Nunez v Lookout, LLC
2015 NY Slip Op 30542(U)
April 8, 2015
Supreme Court, New York County
Docket Number: 150667/12
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN **PART 7**
Justice

JOE A. NUNEZ and ROBERT C. HAY,

Plaintiffs, **INDEX NO. 150667/12**

-against- **MOTION SEQ. NO. 003**

LOOKOUT, LLC and UP 2 CODE, LLC,
Defendants.

The following papers were read on this motion by the defendant Up 2 Code, LLC for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ **Yes** ☒ **No**

Motion sequence numbers 003 and 004 are consolidated for disposition.

This action was commenced by Joe A. Nunez (Nunez) and Robert C. Hay (Hay) (collectively, plaintiffs) to recover damages for injury to property and persons as a result of a fire occurring at a house leased by Hay and owned by defendant Lookout, LLC (Lookout). Nunez was a guest at the house and defendant Up 2 Code, LLC (Up 2 Code) repaired the chimney.

Before the Court is a motion by Lookout for summary judgment dismissing the complaint and on its cross-claims against defendant Up 2 Code (Motion Sequence 003). Up 2 Code moves for summary judgment dismissing all claims and cross-claims (Motion Sequence 004). Plaintiffs cross-move for an order deeming proper the service of their expert exchange nunc pro tunc.

BACKGROUND

Hay was the sole lessee of the single family residence in Southampton for seven years before the fire. The fire, which began on October 8, 2011, caused second-degree burns to

plaintiffs, caused the death of a pet dog, and destroyed personal property.

James Nugent is the representative and property manager for Lookout, which is owned by his wife and children. In 2008, Hay notified Nugent that the fireplace was malfunctioning and Lookout arranged for the fireplace to be repaired and paid for the repair. The fireplace was repaired the second time in August 2011. Nugent testified that, in August 2011, Hay complained to him that water was leaking into the house through the chimney. Nugent hired Up 2 Code, a licensed chimney contractor, to fix the chimney. After the work was done, Hay complained to Nugent that it was sloppy and that cement had dripped onto the roof and into the fireplace from the roof. Nugent arranged for Up 2 Code to clean up for no charge. Nugent says that it was his understanding that the leak problem had been fixed and that the chimney was in proper working condition. Nugent testified that he never saw a break or crack in the fireplace. Nugent states that Lookout did not control the methods of Up 2 Code, an independent contractor, and did not provide it with tools, materials, or instructions. He did not inspect the work that Up 2 Code had done. Lookout says that it was an out-of-possession landlord/owner and that the tenant, not the owner, was responsible for maintaining the property.

Hay testified that the usual procedure when repairs were needed was that he would tell Nugent, Nugent would contact the repair people, and Hay would pay for the repairs. Hay testified that he was responsible for maintaining the property, except for the roof and the fireplace, for which Lookout was responsible. Hay said that Nugent visited at least once a month. Hay said that cracks were still visible in the chimney after Up 2 Code finished the repairs. Hay complained to Nugent about the sloppiness of the repairs to the chimney. Nugent testified that Hay did not complain about cracking.

Upon being retained, Up 2 Code presented Nugent with an invoice listing the repairs that were recommended for the chimney. The invoice also noted several cracks in the chimney. After it did the work, Up 2 Code gave Nugent a copy of the same invoice stating that all the work recommended had been completed. Up 2 Code's representative, Bill Track

(Track), testified that it was the practice to indicate on an invoice which work had been completed. Track stated that an invoice of the work on the chimney indicated the presence of cracking bricks but not that the cracks had been fixed. Track said that this invoice meant that Up 2 Code had recommended that the cracking bricks be repaired, but that the owner had chosen not to repair them.

The fire marshal of the Department of Fire Prevention of the Village of Southampton issued a report on the fire. The report states that Hay lit a fire in the fireplace around 6:30 in the evening of October 8, 2011. Nunez retired around 10:30, and Hay placed one last log on the fireplace before going to bed around 11 o'clock, "leaving [the fire] active and unattended" (Lookout exhibit K). "The fireplace had been in use leading up to the time of the fire" (*id.*). Hay woke up about one o'clock in the morning and discovered the house was on fire.

