

**Huang v Fort Greene Partnership Homes
Condominium**

2020 NY Slip Op 31220(U)

May 6, 2020

Supreme Court, Kings County

Docket Number: 510501/15

Judge: Larry D. Martin

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At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of May, 2020.

P R E S E N T:

HON. LARRY D. MARTIN,

Justice.

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TRISTA HUANG and JOSHUA MATTES,

Plaintiffs,

DECISION AND ORDER

- against -

Index No. 510501/15

FORT GREENE PARTNERSHIP HOMES CONDOMINIUM,
THE BOARD OF MANAGERS OF THE
FORT GREENE PARTNERSHIP HOMES CONDOMINIUM,
IMPACT REAL ESTATE MANAGEMENT INC. AND
CARRIAGE HOUSE MANAGEMENT AND REALTY CORP.,

Defendants.

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The following papers numbered 1 to 9 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4-5
Reply Affidavits (Affirmations)	6
Supplemental/Surreply Affidavit (Affirmation)	7-9

Upon the foregoing papers, defendants Fort Greene Partnership Homes Condominium, the Board of Managers of the Fort Greene Partnership Homes Condominium, and Impact Real Estate Management, Inc. (collectively, FGPI) move (in motion sequence [MS] nine), for an order: 1) pursuant to CPLR 3212, granting them summary judgment dismissing the causes of action for gross negligence, nuisance, trespass and punitive damages, 2) pursuant to CPLR 3212, granting them partial summary judgment dismissing all negligence claims before September 27, 2014; and

3) pursuant to CPLR 3211, dismissing the sixth cause of action seeking an injunction.

Relevant Background and Procedural History

Plaintiffs, Trista Huang (Huang) and Joshua Mattes (Mattes) (collectively, plaintiffs), bring this action for damages to their premises, located at 434 Clermont Avenue in Brooklyn (premises), allegedly sustained from flooding into their premises' basement on or about September 27, 2014. The water originated from a broken underground line running to the neighboring complex of buildings at 438-442 Clermont Avenue controlled by defendants Fort Greene Partnership Homes Condominium and the Board of Managers of the Fort Greene Partnership Homes Condominium (FGP). Defendant Impact Real Estate Management Inc. (Impact) functioned as FGP's property management company on September 27, 2014, and, subsequently, defendant Carriage House Management and Realty Corp. (Carriage House) was retained as FGP's managing agent.¹

Huang testified that she and her husband "gut renovated the basement" of the premises shortly after they purchased it (Huang April 27, 2018 tr at 27, lines 8-18, annexed as exhibit G to FGPI's motion papers). Huang further testified that, in "approximately 2012" her basement was "very damp" and one edge of the south wall shared with the FGP complex was "bubbling" (id. at 61, line 15 through 62, line 23). Neither she nor her husband did anything to the south basement wall upon discovering the bubbling (id. at 65, lines 18-24); she did not seek any consultants or experts for advice about the basement humidity (id. at 76, lines 6-10); but she did purchase a humidifier (id. at 68, line 25 through 69, lines 1-6). Huang added that she believed her husband

¹This court's August 13, 2019 short form order granted Carriage House's summary judgment motion (MS 10) and dismissed the complaint as against them. A decretal paragraph herein will amend the caption to reflect that ruling.

contacted Impact to request access to FGP's property to investigate the source of the moisture in their basement (id. at 76, lines 11-22) and, in response, Impact requested that the couple submit a repair plan which they did not provide (id. at 77, lines 7-21).

