlining 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 Silverlining's papers along with the Broeksmit's motion.

In support of its motion, the Broeksmits have submitted the examination before trial of one Silverlining's 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 Broeksmits' apartment, building steam pipe leakage, or from leaks from the apartment above the Broeksmits'.

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.

Silverlining has adopted the Broeksmit's arguments for summary judgment, and have also opposed plaintiffs' motion as against them. The Broeksmit's state 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 [1st 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 [1st 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

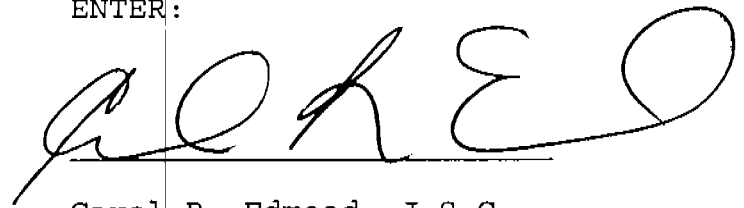
ORDERED that defendants' motion is granted to the extent of granting partial summary judgment dismissing that portion of plaintiffs' complaint seeking punitive damages; and it is further

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: September 2, 2008

ENTER:



Carol R. Edmead, J.S.C.

CAROL EDMEAD
J.S.C.

FILED

SEP 05 2008

COUNTY CLERK'S OFFICE
NEW YORK