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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 110168/2005
ROTT, GITTA
VS.
NEGEV, LLC
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 11/12/10
MOTION SEQ. NO.
MOTION CAL. NO.

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 the annexed Memorandum Decision and Order,

FILED
JUN 24 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: June 21, 2010.

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: PART 11

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GITTA ROTT,

Plaintiff,

INDEX NO. 110168/05

-against-

NEGEV, LLC and HAGIVAH, INC.,
CHRISTOPHER HOLLAND and
SOPHIE REAL ESTATE VENTURES, LLC

Defendants

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JOAN A. MADDEN, J.:

In this action arising out of a dispute among adjacent property owners, defendant Negev, LLC ("Negev") moves, and defendant Hagivah, Inc. ("Hagivah") and defendants Christopher Holland ("Holland") and Sophie Real Estate Ventures, LLC ("Sophie") (together "the Holland defendants") each cross move, for summary judgment dismissing all claims and cross claims against them (motion seq. no. 007). Plaintiff Gitta Rott, appearing pro se, opposes the motion and cross motions and moves for summary judgment (motion seq. no. 009).[1]

Background

Plaintiff is the owner of 2099 5th Avenue, New York, NY, a house located on the corner of 129th Street. Negev owns 3 East 129th Street (hereinafter "the Negev property"), which is adjacent to plaintiff's property. In or about March 2004, defendant Hagivah, Inc. ("Hagivah") was hired by Negev to construct two three-family homes on the Negev property, and that construction work is at the center of the dispute between plaintiff and Negev and Hagivah.

[1]Motion seq. nos. 007 and 009 are consolidated for disposition.

Plaintiff's dispute with the Holland defendants arises out of the renovation of the property at 2101 and 2103 Fifth Avenue, New York ("the Sophie property"), which began in or about May 2004. Holland is the managing member of Sophie. Until July 18, 2005, when Holland transferred his interest in the Sophie property to Sophie, Holland jointly owned the Sophie property with Sophie.

In July 2005, plaintiff commenced an action against Negev and Hagivah, asserting that from March 2003 to date, these defendants purposefully and/or negligently maintained the Negev property "to cause, permit or allow construction debris, materials and personnel and excavation to damage plaintiff's property" (Complaint, ¶ 15) and to interfere with its use. The first cause of action alleges violations of defendants' statutory obligations under the Building Code of the City of New York (Administrative Code §§ 27-1009, 27-1026 and 27-1031) and the State Building Code (§§ 3301.2, 3304.1 and 3307.1), and seeks damages in connection with their failure to protect plaintiff's property from construction debris and materials and for "allow[ing] construction debris, materials and excavation to damage her rear yard fence, fence foundation, underlying land, rear yard property and gate" (Id., ¶ 25).

The second cause of action for trespass and nuisance alleges that Negev and Hagivah "permitt[ed] and caus[ed] debris, materials and personnel to enter and remain on plaintiff's property without her consent," and thus "diminished value of plaintiff's property, created enormous hardship, and expense by way of cleaning, time lost, from plaintiff's employment, emotional damages and the loss of full use and enjoyment of property (Id., ¶ 27).

The third cause of action alleges that plaintiff's land was unlawfully converted without her consent and seeks damages for loss of rental monies, trespass damages and the loss of full

use and enjoyment of the land. Plaintiff also seeks punitive damages.

In or about November 2006, plaintiff commenced a separate action against the Holland defendants alleging damages in connection with renovation work done on the Sophie property.[2] The first cause of action alleges that the Holland defendants violated "their statutory duty to protect plaintiff's property from water runoff and pooling which originates from a partially constructed roof located at the 2101 5th Avenue property" and that as a result caused "significant water damages to plaintiff's main structure" (Complaint, ¶ 15). It is further alleged that the Holland defendants "maintained the 2101 5th Avenue property in such a manner so as to permit contractors and/or employees to trespass onto plaintiff's property without permission" (Id., ¶ 16). It is also alleged that the Holland defendants' agents, contractors and employees "did jet hose plaintiff's newly constructed brownstone stoop allowing and causing water damage to plaintiff's stoop and stoop foundation" (Id., ¶ 17).

