Page v Robison Oil Co.
2017 NY Slip Op 33521(U)
September 12, 2017
Supreme Court, Westchester County
Docket Number: Index No. 68375/2015
Judge: Linda S. Jamieson
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp ____ Dec __x__ Seq. No. __3__ Type _SJ__

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
---------------------------------------x
REBECCA PAGE, ESTANISLAO PERALTA, and
HOMESITE INSURANCE COMPANY,

Plaintiffs,

-against-

Index No. 68375/2015

ROBISON OIL COMPANY, SINGER HOLDING
CORPORATION d/b/a ROBISON OIL COMPANY,
MARIAN LAPSLEY CROSS and LAWRENCE CROSS,

Defendants.
---------------------------------------x

The following papers numbered 1 to 6 were read on this motion:

Paper	Number
Notice of Motion, Affirmation and Exhibits	1
Affirmation and Exhibits in Opposition[1]	2
Affirmation and Exhibits in Opposition	3
Affirmation in Opposition	4
Reply Affirmation and Exhibit	5
Reply Affirmation	6

Defendants Marian Lapsley Cross and Lawrence Cross bring their motion seeking summary judgment dismissing them from the action.

[1]Counsel is warned that the Part Rules of this Court (as well as many others in this County) impose page limits on affirmations, affidavits and memoranda of law. Future overlong submissions will be rejected.

This case arises out of a fire that occurred at a house owned by the Crosses and leased by plaintiffs Page and Peralta. The lease provides, in relevant part, that the landlord made no representations as to the condition of the premises, and tenant accept the premises in "as is" condition. The lease also provides that tenant, at tenant's own expense, shall "make all interior repairs, alterations, decorations and improvements." It also provides that tenant is responsible for all utilities and heating costs. The lease further provides that "Landlord shall bear the entire expense of all structural maintenance and repairs (including, but not limited to, repair and replacement of any originally installed equipment and fixtures) but Landlord shall not be responsible for other repairs, alterations, decorations and improvements."

There is no dispute that defendant Robison Oil Company ("Robison") is the company that installed the furnace in the home in 2004. There is also no dispute that Robison is the only company that has ever serviced the furnace. There is further no dispute that plaintiffs contracted with Robison to continue to service the furnace.

Defendants appear to agree that the fire was a pure accident, just a fluke. Plaintiffs, in contrast, argue that the fire was caused by an fault in the furnace and/or pipes. Significantly, Robison contends that back in 2006, it told the

Crosses that there was a problem with the pipe going from the furnace to the chimney. Robison further contends that in respond to this information, the Crosses stated that they would get "the chimney man" to come and fix the problem. Words to this effect are written on a service record from May 2006. Mr. Cross stateed at his deposition that he did not recall ever having been told this information, or making any such statement in response thereto.

Analysis

It is well-settled that

> the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.

Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986).

Here, the Crosses contend that they are an out-of-possession landlord and thus, as such, they have no liability for the fire that occurred. As the Second Department has explained, "An out-of-possession owner . . . is not liable for injuries that occur on the . . . premises unless it has retained control over the premises, and is statutorily or contractually obligated to

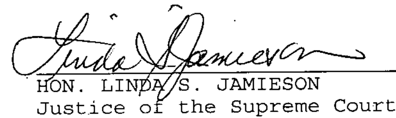
repair or maintain the premises, or has assumed such a duty by virtue of a course of conduct." *Roman v. Junius-Liberty Dev., LLC*, 121 A.D.3d 774, 775, 994 N.Y.S.2d 161, 163 (2d Dept. 2014). *See also Winby v. Kustas*, 7 A.D.3d 615, 615, 775 N.Y.S.2d 906 (2d Dept. 2004).

A review of the lease in this action shows an ambiguity as to which party, landlord or tenant, is responsible for the furnace. While plaintiffs are responsible for "interior repairs," at the same time, the Crosses are responsible for "structural maintenance and repairs," which includes the repair of any originally installed equipment - such as a furnace. If the fire were caused by an improperly installed pipe from the furnace to the chimney, that would be the Crosses' responsibility as a structural repair to originally installed equipment, rather than an "interior repair."

Given the ambiguity in the lease, as well as the lack of clarity about the cause of the fire, the Court must deny the motion for summary judgment. The parties are directed to appear for a Settlement Conference in the Settlement Conference Part, Courtroom 1600, on October 17, 2017 at 9:15 a.m.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
September 12, 2017



HON. LINDA S. JAMIESON
Justice of the Supreme Court

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