

**Public Adm'r of N.Y. County v 6 Gramatan Realty,
LLC**

2019 NY Slip Op 31282(U)

May 6, 2019

Supreme Court, New York County

Docket Number: 157071/16

Judge: Robert D. Kalish

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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: IAS PART 29

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PUBLIC ADMINISTRATOR OF NEW YORK COUNTY
as Administrator of the Estate of JUAN PAZ-REYES,

Plaintiff,

Index No.: 157071/16
DECISION/ORDER

-against-

6 GRAMATAN REALTY, LLC, 1978 THIRD
AVENUE, LLC and 11285 AV, LLC,

Defendants.

-----X
1978 THIRD AVENUE, LLC and 11285 AV, LLC,

Third-Party Plaintiffs,

-against-

GLOBAL GENERAL CONSTRUCTION, INC.,

Third-Party Defendant.

-----X
1978 THIRD AVENUE, LLC and 11285 AV, LLC,

Second Third-Party Plaintiffs,

-against-

6 GRAMATAN REALTY, LLC,

Second Third-Party Defendant.

-----X
HON. ROBERT D. KALISH, J.S.C.:

In this premises liability/wrongful death action, second third-party defendant 6 Gramatan Realty, LLC (6 Gramatan) moves to dismiss the second third-party complaint, pursuant to CPLR 3211 (a) (1) (motion sequence number 005), based upon a contract of sale. For the following

reasons, this motion is granted and the second third-party complaint herein is dismissed.

BACKGROUND

The underlying action herein is a premises liability/wrongful death action which the plaintiff Public Administrator of New York County (the PA) commenced on behalf of the estate of decedent Juan Paz-Reyes. Plaintiff's decedent was a construction worker employed by third-party defendant Global General Construction, Inc. (Global) to perform work on a building (the building) located at 6 Gramatan Avenue (a/k/a 5 Stevens Avenue) in the Town of Mount Vernon, County of Westchester, State of New York. *See* Brosnan affirmation in opposition, ¶ 9. 6 Gramatan is the building's former owner, and co-defendants 1978 Third Avenue, LLC and 11285 Av, LLC (together, landlords) are the building's current owners. *See* notice of motion, Aryeh aff, ¶¶ 5-10.

Plaintiff's decedent died on November 5, 2014 when he fell through an allegedly improperly covered hole in the bulkhead of the building's roof. *See* Brosnan affirmation in opposition, exhibit E (complaint). At that time, landlords were the building's owners, title having been transferred to them on October 1, 2014 via a purchase and sale agreement that they had previously executed with 6 Gramatan (the sale agreement). *See* notice of motion, Aryeh aff, ¶ 10; exhibits A, B. The sale agreement provides as follows:

“5. Premises ‘As-Is’. Purchaser [i.e., landlords] prior to the execution of this Agreement has become thoroughly acquainted with [the building's] condition and agrees that Seller [i.e., 6 Gramatan] has not made and does not make any representations as to the physical condition . . . or any other matter or thing affecting or related to the Premises and this Agreement, except as specifically set forth in this Agreement, and that neither party is relying upon any statement or representation made by the other not embodied in writing in this Agreement, and except as herein specifically set forth, Seller makes no representation or warranties of any kind or nature with respect to the condition of the Premises and

Purchaser hereby expressly acknowledges that no such unstated representations or warranties have been made. Except as specifically set forth herein, Purchaser further agrees to take the Premises in its present 'as-is' condition in all respects at the date hereof. Seller is not liable or bound in any manner by any verbal or written statements, representations . . . or information pertaining to the above property or to . . . [its] condition . . . unless the same are specifically set forth herein.

* * *

“31. Attorney’s Fees. If either party hereto shall commence litigation against the other in connection with the transactions contemplated by this Agreement, the losing party in such action shall reimburse the reasonable attorney’s fees and disbursements of the prevailing party in such action.”

Id., exhibit B.

The PA commenced the underlying action against 6 Gramatan and the landlords on August 23, 2016. *See* Brosnan affirmation in opposition, exhibit E (complaint). 6 Gramatan did not file an answer to the PA’s complaint. On October 10, 2017, this court entered an order granting 6 Gramatan’s motion to dismiss the underlying action as against it (motion sequence number 003). Thereafter, the landlords commenced the instant second third-party action against 6 Gramatan via impleader by filing a summons and complaint setting forth one claim for common-law indemnification and/or contribution. *Id.*, exhibit E (second third-party complaint). 6 Gramatan did not file an answer to the second third-party complaint either, but instead served the instant motion to dismiss on (motion sequence number 005).

