Parabit Realty LLC v Town of Hempstead
2012 NY Slip Op 33815(U)
April 27, 2012
Supreme Court, New York County
Docket Number: 7250/09
Judge: Roy S. Mahon
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

PARABIT REALTY LLC and PARABIT SYSTEMS INC., as authorized agents of Town of Hempstead Industrial Development Agency,

Plaintiff(s),

- against -

TOWN OF HEMPSTEAD, TOWN OF HEMPSTEAD DEPARTMENT OF BUILDINGS, BRIAN NOCELLA as An agent of the Town of Hempstead Buildings Department MARK SCHWARTZ as an agent of the Town of Hempstead Buildings Department, HOLZMACHER, McLENDON & MURRELL, P.C., MICHAEL BONACASA, TODD GOLDFARB and B & A DEMOLITION and REMOVAL INC.,

Defendant(s).

TRIAL/IAS PART 5

INDEX NO. 7250/09

MOTION SEQUENCE NO. 7 & 8 & 9

MOTION SUBMISSION DATE: February 17, 2012

The following papers read on this motion:

Notice of Motion	XX
Notice of Cross Motion	X
Affirmation	XX
Affirmation in Opposition	XXX
Affirmation in Support	X
Reply Affirmation	XX
Memorandum of Law	XXXX

Upon the foregoing papers, the motion by the defendants Holzmacher, McLendon & Murrell, PC and Michael Bonacasa (hereinafter referred to as the Holzmacher and Bonacasa defendants) for an Order pursuant to CPLR Rule 3212, granting summary judgment in favor of Holzmacher, McLendon & Murrell, PC ("H2M") and Michael Bonacasa ("Bonacasa") dismissing the Complaint and all cross-claims against H2M and Bonacasa with prejudice; granting H2M and Bonacasa summary judgment on their cross-claim against B&A Demolition and Removal, Inc. for contractual indemnification; the motion by the defendants Town of Hempstead, Town of Hempstead Department of Buildings, Brian Nocella as an agent of the Town of Hempstead Buildings Department, Mark Schwartz as an agent of the Town of Hempstead Buildings Department (hereinafter referred to as the Town of Hempstead, Nocella and Schwartz) for an Order

pursuant to CPLR 3212 granting summary judgment to dismiss the plaintiffs' claims, contractual indemnification against B and A Demolition and Removal, Inc., and for common law indemnification on the Town defendants' cross-claim against defendants Holzmacher, McClendon & Murrell, PC and Michael Bonacasa and the motion by the plaintiffs for an Order pursuant to CPLR §3212 directing that summary judgment be entered in favor of the plaintiffs, Parabit Realty LLC and Parabit Systems, inc., and against all defendants, upon the ground that no genuine triable issues of fact exist as to the liability for damage to the plaintiffs' property or, in the alternative granting plaintiff leave to file an amended complaint and granting plaintiff leave to file a late notice of claim upon the defendant Town of Hempstead, are all determined as hereinafter provided.

The Court initially observes that the Court has conducted two hearings in this action. The initial hearing was held as to the continuation of a temporary restraining order which resulted in a decision after hearing dated July 31, 2009 which continued the temporary restraining order contained in the plaintiffs' Order to Show Cause. The second hearing was held between intermittently from January 14, 2010 to March 8, 2010 which resulted in the Court's decision after hearing dated may 4, 2010 which granted the plaintiffs' application for a preliminary injunction.

In pertinent part, the Court in its July 31,2009 decision after hearing set forth:

