

Taylor v Park Ave. & 84th St., Inc.

2017 NY Slip Op 30114(U)

January 17, 2017

Supreme Court, New York County

Docket Number: 651631/2010

Judge: Kelly A. O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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SANDRA TAYLOR,

Plaintiff,

-against-

PARK AVE AND 84TH ST., INC., BROWN HARRIS
STEVENS MANAGEMENT, LLC, CATHERINE
WALSH, REGELE BUILDERS, INC., HESSE
CONTRACTING, INC., EAST RIVER
CONTRACTING CORP., and INTEGRATED
SERVICES NY, INC.,

Defendants.
-----X

REGELE BUILDERS, INC.,

Defendant/Third-Party Plaintiff,

-against-

HESSE CONTRACTING, INC., EAST RIVER
CONTRACTING CORP., and INTEGRATED
SERVICES NY, INC.,

Third-Party Defendants.
-----X

KELLY O'NEILL LEVY, J.:

Third-Party Defendant East River Contracting Corp. ("East River") moves pursuant to CPLR 3212 for summary judgment dismissing the second amended complaint, the third-party complaint, and all cross-claims as against it. Plaintiff and defendant/third-party plaintiff Regele Builders, Inc. ("Regele") oppose the motion. East River's motion is granted for the reasons stated below.

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Motion Sequence # 003

DECISION & ORDER

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Background

This action stems from the discovery of leaks in the cooperative apartment of plaintiff Sandra Taylor following the 2007 renovations by her upstairs neighbor, Catherine Walsh, on Ms. Walsh's penthouse at 103 East 84th Street in Manhattan.¹ Plaintiff brought the primary action against, among others, Ms. Walsh, Ms. Walsh's general contractor, Regele, and Regele's subcontractor, East River, for negligence causing property damage. Regele brought a third party action against its subcontractors, East River, Hesse Contracting, Inc., and Integrated Services NY Inc., for contribution, common law indemnification, contractual indemnification, and failure to procure insurance coverage.

In May 2007, Regele contracted with Catherine Walsh to serve as building contractor for a complete renovation as she sought to combine her penthouse apartment with an adjacent unit. Included in Regele's contract was the removal and replacement of a greenhouse on the roof terrace and placement of a stone terrace. The renovation work was completed in or around April 2008. At some point after the renovations were complete, planters were placed on top of the pavers on the penthouse terrace with an irrigation line installed under the planters. The plaintiff discovered evidence of a leak in or around October 2008 and Regele was called back to the jobsite.

John Derlaga, Property Manager of Brown Harris Stevens, testified that the building first became aware of leaks in plaintiff's apartment in or about February 2009. Mr. Derlaga, building superintendent Anton Dushaj, and Regele's president, Joseph Regele, all testified at their depositions that in the course of extensive testing to ascertain the cause of the leaks, a number of

¹ Ms. Taylor testified at her deposition that in or around October 2008, she first noticed a damp smell and later leaks which moved from her master bedroom closet to the bathroom to the bedroom, eventually causing her to move out of the apartment from approximately May 2009 through December 2012 after remediation and renovation of her apartment were complete.

marble pavers were removed from the terrace and a rip in the roof membrane was discovered. Mr. Regele posited that Ms. Walsh's boyfriend installed the irrigation system, lifting the pavers and cutting the roof membrane to accommodate the irrigation system. The cause of the rip in the roof membrane has not been verified but the testimony is clear that once the rip was patched, the leaks were abated.

East River now moves, pursuant to CPLR 3212, for summary judgment dismissing the second amended complaint, the third-party complaint, and all cross-claims as against it. Regele opposes, contending that discovery is not yet complete in that East River has failed to produce paper discovery and is in violation of various court conference orders as it did not produce a witness for deposition. Regele further offers its expert roofing consultant's opinion which challenges the source of the water leak, opining that the stucco work (performed by East River) might have been a cause of the alleged damages. Plaintiff also opposes by attorney affirmation, arguing that significant discovery is outstanding and that the materials used as East River did its work on an exterior wall "could easily have punctured the building's roof membrane causing the rip/cut/tear in the membrane subsequently identified as the defect allowing water to intrude into plaintiff's apartment." Burns Aff. at ¶ 14.

Discussion

On a motion for summary judgment, the moving party has the burden to offer sufficient evidence making a prima facie showing that there is no triable material issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant makes a prima facie showing of entitlement to judgment as a matter of law, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary

judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997).

The court first addresses the branch of the motion which seeks dismissal of the third-party claim for failure to procure insurance. Here, East River produces a certificate of insurance for the applicable time period evidencing that it had indeed procured commercial general liability insurance naming Regele as an additional insured. While Regele maintains that summary judgment on this cause of action is not warranted, it does not raise a triable issue of fact challenging the certificate or this branch of the motion. *See generally Arner v. RREEF America, L.L.C.*, 121 AD3d 450, 451 (1st Dep't 2014), *Chunn v. N.Y.C. Hous. Auth.*, 83 AD3d 416, 417 (1st Dep't 2011). Accordingly, the fourth cause of action in the third-party complaint for failure to procure insurance coverage is dismissed as against East River Contracting Corp. only.

Turning to the remaining claims and cross-claims against it, the record evidences that subcontractor East River's work on the renovation was relegated to stucco work, specifically attaching wire mesh and applying stucco to the vertical surface of an exterior wall of the penthouse. East River offers the affidavit of John D'Augustine, its president and owner, in support.² Mr. D'Augustine states that East River's work occurred on the wall that was "situated directly north of a rooftop terrace that ran parallel to and overlooked 84th Street." D'Augustine Aff. at ¶ 2. Mr. D'Augustine points out that the cut to the roof membrane "on the southern side of the terrace [was] opposite from where East River performed its work." D'Augustine Aff. at ¶ 7.

The deposition testimony of Regele's own president, Joseph Regele, is compelling. Notably, Mr. Regele, testified that neither his company nor his subcontractors cut the roof

² East River submits an additional affidavit from Mr. D'Augustine with its reply.

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membrane and that the third-party action was commenced by his insurance company against his subcontractors despite his belief that Ms. Walsh's boyfriend cut the roof membrane and caused the leak (Regele Tr. 53-60). Mr. Regele also testified that the leaks were caused by the cut in the roof and a leaky upper roof. (Regele tr. at 91-92). He further testified that East River's work had nothing to do with causing the leaks in plaintiff's apartment and that he did not recall having any complaints with East River's work. (Regele tr. at 391). Nothing in Mr. Regele's testimony nor in the testimony of Messrs. Delaga or Dushaj or plaintiff invokes liability on the part of East River.

In opposition, Regele submits an affidavit from a roofing consultant, Richard F. Watsky, stating that based on his review of the pleadings and discovery and an inspection of the roof terrace and plaintiff's residence (for which he provides no dates), in his professional opinion, "the stucco work performed on the penthouse wall adjoining the roof terrace may have been a cause of plaintiff Sandra Taylor's alleged damages." Mr. Watsky notes that "In April 2009, cracks in the penthouse wall stucco adjoining the roof terrace were repaired. These repairs stopped the leakage..." Watsky Aff. at ¶ 3. However, there is no evidence in the record to support that contention and Mr. Watsky offers no foundation for his opinion. The court thus finds Mr. Watsky's affidavit insufficient to warrant denial of summary judgment. *See Terwilliger v. Dawes*, 204 AD2d 433, 434 (2d Dep't 1994), *Margolese v. Uribe*, 238 AD2d 164, 166 (1st Dep't 1997). While plaintiff and Regele argue that the motion is premature in that no representative from East River has been deposed, in light of the discovery conducted thus far and the affidavits offered by East River, they fail to show any evidentiary basis that East River exclusively possesses evidence probative of its claims. *See Mic Property and Cas. Ins. Corp. v. Custom Craftsman of Brooklyn, Inc.*, 269 AD2d 333, 334 (1st Dep't 2000), *Santos v. Booth*, 126

AD3d 506, (1st Dep't 2015), *Progressive Northeastern Ins. Co. v. Penn-Star Ins. Co.*, 89 AD3d 547, 548 (1st Dep't 2011).

Accordingly, it is

ORDERED that East River's motion for summary judgment dismissing the second amended complaint, third-party complaint, and cross-claims against it is granted and the Clerk is directed to enter judgment accordingly; and it is further

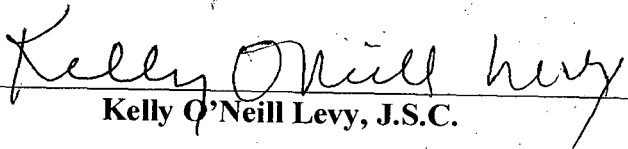
ORDERED that the actions shall continue as against the remaining parties; and it is further

ORDERED that the parties shall recommence discovery forthwith.

This constitutes the decision and order of the court.

ENTER:

Dated: January 17, 2017


Kelly O'Neill Levy, J.S.C.

KELLY O'NEILL LEVY
JSC