

Donoghue v David A. Webb, Inc.

2014 NY Slip Op 31010(U)

April 10, 2014

Supreme Court, Suffolk County

Docket Number: 20793/2008

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Dennis Donoghue and Marian Donoghue,

Plaintiffs,

Motion Sequence No.: 006; MD
Motion Date: 7/23/13
Submitted: 10/16/13

-against-

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David A. Webb, Inc., JL Masonry, Lowell
Electrical, Lowell Mechanical, Inc. and Michael
Scanlon Chimney & Fireplace Services, Inc.,

Defendant.

Attorney for Plaintiff:

Michael G. Walsh, Esq.
860 Montauk Highway, Unit 4
Water Mill, NY 11976

David A. Webb, Inc.,

Third-Party Plaintiff,

Attorney for Defendant/Third-Party
Plaintiff David A. Webb, Inc.:

- against-

Milber Makris Plousadis & Seiden LLP
1000 Woodbury Road, Suite 402
Woodbury, NY 11797

Sandra Reese Hoyer, Executrix
of the Estate of William J. Reese,

Third-Party Defendant.

Attorney for Defendant
Lowell Electrical:

Attorney for Defendant Michael
Scanlon Chimney & Fireplace Services, Inc. :

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& Farquharson, PC
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Clerk of the Court

Upon the following papers numbered 1 to 45 read upon this motion for summary judgment:
Notice of Motion and supporting papers, 1 - 25; Answering Affidavits and supporting papers, 26 -
33; 34 - 40; Replying Affidavits and supporting papers, 41 - 45; it is

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ORDERED that the motion by the defendant Michael Scanlon Chimney & Fireplace Services, Inc. seeking summary judgment dismissing the claims against it is denied.

The plaintiffs Dennis Donoghue and Marian Donoghue commenced this action against the defendants David A. Webb, Inc., JL Masonry, Lowell Electrical, Lowell Mechanical, Inc., and Michael Scanlon Chimney & Fireplace Services, Inc. to recover for alleged property damage in connection with the negligent construction of two masonry fireplaces for a new residence located in the Town of Southampton. The subject premises is owned by the plaintiffs, who entered into a written contract with the defendant Michael Scanlon Chimney & Fireplace Inc. ("Scanlon Chimney") to install chimney caps and dampers, and to waterproof the chimneys located at the aforementioned location. The plaintiffs allege that Scanlon Chimney negligently performed the installation of the chimney caps and dampers on their chimney, which contributed to a smoking condition that they experienced with such fireplaces. The plaintiffs further allege that Scanlon Chimney breached the contractual warranty guaranteeing that the job would be completed in a workmanlike, skillful and professional manner. Thereafter, David A. Webb, Inc. commenced a third-party action against William J. Reese. Subsequently, Sandra Reese Hoyer was appointed executrix of the Estate of William J. Reese, and, by order of this Court dated January 8, 2013, she was substituted as the third-party defendant and the caption was amended to reflect such substitution.

In 2003, the plaintiffs retained William J. Reese, an architect, to design a new four-bedroom residence for real property known as 6 Ezekills Hollow, North Haven. After receiving approval for the home's design plans by North Haven Point Association, the plaintiffs, on January 22, 2004, entered into a contract with the defendant David A. Webb, Inc. (hereinafter Webb), which was signed by Dean Webb, for the construction of their new home. Thereafter, Webb, as the general contractor, entered into contracts with several subcontractors for the construction of the plaintiffs' home, including the defendant Lowell Mechanical, which performed the heating and air conditioning work, and the defendant JL Masonry, which built the two chimneys and the three fireplaces for the residence. Following the construction of their home, the plaintiffs allegedly experienced smoking problems with the fireplaces in the living room and great room, and a gaseous smell allegedly was emitted from the fireplace in their master bedroom whenever the fireplaces were used. As a result, on March 27, 2006, the plaintiffs entered into a contract with Scanlon Chimney for the installation of two stainless steel chimney caps and two seal-tight chimney dampers. The contract also called for Scanlon Chimney to waterproof the two chimneys. Following the completion of the work by Scanlon Chimney, the plaintiffs allegedly continued to experience the smoking conditions and the gaseous smell whenever they used the fireplaces.

Scanlon Chimney now moves for summary judgment in its favor on the basis that the work that it performed did not create or contribute to the smoking condition that plaintiffs allegedly experienced in their home, because such condition was in existence prior to it performing any work in the home. The plaintiffs oppose the motion on the ground that there are material triable issues of fact as to whether the chimney caps and dampers contributed to the smoking problems that they were experiencing with the chimneys and fireplaces. Webb also opposes the motion, arguing Scanlon Chimney failed to submit evidence in admissible form to establish a prima case that it did not cause

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or contribute to the defective condition in existence on the plaintiffs' premises, and that there are genuine issues of material fact as to whether the work performed by Scanlon Chimney caused or contributed to the plaintiffs' alleged damages.

