

Sultan v Connery

2019 NY Slip Op 30087(U)

January 7, 2019

Supreme Court, New York County

Docket Number: 158138/2014

Judge: James E. d'Auguste

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM

Justice

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INDEX NO. 158138/2014

BURTON SULTAN

MOTION DATE 02/01/2018

Plaintiff,

MOTION SEQ. NO. 002

- v -

STEPHANE COSMAN CONNERY, AS TRUSTEE OF THE
STEPHANIE COSMAN CONNERY 2002 TRUST U/D/T DATED
SEPTEMBER 30, 2002.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Defendant, Stephane Cosman Connery, as Trustee of the Stephane Cosman Connery 2002 Trust U/D/T Dated September 30, 2002 ("Mr. Connery") moves pursuant to CPLR 3212 for an order granting him summary judgment dismissing the amended verified complaint. For the reasons set forth below, the motion is denied.

Factual and Procedural Background

This is an action to recover a money judgment for property damages arising out of a water leak that occurred on October 8, 2011 at Mr. Sultan's condominium located at 175 East 71st Street, New York, New York. The subject building contains two condominium units. It is undisputed that on October 8, 2011, Mr. Sultan was the owner of Unit 1 and Mr. Connery was the owner of Unit 2, a condominium located directly above Mr. Sultan's unit.

On August 11, 2014, Mr. Sultan filed a summons and verified complaint alleging a cause of action for negligence and damages in the sum of \$123,424.02. Mr. Connery answered, and the parties entered into a stipulation dated February 5, 2015, whereby Mr. Sultan was permitted to amend his complaint. An amended verified complaint was filed on February 12, 2015 and alleges a cause of action for negligence. Specifically, it is alleged that, on or about October 8, 2011, Mr. Connery or his servants, agents and/or employees “carelessly and negligently disposed of heavy paper towels into the sewer and/or plumbing system at the location 173 E. 171st Street, Unit 2, New York, New York, thereby causing a water loss to occur, resulting in damages to plaintiff’s property located in his condominium.” Mr. Sultan further claims that Mr. Connery and/or his servants, carelessly and negligently misused the sewer and/or plumbing system located in Unit 2 and that the damage was caused solely by Mr. Connery or his agents.

Mr. Connery filed an amended verified answer denying any wrongdoing. The answer contains two affirmative defenses alleging contributory negligence on behalf of Mr. Sultan and/or a third party. Mr. Sultan, Mr. Connery, and non-party witnesses, Marilyn Sultan and Rosalita “Lily” Santos appeared for depositions on December 1, 2015, October 11, 2016, April 25, 2017, March 6, 2017, respectively.

Mr. Connery now moves for summary judgment on the grounds that he did not breach any duty owed to Mr. Sultan, and any damages that were allegedly suffered was not caused by Mr. Connery’s action or inaction. Moreover, Mr. Connery claims that there is no admissible evidence that demonstrates he breached any duty owed to Mr. Sultan.

Discussion

It is well settled that “a movant for summary judgment bears the initial burden of presenting affirmative evidence of its entitlement to summary judgment.” *Hairston v Liberty Behavioral Mtg. Corp.*, 157 A.D.3d 404 9 (1st Dept 2018); *see Cole v Homes for the Homeless Inst., Inc.*, 93 A.D.3d 593 (1st Dept 2012). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Winegrad v New York Univ. Med Ctr.*, 64 N.Y.2d 851 (1985). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See Zuckerman v City of New York*, 49 N.Y.2d 557 (1980).

To prevail on a negligence cause of action, plaintiff must show that (1) defendant owed a duty to plaintiff, (2) defendant breached such duty, and (3) plaintiff’s injuries resulted from defendant’s breach. *Ewen v Maccherone*, 32 Misc.3d 12 (1st Dept 2011); *see Akins v Glens Falls City School Dist.*, 53 N.Y.2d 325, 333 (1981).

In support of his motion, Mr. Connery submits the affirmation of his counsel, Joseph A. Lupo, Esq. Mr. Lupo argues that the record is devoid of admissible evidence that demonstrates he breached of any duty owed to Mr. Sultan. While the parties do not dispute that a water pipe somehow allowed water to flow into the Sultan condominium, Mr. Lupo argues that this fact alone does not establish a breach of any duty owed or the issue of

proximate cause. Mr. Lupo alleges that the deposition testimony of Mr. Sultan contains inadmissible hearsay as it fails to identify the plumber or any other expert who informed Mr. Sultan that paper towels clogged the pipe causing the pipe to break. However, Mr. Lupo's contention that Mr. Connery should be granted summary judgment because it has not been established as a matter of law that he was negligent, misapprehends the movant's burden on his own motion. Mr. Connery has not provided affirmative evidence, such as his own expert testimony indicating the water leak did not originate from his unit and/or the paper towels were not placed in his plumbing system and therefore could not have caused the damage. See *Hairston* 157 A.D.3d at 406.

Mr. Connery asserts that Mr. Sultan's speculation as to who caused the pipes to become obstructed ignores the fact that there is no proof on the record. However, Mr. Connery failed to submit his own affirmative evidence in support of his motion. Because Mr. Connery merely pointed to perceived gaps in plaintiff's proof, he is not entitled to summary judgment. *Hairston* 157 A.D.3d at 406.

Mr. Connery had the burden to come forward with admissible evidence that Mr. Sultan's cause of action had no merit. See *Berkeley v Rensselaer Polytechnic Inst.*, 289 AD2d 690, 691 (3rd Dep't 2001); *Babbie v Boisvert*, 281 A.D.2d 845, 845 (3rd Dep't 2001). Conclusory assertions are insufficient to meet this burden. See *Parks v Greenberg*, 161 A.D.2d 467, 468-469, (1990), *appeal dismissed* 76 N.Y.2d 888, 874 (1990), *lv denied* 76 N.Y.2d 712 (1990). The depositions relied upon by Mr. Connery are conclusory and self-serving, thus Mr. Connery failed to present evidence that his negligence did not cause the pipe to burst. Questions of fact exist regarding, inter alia, whether the pipe burst

because of Mr. Connery's negligent disposal of paper towel and/or his misuse of the plumbing system located in his condominium; and whether Mr. Connery, as an owner, breached the duty of care owed to Mr. Sultan pursuant to the condominium By-Laws. Therefore, the court concludes that Mr. Connery did not meet his initial burden of establishing his entitlement to summary judgment.

In light of the above conclusion, the burden never shifted to Mr. Sultan to raise a triable issue of fact. Accordingly, Mr. Connery's motion for summary judgment is denied.

In accordance with the foregoing, it is hereby

ORDERED the motion for summary judgment is denied; and it is further

ORDERED that counsel is directed to initiate a conference call with this Court on **January 16, 2019 at 3:00 PM** to set the schedule for trial in this matter.

This constitutes the decision and order of this Court.

1/7/2019
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

JAMES EDWARD D'AUGUSTE, J.S.C.

