

**L & R Furniture Corp. v 2410 Amsterdam Ave.  
Assoc.**

2008 NY Slip Op 32431(U)

August 18, 2008

Supreme Court, New York County

Docket Number: 0106316/2004

Judge: Michael D. Stallman

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

PRESENT: **HON. MICHAEL D. STALLMAN**

PART 7

Justice

Index Number : 106316/2004

L&R FURNITURE CORP.

VS.

2410 AMSTERDAM AVENUE ASSOCIATES,

SEQUENCE NUMBER : # 003

SUMMARY JUDGMENT

INDEX NO. 106316-04

MOTION DATE 6/19/08

MOTION SEQ. NO. #003

MOTION CAL. NO. 126

were read on this motion to/for Summary judgment

PAPERS NUMBERED

1-3

4

5

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits A-H

Answering Affidavits - Exhibits A

Replying Affidavits - Exhibit A

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is determined accordingly to the unrefuted pleadings and decision and order.*

**FILED**

AUG 25 2008

NEW YORK  
COUNTY CLERK'S OFFICE

**HON. MICHAEL D. STALLMAN**

Dated: 8/18/08

*[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 CITY OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7

-----X  
L & R FURNITURE CORP. d/b/a  
FLEISCHER JUVENILE FURNITURE,

Index No.: 106316/04

DECISION AND ORDER

Plaintiff,

- against -

2410 AMSTERDAM AVENUE ASSOCIATES,  
AVERY MANAGEMENT CORP, THE CITY OF  
NEW YORK, CONSOLIDATED EDISON, INC.,

Defendants.

-----X  
HON. MICHAEL D. STALLMAN, J.

Plaintiff is the commercial lessee of the premises owned by out-of-possession defendant 2410 Amsterdam Avenue Associates, and managed by defendant Avery Management Corp. (together, "defendants").

**FILED**

AUG 25 2008

NEW YORK  
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Plaintiff contends that defendants had a duty to sufficiently waterproof plaintiff's space so that it would not have been damaged by water main break - caused infiltration. Defendants move for summary judgment.

**BACKGROUND**

On October 16, 2004, a water main broke two blocks from the subject premises. The break caused severe flooding for several blocks on the Upper West Side of Manhattan, and damaged the store and basement rented by plaintiff. It has previously been established that Consolidated Edison, Inc. was responsible for the water main break, and, after extensive discovery, plaintiff settled with Consolidated Edison, Inc. and the City of New York. The

\* 3 ]  
action is currently proceeding only against defendants.

At the time of the occurrence in question, plaintiff had been leasing the premises for 25 years. According to the lease in effect at the time the flooding took place, plaintiff was responsible for maintaining water damage insurance to protect itself and defendants from any possible water damage (§ 68(b) of the Lease); yet, plaintiff did not maintain such insurance coverage. According to § 4 of the Lease, defendants were responsible for maintaining and repairing the public portions of the building, but plaintiff was obligated to make all non-structural repairs to preserve the premises in good working condition, casualty excepted.

Defendants move for summary judgment, asserting that the damage to plaintiff's business was previously determined to have been caused by Consolidated Edison, Inc., which has already settled with plaintiff. Plaintiff's opposition rests on its assertion that defendants are liable for their failure to waterproof the building adequately.

#### DISCUSSION

Summary judgment is appropriate when the movant establishes 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 the moving party

has demonstrated that it is entitled to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986). However, summary judgment must be denied if, upon the papers submitted, there remains a material factual question. See *Skiadas v Barsalis*, 292 AD2d 593 (2d Dept 2002).

Plaintiff's opposition rests on the premise that had defendants provided reasonable waterproofing to the building, plaintiff would not have suffered damage to the extent it did. To support this contention, plaintiff refers to ¶ 4 of the Lease, cited above, in which defendants are obliged to maintain and repair the public portions of the building. Plaintiff also cites to the New York City Building Code for multiple dwellings, in which building owners are required to maintain their buildings in a safe condition.

"It is well settled that an out-of-possession landlord ... is generally not liable for negligence with respect to the condition of the demised premises unless it '(1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision' [citation omitted]."

*Reyes v Morton Williams Associated Supermarkets, Inc.*, 50 AD3d 496, 497 (1<sup>st</sup> Dept 2008).

Plaintiff maintains that defendants' right to enter the premises to maintain and repair the public areas under the lease is sufficient to engender their liability for the damage suffered by

plaintiff as a result of the flood. However, plaintiff has misinterpreted several of the key elements enumerated by the courts with respect to an out-of-possession landlord's liability for injuries to tenants and third parties: a specific contract or statutory obligation, and notice of the defective condition.

