

Rendelstein v United Enters.

2010 NY Slip Op 31670(U)

June 30, 2010

Supreme Court, New York County

Docket Number: 0115502/2007

Judge: Joan A. Madden

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: JOAN A. MADDEN
Justice

PART 11

Edward Rendelstein, et al.

INDEX NO. 115502/07

Plaintiff,
- v -

MOTION DATE 3-18-10

United Enterprises, et al.

MOTION SEQ. NO. 006

Defendant.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for cross summary judgment

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~~ ^{motion} ~~is~~ ^{is} ~~granted~~ ^{denied} ~~in~~ ^{is} ~~accordance~~ ^{is} ~~with~~ ^{is} ~~the~~ ^{is} ~~attached~~ ^{is} ~~memorandum~~ ^{is} ~~decision~~ ^{is} ~~and~~ ^{is} ~~order.~~ ^{is} *

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

FILED
JUL 06 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 30, 2010

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

* The motion was decided by Interim Decision & Order dated January 28, 2010.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : LAS PART 11

-----X
EDWARD RENDELSTEIN, AUGUSTINE AYALA, LOUIS
CALI, TRINA MARTIN, NORRIS VALDEZ, ANOUSEYA
MITTHU, BARBARA RIDLEY, KEVIN O'CONNOR, ANNA
RAMOS, JORGE MADAN, ANA LORENA RUSSELL, HARRY
MARCANO, YVONNE SAMUEL, JERRELYN WOODARD,
CHARLES TOWNES, JILLIAN SMITH, ROSETTA CAMACHO,
LUIS TORRALES, ANTHONY TOMASO, CATALINA SISON,
and MICHAEL A. DUNGEY,

Plaintiffs,

-against-

Index No. 115502/07

UNITED ENTERPRISES, 116 LLC, PAN-AM EQUITIES, INC.
ARAGON, LLC, ALEX GETELMAN, GATEWAY
DEMOLITION CORP., KENNETH FROHLICK, 125 WEST 31ST
STREET ASSOCIATES, LLC and GOTHAM CONSTRUCTION
COMPANY, LLC,

Defendants.

-----X
GATEWAY DEMOLITION CORP. and KENNETH FROHLICK,

Defendants / Third-Party Plaintiffs,

T/P Index No. 590593/09

-against-

TOPLINE CONTRACTING, INC.

Third-Party Defendants.

-----X
Joan A. Madden, J.

Defendants United Enterprises, 116 LLC and Pan-Am Equities, Inc. (together, "United")
cross move for summary judgment dismissing the complaint and any cross claims filed against

them.¹ Plaintiffs (hereafter, the “DOP employees”), defendants/third party plaintiffs Gateway Demolition Corp. and Kenneth Frohlick (“Gateway”), and third-party defendant Topline Contracting, Inc. (“Topline”), oppose the cross motion. For the reasons stated below, United’s cross motion is denied.

Background

In this negligence action, the DOP employees seek to recover damages from the defendants for injuries that they sustained from dust and other airborne contaminants while employed by the Department of Parole (the “DOP”) at offices (the “DOP offices”) in a building located at 119 West 31st Street/116 West 32nd Street (the “Building”).

During the relevant period, the Building was owned by United Enterprises, 116 LLC or its predecessor-in-interest, and was managed by Pan-Am Equities, Inc. The Building is a multi-story office building and the DOP occupied the entrance to the Building on 31st Street, and the first through fourth floors. There were windows on each floor of the DOP offices facing east, north, and south. There were also windows facing west on the third and fourth floors.

From approximately February 2005 until June 2005 (the “exposure period”) demolition work was being conducted on five buildings, comprising the St. Francis of Assisi properties (the “adjacent premises”), which was at least partially adjacent to the Building. The demolition work on the adjacent premises was the only demolition work taking place in the vicinity of the

¹ This cross motion was made in connection with a motion for summary judgment by defendants Aragon, LLC (“Aragon”) and Alex Getelman (“Getelman”), the president of Aragon. Aragon performed interior renovations on the twelfth and thirteenth floors of the building where the plaintiffs worked. By an interim order dated January 28, 2010, this court granted Aragon and Getelman’s motion for summary judgment as per stipulation between the parties, and scheduled this cross motion for argument on March 28, 2010.

Building during the exposure period.² The west windows in the DOP offices faced the adjacent premises.

The adjacent premises was owned by 125 West 31st Street Associates (“125 Associates”). Gotham Construction Company, LLC (“Gotham”) was retained as the construction manager for the work taking place on the adjacent premises during the exposure period. Gotham contracted with Gateway for Gateway to perform demolition work at the adjacent premises. Defendant Kenneth Frohlick is the President of Gateway. Gateway retained Topline to perform asbestos abatement.

Terrence McKeever (“McKeever”) was an employee of United and the manager of the Building during the exposure period. As building manager, McKeever had a variety of responsibilities, including overseeing general repair and maintenance work being conducted in the Building and performing certain repairs, and maintenance.

McKeever testified at his deposition that he was aware of the demolition taking place on the adjacent premises, and that he observed clouds of dust being released into the air from the demolition work. McKeever dep. at 96. McKeever stated in his affidavit that he has been in the construction field for over 29 years and is aware “of what sort of demolition creates concrete/silicate dust and asbestos/mold spores” and that “[a]ny such contamination that occurred during the...[the exposure period] would have emanated from construction demolition performed at the [adjacent premises].” McKeever aff. ¶7. He also testified that Gateway did not setup any curtains to prevent dust from emanating out of the area where the construction took place, and that the sidewalk barricades that were setup at the adjacent premises were about 8 feet tall. McKeever dep. at 47.

² However, during or around the exposure period, it appears that a company known as Galicia was performing Local Law 11 façade restoration work on the exterior of the Building.

McKeever further testified that he received multiple complaints about the amount of dust in the Building during the exposure period. McKeever testified that he informed his supervisor, Andy Reynoso (“Reynoso”), about these complaints. McKeever dep. at 48. McKeever also spoke to the Gateway foreman at the adjacent premises, on at least three occasions, to inform him that the tenants in the Building were complaining about the dust released from the adjacent premises. McKeever testified that, on each of these occasions, the foreman told McKeever that he would address the problem.

Based on McKeever’s testimony, it appears that, in response to the first of McKeever’s complaints, Gateway began watering down the demolition in an effort to prevent the spread of airborne dust into the Building.³ However, it is unclear whether Gateway continued to water down the demolition throughout the relevant period. McKeever never sent Gateway written complaints regarding the release of the dust, and he did not file a complaint with the Department of Environmental Protection. However, in the DOP employees’ bill of particulars in response to United’s demand, the DOP employees state that they made complaints to the New York City Buildings Department (the “Buildings Department”), on February 18, 2005, about the dust being released from the demolition on the adjacent premises.

McKeever stated in his affidavit that, in his experience in the construction and building management industries, it is “the responsibility of the entities performing construction to take whatever protective measures are necessary to prevent the migration of debris...resulting from construction work [to neighboring properties].” McKeever aff. ¶9. He further stated that there “is no standard in the industry for neighboring properties to construct any specific protection from a neighboring construction site.” Id.

³ Watering down demolition involves the use of a device which sprays water droplets into the air. These droplets capture airborne dust particles and bring them to the ground.

During the exposure period, the most significant amounts of dust observed in the Building were located on the perimeters of the Building. United did not install coverings on the Building's windows nor did it seal the windows. McKeever testified that, when he visited the DOP offices after receiving initial complaints, he observed dust on the inside of the window sills, and observed that, although some windows were closed, "some of [the windows] weren't closed but [some of the people working at the DOP] thought they were closed." McKeever dep. at 51. McKeever said he informed the individuals near the windows of this, and how to correctly close the windows. McKeever also testified that, in the hallway of the basement where his office was located, there was an opening in the window where cables were run into the Building, and there was a substantial amount of dust in this hallway. McKeever dep. at 49.

McKeever testified that the air handling system in the Building was maintained by contractors, and that there were two contractors who worked on the air handling system in 2005, Power Cooling, Inc. and Carp Co.⁴ The filters in the air handling system were flat filters, and were installed by Carp. Co.⁵ The sort of flat filters that were used in the air handling system were not the highest efficiency available, and were not capable of capturing particles as small as those that could be captured by HEPA filters. McKeever testified that the Building did not take steps to increase the air pressure in the Building during the exposure period, but that tenants had the ability to change the air pressure in their units by adjusting their thermostats, which would affect the cycling of the fan. McKeever dep. at 85-6.

⁴ While it is undisputed that Carp. Co. performed work related to the air handling system as late as January 2005 and Power Cooling, Inc. performed work related to the air handling system as early as June 2005, it is not clear which, if either, of these companies was performing work during the exposure period. However, McKeever testified at one point during his deposition that Carp Co. was the contractor who would have been maintaining the air handling system during the exposure period.

⁵ McKeever testified that there was no air handling system in the lobby.

Although the filters were generally maintained by the relevant contracting company, McKeever testified that he examined the filters on occasion, when doing periodic spot checking throughout the Building, and did not see substantial dust or dirt. McKeever dep. at 56. He testified that he did not replace the filters he examined, or clean them, because there was not an excessive amount of dust or dirt on them. McKeever dep. at 57. McKeever said that he also examined the air filters and inspected the vents in the DOP offices when he received complaints about excessive dust, but he did not observe an unusual amount of dust on the filters or in the vents. McKeever dep. at 55-9.

McKeever testified that a cleaning contractor, US Cleaning Incorporated (“US Cleaning”), would perform cleaning services on a nightly basis and it appears that US Cleaning was expected to address the settled dust in the Building through standard cleaning practices. McKeever testified that they “probably just did dust-ragging and stuff like that on the windowsills and things like that. The floors, they just have regular vacuums.” McKeever dep. at 50. McKeever stated that US Cleaning probably did not use HEPA vacuums to address the dust

In or about April 2005, the DOP commissioned Olmstead Environmental Services, Inc. (“Olmstead, Inc.”), an environmental consultant, to perform an environmental survey of the DOP offices (“the Olmstead survey”), the findings of which were summarized in a letter (the “Olmstead Report”). Olmstead, Inc. concluded that the work on the adjacent premises caused dust to enter the DOP offices through the windows, and that this dust caused allergy symptoms and respiratory problems in some individuals in the DOP offices. See Olmstead Report, 1. Olmstead, Inc. reported that there was visible settled dust on surfaces of the 4th floor facing the construction and the dust was heaviest adjacent to and on the windows. Olmstead, Inc. reported that the ventilation unit on the fourth floor was inspected and the filters were found to be low

efficiency, and could not remove small dust particles that can cause respiratory irritation. The Olmstead survey revealed elevated lead levels in one of four dust samples tested, and an elevated asbestos level in the only sample tested for asbestos fibers which was taken from dust on the window sash of a west facing window on the fourth floor.⁶ The Olmstead survey also revealed the presence of such construction, demolition debris as fibrous glass, gypsum dust and crystalline silica. Olmstead Report, 2. However, the Olmstead Report states that these analyses of settle dust samples may not provide a good indication of the levels of contaminants in the air of the DOP offices.

Olmstead, Inc. recommended that the DOP offices should be professionally cleaned, and that HEPA vacuums should be used. Olmstead, Inc. also suggested that coverings be used on the windows of offices facing the construction site. Additionally, Olmstead, Inc. recommended that HEPA filters be installed in the air handlers, and that HEPA filter air cleaners be provided to staff members experiencing allergy or respiratory symptoms in offices impacted by the construction dust.

In his affidavit, Edward Olmstead, the president of Olmstead, Inc. and a certified industrial hygienist who conducted the Olmstead survey, opined that United did not adequately address the problematic levels of dust in the Building, in part, because it failed to install high efficiency filters, provide coverings for the Building's windows, or adjust the air pressure in the Building. Olmstead Aff. ¶5. Olmstead further opined that United's response to the

⁶ However, when asbestos levels were examined in a follow-up survey conducted by Olmstead, Inc. (the "follow-up study"), samples of dust were also taken from other locations, and, although significantly elevated levels were still found in the new sample from the westward facing fourth floor window sash that was previously examined, the other samples did not show statistically significant elevated levels. The follow-up study also included testing for asbestos fibers in the air, and the results showed asbestos levels "well below the clean air standard." Olmstead Report, 4.

contaminants in the Building deviated from standard and proper Building maintenance practices. Id. ¶8.

Delno D. Malzahn (“Malzahn”), an industrial hygienist and a Senior Managing Scientist in the Center for Occupational and Environmental Health group at Exponent, Inc. (“Exponent”), states in his affidavit that the Olmstead survey was not sufficient in scope or detail to rule out the possibility that contaminants may have originated from inside the Building. Malzahn Aff. ¶6.

Around the time the Olmstead survey was performed, United retained H.A. Bader Consultants, Inc. (“HABC”) to perform testing in the Building. HABC conducted an environment survey (the “HABC survey”) at the Building on May 3, 2005. HABC performed a visual survey on the lower 8 floors of the Building on May 3rd and observed a layer of dust on the window sills throughout these floors. For floors one through seven, dust was taken from six sampling sites for asbestos and lead testing. Three of the samples were taken from interior window sills. Based on testing, HABC concluded that the asbestos levels did not require professional abatement. The results of the lead testing indicated that most areas did not have elevated lead levels, but high lead concentrations were found by windows in the proximity of the west wall of the Building. HABC recommended that all interior surfaces within 10 feet of perimeter of west, north, and south walls should be thoroughly cleaned, and that exterior window ledges should also be cleaned. HABC further recommended that wet cleaning methods should be used and HEPA vacuuming should be performed.

At some time after the Olmstead study was conducted, the DOP moved out of the Building, due to the dust. After the DOP left the Building, and around the time the demolition work at the adjacent premises was completed, United hired professional cleaners to clean the

floors previously occupied by the DOP, and HEPA vacuums were used in this cleaning. At some time later in 2005, the DOP moved back into the Building.

The DOP employees allege that, while working in the Building during the exposure period, they came to suffer a variety of injuries, including some of them suffering serious and permanent respiratory ailments. Certain DOP employees were hospitalized as a result of the alleged injuries that they suffered from alleged contaminants. Additionally, certain DOP employees were incapacitated from their employment for period ranging from a couple of days to permanent disability.

The DOP employees commenced this action on November 20, 2007. The DOP employees allege that United was negligent because it failed to mitigate the harmful effects of the dust and airborne contaminants in the DOP offices by using more efficient air filters, increasing the air pressure in the Building, adopting better cleaning practices, and taking steps to minimize the amount of dust that entered into the Building through the windows.

United now cross moves to dismiss the complaint and all cross claims against it on the grounds that it had no duty to ensure that the contaminants from the adjacent premises did not reach the DOP employees. United also argues that the DOP employees have made no claim that harmful contaminants, which allegedly caused their injuries, emanated from anywhere other than the adjacent premises. In support of its argument that it did not have a duty to address the dust from the adjacent premises, United points to McKeever's testimony that it is the prevalent practice in the construction industry that the entity performing the construction must take the necessary steps to ensure that debris from the construction does not migrate to adjacent properties. Thus, United concludes that the DOP employees cannot succeed on their negligence claim against it because they cannot show that United had a duty to them which it breached.

United's motion is opposed by the DOP employees, Gateway, and Topline.⁷

The DOP employees argue that United is not entitled to summary judgment since United had a duty to take necessary precautions to prevent contaminants from the adjacent premises from entering into the Building, and that the facts, when viewed in a light most favorable to the DOP employees, show that United breached this duty. The DOP employees also assert that United had notice that dust and airborne contaminants were present in the Building, and that United did not make sufficient efforts to prevent them from entering the Building or make sufficient efforts to remove the dust and contaminants once they entered the Building. The DOP employees further assert that the affidavit of their expert, Edward Olmstead, shows that United was negligent in failing to take such safety precautions as covering the windows or installing HEPA air filters.

Gateway and Topline separately oppose the motion, arguing that United has not proven, as a matter of law, that it is free from negligence in this matter, and that McKeever's deposition testimony shows that United had notice of the contaminants and that United failed to appropriately respond to the problem of dust in the Building, by such measures as upgrading the Building's air filters or placing coverings on the Building's windows. They also argue United and PanAm, as the owner and managing agent of the Building, had a duty to protect its tenants, including the DOP employees, from airborne contaminants, regardless of whether it conducted the activities that released the alleged airborne contaminants, and there are triable issues of fact as to whether United breached this duty.

Gateway also argues that there are factual issues as to whether the elevated levels of dust and contaminants were solely caused by the demolition work on the adjacent premises or

⁷ In addition to other arguments in opposition to United's motion, these parties all assert that United's motion is premature because United has not yet complied with various outstanding discovery requests.

whether the dust may have originated from within the Building, and points to McKeever's testimony showing that there may have been façade work being performed by Galicia on the Building during the exposure period, and Malzahn's statement in his affidavit that the testing performed by Olmstead, Inc. was not sufficient to rule out potential sources of dust in the Building. Gateway also argues that McKeever, who does not have any certifications in the construction industry, is not qualified to opine on the cause of the alleged airborne contaminants in the Building.

Discussion

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).

It is well established that a building owner must maintain its "property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." Basso v. Miller, 40 N.Y.2d 233, 241 (1976); Beck v. J.J.A Holding Corp., 12 A.D.3d 238, 240 (1st Dep't 2004). As the Court of Appeals has noted, a duty may arise between a defendant and a plaintiff "that requires [the] defendant to protect [the] plaintiff from the conduct of others." Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 233 (2001). Although a landlord is not the insurer of the safety of its tenants, a landlord has a duty to take at least minimal precautions to protect tenants from

foreseeable harm caused by the actions of third parties. Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507 (1980).

Under this standard, United had a duty to take reasonable precautions to prevent injuries from the elevated levels of dust and debris in the Building, even if the contaminants wholly originated from the adjacent premises. Notably, while it has been held that a property owner owes no duty to protect a plaintiff from a dangerous condition on an adjacent property (Galindo v. Town of Clarkstown, 2 N.Y.3d 633 (2004)), that precedent is of no relevance here as, in this case, regardless of whether the condition arose on the adjacent premises, the condition complained of was on United's property when it allegedly caused injuries to the DOP employees.

Next, there are triable issues of fact as to whether United breached its duty to the DOP employees. "For a plaintiff to show [that a landlord breached a] duty [it] is required to first establish that the landlord either created or had actual or constructive notice of the hazardous condition which precipitated an injury." Beck v. J.J.A Holding Corp. at 240. Here, while United did not create the alleged dangerous condition emanating from the adjacent premises, there is evidence that it had notice of the condition, and the record raises factual questions as to whether its actions were reasonable under the circumstances such that it breached the duty it owed to the DOP employees.

Thus, for example, while United commissioned HABC to inspect the lower eight floors of the Building to determine whether there were elevated levels of dangerous contaminants, it cannot be said as a matter of law that its actions were reasonable, under the circumstances at issue here, where the exposure period began between one and three months before HABC was retained. Likewise, there are issues of fact as to whether the other actions taken by United to

alleviate the dust, such as McKeever's requests to the Gateway foreman that he take steps to minimize the level of dust released during the demolition, McKeever's examination of the filters and vents, and McKeever's informing tenants in the DOP offices of how to properly close the windows, fulfilled United's duty to its tenants.

Additionally, while proof of custom and usage in a particular industry may be admissible as tending to establish a standard of care (Trimarco v. Klein, 56 N.Y.2d 98, 105-7 (1982)), McKeever's testimony that the "prevalent" practice in the construction industry is for the entity performing construction to take steps to ensure that debris does not emanate to adjoining property is insufficient to relieve United of its duty as a matter of law.

Finally, there are still outstanding issues of fact as to whether some of the dust and airborne contaminants in the DOP offices originated from inside or on the exterior of the Building.

Conclusion

In view of the above, it is

ORDERED that the cross motion for summary judgment by defendants United Enterprises, 116 LLC and Pan-Am Equities, Inc. (motion seq. no. 002) is denied; and it is further

ORDERED that a status conference shall be held on August 5, 2010, at Part 11, Room 351, 60 Centre Street, New York, New York.

Dated: June 30, 2010

FILED
JUL 06 2010
NEW YORK
COUNTY CLERK'S OFFICE
U.S.C.