The first cause of action alleges that the Holland defendants were negligent and breached their statutory duty of care under the New York City Building Code (Administrative Code §§ 27-901(k), 27-1026) and § 1101.2 and § 1105 of the New York State Plumbing Code as enumerated under § 1503.4 of the New York State Building Code by failing "to protect plaintiff's property from water runoff and pooling which originates from the partially constructed roof located at the 2101 5th Avenue property" (Id., ¶ 22). The second cause of action, for trespass, alleges that the Holland defendants permitted "water runoff, drainage and construction personnel to enter/and or remain upon plaintiff's property without her permission, consent or license" and to cause water

[2]In August 2005, plaintiff commenced an action against Christopher Holland only but no Request for Judicial Intervention was ever filed in that action.

damage to plaintiff's stoop and stoop foundation (Id., ¶ 24). The third cause of action alleges that the Holland defendants permitted its agents, contractors and employees to "willfully damage telephone, internet and cable television wiring running into plaintiffs' building resulting in loss of service for extended periods of time [which] diminished the value of plaintiff's property, created enormous hardship and expense"(Id., ¶ 24).

By decision and order dated January 11, 2007, Justice Sherry Klein Heitler granted Hagivah's motion to consolidate the action against it and Negev with the action against the Holland defendants.

Discovery is now complete, and the parties have each moved for summary judgment.

Motions and Cross Motion Regarding the Negev Property

Negev argues that it is entitled to summary judgment as it did not have any employees on the work site but instead sub-contracted the work to Hagivah which, in turn, hired independent contractors to perform the work, as evidenced by an agreement dated March 5, 2004 between Negev and Hagivah. The agreement, which identified Negev as the owner the relevant property, and Hagivah as the contractor provides "(1) Hagivah, Inc. will supervise construction for 2 three family houses, (2) Contractor will sub-contract construction work on the site to other construction companies and will pay on behalf of the owner those expenses to the contractor, (3) Upon completion of the properties, owner will reimburse Hagivah, Inc. all expenses paid by Hagivah on owner's behalf, (4) Hagivah will refund for his services $30,000."

Moreover, Negev asserts that although its President, Joseph Cohen ("Cohen"), testified that he visited the work site on a weekly basis and oversaw the work, he also testified that he did not supervise the work and did not observe any damage to the plaintiff's property including the

damage to her fence alleged in the complaint. Negev also argues that plaintiff's failure to identify the individuals who committed the allege acts of trespass or damaged her fence precludes her recovery.

Negev further contends that it did not breach the statutory provisions cited in the complaint as these provisions either do not impose a duty on property owners, or are inapplicable to the circumstances of this case. Negev also argues that the cause of action for conversion is without merit as a claim for conversion does not applies to personal property as opposed to the real property at issue in this case. Moreover, Negev argues that punitive damages are not appropriately awarded in the absence of malicious, wanton and wilful conduct.

Hagivah argues that it is entitled to summary judgment as it hired independent contractors to perform the work, and it cannot be held liable for any torts committed by such contractors. In addition, Hagivah asserts that to the extent it was present at the construction site, it was only there to monitor the work and not to supervise the daily activities of the independent contractors, furnish the equipment or control the work schedule. In support of its position, Hagivah points to the deposition testimony of Reza Ardebili ("Ardebili"), who is its customer relations officer, including his testimony that although he monitored the work of the subcontractors, the subcontractors supervised the day-to-day activities of the workers. Hagivah further contends that the statutory provisions relied on by plaintiff are inapplicable to the circumstances of this case.

In opposition to Negev's motion, plaintiff points to evidence that during the period between March 2003, when Negev purchased the Negev property, and prior to the beginning of construction in September,2004, Negev built an eight-foot plywood fence without a permit and asserts that Negev left the fence unlocked which resulted in people dumping garbage and

unwanted furniture and created a nuisance. In addition, plaintiff points to photographs showing that after construction work began in September 2004, the workers damaged her new fence on multiple occasions by using it to hold construction materials when constructing a cinder block wall, and according to her deposition testimony, the workers occupied six inches of plaintiff's property while pouring the foundation for the building on the Negev property.