> "Plaintiff Parabit Realty LLC is the owner of premises known as 35 Debevoise Avenue, Roosevelt, NY and occupied by plaintiff Parabit Systems Inc., as a tenant. Plaintiffs' first witness was Mr. David Nation, vice president of Parabit Systems Inc., who testified that he arrived a work in late March 2009 to find workmen at the defendants' adjacent premises of 19 Debevoise Avenue, Roosevelt, NY. These workmen were undertaking construction and excavation work at 19 Debevoise Avenue, Roosevelt, NY and, in so doing, appeared to him to digging and chipping away underneath the foundation at the plaintiffs' premises at 35 Debevoise Avenue. Mr. Nation began videotaping the excavation and found that the plaintiffs' work men had excavated 2 to 3 feet below plaintiff's foundation in at least 2 places.
>
> After complaints were filed with the Town of Hempstead regarding alleged violations committed by the defendants' workmen, a building inspector arrived who issued a temporary stop work order along the wall bordering plaintiffs' premises. A supervising building inspector and defendant herein, Mr. Brian Nocella, arrived the next day to conduct a further inspection and lifted the stop work Order and work at 19 Debevoise Avenue continued.
>
> Approximately 1 week later, plaintiffs' contacted an engineer and an architect to consult with them about his concerns regarding the construction work at 19 Debevoise Avenue. Both the architect and the engineer inspected a wall at plaintiffs' premises at 35 Debevoise Avenue facing onto the project at 19 Debevoise Avenue. While plaintiff's building and specifically the wall facing 19 Debevoise Avenue, had pre-existing cracks, plaintiffs grew concerned over the appearance of new cracks and the expansion of older cracks in the aforementioned wall. Plaintiffs' placed a device to monitor the appearance of new wall cracks and the expansion of old cracks on the wall on April 29, 2009. According to Mr. Nation, the monitoring device confirmed that new cracks were appearing in the wall and older ones expanding, threatening the stability

of the building and its approximately 48 occupants."

The Court observes that the plans for the renovation of 19 Debevoise Avenue were done by the Holzmacher defendants and Bonacasa and that the work was being performed by the defendant B & A Demolition and Removal, Inc (hereinafter B & A).

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 6l6 NYS2d 650, 65l (Second Dept., l994):**

> "It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 85l, 853, 487 N.Y.S.2d 3l6, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 7l8). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 50l N.E.2d 572; *Zuckerman v. City of New York, supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 7l8)."

The Holzmacher defendants and Boncasa seek summary judgment in substance upon the grounds that their plans for the construction of the property at 19 DeBevoise Avenue were in accordance with appropriate professional guidelines/standards relative to construction and construction proximity to adjacent structures and that the Holzmacher defendants and Bonacasa.

A review of the respective submissions and in particular the affidavit of the defendant Michael Bonacasa and the affidavit of the defendant B & A's expert Louis Schwartz create an issue of fact as to whether the plans for the building renovation at 19 DeBevoise Avenue were in accordance with professional standards in relation to building construction and soil examination related to foundations. While the Holzmacher defendants and Bonacasa contend that said defendants are not responsible for the acts of B & A in effectuating the renovations pursuant to contract, there is an issue of the work being performed pursuant to said defendants plans and the appropriateness of said plans in relation to the configurations of the property involved. Based upon this issue of fact, that branch of the Holzmacher defendants and Bonacasa's application which seeks an Order pursuant to CPLR Rule 3212, granting summary judgment in favor of Holzmacher, McLendon & Murrell, PC ("H2M") and Michael Bonacasa ("Bonacasa") dismissing the Complaint and all cross-claims against H2M and Bonacasa with prejudice; granting H2M and Bonacasa summary judgment on their cross-claim against B&A Demolition and Removal, Inc. for contractual indemnification, is **denied**. In light of these issues of fact that portion of said defendants' application which seeks contractual indemnification is premature.

The defendant Town of Hempstead and the respective Town employees Nocella and Schwartz in substance move for an Order pursuant to CPLR §3212 as to those claims sounding in tort based upon the failure of the plaintiffs to file a Notice of Claim. The plaintiffs by the plaintiffs' application seek, amongst other things, leave to serve a late notice of claim. In examining this issue, the Court in **Pierson v City of**

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New York, 56 NY2d 950, 453 NYS2d 615 set forth:

