

**Chatham Towers, Inc. v Castle Restoration &
Constr., Inc.**

2017 NY Slip Op 30518(U)

March 17, 2017

Supreme Court, New York County

Docket Number: 651561/2013

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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CHATHAM TOWERS, INC.,

Plaintiff,

DECISION/ORDER
Index No. 651561/2013

-against-

CASTLE RESTORATION & CONSTRUCTION, INC.,
KEMPER SYSTEM AMERICA, INC., XYZ CORP. and
ABC CORP.,

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Chatham Towers, Inc. commenced the instant action against defendants Castle Restoration & Construction, Inc. (“Castle”) and Kemper System America, Inc. (“Kemper”) seeking recovery for Castle’s alleged breach of contract and Kemper’s alleged breach of a limited warranty. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it partial summary judgment as to liability against Castle and Kemper and scheduling a hearing on damages. Kemper moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff’s complaint and Castle’s crossclaims asserted against it. These motions are consolidated for the purpose of disposition. For the reasons set forth below, plaintiff’s motion for summary judgment is denied, the portion of Kemper’s motion for summary judgment dismissing plaintiff’s complaint against it is granted and the portion of Kemper’s motion for summary judgment dismissing Castle’s crossclaims is denied.

The relevant facts are as follows. Plaintiff is the owner of a residential cooperative building located at 170-180 Park Row, New York, New York (the “building”). The building consists of two towers separated by a plaza (the “plaza”). The plaza is located over an underground commercial parking garage used both by residents and the public (the “parking garage”). In the late 1990s, water from the plaza began leaking into the parking garage. On or about July 1, 2001, plaintiff entered into a contract with Castle (the

“Castle contract”) whereby Castle served as the general contractor for the restoration and waterproofing of the plaza (the “Project”). Pursuant to the Castle contract, Castle installed a waterproofing membrane manufactured by Kemper (the “waterproofing system”). Kemper personnel supervised the installation of the waterproofing system. Further, pursuant to the Castle contract, Castle covered the waterproofing system with a layer of concrete (the “overburden”). Castle completed the Project in or around April 2004. Kemper then issued a twenty-year limited warranty with regard to the waterproofing system (the “Kemper warranty”). The Kemper warranty provides that the waterproofing system “shall be free from leaks or seepage through the System to the substrate for a period of 20 years from the Completion Date” and that Kemper “shall at its option repair or replace any defective area of the System discovered to be defective during the warranty period.” Pursuant to the Kemper warranty,

The Owner [plaintiff] will, at its sole expense, furnish Kemper System, Inc. and its agents free access to the Structure for inspection, testing, and repairs or replacement and provide all required scaffolding, staging, and rigging. Owner shall bear the cost of materials and labor for repairs to the Structure and, except as otherwise provided by an overburden rider, for removal and replacement of overburden to afford access to the claimed System defect.

In early 2010, a parking garage employee informed plaintiff’s Board of Directors (the “Board”) that there were leaks from the plaza into the parking garage. On or about April 28, 2010, Cooper Square Realty, Inc. (“Cooper Square”), plaintiff’s management company, e-mailed Kemper regarding the leaks. A Kemper representative attempted to conduct an inspection but was unable to determine the cause of the leaks because the waterproofing system was covered with the overburden. By a letter dated June 22, 2010, Kemper advised Cooper Square that the overburden would need to be removed before Kemper took any further steps to inspect, repair or replace the waterproofing system. Thereafter, plaintiff decided not to remove the overburden because it would be costly, would leave the plaza exposed and would damage the waterproofing system. On or about June 27, 2012, one of plaintiff’s Board members met with a Castle representative to discuss the leaks. However, Castle did not take any action with regard to the leaks. Thus, on or about April 30, 2013, plaintiff commenced the instant action.

The court first considers plaintiff’s motion for summary judgment based solely on the doctrine of *res ipsa loquitur*. Specifically, plaintiff contends that Castle is liable for breach of contract and that Kemper is

liable for breach of warranty based on the doctrine of *res ipsa loquitur* because the leaks would not have occurred if the waterproofing did not fail, the waterproofing was in the exclusive control of Castle and Kemper and the leaks could not have been caused by any acts or contribution on the part of plaintiff. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. See *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

The doctrine of *res ipsa loquitur* permits the factfinder to infer negligence based only on the occurrence of an event where certain conditions are met. See *Ezzard v. One E. Riv. Place Realty Co., LLC*, 129 A.D.3d 159, 162 (1st Dept 2015). “Without a viable cause of action for negligence, there can be no viable cause of action to which to apply the doctrine of *res ipsa loquitur*.” *Crawford v. City of New York*, 53 A.D.3d 462, 465 (1st Dept 2008) (italicization added).