It is axiomatic that on a motion for summary judgment the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). The court's task on a motion for summary judgment is issue finding rather than issue determination (*see Sillman v Twentieth Century Fox Film Corp., supra*), and it must view the evidence in the light most favorable to the party opposing the motion (*see Boyce v Vazquez*, 249 AD2d 724, 671 NYS2d 815 [3d Dept 1998]). Thus, to obtain summary judgment, the moving party must establish his or her claim or defense by tendering sufficient evidentiary proof, in admissible form, to warrant the court to direct judgment in the movant's favor (*see Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such showing has been made, the burden shifts to the nonmoving party to demonstrate the existence of material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

To establish a prima facie case of negligence, a plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury (*see Tutrani v County of Suffolk*, 10 NY3d 906, 861 NYS2d 610 [2008]; *Derdiarian v Felix Contractor Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]). A plaintiff need not demonstrate, however, that the precise manner in which the accident happened, or the extent of the injuries, was foreseeable (*see Nathan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]).

Marian Donoghue testified at an examination before trial that she and her husband, Dennis Donoghue, purchased land in North Haven, New York in 1995 or 1996, that William Reese was selected as the architect to design the home in 2003, and that they contracted with Webb to construct their home in 2004 based upon Reese's design. She testified that she and her husband had no input into which subcontractors would work on their home's construction, and that all of the subcontractors were chosen by Dean Webb. She testified that she and her husband moved into the home around August 11, 2005, and that they first began experiencing problems with the fireplaces in October 2005. Marian Donoghue testified that smoke would come into the house from the fireplaces in the living room and great room, and that their master bedroom would smell like gas. She testified that her husband immediately placed a phone call to Dean Webb to notify him of the smoking problem with the fireplaces, and that they sent him an email about the problems with the fireplaces on November 6, 2005. She testified that there also was a howling wind sound coming from the fireplaces, and that a letter was sent to Dean Webb informing him of this problem on July 11, 2006. She further testified that whenever a fireplace was lit, they had to open doors and windows

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to ventilate smoke from the fireplace that would come into the house, and that, eventually, they stopped using the fireplaces because of the smoking condition.

Dennis Donoghue testified at an examination before trial that his home has three fireplaces, one in the living room, one in the great room, and one in the master bedroom, and that the fireplaces in the living room and great room burn wood and the fireplace in the master bedroom burns gas. He testified that there only are two chimneys for the three fireplaces, because the fireplace in the master bedroom is situated directly over the fireplace in the great room, and that there are two flues inside the chimney for such fireplaces. He testified that all three fireplaces, which were built by JL Masonry, smoked from the very beginning, and that, when notified about the problem, Dean Webb told him to "play with the fireplaces, try different things, such as opening a window in a different room of the house, use different types of wood." Dennis Donoghue testified that, in an attempt to discover the reason the fireplaces were emitting smoke into the home when used, he looked inside the fireboxes of each fireplace and saw that there were 1½-inch gaps across the front of the fireboxes, and that the wood framing and insulation in the chimneys were exposed. He testified that he immediately reported his discovery to Dean Webb, who sent workers to the home to fill the gaps in the fireboxes with mortar, but that the smoking problems persisted. Dennis Donoghue testified that there also was a howling sound coming from the fireplaces and that, after being notified of the problem, Dean Webb recommended he have caps and dampers installed in the chimneys. He testified that he contracted with Scanlon Chimney to install caps on the chimneys, to install dampers on top of the chimneys, as opposed to inside of the chimneys, and to waterproof the chimneys. Dennis Donoghue testified the installation of the dampers and chimney caps did not stop either the smoking problem or the howling wind sounds.

Michael Scanlon testified at an examination before trial on behalf of the defendant Scanlon Chimney. He testified that he and his wife are the owners of Scanlon Chimney, that he has been in this line of business for approximately 15 years, and that he builds prefabricated fireplaces, but not masonry chimneys. He testified that he was contacted by the plaintiffs regarding the installation of caps and dampers on the chimneys at their home, because they were experiencing smoking conditions whenever the fireplaces were used. He testified that he did not personally observe the smoking problem with the fireplaces, but that Dennis Donoghue informed him of the problem and of the fact that remedial work previously had been performed on the chimneys. Michael Scanlon testified that after an inspection of the fireplaces and chimneys, wherein he either observed staining on the outside of the chimney or wetness on the inside of the fireplace, he entered into a contract on March 27, 2006 to install two stainless steel chimney caps and two seal-tight chimney dampers, and to waterproof the two chimneys. He testified that he determined the size of the chimney caps based upon the size of the top of the chimney, and that he measured the flues of the chimney before the caps were installed. He testified he did not draw any conclusions as to whether the flues were an adequate size or as to the cause of the smoking conditions. Michael Scanlon testified that one of his workers performed the installation work, and that only the interior damper plate was removed from inside the chimney's "throat" and placed on top of the chimney to provide more space for the air to flow at the base of the fireplace to allow the gases to escape. He testified that he did not return to the plaintiffs' premises to inspect the work performed. He testified that prior to the installation, he

informed Dennis Donoghue that it was possible that the smoking problem in the fireplaces could be helped by removing the interior damper plate and placing the cap on top of the chimney, but that it was not guaranteed to alleviate the problem. He also testified that, following the performance of the work by his company on the plaintiffs' chimneys, he was informed by Dennis Donoghue that the smoking problems with the fireplaces persisted. Michael Scanlon testified that he informed Dennis Donoghue that he needed to test the air flow in his home by opening a window on the positive side of the house to determine whether there was enough air feeding the fire, and that air flow problems can occur if the air kits in front of the fireplaces are obstructed. In addition, he testified that the type of heating, venting, and air conditioning ("HVAC") system that is installed in a home can affect the air flow, because if the HVAC system is not properly balanced it will need more air, and that the easiest way for air to enter a home is down the flue of a chimney. Michael Scanlon further testified that to determine if the distance between the flue and chimney cap is inappropriate the cap must be removed and a fire lit to observe whether the smoke is being prevented from escaping when the damper opens, and that he did not have a contractual relationship with the defendant Webb for the performance of the work on the plaintiffs' chimneys.

Based upon the adduced evidence, Scanlon Chimney failed to establish, prima facie, its entitlement to judgment as a matter of law that it did not contribute to the alleged smoking condition that the plaintiffs experienced with the fireplaces in their living room and great room or to the noxious gas smell emitted from their master bedroom fireplace (see *Corsino v New York City Tr. Auth.*, 9 NY3d 978, 849 NYS2d 18 [2007]; *Maheshwari v City of New York*, 2 NY2d 288, 778 NYS2d 442 [2004]; see generally *Alvarez v Prospect Hosp.*, supra). Despite the fact that the evidence demonstrates that, prior to their hiring of Scanlon Chimney, plaintiffs already were experiencing problems with their fireplaces and chimneys, there is a question of fact as to whether Scanlon Chimney's installation of the chimney caps contributed to the alleged smoking condition the plaintiffs experienced with their fireplaces (see *Mora v Cammeby's Realty Corp.*, 106 AD3d 704, 966 NYS2d 99 [2d Dept 2013]). The reports prepared at the plaintiffs' request by Guaranteed Contracting and Condon Engineering, P.C., each conclude that the flues installed for each of the three fireplaces are inadequately sized, fail to meet the requirements of the Residential Code of New York State, and will result in the inadequate venting of combustion gases. In addition, the report prepared by Condon Engineering also states that an inspection of the chimney in the den/great room found it was equipped with a metal screened flue cap, that the bottom of the cap was approximately 2½ inches from the top of the fireplace flue damper, and that, based upon the installation instructions from the manufacturer, a minimum of five inches is required between the top of the flue and the bottom of the cap. The report further states that the clearance between the top of the flue opening, which is in the flue cap damper, is inadequate and will result in inadequate venting of the flue gases. Furthermore, Michael Scanlon testified that, although the specifications of the dampers and caps vary between manufacturers, based upon his knowledge, the appropriate minimum distance between the top of the flue damper and the bottom of the cap is between four to six inches, and that if the cap is too low on the flue liner it can impede the damper from opening, resulting in the reduction of air flow and smoke being emitted into the home. Thus, Scanlon Chimney failed to establish that his company merely furnished the condition or occasion for the occurrence of the event and was not one of the causes of the plaintiffs' alleged fireplace smoking condition (see *Littles v Yorkshire Bus.*

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Corp., 979 NYS2d 840 [2d Dept 2014]; *Castillo v Amjack Leasing Corp.*, 84 AD3d 1298, 924 NYS2d 156 [2d Dept 2011]). As a result, it cannot be said as a matter of law that Scanlon Chimney's conduct was not a substantial cause of the events which produced the plaintiffs' injury (see *Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198, 895 NYS2d 389 [1st Dept 2010]).

In light of the defendant Scanlon Chimney's failure to establish its prima facie entitlement to judgment as a matter of law, the papers submitted in opposition need not be considered by the court (see *Salomon v Prainito*, 52AD3d 803, 861 NYS2d 718 [2d Dept 2008]). Accordingly, the defendant Scanlon Chimney's motion for summary judgment dismissing the claims against it is denied.

Dated: *April 10, 2014*

William B. Rebolini
HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION