

Eglauf v 165 Mamaroneck Ave. Co.

2014 NY Slip Op 33586(U)

October 14, 2014

Supreme Court, New York County

Docket Number: 117995/05

Judge: Milton A. Tingling

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EA
10/24/14
E

Milton A. Tingling

PRESENT: _____
Justice

PART 44

Index Number : 117995/2005
EGLAUF, DOUGLAS R.
vs.
165 MAMARONECK AVENUE
SEQUENCE NUMBER : 015
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 *granted in*
accordance with the attached memorandum of decision

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

RECEIVED
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FILED
OCT 27 2014
COUNTY CLERKS OFFICE
NEW YORK

Dated: 10/14/14

Ma 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

DOUGLAS R. EGLAUF and DIANE EGLAUF,

Index No: 117995/05

Plaintiff(s),

Decision

-against-

165 MAMARONECK AVENUE COMPANY, JOAN MILGRIM, ALL SELF PLUMBING & HEATING, INC., ALL PRO CLEANING & RESTORATION SERVICES, INC., ALMEIDA OIL CO., INC., AND JOHN DOE CORPORATIONS 1 THROUGH 9 (SAID CORPORATIONS BEING THE NAMES, ONE (1) THROUGH NINE (9) OF ENTITIES WHICH INSTALLED, MAINTAINED, MANAGED, REPAIRED AND/OR INSPECTED THE BOILER AND/OR FURNACE AND/OR PREMISES WHOSE NAMES ARE NOT CURRENTLY KNOWN

Defendant(s).

ALL SELF PLUMBING & HEATING, INC.,

Third- Party Plaintiff,

-against-

QUALITY GAS/OIL HEAT SERVICE CORP. and ABSOLUTE CHIMNEY SERVICE,

Third-Party Defendant.

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**COUNTY CLERKS OFFICE
NEW YORK**

Defendant Almeida Oil Co. (Defendant Almeida) moves for summary judgment against Plaintiffs Douglas R. Eglauf (Plaintiff). Plaintiff opposes the motion.

This cases arises out of an incident which occurred on December 30, 2002 at the premises located at 163-165 Mamaroneck Avenue, White Plains. At the time of the incident, Plaintiff was

a tenant in a building owned by Joan Milgrim and 165 Mamaroneck Avenue Company (165 Mamaroneck). From approximately 1988-2006, Defendant Almeida contracted with 165 Mamaroneck to service 165 Mamaroneck's building. The parties did not have a signed contract, but their service agreement covered emergency parts, as well as service on the oil burner and its controls. Defendant Almeida's service technicians made site visits periodically at the request of 165 Mamaroneck.

Defendant Almeida made approximately five site visits to the building during the year prior to the incident in question. Defendant Almeida's final visit before the incident occurred on December 17th, 2002. Defendant Almeida alleges its technician made adjustments to the system which had nothing to do with the burner. Plaintiff alleges it is not clear what work the technician did. In the ticket he filled out in regards to the visit, Defendant Almeida's service technician wrote the building needed a new heating system, as the old one could no longer be repaired. Plaintiffs allege there is no evidence to indicate Defendant Almeida took any steps to notify 165 Mamaroneck of its technician's concerns. Defendant Almeida did not return to the building until after December 30th, 2002.

On December 30th, 2002 Plaintiff alleges he smelled a very strong odor of oil coming from the basement of the building. Plaintiff alleges he contacted 165 Mamaroneck about the odor. Eventually, 165 Mamaroneck's plumber contacted the White Plains Fire Department. The White Plains Fire Department issued a defective appliance tag on the oil burner.

Plaintiff alleges on December 30th, 2002, a puff back explosion occurred involving the oil burner, which caused him to breathe in noxious fumes and suffer personal injuries. Plaintiff further alleges Defendant's negligence contributed to the puff back explosion. Defendant contends that it did not cause or contribute to the alleged puff back explosion and that Plaintiff

has not provided medical causation of his alleged injuries. Defendant contends the puff back explosion was caused by numerous people, including Plaintiff, touching the burner's reset button.

Defendant further alleges Plaintiff did not file his complaint against Defendant within the Statute of Limitations. Plaintiff's original complaint, which he filed on December 29, 2005, did not include Almeida Oil Co. as a defendant. Plaintiff filed his amended complaint on April 14, 2006, which named Almeida Oil co. as a defendant. Defendant filed a Motion to Dismiss Plaintiff's complaint on the grounds it was not filed within the Statute of Limitations. Judge Karen Smith ruled that under the circumstances, even though Plaintiff's amended complaint was filed after the Statute of Limitations had expired, it was still timely as it was filed within 120 days after the filing of the original complaint. Defendant presently alleges Plaintiff did not file his complaint within the Statute of Limitations.

The movant on a summary judgment motion must establish his case as a matter of law. *Winegrad v. New York University Medical Center*, 64 N.Y. 2d 851, 853 (1985). A motion for summary judgment must be denied if a triable issue of facts exists. C.P.L.R. Section 3212; The proponent of the summary judgment motion has the initial burden of coming forward with evidentiary proof in an admissible form demonstrating that it is entitled to summary judgment. *Zuckerman, supra*. In the instant case, Defendant alleges entitlement to summary judgment on the grounds that its actions did not cause or contribute puff back, that Plaintiff did not rely on Defendant, that 165 Mamaroneck was responsible for the building's burner at the time of alleged puff back incident, and that Defendant did not owe a duty to Plaintiff. Defendant also alleges entitlement to summary judgment on the grounds that Plaintiff's alleged respiratory condition was not caused by the puff back incident, and that there is no causal link between the injuries

alleged by plaintiff and the puff back incident. Finally, Defendant alleges entitlement to summary judgment on the grounds that Plaintiff did not file his complaint within the applicable Statute of Limitations, and that the complaint against Defendant was untimely.

Once the movant has established a *prima facie* case that it is entitled to summary judgment, the burden then shifts to the party opposing the motion to tender sufficient evidence in admissible form to defeat the motion. *Zuckerman v. City of New York*, 49 N.Y. 2d 557 (1980). Plaintiff claims there is a triable issue of fact as to whether Defendant failed to maintain the building's boiler/burner properly, whether Defendant failed to warn 165 Mamaroneck about the state of the burner, and whether Defendant had absolute responsibility of the burner. Defendant contends that if Defendant launched an instrument of harm and/or displaced 165 Mamaroneck's duty to Plaintiff, Defendant owed a duty to Plaintiff, which it breached.

Plaintiff further contends that he suffered from Reactive Airways Dysfunction Syndrome as a result of his exposure to smoke, vapors, fumes, and soot caused by the puff back incident. Thus, Plaintiff contends the puff back incident caused him injuries. Finally, Plaintiff contends that per Judge Smith's prior decision, the complaint Plaintiff filed against Defendant was timely.

While the record demonstrates Plaintiff's complaint was timely and Defendant did not displace the duty of 165 Mamaroneck, there is an issue of fact as to whether Defendant launched an instrument of harm which caused the alleged puff back incident and an issue of fact as to whether Plaintiff sustained injuries as a result of the alleged puff back incident. Accordingly summary judgment does not lie.

Almeida Oil Co.'s motion for summary judgment against Douglas R. Eglau is denied.

The cross-motion of 165 Mamaroneck for an Order (a) denying the liability portion of Almeida Oil Co.'s motion for summary judgment, pursuant to CPLR § 3212, dismissing Douglas

R. Eglauf's complaint against Almeida Oil Co. and (b) in the alternative, granting 165 Mamaroneck's cross-motion to add Almeida Oil Co. as a third-party defendant for indemnification and contribution claims, is denied as moot.

This constitutes the decision and order of the Court.

MAF

Judge Milton A. Tingling

J.S.C.

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OCT 27 2011
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NEW YORK