Huang recounted that on September 27, 2014, her husband observed a "big puddle of water" on the basement floor, so they called a plumber, removed wet items from the floor and used towels to try and absorb the water (id. at 79, lines 17 through 82, line 8). She had not previously observed any standing water in her basement (id. at 79, lines 11-19), but the basement leak was "constant" from October 9, 2014 to October 17, 2014 (id. at 223, lines 17-24). Their plumber cut away some basement storage room drywall and discovered that the leak did not originate from plaintiffs' sewage pipe (id. at 166, line 18 to 167, line 9) so they called 311 (id. at 199, lines 16-21). Huang testified that the Department of Environmental Protection (DEP) discovered the cause of the flooding was not plaintiffs' water line when it stopped the water flow to their premises and flooding continued to worsen (id. at 211, lines 4-11). On October 9, 2014, the DEP found that the water "was coming from the condo" (id. at 212, lines 3-21), "put a notice on the condo gate [, and] gave the condo three days to repair the water line" (id. at 213, lines 7-10). Huang attempted to contact Impact multiple times by email and phone to inform them of the DEP's findings (id. at 215, lines 15-21). Daniel Hom, plaintiffs' engineer, who they originally retained to do a pre-purchase inspection of the premises, reexamined the basement after the flood and observed cracks in plaintiffs' south wall (id. at 141, lines 7-20; at 143, lines 19-23). The DEP informed plaintiffs that the pipe was finally repaired by October 17, 2014 (id. at 184, line 17 to 185, line 3).

As to the gut renovation, Mattes admitted that he noticed water coming through that south wall at the time of purchase, so he hired a contractor to waterproof it (Mattes May 17, 2018 tr at

29, lines 7-10, annexed as exhibit H to FGPI's motion papers). Mattes testified that there was no active leak or pouring water before September 27, 2014, but he observed basement moisture which caused the paint to “pull away” from the wall (id. at 63, lines 1-22). He complained by email to FGPI and requested permission to dig into the neighboring property to find what was causing the moisture (id. at 73, line 14 to 74, line 10). Impact gave him and his wife permission to dig and investigate contingent on their retention of an insurable contractor to do the work, but plaintiffs failed to locate the needed contractor (id. at 74, line 14-75, line 19).

Mattes confirmed his discovery of the leak on September 27, 2014 and the efforts by him and his wife to remedy the problem. He testified that his contact with Impact was strained because Amin Tauran, an Impact manager was not responsive to inquiries (id. at 112, lines 2-15). Mattes acknowledged that he previously signed an affidavit attributing delays on the pipe repair to required inspections by the Department of Buildings and the premises' location in a historic district (see id. at 173-174)

FGPI presented both Tauran, the property manager, and Ms. Stacey Choi (Choi), former president of the FGP Board of Managers. Tauran testified that he received the three-day notice about the subject leak from the DEP on October 9, 2014 and received an email about the leak from Huang, which was his first contact with her (see Tauran June 29, 2018 tr at 45 lines 17-25, annexed as exhibit K to FGPI's motion papers). He quickly set an appointment with the DEP to visit FGP's property the next morning and then he replied to Huang's email (id. at 46, lines 4-25). Tauran immediately retained a contractor, Harris Water Main and Sewer Contractors Inc. (Harris) (id. at 118, lines 19-25), who performed exploratory digging in the area for two days before they located the break in the pipe (id. at 54 lines 20-25).

Tauran conceded that, even though he knew about the continuing flooding on the plaintiffs' premises, shutting off the water in the FGP condominium while repairs were done to prevent water from continuing to leak into plaintiffs' premises was never discussed (*id.* at 107, lines 4-10; *id.* at 108, lines 16-22). However, Tauran later contradicted himself and stated that FGP's engineering contractor, Rand Engineering (Rand) recommended shutting off the water to 438 and 442 Clermont Avenue and providing temporary potable water to the tenants of those buildings as one option to address the three-day notice (*id.* at 137, line 21 to 138, line 13). He testified that FGPI ultimately chose Rand's other option and hired a plumber to do the water line work, which would be faster (*id.* at 138, lines 10-24). Tauran believed the subject leak was urgent (*id.* at 60, lines 17-21), but he never inspected plaintiffs' premises (*id.* at 60, lines 22-24).

Tauran acknowledged that the DEP later emailed him and warned that if the contract with Harris was not signed by October 15, 2014, they would shut off the water from 438 to 442 Clermont Avenue (*id.* at 165, lines 8-18). Tauran recounted that immediately after approval was given, the contract was signed, Harris was paid, and the pipe was fixed by October 17, 2014 (*id.* at 55, lines 2-5, at 141, lines 22-24). He recalled that once the repair was done by October 17, 2014, he saw the repaired pipe and the ground was filled in with soil later that same day (*id.* at 92, lines 4-9).

Tauran could not specifically recall his interactions with plaintiffs, various contractors or FGP's Board following the flooding, or whether plaintiffs were informed about how and when the repairs would be made (*id.* at 119, line 20 to 120, line 9). He also did not recall cracks or holes in the courtyard between the FGP properties and plaintiffs' premises and stated that he was not informed of any problems in the cement walkways (*id.* at 56, lines 10-21). Tauran testified that

no one ever complained to him about any water issue or loss of water pressure before DEP informed him a water leak existed from the FGP condominiums (id. at 61, lines 16-20). However, he did recall that FGP had issues with its sanitary line condition (id. at 57, lines 20-23).

Choi testified that Tauran informed her about the subject leak (see Choi September 18, 2018 tr at 25, lines 3-10, annexed as exhibit J to FGPI's motion papers), and that he was working with the DEP and a contractor to resolve the issue (id. at 31, lines 9-17).

Plaintiffs filed this action on August 25, 2015. Their complaint alleged negligence, gross negligence, nuisance, trespass, continuing trespass and sought a permanent injunction to stop defendants from causing a water intrusion. FGPI answered the complaint on or about November 6, 2015, denied the material allegations, and asserted 16 affirmative defenses.

An August 10, 2018 short form order, issued by the Hon. Muriel S. Hubsher, JHO, directed FGPI to afford plaintiffs an opportunity to depose defense expert Christine Hobson "only as to . . . her observations at [the] location of the pipe burst involved in this case (i.e. no other plumbing problems)." The order also specified "no questions as to communications with others should be posed," and enlarged the time to file a summary judgement motion.

The Parties' Contentions

FGPI argues for summary judgment dismissal because they lacked actual and constructive notice of their underground, domestic water line break, which they regard as unforeseeable. The record, they note, shows that plaintiffs knew about basement moisture before September 2014, never complained to FGPI, other than seeking access to observe FGPI's foundation, which was granted, but then never utilized. FGPI cites Tauran's testimony about being unaware of any water line problems before September 27, 2014 as demonstrating its lack of notice. It distinguishes the

prior sewer line issues from the broken water line, which caused the flooding in plaintiffs' basement and contends that a 2013 investigation Rand performed was limited to the sewer line. FGPI submits that the time it took the DEP and Harris to find the source of the leak further shows that it did not know of water line issues at the condominium complex.

FGPI also argues that the cause of action for gross negligence and claims for other remedies sounding in exemplary and punitive damages should be dismissed as a matter of law because no evidence indicates malice, intentional wrongdoing or recklessness on their part. In addition, FGPI highlights that they promptly reacted with the most expeditious option for repairs, and any delays can only be attributed to the search for the pipe break and the wait to obtain permits.

FGPI argues that the private nuisance cause of action requires an intentional continuous invasion, and here, only one alleged water intrusion occurred in September 2014, which has since been remedied. Further, there is no evidence, they contend, that the water intrusion was intentional. Likewise, FGPI seeks dismissal of the trespass cause of action, as it too requires a defendants' intent, not present in this case.

FGPI further argues that this court should dismiss the punitive relief claims as moot because the broken water line has been repaired and consider all claims before September 27, 2014 barred by the three-year statute of limitations on property damage given that plaintiffs noticed basement moisture as early as 2011.

Plaintiffs, in opposition, disagree with FGPI's differentiation between the sanitary and water lines and claim factual issues exist which bar summary judgment. They contend that FGPI had actual and constructive notice because the entire plumbing system on their property was poorly installed from the condominium's inception. Plaintiffs, in this regard, allege that FGPI negotiated

a \$180,000 reimbursement with a developer immediately after the condo was constructed due to the faulty installation. They also claim that issues with the cement upon which the condominium sits were apparent, as the cement was noticeably broken and cracked, the FGP buildings leaned, and the New York State Department of Buildings cited FGP in 2004 for failing to maintain one of its cellar floors which had a section that cracked and fell approximately six inches.

