Kent v 534 E. 11th St.

2009 NY Slip Op 33243(U)

November 10, 2009

Supreme Court, New York County

Docket Number: 107528/2008

Judge: Walter B. Tolub

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SCANNED ON 11/16/2009

[* 1]

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

PRESENT: TOLUB
Justice

PART 15

GILL KENT

- v -

534 EAST 11ST

INDEX NO. 107528/08

MOTION DATE

MOTION SEQ. NO. 6

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
NOV 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/10/09

J.S.C.
WALTER B. TOLUB

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

---------------------------------------x

GILL KENT

Plaintiff,

-against-

534 EAST 11th STREET, HOUSING DEVELOPMENT FUND CORPORATION, CAROLE FERRARA ASSOCIATES, INC., and CAROLE FERRARA

Defendants.

Index No. 107528/08
Mtn Seq. 006

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534 EAST 11th STREET, HOUSING DEVELOPMENT FUND CORPORATION, CAROLE FERRARA ASSOCIATES, INC., and CAROLE FERRARA

Third-Party Plaintiffs,

-against-

SND CONTRACTING CORP.,

Third-Party Defendant.

Index No: 590748/08

FILED
NOV 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

WALTER B. TOLUB, J.:

This is Plaintiff's motion for an order pursuant to CPLR §5015(a)(1) vacating this Court's October 9, 2009 order and to reargue this Court's decision dated March 19, 2009.

Facts

As stated in this Court's March 19, 2009 decision, Plaintiff owns shares in the 534 East 11th Street Housing Development Fund Corporation (HDFC) and is a tenant of apartment 27/28 (Premises) pursuant to a proprietary lease.

HDFC is the owner of the building known as 534 East 11th

Street, New York, New York (building) and the lessor under Plaintiff's lease for the Premises.

Carole Ferrara Associates, Inc., was hired as the managing agent for the building.

Plaintiff claims that in 2002, Defendants retained a contracting company to work on the roof the building. The contractors were hired to demolish the parapets on the roof and remove the roof of the building. Work commenced and a scaffold was set up outside of Plaintiff's livingroom window. At the end of each day the workers would throw rubble off the roof into the alley leading to the backyard.

Plaintiff claims that clouds of dust would enter the Premises on a regular basis causing health problems[1]. Plaintiff further claims that the roof was taken off the building without adequate protection causing a flood on the Premises which became damp and moldy.

In 2006, four years after work was commenced at the building, Plaintiff hired JLC Environmental Consultants (JLC) to study and report on the physical conditions of the Premises. JLC conducted an investigation from July 2006 through August 2006. On September 5, 2006 JLC issued its "final" report. The report stated that the Premises contained heavy metals but that the

[1]Given that part of Defendants' motion is to exclude language relating to Plaintiff's health and that this is not a personal injury action, the Court excludes the specific ailments Plaintiff complains of.

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source of the metals was unclear. JLC recommended that Plaintiff test the bricks demolished during the roof work and conduct mold testing. By October 2006, Plaintiff hired a company to clean the apartment. JLC tested the apartment again and in its report dated October 19, 2006, it found that levels of heavy metal concentration were lower than the previous tests and that generally levels were below the detection limit.

Plaintiff then commenced this action in May of 2008. Plaintiff's Complaint states causes of action for: (1) Nuisance; (2) money damages; (3) negligence; and (4) constructive eviction. Plaintiff claims that the negligent work on the roof contaminated her apartment with toxins, constructively evicted her from her apartment and prevented her from working because Plaintiff works from home. Although there is no personal injury claim, Plaintiff's Complaint is filled with ailments she claims to have suffered as a result of the work performed and the toxins left behind. A preliminary conference was held in September 2008, resulting in a discovery schedule.

Defendants then filed a motion seeking summary judgment dismissing the Complaint on December 3, 2008. That motion was granted by order of this Court dated March 19, 2009. This Court stated that:

> The unsworn reports of JLC's Evan Browne, the inspector taking environmental tests two years after work was commenced on the building, have no probative weight and cannot

> raise a triable issue of fact. The JLC reports are insufficient to sustain causes of action for damages stemming from toxic contamination. Plaintiff has not submitted any admissible evidence that she was subjected to toxins in the apartment. Moreover, Plaintiff has not submitted any evidence that if the toxins existed that they were caused by work performed on the building.

(Decision and Order dated October 19, 2009 pp. 5-6).

Plaintiff moved to reargue this Court's decision. This Court denied Plaintiff's motion on October 2, 2009 for Plaintiff's failure to appear at the call of the calender.

By this motion, Plaintiff seeks an order vacating the decision of October 2, 2009 and seeks to reargue this Court's March 19, 2009 decision and order.

Discussion

CPLR §5015(a) provides, inter alia, that the court which rendered the judgment or order may relieve a party from such order upon such terms as may be just upon the ground of excusable default. Courts have routinely recognized that there is a strong preference for adjudicating matters on the merits rather than relying on procedural issues. (Campos v. New York City Health and Hospitals Corp., 307 AD2d 785 [1st Dept 2003]). Where the party's default resulted from a mistake and an inadvertent assumption, courts have grated motions to vacate. (Connolly v. Tuan, 12 Misc.3d 1172(A) [Sup. Ct. NY Co. June 23, 2006]).

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Here, Plaintiff's attorney claims that he did not appear at the call of the calender because of law office failure. Plaintiff's attorney's failure to appear was not willful. Additionally, Plaintiff's motion to renew and reargue is meritorious. As such, Plaintiff's motion to vacate this Court's October 2, 2009 decision granted.

On a motion to reargue, the movant must establish that the court overlooked or misapprehended facts or law, or "misapplied any controlling principle of law," in an earlier decision. (CPLR § 2221(d)(2); Foley v. Roche, 68 AD2d 558 [1st Dep 1979]; *See also* 300 W. Realty Co. v. City of New York, 99 AD2d 708, 709 [1 Dept 1984]). Reargument is not meant to provide the parties with an opportunity to reargue previously decided issues or to advance new arguments. (William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, 27 [1 Dept. 1992], *citing* Pro Brokerage, Inc. v. Home Insurance Co., 99 AD2d 971 [1st dept 1984], Foley v. Roche, 68 AD2d 558 [1st Dept 1979]).

Plaintiff argues that this Court failed to appreciate that the motion for to dismiss was made prior to discovery. Additionally, Plaintiff argues that many issues raised by Defendant, on which this Court based its opinion, were raised for the first time in Defendant's Reply papers and that therefore Plaintiff was unable to raise issues with the Court to defeat the motion.

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Although this Court still holds to its belief that Plaintiff's proof is insufficient to sustain the within action, a review of the history of the case requires vacatur as Plaintiff has not had an adequate opportunity to undertake discovery. More particularly, as it is alleged, the Defendants have exclusive knowledge of evidentiary material sufficient to buttress Plaintiff's allegations (Utica Sheet Metal Corp. v. J.E. Schecter Corp., 12 AD2d 928 [1st Dept 1966]).

Accordingly, it is

ORDERED that Plaintiff's motion to vacate this Court's order dated October 9, 2009 is granted upon the Plaintiff's counsel paying the sum of $250.00 to Defendant's counsel for the repeated appearances necessitated due to Plaintiff's counsel's failure to appear; and it is further

ORDERED that written proof of such payment be provided to the Clerk of Part 15 and opposing counsel within 30 days of service of a copy of this order with notice of entry; and it is further

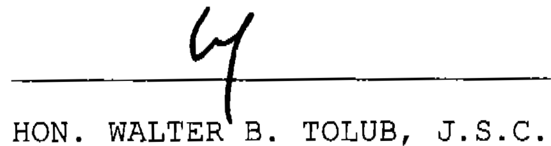
ORDERED that Plaintiff's motion to reargue is granted and that upon reargument, the Court vacates to its decision and order of March 19, 2009.

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Counsel for the parties are directed to appear for a conference on December 4, 2009 at 11:00 AM in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/10/09



HON. WALTER B. TOLUB, J.S.C.

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