

Rutledge v West 127, LLC
2019 NY Slip Op 34128(U)
October 1, 2019
Supreme Court, New York County
Docket Number: 114902/2009
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 53EFM
 _____X
 Justice
 RUTLEDGE, LESELEE, Plaintiff, INDEX NO. 114902/2009
 - v - Defendant MOTION DATE 06/12/2018
 WEST 127, LLC, Defendant MOTION SEQ. NO. 007
 _____X
 DECISION + ORDER ON MOTION

FILED
 OCT 03 2019
 NEW YORK COUNTY
 COUNTY CLERK

The following papers, numbered 1 _____, were read on this application to/for _____
 Notice of Motion/ Petition/ OSC - Affidavits - Exhibits No(s) _____
 Answering Affidavits - Exhibits No(s) _____
 Replying No(s) _____

ORDER

Upon the foregoing documents, it is
 ORDERED that the motion of defendants and the cross motion
 of plaintiff, each to reargue the order of this court dated
 October 27, 2017, are granted, but upon reargument, the court
 adheres to its original order; and it is further

ORDERED that the order of this court dated October 27, 2017, is resettled as follows:

RECEIVED
 OCT 02 2019
 GENERAL CLERK'S OFFICE
 NYS SUPREME COURT - CIVIL

 LESELEE RUTLEDGE,
 Plaintiff, Index No. 114902/2009
 v.
 WEST 127, LLC, T&R CONSTRUCTION CORP.,
 SCHULAMN CONSTRUCTION INC. and JEFFREY

BENNETT, BENNETT HOLDINGS, LLC,

Defendants.

DEBRA A. James, J.:

The Memorandum Decision and Order dated October 25, 2017 (Motion Sequence Numbers 005 and 006) is hereby vacated and corrected as follows pursuant to CPLR 5019(a):

In this negligence action alleging damage to real property, defendants West 127, LLC (West), Jeff Bennett (Bennett) and Bennett Holding LLC (Holding) move for summary judgment dismissing the complaint (Mot. Seq. No. 005). Defendant/third-party plaintiff T & R Construction Corp. (T&R) moves for partial summary judgment (Mot. Seq. No. 006). The motions are consolidated for disposition.

CONCLUSION

The motion of West, Bennett and Holding for summary judgment dismissing the complaint against them shall be granted to the extent the fourth cause of action for deprivation of natural air without permission of the plaintiff and the complaint against Bennett and Holding shall be dismissed in its entirety, and such motion is otherwise denied. The motion of T&R for summary judgment dismissing claims against it is granted only to the extent that the claims for loss of rent, use, air rights, and attorneys' fees are dismissed and otherwise such motion shall be denied.

BACKGROUND

In this property damage action, plaintiff Leselee Rutledge alleges negligence, trespass, conversion and nuisance against defendants, and seeks compensatory and punitive damages, as well as attorneys' fees.

West is the owner of the property located at 50 West 127th Street, New York, New York which is contiguous to plaintiff's property located at 46 West 127th Street, New York, New York. Bennett is the principal of Holding, a limited liability company, which serves as West's managing member.

West entered into an agreement with T& R, a contractor, to perform various construction work on West's property, including excavation and development. T& R subsequently hired defendant/third-party defendant Schulman Construction, Inc. (Schulman) as a subcontractor.

According to the complaint, Bennett personally involved himself in overseeing and supervising the daily performance of the contractors on West's property.

Plaintiff alleges the defendants damaged his property, including his garden and lawn furniture when defendants (1) intentionally seized a portion of his property without his consent, by installing braces and underpinnings, which encroached on his property; (2) intentionally partitioned a portion of his rear yard space, erected an eight-foot plywood fence, and installed

scaffolding without his consent; (3) intentionally removed his fence without his consent; (4) unlawfully seized his air and natural light rights; (5) negligently used construction material in a manner that damaged his roof; and (6) carried out excavation that resulted in cracks in the foundation of his property, causing plaintiff's floors and walls to shift and warp.

DISCUSSION

Movants Bennett, Holding and West and T&R on their respective motions, each have the burden to provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in their favor (Kershaw v Hospital for Special Surgery, 114 AD3d 75, 81 [1st Dept 2013]). "Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial [citation omitted]" (*id.* at 82).

In Fernandez v 707, Inc., 85 AD3d 539 (1st Dept 2011), the court held that a property owner is not responsible for the negligence of its independent contractors who work on its property, unless the work is inherently dangerous, or the owner interferes with or assumes control over the work. Moreover, the mere retention of general supervisory powers over these contractors cannot form a basis for the imposition of liability (*id.* at 540).

In addition, it is settled that "[m]embers of a limited liability company may be held personally liable if they participate

in the commission of a tort in the furtherance of company business," but only if necessary to prevent fraud or to achieve equity [internal quotation marks and citations omitted]" (Smith v Delta Intl. Mach. Corp., 69 AD3d 840, 842 [2d Dept 2010]); Matias ex rel Palma v Mondo Properties, LLC, 43 AD3d 367 [1st Dept 2007]).

Bennett, by his testimony, asserts that he is a member of Holdings, a limited liability company. As such, he is not liable for the torts of Holding. Likewise, with respect to Holding, the testimony of Bennett that Holding is a mere managing member of West, has not been refuted by plaintiff. Holding's status as the managing member of West insulates it from tort liability to plaintiff. See Matias ex Palma, supra. The affirmation of plaintiff's attorney that asserts that Holding was the developer is insufficient to raise an issue of fact. In fact, her assertion is belied by the copy of the construction agreement, submitted by defendants, that names only West, as owner and T&R, as contractor.

At his deposition, the principal of T&R testified that the construction included an excavation to build the underground parking garage. As such, there is a question of fact whether West, as owner, and T&R, as general contractor, are strictly liable for any property damage arising from such excavation pursuant to New York City Administrative Code § 3309.4. (See 87 Chambers, LLC v 77 Reade, LLC, 122 AD3d 540 [1st Dept. 2014]).

Nor does the order dated January 29, 2007 in West 127 LLC v Rutledge, New York County Supreme Court Index No. 119086/2006 (Payne, J.), which gave West a license limited to installing flashing, stucco and waterproofing on the wall of plaintiff's property, establish defendant West's prima facie defense to the first and second causes of action (sounding in trespass) against it.

T & R moves for partial summary judgment dismissing the fourth cause of action wherein plaintiff claims a loss of air rights, and the parts of the "wherefore" clause that demands damages for loss of use of his property and rental income, legal fees, statutory interest and punitive damages.

As to air rights, such are incident to the ownership of surface property, as one who owns land can utilize the space above it (see Macmillan v C F Lex Assoc., 56 NY2d 386, 392 [1982]). T&R has prima facie established a defense to plaintiff's allegations that T & R trespassed on his air space, which negatively affected the property value of his space (see Wing Ming Props. [U.S.A.] v Mott Operating Corp., 79 NY2d 1021, 1023 [1992]), in the form of the deposition testimony of plaintiff and his wife, in which they state no more than they negotiated with West with respect to the sale of the air rights, but no agreement was reached, and that West informed them that it had purchased air rights from another

adjoining building and was no longer interested in purchasing plaintiff's rights.

With respect to rental income, T&R comes forward with the deposition testimony of plaintiff's wife that she received all rental income due to her by the two tenants on the premises, and continued to receive it during the construction period, applying the security deposit to the three months of rent that the lone tenant on the fourth floor, who did not pay because the doors and windows of her apartment would not close due to the adjacent construction. Likewise, the deposition testimony of plaintiff and his wife contain no claims that they were deprived of any use, including air rights. Moreover, T&R is correct that to the extent that plaintiff claims he was deprived of natural light or air, such states no cognizable claim.

As for punitive damages, the settled law is that "Punitive damages are 'a social exemplary remedy, not a private compensatory remedy [citation omitted]" (Macy's Inc. v Martha Stewart Living Omnimedia, Inc., 127 AD3d 48, 57 [1st Dept 2015]). Punitive damages are available in a tort action, where the wrongdoing is intentional or deliberate, presents circumstances of aggravation or outrage, evinces a fraudulent or evil motive, or is in such a conscious disregard of the rights of another that it is deemed willful and wanton (see Bishop v 59 W. 12th St. Condominium, 66 AD3d 401, 402 [1st Dept 2009]). T&R has not come forward with

evidence that prima facie establishes its defense to plaintiff's claim that T & R carried out the excavation work recklessly (see Fonda v 157 East 74th Co., 158 AD2d 297 [1st Dept 1990]).

T&R has not established its entitlement to dismissal of plaintiff's plea for statutory interest on any judgment.

Finally, as a matter of law, defendants are correct that plaintiff may not recover attorneys' fees. It is hornbook law that attorneys' fees and disbursements are incidents of litigation, and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or regulation (see Matter of A.G. Ship Maintenance Corp. v Lezak, 69 NY2d 1, 5 [1986]). Plaintiff has not come forward with any agreement or statutory basis for such relief.

Accordingly, it is

ORDERED that the motion of defendants West 127, LLC, Jeffrey Bennett and Bennett Holding LLC for summary judgment to dismiss the complaint (Motion Sequence Number 005) is granted only to the extent that the complaint in its entirety against Jeffrey Bennett and Bennett Holding LLC is dismissed, with costs and disbursements to such defendants, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such defendants; and it is further

ORDERED that the motion of defendant/third-party plaintiff

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T & R Construction Corp. for partial summary judgment (Motion Sequence Number 006) is granted only to the extent that the fourth cause of action for deprivation of natural light without the permission of the plaintiff, and for loss of rental income, loss of use, air rights, and attorneys' fees are dismissed, and such motion is otherwise denied; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption.

10/01/2019
DATE

FILED
OCT 03 2019
NEW YORK COUNTY
COUNTY CLERK

Debra A. James
DEBRA A. JAMES
J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE