

Heights Found., Inc. v Reed Krakoff

2014 NY Slip Op 31065(U)

April 28, 2014

Sup Ct, New York County

Docket Number: 402049/09

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

to CPLR 3212, for summary judgment dismissing the complaint and all cross claims, or in the alternative, moves the court to grant the relief sought in its third-party complaint.

In motion sequence no. 003, third-party defendant Squillace Steel LLC (Squillace) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, the third-party complaint, and all cross claims on the grounds that there is no basis, as a matter of law, to impose liability upon it.

In motion sequence no. 004, defendant Reed Krakoff moves, pursuant to CPLR 3212, to dismiss the complaint and all cross claims against him, or in the alternative, grant him conditional summary judgment over and against co-defendant/third-party plaintiff C-Squared, as well as third-party defendant Squillace, based on the principals of contractual and common-law indemnity.

This action arises out of the damage caused by a fire started in the premises adjacent to plaintiff's building.

Plaintiff owns a six-story building at 117 East 70th Street, New York, New York, which it operated as a group residence and for spiritual activities (the Building). The adjacent premises, located at 113-115 East 70th Street, was a residential townhouse owned by defendant Krakoff at the time of the fire (the Townhouse).

In June 2006, Krakoff entered into a contract with defendant/third-party plaintiff C-Squared to extensively renovate

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the Townhouse. C-Squared entered into a subcontract with third-party defendant Squillace for the removal of steel beams and columns in the Townhouse as part of completing the extensive renovation.

On October 12, 2006, three of Squillace's workers, Joseph Joseph, Kevin Bischoff, and Peter "Felice" Panageotoes, performed beam cutting work at the Townhouse. Specifically, they cut two steel beams from the basement ceiling using oxyacetylene torches. Joseph did the cutting, Bischoff stood watch, and Panageotoes sprayed any sparks with a hose. As part of the process, the workers wetted down the basement as a fire prevention method. The work lasted approximately from 8:00 a.m. to 2:30 p.m., but Joseph and Panageotoes remained at the Townhouse until 4:00 p.m. Also present during the work, although not involved in the actual cutting, was Aquilino Bardales, C-Squared's foreman. Several hours later, at approximately 2:30 a.m. on October 13, 2006, a fire broke out in the Townhouse damaging both the Townhouse and the Building.

At approximately 3:30 a.m., New York City Fire Marshal John J. Farrell arrived at the scene. After an investigation, Farrell concluded that the fire started on the second floor of the Townhouse, but could not conclusively determine the cause. The "Fire Incident Report" prepared by Farrell listed the cause of the fire as "Not Ascertained."

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The court will first address whether it should grant C-Squared and Krakoff's motions for summary judgment dismissing the complaint, as all other cross claims, as well as the third party complaint, are moot if the complaint is dismissed. C-Squared and Krakoff both argue that plaintiff's negligence claim against them must be dismissed, because they owed no duty to plaintiff, they were not negligent, and there is no evidence that any alleged negligence was the proximate cause of the damage to the Building.

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law" (People v Grasso, 50 AD3d 535, 545 [1st Dept 2008]). Once the movant has demonstrated entitlement, the burden shifts to the opposing party to produce evidence sufficient enough to raise an issue of fact warranting a trial (*id.*).

To be successful on a claim for common-law negligence, plaintiff must show there was "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury" (Ingrassia v Lividikos, 54 AD3d 721, 724 [2d Dept 2008]). Here, C-Squared and Krakoff present sufficient evidence, showing that the beam cutting operation was not the proximate cause of the fire, and in turn, the proximate cause of the damage to the Building. In support of their motions, C-Squared and Krakoff submit the Fire Incident Report, which lists the cause of the

fire as "Not Ascertained," which evidences that the beam cutting operation could not conclusively be determined as the cause of the fire.

Plaintiff, in an effort to raise an issue of fact, submits the affidavit of its expert Mark Dempsey, P.E., a professional fire protection engineer. After a review of the Fire Incident Report, the testimony of various C-Squared and Squillace employees and Fire Marshall Farrell, as well as photographs and other unidentified documents, Dempsey concluded that the most likely cause of the fire was the beam cutting operation. Dempsey then shifts the focus of his findings to the defendants' alleged negligent violations of applicable safety and fire codes, including the National Fire Protection Association sections 241 and 51B and the New York City Fire Code, title 29, chapter 26. Dempsey makes a final conclusion that it was these violations that contributed and caused the fire.

Even if this court finds that defendants did commit serious code violations in connection with the beam cutting operation, it does not change the fact that the actual cause of the fire cannot be conclusively determined, as evidenced by Farrell's deposition testimony and Dempsey's affidavit, as well as the Fire Incident Report itself. Although there is evidence of code violations in connection with the beam work, any violation is irrelevant in the absence of conclusive proof that the fire was caused by the beam

work itself, because without such proof, the code violations cannot be said to be the proximate cause of the fire (see Reed v Piran Realty Corp., 30 AD3d 319, 320 [1st Dept 2006]; Costantino v Webel, 57 AD3d 472, 472-473 [2d Dept 2008]). While Farrell and Dempsey both testify that the beam cutting operation was "most likely" the cause, it is nothing more than speculation absent a definitive cause of the fire. If this action went to trial, any jury verdict would be based on such speculation and would be set aside as a nullity (Dawson v New York City Hous. Auth., 203 AD2d 55, 56 [1st Dept 1994]).

Therefore, based on the foregoing, defendants C-Squared and Krakoff's motions for summary judgment dismissing the complaint are granted. As the complaint is dismissed, all cross claims for indemnification and contribution are also dismissed as moot, as well as the third-party complaint, which seeks indemnification and contribution.

Accordingly, it is

ORDERED that defendant and third-party plaintiff C-Squared Contracting, Inc.'s motion for summary judgment dismissing the complaint is granted and all cross claims against it are dismissed as moot (motion sequence no. 002); and it is further

ORDERED that defendant Reed Krakoff's motion for summary judgment dismissing the complaint is granted and all cross claims against him are dismissed as moot (motion sequence no. 004); and

it is further

ORDERED that third-party defendant Squillace Steel LLC's motion for summary judgment dismissing the third-party complaint and all cross claims is granted as moot (motion sequence no. 003); and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: April 28, 2014

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.

FILED

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COUNTY CLERK'S OFFICE
NEW YORK