DISCUSSION

I. Motion to Dismiss

When evaluating a defendant’s motion to dismiss, pursuant to CPLR 3211 (a), the court “must give the pleadings a liberal construction, accept the allegations as true and accord the

plaintiffs every possible favorable inference.” See *Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 (2106), citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002). On a CPLR 3211 (a) (1) motion to dismiss, where a defense is founded upon documentary evidence, dismissal “is only appropriate where the documentary evidence presented conclusively establishes a defense to the plaintiff’s claims as a matter of law.” *Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 626-27 (1st Dept 2017) (internal citations omitted).

“The documents submitted must be explicit and unambiguous. In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all reasonable inferences. However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence.”

Id. Further, where the documentary evidence submitted flatly contradicts the plaintiff’s factual claims, the entitlement to the presumption of truth and the favorable inferences are both rebutted. *Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 (1st Dept 2001), *affd as mod Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002), citing *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1st Dept 1994).

On this motion, 6 Gramatan moves, pursuant to CPLR 3211 (a) (1) to dismiss the second third-party complaint on the ground that the landlords’ claim therein is barred by documentary evidence—specifically, the terms of the sale agreement. 6 Gramatan argues that it “owes no duty or liability to the present owner” because: 1) it transferred title to the building to the landlords on October 1, 2014, a month before the accident which claimed plaintiff’s decedent’s life; and 2) prior to the closing of the sale agreement, the landlords retained non-party engineering firm Tri-State Engineering, P.C. (Tri-State) who inspected the building and delivered a “project condition

assessment report” to the landlords which set forth its comprehensive analysis of the building’s condition. *See* second third-party defendant’s mem of law at 3-14. 6 Gramatan argues that these documents conclusively prove that it did not owe any legal duty of care to the landlords at the time of plaintiff’s decedent’s accident which could serve as the basis for the landlords’ third-party claim against it. *Id.* The landlords acknowledge the general rule that a property owner’s “liability for the condition of real property usually ceases when possession and control thereof is transferred,” but argue that their claim against 6 Gramatan should survive pursuant to the “undisclosed condition” exception to that rule. *See* Brosnan affirmation in opposition, ¶¶ 13-14. 6 Gramatan’s reply papers reassert its original argument that the landlords’ claim against it is barred by the sale agreement’s “as-is” clause. *See* second third-party defendant’s reply mem, at 3-6. As will be further explained, the Court finds that the documentary evidence—namely, the contract of sale—conclusively establishes that 6 Gramatan cannot be liable to the landlords for decedent’s injuries as a matter of law.

In *Armstrong v Ogden Allied Facility Mgt. Corp.* (281 AD2d 317 [1st Dept 2001]), the Appellate Division, First Department, observed that:

“Generally, liability for a defective condition on premises does not attach to a prior owner or managing agent, except where a dangerous condition may have existed at the time of the conveyance and the new owner or manager has not had reasonable time to discover and remedy the defect. In those rare instances where the exception is sustained, ‘[u]ntil liability passes to the new owner, the onus should remain with the old.’ As a general proposition, the controller of premises cannot be held liable for a defect unless he had either actual or constructive notice of the hazard. In the case at bar, there was no actual notice because no one had complained of a defect where the accident took place. But a trier of facts could find constructive notice, based upon the similar hazardous condition that was known to have existed for at least two years elsewhere in the building. A plaintiff carries the burden at trial of convincing the trier of facts, even by circumstantial evidence, of at least constructive notice of an ongoing dangerous condition. On

the other hand, in order to obtain summary judgment, the defendant must demonstrate that the plaintiff will be unable to satisfy that burden at trial. Since [defendant] failed to make that showing, its motion should have been denied.”

281 AD2d at 318 (internal citations omitted). Here, the landlords argue that 6 Gramatan had constructive notice because “the unprotected and unregulated opening [in the building’s roof] existed at the time of the conveyance,” and that 6 Gramatan, “did not notify [them] of, or allow access to, the alleged unprotected and unregulated opening at [the building] prior to the conveyance . . . on October 1, 2014.” *See* Brosnan affirmation in opposition, ¶ 14. However, the Court notes that Tri-State’s building inspection report is dated June 10, 2014, well before either the closing date of the sale agreement or plaintiff’s decedent’s accident, and that it discloses that Tri- State’s site engineer conducted an inspection of the building’s roof on that date. *Id.*; exhibit C. The Tri-State inspector’s report specifically noted as follows:

“GENERAL NOTE - CONDITIONS AND LIMITATIONS

* * *

“This report is based on the examination of readily accessible areas of the structure and is limited to visual observations of conditions existing at the time of the inspection. Inspection is not made in areas that are concealed, obstructed or cluttered. Objects are not moves, which is not limited to furniture, heavy appliances, carpeting, floor and wall coverings, etc. Concealed defects and deficiencies are excluded from the inspection. No equipment or building materials shall be dismantled for inspection.

* * *

“FINDINGS AND CONCLUSIONS

* * *

“The following is a partial list of items found. Please note that this list is not inclusive of all findings and must be used with caution. This list is not to be considered the most significant items or a priority list. Review report for

additional findings.

- “1. Roofing material is aged and at the end of its service life. Replacement of the entire roof is required. Replacement of all flashing materials at parapets, *penetrations*, HVAC equipment will also be required during update.
- “2. Roofing or waterproofing the horizontal shelf at the front perimeter of the building is required due to evidence of water seepage to the parapet and tenant spaces below.

* * *

“GENERAL

* * *

“Roofing material is flat single ply membrane type. The building is heated by several roof mounted HVAC single package units.

Note: Not all of areas of the building were accessible at the time of this inspection. Not all areas of the inspected tenant spaces and common areas were visible due to excessive storage. *Comments made herein are based on the inspected portions of the building.*”

* * *

“EXTERIOR

“Roofing

“Roofing system is of flat, single-ply material. Roofing material is aged and in poor condition. Normal lifespan for this type [of] roofing material is 12-15 years. Material is at the end of its life. Updating is required at this time.

“Adjustments will need to be made during the roof replacement to eliminate ponding on the roof surface.

“Check flashing annually as part of roof inspection and repair accordingly. Vulnerable roof flashing areas include: 1) roof vents; 2) plumbing stacks; 3) parapets; [and] 4) *bulkheads*.

“Updating flashing during roof update will be required

* * *

“*Bulkheads* and sections of the parapets have been coated with mastic, which is a poor and temporary condition. This can lead to mortar deterioration. Mastic is pulling off several sections of the parapets Stripping of this material during the roof update will be required.”

Id. (Emphasis added). In landlords’ opposition papers, counsel avers that the report “notes that the building’s bulkhead was not accessible for inspection . . . [and that] the bulkhead was filled with garbage and sealed shut by plywood and/or other material at this time.” *See* Brosnan affirmation in opposition, ¶ 6 (emphasis in original). To support this claim, landlords present an affidavit from one Michael Kessner (Kessner), who repeats the allegations that “the report . . . notes that the building’s bulkhead was not accessible for inspection . . . [and that] it is my understanding that the bulkhead was filled with garbage and sealed shut with plywood and/or other material . . .” *Id.*; exhibit B. Kessner appears to be one of landlords’ principals, inasmuch as his affidavit acknowledges that the “Michael Kessner Trust” is a “member” of 1978 Third Avenue, LLC . *Id.* However, Kessner merely states that he reviewed the Tri-State inspection report, and does not allege that he was either present during the inspection or conducted it himself.

The June 10, 2014 report certainly contains limiting language that the inspection was “limited to visual observations of conditions existing at the time,” that “inspection is not made in areas that are concealed, obstructed or cluttered,” that “not all areas of the inspected tenant spaces and common areas were visible due to excessive storage,” and that the “comments made herein are based on the inspected portions of the building.” *See* Brosnan affirmation in opposition, exhibit C. However, the inspection report plainly does *not* say that the building’s

bulkhead was inaccessible on June 10, 2014, or that it “was filled with garbage and sealed shut with plywood and/or other material” at that time, as counsel and Kessner both allege. Rather, the report itself recited that the inspector *did* enter onto the building’s roof on June 10, 2014, that he *did* observe the condition of the bulkheads (which included deteriorated flashing and mastic),¹ and that he *did* conclude that the entire roof needed to be replaced. *Id.* In the court’s view, this language flatly contradicts the landlords’ allegation that they did not have access to the building’s roof (or the subject bulkhead) before the closing date of the sale agreement.

More importantly, the contract between the landlords and 6 Gramatan makes clear that the premises were sold "as is" and, as such, “Purchaser [i.e., landlords] prior to the execution of this Agreement has become thoroughly acquainted with [the building's] condition” (Aryeh aff, exhibit B ¶ 5.) Pursuant to well-settled law “the passing of title on an 'as is' basis generally extinguishes any claim for after-discovered defects or breakdowns.” *Caldwell v 302 Convent Ave. Hous. Dev. Fund Corp.*, 272 AD2d 112, 114 (1st Dept 2000). Further, the landlords were given an opportunity to inspect the premises after entering into the contract of sale. Aryeh aff, exhibit B ¶ 18 (d). Even before the landlords entered into the contract of sale, the landlords hired an engineer to inspect the premises, and the engineer reported that the roof needed to be entirely replaced. After closing, the landlords undertook to replace the roof, and this was the work that brought decedent to the roof at the time of his tragic fall.

Therefore, the landlords are seeking, in sum and substance, to hold 6 Gramatan liable for an accident that occurred during renovations that they undertook. However, in agreeing to

¹ The court notes that the inspection report refers to “bulkheads” in the plural, rather than in the singular, which is the characterization that landlords employ in their opposition papers. Landlords offer no reason for this plain discrepancy.

purchase the premises “as is,” the landlords agreed to bear the cost of replacing the roof. Those costs included not just the material and labor costs required but also the costs associated with lawsuits arising from workers injured during that renovation.

In this sense, the instant case where a worker was tragically killed by the unsafe condition he was hired to help remedy is fundamentally different from other cases where a lay person is injured by an unsafe condition days or weeks after the current owner takes possession and lacked an opportunity to discover and remedy the unsafe condition. *Compare Gramazio v 370 Lexington Ave., L.L.C.*, 40 AD3d 303, 304 (1st Dept 2007) (affirming denial of summary judgment to prior owner where plaintiff pedestrian tripped on allegedly "latent and undiscoverable" defect on sidewalk two days after current owner took title). Here, the accident occurred during the landlords attempt to renovate the roof—which inevitably required workers involved in the renovation to encounter certain dangerous conditions. Just like the cost of labor and materials necessary for the renovation of the roof, the cost associated with lawsuits arising from worker injuries was placed on the landlords pursuant to a contract negotiated between landlords and 6 Gramatan.

Landlords do not assert that 6 Gramatan unreasonably denied them access to inspect certain portions of the roof in violation of the purchase contract or that 6 Gramatan engaged in subterfuge to hide the dangerous condition. Rather, the thrust of landlords argument for allowing their case to proceed is, in sum and substance, that 6 Gramatan had an obligation to identify and inform them as to any possible danger on their premises that a construction worker such as decedent might encounter at any time during any future work that might be required to bring the premises from the “as is” condition to the condition desired by the landlord. (See e.g. Oral Arg.

Tr at 21:13-22:15.) That simply was not the deal bargained for between the parties.

Accordingly, based on the unambiguous language of paragraph 5 of the purchase contract, the Court finds that 6 Gramatan is entitled to dismissal of the third-party complaint, pursuant to CPLR 3211 (a) (1).

II. Attorney Fees

The balance of 6 Gramatan's motion seeks an award of legal fees, pursuant to paragraph 31 of the sale agreement. *See* second third-party defendant's mem of law at 15-16. The court notes that, "[u]nder the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper Assoc. v AGS Computers*, 74 NY2d 487 (1989); *see also Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279 (1st Dept 2007); *see also LG Funding, LLC v Johnson and Son Locksmith, Inc.*, 170 AD3d 1153 (2d Dept 2019) ("New York public policy disfavors any award of attorneys' fees to the prevailing party in a litigation.").

"Accordingly, a contractual provision permitting the prevailing party to recover fees that are incidents of litigation should be construed strictly." *214 Wall St. Assoc., LLC v Med. Arts-Huntington Realty*, 99 AD3d 988, 990 (2d Dept 2012).

Here, the relevant fee shifting provision is triggered in the event that one of the signatories to the agreement "shall commence litigation against the other in connection with the transactions contemplated by this Agreement . . ." Aryeh aff, exhibit B. As such, the Court reads this prevailing party provision as applying only to litigation arising from "transactions contemplated by this Agreement" before those transactions are fully consummated at closing, and thus the prevailing party provision would not apply to litigation arising from events that occurred

after closing.

Accordingly, the branch of this motion seeking attorney fees is denied.

CONCLUSION

ACCORDINGLY, for the foregoing reasons, it is hereby

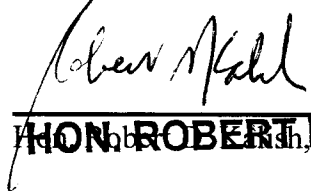
ORDERED that the branch of the motion, pursuant to CPLR 3211 (a) (1), to dismiss the second third-party complaint as against second third-party defendant 6 Gramatan Realty, LLC (motion sequence number 005) is granted, and the second third-party complaint is dismissed in its entirety as against said second third-party defendant, with costs and disbursements to said second third-party defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said second third-party defendant; and it is further

ORDERED that the branch of the second third-party defendant's motion that seeks the recovery of attorney fees is denied.

The foregoing constitutes the decision and order of the Court.

Dated: New York, New York
May 6, 2019

ENTER:



HON. ROBERT D. KALISH
J.S.C.