

New Hampshire Ins. Co. v Rosebud Assoc. LLC

2010 NY Slip Op 31855(U)

June 30, 2010

Supreme Court, New York County

Docket Number: 110061/04

Judge: Emily Jane Goodman

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

PRESENT: _____

PART _____

Index Number : 110061/2004
NEW HAMPSHIRE INSURANCE
 VS.
ROSEBUD ASSOCIATES LLC
 SEQUENCE NUMBER : 005
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

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

be denied as moot at the close

is decided as

FILED
 JUL 09 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 6/30/10

[Signature]

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

if appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X

NEW HAMPSHIRE INSURANCE COMPANY, a/s/o
YORK REALTY LLC, a/s/o IDEAL REALTY LLC
and a/s/o REGAL REALTY LLC, YORK REALTY
LLC, IDEAL REALTY LLC, and REGAL REALTY
LLC,

Plaintiff,

Index No. 110061/04

-against-

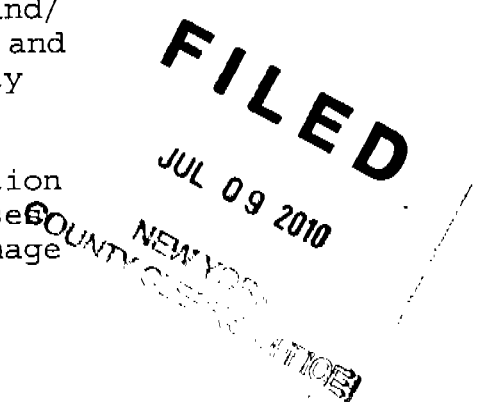
ROSEBUD ASSOCIATES LLC, PAVARINI MCGOVERN
LLC, PAVARINI CONSTRUCTION CO., INC., THE
HAKIM ORGANIZATION, EL-KAM REALTY, GOLAN
DEMOLITION & RUBBISH REMOVAL, INC., CHF
CONSULTING INC., BUCKINGHAM TRADING
PARTNERS INC., and JOHN DOES 1-10, said
names being fictitious, their true names
being unknown to plaintiff, such persons
intended to be the owners of 222 East 34th
Street, New York and/or the property and/
or building on 34th Street adjacent to and
to the west of the plaintiff's property
at 621 Second Avenue, and those
individuals, entities or corporations
responsible for the ownership, demolition
and construction of the current premises
located at that address who caused damage
to the plaintiff's property,

Defendants.

-----X

EMILY JANE GOODMAN, J.S.C.:

Plaintiffs New Hampshire Insurance Company, a/s/o York
Realty LLC, a/s/o Ideal Realty LLC, and a/s/o Regal Realty LLC
(New Hampshire), York Realty LLC (York), Ideal Realty LLC and
Regal Realty LLC move for summary judgment in favor of New
Hampshire as to liability (motion sequence number 005).



Plaintiffs also move, pursuant to CPLR 3025, for leave to amend their complaint to assert the applicability of *res ipsa loquitur* and Administrative Code of the City of New York (Administrative Code) § 27-1031, and to stay the trial pending resolution of the motion (motion sequence number 006).

FACTS

This action arises out of construction activity that was performed by defendants on premises located at 248 East 34th Street, New York, New York. Those premises are located adjacent to the property owned by York, located at 621 2nd Avenue, New York, New York (the Building). The construction activity involved several lots that were purchased by defendant Rosebud Associates LLC (Rosebud), as part of its construction of a large apartment complex called the Anthem building (the Anthem). Defendant Buckingham Trading Partners, Inc. (Buckingham) owned some of the lots that were eventually part of the Anthem. Buckingham was involved with the demolition of the prior existing building, and with the excavation and underpinning in preparation for the construction of the Anthem.

There is a discrepancy regarding when the demolition of the building at 248 East 34th Street took place. There is some evidence that it began in September 2000, and other evidence that it did not commence until November or December 2000. The company hired to perform the demolition, Golan Demolition (Golan),

entered into the contract for the demolition in January 2000, in which it agreed to indemnify and save harmless El-Kam Realty Company (El-Kam), identified as "Owner," from any claim arising out of the demolition work. However, Buckingham acknowledged that it, not El-Kam, had hired Golan. Samuels Tr., at 18-19. Golan has defaulted in this action; therefore, it has not offered any clarification regarding when it performed the demolition. Rosebud became the owner of the premises on November 9, 2000. The demolition was completed at approximately the end of 2000. After removing the prior structure, the demolition company removed four inches from what was previously a 12-inch wall of the Building. The precise circumstances surrounding this event, and the reasons for it, are somewhat vague in the papers before the court.

In July 2001, Vincent Cuttita (Cuttita), a principal of York, noticed cracks forming in the exterior walls of the Building. He notified his insurance company, which assigned Andrew J. Peck (Peck), then of Giani & Peck P.C., an engineer, to inspect and evaluate the damage. Peck submitted his initial report on August 22, 2001, in which he noted several areas of damage which were, in all probability, caused by the demolition activity, and others which were exacerbated. The commencement of digging for the foundation of the Anthem did not occur until early 2002.

In December 2001, Buckingham hired a company named Baltic to put tie rods into the Building to brace the walls. Samuels Tr., at 41. The tie rods anchored steel beams bracing the west, front and rear walls of the Building, and numerous holes were made in the walls in order to install them.

In early 2002, excavation and underpinning of the lot commenced, with defendant Pavarini McGovern, LLC (Pavarini McGovern) as contractor, and Urban Foundation (Urban) as subcontractor. The excavation reached a depth of between 15 and 16 feet below the sidewalk level. Peck Aff., ¶ 10. During this time, there were severe vibrations throughout the Building, which continued for approximately one month. Cuttita noticed additional damage to the Building, including cracks in the basement floor and foundation wall, and wet concrete that was used in the construction on the adjacent lot had seeped in through the cracks, causing damage to the basement.

On May 7, 2002, Peck performed a second inspection of the Building. In his report, he noted several items of damage that were not present at the time of the August 1, 2001 inspection. The New York City Department of Buildings issued York a violation for failure to maintain the exterior building wall on June 28, 2002. York was unable to commence repairs on the Building until Rosebud's construction activity ceased. As a result, repairs on the exterior walls could not commence until October 2003, and

were substantially completed in late fall 2004. The interior repairs could not commence until July 2004, and were completed in approximately February 2005.

Plaintiffs commenced this action by filing a summons with notice on July 9, 2004. The complaint contains four causes of action: New Hampshire seeks to recover in excess of \$750,000 that it has or will pay for damages caused by defendants' conduct (first cause of action); for trespass (second cause of action); for nuisance (third cause of action); and for breach of contract against Rosebud (fourth cause of action). Plaintiffs are now moving for summary judgment on liability against defendants, and are also moving to amend the complaint in order to add *res ipsa loquitur* and a violation of the Administrative Code to the complaint.

DISCUSSION

Plaintiffs argue that their motion for summary judgment should be granted because they have made a *prima facie* showing of entitlement to judgment as a matter of law by demonstrating that the Building was damaged due to the demolition, excavation, and underpinnings which were preparatory to building the Anthem. They further maintain that they have made a *prima facie* showing of entitlement to judgment on the trespass and nuisance claims, because defendants physically intruded on the Building by causing wet concrete to seep through the cracks which defendants'

construction created, and defendants placed steel beams on the Building, which caused damage to the interior finishes of the Building.

Rosebud contends that the demolition occurred before it was the owner of the property where the Anthem was built. Pavarini likewise maintains that it was not involved with the demolition. Buckingham argues that no damage was discovered until six months after it left the job site, and questions whether the demolition could have caused the damage. El-Kam avers that the demolition did not occur until after it transferred ownership to Rosebud.

Defendants contend that plaintiffs have not established who was responsible for which damage, and improperly lump all the defendants together as having caused the damage to the Building. They point out that Peck's report also does not indicate which defendant was responsible for which damage.

In seeking summary judgment as to liability, plaintiffs rely on the proposition that joint tortfeasors can be found liable for all of the damage, and it is not necessary for the injured party to determine which party was responsible for which damage.

The rule regarding joint tortfeasors is used in New York in five situations:

1. when defendants act in concert to produce an injury;
2. when defendants fail to perform a common duty owed to the plaintiff;
3. when there is a special relationship between the parties which imposes liability on one for the acts of another (vicarious liability);
4. when independent acts of several

tortfeasors concur to produce an indivisible injury incapable of apportionment; and 5. when two or more actors acted tortiously and there is evidence that only one actor injured plaintiff, but it is impossible for plaintiff to prove which one.

14 NY Prac, New York Law of Torts § 10:1. Here, there is no evidence that it is impossible for plaintiffs to prove which defendant was responsible for which damage. Rather, that issue has been ignored, as if there had already been a determination that defendants are joint tortfeasors. However, that is a determination which must be based on the evidence. If, in fact, it is the case that the damage cannot be apportioned, then plaintiffs will not be obligated to demonstrate which defendant is responsible for which damage. However, until that is established, the court cannot award judgment as to liability. There are also questions of fact regarding who owned the property at the time that the demolition commenced, and what role each of the defendants played. This affects not only the liability on the first cause of action, but also on the causes of action for trespass and nuisance. With respect to the breach of contract claim, there has been no evidence presented regarding the terms of the contract, and the parties present conflicting evidence regarding whether Rosebud prevented York from repairing the building.

Consequently, plaintiff's motion sequence number 005 is denied.

In motion sequence 006, plaintiffs seek leave to amend the complaint to include claims based on *res ipsa loquitur*, and based on the Administrative Code § 27-1031. That section of the Administrative Code states that when excavation takes place more than 10 feet below the sidewalk level, the activity is inherently dangerous, and the owner is absolutely liable for any damage such excavation causes to a neighboring building. Defendants object to the proposed amendment on the ground that plaintiffs have delayed in raising that basis for liability, and defendants have been prejudiced by the delay. They also point out that in the proposed amended complaint annexed to the moving papers, Administrative Code § 27-1031 is not mentioned, although the facts recite that the excavation was more than 10 feet deep.

In their reply papers, plaintiffs include another proposed amended complaint, which does allege a violation of Administrative Code § 27-1031. Therefore, the failure to include that section in the proposed amended complaint annexed to the moving papers is moot. Defendants were aware of the basis of plaintiff's amendment and had sufficient opportunity to raise any objections.

Defendants contend that they have been surprised and prejudiced by plaintiff's delay in seeking to amend the complaint because discovery has been completed, and plaintiffs are now seeking to utilize an absolute liability statute, without

offering any reasonable excuse for the delay. Defendants also maintain that there is no evidence that the excavation caused any of the damage, nor is there evidence that the excavation was more than 10 feet deep.

Defendants' position is unpersuasive. They have not suggested any specific prejudice resulting from the delay. Although discovery has been completed, defendants do not need discovery from plaintiffs in order to ascertain the depth of the excavation that they performed. Contrary to defendants' argument, there is evidence that the excavation was more than 10 feet deep, because Peck observed the excavation and stated that it was between 15 and 16 feet deep. Any quarrel that defendants have with his method of ascertaining the depth is a matter of credibility to be determined at trial; it does not nullify the evidence on a motion. See e.g. *Jackson v Nutmeg Tech., Inc.*, 43 AD3d 599 (3d Dept 2007); *Matter of Troy v Town of Pittstown*, 306 AD2d 718 (3d Dept 2003). Peck's second report also indicates that some of the damage resulted from the excavation. Again, whether or not a jury would accept his conclusion is not something that the court can address on a motion for summary judgment.

Defendants argue that plaintiff has failed to demonstrate that the doctrine of *res ipsa loquitur* applies to this case, because plaintiff has failed to establish which of the defendants

was actually negligent in causing the damage to the Building, or who was in exclusive control of the property. However, if defendants are determined to be joint tortfeasors, plaintiffs would not have to establish which defendant caused which damage.

In order to proceed on the theory of *res ipsa loquitur*, a plaintiff must demonstrate that the incident is one that does not normally occur in the absence of some negligence, it must be caused by an instrumentality that is within the exclusive control of the defendant(s), and the plaintiff did not voluntarily contribute to its happening. *Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 (2006). In view of the fact that there is no evidence that the damage would have occurred in the absence of negligence, the defendants were in control of whatever instrumentality was used to demolish and excavate the building next door, and there is no suggestion that plaintiffs were in any way responsible for the damage, at this juncture, *res ipsa loquitur* is appropriately included in the complaint.

Nonetheless, contrary to plaintiffs' contention, this matter is not one that should be summarily decided. In addition to the factual questions raised earlier, except in exceptional circumstances, the question of whether *res ipsa loquitur* applies is one that is generally left to the trier of fact. *Id.* at 212.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment (motion sequence number 005) is denied; and it is further

ORDERED that plaintiffs' motion for leave to amend the complaint (motion sequence number 006) is granted, and the amended complaint in the proposed form annexed to the reply papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

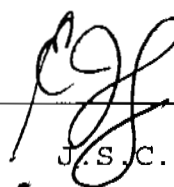
ORDERED that the defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that so much of plaintiffs' motion (motion sequence number 006) as seeks a stay of trial pending resolution of this motion is denied as moot; and it is further

ORDERED that counsel are directed to appear for a pre-trial conference in Room 422, 60 Centre Street, on July 22, 2010, at 10:30 AM

Dated: June 30, 2010

ENTER:


J.S.C.

FILED
JUL 09 2010
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