Balkin v 1082 Madison Ave. L.L.C.

2011 NY Slip Op 32907(U)

November 1, 2011

Supreme Court, New York County

Docket Number: 111053/2009

Judge: Saliann Scarpulla

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SCANNED ON 11/2/2011

[* 1]

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

PRESENT: ______________________ PART 19

Justice

Index Number : 111053/2009

BALKIN, STEPHEN

vs.

1082 MADISON AVENUE

SEQUENCE NUMBER : 002

VACATE NOTE OF ISSUE/READINESS

INDEX NO. ________

MOTION DATE ________

MOTION SEQ. NO. ________

MOTION CAL. NO. ________

ı 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

motion and cross-motion are decided in accordance with accompanying memorandum decision.

FILED

NOV 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: November 1, 2011

SALIANN SCARPULLA J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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: CIVIL TERM: PART 19
---X
STEPHEN BALKIN and BURLINGTON ANTIQUE TOYS LTD.,

Plaintiffs,

Index No.: 111053/2009
Submission Date: 6/8/11

- against-

1082 MADISON AVENUE L.L.C. D/B/A CRAWFORD DOYLE BOOKSELLERS, BURLINGTON HOUSE CONDOMINIUM INC., 24-26 EAST 82ND STREET TENANTS CORP. and ANDREA BUNIS MANAGEMENT, INC.,

DECISION AND ORDER

Defendants.
---X

For Plaintiff:
Weingrad & Weingrad LLP
350 Fifth Avenue, Suite 7720
New York, NY 10118

For Defendants Burlington House Condominium, 24-26 East 82nd Street Tenants Corp., and Andrea Bunis Management Inc.:
Margaret G. Klein & Associates
200 Madison Avenue
New York, NY 10016

Papers considered in review of this motion to strike not of issue and cross-motion for summary judgment and sanctions:

Notice of Motion 1
Aff in Support 2
Notice of Cross-Motion. 3
Aff in Opp and Support. 4
Aff in Opp and Reply Aff 5

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action to recover property damages stemming from a burst water pipe at the premises located at 24-26 East 82nd Street, New York, New York, defendants Burlington House Condominium, s/h/a “Burlington House Condominium Inc.,” (“Burlington House”), 24-26 East 82nd Street Tenants Corp. (“Tenants Corp.”), and Andrea Bunis

Management Inc. ("Bunis") (collectively, "defendants"), move (1) pursuant to the Uniform Civil Rules for the Supreme Court and the County Court (22 NYCRR) 202.21(e) for an order striking the note of issue and certificate of readiness of plaintiffs Stephen Balkin ("Balkin") and Burlington Antique Toys LTD. ("Burlington Toys") (collectively, "plaintiffs"), and striking the action from the trial calendar; (2) pursuant to CPLR 3124 for an order compelling plaintiffs to provide sales records of art work and/or permit inspection of alleged damaged art work; and (3) pursuant to CPLR 3212(a) for an order extending the time to move for summary judgment for one-hundred-twenty (120) days after all discovery has been completed, or one-hundred-twenty (120) days after an order determining this application is entered, whichever is longer.

In support of the motion, defendants argue that the note of issue should be stricken because discovery is not complete. In particular, defendants assert that plaintiffs failed to provide sales records of art work or permit inspection of art work alleged to have been damaged by the burst water pipe. Defendants also argue that plaintiffs failed to comply with a So Ordered stipulation, dated May 26, 2010, which required plaintiffs to provide sales records of the damaged art work, and that plaintiffs should now be compelled to do so.

Plaintiffs oppose the motion, and cross-move for summary judgment and sanctions. In opposition to defendants' motion, plaintiffs assert that all discovery is complete, the action is trial ready, and the discovery sought by defendants in this action (sales records of art work and/or inspection of alleged damaged art work) cannot be produced as these

records do not exist. In support of their cross-motion for summary judgment, plaintiffs assert that "there need to be no motion for summary judgment from the defendants, because there is no defense," and that defendants need only oppose plaintiffs' summary judgment motion. Plaintiffs assert that there is no material question of fact to present to a jury, and that the court should find defendants liable for the damage to plaintiffs' property.

Plaintiffs also argue that they are entitled to costs including attorneys' fees pursuant to CPLR 3123 because defendants refused to admit in response to plaintiffs' notice to admit regarding the leaky pipe, and that defendants' counsel engaged in frivolous conduct, including signing a false pleading denying every requested admission.

In opposition to plaintiffs' cross-motion for summary judgment, defendants argue that plaintiffs have failed to establish a prima face case of negligence against the defendant-landlord, and that the conclusions reached by plaintiffs' expert are not supported by the evidence. Defendants also oppose the cross-motion for sanctions. They argue that the notice to admit requests admission of ultimate or conclusory facts and interpretations of the law which are beyond the proper scope of a notice to admit. In addition, defendants assert that a notice to admit is not to be used as a substitute for other disclosure devices, such as depositions.

Lastly, in light of plaintiffs' contention that the damaged paintings no longer exist, defendants request that the plaintiffs permit defendants to examine Mr. Balkin's unsold art work, so that defendants may have an expert examine the work and place a market value on it.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers.*'" *Smalls v. AJI Indus., Inc.*, 10 N.Y.3d 733, 735 (2008) (quoting *Alvarez*, 68 N.Y2.d at 324) (emphasis in original).[1]

For plaintiffs to make a prima facie case for summary judgment, they must establish that defendants had notice of the leaky pipe. "It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the

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[1] Plaintiffs' assertion that, although this is *plaintiffs'* motion for summary judgment, "[i]t is not plaintiff's burden to establish that he has a meritorious case, it is defendant's burden to show that plaintiff does not," is simply incorrect. It is well settled that the burden is on the movant – whether plaintiff or defendant – on a motion for summary judgment. The cases relied on by plaintiffs do not suggest otherwise. *See Padula v. Big V. Supermarkets*, 173 A.D.2d 1094, 1095 (3d Dep't 1991) ("The proponent of a summary judgment motion 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. A failure to do so requires denial of the motion regardless of the sufficiency of the opposing papers") (citations omitted); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853) (1985) (same); *Boone v. NYC Transit*, 263 A.D.2d 463 (2d Dep't 1999) (same); *Faruque v. Ponce*, 259 A.D.2d 464 (2d Dep't 1999); *Belmonte v. Collins*, 261 A.D.2d 496 (2d Dep't 1999); *Prince v. Benedetto*, 189 A.D.2d 757 (2d Dep't 1993).

premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the existence of reasonable care, it should have been corrected." *Juarez v. Wavecrest Management Team Ltd.*, 88 N.Y. 2d 628, 646 (1996). *See also Rosas v. 397 Broadway Corp.*, 19 A.D.3d 574 (2d Dep't 2005) ("a property owner is not liable in negligence unless he or she created the allegedly dangerous condition or had actual or constructive notice of its existence"). Plaintiffs failed to make a prima face showing that defendants either created the leak, or were on notice of the defective condition.

In support of their cross-motion, plaintiffs assert that defendants must have been on notice of the defective pipe, because of the number of times the plumber visited the building and made repairs over the last five years. Plaintiffs rely on the affidavit of Stanley Fein ("Fein"), a licenced professional engineer, and his review of the building's repair bills. However, Lakhram Jagrup, the plumber who serviced the building, testified at his deposition that although he had been called to the building a number of times over the previous years, it had been to repair steam and waste lines. He was not called to the building to repair the cold water riser, which was the pipe which burst and caused the damages at issue here, or for any repairs in the "B line" of the apartment building, which is where the leak occurred.

As there is a question of fact as to whether the defendants were on notice of the alleged defective pipe, plaintiffs have failed to meet their burden of proof, and their cross-motion for summary judgment is denied.

Plaintiffs cross-motion for sanctions is also denied. Pursuant to 22 NYCRR §130-1.1, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct. *See also Llantin v. Doe*, 30 A.D.3d 292 (1st Dept. 2006). Sanctions are within the sound discretion of the trial court and are reserved for serious transgressions.

Here, no such showing was made and therefore plaintiffs' motion seeking sanctions is denied. Plaintiffs' allegation that defendants acted improperly in denying the requested admissions in the notice to admit is unavailing. "[T]he purpose of a notice to admit is to 'eliminate from the litigation factual matters which will not be in dispute at trial, not to obtain information in lieu of other disclosure devices.'" *Taylor v. Blair*, 116 A.D.2d 204, 205-206 (1st Dep't 1986) (quoting *Berg v. Flower Fifth Ave. Hosp.*. 102 A.D.2d 760 (1st Dep't 1984)). *See also Wolin v. St. Vincent's Hosp. and Medical Ctr. of New York*, 304 A.D.2d 348 (1ST Dep't 2003) (intended purpose of notice to admit is "to resolve factual matters pertaining to the elements of [a] claim which will not be in dispute at trial"); *Miller v. Hilman Kelly Co.*, 177 A.D.2d 1036 (4th Dep't 1991) (beyond permissible scope of notice to admit where defendants "sought admissions of contested ultimate issues by seeking to have plaintiff subvert the basic premise of his complaint and concede his entire claim against these defendants"). As plaintiffs' notice to admit requested that defendants admit one of the ultimate issues in this action, it was beyond the scope of a notice to admit, and defendants did nothing wrong in denying the requests. Moreover, it would be

improper for plaintiffs to attempt to use the notice to admit in lieu of other discovery devices, such as examinations before trial.

Turning to defendants motion to strike the note of issue, defendants contend that the note should be stricken as they have not had a chance to examine the damaged art work or record of sales. In their opposition, plaintiffs state that the damaged art work was discarded in August 2010 and that prior to that date, there had been no requests to inspect the art. Defendants argue that plaintiffs did not advise defendants that there were no records of sales of Balkin's art work until Novemebr 17, 2010.

Balkin testified at his deposition that as of 2009, he had stored about 500 paintings, and that a total of 49 were damaged. In light of this testimony, the information from plaintiffs that the damaged art work has been discarded, and that there are no records of sales, defendants now seek inspection of Balkin's unsold art, so that an expert may examine some pieces and place a market value on them. As the requested damaged items appear to no longer exist, defendants will be allowed an opportunity to examine ten (10) pieces of Balkin's art work, and show them to their expert for a valuation. This, however, will not necessitate striking the note of issue.

In accordance with the foregoing, it is

ORDERED that the motion by defendants Burlington House Condominium, s/h/a "Burlington House Condominium Inc.," 24-26 East 82nd Street Tenants Corp., and Andrea Bunis Management Inc. to strike the note of issue and certificate of readiness, compel plaintiffs to provide sales records and/or permit inspection of damaged art work, and to

extend the time to move for summary judgment, is granted only to the extent that within thirty days (30) days of the date of note of entry of this order, plaintiffs will make available for inspection and examination by an expert at a time and place mutually agreeable ten (10) of Stephen Balkin's unsold paintings, and in all other respects the motion is denied; and it is further

ORDERED that the cross-motion by plaintiffs Stephen Balkin and Burlington Antique Toys Ltd. for summary judgment and sanctions is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
November 1, 2011

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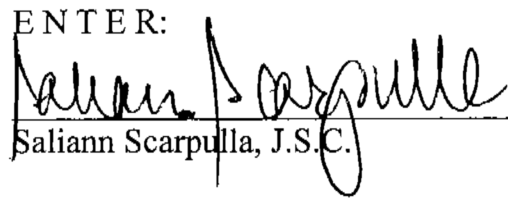

Saliann Scarpulla, J.S.C.

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