Plaintiff also notes that Cohen acknowledged at his deposition that Hagivah's President, Allan Cohen, who is Cohen's brother, consulted with him before hiring the subcontractors to perform the work, and that Cohen testified that Negev paid both Hagivah and the subcontractors (Cohen Dep. at 137-138). Cohen also testified that Hagivah provided workers compensation, liability and disability insurance at the job site (Cohen Dep. at 65). Plaintiff also points to the testimony of Ardebili, who described Hagivah as the general contractor on the job site and testified that his role was as the supervisor of the "entire job site" (Arbdebil Dep, at 20). He also testified that Hagivah was responsible for overall maintenance, compliance and construction at the work site and that he was on the job site on "many occasions" and that he would inspect the work performed (Id., at 19).

While Ardebili testified that "everything on the project was done legally," and denied that he was aware of any damages to the neighboring properties, he did not recall specifics regarding permits obtained and did not know whether or not bridges were built to protect the neighboring properties.

On a motion for summary judgment, the proponent "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..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d

851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

At issue here is whether summary judgment is properly granted in connection with the complaint regarding the Negev property which purports to assert causes of action for, negligence (first cause of action), nuisance and trespass (second cause of action) and conversion (third cause of action).[3]

With respect to the negligence cause of action, Negev and Hagivah each contend that they cannot be held liable for the negligent acts of their independent contractors. "The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts." Kleeman v. Rheingold, 81 NY2d 270, 273 (1993). "[T]he most commonly accepted rationale [for this rule] is based on the premise that one who employs an independent contractor has no right to control the manner in which the work is done and, thus, the risk of loss is more sensibly placed on the contractor." Id.

"Whether an individual is an independent contractor or employee must be determined on an ad hoc basis...and typically involves questions of fact as to who controls the methods and means by which the work is done." Stevens v. Spec. Inc., 224 AD2d 811 (3d Dept 1996). Other factors to be considered are the method of payment, the furnishing of equipment, the right to

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[3]Although plaintiff alleges emotional harm, the complaint does not appear to assert a claim for the intentional infliction of emotional distress and, in any event, as argued by Negev, plaintiff has not demonstrated the type of outrageous conduct necessary to plead and prove this tort.

discharge and the relative nature of the work. Fitzpatrick v Holimont Inc., 247 AD2d 715 (3d Dept), lv dismissed 92 NY2d 888 (1998); Weingarten v XYZ Two Way Radio Serv., Inc., 183 AD2d 964 (3d Dept), lv dismissed, 80 NY2d 924 (1992).

Here, based on the record, it cannot be said as a matter of law that the work was performed by independent contractors as opposed to employees of Negev and/or Hagivah. First, the March 4, 2004 agreement between Negev and Hagivah which indicates that Hagivah will supervise the construction and subcontract the work on behalf of Negev and that Negev will reimburse Hagivah for "expenses" is insufficient to establish that the subcontractors on the job site were independent contractors as opposed to employees of Negev and Hagivah. In fact, the record is devoid of any evidence identifying who supervised the work on the Negev property other than Negev or Hagivah. Additionally, there are no written agreements with the subcontractors which would enable the court to determine the nature of their relationship with the Negev or Hagivah. Moreover, the record shows that Negev and Hagivah decided together which subcontractors to hire and that Negev, paid the subcontractors,[4] while Hagivah paid for workers' compensation, liability and disability insurance.

There is also evidence that Negev's President visited the work site on a weekly basis, and that Hagivah's employee was responsible for supervising the subcontractors on the site and inspecting the work and was regularly present on the job site. Moreover, while Negev and Hagivah deny that they exercised control over the day-to-day activities of the workers and the record shows that the subcontractors supplied their own equipment, this evidence is insufficient

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[4]It is unclear from the record whether the subcontractors/workers were paid a flat fee, which would support a finding that they were independent contractors or whether taxes or Social Security was deducted, which would be indicative of an employer/employee relationship.

to show that as a matter of law that the work causing injury was performed by independent contractors. Compare Stevens v. Spec. Inc., 224 AD2d 811 (finding that individual providing sound system for defendant nightclub was an independent contractor based on evidence that the individual provided his own equipment, paid his own insurance, and that nightclub did not control or direct the manner in which the individual set up his own sound system).

Next, even if the workers were found to be independent contractors, the general rule that an employer cannot be held liable for the actions of its independent contractor is subject to "a wide variety of so-called 'exceptions.'" Id. Of relevance here, is the rule that an employer who retains the independent contractor may be held liable for that contractor's negligence when the employer owes a non-delegable duty to ensure the work has been done properly, or when there is a statute or regulation requiring the employer to perform the work in a specified way, and the resulting injuries are proximately caused by the violation of such statute or regulation. Id.; See also, Brothers v. New York State Elec. and Gas Corp., 11 NY3d 251 (2008); 2A N.Y.Jur2d Agency, § 413.