In the present case, plaintiff’s motion for summary judgment is denied on the ground that the doctrine of *res ipsa loquitur* is inapplicable as plaintiff has not asserted any cause of action for negligence against defendants. To the extent that plaintiff cites case law from foreign jurisdictions wherein the courts applied the doctrine of *res ipsa loquitur* to products liability cases, plaintiff’s citation to this legal authority is unavailing as New York case law clearly holds that the doctrine of *res ipsa loquitur* only applies where the plaintiff asserts a cause of action for negligence.

The court next considers the portion of Kemper’s motion for summary judgment dismissing plaintiff’s complaint against it. Kemper has established its *prima facie* right to judgment as a matter of law on the ground that it has not breached the Kemper warranty by failing to repair or replace the waterproofing system as plaintiff has failed to first bear the cost for the removal of the overburden, which is a condition precedent under the Kemper warranty. The Kemper warranty specifically provides that plaintiff must

"furnish Kemper [with]...free access to the Structure" and "shall bear the cost of materials and labor...for removal and replacement of overburden to afford access to the claimed System defect," thereby allowing Kemper to inspect and repair or replace the waterproofing system. It is undisputed that plaintiff decided not to comply with Kemper's request that plaintiff remove the overburden because it determined that removing the overburden would be costly, would leave the plaza exposed and would damage the waterproofing system.

In opposition, plaintiff has failed to raise a triable issue of fact. Plaintiff's argument that the provision of the Kemper warranty requiring it to bear the cost for the removal of the overburden is not a condition precedent to Kemper's obligation to repair or replace the waterproofing system because the provision does not expressly state that the removal of the overburden is a condition precedent and because it is not included in the section of the Kemper warranty titled "Conditions to Continued Coverage" is without merit. The court finds that the Kemper warranty clearly requires plaintiff to pay for the removal of the overburden, thereby providing Kemper with access to the waterproofing system, before Kemper is required to repair or replace the waterproofing system. In fact, Kemper cannot repair or replace the waterproofing system unless it has such access to the waterproofing system.

Further, plaintiff's argument that the Kemper warranty only requires it to reimburse Kemper for its removal of the overburden rather than to directly pay for the removal of the overburden based on the provision requiring plaintiff to reimburse Kemper for "expenses incurred in the investigation and repair of non-warranted conditions" is without merit. It is clear that this reimbursement provision, which is included in a different section of the Kemper warranty than the provision requiring plaintiff to bear the cost for the removal of the overburden, only refers to expenses incurred by Kemper in the course of its own investigation and repair of the waterproofing system where the system's defect is not covered under the warranty.

Castle's argument that the portion of Kemper's motion for summary judgment dismissing plaintiff's complaint against it must be denied on the ground that any conditions precedent in the Kemper warranty are unenforceable because the Kemper warranty is a contract of adhesion is without merit. A contract is one of

adhesion “where the party seeking to enforce the contract use[s] high pressure tactics or deceptive language in the contract and where there is inequality of bargaining power between the parties...In addition, it must be shown that the contract inflicts substantive unfairness on the weaker party.” *Precision Mech. v. Dormitory Auth. of State of N.Y.*, 5 A.D.3d 653, 654 (2d Dept 2004) (internal citation omitted).

In the present case, Castle has failed to make a *prima facie* showing that the Kemper warranty is a contract of adhesion as it has failed to submit evidence that Kemper used high pressure tactics or that there is deceptive language in the Kemper warranty, that there was inequality of bargaining power between Kemper and plaintiff and that the Kemper warranty inflicts substantive unfairness on plaintiff.

Castle’s argument that the inequality of bargaining power between Kemper and plaintiff is demonstrated by plaintiff’s inability to alter the terms or conditions of the Kemper warranty is unavailing as, even assuming *arguendo* that there was inequality of bargaining power between Kemper and plaintiff, such inequality alone is insufficient for the court to find that the Kemper warranty is a contract of adhesion. Further, to the extent that Castle contends that the Kemper warranty is a contract of adhesion because it provides that plaintiff waives all claims for negligence and agrees to indemnify Kemper for any such claims, which is allegedly an unenforceable exculpatory clause pursuant to General Obligations Law (“GOL”) § 5-322.1, such contention is unavailing. Even assuming *arguendo* that the aforementioned provision is unenforceable pursuant to GOL § 5-322.1, the inclusion of such a provision does not show that the Kemper warranty is a contract of adhesion.

As the court has determined that Kemper is entitled to summary judgment dismissing plaintiff’s complaint against it on the ground that plaintiff has failed to bear the cost for the removal of the overburden, the court need not consider Kemper’s argument that it is entitled to summary judgment on the additional ground that plaintiff failed to give timely notice of the leaks as required under the Kemper warranty.

The portion of Kemper’s motion for summary judgment dismissing Castle’s crossclaims is denied as Kemper has failed to provide any analysis as to why the court should grant it summary judgment dismissing Castle’s crossclaims. Although Kemper raises specific arguments with regard to Castle’s crossclaims in its reply papers, this court will not consider such arguments as “[t]he function of reply papers is to address

