

Admiral Indem. Co. v Miji Wu Jeng

2010 NY Slip Op 30794(U)

April 1, 2010

Supreme Court, New York County

Docket Number: 102193/08

Judge: Martin Shulman

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

MARTIN SHULMAN

PRESENT: J.S.C.

PART 1

Index Number : 102193/2008
ADMIRAL INDEMNITY
 vs.
JENG, MIJI WU
 SEQUENCE NUMBER : 002
 SUMMARY JUDGMENT

INDEX NO. 102193/08
 MOTION DATE _____
 MOTION SEQ. NO. 002
 MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... A-H
 Answering Affidavits — Exhibits A-C
 Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.


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

FILED

APR 09 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: APR 1 2010


 MARTIN SHULMAN
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
ADMIRAL INDEMNITY COMPANY A/S/O
14 EAST 96TH STREET CONDOMINIUM,

Plaintiff,

Index No.: 102193/08

-against-

MIJI WU JENG, CHRISTINA L. JENG and
ANILDA M. BORGMAYER,

Defendants.

-----X
MARTIN SHULMAN, J.:

FILED
APR 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

Defendant Ani Borgmeyer i/s/h/a Anilda M. Borgmeyer ("Borgmeyer") moves, pursuant to CPLR 3212 for summary judgment dismissing the complaint as against her.

This is a subrogation action seeking monetary damages for property damage from a water leak emanating from apartment number 12 in the condominium building located at 14 East 96th Street, New York, New York ("Apt. 12"). On May 28, 2007, the HVAC system inside Apt. 12 malfunctioned and a quantity of water was released allegedly causing approximately \$37,840.53 of property damage to an apartment on a lower floor. At the time of the occurrence, Borgmeyer was the tenant of Apt. 12, and defendants Miji Wu Jeng and Christina L. Jeng (collectively the "Jengs")¹ owned this unit. Plaintiff Admiral Indemnity Company paid the claim for the damage pursuant to its insurance policy with the condominium and now seeks repayment from Borgmeyer.

Gerald Bordey ("Bordey"), the building superintendent, testified at an examination before trial ("EBT") on behalf of plaintiff. Bordey stated that each

¹ By short form order dated December 29, 2009 and entered in the office of the New York County Clerk on January 8, 2010, this court *inter alia* granted the Jengs' unopposed motion for summary judgment dismissing the action against them.

apartment in the building has one HVAC unit per room. The HVAC units, including the ones in Apt. 12, were installed in 1982 during the building's construction. Bordey EBT at Exh. D to Motion, pp. 12-13. An outside company, Alexander Climate Control, retained by the building's managing agent serviced the HVAC units once each year. *Id.* at 17-18, 24-25. According to Bordey, the purpose of the maintenance contract is to ensure that the HVAC units are operating and cooling properly and that there are no leaks. *Id.*

Bordey said that on the morning of May 28, 2007, he received a call from Borgmeyer who complained that the second bedroom in Apt. 12 was flooded due to water seemingly leaking from the HVAC unit in that room. *Id.* at 36-40. Bordey then went to Apt. 12 and found an active leak from inside the HVAC unit, which he discovered when he removed the housing covering the unit. *Id.* at 40-43.

At her EBT, Borgmeyer testified that she was asleep in the master bedroom, recovering from chemotherapy treatments, when her 13-year old son woke her in the middle of the night to say that he heard a noise in his bedroom. Borgmeyer EBT at Exh. E to Motion, p. 23. Borgmeyer went to investigate and discovered a small amount of water on her son's bed, which she wiped up and then turned off the air conditioner. Borgmeyer stated that there was only a little bit of water on the floor by her son's bed, which she thought was caused by condensation. She further averred that there was no other water in the room, no visible leak and everything in the room looked fine. *Id.* at 24-26. The next morning she found standing water in the second bedroom and immediately called Bordey. *Id.* at 29-30.

Borgmeyer further testified that throughout the entire time she lived in Apt. 12 until the day of the occurrence, she never experienced any problems with the HVAC unit. *Id.* at 56. There is no evidence that any downstairs tenant noticed a leakage problem anytime prior to the incident in question and there is no evidence of any prior water leaks in Apt. 12. Plaintiff does not dispute the facts as presented above, nor does it claim that Borgmeyer created the problem and/or misused or tampered with the HVAC unit. However, plaintiff asserts that Borgmeyer had constructive notice of a defect with the unit and negligently failed to take immediate action to remedy the leak.

DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted].” *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

The crux of plaintiff’s argument is that Borgmeyer had constructive notice of the leak and was negligent in failing to repair the problem. “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of

time prior to the accident to permit [defendant] to discover and remedy it.” *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986) (bracketed matter added); *Larsen v Congregation B’Nai Jeshurun of Staten Island*, 29 AD3d 643 (2d Dept 2006). Further, “it is the plaintiff’s burden to show actual or constructive notice of a defect prior to the [occurrence]; otherwise the complaint must be dismissed.” *Figuroa v Goetz*, 5 AD3d 164, 165 (1st Dept 2004) (bracketed matter added).

In order to meet this burden, plaintiff must establish that the leak existed for a substantial period of time to raise the possibility that Borgmeyer had constructive notice of a problem with the HVAC unit. *Tucker v New York City Transit Auth.*, 42 AD3d 316 (1st Dept 2007). In the case at bar, there is no basis in the record whatsoever, other than speculation contained in the affirmation of plaintiff’s counsel, that Borgmeyer was on notice of a defect in the HVAC unit.

The facts presented indicate that there was no prior problem with leaks emanating from the HVAC unit in the second bedroom of Apt. 12, no prior complaints of leakage problems from tenants living in apartments underneath Apt. 12, the source of the leak was not visibly apparent until the housing covering the HVAC unit was removed and Borgmeyer notified the superintendent as soon as she noticed the flooding. Under these circumstances, plaintiff failed to raise a triable issue of fact as to whether the defect existed for a sufficient period of time to put Borgmeyer on actual or constructive notice of a problem that needed to be remedied. *Ellisy v Eklecco, LLC*, 56 AD3d 517 (2d Dept 2008).

Based on the foregoing, it is hereby

ORDERED that the motion for summary judgment is granted and the complaint is dismissed against defendant Ani Borgmeyer i/s/h/a Anilda M. Borgmeyer, and the Clerk is directed to enter judgment in favor of said defendant.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
April 1, 2010



HON. MARTIN SHULMAN, J.S.C.

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