Thus, it has been held that a property owner owes a non-delegable duty to a neighbor to ensure the work is performed properly when it involves the adjoining property. Seltzer v. Bayer, 272 AD2d 263, 264 (1st Dept 2000). Here, the record raises issues of fact as to whether Negev breached this duty.

In addition, Negev and Hagivah may be potentially liable to plaintiff for breaching certain of the statutes cited by plaintiff in the complaint. Administrative Code § 27-1009 provides that "a contractor engaged in building work shall institute and maintain safety measures and provide all equipment or temporary construction necessary to safeguard all persons and property affected

by such contractor's operations." With respect to this provision, the record raises triable issues of fact as to whether Hagivah, as the general contractor on the project, failed to provide all necessary equipment and temporary construction and whether such failure resulted in damage to plaintiff's property in light of evidence that the contractors used and damaged plaintiff's fence to perform work. That being said, however, as Negev is an owner of property and not a contractor, this section does not apply to it.

Next, a contractor and owner owe a non-delegable duty to comply with provisions regarding excavations. Fagan v. Pathe Industries, Inc., 274 AD 703 (1st Dept 1949). At issue here are Administrative Code § 27-1031 and the New York State Building Code section, 3304.1 and 3307.1. Plaintiff testified that the excavation on Negev's property resulted in the northeast corner of her property and her fence to sink two feet. However, she did not allege any damage to any structures. Thus, § 27-1031(b)(1) which requires that excavation of more than ten feet in depth be performed "to protect and preserve any adjoining structures" is not applicable. Moreover, while subsection (a) requires support of adjoining ground when required by regulations, it cannot be said based on this record that such regulations apply here. Likewise, it has not been shown New York State Building Code § 3304.1 which provides, *inter alia*, requirements for the fill used for excavation and slope limits has been violated in this case.

On the other hand New York State Building Code § 3304.1 which requires that "adjoining public and private property be protected from damage during construction, remodeling and demolition work" would apply to the damage allegedly caused by the excavation and other damage alleged by plaintiff. In addition, this provision requires that ten days notice be given of the excavation and plaintiff claims she did not receive such notice.

Next, New York State Building Code § 3301.2 regarding proper storage of equipment is not a basis for liability as plaintiff has not shown any violation of this provision resulted in damage to her. In addition, Administrative Code § 27-1026 regarding, *inter alia*, physical examination of adjoining property, adjoining walls and the weatherproof integrity of adjoining buildings are not relevant to plaintiff's claims against Negev and Hagivah.

Accordingly, with respect to the negligence cause of action, both Negev and Hagivah are entitled to partial summary judgment dismissing that part of the claim relating to the breach of their statutory obligations under New York State Building Code § 3301.2, Administrative Code §§ 27-1026, 27-1031 while Administrative Code § 27-1009 is dismissed as against Negev only. Plaintiff's motion for summary judgment with respect to the negligence claim is also denied.

The next issue concerns whether summary judgment is appropriately granted with respect to the claims for nuisance and trespass. "One is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional or unreasonable, (2) negligent or reckless, or (3) actionable under the rules for abnormally dangerous conditions or activities." Copart Industries, Inc. v. Consold. Edison Co. of New York, Inc., 41 NY2d 564, 569 (1977). To qualify as a nuisance, it must also be shown that the invasion or interference is "substantial in nature" and "unreasonable in character." Id., at 570. Otherwise put, the invasion or interference "must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment [e]specially inconvenient." Lawrence Wolf v. Kissing Bridge Co, 288 AD2d 935, 936 (4th Dept 2001)(internal quotations and citations omitted). The determination of whether a use constitutes

a private nuisance is usually a question of fact. Id. see also, Futerfas v. Shultis, 209 AD2d 761, 763 (3d Dept 1994).