The fire marshal's report states that the area most damaged by the fire was the exterior wall by the chimney. "This same area is where a large crack was observed in the chimney mortar joint" (*id.*). The report states that all possible sources of ignition, 12 in number, were examined. Nine possible sources were eliminated. Not eliminated as possible sources of ignition were the heating system, the fireplace, and hot embers. Concerning the non-eliminated sources, the fire marshal's report notes that the furnace and the water heater were in the basement, and that the flue pipes connected to them exhausted into the same chimney servicing the fireplace. "Examination of the fireplace and the chimney resulted in the observation of numerous cracks and deteriorated mortar joints" (*id.*). Cracks were observed on the interior and exterior of the chimney. Hot embers from the active fire could have dropped down from the chimney flue and ignited the "drapes and pillows" decorating the immediate area around the chimney on the porch. The report concludes that the fire originated on the exterior of the house by the chimney, at the area where the chimney, the house wooden siding and the porch wooden exterior met. "This same area is where a large crack was observed and located at or about the same height as the firebox" (*id.*). The report states that the fire is "classified as

undetermined" (*id.*).

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Svc. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez*, 68 NY2d 320, 324 [1986]; *see also Scafe v Schindler El. Corp.*, 111 AD3d 556, 556 [1st Dept 2013]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]; CPLR 3212[b]). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]).

The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY3d 941 [1957] [internal quotation marks omitted]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v*

Stop & Shop, Inc., 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

DISCUSSION

Lookout submits two expert statements in support of its motion for summary judgment . The report by Salvatore Salvato (Salvato), a certified fire investigator, says that he examined the site on October 12, 2011 and two more times. He reviewed the fire marshal's report, deposition transcripts, interviews, pleadings, and discovery. He notes that the fire marshal could not determine the cause of the fire. He came to the same conclusions as the fire marshal about the possible sources. Salvato references the fire marshal's statements about hot embers and combustible materials on the porch. Salvato states that he cannot eliminate as the source of ignition "escaping hot embers from the wood burning fireplace roof vent termination coming into contact with nearby ordinary combustible materials" including the canvas covering of the porch.

Leo Herrmann (Herrmann), qualified in the areas of forensic investigation and chimney repair and maintenance, visited the site on January 10, 2012. He examined the same documents as Salvato, and he comes to the same conclusion, that the source of ignition was likely a stray ember coming into contact with "decorative flammable material located immediately adjacent to the exterior chimney." Herrmann "ruled out, within a reasonable degree of certainty that a deficiency in the fire box was the cause of this fire and has determined that it was accidental in nature." He agrees with the fire marshal's report on the possible sources of the fire.

Paragraph 8 of the lease provides that the tenant must keep the premises in good order and repair. If the tenant defaults, the landlord has the right to make repairs and charge the tenant the cost. Paragraph 12 provides that the landlord is not liable for loss or damage to any

person or property unless due to the landlord's negligence. Paragraph 15 provides that the landlord may at reasonable times enter the premises to examine, make repairs, or alterations and to show the premises to possible buyers, lenders, or tenants. At the bottom of the lease are typed additions, of which paragraph 39 provides that the tenant shall maintain insurance on its personal property and that the landlord is not responsible for loss or damage to same unless caused by the landlord's gross negligence and then only to the extent not covered by insurance.

Lookout states that, as an out-of-possession landlord which ceded all control over the premises to the tenant, it is not responsible for the fire.

> "A landlord is generally not liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept 1996]).

In this case, Lookout has the contractual right to reenter, inspect, and make needed repairs. However, as plaintiffs do not name any significant structural or design defect that is based on a statute, Lookout is not liable pursuant to the contractual right to reenter.

A landlord may also become liable for negligence that causes injury on the demised property, when the injury results from defects on a portion of the premises over which the landlord has retained control (*Cherubini v Testa,* 130 AD2d 380, 382 [1st Dept 1987]). The landlord's control may be established by a promise, written or otherwise, or by a "course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises" which contains the defective condition (*id.*; *see also* *Melendez v American Airlines*, 290 AD2d 241, 242 [1st Dept 2002]). In *Ritto v Goldberg* (27 NY2d 887, 889 [1970]), the landlord leased a room to the operators of commercial washing machines. A residential tenant was injured by a defective machine. Although the lease ceded

control and occupancy to the commercial operators, the court concluded that:

> "[t]here is proof . . . from which a jury might determine that the landlord, by a long course of conduct of his employees in reporting malfunctions of the machines to the repair service and the owner, so intervened in the operation of the business as to give rise to a reliance by residential tenants in the building on reports of malfunction being made by the landlord. Hence a liability might result if reports were not made and this played an effective part in the occurrence of the accident" (*id.* at 889).

While the lease does not provide that Lookout will maintain the fireplace and chimney, evidence suggests that Lookout could have assumed such a duty through its conduct. Hay alleges that Lookout was responsible for the fireplace and Lookout arranged for and paid for repairs to the fireplace and chimney. Whether Lookout retained control over those parts, such that it was responsible for defects, is a question of fact. As for notice, Lookout shows that it lacked actual notice of a defect in the fireplace or chimney, but not that it lacked constructive notice. A person has constructive notice "only if the defect [is] visible and apparent and [has] existed for long enough before the accident occurred to permit the landlord's employees to discover and remedy it" (*Soto v Michael's N.Y., Inc.*, 282 AD2d 300, 300 [1st Dept 2001]). The evidence suggests that cracks in the chimney were visible after the repairs, and that some cracks were on the exterior of the chimney and could be seen outdoors. Whether Lookout had constructive notice is an issue of fact.

As Lookout argues, an owner may make a prima facie showing of entitlement to judgment as a matter of law by demonstrating that the cause of the fire was undetermined and "that they committed no act from which a jury could rationally infer that they negligently caused the fire" (*see Ali Abd Aloan Alomsi v 250 Dean, LLC*, 101 AD3d 1056, 1056 [2d Dept 2012]; *Tower Ins. Co. v Allstate Ins. Co.*, 31 AD3d 630, 631 [2d Dept 2006]). That Lookout committed no act that could be characterized as negligence is not shown. Also, plaintiffs submit an expert report which renders the cause of fire an issue of fact. Guardian Investigation Group, Inc. (GIG) states that it examined the site on October 14, 2011. GIG's report does not classify the

cause of the fire as undetermined.

GIG's report states that the fire originated on the exterior of the premises, where a corner of the chimney abuts the east wall of the premises. The ignition source was "superheated flue gases generated by a wood and Duraflame log fire in the fireplace . . . . Heat from the fire in the fireplace extended through the cracks and missing mortar joints in the fireplace firebox and therefrom through the above described cracks and missing mortars joints in the chimney" (plaintiffs' opposition, exhibit A). The examination disclosed that water emanated from the fireplace firebox flooding the living room floor in August 2011. The cracks in the firebox and chimney allowed water to enter from outside. The same conditions that allowed water to come through the chimney into the firebox "also eventually allowed for an outward venting of superheated flue gases and hot ember/sparks that were the ignition source for this fire" (*id.*). The expert states that he determined to a reasonable degree of certainty that Up 2 Code did not adequately repair the chimney and fireplace.

The general rule is that the owner of a building who employs an independent contractor to do repair work is not ordinarily liable for injuries sustained on the premises as a result of negligence by the contractor (*Roter v Wexler,* 195 AD2d 323, 324 [1st Dept 1993]; *Fischer v Battery Bldg. Maintenance Co.*, 135 AD2d 378, 379 [1st Dept 1987]). There are some well settled exceptions to this general rule, wherein an employer will be vicariously liable for the negligence of an independent contractor: where the employer is negligent in hiring the independent contractor; where an independent contractor is hired to perform inherently dangerous work; or where the employer is subject to a nondelegable duty (*Acevedo v Audubon Mgt.,* 280 AD2d 91, 97 [1st Dept 2001]). Plaintiffs allege that Lookout owed its tenant a nondelegable duty to keep the premises safe, an issue which presents a question of fact (*see Seltzer v Bayer,* 272 AD2d 263, 264 [1st Dept 2000]). If the employer/lessor assumes a nondelegable duty to the tenant, it cannot discharge it by delegating it to an independent contractor (*Paltey v Egan*, 200 NY 83, 91 [1910]; *Russo v Watson,* 249 App Div 782, 782 [2d

Dept 1936]).

In regard to Lookout's arguments that under the lease it is only liable for gross negligence, General Obligations Law § 5-321 deems void and unenforceable an agreement in a lease "exempting the lessor from liability for damages or injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises . . . ." There is no exception for gross negligence.

