Kwong v Southeast Grand St. Guild Hous. Dev. Fund Co. Inc.
2014 NY Slip Op 30884(U)
April 3, 2014
Sup Ct, New York County
Docket Number: 111429/08
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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JOE SHENG KWONG individually and as Administrator of the goods, chattels and credits of YUET SIM KWONG, decedent and for the benefit of the distributees, CANARIDA GONZALEZ, ELIDA GONZALEZ, DOLORES GUZMAN, and LUIS PENA,

Plaintiffs,

-against-

SOUTHEAST GRAND STREET GUILD HOUSING DEVELOPMENT FUND COMPANY INC. and WAVE CREST MANAGEMENT TEAM LTD.,

Defendants.

Index No.

111429/08

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RAQUEL MARGARY,

Plaintiff,

-against-

SOUTHEAST GRAND STREET GUILD HOUSING DEVELOPMENT FUND COMPANY INC. and WAVE CREST MANAGEMENT TEAM LTD.,

Defendants.

Index No.

150034/09

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SOUTHEAST GRAND STREET GUILD HOUSING DEVELOPMENT FUND COMPANY INC. and WAVE CREST MANAGEMENT TEAM LTD.,

Third-Party Plaintiffs,

-against-

FORTE NETWORK INC., CAMILO CORREIA and KELLY LIN,

Third-Party Defendants.

Third-Party Index No.

591093/09

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HON. ANIL C. SINGH, J. :

For convenience, the following motions will be consolidated.

Defendants/third-party plaintiffs Southeast Grand Street Guild Housing Development Fund Company Inc. (Southeast) and Wave Crest Management Team Ltd. (Wave) move for summary judgment dismissing the complaints as against them (Mot. Seq. No. 011). Third-party defendant Forte Network Inc. (Forte) moves for dismissal of the third-party complaint as against it (Mot. Seq. No. 012).

The following actions concern allegations of negligence which resulted in claims based on property damage, personal injuries and wrongful death. The site of the alleged negligence was a twenty-six story apartment building located at 460 Grand Street, New York, New York. On March 27, 2008, a fire originating in Apartment 3B resulted in smoke that spread throughout the building, seriously affecting the tenants who have brought actions against defendants, the owner and manager of the building. In the two complaints, said defendants are alleged to have been negligent in lacking a building safety plan, in failing to provide adequate warnings and instructions with respect to a prospective fire, in failing to provide proper ventilation and in failing to maintain safe doors to the stairwells. Plaintiff Raquel Margary, a tenant, is suing defendants in a separate action, alleging (1) negligence, resulting in her personal injuries, and (2) nuisance, both private and public.

Defendants Southeast and Wave have subsequently commenced a third-party action against Forte, a security company allegedly providing security personnel for defendants, and against Camilo Correia and Kelly Lin, the tenants of Apartment 3B. Defendants allege that these parties are liable on the grounds of indemnification or contribution with respect to the negligence alleged by plaintiffs in the main actions.

These defendants move for summary judgment dismissing plaintiffs' complaints and third-party counterclaims. They argue that this court should dismiss all of the common-law negligence claims because defendants maintained the building in a safe and proper condition at the time of the fire, defendants did not cause or exacerbate the spread of the smoke which resulted in plaintiffs' injuries, and that it was the actions of the New York Fire Department (Fire Department), the security guards employed by Forte, and plaintiffs that exacerbated the spread of the smoke. Specifically, plaintiffs' efforts at evacuation, such as taking the elevator and failing to take safety precautions, allegedly resulted in their injuries.

Defendants seek the dismissal of Margary's private and public nuisance claims because: defendants' actions did nothing that can be deemed a nuisance; defendants did not intend to create a nuisance; the alleged nuisance was not recurrent; and Margary suffered no special damages distinct from the general public, as required for an individual cause of action for public nuisance.

Defendants seek the dismissal of Correia and Lin's third-party counterclaims for breach of lease and breach of the implied warranty of habitability, because defendants allegedly fulfilled their obligations under the lease, and provided a safe and habitable apartment; Correia and Lin acknowledged the habitability of the apartment when they signed the lease in 2007 and never complained of any defects in writing prior to the fire; and defendants provided Correia and Lin with a substitute, rent-free apartment in the building while defendants repaired Apartment 3B after the fire.

