

452 E. 118th St. LLC. v 329 Pleasant Ave. Mazal Holdings LLC

2019 NY Slip Op 31951(U)

July 8, 2019

Supreme Court, New York County

Docket Number: 151437/2017

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART IAS MOTION 32

Justice

-----X INDEX NO. 151437/2017

452 EAST 118TH ST. LLC., TORRESCO REALTY LLC.,
LAURENA TORRES,

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 004

- v -

329 PLEASANT AVENUE MAZAL HOLDINGS LLC, HAP
INVESTMENT LLC., UMF CONTRACTING CORP., S.I.
SERVICES OF N.Y. INC., MARIO BULFAMANTE & SONS,
WEXLER ASSOCIATES

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 131, 132, 133, 134,
135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 153, 169

were read on this motion to/for MODIFY ORDER/JUDGMENT

The branch of plaintiffs' motion to modify the Decision and Order of this Court dated
May 1, 2019 is granted. The branch of the motion for a protective order is denied.

The cross-motions by defendants 329 Pleasant Avenue Mazal Holdings and HAP
Investments LLC ("developer defendants"), UMF Contracting and S.I. Services Group to modify
the May 1, 2019 Order to clarify the identity of the specific causes of action dismissed in that
Order and to confirm that all causes of action asserted by plaintiffs Laurena Torres and Torresco
Realty, LLC have been dismissed pursuant to that Order is granted. The branch of these
defendants' motions to compel the plaintiffs to submit the subject property to soil testing is
granted.

Discussion

Modification of the May 1, 2019 Order

In a decision dated May 1, 2019, the Court dismissed the strict liability claim asserted by all named plaintiffs, mistakenly believing that all plaintiffs had withdrawn this cause of action. In reality, only plaintiff Torresco Realty LLC had withdrawn this claim and the Partial Motion to Dismiss only presented Torresco Realty LLC's strict liability cause of action to the Court for decision. Therefore, the Order is changed from "**Strict Liability**- Plaintiffs withdraw this cause of action" to "**Strict Liability**- Torresco Realty LLC has withdrawn the cause of action."

Modification/Clarification of the May 1, 2019 Order

Certain defendants cross-move to clarify the identity of the specific causes of action dismissed and to confirm that all causes of action asserted by plaintiffs Laurena Torres and Torresco Realty, LLC have been dismissed pursuant to the May 1, 2019 Order.

The Court modifies the May 1, 2019 Order with respect to the negligence cause of action asserted by plaintiffs Laurena Torres and Torresco Realty, LLC. In the prior decision, the Court dismissed the claims for emotional damages (negligent infliction of emotional distress and intentional infliction of emotional distress) but left the general negligence claim. To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom (*Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 489 NE2d 1294 [1985]).

The Court now dismisses the negligence cause of action in light of its finding that the only damages claimed by Torresco and Torres are emotional/mental, even for the negligence claim. Torres has not alleged a physical injury; her only injuries were emotional/mental. The Court dismissed all of Torres' emotional/mental injury claims. Although Torres claims she suffered from PTSD, PTSD is a psychiatric injury. New York courts routinely consider PTSD as part of a plaintiff's mental anguish claims. For example, the court in *Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1, 9, 881 NE2d 1187 [2008] stated, "In this case, in response to defendants' motion to dismiss, plaintiff offered medical proof that she continued to suffer from post-traumatic stress disorder, a recognized *psychiatric* condition requiring treatment with medication and therapy" (emphasis added).

In light of this Court's determination dismissing the negligent and intentional causes of action for emotional/mental damages and because the complaint does not allege that Torres suffered any physical damages, the negligence claim is dismissed because the prima facie case for negligence has not been met. Now that it has been clarified that the damages are the same for NIED, IIED and negligence, that is, emotional/mental damages, Torresco and Torres' negligence claim must be dismissed.

The intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED) claims asserted by plaintiffs Laurena Torres and Torresco Realty, LLC were dismissed pursuant to the May 1, 2019 Order.

Pursuant to the May 1, 2019 Order, the nuisance claim asserted by plaintiffs Laurena Torres and Torresco Realty LLC was dismissed.

Pursuant to this order, the negligence claim asserted by plaintiffs Torres and Torresco Realty LLC is dismissed.

Site Testing

As part of discovery in this case, plaintiffs agreed to a site inspection (NYSCEF Doc. No. 122). Plaintiffs now bring a motion seeking a protective order to prevent defendants from engaging in any type of geotechnical testing during the site visit. Certain defendants cross-move to compel plaintiffs to permit the testing. As set forth in the affidavit of defendants' engineer, the purpose of the testing is to evaluate "the subsurface soil conditions on the plaintiffs' property, which is necessary in order to provide an opinion regarding the cause and origin of the reported damage to the plaintiff's property" (NYSCEF Doc. No. 139 at ¶ 4). The engineer claims that plaintiff's Exponent Engineering report implies that damage to the building was caused by settlement and/or vibrations due to the construction (*id.* at ¶ 6). Testing the soil will help in evaluating the potential of building settlement and what caused the settlement (*id.* at ¶ 7).

Plaintiff claims that such testing is unnecessary because causation need not be established here because excavating activities are a strict liability activity pursuant to the New York City Administrative Code.

The cross-motion to compel the testing is granted. Although a strict liability tort was alleged by plaintiffs, the burden of proving causation is still present. There is no indication that the Administrative Code dispenses with the requirement of proving that defendants' actions actually caused the purported damage. In *Moskowitz v Tory Burch LLC*, 161 AD3d 525, 526, 77 NYS3d 364 [1st Dept 2018]), the Court considered the Administrative Code and property damage, and in doing so, still engaged in a proximate causation analysis: "Plaintiff established prima facie that TBLLC cause[d]' soil or foundation work to be made, pursuant to the license

agreement, and that the work proximately caused damage to his building” (*id.*). Defendants’ engineer claimed that testing the soil will be helpful in determining the cause and extent of the damages to the property, which is at issue in this case. Plaintiff has not submitted a contradicting engineer’s affidavit.

Summary

The order is modified as follows: the strict liability cause of action is dismissed only against plaintiff Torresco Realty LLC. The negligence cause of action by plaintiff Torresco Realty LLC and Laurena Torres is dismissed. As a point of clarification, the IIED and NIED claims asserted by plaintiffs Laurena Torres and Torresco Realty, LLC were previously dismissed; the nuisance claim by plaintiff Torresco Realty LLC and Laurena Torres were previously dismissed. This means that each of the causes of action asserted by Torresco Realty LLC are dismissed.

The motion seeking a protective order is denied and the cross-motion to compel the testing is granted.

Accordingly, it is hereby

ORDERED that the May 1, 2019 Order of this Court is modified in accordance with the terms of this decision; and it is further

ORDERED that the motion for protective order is denied and the cross-motion to compel testing is granted; and it is further

ORDERED that all claims of Torresco Realty LLC are severed and dismissed.

7/8/19

DATE

ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED

- NON-FINAL DISPOSAL
- GRANTED IN PART OTHER

APPLICATION:

- SETTLE ORDER
- SUBMIT ORDER

CHECK IF APPROPRIATE:

- INCLUDES TRANSFER/REASSIGN
- FIDUCIARY APPOINTMENT REFERENCE