

**B.E.W. Parking Corp. v Apthorp Assoc. LLC**

2020 NY Slip Op 32294(U)

July 13, 2020

Supreme Court, New York County

Docket Number: 601155/2009

Judge: Saliann Scarpulla

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

-----X

B.E.W. PARKING CORP., WOLF, KEVIN R.,

INDEX NO. 601155/2009

Plaintiff,

MOTION DATE N/A

- v -

APTHORP ASSOCIATES LLC., GILBERT RODRIGUEZ  
(NON-PARTY),

MOTION SEQ. NO. 014

Defendant.

**DECISION + ORDER ON  
MOTION**

-----X

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 014) 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 495, 496, 497, 501

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

Upon the foregoing documents, it is

In this action for breach of a commercial lease, defendant Apthorp Associates, LLC (“Defendant”) moves for summary judgment dismissing the complaint of plaintiffs B.E.W. Parking Corp. (“BEW”) and Kevin R. Wolf (“Wolf,” and collectively, “Plaintiffs”) and in favor of its counterclaims.

**Background**

Defendant is the owner of a parking garage (“Garage”) located in the basement of the building 390 West End Avenue, New York, New York (“Premises”). Wolf is a tenant of the Garage, pursuant to a lease executed in April 1983 and modified by an agreement in 1986 (collectively, the “Lease”), and Defendant is the successor-in-interest to the

landlord who executed the Lease. Plaintiffs maintain that BEW is also a tenant, which Defendant disputes.

On April 13, 1998 Wolf and Defendant's predecessor-in-interest executed a stipulation ("1998 Stipulation") to settle a previous action. ¶10 of 1998 Stipulation provides, *inter alia*:

Responsibility for repairs has been in issue in this action. [Landlord] shall make and pay for the following structural repairs to the Garage: repairs to the support columns, walls and foundation of the building. Notwithstanding the foregoing, [Tenant] shall be responsible for routine maintenance and repairs of the Garage as provided in the Lease and Supplementary Agreement, and all repairs, structural or otherwise, to the ramps within the Garage and as well as patching and/or resurfacing the floors. The Parties agree that the cost of structural repairs to the floors and ceilings of the Garage shall be shared equally by [Landlord] and [Tenant], with decisions regarding cost and approval of contractors to be made by [Landlord] after consultation with [Tenant]. Such repairs shall be performed so as to minimize disruption to the operation of the Garage.

In April 2008,<sup>1</sup> the New York City Department of Buildings ("DOB") issued a peremptory vacate order ordering the Garage to be vacated ("Vacate Order") (NYSCEF 417). The Vacate Order states that it was issued because there was "imminent danger to the life and safety of the occupants, in that the Concrete floor-slab has deteriorated, exposing rebars. Cracks and sagging has developed at various locations, at both levels, creating a danger of collapsing. The garage also has no second means of egress or required ventilation, at both levels."

---

<sup>1</sup> The Vacate Order is dated April 18, 2008 and signed on April 21, 2008.

The Garage was closed from April 2008 until December 2010. It is undisputed that the Garage was repaired after the Vacate Order was issued. Defendant maintains that it spent more than \$2,000,000 to extensively repair and restore the Garage.

Plaintiffs commenced this action in April 2009, asserting five causes of action. In the first cause of action, Plaintiffs seek an order directing Defendant to: (1) sign Plans and LPC applications and promptly provide them to Plaintiffs; and (2) grant Plaintiffs, their engineers, and insurance carrier access to the Premises. In the second cause of action, Plaintiffs seeks an order: (1) declaring Defendant's impediment of Plaintiffs' access to the Premises and failure and refusal to sign the Plans and LPC Applications to be wrongful; (2) allocating the costs of the remedial work on the Vacate Order; and (3) abating the rent.

In the third cause of action, Plaintiffs allege that Defendant owed Plaintiffs a duty to exercise reasonable care in the maintenance and repair of the Premises, but that Defendant failed to exercise reasonable care in protecting and/or repairing the foundation of the Building to prevent the Premises from the issuance of a Vacate Order. Plaintiffs further allege that Defendant failed to undertake the necessary remedial work to lift the Vacate Order.

In the fourth cause of action, Plaintiffs allege that Defendant breached the covenant of quiet enjoyment and Plaintiffs were evicted from the Premises because Defendants failed to take necessary remedial action to avoid the issuance of a Vacate Order, failed to make the repairs to lift the Vacate Order, and impeded Plaintiffs from trying to resolve the Vacate Order.

The fifth cause of action alleges that Defendant breached its requirement to undertake certain obligations, including making and paying for structural repairs to the Garage, to support columns, and to the foundation of the building; because of this, Plaintiffs suffered injury to their business and are threatened with irreparable harm by the continuation of Defendant's conduct.

Defendant answered the complaint and asserted four counterclaims for: (1) rent and additional rent; (2) an order declaring that Plaintiffs are solely responsible for all costs and expenses incurred by Defendant in complying with the Vacate Order and 1998 Stipulation; (3) an order declaring that Plaintiffs shall pay a percentage of Defendant's costs and expenses incurred by Defendant in complying with the Vacate Order and 1998 Stipulation; and (4) attorneys' fees and costs.

Defendant now moves for summary judgment: (1) dismissing BEW as a plaintiff; (2) dismissing the complaint; (3) in favor of its first counterclaim for rent and additional rent; and (4) in favor of its second and third counterclaims for damages, or in the alternative, partial summary judgment as to liability on these counterclaims.

### **Discussion**

#### **Is BEW A Proper Party?**

Defendant argues that it should be granted summary judgment dismissing BEW as a plaintiff in this action because BEW was never assigned the lease. Defendant maintains that, although BEW alleges that it is a tenant by assignment (complaint ¶7), Plaintiffs have never produced the written assignment and Wolf admitted, under oath, that there

was no assignment ever made. Defendant maintains that no exception to the statute of frauds applies. Therefore, Defendant concludes that BEW has no right to maintain any claim that arises from or is based on the Lease.

In ¶3 of its answer, filed on June 17, 2009, Defendant admitted that Plaintiffs were tenants of the Premises, and failed to set forth an affirmative defense stating that BEW was not a proper party. Therefore, Defendant waived any defense that BEW lacks standing or the capacity to sue in this action, and this portion of Defendant's motion for summary judgment is denied. *See* CPLR 3211(a)(3); CPLR 3211(e); *see also* *Sec. Pac. Nat. Bank v Evans*, 31 AD3d 278, 280 (1st Dept 2006) ("The statute is clear that the defense of lack of capacity must be raised in a pre-answer motion to dismiss or the answer, or else it will be waived." [citations omitted]); *Charles Offset Co., Inc. v Hobart-McIntosh Paper Co.*, 192 AD2d 419, 419 (1st Dept 1993) ("Defendant has waived the defense of lack of standing since it failed to assert the claim as an affirmative defense in its answer and waited over six years after issue was joined in this action to move to dismiss the complaint on that ground." [citations omitted]).

### **First Cause of Action**

This cause of action, which was the subject of an order to show cause, was resolved pursuant to a decision and order by Justice Barbara Kapnick on August 3, 2009 ("2009 Decision"). *See* NYSCEF 6. Therefore, I need not address the motion to dismiss the first cause of action.

## Plaintiffs' Obligations To Pay Defendant For Repairs

Defendant argues that the portions of the second and fifth causes of action seeking to require Defendant to pay the costs of the repairs are moot because Defendant has already completed and paid for the repairs. However, Defendant's second and third counterclaims seek to recover the costs incurred in complying with the Vacate Order, pursuant to the 1998 Stipulation.

The relevant portion of the 1998 Stipulation provides:

[Landlord] shall make and pay for the following structural repairs to the Garage: repairs to the support columns, walls and foundation of the building. Notwithstanding the foregoing, [Tenant] shall be responsible for routine maintenance and repairs of the Garage as provided in the Lease and Supplementary Agreement, and all repairs, structural or otherwise, to the ramps within the Garage and as well as patching and/or resurfacing the floors. The Parties agree that the cost of structural repairs to the floors and ceilings of the Garage shall be shared equally by [Landlord] and [Tenant], with **decisions regarding cost and approval of contractors to be made by [Landlord] after consultation with [Tenant]. Such repairs shall be performed so as to minimize disruption to the operation of the Garage.**

¶10 (emphasis added).

Defendants argues that, per the 1998 Stipulation, Plaintiffs were responsible to pay 50% of the cost of the structural repair work, which constituted a significant portion of the amount spent to repair the Garage. Plaintiff maintains that they were never provided with an opportunity to review the repair plans and what percentage, if any, were for structural work.

On summary judgment Defendant has failed to meet its burden of establishing that the repairs performed were for "routine maintenance and repairs," or that the type of

structural repairs performed were such that would require the parties to share the cost. Although there is no dispute that repairs were completed on the Garage, Defendant has failed to proffer any evidence establishing that the work performed was structural or for “routine maintenance and repairs,” or that the repairs completed were necessary to lift the Vacate Order.<sup>2</sup>

Moreover, although the parties agreed in the 1998 Stipulation “that the cost of structural repairs to the floors and ceilings of the Garage shall be shared equally by [Landlord] and [Tenant], with decisions regarding cost and approval of contractors to be made by [Landlord],” this was to be done “after consultation with [Tenant, and were to be] . . . performed so as to minimize disruption to the operation of the Garage.” Plaintiffs maintain that they were never consulted on the repairs, never given an opportunity to comment on the repair plans, and were never consulted on who performed the repairs and the costs of these repairs. Plaintiffs also maintain that the repairs fixed damage that resulted from Defendant’s neglect and mismanagement of the Premises.

