

Dorr v London Terrace Towers Owners, Inc.
2009 NY Slip Op 32937(U)
December 8, 2009
Supreme Court, New York County
Docket Number: 105451/06
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JUDITH J. GISCHE, J.S.C.

PART 10

Index Number : 105451/2006

DORR, CHERI L.

vs

LONDON TERRACE TOWERS

Sequence Number : 006

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following 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 (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

DEC 17 2009

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/8/09

JUDITH J. GISCHE, J.S.C. 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 STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
Cheri Dorr and Dorr Design Associates, Inc.,

Plaintiffs,
-against-

London Terrace Towers Owners, Inc., The Board of Directors of London Terrace Towers, Inc., London Terrace Towers Condominium, The Board of Managers of London Terrace Towers Condominium, Douglas Elliman Property Management, Westfair Restoration Services, Inc., Nancy Frawley, Steven Engel and Kay Waterproofing Corp.,

Defendants.

-----X
Peter Kaufmann and Jenny Kaufman,

Plaintiffs,
-against-

London Terrace Towers Owners, Inc., The Board of Directors of London Terrace Towers, Inc., London Terrace Towers Condominium, The Board of Managers of London Terrace Towers Condominium, Douglas Elliman Property Management, Westfair Restoration Services, Inc., Nancy Frawley, Steven Engel and Kay Waterproofing Corp.,

Defendants.

-----X

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Numbered
Westfair n/m (reargue), SAT affirm, exhs	1
MDB affirm in opp	2

DECISION/ORDER

Action #1
Index No.: 105451/06
Seq. No.: ~~003~~ 066

Present:
Hon. Judith J. Gische
J.S.C.

Action #2
Index No.: 102219/06

FILED
DEC 17 2009
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers the decision and order of the court is as follows:

These actions arise from property damage caused by flooding at the plaintiffs' residential cooperative units. Defendant Westfair Restoration Services, Inc. ("Westfair") moves to reargue its prior motion for summary judgment to dismiss the cross-claims asserted against it; and barring co-defendants London Terrace Towers Owners, Inc., The Board of Directors of London Terrace Towers, Inc., London Terrace Towers Condominium, The Board of Managers of London Terrace Towers Condominium, Douglas Elliman Property Management, Nancy Frawley and Steven Engel (collectively herein referred to as the "LTDE Defendants") from opposing Westfair's underlying motion for summary judgment. CPLR §§ 2221, 3212.

The LTDE Defendants have submitted the affirmation of Michael D. Baer in opposition to the instant motion. Attorney Baer argues: [1] that Westfair's prior motion for summary judgment was not opposed because the LTDE Defendants didn't receive notice of it; [2] that Westfair failed to demonstrate entitlement to summary judgment dismissing the LTDE Defendant's claims against it; and [3] that if the court finds summary judgment warranted in Westfair's favor, that the cross-claims should be dismissed without prejudice, rather than with prejudice, so that the LTDE Defendants may renew their claims if further discovery otherwise reveals Westfair's liability.

On April 9, 2009, Westfair moved for summary judgment to dismiss this action in its entirety. By Stipulation dated May 21, 2009, plaintiffs discontinued their claims

against Westfair, with prejudice. Despite failing to oppose the motion, the LTDE Defendants would not voluntarily discontinue their claims against Westfair. By order dated June 12, 2009, the court marked the motion fully resolved as per the 5/21/09 stipulation.

The court's marking was in error, since the cross-claims had not been resolved. Westfair now seeks to reargue the motion insofar as it seeks an order from the court granting it summary judgment dismissing the LTDE Defendants' cross-claims against it. The LTDE Defendants do not oppose Westfair's application for leave to reargue. The court, therefore, grants reargument. CPLR § 2221.

The following facts are undisputed. In September 2004, plaintiffs' apartments sustained water damage and associated mold growth as a result of several severe rain storms. The LTDE Defendants took responsibility for the resultant damage, and hired Westfair to remediate the mold growth in the subject apartments. The LTDE Defendants also hired certified industrial hygienist MACTEC Engineering and Consulting, Inc. ("MACTEC") to inspect Westfair's work and to perform clearance testing. Westfair performed the remediation, and completed its work by January 10, 2005. MACTEC thereafter certified that the work was complete and that the two apartments were clear of mold. See Limited Microbial Sampling Report dated February 10, 2005 (annexed to Westfair's Motion Papers, Exhibit "M").

Thereafter, the apartments suffered further water damage as a result of, *inter alia*, a water tank rupture on the roof of the building and water incursions in the building facade. Plaintiffs allege that water incursions into the apartments continue to this day.

The essence of Westfair's underlying motion for summary judgment is that because it is undisputed that plaintiffs' apartments suffered water damage before and after Westfair performed the mold remediation, plaintiffs, and consequently the LTDE Defendants, cannot prove that Westfair caused and/or contributed to any of the damage to the subject apartments as a result of the work that it performed.

Discussion

For the reasons that follow, even considering the opposition, the court finds that Westfair is entitled to summary judgment, with prejudice, on the LTDE Defendants' cross-claims.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as

to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 NY2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2d Dept 2003).

The LTDE Defendants have asserted two cross-claims against Westfair for contribution and common law indemnity. Westfair has established that it satisfactorily performed the mold remediation based upon the MASTEC report. The LTDE Defendants claims for contribution and indemnity fail because they have failed to come forward with any evidence from which a trier of fact could conclude that Westfair negligently performed its work or otherwise caused or exacerbated the mold condition or plaintiffs' other alleged damages in the apartments after it completed its work. On this record, there is no dispute that Westfair did not breach a duty which thus contributed to plaintiff's alleged damages.

To the extent that the LTDE Defendants argue that summary judgment is premature because Westfair has not been deposed, this argument is unavailing. First, summary judgment relief is not premature simply because a deposition has not been conducted. The LTDE Defendants have failed to explain how Westfair's testimony will lead to any relevant evidence sufficient to raise a triable issue of fact. See 2386 Creston Ave. Realty v. M-P-M Management Corp., 58 AD3d 158 (1st Dept 2008).

Since the record is devoid of any evidence that Westfair performed any act

which caused, contributed to and/or aggravated the damage to the apartments, Westfair is entitled to summary judgment dismissing the LTDE Defendants' cross-claims. The court further rejects the LTDE Defendants' request that summary judgment be granted without prejudice. The LTDE Defendants have had ample opportunity to conduct discovery in these consolidated actions, and having failed to identify even a potential theory of liability, the LTDE Defendants are not entitled to such a request.

Accordingly, Westfair's motion for reargument is granted, and upon reargument, Westfair is entitled to summary judgment dismissing the LTDE Defendants' cross-claims for contribution and common law indemnification with prejudice.

Conclusion

In accordance herewith, it is hereby:

ORDERED that Westfair's motion to reargue its prior motion for summary judgment is granted and upon rearguement, Westfair is entitled to summary judgment dismissing the LTDE Defendants' cross-claims for contribution and common law indemnification.

Any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
December 8, 2009

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.

FILED
DEC 17 2009
NEW YORK
COUNTY CLERK'S OFFICE