With respect to plaintiffs' complaints, defendants contend that they are entitled to summary judgment because the evidence establishes that the subject building was in safe

condition at the time of the fire. They claim that the building is fireproof, which allegedly means that the building is built in a manner that prevents the spread of a fire to other portions of the building. Defendants assert that in a fireproof building, it is safer for occupants outside of the immediate vicinity of the fire to remain in place rather than try to evacuate through common areas which may become filled with smoke. Thus, occupants should remain in their apartments with the doors closed, sealing any door gaps with wet towels, and opening windows to the outside.

The building has two stairwells, labeled A and B (Stairwell A and Stairwell B), at either end of the building. Both stairwells allowed egress from the building via the lobby, which itself had both front and rear exits. Stairwell A also provides access to the roof. Defendants state that both stairwells were accessible on each floor through self-closing fireproof doors, clearly marked with exit signs.

Defendants claim that, prior to the March 27, 2008 fire, the building received no violations relating to fire safety. The building received a certificate of occupancy approving its stairwells and exits. The Fire Department inspected the building on August 28, 2007, seven months before the fire, and found no violations. Defendants aver that they had no notice of any defects in the building prior to the fire.

The cause of the fire was determined by members of the Fire Department. The Fire Marshals' report, although stating that the cause was "not fully ascertained," clearly referred to an electrical problem in Apartment 3B – specifically, a power strip owned by the tenants. The report ruled out the building's electrical system as a cause. Defendants argue that the report concludes that external, rather than internal damage to the electrical outlet indicates that the fire

began in an external cord installed by the tenants, not in the building's internal electrical system. Defendants also argue that the fire was unrelated to water leaks in the building.

According to the deposition testimony of some of the firefighters who responded to the fire, the fire was contained within Apartment 3B. However, the smoke was not contained and spread from that apartment to the hallway and then the stairwells. According to defendants, the spread of the smoke was unavoidable. They claim that the doors to the stairwells were closed prior to the arrival of the firefighters. Defendants state that it is standard Fire Department procedure to designate one stairwell as the attack stairwell and the other stairwell as the escape stairwell. Firefighters will use the attack stairwell for their firefighting activities, and reserve the escape stairwell for evacuating occupants if necessary.

Defendants contend that it is a normal aspect of firefighting that smoke will contaminate the attack stairwell. Firefighters use wooden chocks to prop open the attack stairwell doors on the fire floor, so they can bring their fire hose to the fire, vent smoke away from the fire, and provide an escape route for themselves. Firefighters also chock stairwell doors on other floors, such as the floor below and the lobby door. Smoke would readily enter the attack stairwell from the fire door and fill the attack stairwell. In this case, Stairwell A was designated the attack stairwell based on its proximity to the fire. According to defendants, firefighters went up this stairwell, which reached the roof, but ran out of air after only reaching the 22nd floor, where they were forced to take time to rescue people that they found in the stairwell. The firefighters were able to retreat with the victims they rescued into the fresher air of an apartment on the 21st floor.

Defendants claim that prior to the fire, they gave their tenants fire safety notices, mailing them annual instructions on what to do in a fire. Defendants assert that tenants were informed

that the building was fireproof, and that in case of fire, they should remain in their apartments. Defendants provide an invoice documenting the most recent mailing of safety notices as of October 10, 2007. They also provide the deposition testimony of Ramon Pena, site manager of the building, who testified that he carried fire safety stickers with him when he performed apartment inspections, and would affix a sticker in any apartment that was missing one. Defendants also assert that signs were posted by the elevators showing the locations of stairs and warning to use stairs in case of a fire.

Defendants argue that it was plaintiffs' actions which exacerbated the smoke conditions, resulting in their injuries. Defendants state that plaintiffs' general failure to take appropriate precautions relieves defendants of liability.

With respect to plaintiff Luis Pena, who resided in Apartment 15H, and plaintiffs Elida and Canarida Gonzalez, who resided in Apartment 12C, these parties did not remain in their apartments, and attempted to evacuate by elevator. The elevator stopped on the third floor, where the fire occurred, and its door opened onto a smoke-filled hallway. Pena and Elida Gonzalez later lost consciousness, and all three were evacuated by firefighters. Plaintiff Dolores Guzman, who resided in Apartment 15H, remained in her apartment, and placed a wet towel in front of her door. She tried, but was unable to open her window. She made no attempt to break the window, despite the emergency. Firefighters eventually rescued her from her apartment, taking her to a neighboring apartment with open windows.

Plaintiff Joe Sheng Kwong resided with his wife, the decedent Yuet Sim Kwong, in Apartment 25H. On the day of the fire, the Kwongs noticed smoke emerging through gaps around their door. Instead of sealing the gaps with wet towels or opening windows, they

attempted to evacuate the apartment. The Kwongs went down Stairwell A, the attack stairwell, trying to reach the lobby. They were eventually overwhelmed by the smoke, and lost consciousness. They were rescued by the firefighters. While Joe Sheng Kwong eventually recovered in a hospital, his wife died there.

Plaintiff Raquel Margary, who resided in Apartment 25G, and who is bringing a separate suit against defendants, also evacuated her apartment with her neighbors, the Kwongs. She also lost consciousness on Stairwell A, and was evacuated by firefighters while on the 21st floor.

Defendants conclude that there is no evidence that indicates any negligence on their part as it relates to the consequences of the fire. They seek summary judgment in the absence of liability for negligence. Defendants argue that Margary has failed to make out a viable claim for nuisance.

With respect to their third-party complaint, defendants seek dismissal of the counterclaims of breach of lease and breach of the warranty of habitability brought by third-party defendants Correia and Lin, the tenants of Apartment 3B.

In opposition to this motion, plaintiffs Kwong, Canardia Gonzalez, Elida Gonzalez, Guzman and Pena argue that issues of fact exist which preclude judgment. First, they contend that before and during the fire, some of them noticed that the doors to the stairwells were open, and that the open doors caused smoke to spread throughout the building even though the flames were contained on the third floor. Plaintiffs assert that defendants' failure to maintain and ensure that the self-closing doors were functioning properly caused the smoke to proliferate and overwhelm plaintiffs, who suffered from smoke inhalation.

Plaintiffs aver that their actions in response to the spread of smoke were not as

unreasonable as depicted by defendants. In their deposition testimony, plaintiffs stated that they never received fire safety notices or instructions, that defendants failed to post fire safety plans inside their apartments until after the fire, and that the hallways and stairwells contained no fire safety instructions. Plaintiffs contend that such failure violated the New York City Fire Code. They also state that defendants never advised them to remain in their apartments during a fire.

Plaintiffs claim that defendants' alleged violations of the New York City Fire Code, as well as defendants' alleged failure to maintain the self-closing stairwell doors, were proximate causes of plaintiff's injuries.

In a separate affirmation in opposition, plaintiff Margary makes similar arguments against summary judgment with respect to negligence. She does not respond to defendants' arguments in opposition to the nuisance claim.

Third-party defendants Correia and Lin do not respond to defendants' arguments against their counterclaims.

Defendants state that, because of the lack of a response to their arguments against Margary's nuisance claim and the third-party defendants' counterclaims, the claim and counterclaims should be dismissed by this court.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." *Birnbaum v Hyman,* 43 AD3d 374, 375 (1st Dept 2007). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [internal quotation marks and citation omitted].'" *People v Grasso,* 50 AD3d 535, 545 (1st Dept 2008). "Where a defendant is the

proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law." *Flores v City of New York,* 29 AD3d 356, 358 (1st Dept 2006). "Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment." *Id.*

The court will first consider defendants' argument to grant their summary judgment motion in the absence of opposing papers from plaintiff Margary with respect to her private and public nuisance claim, and from third-party defendants' Correia and Lin with respect to their counterclaims.

Margary, in her separate suit, includes a claim of nuisance along with her negligence claim. Defendants contend that this claim should be dismissed as lacking in merit. "The elements of a common-law claim for a private nuisance are: '(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act [citation omitted].'" *Berenger v 261 W. LLC,* 93 AD3d 175, 182 (1st Dept 2012). "Nuisance is characterized by a pattern of continuity or recurrence of objectionable conduct." *Id.* Moreover, "[a] private action to abate a public nuisance exists only if it is shown that the person seeking relief suffered special injury beyond that suffered by the community at large." *See Matter of Agoglia v Benepe,* 84 AD3d 1072, 1077 (2d Dept 2011).

Because Margary has not shown a recurrent objectionable conduct on defendants' part, or that she suffered special damages, defendants have made out a sufficient defense in opposition to

the private and public nuisance claim. In the absence of any opposition from Margary, judgment dismissing the claim is granted.

As for the counterclaims based on breach of the lease and breach of the warranty of habitability, defendants have demonstrated an adequate case for dismissal, as they have shown that they provided a habitable apartment to Correia and Lin. Nor are consequential damages recoverable for breach of the warranty of habitability. *Elkman v Southgate Owners Corp.*, 233 AD2d 104 (1st Dept 1996). In the absence of any opposition from these parties, judgment dismissing these counterclaims is granted.

