

71st Street Lexington Corp. v Waitman
2015 NY Slip Op 31610(U)
August 25, 2015
Supreme Court, New York County
Docket Number: 152513/13
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
*Justice*PART 1371st. STREET LEXINGTON CORP.,

Plaintiff

INDEX NO. 152513/13MOTION DATE 08-05-2015

- v -

ALBERT WAITMAN, M.D., and BAT-SHEVA
WAITMAN, GREATER NEW YORK MUTUAL
INSURANCE COMPANY,MOTION SEQ. NO 007
MOTION CAL. NO

Defendant.

The following papers, numbered 1 to 6 were read on this motion for partial summary judgment on the issue of liability.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-23-45-6Cross-Motion: Yes ☒ No

Upon a reading of the foregoing cited papers, it is ordered that this motion for partial summary judgment on liability is granted.

Plaintiff brings this action to recover from the defendants for damage to its property resulting from a flood on defendants terrace due to the malfunctioning of defendants' plant irrigation system and the clogging of the terrace drains. Plaintiff alleges that defendants installed a plant irrigation system that malfunctioned and failed to clear the terrace drains of dirt and debris, which caused the drains to clog, thereby causing water to accumulate on their terrace, thereby causing damage to the apartment below and to plaintiff's property. In support of its motion for partial summary judgment plaintiff submits the affidavits of its building superintendent, Manuel Dominguez, who witnessed the accumulation of water on the terrace due to the malfunctioning plant irrigation system and the clogged drains; the affidavit of Mark Licalzi a professional engineer who is of the opinion that the damage to the property was caused by a flooding on the roof; the affidavit of Kimball J. Beasley who is of the opinion that the debris clogged drains caused the accumulation of water that ultimately caused damage to the property; the affidavit of Sharon Langlais, the building's property manager, who laid the foundation for the introduction of the House Rules as business records. The House Rules at the time of the flood Section 8 item 5 which makes the "shareholders responsible for keeping the drains free of dirt and debris." Plaintiff also submits the deposition transcripts of testimony given by Manuel Dominguez and defendant Albert Waitman to show that defendants installed the plant irrigation system, that the plant

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

irrigation system malfunctioned, that the drains were clogged thereby allowing for the accumulation of water that caused the damage to plaintiff's property. [see plaintiff's moving papers Exhibits A through L],

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

Plaintiff has made a prima facie showing of entitlement to judgment as a matter of law through the introduction of its exhibits that prove that defendant installed a plant irrigation system that malfunctioned, the debris clogged drains caused water to accumulate, thereby causing damage to plaintiff's property. Summary judgment can only be defeated if defendants are able to raise an issue of fact.

Defendants in opposing the motion submit the affidavit of Dr. Albert Waitman who states that approximately two weeks before the May 21, 2010 (the day the flood was discovered) Mr. Dominguez contacted him to ask permission to enter his apartment to clean and/or check on the terrace drains. Mr. Dominguez was granted permission to enter the apartment and the terrace but he never did enter the apartment or the terrace to clean and/or check the drains before the events of May 21, 2010." Dr. Waitman further stated and this was corroborated by the deposition transcript of Manuel Dominguez that "on several occasions prior to May 21, 2010, Mr. Dominguez and/or members of his staff would utilize a "snake" to clean the drains on the terrace surrounding my apartment unit. On certain occasions Mr. Dominguez would show me buildup, or materials that the snake dislodged, from the drain and remarked to me that it was caused by the efflorescence that occurred on the terrace which operated to clog the drains. Dr. Waitman acknowledged that it is his responsibility to keep the drains free of dirt and debris, something which he claims he did. However, he states that the drains became clogged on numerous occasions below the surface of the terrace floor which is the responsibility of the plaintiff.

Mr. Dominguez admitted in his deposition testimony that efflorescence would clog the drains, That efflorescence was caused by water removing part of the surface of the pavers and that this would build up, clogging the drains, requiring the use of a snake or acid to clean and That the building was addressing this problem of efflorescence buildup by changing the surface of the terraces, which it did with some terraces before the incident of May 21, 2010. Mr. Dominguez further stated that he would inspect the drains on the terraces when the weather got warm, twice a year either in the spring or the following month, to make sure that the drains

were not clogged with dirt and debris. If the drains were clogged with dirt and debris he would inform the Unit owner to have the drains cleaned. He stated that he instructed Dr. Waitman to use acid to unclog drains that were clogged due to efflorescence or to remove the dirt and debris by sweeping the surface of the terrace.

Dr. Waitman admitted that it was his responsibility to keep the drains clear of dirt and debris, that he gave Mr. Dominguez and other porters in the building a large tip at the end of the year so that they would do things for him and look after his apartment and terrace when he was away. He also admitted that it was his responsibility to have someone check regularly on his apartment, something which he claims he did by having relatives (nephews and in-laws) stop by the apartment to make sure everything was okay.

Finally Dr. Waitman submits the affidavit of Peter L. Anderson, a professional engineer who is of the opinion that the flood occurred because of the lack of an overflow drain on the terrace of defendants' apartment.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits(Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966];Sillman v. 20th Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387[1957];Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318[1984]. Summary Judgment is "issue finding" not "issue determination"(Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

Defendants have failed to raise an issue of fact. The flood occurred due to a malfunctioning plant irrigation system installed by defendants, that caused water to accumulate as a result of the terrace drains being clogged. The accumulation of water caused damage to plaintiff's property. That Mr. Dominguez called to perform his customary inspection does not raise any issue of fact because ultimately it was defendants' responsibility and not the responsibility of the building to make sure the drains were not clogged and if they were, to unclogged them. It was defendants' responsibility to have other people check on the apartment and the terrace while they were away to make sure that their plant irrigation system was working properly and there was no flooding on the terrace.

Defendants failed to make sure their plant irrigation system was working properly, the plant irrigation system malfunctioned, the drains were clogged causing water to accumulate thereby causing damage to plaintiff's property.

Accordingly, it is ORDERED that the motion for partial Summary Judgment on the issue of liability is granted, and it is further

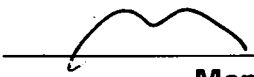
ORDERED that plaintiff is granted judgment on the issue of liability, and it is further

ORDERED that a trial be held on the damages to which plaintiff is entitled.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: August 25, 2015



Manuel J. Mendez
J.S.C.

Check one: **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**

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