

Allstate Ins. Co. v 8 West 65th St. Condominium Corp.

2011 NY Slip Op 33684(U)

May 12, 2011

Supreme Court, New York County

Docket Number: 108876/2007

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 108876/2007
ALLSTATE INSURANCE
 vs.
8W. 65TH ST. CONDOMINIUM
 SEQUENCE NUMBER : 004
 DISMISS ACTION

INDEX NO. _____
 MOTION DATE 5/9/11
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

is 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

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Epcore Building, LLC pursuant to CPLR 3212 to dismiss the complaints and all cross-claims against it is granted. And it is further

ORDERED that the complaints and all cross claims in the consolidated actions noted herein are severed and dismissed as against Epcore Building, LLC and the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 5/12/11

HON. CAROL EDMEAD 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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
ALLSTATE INSURANCE COMPANY,
A/S/O GREGORY OYEN & JULIE OYEN,
Plaintiffs,

DECISION/ORDER
Index No.: 108876/2007
Motion 004

-against-

8 WEST 65TH STREET CONDOMINIUM CORP.,
EPIC BUILDING RESTORATION, INC., EPCORE
BUILDING, LLC, EPIC RESTORATION &
RENOVATION, INC., BOARD OF MANAGERS OF THE
8 WEST 65TH STREET CONDOMINIUM, 8 WEST 65TH
STREET ASSOCIATES, and BENNY MOLINA,
Defendants.

-----X
GREGORY S. OYEN and JULIE OYEN,
Plaintiffs,

Index No.: 104883/07

-against-

EPIC RESTORATION & RENOVATION, INC., EPCORE
BUILDING LLC, BENNY MOLINA, and BOARD OF
MANAGERS OF THE 8 WEST 65TH CONDOMINIUM,
Defendants.

-----X
BORIS KOMAROV,
Plaintiff,

Index No.: 604023/07

-against-

GREGORY S. OYEN, JULIE OYEN,
THE 8 WEST 65th STREET CONDOMINIUM, and
BOARD OF MANAGERS OF THE 8 WEST 65TH STREET
CONDOMINIUM,
Defendants.

-----X
BEVERLY SKAAR,
Plaintiff,

Index No.: 150069/08

-against-

EPIC BUILDING RESTORATION, INC., 8 WEST
65th STREET CONDOMINIUM ASSOCIATION,
EPCORE BUILDING, LLC, ABC CORP.,
BENNY MOLINA, and JOHN DOE,
Defendants.

-----X

HON. CAROL ROBINSON EDMOND, J.S.C.

MEMORANDUM DECISION

In this consolidated property damage action concerning condominium units located at 8 West 65th Street, New York, New York (the “condominium building”), defendant, Epcore Building, LLC (“Epcore”) moves pursuant to CPLR 3212 to dismiss the complaints and all cross-claims against it.

*Factual Background*¹

The Board of Managers of the condominium building (the “Board of Managers”) retained defendants Benny Molina (“Molina”) and Epic Restoration, Inc. and Renovation and/or Epic Building Restoration, Inc. to conduct certain repairs, renovation and maintenance work at the property beginning in 2002 and through 2006. As a result of certain property damage occurring at the property on or before August 14, 2005, four actions were commenced.

In Action 1, Allstate Insurance Company (“Allstate”), as insurer of Gregory and Julie Oyens (“Oyens”) seeks to recover damages from 8 West 65th Street Condominium Corp., Epic Building Restoration, Inc., Epcore, Epic Restoration & Renovation, Inc., Board of Managers, 8 West 65th Street Associates, and Benny Molina, resulting from claims paid by Allstate to the Oyens as a result of alleged property damage and loss of use of their condominium unit (the “Allstate” action).

In Action 2, the Oyens seek damages against Epic Restoration & Renovation, Inc., Epcore, Molina, and Board of Managers for property damage and loss of use of their condominium unit. The Oyens seeks recovery for the portion of their alleged losses that was not

¹ The Factual Background is taken in large part from Epcore’s motion.

covered by their Allstate policy (the "Oyen action").

In Action 3, Boris Komarov asserts property damage claims against the Oyens, the 8 West 65th Street Condominium and Board of Managers (the "Komarov" action).

In Action 4, Beverly Skaar asserts property damage claims against Epic Building, Inc., 8 West 65th Street Condominium Association, Epcore, ABC Corp., Molina and John Doe (the "Skaar" action).

All four of these actions arise out of claims that construction performed at 8 West 65th Street in 2005 and prior caused damages to condominium units and/or personal property located therein, including the unit owned by the Oyens and insured by Allstate, and the units owned by Komarov and Skaar. Thus, the Allstate and Oyen actions were consolidated for joint discovery, followed by the consolidation of the Komarov and Skaar actions with the Allstate and Oyen actions for joint discovery.

In the actions by Allstate, the Oyens, and Skaar, it is alleged that on or before August 14, 2005, defendants Epic Restoration & Renovation, Inc., Epic Building Restoration, Inc., and/or Molina performed work on the roof at 8 West 65th Street, resulting in damage to the roof causing rain and the outside elements to intrude into the premises, including the Oyen's penthouse and Skaar's apartment. (Komarov's claims are not based on the August 14, 2005 loss).

In support of dismissal, Epcore contends that Molina testified at his deposition that he was the principal owner of Epic Building Restoration, Inc., Epic Restoration & Renovation, Inc. and Epcore, and that all three of these entities performed work as part of a renovation project at 8 West 65th Street. While Molina was unsure as to the exact dates that these companies began and ended their work on the project, he testified that Epic Restoration and Renovation began the

project, followed by Epic Building Restoration and Epcore. Epcore was the last of Molina's company to perform work at the location. Molina stated that all roof work at the building and water proofing work at the location was performed by Epic Restoration and Renovation. Epcore performed only masonry work, and Epcore's work was relegated solely to the parapet wall. Moreover, Molina testified that Epcore did not perform its work at the subject building until after August 14, 2005, the alleged date of incident. Therefore, there can be no negligence on behalf of defendant, Epcore, and Epcore did not perform any work at the subject location prior to the alleged loss. Thus, there can be no negligence.

In opposition, Allstate argues that Epcore's motion should be denied because Molina's testimony, on which the motion is based, should be disregarded due to the lack of any records to support his testimony. As a result of Molina's inability to produce any records, his testimony is completely from memory and in a large part consists of his answering that he did not recall. While Molina was able to state that Epcore was not working at the time of the incident in August, 2005 and that Epcore did not do roof work, he could not state the number of corporations that he had or when each corporation went into existence and was terminated.

On November 9, 2010, the Court ordered Molina to provide various documents and tax returns relating to his business, or to sign authorizations to obtain the tax returns. In response, Molina provided signed authorizations for tax returns for his business and an affidavit claiming that he performed a search of his records and could not produce one item of information relating to the work done by his companies at the property. Further, although Molina signed authorizations to obtain the tax returns he was not able to provide the tax identification number for each corporation which made the authorizations completely useless. In his affidavit, he

indicates that he is not in possession of his identification number for any of those corporations. Molina also denied having any records involved with any of the work being done by himself or any of his companies at the property.

Allstate points out that Mr. Oyen testified that the water damage in the subject apartment occurred on the weekend of August 14, 2005 at a time when Molina and his companies were working on the roof area including the flashing. Oyen stated that he had spoken to Molina prior to that weekend relating to the work to be done (pages 20-24, 45-46 and 55-57). Frank Caminiti, ("Caminiti"), the architect hired by the Board of Managers to oversee the work being done by Molina and his companies, specifically contradicts Molina's testimony. Caminiti describes the cause of the leak which occurred that weekend. Caminiti testified that Molina's company was performing roofing work at the property and that he was installing base flashing along the wall and was attempting to protect it by means of a tarp. However, he indicated that the tarp had been blown away and that water leaked through this opening into the Oyen penthouse apartment. Further, Caminiti testified Molina told him that he was going to complete the roof work before the subject weekend since they knew that there was going to be rain that weekend. Allstate contends that the work was not completed prior to the weekend and the ensuing damage was caused by the water intrusion through the area which was not properly sealed and protected by Molina and his companies. Such testimony contradicts Molina's testimony wherein he denies doing roof work under any company in August, 2005 and claims that the roofing work was done "a couple of months" prior to August, 2005. Molina testifies that Epcore was doing parapet wall work at that time and it was Caminiti's testimony that it was the improper installation of base flashing at the base of the wall and roof which caused the water to leak into the penthouse.

Allstate argues that Epcore cannot isolate its work from any other work performed by Molina and his other companies. Caminiti and Mr. Oyen testified that there was never any indication on the part of Molina to the Board of Managers, to Mr. Oyen or to Caminiti of the difference between the companies. The Board and Caminiti were never informed of the existence of Epcore until some time after the subject loss occurred when an insurance certificate was submitted, indicating that a policy of insurance was issued for Epcore with an effective date of July 27, 2005 just weeks before the subject loss, and naming the Board of Managers and the managing agent Hidalgo Realty as additional insureds on this policy.² This coincides with the New York State Department of State Division of Corporations document indicating that a corporation in the name of Epcore Building, LLC which was initially filed on July 14, 2005 and that the corporation is still active.

Molina testified that Epcore started towards the middle to the end of 2005 and that Molina had taken in a partner and they did not want the partner to be involved with the prior company as a result of an electrocution at a job site and an ultimate litigation against the Epic Restoration company. Therefore, based upon the insurance certificate and the information from the Department of State, it is logical that in July, 2005 Molina changed the name of his company as a result of a job site accident and lawsuit against his prior company and he established Epcore on July 14, 2005 and obtained insurance for that company effective July 27, 2005.

Furthermore in November, 2005, Molina signed a letter agreement on behalf of Epic Building Restoration, Inc. and Epcore and in his individual capacity regarding the completion of

² In an affidavit, Mr. Oyen explains that, as a member of the Board of Managers, he had received from Molina a Certificate of Insurance for Epcore, indicating that the policy of insurance issued by Utica First Insurance Company was effective on July 27, 2005, several weeks prior to the incident.

the work (Exhibit F). There is no indication in this agreement specifying what particular work is done by any one company owned by Molina and the agreement was to cover work done by whatever company was doing the work with the recognition that it was Molina who was orchestrating the work and had been doing the work for the project since 2002. As part of this agreement, Molina on behalf of Epic (and Epcore) agreed to provide insurance coverage and the insurance coverage which was in effect at that time was the coverage with Epcore as indicated by their insurance certificate. Yet, Molina, even when shown insurance certificates at his deposition, could not recall details of the insurance nor recognize the names of the brokers other than the fact that the name appeared on the certificate.

The Oyens also oppose the motion arguing that Epcore, which submitted only an attorney affirmation and an unsigned deposition transcript, failed to meet its burden on the motion. Further, there are issues of material fact that Epcore was the corporate entity for which Molina was performing the work at the time of the loss alleged in the complaint. The statements in Mr. Oyen's affidavit are supported by documentary evidence, such as the insurance binder and other records showing that Epcore was responsible for the work performed by Molina that led to the water damage. Mr. Oyen explains that, before the weekend when Molina and Epcore left the roof uncovered, he "had spoken with Mr. [Molina] just prior to the weekend relating to the work that he was going to do at that time." Molina led the Condominium Board to believe that it was Molina and his various companies doing the work and not any one specific company at any one given time. Mr. Oyen explains that based upon his own observations, the findings of the architect, and the conversations he had with Molina, Molina and Epcore, began work at the premises in or about the latter part of July, 2005, as per the Certificate of Insurance. Molina

offers not a single document to refute the fact that Epcore was the entity for which work was being performed when Mr. Molina, acting on behalf of Epcore, left the roof uncovered leading to the water damage at the property. Epcore's motion must be denied.

In reply, Epcore argues that parties are also not in possession of any records placing Epcore at the subject location prior to the date of loss. Any work records or documents between Epcore and the other parties should also be in possession of the parties. Epcore's inability to produce these records should not preclude the parties from producing their own records showing that Epcore was present at the site prior to the date of loss.

It is undisputed that the parties did not become aware of the existence of Epcore until after the August 14, 2005 incident. The parties have failed to produce any contract or work records placing Epcore at the subject project on or before August 14, 2005. And, the undisputed testimony of Molina establishes that Epcore did not perform any roof work at the location prior to the date of loss. Further, Caminiti's testimony is insufficient to impute any liability to Epcore. Caminiti testified that he was unable to identify which of Molina's companies was performing the roof work.

Allstate's contention that the Board of Directors and Caminiti were never informed of the existence of Epcore until sometime after the subject loss occurred further supports Molina's position that Epcore did not perform any roof work prior to the date of incident. Additionally, the existence of an insurance certificate is not proof that Epcore was performing roof work prior to August 14, 2005. Likewise, the fact that Epcore was in existence weeks before the incident is not proof that it performed work at the location prior to the loss. Furthermore, it should be noted that Epcore's policy of insurance with Utica First Insurance contains a roofing exclusion which

precludes coverage for work arising out of roofing operations.

The November 21, 2005 letter shows that the two entities mentioned therein were separate and distinct and were performing work at the location at the same time. Although there is no indication in the letter specifying what work was done by what company, one may infer that all the roofing work was performed by Epic Restoration Inc., not Epcore, since Epcore was precluded by its insurance agreement from performing roofing work. Again, it should be noted that the letter references work that was to be performed after the date of incident.

As Allstate failed to put forth any evidence of Epcore's presence at the site prior to the date of loss, Epcore's motion must be granted.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 908 NYS2d 33 [1st Dept 2010]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to

summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d at 927; *Meridian Management Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 894 NYS2d 422 [1st Dept 2010]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Cabrera v Rodriguez*, 72 AD3d 553, 900 NYS2d 29 [1st Dept 2010]; *Casper v. Cushman & Wakefield*, 74 AD3d 669, 904 NYS2d 385 [1st Dept 2010]). The opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist,” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

At the outset, the Court notes that it may consider the unsigned deposition transcript of Molina. “CPLR 3116(a) allows an unsigned deposition transcript to be admitted as though it were signed, especially where . . . the transcript was certified by the court reporter as accurate (*Ramirez v Willow Ridge Country Club, Inc.*, --- NYS2d ----, 2011 WL 1675258 [1st Dept 2011] (internal citations omitted)). The transcript here is certified by the court reporter as accurate, and no party challenged the accuracy of the statements. Thus, Molina’s unsigned deposition

transcript could be considered by the Court (*see Martin v City of New York*, 82 AD3d 653, 919 NYS2d 330 [1st Dept 2011]; *White Knight Ltd. v Shea*, 10 AD3d 567, 782 NYS2d 76 [1st Dept 2004]). Further, Allstate fails to cite any caselaw indicating that testimony in a deposition transcript must be supported by documentary evidence in order for such testimony to be admissible for consideration by a court determining summary judgment. The issue in this motion, as presented by the movant, Epcore, is whether Epcore established as a matter of law, solely through the testimony of Molina, that Epcore is free from negligence.

Epcore established that it played no role in the alleged water damage at the property which occurred at or about August 14, 2005.

Molina testified that at the time Epcore was formed, his intent was for Epcore to specialize in “masonry.” (P. 74). Epic Restoration and Renovation “did waterproof work” (p. 58), that the actual roof work was done prior to August 2005 (p. 59), that Epic Restoration and Renovation “removed the parapet walls and were replacing them” (p. 73), and that when Epcore began working at the site “at that point, we were down to just masonry” (p. 58). Epcore performed the parapet masonry (p. 73) after Epic Restoration and Renovation completed the parapet walls, “a couple of months prior to August” 2005 (p. 72-73). Further, Epcore began working at the project “after the August incident” (p. 146).

Epcore also established that there are no documents indicating that Epcore performed work on the roof for the period in question. Molina performed a search for photographs, proposals, contracts, W2 statements prepared by his companies from 2000, insurance policies for his companies during the time period of 2002 through 2006, federal income tax returns for the relevant three companies from 2002 through 2006, employee records relating to any of Molina's

companies regarding employees who worked on the subject property during the years 2002 through 2006, correspondence between Molina and Molina's companies and any other entity working for the subject project, invoices and proof of payment of work performed by Molina and his companies regarding the subject projects, files for the work done on the subject property, and were unable to obtain any such documents. Molina attests that the records were unrecoverable because (1) those records maintained on his home computer were destroyed due to a crash of his hard-drive and (2) those records that were maintained in his vehicle (because he maintained all of the hard copies of records in his vehicle as he would commute daily from Pennsylvania to New York City) were all destroyed as a result of a car fire. Thus, Molina has no documents concerning the work he performed at the property.

Therefore, Epcore established its burden of showing that it was not negligent in causing the property damages at issue.

Allstate and the Oyens failed to raised an issue of fact as to Epcore's role at the subject property.

None of the deposition testimony cited by these opponents to the motion indicate that *Epcore* was the entity which performed the roof work or improper installation of the base flashing, which allegedly caused the water to leak. That "Molina" performed work on the weekend of the incident at issue does not establish that Epcore was the entity through which Molina performed such work.

Further, the Certificate of Insurance indicating that Epcore performed work at the site is likewise insufficient. The Certificate of Insurance merely shows the possibility that Epcore performed work at the site during the period in question, but does not indicate that the work

Epcore performed was related to any roof work or installation of base flashing that allegedly caused the leak. Moreover, the portion of the insurance policy submitted by Epcore in reply contains an exclusion of coverage for damages "arising out of any Roofing Operations, which involve any replacement roof or recovering of existing roof." Such exclusion supports Molina's testimony that Epcore's work was limited to masonry work at the project.

Likewise, the New York State Division of Corporations document merely shows that Epcore was in existence prior to the date of the incident, which is insufficient to raise any issue of fact on this motion.

Finally, the Letter Agreement signed by Molina on behalf of Epcore establishing the timeline for completing work is dated November 21, 2005, several months after the alleged incident.

Therefore, as the opponents have failed to raise an issue of fact sufficient to defeat Epcore's motion, Epcore's motion for summary judgment is warranted.

Conclusion

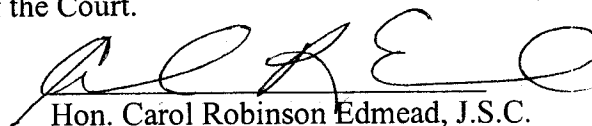
Based on the foregoing, it is hereby

ORDERED that the motion by Epcore Building, LLC pursuant to CPLR 3212 to dismiss the complaints and all cross-claims against it is granted. And it is further

ORDERED that the complaints and all cross claims in the consolidated actions noted herein are severed and dismissed as against Epcore Building, LLC. The Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: May 12, 2011



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD