

Hanover Ins. Co. v Dugan

2013 NY Slip Op 30624(U)

March 28, 2013

Sup Ct, New York County

Docket Number: 104158/2010

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Judge

PART 15

Index Number : 104158/2010
HANOVER INS. CO.
vs
DUNGAN, TIM
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
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) 1 2 3

Answering Affidavits — Exhibits _____ | No(s) 4 5

Replying Affidavits _____ | No(s) 6 7


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

FILED
APR 02 2013
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 3/28/13


_____, J.S.C.

HON. EILEEN A. RAKOWER

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 — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 15

HANOVER INSURANCE COMPANY
A/S/O SOHO GEMS,
Plaintiff,

INDEX NO. 104158/2010

MOTION DATE _____

- v -

MOTION SEQ. NO. _____

TIM DUNGAN, CONTRAST COMMUNICATIONS,
INC., AND CONTRAST MEDIA, INC.,

MOTION CAL. NO. _____

Defendants.

TIM DUNGAN, CONTRAST COMMUNICATIONS,
INC., AND CONTRAST MEDIA, INC.,

Third-Party Index No.
590818/2011

Third-Party Plaintiff,

-v-

FOOD CENTER REALTY CORP.,

Third-Party Defendants.

FILED
APR 09 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answer — Affidavits — Exhibits _____	4, 5
Replying Affidavits _____	6, 7

Hanover Insurance Company (“Hanover Insurance”), as a subrogee of Soho Gems, seeks recovery in subrogation for amounts it paid to its insured upon a claim for property damage which occurred on September 25, 2009, at its premises at 367 West Broadway, New York, NY. Defendant Food Center Realty Corp. (“FCRC”) now moves for summary judgment pursuant to CPLR §3212.

Soho Gems conducts business at 367 West Broadway, New York, NY, and is insured by Hanover Insurance. 500 Broome Street adjoins the property located

at 367 West Broadway, New York. FCRC is the owner and lessor of 500 Broome Street. On March 5, 1988, FCRC leased the entire building, except for the second floor, to 500 Broome Street Associates. On December 25, 2003, FCRC leased the second floor of 500 Broome Street to Contrast Communications, Inc. ("Contrast Communications"). Tim Dugan ("Dugan"), is the principal and sole shareholder of Contrast Communications.

On September 25, 2009, a boiler located in the Contrast Communications leasehold at 500 Broome Street, burst, resulting in a water leak. As a result of the water leak, Soho Gems suffered damage to its property. Soho Gems submitted a claim to Hanover Insurance. Hanover Insurance made payments to Soho Gems. Hanover now seeks to recover money that it paid to Soho Gems as a result of the water damage.

Hanover Insurance's complaint alleges that Dugan, Contrast Communications, and Contrast Media (collectively, "Defendants") failed to take appropriate steps to protect the property from water damages, and that the leak was caused by or contributed to by reasons of Defendants' negligence. Hanover Insurance demands \$105,740.06 in damages from Defendants.

Defendants commenced a third-party action against FCRC on September 30, 2011. In the third-party complaint, they allege that FCRC, who leased the premises to Contrast Communications, was responsible for the upkeep and maintenance of the premises located at 500 Broome Street, including the building water heater located within Contrast Communication's premises. They allege that if Hanover Insurance recovers judgment against Defendants, then all three parties are entitled to recover from FCRC in the amount of such judgment.

FCRC now moves for summary judgment and to dismiss the third party complaint against it. Dugan opposes this motion. Hanover Insurance takes no position.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual

issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

An out of possession landlord is one who “has surrendered possession and control over premises leased to a tenant.” (*Mehl v. Fleisher*, 234 AD3d 274, 650 NYS2d 784 [2nd Dept 1996]). An out of possession landlord is generally not liable in negligence with respect to the condition of the demised property. (*Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559 [1987]). However, there are two exceptions to this general rule: where the landlord “(1) is contractually obligated to make repairs or maintain the premises; or (2) has contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provisions.” (*Vasquez v. The Rector*, 40 AD3d 265 [1st Dept 2007]); *see also, Lane v. Fisher Park Lane Co.*, 276 AD3d 136 [1st Dept 2000]).

“Absent statutory duties, a landlord's reservation of the right to enter the leased premises to make repairs or correct improper conditions does not impose liability for a subsequently arising dangerous condition.” *Brooks v. DuPont Associates*, 164 A.D. 2d 847, 848 [1st Dept 1990]).

In support of its motion, FCRC provides: the pleadings, the bill of particulars, a preliminary conference Order dated January 31, 2012, a compliance conference Order, dated June 5, 2012, the Lease between Dama Inc. and 500 Broome Associates dated July 15, 1998 (the “Soho Gem Lease”), the Affidavit of Adrienne Schere the President of FCRC, the Lease between FCRC and 500 Broome Associates dated March 5, 1988 for the entire building except the second floor, and the Lease between FCRC and Contrast Communications dated December 25, 2003, for the second floor of the building.

The lease between FCRC and Contrast Communications states in Article 4. Repairs:

Tenants shall, through the terms of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expenses, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty, excepted.

It further provides in Article 13, Access to Premises:

Owner or Owner's agents shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the premises, following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under the lease, or for the purpose of complying with the laws, regulations and other directions of governmental authorities.

A rider to the lease provides:

In no event shall Landlord be required to furnish, heat, air conditioning, ventilation or any other services except as provided herein. Tenant will maintain day-to-day operations of the demised premises including, but not limited to HVAC, plumbing and electricity including repair and if necessary replacements, **provided, however, landlord will make any "capital repairs" thereto.** A capital repair shall be one or more related repairs and/or replacements incurred at the same time costing in excess of \$350.00.

(emphasis added).

In its motion for summary judgment, FCRC disclaims liability on the basis that

it is an out-of-possession landlord. In opposition, Dugan provides his own affidavit, and asserts that the pursuant to the terms of the Lease, FCRC was responsible for any capital repair, including repair to the boiler or water heater that is the subject of this case.

Here, given the terms of the Lease and FCRC's contractual obligation to make "capital repairs," FCRC has not established that it was out-of-possession landlord who "has surrendered possession and control over premises leased to a tenant" (*Mehl v. Fleisher*, 234 AD3d 274, 650 NYS2d 784 [2nd Dept 1996]) and thus not liable for negligence in this case as a matter of law. FCRC's motion is therefore denied.

Wherefore, it is hereby,

ORDERED that defendant Food Center Realty Corp.'s motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 3/28/13


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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