Both defendants claim that plaintiffs were responsible for the fire. A tenant-in-possession has a duty to keep the premises in a reasonably safe condition; this duty exists independently of the terms of the lease and regardless of whether the tenant actually agreed to keep the property in good repair (*see Putnam v Stout,* 38 NY2d 607, 617-618 [1976]; *see also Helena v 300 Park Ave.,* 306 AD2d 170, 171-172 [1st Dept 2003]; *Zito v 241 Church St. Corp.,* 223 AD2d 353, 355 [1st Dept 1996]). The validity of defendants' claim raises another issue of fact.

Up 2 Code wrongly claims that as an independent contractor it owes no duty to plaintiffs. It cites to *Espinal v Melville Snow Contrs.* (98 NY2d 136 [2002]), which held that a snow removal contractor is under no duty to a third party who was injured on a parking lot because the contractor was negligent in removing snow. While in *Espinal,* the contractor's services were for the benefit of the general public, in this case, Up 2 Code's services were for the benefit of a particular tenant of a private dwelling and guests. Here, unlike *Espinal,* there are "no indefinite number of potential beneficiaries" (*Caroline A. v New York City Hous. Auth.,* 23 Misc 3d 1135[A], 2009 NY Slip Op 51111[U], *14 [Sup Ct, Bronx County 2009] [distinguishing *Espinal*]). Adhering to the rationale in *Espinal* and in *Palka v Servicemaster Mgt. Servs. Corp.* (83 NY2d 579, 587 [1994]), the Court finds that plaintiffs had a justified reliance on Up 2 Code's proper performance of its work and that the reliance creates a reasonable duty of care on Up 2 Code's

part.

The Court finds that defendants fail to meet their *prima facie* burden on their motions for summary judgment. Lookout does not show that it did not have control over the allegedly defective chimney and fireplace and that it lacked notice of any dangerous condition. Up 2 Code does not show that it did the work properly and that it did not have a duty towards plaintiffs. Whether one or both of the defendants breached their respective duties and whether plaintiffs were free from comparative negligence are disputed questions.

Because Nugent's affidavit and plaintiffs' expert statements do not state that they were made under penalty of perjury, plaintiffs object to their being considered. However, the statements were sworn to and notarized. Affidavits that are sworn to and notarized are admissible, although they do not state "under the penalty of perjury," since such language is only required for affirmations from attorneys, physicians, osteopaths, or dentists (*Rodriguez v New York City Tr. Auth.*, 118 AD3d 618, 619 [1st Dept 2014]).

Further, Herrmann's affidavit was sworn to in Pennsylvania by a notary of that state, in violation of CPLR 2309(c), which provides that oaths and affirmations taken without the state must be accompanied by an authenticating certification. The failure to comply with CPLR 2309(c), is not fatal, and the "the oathgiver's authority can be secured later, and given nunc pro tunc effect if necessary" (*Matapos Tech. Ltd. v Compania Andina de Comercio Ltda,* 68 AD3d 672, 673 [1st Dept 2009]).

In regard to plaintiffs' cross-motion, it is granted and their disclosure of expert evidence is deemed to have been properly served, although service took place after the Note of Issue was filed, after Lookout's instant motion was filed, and not in accordance with the case schedule. Defendants oppose the cross-motion, pointing out that plaintiffs have neither good cause nor a valid excuse for not complying with case deadlines. Lookout points out that one of the bases of its motion for summary judgment is that plaintiff had no expert testimony to

respond to their expert testimony, and that the late disclosure is prejudicial for that reason. Prejudice requires that "the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]; *see also Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 293 [1998]). Neither defendant has been prejudiced.

CONCLUSION

For these reasons and upon the forgoing papers, it is,

ORDERED that the motion for summary judgment by defendant Lookout, LLC (Motion Sequence 003) is denied; and it is further,

ORDERED that the motion for summary judgment by defendant Up 2 Code, LLC (Motion Sequence 004) is denied; and it is further,

ORDERED that plaintiffs' cross-motion (Motion Sequence 004) for an order deeming plaintiffs' expert exchange timely served *nunc pro tunc* is granted, and it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 4/8/15

Enter:

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**