Nemerov v Moisan Architects, Inc.

2009 NY Slip Op 31150(U)

May 21, 2009

Supreme Court, New York County

Docket Number: 602000/04

Judge: Barbara R. Kapnick

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SCANNED ON 5/26/2009

[* 1]

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

PRESENT: BARBARA R. KAPNICK PART 39

Index Number : 602000/2004

NEMEROV, NEAL

vs

NATIONAL UNION FIRE

Sequence Number : 006

SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

...ing papers, numbered 1 to _____ were read on 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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAY 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5/21/09

BARBARA R. KAPNICK J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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NEAL NEMEROV and JACKWYN NEMEROV,

Plaintiffs,

-against-

MOISAN ARCHITECTS, INC. RICHARDSON STRUCTURAL ENGINEERS, LOPARCO HOMEBUILDERS, INC., CHARLES H. KLEIN, INC., ANTONIO BRUGELLIS, AB MARBLE AND TILE DESIGN, INC., a/k/a MARBLE AND TILE DESIGN, INC., and ASSOCIATED MARBLE INDUSTRIES, INC.,

Defendants.

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DECISION/ORDER
Index No. 602000/04
Motions Seq. Nos.
006, 007, 008
and 009

FILED
MAY 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

BARBARA R. KAPNICK, J.:

Motions sequence numbers 006, 007, 008 and 009 are consolidated for disposition.

In this action, plaintiffs Neal Nemerov and Jackwyn Nemerov seek to recover damages for negligence against defendants Moisan Architects, Inc. ("Moisan") (first cause of action), Richardson Structural Engineers ("Richardson") (second cause of action), LoParco Homebuilders, Inc. ("LoParco") (third cause of action), Charles H. Klein, Inc. ("Klein") (fourth cause of action), Antonio Brugellis (fifth cause of action), AB Marble & Tile Design, Inc. ("AB Marble") (sixth cause of action) and Associated Marble Industries, Inc. ("Associated") (seventh cause of action).

Plaintiffs also seek to recover damages for breach of contract against defendants Moisan (eighth cause of action), Richardson (ninth cause of action), LoParco (tenth cause of action) and Klein (eleventh cause of action).[1]

Background

Plaintiffs are the owners of a one-family house located at 28 Mooreland Road in Greenwich, Connecticut. Plaintiffs purchased the partially constructed home from a developer, Jordan Saper ("Saper"), for the purchase price of $7 million, pursuant to a Contract of Sale dated July 15, 1999. Plaintiffs thereafter spent between 15 and 20 million dollars to finish the home which they hoped would showcase their "exquisite flair".

Plaintiffs purchased an eighteen (18) by fifty-five (55) foot top quality, marble floor to be installed in the entrance foyer of the home.[2]

Pursuant to a written Agreement with plaintiffs dated July 15, 1999, the same day as the Contract of Sale, Saper continued to

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[1] Plaintiffs' original Complaint also included claims against defendants National Union Fire Insurance Company of Pittsburgh, PA and American Home Assurance Company for breach of an insurance contract based on their failure to indemnify plaintiffs for the loss that gives rise to this lawsuit, but those claims were not re-alleged in the Amended Complaint.

[2] The original specifications for the house called for Jerusalem tile to be installed in the foyer.

work as a "Contractor" on the construction project until October 1999.

Non-party Jeffrey Downes was a construction administrator hired directly by the plaintiffs to oversee, supervise and monitor the various contractors working on the project. He is also designated in plaintiffs' July 19, 1999 Agreement with Saper "as the Architect, recognizing that he is not a licensed Architect."

Defendant Moisan is a licensed architectural firm and was the Architect of Record hired by Saper to design the "spec" house pursuant to a written agreement. Defendant Moisan continued to work on the project after plaintiffs purchased the property.

Defendant Moisan retained defendant Richardson, a professional engineering firm, as a structural consultant. Richardson gave Moisan input on the location and size of beams and columns and flooring support joists, including supports for the foyer floor.

Defendant LoParco was the Construction Manager hired at the inception of the project by Saper, pursuant to a written Letter Agreement dated December 15, 1998. Pursuant to the Agreement, LoParco was "responsible for the supervision, coordination, accounting and bookkeeping of the project." Plaintiffs were not

signatories to the Letter Agreement, but contend that they are third-party beneficiaries to that Agreement.

There is no dispute that LoParco continued to work on the project after the plaintiffs' purchase of the property, and that LoParco referred contractors to the Nemerovs.[3] There is also no dispute that plaintiffs entered into an oral agreement with LoParco by which LoParco continued to serve in substantially the same role it fulfilled with Saper.[4]

Defendant Klein is an interior designer/decorator who was hired by plaintiffs, upon LoParco's recommendation, to perform the interior designing and decorating of the subject property, pursuant to a Letter Agreement dated September 17, 1999. Klein was involved in the process of selecting, among other things, draperies, color schemes, and design concepts for the home. In addition, Klein retained a design artist to draft an artist's rendering of the marble foyer floor.[5]

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[3] Plaintiffs then entered into contracts directly with the contractors.

[4] Downes drafted a Memorandum entitled, Recap of Basic Understanding of Contract Between LoParco Homebuilders, Inc. and Neil and Jacki Nemerov, dated January 9, 2000, to plaintiffs' real estate attorney, Lorraine Slavin, Esq., memorializing an agreement to pay LoParco a "[m]anagement fee of $14,000.00 per month, not to exceed 14 months unless mutually agreed upon."

[5] Thereafter, the artist's rendering was allegedly revised by plaintiffs.

Defendant Antonio Brugellis, who is a principal and/or employee of AB Marble and/or Associated (collectively, "Brugellis"), was hired at Klein's recommendation, to perform the installation of the marble flooring in accordance with those drawings.

Mrs. Nemerov testified that "Charles [Klein] was hired to oversee the design aspect of the interior of the house, but Charles has good taste and I would [also] ask him about the exterior of the house as well."

On the other hand, she understood Mr. Brugellis to be responsible for the installation of the marble floor. When asked, "Are you aware of anyone else who had responsibility for supervising the installation of the marble floor?", Mrs. Nemerov responded, "Not that I know of."

A layer of protective masonite and paper were placed over the foyer floor after the tiles were installed and polished.

On or about June 25, 2002, approximately three months later, after the center hall of the home was completed, the masonite layer was uncovered and seven cracks and/or splits in the marble floor were revealed. The epicenter of the cracks was allegedly at the

base of a free flowing staircase where a 4-foot square steel platform/plate had been placed, at Mr. Downes' purported direction, to disburse the weight of the stairway.

Plaintiffs moved into the house in or about August or September 2002. They claim that the cracks which developed throughout the marble floor have worsened over time.

Discussion

Defendant Klein now moves, under motion sequence number 006, for summary judgment dismissing plaintiffs' Complaint and any and all cross-claims against it.

Defendants Moisan and Richardson move, under motion sequence number 007, for summary judgment dismissing plaintiffs' Complaint and any and all cross-claims against them.

Defendant LoParco moves, under motion sequence number 008, for summary judgment dismissing plaintiffs' Complaint and any and all cross-claims against it.

Plaintiffs move, under motion sequence number 009, for leave to serve and file a sur-reply in further opposition to motion sequence number 007.

Motion Sequence Number 009

Defendants Moisan and Richardson argue in their reply affirmation to motion sequence number 007 that plaintiffs' papers in opposition to that motion failed to raise an issue of fact because they were unsupported by an expert's affidavit. *See, Zweng v. DeBellis & Semmens*, 22 AD3d 845 (2nd Dep't 2005). Although plaintiffs argue that an expert's affidavit is not required to determine whether or not defendants Moisan and Richardson were negligent, plaintiffs seek leave in motion sequence number 009 to submit a sur-reply to motion sequence number 007, which contains an affidavit and an Engineer's report from Nicholas J. Mazzaferro, P.E.

Defendants Moisan and Richardson argue in opposition that plaintiffs should have submitted the expert's affidavit in the first instance.[6]

In the discretion of the Court, the motion for leave to file a sur-reply is granted, and all the voluminous papers submitted and

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[6] Although counsel for Moisan and Richardson indicated on the record on July 2, 2008 that Judge DeGrasse, who was previously handling this case before he was appointed to the Appellate Division, First Department, had denied plaintiffs' request to submit a sur-reply, it appears that he had stated off the record that there would be no sur-replies, after which plaintiffs formally made and briefed their motion (# 009) which was never formally decided.

the arguments raised by counsel for the various parties during the extensive oral argument held on the record on July 2, 2008 shall be considered by the Court in determining the pending motions.

Motion Sequence Number 006

Defendant Klein argues that it is entitled to summary judgment on the grounds that it neither owed a duty to the plaintiffs regarding the installation of the floor nor did it cause, create or contribute to the cracked condition of the floor. Specifically, defendant Klein argues that it had no control over or contractual duty to supervise defendant Brugellis or any of the other defendants, and was not responsible in any way for the allegedly negligent installation of the tiles. Klein contends that his drawings were intended to be aesthetic only as opposed to architectural blueprints or schematics.

Plaintiffs argue in opposition that defendant Klein owed a duty of care to them which he breached. Plaintiffs contend that Klein, who is not a licensed architect but who possesses an educational background in architecture and interior design, was not merely an interior designer, but had a lead role in completing the house. Specifically, plaintiffs claim that Klein made recommendations to them about the type of marble to be installed in the entrance foyer, and was responsible for coordinating and confirming all proposed work. Plaintiffs further claim that they

relied on Klein's superior knowledge as an interior designer to ensure that the interior finishes did not impact the structure of the subject property.

Plaintiffs also note that Klein was obligated under the September 17, 1999 letter agreement to "provide the vendors with any assistance necessary to complete the job as designed and [to] make visits to determine if the work [was] being performed in compliance with the design."

Plaintiffs further contend that Klein's failure to advise the contractors and subcontractors about the type of marble to be used constituted a breach of duty which caused and contributed to the fracturing, splitting and cracking of the floor.

Defendant Klein argues in reply that there is nothing in the record to support the proposition that he possessed 'superior knowledge' of the marble tile's properties, and that it was Downes' duty as plaintiffs' representative to ensure the quality of the work of all contractors at the site. Klein claims he merely collaborated with plaintiffs in selecting a black and white marble tile diamond pattern scheme based upon their wishes, tastes and preferences.

Moreover, the September 17, 1999 letter agreement specifically provides that "[a]ll contractors and vendors will be responsible for the quality of their work," and that

> [m]y [i.e., Klein's] drawings and specifications are intended to set forth design intent only and are not to be the basis for architectural, engineering or construction purposes. I do not undertake the performance of any architectural or engineering services [emphasis supplied].

Based on the papers submitted and the oral argument held on the record, this Court finds that there is no basis for a jury to conclude that Klein was responsible for the installation of the floor or the supervision of that work and/or that any of his actions as an interior designer and decorator contributed to the cracked condition of the floor. Accordingly, defendant Klein's motion for summary judgment is granted.

Motion Sequence Number 007

Defendants Moisan and Richardson move for summary judgment dismissing plaintiffs' Complaint and all cross-claims against them on the grounds that there is no basis to impose contractual liability against them because they never entered into a contract directly with plaintiffs.

Plaintiffs argue in opposition that defendants Moisan and Richardson are liable to them for both breach of contract and negligence.

There is no dispute that Moisan sent Downes a proposed 'Agreement for Architectural Services on an Hourly Basis' dated January 18, 2000, signed by its principal, Richard C. Moisan, AIA, for Moisan to serve as "Architect of Record" for the property for any necessary revisions to the existing drawings.[7]

Annexed to that Agreement were Standard Conditions, which included the following:

> 5. CONSTRUCTION OBSERVATION - The Design Professional shall visit the project at appropriate intervals during construction to become generally familiar with the progress and quality of the contractors' work and to determine if the work is proceeding in general accordance with the Working Drawings. The Client has not retained the Design Professional to make detailed inspections or to provide exhaustive or continuous project review and observation services...

Moisan claims that the proposed Agreement was never accepted by either Downes or the plaintiffs, and that a singed copy was never returned to the Moisan firm.

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[7] Mr. Moisan died in February 2005.

Plaintiffs, however, contend that they did, in fact, enter into the January 18, 2000 Agreement with Moisan retaining it as the Architect of Record throughout the construction project. They argue that even if they failed to return a signed Agreement to the Moisan firm, Moisan performed services pursuant to that Agreement and plaintiffs paid for those services, thus demonstrating an acceptance of the Agreement and the formation of a binding contract.

Plaintiffs further argue that they are the third-party beneficiaries of the Agreement between Moisan and Saper, as well as the Agreement between Moisan and Richardson, since Moisan and Richardson knew that Saper was merely a developer and was not the ultimate owner of the property, i.e., that Saper would sell the property upon completion of the project.

It is well settled that

> "[i]n determining a plaintiffs' asserted right as a third-party beneficiary, it is necessary to determine the intent of the contracting parties, as it is often stated by the courts that the contract must have been intended for the benefit of the third person in order to entitle him to enforce the same, or at least that such benefit must be the direct result of performance and so within the contemplation of the parties." (citations omitted). While it is true, as plaintiff points out, that "it is not necessary that third-party beneficiaries be identified or identifiable at the time of the making of the contract" (emphasis supplied; citation omitted), it

> is also true that the person who claims to be a third-party beneficiary must be one of a class of persons intended to be benefitted (22 NY Jur 2d, Contracts, § 275).

981 Third Avenue Corp. v Beltramini, 108 AD2d 667, 669 (1st Dep't 1985), aff'd, 67 NY2d 739 (1986). *See also, MK West Street Co. v Meridien Hotels, Inc.*, 184 AD2d 312 (1st Dep't 1992).

Here, it is clear that the work undertaken by defendants Moisan and Richardson pursuant to the contracts at issue was intended for the benefit of the ultimate owners of the property. Thus, plaintiffs are entitled to enforce their rights as third-party beneficiaries. *See, generally, Key Intl. Mfg. v Morse/Diesel, Inc.*, 142 AD2d 448 (2nd Dep't 1998).

That portion of the motion by defendants Moisan and Richardson seeking to dismiss plaintiffs' claim against them for lack of privity is, therefore, denied.

Defendants Moisan and Richardson next argue that the Complaint should be dismissed against them on the grounds that they were involved in a 'limited' fashion only after Downes was retained by plaintiffs and were not involved in the interior design of the foyer. Defendants Moisan and Richardson deny that they were consulted and/or had any input into the design, specification, installation or evaluation of the foyer floor or the subfloor.

They claim that they were never told that a marble floor was to be installed in the foyer.[8]

Plaintiffs, however, contend that had Moisan complied with its obligations under paragraph "5" of the Agreement to visit the project at appropriate intervals during construction to become generally familiar with the progress and quality of the contractors' work and to determine if the work [was] proceeding in general accordance with the Working Drawings", Moisan would have discovered that radiant heating tubes and a floating staircase, which were not included in the original Working Drawings, were installed in the entrance foyer. Plaintiffs contend that Moisan would have thus been alerted that additions had been made which required changes to the flooring system to ensure that the selected marble and the thickness of that marble could withstand the additional weight of radiant heating and the staircase.

Plaintiffs further contend that defendants Moisan and Richardson are liable to them in negligence because the designs they submitted failed to provide adequate support for the marble flooring. According to plaintiffs' expert, Nicholas J. Mazzaferro, P.E., the cracking of the floor was caused by

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[8] Defendants Moisan and Richardson contend that they were consulted for the first time regarding the floor when they were called after the masonite and paper covering was removed and were asked to give an opinion as to the cause of the crack.

> extensive tension and bending stresses as a result of the improper installation of the tile system, improper construction of the subfloor and inadequate support from the framing system; absence of an isolation membrane; improperly positioned wire reinforcement in the concrete base; inadequate support provided by the selected joists for the subfloor; and failure to use the MIA Manual and the TCA Handbook for the design and installation of the marble flooring.

Based on all the papers submitted, this Court finds that there are outstanding issues of fact as to whether defendants Moisan and Richardson were negligent in their design of the flooring system and as to whether defendant Moisan breached Paragraph "5" of the Standard Conditions of the Agreement in failing to determine that the work in the foyer was proceeding in general accordance with the Working Drawings.

The motion to dismiss plaintiffs' claims against said defendants is accordingly denied.

Alternatively, defendant Moisan argues that its liability is limited pursuant to paragraph "11" of the Standard Conditions annexed to the January 18, 2000 Agreement, which provides as follows:

> 11. LIMITATION OF LIABILITY - To the maximum extent permitted by law, the Client agrees to limit the Architect's liability for the Client's damages to the sum of $50,000 or the Architect's fee, whichever is greater. This limitation shall apply regardless of the cause of action or legal theory pled or asserted.

Plaintiffs argue in opposition that the exculpatory clause contained in paragraph "11" is unenforceable with respect to claims of reckless or intentional conduct, i.e., gross negligence, and contend that Moisan's failure to abide by Paragraph "5" constitutes a gross disregard for plaintiffs' property.

The Court of Appeals has held that

> [a]bsent a statute or public policy to the contrary, a contractual provision absolving a party from its own negligence will be enforced (citations omitted)...
>
> It is the public policy of this State, however, that a party may not insulate itself from damages caused by grossly negligent conduct (citations omitted). This applies equally to contract clauses purporting to exonerate a party from liability and clauses limiting damages to a nominal sum.
>
> Gross negligence, when invoked to pierce an agreed-upon limitation of liability in a commercial contract, must "smack [] of intentional wrongdoing" (citation omitted). It is conduct that evinces a reckless indifference to the rights of others (citations omitted).

Sommer v Federal Signal Corp., 79 NY2d 540, 553-554 (1992). *See also, Midtown Distributors Corp. v Mutual Central Alarm Services, Inc.*, 49 AD3d 346 (1st Dep't 2008).

This Court finds that none of the facts presented rise to the level of intentional wrongdoing and/or reckless indifference to plaintiffs' rights. Accordingly, plaintiffs' recovery against

defendant Moisan in this case is limited pursuant to paragraph "11" to the sum of $50,000.00 or Moisan's fee, whichever is greater.

Motion Sequence Number 008

Defendant LoParco moves for summary judgment dismissing plaintiffs' third cause of action against it sounding in negligence on the grounds that said claim is a mere duplication of plaintiffs' tenth cause of action against it for breach of contract.

Plaintiffs deny that their contract and tort claims against LoParco are identical since their claimed damages extend beyond the damage to the marble floor itself. Specifically, plaintiffs claim that the actions necessary to correct the condition exceed simply replacing the marble floor and require re-construction of the subflooring system, the basement ceiling, the billiard room and the theater gallery, as well as extensive demolition and debris removal.

Defendant LoParco next argues that plaintiffs' claims against it must be dismissed because it neither owed a duty to the plaintiffs, nor did it cause, create or contribute to the purported defects in plaintiffs' floor.

Defendant LoParco argues that it had no contractual obligation to supervise or provide 'proper guidance' with respect to the

installation of the marble floor. Specifically, defendant LoParco contends that (a) it never agreed to provide 'adequate structural support' for the marble floor;[9] (b) plaintiffs have not established that structural support for the subfloor was inadequate; (c) LoParco never agreed to insure that a marble installer would install a marble foyer free of defects or indemnify plaintiffs if the floor was defective; and (d) LoParco's oral Construction Management agreement with plaintiffs did not obligate it to supervise, direct or control Brugellis' work.

Steven H. LoParco, the President of defendant LoParco, testified that neither Charles Klein nor the Nemerovs consulted with him regarding any change in the foyer floor. He further testified that he was not involved in reviewing any invoices submitted by Brugellis for the marble work, although he processed invoices submitted by other contractors.

Plaintiffs, however, contend that LoParco continued to serve as the Construction Manager of the entire project pursuant to their oral agreement based on the terms set forth in the written agreement between Saper and LoParco.

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[9] LoParco denied building the subfloor upon which the marble tiles were laid. According to LoParco, the floor was built by Lenihan Builders and/or O'Neil Construction who installed the TJI joist system, as well as the plywood over the joist system.

Plaintiffs further argue that LoParco's lack of coordination amongst the contractors resulted in the thinness of the subflooring, which allegedly caused and/or contributed to the cracking of the marble floor. Specifically, plaintiffs claim that LoParco failed to apprise co-defendants Moisan, Richardson, Brugellis and Klein that a radiant heating system had been installed in the floor.

LoParco argues in reply that whether or not LoParco notified all the co-defendants of the existence of the radiant heating system is irrelevant because both Klein and Brugellis have admitted that they were aware of the existence of the radiant heating system.

However, plaintiffs contend that LoParco had the ability to question and obtain clarification of any item not completely detailed or specified, but failed to request additional information about the flooring system. Specifically, plaintiffs contend that LoParco failed to actively seek information from Klein and Brugellis about the installation of the floors to determine whether the subfloor would be able to withstand the load of the marble floor. Plaintiffs further contend that LoParco failed to properly coordinate the heating and flooring contractors.

Based on all the papers submitted and the oral argument held on the record, this Court finds that there are outstanding issues of fact as to whether LoParco breached its Construction Management agreement with plaintiffs and/or was negligent in the performance of its Construction Management duties.

Accordingly, the motion by defendant LoParco for summary judgment is denied.

The Clerk may enter judgment dismissing plaintiffs' Complaint and all cross-claims against defendant Charles H. Klein only. Plaintiffs' claims against the co-defendants are severed and continued.

A pre-trial/settlement conference shall be held in IA Part 39, 60 Centre Street, Room 208 on June 17, 2009 at 11:00 a.m.

This constitutes the decision and order of this Court.

Dated: May 21, 2009

BARBARA R. KAPNICK
J.S.C.

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MAY 26 2009
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BARBARA R. KAPNICK
J.S.C.

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