

Kleinberg v 516 W. 19th LLC
2015 NY Slip Op 30118(U)
January 20, 2015
Supreme Court, New York County
Docket Number: 109371-2009
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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PAUL KLEINBERG, CAROL KLEINBERG,
MASSY GHAUSI and DENISE DORN,

Plaintiffs, Index Number
109371-2009

-against-

516 WEST 19th LLC, THE J CONSTRUCTION
COMPANY LLC, SLCE ARCHITECTS LLP, and
THE BOARD OF MANAGERS OF THE WEST 19th
STREET CONDOMINIUM,

Defendants.

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516 WEST 19th LLC,

-against- Third-Party Plaintiff, Third-Party
Index Number
591008-2009

I.M. ROBBINS, P.C.,

Third-Party Defendant.

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THE J CONSTRUCTION COMPANY LLC,

-against- Second Third-Party Plaintiff, Third Party
Index Number
590362-2010

INTERSTATE INDUSTRIAL CORP., FCI
CONSULTING CORP., RCI PLUMBING CORP.,
INTERSTATE DRYWALL CORPORATION, ABCO
PEERLESS SPRINKLER CORPORATION,
ABSOLUTE ELECTRICAL CONTRACTING CORP.,
CUSTOM METAL CRAFTERS INC. a/k/a A&S
WINDOW PRODUCTS LLC f/k/a CUSTOM METAL
CRAFTERS & ERECTORS LLC, GARDEN STATE
COMMERCIAL SERVICES, KNS BUILDING
RESTORATION CORP., RONALD T. VASS CORP.,
GRACIANO CORPORATION, CITY ELEVATOR,
JANSONS ASSOCIATES INC., DELTA TEST
LABORATORIES INC., and JAM CONSULTANTS INC.,

Second Third-Party Defendants.

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JOAN A. MADDEN, J.:

Second third-party defendant KNS Building Restoration Corp. (KNS) moves, and second

third-party defendant Delta Testing Laboratories (“Delta”) cross moves, to dismiss the claims of defendant/second third-party plaintiff The J Construction Company LLC (J-Con) and all cross claims asserted against them on the grounds of spoliation of evidence. J-Con opposes KNS’s motion and Delta’s cross motion or, alternatively, argues that in the event the court finds that spoliation sanctions are warranted that the claims and cross claims against J-Con be dismissed on the same grounds. Defendants 516 West 19th LLC, the Board of Managers of the West 19th Street Condominium and plaintiffs oppose J-Con’s cross motion.

Background

Plaintiffs, the owners of two luxury penthouse units (“Units”) in a newly-constructed condominium building (“the Building”), commenced this action to recover monetary damages arising out of alleged construction defects, including a leaky roof that was installed by KNS. This action was brought against defendant 516 West 19th LLC, the sponsor and developer of the construction project, as well as the Board of Managers of the condominium (together “the Sponsor”), and J-Con, the general contractor and the architect. J-Con then commenced a third-party action against its many subcontractors, including KNS which installed the roof which was manufactured by the Johns Manville Company (hereafter the “KNS roof”).¹ Delta performed inspection of the fire-stopping installations in the Building, and it is alleged that these inspections were not properly performed, and that the absence or inadequacy of fire stopping material resulted in, *inter alia*, the infiltration of rainwater into the Units.

Before this action was commenced, plaintiffs retained the engineering firm of Erwin

¹KNS originally agreed to install an Inverted Roof Membrane Assembly (an “IRMA Roof”), however, the KNS roof was installed pursuant to a change order issued by J-Con.

Lobo Bielinski (ELB) as consultants. In April 2009, ELB inspected the Units on several occasions and prepared reports of its findings. Upon learning of the issues raised by plaintiffs, the Sponsor met with plaintiffs and ELB to discuss how to remediate such issues. In June 2009, various representatives of the Sponsor, J-Con, ELB and KNS discussed the multiple conditions affecting the Building and the Units (including the JMC roofing system) to determine the types of remedial actions to be undertaken.

On July 1, 2009, plaintiff commenced this action, and sought a preliminary injunction to enjoin the Sponsor and J-Con from making allegedly “substandard” repairs. By letter dated July 9, 2009, and pursuant to the Sponsor’s Construction Management Agreement with J-Con (“the C-M Agreement”), the Sponsor demanded indemnity from J-Con and tendered the defense of this action to J-Con. By letter dated July 29, 2009, J-Con sent KNS a copy of plaintiffs’ summons and complaint and stated that based on KNS’s obligations under the trade contract executed with J-Con, J-Con was tendering to KNS the obligation to “defend, indemnify and hold harmless [J-Con].”

In the meantime, the Sponsor retained Gilsanz Murray Stefickek (GMS), as consultants, to ascertain the condition of the JMC roofing system. In September 2009, GMS issued its “Roof Assessment Report” to the Sponsor, who agreed to share it with J-Con only upon the execution of a confidentiality agreement. According to Keith Jacobson, a member of the Sponsor, J-Con was given access to the roof from May 2009 and December 2009; J-Con supervised KNS’s attempt to repair the roof through September 2009, which repair efforts were unsuccessful. In August 2009, the New York City Department of Buildings issued four violations, requiring remediation and re-inspection, including a violation concerning the lack of firestopping on the

roof slab. In October 2009, Johns Manville inspected the roof and found water leakage and water accumulation.

By agreement dated November 24, 2009, the Sponsor and the plaintiffs settled their disputes regarding access to the Units, as well as the design and construction conditions of the Units. In addition, the Sponsor agreed to pay the cost of repair, including replacement of the KNS roof with an Inverted Roof Membrane Assembly (“IRMA”) roof (“the Settlement”).² The Sponsor also agreed to replace all the mechanical ductwork located on the KNS roof and make other changes to the roof. Pursuant to the Notice of Termination, dated December 9, 2009 (the Termination Notice), the Sponsor terminated J-Con as the general contractor and/or construction manager of the Building.

The KNS roof was destroyed in February 2010 and replaced with an IRMA roof in the spring of 2010. On April 30, 2010, J-Con commenced the third-party action against its various subcontractors, including KNS and Delta.³

KNS and Delta previously moved for summary judgment dismissing all claims asserted against them by J-Con, including breach of contract (express warranty), breach of implied warranty, contribution, indemnification and negligence. By decision and order dated January 24, 2012, this court granted KNS’s and Delta’s motions to the extent of dismissing all of J-Con’s claims except for the breach of contract claim. Subsequently, by decision and order dated January

² Due to the Settlement, plaintiffs are no longer pursuing claims against the Sponsor, and proceed only against J-Con and SLCE Architects, LLP (SLCE), the architect for the Project.

³ While KNS maintains that it was not served with the third-party complaint until October 2010, J-Con submits an affidavit of service showing KNS was served in May 2010. In any event, there is no dispute that KNS was not served until after the KNS roof was demolished and replaced.

23, 2013, this court granted J-Con renewal to the extent of permitting J-Con to serve and file a second amended verified third-party complaint reinstating J-Con's indemnification claim based on a specific provision in its subcontract.

KNS's Motion and Delta's Cross Motion to Dismiss on Spoliation Grounds

KNS now moves to dismiss J-Con's remaining claims against them and all cross claims on the grounds that the KNS roof was destroyed before KNS had the opportunity to have it inspected and tested by KNS's expert. KNS argues that the unavailability of the KNS roof for inspection has severely prejudiced it.

In support of its motion, KNS submits the affidavit of its principal and officer Anthony Ballato, Jr. ("Ballato"), who states that he has been advised that the KNS Roof was destroyed in the Spring of 2010 and that "KNS was not informed that the KNS roof was going to be demolished and unavailable for inspection (in fact, at that time, KNS didn't even know that it was going to be brought into the lawsuit)" Ballato Affidavit, ¶ 8.

KNS also submits the affidavit of Joseph A. Jabour ("Jabour") a licensed professional engineer in New York State. Jabour, who reviewed the pleadings in the this action, states that he inspected the roof in January 2013, which he states is "comprised of an entirely different type of roofing system than the one installed by KNS." Jabour Affidavit, ¶ 6. Jabour also states that he reviewed various reports prepared by ELB (plaintiff's engineering consultant), GMS (consultants hired by the Sponsor), and a representative of Johns Manville upon inspection of the KNS roof. He further states that "after inspecting the same roof, each of these reports came to different conclusions." Id ¶ 8. For example, he states that the ELB reports "conclude that the KNS roof was not installed within industry standards and required demolition and replacement"

while the “GMS reports conclude that the roof could remain provided some fixes were undertaken to make it watertight [and that]... many of th leaks experienced by the Penthouse apartments are not caused by roofing deficiencies, but by poor installation of rooftop ductwork and hoods” Id ¶ 9, quoting GMS Report, at 6. As for the inspection by Johns Manville, Jabour states that the report “does not make any conclusions regarding the integrity of the KNS roof [but] finds that “[w]ater entered the roof system through leaks in the HVAC equipment mounted on the roof.” Id ¶ 9, quoting Johns Manville Report.

Jabour concludes that “these contradictory findings demonstrates the necessity of an in-person expert inspection of the KNS in order to determine the source of the alleged water infiltration.” Id ¶ 10. Jabour states that “without access to the KNS roof as it existed in the Spring of 2009, it is impossible to determine whether if the roof was properly installed, if the roof failed, if the mechanical equipment on the roof was improperly installed or if water infiltration was the result of other trade work on the roof that had nothing to do with KNS.” Id ¶ 13. He further states that the pictures in the existing reports are “insufficient to make a determination as to whether or not the HVAC systems and the ducts were properly installed [and that] other expert’s conclusory reports cannot replace an actual in-person inspection.” Id ¶ 14. He opines that “KNS has been severely prejudiced by the unavailability of the KNS roof as it existed in the Spring through the Fall of 2009 [which] deprives KINS from being able to fully defend itself against the claims brought against it.” Id ¶ 15.

Delta cross moves for the same relief as KNS, arguing that the pre-existing KNS roof and the piping, electrical conduits, ductwork and HVAC equipment that penetrated the roof, and the materials used in their installation, are critical to Delta’s defense since they would demonstrate

the extent to which any firestopping had been impaired by this work and whether any absence or inadequacy in firestopping can be attributed to the contractors working on these aspects of the Project as opposed to lapses in Delta's inspections.

In opposition, J-Con asserts that the relief sought in the KNS's motion and Delta's cross motion, J-Con should have been part of these third-party defendants' previous requests for summary judgment. In addition, J-Con argues that it was not responsible for the destruction of the KNS roof, and that, in any event, KNS had notice of its destruction. The Sponsor argues that the events do not constitute spoliation but, rather, reflect the mitigation of damages by the Sponsor in correcting the defective conditions, including the roof. The Sponsor further argues that J-Con and KNS had access to the defective condition of the roof before it was remedied, and that, in any event, there is voluminous evidence in the form of photographs, video records and witness testimony with respect to the KNS roof.

Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence ... before the adversary has an opportunity to inspect them." Kirkland v New York City Housing Authority, 236 AD2d 170, 175 (1st Dept 1997). Under certain circumstances, spoliation sanctions have been held to be appropriate even where the evidence at issue was destroyed prior to the issuance of any discovery order seeking such evidence and where the destruction of evidence has not been shown to be intentional or in bad faith. Id.; See also Squitieri v. City of New York, 248 A.D.2d 201 (1st Dept 1998).

However, spoliation sanctions are not warranted unless the party seeking such sanctions meets its burden of establishing that the evidence destroyed is crucial to the moving parties' case. See Cameron v. Nissan 112 Sales Corp., 10 AD3d 591 (2d Dept.2004), Tawedros v. St. Vincent's

Hospital of New York, 281 AD2d 184 (1st Dept 2001).

Under this standard, there is no basis for imposing spoliation sanctions against J-Con. First, there has been no showing that the destruction of the KNS roof was done to intentionally or negligently dispose of evidence required to defend against the third-party action. Instead, the record shows that the purpose of the replacing the KNS roof was to correct the defective roof and other conditions which had made the Units uninhabitable. See Greater N.Y. Mut. Ins. Co. v. Curbeon, 300 AD2d 182 (1st Dept 2002)(denying spoliation sanctions against landlord who acted in good faith and pursuant to the orders of the Building Department in removing the remains of a fire); Popfinger v. Terminix International Company Limited Partnership, 251 A.D.2d 564, 564 (2nd Dept 1998) (finding that repairing and discarding termite-damaged wood prior to commencement of action against exterminator for negligence was not “an intentional attempt to hide or destroy evidence,” nor, under the circumstances, negligent); Yager v. Thompson, 1 Misc3d 902(a)(Dist Ct Nassau Co, 2003)(spoliation sanctions should not be imposed where destruction of evidence is necessary for mitigation).

Furthermore, while KNS and Delta seek sanctions as against J-Con, the record shows that J-Con was not in possession or control of the roof at the time it was demolished and replaced, and thus spoliation sanctions are not warranted against it. See O’Reilly v. Yavorskiy, 300 AD2d 456, 457 (2d Dept 2002) (spoliation sanctions improper unless it is shown that party against which such sanction were imposed was responsible for the destruction of evidence or that it destroyed it in an effort to frustrate discovery).

Next, although KNS’s representative maintains that it was not informed the KNS roof was going to be destroyed, such statement does not provide a basis for spoliation sanctions,

particularly as the record, including affidavits from Susanne Mackiw of GMS and the Sponsor's representative, Mr. Jacobson, demonstrate that KNS was actively involved in the efforts to remediate the KNS roof and therefore had the opportunity to personally observe the alleged defects in the roof. Moreover, although KNS was not joined as a party until after the KNS roof was replaced in the spring of 2010, as indicated above, in July 2009, J-Con sent a tender letter to KNS notifying it of the main action which put KNS on notice of the action. Furthermore, KNS attempted to repair the roof through September 2009, at which time KNS's employees had the opportunity to personally observe the roof. Thus, although KNS had notice of its potential liability in connection of this action, it never made a request to have an expert inspect the roof. Under these circumstances, KNS's claim of prejudice rings hollow.

Significantly, neither KNS nor Delta can show that they have been prejudiced by the destruction of the roof in light of the existence of reports from ELB, GMS and Johns Mansville, and the extensive photographic and other evidence attached to the ELB and GMS reports. While the reports do not come to identical conclusions regarding the KNS roof and related defects, the evidence accompanying these reports demonstrates that neither KNS nor Delta have been prejudiced by their inability to inspect the roof. Greater N.Y. Mut. Ins. Co. v. Curbeon, 300 AD2d at 182-183 (spoliation sanctions not appropriate where apartment was inspected by Fire Department and Department of Buildings before landlord removed remains of fire from apartment); Chiu Ping Chung v. Caravan Coach Co., 285 AD2d 621 (2d Dept 2001)(trial court properly exercised discretion in refusing to strike defendant's answer where its mechanic removed and disposed of bus' shock absorbers before plaintiff could inspect them but plaintiff was provided with reports from DOT's inspection of the bus including one performed a few days


before the incident). Finally, in light of the extensive nature of the reports and other evidence regarding the KNS roof and other conditions related thereto, the conclusion of KNS's expert that KNS will be "severely prejudiced by the unavailability of the KNS roof" is insufficient to meet KNS burden of establishing that the KNS roof is crucial to defending against the claims against it.

Accordingly, as spoliation sanctions are not appropriately granted against J-Con, the court need not reach whether the KNS's motion and Delta's cross motion should be denied on the grounds that they constitute successive motions for summary judgment, or J-Con's cross motion for spoliation sanctions.

In view of the above, it is

ORDERED that KNS's motion and Delta's cross motion to dismiss J-Con's remaining claims and all cross claims on the grounds of spoliation of evidence are denied; and it is further

ORDERED that J-Con's cross motion for spoliation sanctions is denied..

DATED: January , 2015


HON. JOAN A. MADDEN
J.S.C.