

Barton v 157 Chambers Dev. Owner LLC

2008 NY Slip Op 32947(U)

October 27, 2008

Supreme Court, New York County

Docket Number: 602877-2007

Judge: Carol R. Edmead

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

PRESENT: **CAROL EDMEAD**
J.S.C. Justice

PART 35

Paul Barton

INDEX NO. 114150/07

MOTION DATE 10/27/08

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

- v -

157 Chambers Development

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant 137 Reade Street Condominium pursuant to CPLR 3211(a)(1) and (a)(7), and pursuant to CPLR 3212 to dismiss the second amended verified complaint of the plaintiff is denied; and it is further

ORDERED that said defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 10/27/08

FILED
OCT 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----x

PAUL BARTON,

Plaintiff,

Index No. 602877-2007

-against-

157 CHAMBERS DEVELOPMENT OWNER LLC,
ARTISAN LOFTS DEVELOPMENT OWNER LLC,
TRIBECA ASSOCIATES L.L.C, PAVARINI
MCGOVERN LLC, 137 READE STREET
CONDOMINIUM,

Defendants.

-----x
HON. CAROL ROBINSON EDMEAD, J.S.C.

FILED
OCT 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this property damage action, defendant 137 Reade Street Condominium (the "Condominium") moves pursuant to CPLR 3211(a)(1) and (a)(7), and pursuant to CPLR 3212 to dismiss the second amended verified complaint of the plaintiff, Paul Barton ("plaintiff").

Factual Background

The Condominium is located at 137 though 143-C Reade Street, New York, New York. Plaintiff owns unit 141-C.

On August 20, 2007, defendant Pavarini McGovern LLC ("Pavarini") was performing renovations of an exterior wall of a building located at 157 Chambers Street, New York, New York, adjacent to the Condominium (the "adjacent building"). During the renovations, a piece of concrete from the work being performed at the adjacent building fell through the skylight of plaintiff's unit. Plaintiff alleges that the Condominium, Pavarini, and defendants 157 Chambers Development Owner LLC ("157 Development"), Artisan Lofts Development Owner LLC ("Artisan") and Tribeca Associates LLC, were negligent and grossly negligent, and seeks

recovery for the damage to his personal property, as well as punitive damages. Plaintiff also claims that Pavarini, with the consent of the Condominium, erected a wooden structure over the skylight rendering the unit uninhabitable.

Defendant's Motion

The Condominium argues that dismissal pursuant to CPLR 3211(a)(1) is warranted, as the documentary evidence, *i.e.*, the Declaration of Condominium (the "Declaration"), establishes that plaintiff was solely responsible for his skylight and conclusively refutes plaintiff's allegations. The Condominium owed no duty of care to protect plaintiff against the unforeseeable accident, which occurred as a result of construction work being performed on the adjacent building. Since the Court is bound to consider the larger social consequences of its decision and tailor its notion of duty so that the legal consequence of wrongs are limited to a controllable degree, plaintiff might argue that building owners in the recent crane collapse on the East Side owed a duty to their tenants to protect against the negligent acts of the crane operators. However, to establish negligence, plaintiff must demonstrate that the Condominium either created the condition or had notice of same and failed to correct or warn about the condition. The Condominium did not own the skylight. There is no issue of fact that the Condominium was not performing the work at the adjacent building. Nor is there an issue of fact that the Condominium did not cause or contribute to the piece of concrete falling through the skylight. In further support, the Condominium submits an affidavit from Sandra Greer ("Ms. Greer"), the President of the Condominium's managing agent. In her affidavit, Ms. Greer states that the Condominium does not own or perform any construction work at the adjacent building, and that it was not aware of the alleged condition at the adjacent building leading to plaintiff's incident.

Therefore, as the Condominium had no role with respect to the construction at the adjacent building, there is no duty running from the Condominium to plaintiff.

Further, the Condominium's actions do not evince such a disregard for plaintiff's rights so as to support her claim for negligence and gross negligence. The complaint does not allege that the Condominium caused or contributed to the accident. Further, the plaintiff signed an Agreement and Release (the "Release") releasing the Condominium from claims arising out of Artisan's alteration work to the ground floor at 143 Reade Street for a lobby at the building located at the 157 Chambers Street, the adjacent building. Had the Condominium had any control over the work at 157 Chambers Street building, it would have bargained for the Release to include claims arising from the work being performed at such building as well.

Additionally, as owner of the skylight, plaintiff is required to maintain, repair and replace the skylight. The Administrative Code §26-230 requires that Artisan protect plaintiff's skylight, and be given a license to enter the Condominium's building in order to provide such protection. Otherwise, the duty of protecting the skylight rests upon the owner, plaintiff herein. At Artisan's letter request, the Condominium granted Artisan such a license, and therefore, Artisan had the duty under the Administrative Code to protect plaintiff's skylight (the "Letter"). Therefore, the documentary evidence supports dismissal pursuant to CPLR 3211(a)(1) and (a)(7) of plaintiff's negligence and gross negligence claims against the Condominium. As no issue of fact exists for a jury trial, summary judgment should be granted.

Opposition

Plaintiff argues that triable issues of fact exist regarding the foreseeability of the negligence of the Condominium, the Condominium's nondelegable duty to protect plaintiff's

unit, and as to who controls the skylight at issue.

The Declaration designates the skylight as a common element, and as such, the property of the Condominium. Yet, the Declaration relegates responsibility for the “maintenance, repair and replacement” of the skylight to the plaintiff. The Declaration is silent as to the safety and protection of the skylight. Caselaw holds that condominium common elements are solely under the control of the board of managers, who bear the responsibility of managing the property for the benefit of the proprietary lessees. Plaintiff alleges that the Condominium controls the skylight and must protect it from falling debris from the adjacent construction site.

Furthermore, the Condominium has a nondelegable duty to maintain the building in a reasonably safe condition. The Administrative Code provides that the owner of an adjoining building under construction may obtain a license to enter, inspect and protect contiguous properties, but where a license is not obtained, then the owner of the adjoining property must protect its own property.

The Letter from Artisan, which was approved by the Condominium, runs from the owner of the easement at 143 Reade Street, Artisan, to 141C Reade Street (plaintiff’s unit) and does not extend to defendant 157 Chambers. The Condominium’s attempt to extend this Letter beyond its language warrants discovery. The Letter also raises issues as to the role of the Condominium’s board of managers and managing agent, as to any legal advice given thereto. Thus, factual issues exist as to whether the Letter serves as a license between defendant 157 Chambers and the Condominium. If the Letter does not constitute a license between defendant 157 Chambers and the Condominium, then the Administrative Code renders the Condominium responsible.

Finally, the Letter, which is dated February 9, 2007, indicates that the Condominium was

aware of the problems related to the renovation and that the possibility of an accident was contemplated as early as this date, almost six months prior to the accident.

Analysis

Failure to State a Cause of Action

The standard on a motion to dismiss a pleading for failure to state a cause of action pursuant to CPLR 3211(a)(7) is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026), and the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*see Arnay Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Plaintiff asserts claims for negligence and gross negligence against the Condominium.

To state a claim of negligence, the plaintiff must allege the existence of a duty on the defendant’s part to the plaintiff, the breach of the duty, and that the breach of the duty was a proximate cause of an injury to the plaintiff (*Fuda Indus., Inc. v Falchi Bldg. Co., L.P.*, 189 Misc 2d 1, 730 NYS2d 827 [Sup Ct Queens County 2001], *citing Akins v Glens Falls City School Dist.*, 53 NY2d 325, 441 NYS2d 644 [1981] and *Gordon v Muchnick*, 180 AD2d 715, 579

NYS2d 745).

Gross negligence is reckless conduct that borders on intentional wrongdoing and is “different in kind as well as degree” from ordinary negligence (*Sutton Park Dev. Corp. Trading Co. v Guerin & Guerin Agency*, 297 AD2d 430, 431, 745 NYS2d 622 [2002]; *see e.g. Green v Holmes Protection of N.Y.*, 216 AD2d 178, 178-179, 629 NYS2d 13 [1st Dept 1995]). It is conduct that “evinces a reckless disregard for the rights of others or ‘smacks’ of intentional wrongdoing” (*Sutton Park Dev. Corp. Trading Co. v Guerin & Guerin Agency*, 297 AD2d 430, *supra*). Gross negligence is defined as conduct of an aggravated character which discloses a failure to exercise even slight diligence (*Civil Service Employees Assn, Inc. v Public Employment Relations Bd.*, 132 AD2d 430, 522 NYS2d 709 [3d Dept 1987] *citing* 41 NY Jur, Negligence, § 27, at 39-40 [1965]), and as the “disregard of the consequences which may ensue from the act, and indifference to the rights of others” (*id.*, at 40).

Accepting the allegations in the complaint as true, plaintiff states a claim for negligence. Plaintiff alleges, *inter alia*, that the Condominium was “aware that renovations were ongoing” at the 157 Chambers Street building “and of its obligation to ensure the safety of [its] residents.” The Condominium “did not provide any protection” to safeguard plaintiff’s unit from falling debris, including the “75 pound piece of concrete” which dislodged itself and fell through the skylight. The falling concrete allegedly caused plaintiff to sustain property damage in the amount of approximately \$1.425 million. The Condominium had a duty to protect plaintiff’s unit, and failed to exercise reasonable care in the protection of the Unit. It is also alleged that the incident was “reasonably foreseeable” by the Condominium, and that the Condominium was negligent by failing to “investigate existing control technology for either the Condo’s building or

Artisan Lofts including . . . proper catch platforms, proper vertical debris netting, proper horizontal or perimeter debris netting or proper exterior built up scaffolding.” Having stated the duty owed by the Condominium to the plaintiff, the manner in which the Condominium breached such duty, that the breach caused physical damage to plaintiff’s property, and the damages sustained by the plaintiff, plaintiff has sufficiently stated a claim for negligence.

Plaintiff also states a claim for gross negligence. Accepting as true plaintiff’s averments that the Condominium had a duty to protect plaintiff’s unit, that the Condominium did not provide *any* protection for plaintiff’s unit during the renovation work, and did not ascertain whether there were any protective netting, platforms or scaffolding, plaintiff’s claim that the Condominium’s actions “were willful, malicious and wrongful and so recklessly disregarded facts [sic] as to amount to gross negligence,” is sufficiently stated. Thus, dismissal of plaintiff’s claims for negligence and gross negligence for failure to state a cause of action is unwarranted.

Documentary Evidence

Pursuant to CPLR 3211 (a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that “a defense is founded upon documentary evidence.” Thus, where the “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law,” dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; *see also, Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

The Condominium maintains that since plaintiff owns the skylight pursuant to the Declaration, the Administrative Code places the burden on protecting the skylight on either the

owner thereof or party performing the construction work over the skylight, *i.e.*, Artisan, and that the Condominium granted Artisan a license to enter its building and protect it from the work Artisan was performing, the Condominium bore no duty to protect “plaintiff’s unit skylight” (p. 9, ¶26) so as to support plaintiff’s negligence and gross negligence claims. However, the evidence on which defendant relies does not conclusively establish the Condominium’s defense to plaintiff’s claims.

New York City Administrative Code § 26-230 entitled, “Protection of roofs, skylights, etc.” provides:

Whenever any building is to be constructed above the roof of an adjoining building, it shall be the *duty of the person causing such building to be constructed* to protect the roof, skylights and other roof outlets of the adjoining building from injury, and to use every reasonable means to avoid interference with the use of the adjoining building during the course of construction. Such person shall be afforded a license to enter and inspect the adjoining building and perform such work thereon as may be necessary for such purpose; *otherwise, the duty of protecting the roof, skylights* and other roof outlets of the adjoining building *shall devolve upon the owner* thereof. . . . (Emphasis added).

Pursuant to the Declaration, “Condominium” is defined as:

A form of ownership of real property in which individual Units as component parts of a whole are owned in fee simple with the right of exclusive use, by separate individuals or entities, *which separate individuals* and/or entities *jointly own* those parts of the whole designated as *Common Elements*. . . . (Emphasis added).

“Common Elements” are defined as:

All portions of the Property other than Units. Common Elements are comprised of General Common Elements and Limited Common Elements.

“General Common Elements” are defined as:

(2) “All . . . roof areas which are not for the exclusive use of a particular unit. . . . skylights, if any, other than those directly over Units. . . .

“Limited Common Elements” are defined as:

Parts of the whole which are owned as Common Elements, but the exclusive use of which is granted to a single Unit Owner . . . and unless otherwise specified, the maintenance and repair of which is the responsibility of the Unit Owners or Owner to which the exclusive use has been allocated.

(Emphasis added)

The Declaration further provides:

The following portions of the Common Elements will be Limited Common Elements:

* * *

- 2) The skylights above any Residential or Commercial unit which shall be for the exclusive use of such Unit Owner. The maintenance, repair and replacement of such skylights shall be the responsibility of the individual Units Owners of such Units.

“The best evidence of what parties to a written agreement intend is what they say in their writing” (*Slamow v Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see e.g. R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]). “A contract is ambiguous ‘if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings’” (*Feldman v National Westminster Bank*, 303 AD2d 271 [2003], *lv denied* 100 NY2d 505 [2003]). However, a contract is unambiguous if the language it uses has “a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion” (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Thus, if the agreement on its face is reasonably susceptible

of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520, 640 NYS2d 472 [1996]; *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630, 638, 290 NYS2d 721, *rearg denied* 22 NY2d 827, 292 NYS2d 1031 [1968]).

Based on a plain reading of the definitions contained in the Declaration, the skylight falls within the definition of a “Common Element.” Plaintiff’s skylight is indeed a “Limited Common Element,” by virtue of the fact that it is “above” his residential unit and that he has “exclusive use” of the skylight. And since plaintiff has exclusive use of the skylight, he bears the responsibility of maintaining, repairing and replacing the skylight. However, Common Elements” include, by definition, “General” *and* such “Limited” common elements. Further, “Limited Common Elements” are expressly “owned as Common Elements,” in which the individual Unit owners, as “joint owners,” have an undivided interest.

This interpretation is consistent with the settled rule that the condominium form of ownership “is manifested as a division of a single parcel of real property into individual units and common elements in which an owner holds title in fee to his individual unit as well as an *undivided interest in the common elements* of the parcel (*Murphy v State*, 14 AD3d 127, 787 NYS2d 120 [2d Dept 2004] *citing Kaufman & Broad Homes of Long Is. v Albertson*, 73 Misc 2d 84, 341 NYS2d 321, *Susskind v 1136 Tenants Corp.*, 43 Misc 2d 588, 251 NYS2d 321, 15A Am. Jur. 2d, Condominiums and Co-operative Apartments, § 1, and 19 N.Y. Jur. 2d, Condominiums and Co-operative Apartments § 9) (emphasis added).

Notably, the Declaration is silent as to whether the duty to “safeguard” or “protect”

Limited Common Elements from damage incurred by third parties rests with plaintiff, and the Condominium points to no caselaw so holding. Nor does the Condominium point to any portion of the Declaration or caselaw indicating that plaintiff “controls” the skylight to bear the responsibility to protect same from damages (*cf. Caprer v Nussbaum*, 36 AD3d 176, 825 NYS2d 55 [2d Dept 2006] [noting that “Despite the undivided nature of the unit owners’ interest, the unit owners have no direct control over either the common elements . . . of the condominium. Rather, exclusive authority to manage the common elements . . . is vested in the board of managers]). Real Property Law §§ 339-e[9], 339-v[1][a]).

Therefore, contrary to the Condominium’s contention, it cannot be said that plaintiff “owns” the skylight in question, so as to create a duty upon the plaintiff to protect the skylight pursuant to New York City Administrative Code § 26-230. Nor can it be said, as a matter of law, that plaintiff “controls” the skylight to such a degree as to bear the burden of protecting same from damages incurred by third-parties.

The Letter dated February 9, 2007 which granted Artisan a license to “install temporary protection” also fails to conclusively establish that the Condominium bore no duty to protect the skylight. The Release between plaintiff and the Condominium, entered the day before, indicates that Artisan owns the building located at 143 Reade Street. The Release also indicates that Artisan was altering the *ground floor* of its building located at “143 Reade Street . . . so that the ground floor portion thereof may serve as a lobby for a building at 157 Chambers Street . . . being developed by Artisan.” Although the Letter grants the license to Artisan, Artisan represents in the Letter it is the “owner[.]” of the condominium building located at “157 Chamber [sic] Street.” The record indicates, however, that defendant 157 Chambers Development Owner,

LLC, is the owner of the building located at 157 Chamber Street, from which the concrete fell. Therefore, issues remain as to whether the Letter granting a license to Artisan extends to the building located at 157 Chambers Street.

Furthermore, the Release does not establish, as a matter of law, that the incident was unforeseeable to the Condominium. That the Release between the Condominium and plaintiff speaks to work being performed by Artisan on the *ground* floor of Artisan's building, does not, in and of itself, establish that the Condominium was unaware of construction being performed at 157 Chambers Street. In any event, the Letter (which was addressed to the President of the Condominium's Managing Agent, Ms. Greer) references "Demolition at the upper floors of the existing buildings in preparation for construction of a new foot print configuration at the top of the building on our site located on Block 140 and lots 10, 2 & 3," and Lot 10 appears to pertain to 157 Chambers Street (*see* Exh. B to Verified Complaint).

Therefore, the documentary evidence fails to establish that the common area at issue, the skylight, in this instance, was solely under the control of plaintiff so as negate plaintiff's claim that the Condominium was negligent or grossly negligent in failing to protect same during the renovations performed by Artisan.

Summary Judgment

In order to prevail on a motion for summary judgment, the moving party must demonstrate entitlement to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498). This standard requires that the proponent of a motion for summary

judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, *supra*; *Silverman v Perlbinde*r, 307 AD2d 230, 762 N.Y.S.2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 N.Y.S.2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Once this showing is made, however, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR § 3212 [b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). The opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd.* 62 NY2d 686 [1984]).

Based on the Declaration, Release, and Letter, noted above, the Condominium failed to

demonstrate, as a matter of law, that it is free from liability for the damages sustained by plaintiff herein.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant 137 Reade Street Condominium pursuant to CPLR 3211(a)(1) and (a)(7), and pursuant to CPLR 3212 to dismiss the second amended verified complaint of the plaintiff is denied; and it is further

ORDERED that said defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 27, 2008



Hon. Carol Robinson Edmead, J.S.C.

**CAROL EDMead
J.S.C.**

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