Plaintiffs also allege that FGPI knew about the plumbing issues because FGPI sent invitations to companies in 2012 to make capital improvements including plumbing repairs and retained Rand in 2013 to repair the sanitary plumbing system. In addition, plaintiffs cite Rand's findings of collapsed plumbing due to soil compaction near the broken water pipe, Rand's \$110,000 proposed preliminary budget to repair the collapse of the sanitary plumbing line, and the fact that some of the work never occurred as indicating FGPI's failures to respond to the plumbing issues on its property. Further, plaintiffs contend that defendants' insurance company disclaimed coverage of plaintiffs' damages because defendants previously knew about the condition.

Plaintiffs submit that *res ipsa loquitur* applies, and FGPI must be found negligent here because it exclusively controlled the pipe, the flood was an event that does not ordinarily occur without moving defendants' negligence, and the flood did not occur from a voluntary action or contribution on plaintiffs' part. They maintain that a jury should decide if notice can be attributed to FGPI considering the soil weakening and whether FGPI intentionally, deliberately and recklessly failed to make necessary repairs for years.

Plaintiffs separately claim that FGPI did not adequately respond to the flooding, essentially did nothing for 10 days and thus compromised the structure of plaintiffs' building. They reference engineer Hom's October 14, 2014 report as supporting their argument. Plaintiffs posit

that an injunction is needed because FGPI failed to give them: 1) notice of the repair work, 2) a chance to inspect the completed repairs, and 3) proof that the repairs were done adequately to prevent further damage to the structural integrity of their home. They intend to supplement their pleadings to include continuing damage as more mold has developed and they have not yet been able to assess the full extent of the damage caused. Mattes states in an affidavit, filed in a related RPAPL 881 proceeding, that he inspected the FGPI property on April 20, 2017, three years after the subject flooding, and found running water in a hole in the ground near the water line break that caused the damage at issue herein. The causes of action in trespass and nuisance are still meritorious, plaintiffs argue, even if the leak has been completely stopped, because the conditions that caused damage to their premises existed for more than 21 days and FGPI disregarded their duties once notified about the flooding.

Plaintiffs consider the defense witnesses not credible because Tauran made contradicted statements, and Hobson failed to acknowledge the obvious deteriorated condition of FGPI's cement. Plaintiffs also disagree with FGPI's assertion that any claims should be dismissed due to the statute of limitations.

In reply, FGPI argues that unrelated construction and plumbing issues in a different location on the property and the cracked concrete near the water line break do not establish that FGPI had actual or constructive notice of it. FGPI reiterates that water and sanitary pipes are different and claims that the August 10, 2018 decision to limit Hobson's deposition only to her observations of the subject burst pipe supports their position. FGPI asserts that plaintiffs' 2011 discovery of basement moisture could have been caused by an unrelated water condition, and plaintiffs' request for access from it to investigate does not attribute notice to them.

FGPI submits that a latent defect caused the leak, that they had no notice of the leak until October 2014, and that they bore no duty to periodically dig up the soil and inspect the pipes. They similarly argue that plaintiffs' reliance on *res ipsa loquitur* fails here because no contractual obligations exist between the parties. FGPI objected to plaintiffs' various documentary submissions including Hom's report and any documents not previously identified during witness testimony.

Plaintiffs object to legal conclusions and unsubstantiated claims in FGPI's motion papers and, in further opposition to the motion, submit an affidavit from Hom as foundation for his report. Plaintiffs assert that FGPI's plumbing issues were only a few yards away from the water pipe break, that FGPI knew about plaintiffs' basement moisture in October 2011 but did not hire Rand until August 2013, and that FGPI subsequently failed to respond to Rand's findings. Plaintiffs challenge FGPI's assertion about having expeditiously rectified all the premises' issues as disingenuous and urge allowing a trier of fact to determine whether FGPI's conduct constitutes reckless disregard for plaintiffs' welfare.

Law

A party seeking summary judgment bears the burden of establishing his or her defense "sufficiently to warrant the court as a matter of law in directing judgment in his [or her] favor, and . . . must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted]; see CPLR 3212 [b]). The moving party *prima facie* shows its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material issue of fact (see CPLR 3212 [b]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). Failing to make that

showing requires denying the motion, regardless of the adequacy of the opposing papers (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 502 [2012]). Once movant has made its prima facie showing, the burden shifts to the nonmoving party to show “facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]).

"[T]he essential elements of a cause of action sounding in trespass are the intentional entry onto the land of another without justification or permission" (*Reyes v Carroll*, 137 AD3d 886, 888 [2d Dept 2016]). The statute of limitations governing a property damage action is three years from the alleged injury to the property (CPLR 214 [4]). If water from a property causes injury or loss on a neighboring property, the water source property owner may be liable where the intrusion was caused by negligent design or installation of the water system on the property, or where the landowner had actual or constructive notice of the water defect on his premises causing the problem (see *Griffin v 19-20 Indus. City, Assoc., LLC*, 37 AD3d 412, 413 [2d Dept 2007]). However, “a ‘general awareness’ that leaks may be present is legally insufficient to constitute notice of [a] particular leak” which caused the injury to the plaintiff (*Ellisy v Eklecco, LLC*, 56 AD3d 517, 518 [2d Dept 2008]). Further, leaks in different part of the property are insufficient to charge a defendant with constructive notice of the leak under scrutiny (see *Wienges v Newburgh Mall, LLC*, 94 AD3d 1110, 1111 [2d Dept 2012]). “[M]ere notice of a general or unrelated problem is not enough; the particular defect that caused the damage must have been apparent” (*id.* at 1110-1111 quoting *Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 500 [1st Dept 2007]).

Discussion

Here, triable factual questions exist regarding whether FGPI had actual or constructive notice of the water condition that eventually damaged plaintiffs’ premises. Assuming arguendo

that prior sewage problems and cracked concrete on FGPI's property did not constitute notice of a leak in the underground water pipe, the alleged 2011 email from Mattes to Impact regarding the moisture buildup on the wall in plaintiffs' basement raises a triable factual issue as to whether defendants were on notice of the condition which eventually led to water damage years later. FGPI fails to show that the moisture found in plaintiffs' basement before September 27, 2014 was not evidence of damage to FGPI's water line which eventually caused the flooding in defendants' basement. Therefore, FGPI has failed to demonstrate their entitlement to judgment as a matter of law as to the negligence and gross negligence causes of action based on defendants' lack of actual and constructive notice. Further, triable factual issues exist as to whether defendants' response to the preliminary moisture notification in 2011 by Mattes and the September 27, 2014 flood in plaintiffs' basement was reasonably responsive and adequate. FGPI fails to provide sufficient evidence that their invitation to plaintiffs to investigate with no other follow-up was a reasonably sufficient response to being informed by Mattes about moisture in their neighbors' basement. FGPI claims that their response to the leak in September 2014 was quick and aimed at minimizing damage, but multiple issues bar finding, as a matter of law, that the resulting property damage was not formed in whole or in part from malice or intentional wrongdoing. Those issues include, but are not limited to: 1) the decision to allow water to continue to flow to 438 and 442 Clermont Avenue following discovery of the leak source, 2) the delay in repair of the pipe after discovery of the leak source, 3) the lack of communication with plaintiffs during the repairs, and 4) the lack of access granted to plaintiffs to inspect the repairs once complete before the pipe was covered with soil. FGPI does not present sufficient evidence to demonstrate a complete lack of malice, intentional wrongdoing or recklessness in their actions. Therefore, FGPI has failed to demonstrate their entitlement to judgment as a matter of law as to the causes of actions for nuisance

and trespass. Similarly, FGPI has failed to provide sufficient evidence to warrant dismissing plaintiffs' action for a permanent injunction as a matter of law.

The alleged property injury is measured in this action from the flooding in plaintiffs' basement on September 27, 2014. Hence, FGPI's request to dismiss all claims before September 27, 2014 is denied. Accordingly, and for the reasons discussed above, it is

ORDERED that FGPI's motion, MS nine, is denied; and it is further

ORDERED that the caption is amended pursuant to the previously referenced August 13, 2019 short form order, as follows:

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TRISTA HUANG and JOSHUA MATTES,

Plaintiffs,

- against -

Index No. 510501/15

FORT GREENE PARTNERSHIP HOMES
CONDOMINIUM, THE BOARD OF MANAGERS OF
THE FORT GREENE PARTNERSHIP HOMES
CONDOMINIUM AND IMPACT REAL ESTATE
MANAGEMENT INC.,

Defendants.

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The foregoing constitutes the decision and order of this court.

E N T E R,



J. S. C.