With respect to the Negev property, there are questions of fact as to whether Negev and Hagivah can be held liable for nuisance based on allegations that both during and after the construction they negligently caused and permitted garbage and other items to collect on the Negev property. Moreover, given plaintiff's testimony that the conduct occurred over a substantial period of time and resulted in foul odors, it cannot be said as a matter of law that the nuisance was not substantial in nature or unreasonable in character. See e.g. Lawrence Wolf v. Kissing Bridge Co, 288 AD2d at 936 (trial court engaged in "impermissible fact finding" when it determined that defendant's failure to maintain artificial pond in proper manner, resulting in foul odors and excessive mosquitos was insufficient to establish a nuisance as a matter of law).

In addition, contrary to Negev's position, the failure to identify the particular individuals who were responsible for dumping the garbage, does not bar the nuisance claim since Negev, as the property owner, was responsible for maintaining its property. On the other hand, the temporary plywood fence, while unsightly and arguably illegal, or the noise from the construction, did not constitute the type of interference giving rise to a nuisance. See Turner v. Coppola, 102 Misc2d 1043 (Sup Ct, Kings Co.), aff'd, 78 AD2d 781 (2d Dept 1980). In addition, contrary to plaintiff's position, the record is insufficient to support of finding in her favor on the nuisance claim as a matter of law.

"Trespass...involves the invasion of a person's interest in exclusive possession of land." Copart Industries, Inc. v. Consold. Edison Co. of New York, Inc., 41 NY2d at 570 (internal citation omitted). To elements of trespass are: (1) intent or recklessness, (2) entry by a person or

thing onto land, (3) in the actual or constructive possession of another. Long Island Gynecological Services, P.C. v. Murphy, 298 AD2d 504 (2d Dept 2002). With respect to the element of intent, the Court of Appeals has written that "[t]respass is an intentional harm to at least this extent: while the trespasser, to be liable, need not intend or expect damaging consequences of his intrusion, he must intend to the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate and inevitable consequence of what he wilfully does, or which he does so negligently as to amount to wilfulness." Phillips v. Sun Oil Co., 307 NY 328, 331 (1954).

Under this standard, Negev and Hagivah have not demonstrated their entitlement to summary judgment as there is evidence in the record that the workers at the job site on Negev's property placed debris on plaintiff's property, entered plaintiff's property and used the top of plaintiff's fence to erect a cinder block wall. Moreover, as indicated above, there are issues of fact as to whether the workers allegedly committing the trespass are independent contractors such that it cannot be said as matter of law that Negev and Hagivah are not vicariously liable for their acts. In addition, there are triable issues of fact as to whether Negev, as a neighboring property owner breached a non-delegable duty to plaintiff, to ensure that the work on its property was done properly. Seltzer v. Bayer, 272 AD2d at 264. Thus, case law holding that an owner cannot be held liable for trespass committed by independent contractors unless it either directed the trespass or such trespass was necessary to complete the contract is not dispositive here. See Axtell v. Kurey, 222 AD2d 804 (3d Dept 1995); Gracey v. Van Camp, 299 AD2d 837 (4th Dept 2002).

Furthermore, contrary to defendants' argument, Phillips v. Sun Oil Co., is factually

distinguishable from the instant case. In Phillips, the court found that even though defendant intentionally polluted its own land with gasoline, it did not know or have reason to know that gasoline would enter plaintiff's land, and thus was not liable for trespass. In contrast, here, it cannot be said as a matter of law that the workers did not know that they were entering and using plaintiff's property in connection with the construction of the Negev property.

There are also factual issues precluding a grant of summary judgment in plaintiff's favor on the trespass claim, including whether Negev and Hagivah knew about the trespass allegedly committed by the workers at the job site, and whether they had sufficient control over such workers to be held responsible for their acts.

With respect to the third cause of action, the courts have held that a conversion claim which "lies only with respect to personal, not real property." Boll v. Town of Kinderhook, 99 AD2d 898, 899 (3d Dept 1984); Garelick v. Carmel, 141 AD2d 501 (2d Dept 1988). Moreover, although there is evidence in the record that defendants damaged plaintiff's property, there is no evidence that they "exercise[d]... the right of ownership [over such property] to the exclusion of [plaintiff's] rights.'" Vigilant Ins. Co. of Am. v Housing Auth. of the City of El Paso, Texas, 87 NY2d 36, 44 (1995)(citations omitted). Accordingly, the conversion claim must be dismissed.

Finally, plaintiff has not adequately shown that defendants acted with wanton, wilful or reckless disregard of plaintiff's rights so as to entitle her to punitive damages.

Motion and Cross Motion Regarding the Sophie Property

The Holland defendants argue that they cannot be held liable to plaintiff as the record demonstrates that the renovation work at issue was performed and overseen by either (1) the Holland defendant's independent general contractor DECONST Corporation ("DECONST") and

its subcontractors, (2) other trade specific independent contractors, or (3) Anthony Gonzalez, an independent contractor who served as construction manager for the renovation.

In support of this position, the Holland defendants submit a copy of contract dated July 7, 2004 between Sophie, as owner and DECONST, as contractor on the renovation project for cost plus 20% with a cap of $435,000. The contract requires DECONST to obtain workers' compensation and liability insurance, and all necessary permits and bonds, and to "include all labor and approved materials appliances and services of every kind necessary for the execution of the work...[and that] Contractor shall adequately protect the work, adjacent property and the public and shall be responsible for any damage or injury due to his act or neglect." It also provides a list of approved subcontractors and suppliers for DECONST to utilize. The Holland defendants also attach evidence of contracts between Holland and various trades for work on the Sophie property.

According to the Holland defendants, this documentary evidence demonstrates that the work on the Sophie property was performed by independent contractors hired by DECONST or Holland and that these contractors supplied their own equipment, materials, labor and insurance, and that project was supervised by Anthony Gonzalez ("Gonzalez") or DECONST. In addition, the Holland defendants point to the deposition testimony of Holland that shortly after acquiring the premises he was diagnosed with cancer and that he was absent during most of the construction phase. They also argue that Holland's deposition testimony shows that DECONST installed an iron fence on the parapet wall between the Holland defendant's premises and plaintiff's building that is alleged to have caused a majority of the damage to plaintiff.

In opposition to the Holland defendants' motion and in support of her own motion,

plaintiff notes that Holland testified that Sophie paid certain trades, including the roofing and iron workers directly and not through DECONST and that Sophie also paid workers' compensation, disability and liability insurance. Holland also testified that DECONST was paid $105,000 and that Sophie ended up using DECONST for management and not the whole construction. Plaintiff also submits a ledger of vendor check payments from Sophie showing that Sophie paid for work related expenses such as various permits and paid various day laborers to perform construction related work.

Plaintiff also points to evidence that the roof work allegedly causing the water damage to plaintiff's building was not performed by DECONST but rather by laborers employed by the Holland defendants, and that when the telephone and cable wires were allegedly intentionally cut in September 2006, that DECONST had no workers at the site.[5] Plaintiff also asserts that without her permission, work was performed and holes drilled on a shared parapet wall at roof level, and that this work was improperly performed and caused leaking and water damaged to her property, and that Sophie repaired the fence posts without her permission utilizing an inexpensive and faulty method of repair

In support of her position, plaintiff submits a September 17, 2008 report from Rand Engineering and Architecture, P.C. indicating, *inter alia*, that holes drilled in front west coping stone of a shared parapet wall for a flagpole and for fence posts causing damage to the coping stone allowed for water to penetrate, and that the fence posts were later capped with aluminum

[5]While plaintiff quotes from deposition testimony of an employee of DECONST in her papers she fails to attach the transcript to her papers. In reply, the Holland defendants point out this failure and assert that the quotation is taken out of context. However, since the Holland defendants do not submit the relevant transcript or explain how the testimony relied by plaintiff is inaccurate, the court will consider it.

cladding and that this method of repair was done poorly and was not the preferable method of repair, and that caps over fence posts were not secured in place or were missing also allowing for water penetration. The report also stated that there was roofing debris and that a clean up of the debris was not possible without damaging plaintiff's property.

In addition, plaintiff argues that the Holland defendants are responsible for damage to her newly restored front stoop, which she maintains was covered with debris from the construction on the Sophie property and which was repeatedly pressure washed without her permission by workers on the Sophie property on a daily basis from 2004 to 2007.

Assuming that Holland defendants have made a prima facie showing entitling them to summary judgment on the negligence claim based on their argument that the work causing damage to plaintiff was performed by independent contractors, plaintiff has provided sufficient evidence to controvert that showing. In particular, the record raises factual questions as to whether the Holland defendants exercised control over the work at the property that allegedly caused damage to plaintiff, particularly as it appears that contractors employed by DECONST did not perform the work at issue, and it is unclear from the record the extent to which Gonzalez exercised control over, supervised and/or directed the workers who were hired by the Holland defendants. Stevens v. Spec, Inc., 224 AD2d 811.

In addition, even if the work at issue is found to have been performed by independent contractors, the Holland defendants are potentially liable to plaintiff if it can be shown that it either breached a non-delegable duty owed to plaintiff to ensure the work performed on its property which involved plaintiff's property was done properly (Seltzer v. Bayer, 272 AD2d 263), or a statute of regulation which proximately caused damage to plaintiff's property.

Brothers v. New York State Elec. and Gas Corp., 11 NY3d 251.

Here, the record raises issues of fact as to whether the Holland defendants are potentially liable for the alleged harm caused by the roof work based on Administrative Code section 27-1926 (d), providing that "when the weatherproof integrity of an adjoining building is impaired by construction operations... necessary measures be taken to restore the weatherproof integrity of adjoining buildings." In addition, plaintiff testified that her property was damaged by a failure to provide proper drainage for the roof at 2101 Fifth Avenue and thus the Holland defendants are potentially liable based on a violation §§ 1101.2 and 1105 of the New York State Plumbing Code. On the other hand, Administrative Code § 27-901(k) relating to disposal of storm water for "new buildings" or "substantial horizontal enlargements" has not been shown to be applicable to the building in issue.

As for the trespass cause of action, evidence that work was performed on the shared parapet wall without plaintiff's permission, and that workers hosed down plaintiff's stoop without plaintiff's permission is sufficient to raise a triable issue as to whether the Holland defendants can be held liable for a trespass even if the workers are found to be independent contractors. Seltzer v. Bayer, 272 AD2d 263, 264. Moreover, an owner of property can be held liable for the trespass committed by independent contractors to the extent the owner directs the work or the trespass is necessary to complete the contract. See Axtell v. Kurey, 222 AD2d at 805; Gracey v. Van Camp, 299 AD2d at 836. Here, it appears that the trespass with respect to the shared parapet wall was necessary to complete the fencing work and there are issues of fact as to whether Holland defendants directed other work including the making of holes for the flag post.

Likewise, there are issues of fact as to whether the Holland defendants committed trespass by virtue of the water entering plaintiff's property as a result of the roof work, since it cannot be said as a matter of law that the Holland defendants did not know or have reason to know that the water would leak into plaintiff's property. Compare Theofilatos v. Koleci, 105 AD2d 514 (3d Dept 1984).

With respect to the third cause of action, relating to the allegedly willfully damage telephone, internet and cable television wiring running into plaintiff's building, the record raises triable issues of fact as to whether such damage was the result of the acts of the Holland defendants and/or their agents.

Finally, plaintiff has not adequately shown that defendants acted with wanton, wilful or reckless disregard of plaintiff's rights so as to entitle her to punitive damages.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendant Negev, LLC is granted to the extent of dismissing (1) that part of the first cause of action against it on based its alleged breach of its obligations under Administrative Code §§ 27-1009, 27-1026 and 27-1031 and the New York State Building Code §§ 3301.2 and 3304.1, (2) the third cause of action, (3) plaintiff's request for punitive damages, and the motion is otherwise denied; and it is further

ORDERED that the cross motion for summary judgment by defendant Hagivah, Inc. is granted to the extent of dismissing (1) that part of the first cause of action against it based on its alleged breach of its obligations under Administrative Code §§ 27-1026, 27-1031 and the State Building Code § 3301.2, and 3304.1 (2) the third cause of action, (3) plaintiff's request for

punitive damages; and the motion is otherwise denied; and it is further

ORDERED that the cross motion for summary judgment by defendants Christopher Holland and Sophie Real Estate Ventures, LLC is granted to the extent of dismissing (1) that part of the first cause of action based on its alleged breach of its obligations under Administrative Code § 27-901(k) (2) that part of the trespass claim seeking damages for trespass as a result of water leaking into plaintiff's property, (3) plaintiff's request for punitive damages, and the cross motion is otherwise denied; and it is further

ORDERED that plaintiff's motion for summary judgment on her claims against defendants is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on July 1, 2010, at 2:00 pm, in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: ~~May —, 2010~~ June 24, 2010

J.S.C.

FILED
JUN 24 2010
COUNTY CLERK'S OFFICE
NEW YORK