The remainder of the claims sound in negligence. "In order to prevail in any action premised upon negligence, it must be established that defendant owed plaintiff a duty, that a defendant, by act or omission, breached such duty, that such breach was the proximate cause of plaintiff's injuries, and that plaintiff sustained damages [citation omitted]." *Salvador v N.Y. Botanical Garden,* 71 AD3d 422, 423 (1st Dept 2010). Under New York law, "'[a] landowner has a duty to exercise reasonable care under the circumstances in maintaining its property in a safe condition,' *Kush v City of Buffalo,* 59 NY2d 26 (1983), including the duty to adopt reasonable fire-safety precautions, *see Washington v Albany Hous. Auth.*, 297 AD2d 426 (3d Dept 2002), regardless of the origin of the fire, *see Whitfeld v City of New York,* 239 AD2d 492 (2d Dept 1997), and *Taieb v Hilton Hotels Corp.*, 131 AD2d 257 (1st Dept 1987)." *In re September 11 Litig.*, 280 F Supp 2d 279, 299 (SD NY 2003).

Plaintiffs in the two main suits are seeking damages for personal injuries. One plaintiff is also suing for the wrongful death of his wife. "'To succeed in a cause of action to recover damages for wrongful death, the decedent's personal representative must establish, inter alia, that

the defendant's wrongful act, neglect or default caused the decedent's death.' " *Roth v Zelig,* 64 AD3d 558, 559 (2d Dept 2009), quoting *Eberts v Makarczuk,* 52 AD3d 772, 772-773 (2d Dept 2008).

The primary issues are the condition of the stairwell doors and the extent to which defendants adequately provided advance notice of fire precautions to plaintiffs. There appears to be no question that the cause of the fire, which occurred in Apartment 3B, was an electrical meltdown involving the tenant's power strip. The device was apparently not connected to the building's electrical system, and there was no evidence of water leakage. The matter at hand is: to what degree defendants may be liable for the spread of the smoke from the fire, which resulted in plaintiffs' damages.

Defendants contend that they did not leave the stairwell doors open prior to the fire. No agent of defendants was present during the fire. Based on the deposition testimony, the doors were opened by firefighters and some of the tenants, and this inevitably resulted in the flow of smoke. The deposition testimony of site manager Ramon Pena, and affidavits from defendants' employees, including superintendent Raul Valentine, and the Fire Marshal's report provide that the stairwell doors were properly closed.

In stark contrast, some plaintiffs assert in sworn statements that they observed multiple doors to the stairwell propped open before the fire. Plaintiffs contend that there is an issue of fact as to whether defendants allowed the doors to the stairwells to remain open prior to the fire, so as to create a dangerous condition which exacerbated the smoke danger.

The question of the probative value of plaintiffs' assertions should be left to the jury, and it is not the court's function on the motion for summary judgment to assess credibility. *MJM*

Advertising Inc. v Panasonic Industrial Co., 2 AD3d 252, 252-253 (1st Dept 2003).

Plaintiffs rely, in part, on the expert testimony of Eugene West, who states that he is an expert on fire evaluation. He contends that after examining the building after the fire, he observed several of the self-closing doors to be open. He states that the B stairwell does not contain a vent outlet at the top or a door leading to the roof. The lack of a vent or a door to the outside increased the flue effect within that stairwell, and probably resulted in a heavy and concentrated accumulation of unvented smoke at the top of its enclosure. According to West, with the absence of a vent, the smoke within the stairwell would increase in volume, the heaviest concentration occurring at the highest floors.

"[R]esolution of issues of credibility of expert witnesses and the accuracy of their testimony are matters within the province of the jury." *Frye v. Montefiore Med. Ctr.*, 70 AD3d 15, 25 (1st Dept 2009); *see also Cokeng v Ogden Cap Properties, LLC*, 104 AD3d 550 (1st Dept 2013).

In light of the conflicting statements of the parties and the issue of the expert's credibility, the Court finds that plaintiffs may proceed against defendants on a theory that defendants' negligence regarding the condition of the fire doors caused plaintiffs' injuries.

The other basis for liability involves the measures taken by defendants to inform plaintiffs of what they were to do in case of a fire. Plaintiffs contend that they were never properly informed of fire precautions, that fire notices did not appear on their doors, at least prior to the fire, and that they were unaware of how to proceed in the event of a fire. Plaintiffs attribute their ignorance to defendants' negligence. They cite sections 408.9.1 and 408.9.1.2 of the New York Administrative Code, regulations relating to the provision of fire safety guides and

notices, which defendants allegedly violated. Plaintiffs argue that, had they been properly informed by defendants, they would not have acted as they did during the fire, particularly in response to the smoke, causing them to suffer severely.

In response, defendants rely on the deposition testimony of Ramon Pena, and the tenants association president Dashia Lopez, who states that annual fire safety guides were mailed to tenants. A copy of a mailing of annual safety instructions as of 2007 is submitted by defendants. It was deemed to be Wave's responsibility to forward the mailings. Some evidence is also submitted to indicate that Kwong and Guzman had fire notices on their door, though the other plaintiffs did not have notices.

City administrative code sections requiring that the owner of a building maintain and be responsible for its safe condition do not impose liability on the owner in the absence of a breach of "some specific safety provision" of the administrative code. *See Plung v Cohen,* 250 AD2d 430, 431 (1st Dept 1998). Section 408.9.1 provides that "[t]he owner of any premises containing a Group R-2 occupancy [building containing 3 or more dwelling units] shall cause a fire safety guide to be prepared for such premises, and periodically reviewed, amended and distributed in accordance with this section and the rules." Section 408.9.1.2 provides "[t]he fire safety notice shall serve to inform building occupants, building service employees and visitors as to the evacuation and other procedures to be followed in event of fire in the building." The notice is to be "posted within each dwelling unit and such other locations as set forth in the rules" by the Fire Commissioner.

The testimony of plaintiffs indicates that there was an absence of posted signs near the elevators or stairwells. Plaintiffs state that there was an absence of posted signs inside their

apartments. They contend that there was an overall absence of information conveyed by defendants to plaintiffs with respect to proper safety procedures in the event of a fire. According to them, it was only after the fire that proper measures were claimed to be taken – i.e., the posting of safety notices.

The question as to the sufficiency of defendants' directions to plaintiffs of precautionary measures provided prior to the fire is an issue of fact, which should be determined by a trier of fact. Therefore, summary judgment will be denied on this issue.

The remainder of this decision will focus on the motion brought by third-party defendant Forte in the third-party suit. Forte is being sued by defendants for contribution, common-law indemnification, contractual indemnification and breach of contract in failing to procure insurance for the benefit of defendants/third-party plaintiffs. Forte moves for the dismissal of all claims, contending that it has no contract with defendants; that it has no obligations to plaintiffs in the main action, contractual or otherwise, relating to fire safety measures; and that none of its actions contributed to the cause or exacerbation of the fire.

In opposition, defendants dispute the lack of a contractual relationship.

The evidence provides Forte's existence as a private company specializing in security services. Forte's relationship with defendants indicates that it is an independent contractor. Defendants have not submitted a copy of a contract which might indicate Forte's specific duties and responsibilities as a security provider.

The claims brought against Forte based in contractual indemnification and breach of contract are dismissed, as defendants have failed to show that there was a written contract with the security company.

After reading the deposition testimony of Clarence Eubanks and Frank Bowles, individuals who were Forte employees at the time of the fire, and who participated in the evacuation of some tenants, the court concludes that there are questions of fact as to the extent that Forte's activities during the fire, which apparently involved the evacuation of some of the tenants from their apartments, effected the spread of smoke in the building.

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work [citations omitted]." *Naughton v City of New York,* 94 AD3d 1,10 (1st Dept 2012). Defendants clearly allege no negligence on their part in this action. However, there is a question of fact. There is also an issue as to the extent to which Forte's actions, involving the evacuation of tenants, constituted a breach of security measures, as whether such activity, including the steps taken to notify the fire department after the fire broke out, contributed to the exacerbation of the smoke and conditions in the building. Therefore, Forte's motion to dismiss the counterclaim for common-law indemnification must also be denied.

Accordingly, it is

ORDERED that defendants/third-party plaintiffs Southeast Grand Street Guild Housing Development Fund Company Inc. and Wave Crest Management Team Ltd.'s motion for summary judgment is granted to the extent that the nuisance claim in plaintiff Raquel Margary's action, Index No. 150034/09, is dismissed, and the counterclaims brought by third-party defendants Camilo Correia and Kelly Lin in the third-party action, Third-Party Index No. 591093/09 are dismissed; and it is further

ORDERED that the action shall continue as to the remainder of the aforesaid action and third-party action; and it is further

ORDERED that third-party defendant Forte Network Inc.'s motion to dismiss the claims against it in the third-party action is granted to the extent that the claims for contractual indemnification and breach of contract are dismissed; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 320, 80 Centre Street, on May 28, 2014, at 9:30 AM.

Dated: 4/3/14

ENTER:

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE