

Allstate Ins. Co. v 8 W. 65th St. Condominium Corp.
2012 NY Slip Op 33201(U)
June 26, 2012
Sup Ct, NY County
Docket Number: 108876/07
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMOND Justice

PART 35

Index Number : 108876/2007
ALLSTATE INSURANCE
vs.
8W. 65TH ST. CONDOMINIUM
SEQUENCE NUMBER : 007
RENEWAL

INDEX NO.
MOTION DATE 6.5.12
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

Motion sequence 007 is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that defendants 8 West 65th Street Condominium Corp. and Board of Managers of the 8 West 65th Street Condominium motion to renew is denied. And it is further

ORDERED that counsel for the moving defendants shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

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

Dated: 6.26.2012

[Signature] J.S.C.
HON. CAROL EDMOND

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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,

-against-

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

Defendants.

-----X

GREGORY S. OYEN and JULIE OYEN,

Plaintiffs,

-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,

-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

Index №.: 108876/07
Motion Seq. No. 007
DECISION AND ORDER

Index №.: 104883/07

Index №.: 604023/07

-----X
BEVERLY SKAAR,

Index №.: 150069/08

Plaintiff,

-against-

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

Defendants.

-----X
CAROL R. EDMEAD, J.S.C.:

In a set of consolidated cases arising from an incursion of water into individual units of a condominium, defendants 8 West 65th Street Condominium Corp. (the Condo) and Board of Managers of the 8 West 65th Street Condominium (the Board) (together, the Condo) move jointly, pursuant to CPLR 2221, to renew their motion for summary judgment, decided by this court in its order and decision dated June 23, 2011 (the June 2011 Order).

BACKGROUND

Plaintiff Allstate Insurance Company A/S/O Gregory and Julie Oyen (Allstate) asserted two causes action: the first, which relates to the construction work that allegedly caused the water incursion, claims that defendants were negligent "in the construction, renovation and repair of the premises," while the second alleges that defendants are liable for further damage, such as the development of mold in the subject apartment, for failing to promptly "clean, deodorize, remove, and remediate the

water and other elements from the subject apartment." Among other things, the June 2011 Order granted the Condo's motion for summary judgment as to dismissal of plaintiff Allstate's first cause of action, but denied, without prejudice, the Condo's application for summary judgment as to Allstate's second cause of action as against it (June 2011 Order, at 12-15). The basis of the denial was the Condo's failure to address Allstate's second cause of action until its reply to Allstate's opposition (*id.* at 14-15).

Now the Condo seeks, upon the requested renewal, a modification to the June 2011 Order dismissing Allstate's second cause of action as against it. The Condo argues that it was "technically justified" in not addressing Allstate's second cause of action, since both claims arose from the same event, the water incursion. Additionally, the Condo offers evidence to show that it did take prompt action to remediate water damage in the subject apartment. Specifically, the Condo submits deposition testimony from Gregory Oyen and defendant Benny Molina; however, it does not suggest that this testimony was unknown to it at the time it made the underlying motion.

The June 2011 Order also dismissed Gregory and Julie Oyen's (the Oyens) second cause of action, which alleged that defendants breached their duty to maintain and repair the common areas (June 2011 Order, at 15-16). Now, the Condo seeks dismissal of the

Oyens' third cause of action, which alleges that defendants are liable for negligently failing to ensure that the common areas were in a condition to prevent the incursion. The Condo does not offer any new evidence, but instead argues that the court's reasoning in rejecting the second cause of action, that the water incursion did not result from the negligence of the Condo, necessarily requires the dismissal of the third cause of action.

As to plaintiff Boris Komarov (Komarov), the June 2011 Order granted the Condo's motion to amend its answer, to add the defense of release, but denied the Condo dismissal of Komarov's complaint pursuant to CPLR 3211. Here, the Condo argues that the court should modify its ruling in order to vacate Komarov's note of issue and direct further discovery. Again, the Condo does not offer any new evidence, or any change in the law, but instead argues that vacatur is appropriate, as the affidavit Komarov submitted in opposition to the underlying motion asserted new claims relating to leaks occurring after November 2005.

DISCUSSION

CPLR 2221 (e) (2) provides that a motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." In order to qualify as "new facts," such material may be either truly new, or facts that were "in

existence at the time of the original motion that were unknown to [the moving party] and therefore not brought to the court's attention" (*Farahmand v Dalhousie Univ.*, __AD3d__, 2012 NY Slip Op 05079, *2, [1st Dept 2012] [internal quotation marks omitted]).

Here, the Condo does not offer any new facts or law that were unknown to it at the time of the underlying motion. Although the Condo notes that courts have discretion, in the interest of justice, to circumvent the requirements of a motion to renew under CPLR 2221, the facts of this case do not urge a contortion of the rules (*compare Daniels v City of New York*, 291 AD2d 260, 260 [1st Dept 2002] [granting motion to renew where deposition testimony was not "technically" newly discovered evidence, but the underlying order limited discovery to a one-year period, which "unduly restrict[ed] plaintiff's right to [] discovery"]). Consequently, the application for renewal must be denied.


CONCLUSION

Based on the foregoing, it is

ORDERED that defendants 8 West 65th Street Condominium Corp. and Board of Managers of the 8 West 65th Street Condominium motion to renew is denied. And it is further

ORDERED that counsel for the moving defendants shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: June 26, 2012

ENTER:

Hon. CAROL R. EDMED, J.S.C.

HON. CAROL EDMED