

Harmony Trio LLC v 327 Bowery, Inc.

2013 NY Slip Op 31001(U)

May 6, 2013

Supreme Court, New York County

Docket Number: 114820/2008

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: 5/9/13 Justice

PART _____

Index Number : 114820/2008
HARMONY TRIO LLC
vs.
327 BOWERY
SEQUENCE NUMBER : 005
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). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

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

is decided in accordance with the annexed decision.

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

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MAY 08 2013
Clerk of the Court
NEW YORK COUNTY SUPREME COURT CIVIL

FILED
MAY 09 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/6/13

CR, J.S.C.

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 55

-----X
HARMONY TRIO LLC,

Plaintiff,

Index No. 114820/2008

-against-

DECISION/ORDER

327 BOWERY, INC., 327B EOAG LLC and THE
CONSOLIDATED EDISON COMPANY OF
NEW YORK INC.,

Defendants.

FILED

MAY 09 2013

-----X
HON. CYNTHIA S. KERN, J.S.C.

COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	_____
Answering Affidavits to Cross-Motion.....	_____
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action to recover damages stemming from repair work on the sewer pipe connected to its building located at 329 Bowery in Manhattan. Defendants 327 Bowery, Inc. ("327 Bowery") and 327B EOAG LLC ("EOAG") have now moved by separate motions for an order pursuant to CPLR § 3212 dismissing all of plaintiff's claims against them and dismissing defendant Consolidated Edison Company of New York Inc.'s ("ConEd") cross-claims. The motions are hereby consolidated for disposition purposes and for the reasons set forth below, 327 Bowery's motion is denied in its entirety and EOAG's is granted in part.

The relevant facts are as follows. Plaintiff Harmony Trio, LLC is a New York

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corporation that owns the real property and building located at 329 Bowery, New York, New York ("329"). Until September 2008, defendant 327 Bowery was the owner of the adjacent building located at 327 Bowery ("327"). On or about September 17, 2008, 327 Bowery sold the property to its current owner, defendant EOAG.

From the inception of the buildings, allegedly sometime around 1940, until sometime in 2011, 329 and 327 shared a sewer line that transferred waste from each property to the NYC sewer system. The shared sewer line between the two buildings was allegedly connected in the 329 property and was brought out to the NYC sewer system from that location. EOAG has since created a direct connection from 327 to the NYC sewer system.

According to plaintiff's amended complaint, "in or about April 2008 the sewer line or pipe servicing [329] and the [327] Property was blocked, causing the sewer line or pipe to back up and flood the cellar of Plaintiff's Building at 329." Thereafter, plaintiff hired Liberty Water and Sewer LLC ("Liberty Water") to determine the cause of the blockage and repair or replace the sewer line or pipe. It is undisputed that sometime around May 2008, Liberty Water relayed a new sewer line at plaintiff's expense. Prior to commencing this action, plaintiff allegedly tried to seek contribution for the repair work from 327 Bowery but was unsuccessful.

According to the unverified letter attached to the present motions, which was produced during discovery in this action, an employee from Liberty Water and Sewer wrote to plaintiff on May 6, 2008 stating that : "upon excavation it was discovered the existing sewer line was crushed. Electrical lines installed above the sewer line encased in concrete had settled and crushed the existing sewer pipe" (the "Liberty Water Letter"). After this letter was produced in discovery, ConEd was also joined as a defendant in this action.

In its amended complaint, plaintiff asserts four claims against 327 Bowery and EOAG: (1) a claim for contribution by which plaintiff seeks reimbursement for the costs of the repair work on the sewer pipe; (2) a trespass claim stemming from 327 Bowery and EOAG's alleged continued use of the newly repaired sewer pipe; (3) a claim based upon plaintiff's alleged detrimental reliance that 327 Bowery and EOAG were going to install their own sewer pipe for 327 by which plaintiff seeks reimbursement for the costs of the repair work on the sewer pipe "as well as the costs referable to their continued use of the repaired sewer pipe"; and (4) a claim sounding in *quantum meruit* seeking reimbursement for the costs of the repair of the sewer pipe. Plaintiff also seeks a declaratory judgment enjoining EOAG from the continued use of the repaired sewer pipe and/or ordering EOAG to sever its connection and install a separate sewer line. Upon being joined as a defendant, ConEd also asserted a cross-claim for indemnification against 327 Bowery and EOAG. 327 Bowery now moves for summary judgment dismissing all claims against it on the ground that the evidence uncovered during discovery, specifically the Liberty Water Letter and plaintiff's principal Victor Yau's subsequent statement during his deposition that ConEd caused the sewer pipe to be crushed, clearly establish that ConEd, not 327 Bowery, is responsible for causing the damage to the sewer pipe. Additionally, 327 Bowery argues that any claim asserted against it seeking damages for the use of the pipe after it was repaired in 2008 must be dismissed as they sold the building on September 17, 2008. EOAG also moves for summary judgment dismissing all claims against it on the ground that it was not the owner of 327 when the sewer pipe allegedly became blocked or crushed and required repair work. Thus, it argues, it clearly did not cause the problem nor did it have a duty to contribute to the repair costs. Additionally, EOAG argues that plaintiff cannot recover under *quantum meruit*

for 327's continued use of the repaired sewer pipe as EOAG spent over \$99,750.00 to install its own sewer line that no longer connects with 329.

“A defendant moving for summary judgment has the initial burden of coming forward with admissible evidence, such as affidavits by persons having knowledge of the facts, reciting the material facts and showing that the cause of action has no merit.” *GTF Mktg. V. Colonial Aluminum Sales*, 66 N.Y.2d 965, 967 (1985). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In the present case, as an initial matter, 327 Bowery is not entitled to summary judgment as it has failed to present admissible evidence demonstrating that plaintiff's claims and ConEd's cross-claims have no merit. 327 Bowery relies on the Liberty Water Letter to support its contention that it is clearly established that the damage to the sewer pipe was caused by ConEd and there remains no issue of fact as to its liability. However, this letter is inadmissible hearsay on the issue of ConEd or 327 Bowery's liability and cannot be considered on a motion for summary judgment. Additionally, it is immaterial that plaintiff alleges in its complaint that “[a]s a consequence of the repairs and the maintenance conducted by Con Edison on its electrical lines, the sewer line or pipe servicing both 329 Bowery and 327 Bowery was crushed” or that its principal Victor Yau also made a similar statement during his deposition. A plaintiff is allowed to assert alternative theories of liability and claiming that ConEd is responsible for crushing the sewer line does not in and of itself prove that 327 Bowery is not also liable. Additionally, plaintiff's contention that any claim seeking damages for 327's continued use of the repaired sewer pipe must be dismissed as against it as it sold the building in September 2008 is unavailing

as the sewer pipe was repaired sometime in April, approximately five months prior to when 327 Bowery sold the building. Accordingly, 327 Bowery is not entitled to summary judgment as there remain material issues of fact as to who is responsible for the initial damage to the sewer pipe and whether plaintiff is able to recover damages from 327 Bowery for its continued use of the repaired sewer pipe prior to selling the building.

Similarly, EOAG has failed to demonstrate that plaintiff's claims sounding in trespass and seeking damages relating to EOAG's continued use of the repaired sewer pipe have no merit. While EOAG argues that it clearly did not receive any benefit from the repaired pipe as it immediately undertook to have its own sewer pipe or line installed at its own cost and expense once it took title to 327, such contention is unavailing as the separate pipe was not actually installed until approximately three years after the sewer pipe was repaired. Thus, as 327 was still using the connected sewer pipe during this time, a material issue of fact exists as to whether EOAG was unjustly enriched because of plaintiff's repair of the shared sewer pipe and whether plaintiff should be compensated for such benefit, if any. EOAG's argument relating directly to the claim of trespass in its reply papers will not be considered by this court as a movant must make its *prima facie* in its moving papers, not reply. See *Dannasch v. Bifulco*, 184 A.D.2d 415 (1st Dept 1992) (It is well established that "[t]he function of reply papers is to address argument made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion."). Additionally, EOAG's contention that plaintiff had a duty to mitigate its damages by submitting a claim to its insurance company is irrelevant for this summary judgment motion.

However, EOAG is entitled to partial summary judgment dismissing the third cause of

