

Admiral Indem. Co. v Sudan

2010 NY Slip Op 32541(U)

September 16, 2010

Supreme Court, New York County

Docket Number: 102038/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C.

PART 10

Index Number : 102038/2009

ADMIRAL INDEMNITY

vs
SUDAN, DEREK

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

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

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED
SEP 17 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

SEP 16 2010

Dated: _____

J. GISCHE
HON. JUDITH J. GISCHE 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: IAS PART 10**

-----x
ADMIRAL INDEMNITY COMPANY A/S/O
MANDARIN PLAZA CONDOMINIUM,

Plaintiff,

-against-

DEREK SUDAN,

Defendant.
-----x

DECISION/ ORDER
Index No.: 102038/09
Seq. No.: 001

PRESENT: •
Hon. Judith J. Gische
J.S.C.

FILED
SEP 17 2010
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the view of this (these) motion(s):

Papers

	Numbered
Def's n/m (3212) w/ALV affirm, exhs	1
Pltf's opp w/KC affirm, exhs	2
Def's reply w/ALV affirm	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is a subrogation action by plaintiff for property damages due to a toilet leak. Mandarin Plaza Condominium (the "insured"/the "condo") owns the building located at 376 Broadway, New York, New York (the "Building") and is the subrogor of Admiral Indemnity Company ("Admiral"). Defendant, Derek Sudan, owner of Apartment 7E (the "Apartment") in the Building, moves for summary judgment, dismissing plaintiff's complaint.

Issue has been joined and the note of issue was filed on October 15, 2009. This motion was brought timely (within 120 days of the note of issue being filed), therefore, it will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2d Dept. 2004). The court's decision and order is as follows:

Arguments

Plaintiff claims that on May 23, 2008, a toilet located in the Apartment malfunctioned and released large quantities of water, resulting in property damage to various parts of the Building. The Condo tendered a claim to its insurance company (Admiral), which Admiral paid. Admiral contends that it has the right to recover its payment from defendant because defendant negligently maintained his toilet.

Defendant contends that plaintiff cannot establish its *prima facie* case because, although discovery is complete, there is no evidence that defendant was negligent.

Defendant and Wing Fat Lau ("Lau"), a part-time superintendent at the building, were each deposed. Defendant testified at his examination before trial (EBT) that he had lived in the Apartment since July 7, 2007 and prior to the date of the incident, had not had any problems with the toilet. Defendant stated that he was out of town when the incident occurred. On May 24th, he received a phone call from the managing agent of the Building notifying him of the leak. Defendant stated he returned to his Apartment on May 26th at 9 p.m. and "observed industrial size heaters in the hallway in the apartment and damage to my bathroom ceiling, water damage."

Lau testified at his EBT that upon receiving a phone call from someone at the front desk of the Building regarding complaints, he went to the Building and got the spare key for the Apartment. When entering the Apartment, Lau stated "I heard a noise from the bathroom . . . and then I noticed one of the hoses was being disconnected with the toilet bowl. It was like it popped out." Lau testified that the hose connects to the bottom part of the water tank and the flexible hose connects to the cold water line, which is located "partly outside and partly inside the wall." Lau testified "I don't really observe why it's

being disconnected or being pops out . . . my first reaction was to try to stop the water.”

Discussion

The movant on a summary judgment motion has the initial burden of proving entitlement to summary judgment, by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1st Dept. 1980); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1st Dept. 1985). It is only when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman v. City of New York, *supra* at 562. Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or debatable. International Customs Assoc., Inc. v. Bristol-Meyers Squibb Co., 233 A.D.2d 161, 162 (1st Dept. 1996). Moreover, the court cannot resolve issues of credibility, as it is for the jury to weigh the evidence and draw legitimate inferences therefrom. S.J. Capelin Assocs. v. Globe Mfg. Corp., 34 N.Y.2d 338 (1st Dept. 1974).

Although at trial plaintiff has the burden of proving its property damage was caused by a defendant's negligence (Cam v. Mainor, 276 A.D.2d 416 [1st. Dept. 2000]), on this motion for summary judgment, defendant (the movant) has the initial burden of proving his defenses, which is that he was not negligent. Defendant has not met his burden and has failed to eliminate issues of fact.

There is a factual dispute about how the incident occurred. It is unclear or unknown

what caused the pipe to leak, and whether the pipe was located inside or outside of the Apartment. As the moving party, defendant has a greater burden to produce evidentiary facts than his adversary. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). By their very nature, negligence cases do not lend themselves to summary judgment because the issue of whether the defendant (or plaintiff) acted reasonably under the circumstances is rarely an issue that can be decided as a matter of law. Ugarriza v. Schmieder, 46 N.Y.2d 471 (1979). Here, not only has defendant failed to meet his burden of proof, but there are triable issues of fact requiring the denial of defendant's motion. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985); Rotuba Extrudes v. Ceppos, 46 N.Y.2d 223 (1978). The determination of whether defendant was negligent is for the trier of fact to decide. Ugarriza v. Schmieder, *supra*.

Conclusion

In accordance herewith:

Defendants' motion for summary judgment is denied. Since the Note of Issue has been filed, this case is ready to be tried. This case shall proceed to mediation and plaintiff shall serve the Office of Trial Support with a copy of this decision and order, so the case may be scheduled for trial.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
September 16, 2010

FILED
SEP 17 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON. JUDITH J. GISCHE, J.S.C.