Plaintiff contends that defendants did have a contractual duty to provide waterproofing for the building, basing this argument on the lease's warranty of quiet enjoyment. However, there is no provision in the lease that specifies waterproofing, and the only cases dealing with a landlord's obligation to water-proof a building all require actual or constructive notice to the landlord of a water leak problem. See *Silver v Dry Dock Savings Institution*, 261 AD 283 (1<sup>st</sup> Dept 1941); *Kramer v Stone*, 176 AD 549 (1<sup>st</sup> Dept 1917).

Here, there is no express contract language imposing on the landlord the duty to provide waterproofing. In the absence of such a provision, in order to find an out-of-possession landlord liable for losses caused by water damage, it must be shown that the landlord violated a specific statutory duty. *Valenti v 400 Carlls Path Realty Corp.*, \_\_\_ AD3d \_\_\_, 2008 WL 2447490, 2008 NY App Div Lexis 5584 (2d Dept 2008). "In the absence of a statutory duty, ... mere reservation of the right to enter the leased premises to inspect and repair [is] insufficient to give rise to liability for

a subsequently arising dangerous condition." *Kilimnik v Mirage Rest., Inc.*, 223 AD2d 530, 531 (2d Dept 1996). Plaintiff has failed to support an allegation of a statutory violation by defendants.

Although plaintiff cites the New York City Building Code extensively, it fails to indicate or specify any violation on the part of defendants. There is no evidence that defendants were ever cited by the Department of Buildings for violating any of the Building Code provisions, and plaintiff's argument rests on the conclusory assumption that the damage could not have been caused unless defendants failed to waterproof the building properly. Conclusory statements alone, without competent evidentiary support, are insufficient to sustain plaintiff's arguments. *Lombardo v Island Grill Diner*, 276 AD2d 532 (2d Dept 2000).

In *Worth Distributors, Inc. v Latham* (59 NY2d 231 [1983]), a case relied upon by plaintiff, the court applied the Building Code to an out-of-possession landlord to find liability for injuries when a portion of the building collapsed. However, in *Latham*, the court found that the damage resulted from a structural problem in the building, a problem of which the owners had "both constructive notice of the long-standing defect and, ... actual notice of the dangerous condition." *Id.* at 238.

In the instant case, there is not a scintilla of evidence that there was any structural problem with the building, or that

defendants had any notice, actual or constructive, of any latent defect. In fact, plaintiff had been in possession of the premises for 25 years and has provided no documentation that they ever knew of, or alerted defendants to, a waterproofing problem.

In *Chapman v Silber* (97 NY2d 9 [2001]), the Court of Appeals held that, to survive a landlord's summary judgment motion, a tenant must be able to come forth with some evidence that the landlord knew or should have known of the hazardous condition that caused the alleged injury. In *Chapman*, the plaintiff was injured from lead paint, and the court surmised that, because of the age of the building, it was reasonable to believe that the landlord should have been aware, from general knowledge, of the potential lead paint poisoning problem. However, in the case at bar, plaintiff was in possession of the property for 25 years without any indication of a water damage problem, and the flooding was caused by an extraordinary occurrence of a water main breaking. In this instance, without providing any fact that could give rise to even an inference of notice, plaintiff has failed to meet its burden of raising any triable question.

Furthermore, despite plaintiff's assumption that a landlord has a duty to waterproof a building, there is no such statutory provision, absent some problem that requires repair.<sup>1</sup>

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<sup>1</sup> Pursuant to the Rent Stabilization Law, which only applies to residential tenants, pointing, the primary method of  
(continued..)

CONCLUSION

Accordingly, defendants' motion for summary judgment is granted.

It is hereby

ORDERED that the motion of defendants 2410 Amsterdam Avenue Associates and Avery Management Corp. for summary judgment is granted in favor of defendants and against plaintiff L&R Furniture Corp. d/b/a Fleischer Juvenile Furniture; and it is further

ORDERED that the complaint is dismissed with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 18, 2008  
New York, New York

E N T E R:

  
MICHAEL D. STALLMAN, J.S.C.

**FILED**

AUG 25 2008

NEW YORK  
COUNTY CLERK'S OFFICE

<sup>1</sup>(...continued)

waterproofing a building, has a useful life of 15 years. 9 NYCRR § 2502.4. If a landlord voluntarily points and waterproofs his property more frequently, which he is not required to do, he may be entitled to the benefit of a rent increase for having effectuated a major capital improvement. See generally *West Village Associates v New York State Division of Housing & Community Renewal*, 277 AD2d 111 (1<sup>st</sup> Dept 2000). There is no basis for applying the standards of the Rent Stabilization Law to a commercial lease. Neither is there any evidence that pointing the walls could have prevented the flooding. Indeed, plaintiff has offered no evidence that defendants did not point during the useful span.