Stadnick v Board of Mgrs. of the Emory Condominium
2017 NY Slip Op 32881(U)
January 2, 2017
Supreme Court, New York County
Docket Number: 656427/16
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MICHAEL STADNICK,

Plaintiff,

–against–

THE BOARD OF MANAGERS OF THE EMORY CONDOMINIUM,

Defendant.

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Index No. 656427/16
Motion Seq. No. 04

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a condominium action involving a roof leak, petitioner Michael Stadnick (Stadnick), a condominium owner, seeks partial summary judgment, pursuant to CPLR 3212, as to liability against defendant Board of Managers of the Emory Condominium (the Condo). Stadnick's verified complaint lists five causes of action, but he fails, in his notice of motion, to specify for which cause or causes of action he seeks summary judgment. However, his memorandum of law suggests that he is seeking summary judgment directed at his third cause of action, for negligence, and his second cause of action, for breach of contract.

BACKGROUND

This case involves roof leaks into a condominium owner's unit. The structural issue with the roof above Stadnick's apartment has apparently been fixed and the crux of what is left of this case is Stadnick's claism related to property damage caused by the leaks. He now moves for summary judgment as to the Condo's liability for those damages pursuant to his negligence and breach of contract claims.

DISCUSSION

As the proponent of the motion for summary judgment, plaintiff must establish its cause of action or defense sufficiently to warrant the court directing judgment in its favor as a matter of law in (CPLR §3212 [b]; *VisionChina Media Inc. v Shareholder Representative Services, LLC,* 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]; *Ryan v Trustees of Columbia University in City of New York, Inc.*, 96 AD3d 551, 947 NYS2d 85 [1st Dept 2012]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1st Dept 2012]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012], *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*Wing Wong Realty Corp. v. Flintlock Const. Services, LLC*, 95 AD3d 709, 945 NYS2d 62 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986]; *Ostrov v Rozbruch*, 91 AD3d 147, 936 NYS2d 31

[1st Dept 2012]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562; *IDX Capital, LLC v Phoenix Partners Group*, 83 AD3d 569, 922 NYS2d 304 [1st Dept 2011]).

The defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" *(Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]; *see Machado v Henry*, 96 AD3d 437, 945 NYS2d 552 [1st Dept 2012]; *Garber v Stevens*, 94 AD3d 426, 941 NYS2d 127 [1st Dept 2012], *citing Pippo v City of New York*, 43 AD3d 303, 304, 842 NYS2d 367 [1dt Dept 2007] ["(a) party's affidavit that contradicts (his or) her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment"]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Siegel v City of New York*, 86 AD3d 452, 928 NYS2d 1 [1st Dept 2011] *citing Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718 [1980]).

I. Negligence

To establish negligence, a plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, *inter alia, Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]).

Although Stadnick does not refer to the doctrine of *res ipsa loquitur* in his complaint or bill of particulars, it is at the center of his application for summary judgment on his negligence

claim here. "Res ipsa loquitur is not a separate theory of liability but merely a common-sense application of the probative value of circumstantial evidence" and "failure to specifically plead res ipsa loquitur does not constitute a bar to the invocation of res ipsa loquitur where the facts warrant its application" (*Smith v Consolidated Edison Co. of N.Y., Inc.*, 104 AD3d 428, 428-429 [1st Dept 2013]). Thus, plaintiff's failure to plead the doctrine does not bar his invocation of it here.

"To apply res ipsa loquitur, a plaintiff must establish that: "(1) the accident [is] of a kind that ordinarily does not occur in the absence of negligence; (2) the instrumentality or agency causing the accident [is] in the exclusive control of the defendants; and (3) the accident must not be due to any voluntary action or contribution by plaintiff" (*Smith v Consolidated Edison Co. of N.Y., Inc.*, 104 AD3d 428, 429 [1st Dept 2013]).

Stadnick cites to *Dillenberger v 74 Fifth Ave. Owners Corp.* (155 AD2d 327 [1st Dept 1989]) and *Swain v 383 W. Broadway Corp.* (216 AD2d 38 [1st Dept 1995]) in support of his argument that the leak into his apartment speaks for itself, showing the negligence of the Condo. In *Dillenberger*, the First Department held that *res ipsa loquitur* permitted an "inference of negligence" where a pipe in a common area burst, damaging the proprietary-lessee plaintiff's property, where the proprietary lease required defendant to "maintain, operate and repair the plumbing, heating and sprinkler systems and to maintain the common areas in good repair" (155 AD2d at 327). *Swain*, like *Chan v 1058 Corp.* (200 AD2d 434 [1st Dept 1994) did not involve res ipsa loquitur at all; instead, in *Swain*, the First Department considered ordinary principles of negligence involving a premises defect, such as notice, in upholding a jury verdict (216 AD2d at 38-39).

Here, plaintiff has made no showing that a roof leak does not typically occur in the absence of negligence. Thus, the court declines to apply the doctrine at this stage. As plaintiff's argument rests on *res ipsa loquitur*, he fails to make a *prima facie* showing of entitlement to summary judgment on his claim for negligence.

II. Breach of Contract

As to breach of contract, the record makes clear and the parties agree that the leak emanated from a defect in the bulkhead of the roof. It is equally clear that the bulkhead is a "common element" pursuant to the proprietary lease. Meanwhile, ¶ 6.9.3 of the Condo's bylaws provides that the Condo will keep the common elements "in first-class condition" and to "promptly make or perform, or cause to be made or performed, all maintenance work, repairs and replacements necessary in connection therewith."

"To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages" (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013] [internal citation omitted]).

Here, the Condo hired a contractor to make repairs on the subject roof. The time between the plaintiff's first alleged complaint regarding the leaks to the Condo was less than a year before the roof repairs were done. In these circumstances, the court cannot resolve, as a matter of law, whether the Condo made the repairs "promptly," as it is required to do under the bylaws. As a question of fact remains as to whether the Condo failed to perform its contractual obligations, plaintiff, at this stage, is not entitled to summary judgment on his breach of contract claims against the Condo.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied without prejudice; and it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 2, 2017

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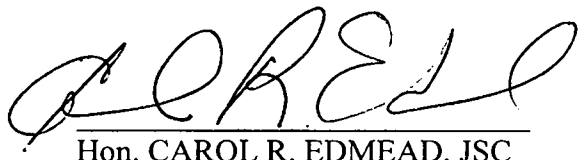

Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.