> "The 1976 amendments to section 50-3 of the General Municipal Law permit a court to grant an application to file a late notice of claim after the commencement of the action but preclude the court from granting an extention which would exceed "the time limited for the commencement of an action by the claimant against the public corporation" (*L 1976, ch 745, §2 [now General Municipal Law, §50-e, subd 5]).* That means that the application for the extension may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled (*General Municipal Law, §50-I, subd 1; Cohen v Pearl Riv. Union Free School Dist., 51 NY2d 256, 262-263).* This result is compelled by precedent, by sound principles of statutory interpretation, and by common sense. To permit a court to grant an extension after the Statute of Limitations has run would, in practical effect, allow the court to grant an extension which exceeds the Statute of Limitations, thus rendering meaningless that portion of section 50-e which expressly prohibits the court from doing so. In our view, it was the intention of the Legislature, manifested in the amended statute, to relax the objectionably restrictive features of the old statute, but to fix the period of the Statute of Limitations as the period within any relief must be sought. With the expiration of the period of limitations comes the bar to any claim.
>
> The history of the statute does not support the dissenter's contention that the Legislature intended to permit the court to grant the application at any time. The 1976 legislative documents, on which the dissent so heavily relies, simply show that the revisions of subdivision 5 of section 50-e were meant to alter the substantive criteria upon which the court could grant the application to file a late notice of claim (*Twenty-first Ann Report of NY Judicial Conference, 1976, pp 286, 297-303, 358, 401-403, 412).* No mention was made of any intent to abandon the long-standing requirement that the application must be made within a specified and relatively short period of time, nor was it proposed that the court be permitted to grant an application to file a late notice of claim whenever made, even many years after the event. On the contrary, Professor Graziano's study expressly states that even if the liberalizing amendments were adopted "applications under subdivision 5 of section 50-e must still be made within one year after the happening of the event upon which the claim is based" *(ibid., p 412).* The final version and latest amendment simply extends that period by an additional 90 days.
>
> To the extent that the recent amendments may fail to remove the harsher aspects of the statute, in accordance with this court's suggestion in *Camarella v East Irondequoit Cent. School Bd. (34 NY2d 139, 142),* it is sufficient to note that calls for broad reform are often met by more modest revisions on the part of the Legislature.
>
> In this case the time for filing a notice without court approval had expired and no application for an extension was made prior to the expiration of the Statute of Limitations. Thus the court lacked the power to authorize late filing of the

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notice."

Pierson v City of New York, supra at 954-956

A review of the respective submissions establishes that the plaintiffs' alleged causes of action occurred against the municipal defendants on or about April 1, 2009 and as such the last date within which the plaintiffs could file a Notice of Claim was June 30, 2010. The plaintiffs did not file by that date nor seek leave to serve a late Notice of Claim except by the instant application which was brought on September 30, 2011. While the plaintiffs maintain that the defendants were on notice of the events in issue based upon the contents of the Order to Show Cause, contrary to the plaintiff's contention there is no authority to seek leave to serve a late notice of claim subsequent to the expiration of the 1 year 90 day period (*see, Pierson v City of New York supra).*

Based upon the foregoing to the extent that the defendant Town of Hempstead; the defendant Nocella and the defendant Schwartz seek an Order pursuant to CPLR 3212 granting summary judgment to dismiss the plaintiffs' claims, contractual indemnification against B and A Demolition and Removal, Inc., and for common law indemnification on the Town defendants' cross-claim against defendants Holzmacher, McClendon & Murrell, PC and Michael Bonacasa, said application is **granted** and the plaintiffs' application which seeks an Order to serve a late Notice of Claim and to amend the plaintiffs' complaint as to the defendant Town of Hempstead, the defendant Nocella and the defendant Schwartz, said applications are respectively **denied**.

Based upon the issues of fact presented in the respective submission as to the causes for the alleged damage to the plaintiffs' foundation to the extent that the plaintiffs seek an Order pursuant to CPLR §3212 as to the Holzmacher defendants, Bonacasa and B & A, said applications are **denied**. The Court observes that to the extent that the plaintiffs seek a declaratory judgment, said application is **denied** and referred to the trial judge for determination of the equitable relief after determination of the factual issues by the trier of the facts.

SO ORDERED.

DATED: 4/27/2012

Roy S. Mahon J.S.C.

ENTERED
MAY 02 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE