

California Suites, Inc. v Russo Demolition Inc.

2010 NY Slip Op 31256(U)

May 19, 2010

Supreme Court, NY County

Docket Number: 111448/08

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART 52

California Suite

INDEX NO. 111448/08

MOTION DATE _____

- v -

MOTION SEQ. NO. 02

City

MOTION CAL. NO. _____

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 is decided in accordance with the answer decision. This action is transferred to a non-city part as the City is no longer a defendant in the action.

FILED
MAY 24 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/19/10

CYNTHIA S. KERN
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):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
CALIFORNIA SUITES, INC.,

Plaintiff,

Index No. 111448/08

-against-

DECISION/ORDER

RUSSO DEMOLITION INC., A. RUSSO WRECKING,
INC., THE CITY OF NEW YORK, THE NEW YORK
CITY DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT, THE NEW YORK CITY
DEPARTMENT OF BUILDINGS,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3, 4, 5</u>
Exhibits.....	<u>6</u>

Plaintiff commenced the instant action against defendants asserting that defendants Russo Demolition Inc. and A. Russo Wrecking Inc. (together, "Russo") illegally entered its premises at the behest of the Municipal Defendants (the City of New York, the New York City Department of Housing Preservation and Development and the New York City Department of Buildings, collectively) and removed and/or demolished a steel structure. The Municipal Defendants now move for summary judgment dismissing the complaint. Plaintiff cross-moves to amend its complaint to allege that the Municipal Defendants violated its due process rights by failing to

give it proper prior notice of their intention to remove or demolish the structure and failing to give it an opportunity to remedy the unsafe condition requiring such removal or demolition. For the reasons set forth below, plaintiff's cross-motion to amend its complaint is denied and the Municipal Defendants' motion for summary judgment dismissing the complaint is granted.

The relevant facts are as follows. Plaintiff owned the building located at 610 West 111th Street, New York, New York 10025 (the "premises"). In May 2007, after various violations were found at the premises and various warnings were given to plaintiff, the architect and the contractor on the project, the Department of Buildings ("DOB") revoked approvals and permits for a previously approved five-story extension at the premises. On June 19, 2008, DOB personnel were called to the premises to conduct a structural assessment. A DOB engineer and a DOB inspector's supervisor conducted the assessment, accompanied by an owner of the premises, Alan Lapes. The DOB personnel determined that the structural stability of the entire building was at risk because of the partial construction of the project. The DOB wrote a special report detailing these conditions, although there are no allegations that the report was sent or given to plaintiff. On June 23, 2008, the DOB sent plaintiff a letter stating that the building was unsafe and needed immediate repair or demolition and that if plaintiff failed to act, the City of New York would commence remedial action and seek to recover expenses from plaintiff. The DOB addressed the letter to plaintiff at 850 West End Avenue, which was the address plaintiff had provided to the NYC Department of Finance. The DOB did not mail the letter to the plaintiff at the premises itself, which is the address for service of process on plaintiff. On July 17, 2008, the NYC Department of Housing and Preservation ("HPD") notified plaintiff by letter

dated July 14, 2008 that if it failed to remedy the dangerous condition at the premises, the City would do so and bill plaintiff. This notice was sent by certified mail on July 17, 2008 to the 850 West End Avenue address. Someone signed the certified mail receipt on July 18, 2008 and the United States Postal Service has a record that delivery of the letter was made that day at 3:39 p.m. Plaintiff denies having received either the June 23rd or July 14th letters. Plaintiff failed to take any action with regard to the premises. The Municipal Defendants contracted with Russo to demolish the steel structure, which it did between August 18 and August 25, 2008.

As an initial matter, the Municipal Defendants' motion for summary judgment dismissing plaintiff's claims based on Russo's entry and demolition is granted as such entry and demolition were discretionary acts for which municipal defendants are immune from liability. "Government action, if discretionary, may not be a basis for liability..." *McLean v City of New York*, 12 N.Y.3d 194, 203 (2009). Plaintiff does not dispute that the Municipal Defendants' decision to remove and/or destroy the structure at issue was a discretionary act. Accordingly, the Municipal Defendants are immune from liability for removing and/or destroying said structure.

The court now turns to plaintiff's cross-motion to amend its complaint to add a cause of action for violation of its due process rights. Pursuant to CPLR § 3025(b), leave to amend a pleading should be freely given unless the pleading is devoid of merit or will result in undue prejudice or surprise to the other party. *See McCaskey, Davis and Associates, Inc. v New York City Health and Hospitals Corp.*, 59 NY2d 755 (1983). In the instant case, plaintiff's proposed amendment is devoid of merit. Plaintiff argues that its due process rights were violated because it never received notice of the Municipal Defendants' intent to remove or demolish the subject

structure themselves if plaintiff did not remedy the situation. The Court of Appeals has held that there is a presumption of receipt where the sender submits proof regarding office practices designed to ensure that documents are properly addressed and mailed. See *Nassau Ins. Co. v Murray*, 46 N.Y.2d 828 (1978) (in the insurance context). "Denial of receipt... standing alone, is insufficient to rebut the presumption." *Id.* In support of its contention that it never received the June 23rd or July 14th notices, plaintiff submits only the affidavit of Alan Lapes to this effect. In response, the Municipal Defendants submit affidavits of employees attesting to the office practice regarding the mailing of notices, a signed certified mail receipt for the July 14th letter, and a United States Postal Service tracking document stating that the July 14th letter was delivered at 3:39 p.m. on July 18th. Therefore, the Municipal Defendants have established the presumption of receipt and plaintiff's bare denial fails to rebut that presumption.

Plaintiff also asserts that its due process rights were violated because the June 23rd and July 14th notices were sent to 850 West End Avenue, the address designated for receipt of financial and tax documents only and not to 610 West 111th Street, the address designated for service of process. Notice must be "reasonably calculated" to apprise the parties affected of the relevant information. See *Schroeder v City of New York*, 371 U.S.208, 209 (1962). Sending the notices to 850 West End Avenue, a valid address for plaintiff, was reasonably calculated to notify plaintiff of the problem and potential removal and/or demolition of the structure at issue. Moreover, plaintiff's claim that the notice was required to have been sent pursuant to the CPLR is without basis. Because plaintiff's proposed amendment to its complaint is without merit, its cross-motion to amend the complaint is denied.

Accordingly, the Municipal Defendants' motion for summary judgment is granted.