Defendant failed to meet its *prima facie* burden entitling it to summary judgment; Defendant did not submit any evidence to show that it consulted with Plaintiffs or that the repairs – which took more than two years to complete, during which time Plaintiffs did

---

<sup>2</sup> Defendant’s reliance on the unauthenticated DOB document entitled “Special Report” (NYSCEF 418) to establish the condition of the Garage is improper. *Cf. Ortiz v Sohngen*, 56 Misc 3d 19, 20-21 (App Term, 2d Dept 2017) (“Pursuant to CPLR 4518(c), certified records of a department or bureau of a municipal corporation are admissible as prima facie evidence of the facts contained therein. Here, the record of the ECB violation, which has been certified by a designated certifying officer as authentic, is prima facie evidence . . . .” (citations omitted)).

not have access to the Garage – were performed in a manner to minimize the disruption of the Garage’s operation. Therefore, Defendant’s motion for summary judgment on its second and third counterclaim and to dismiss the portions of the second and fifth causes of action seeking to hold Defendant liable for the costs of repairs are denied.

Defendant also argues that the 2009 Decision renders the first portion of the second cause of action moot. Pursuant to the 2009 Decision, Plaintiffs’ motion for an order directing Defendant to sign plans for Plaintiffs to submit to the DOB was denied because “the DOB ha[d] already issued permits approving alternative plans prepared on behalf of [D]efendant.” The 2009 Decision did not make any determination as to whether Defendant’s actions were wrongful under the Lease. Therefore, Defendant’s motion for summary judgment dismissing this portion of the second cause of action is denied.

Plaintiffs concede Defendant's argument that, to extent the fifth cause of action alleges threat of irreparable harm, the concern is moot since the work has already been completed. As it is undisputed that the repairs have already been completed, summary judgment is granted dismissing the fifth cause of action solely to the extent that the threat of irreparable harm is moot.

### **First Counterclaim for Rent and Additional Rent**

Defendant’s first counterclaim seeks rent and additional rent due under the Lease. Defendant argues that, under the Lease, Plaintiffs were responsible for maintenance and repairs. 1998 Stipulation does not change this responsibility where damage to the

Premises is “due to the fault of neglect of the tenant.” Defendant argues that Plaintiffs’ obligation to pay rent may be limited only when damage occurs “without the fault or neglect of the tenant.”

¶4 of the Lease, entitled “Fire Clause” provides in part:

If the demised premises shall be partially damaged by fire or other cause without the fault or neglect of Tenant . . . the damages shall be repaired by and at the expense of Landlord and the rent until such repairs shall be made shall be apportioned according to the part or the demised premises which is unusable by Tenant. But if such partial damage is due to the fault or neglect of Tenant, . . . without prejudice to any other rights and remedies of Landlord and without prejudice to the rights of subrogation of Landlord’s insurer, the damages shall be repaired by Landlord but there shall be no apportionment or abatement of rent.

(emphasis added).

¶50 of the Lease provides, in part, that the “[l]andlord shall be responsible for maintaining all plumbing lines, conduits, pipes, and similar appurtenances that may pass through, in or over the demised premises, and landlord shall repair any damage thereto, except that the tenant shall be responsible for any damage that may be caused by the tenant, its agents, employees, or visitors.”

Defendant maintains that nothing in the record shows that the Vacate Order and closure of the Garage occurred “without the fault or neglect of the tenant” because Plaintiffs failed to perform maintenance and repairs, performed unauthorized repairs of poor workmanship, performed unauthorized structural work, failed to notify Defendant of conditions that might have warranted repairs that caused the conditions that led to the Garage being closed.

However, as described above, Defendant failed to establish as a matter of law the repairs that were actually completed and in which portion of the Premises they occurred; it would be premature to determine that the damages requiring repairs were due to the fault of Plaintiffs. Defendant has also failed to establish, as a matter of law, that Plaintiffs are not entitled to an abatement or apportionment of rent. Accordingly, summary judgment on Defendant's first counterclaim is denied.

### **Third Cause of Action for Negligence**

In the third cause of action, Plaintiffs alleged that Defendant owed Plaintiffs a duty to exercise reasonable care in the maintenance and repair of the Premises, but that Defendant failed to exercise reasonable care in protecting and/or repairing the foundation of the Building to prevent the Premises from the issuance of a Vacate Order. Plaintiffs further allege that Defendant failed to undertake the necessary remedial work to lift the Vacate Order.

“A landlord is not generally liable for negligence with respect to the condition of property after its transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision.” *Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [1st Dept 2010] (citations omitted).

Plaintiffs allege that Defendant owed Plaintiffs a duty to exercise reasonable care in the maintenance and repair of the Premises. However, under the 1998 Stipulation, Plaintiffs are contractually obligated to perform “routine maintenance and repairs,” and no duty exists.

To the extent that Plaintiffs allege that Defendant owed a duty to perform structural repairs to the Premises, this is duplicative of the fifth cause of action, which alleges that Defendant breached its requirement under the Lease to undertake certain obligations, including making and paying for structural repairs to the Garage, to support columns, and to the foundation of the building. *See Bd. of Managers of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506, 507 (1st Dept 2014) (“Breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. Allegations of negligence based on defects in construction of a condominium sound in breach of contract rather than tort.” (citations omitted)). Therefore, the third cause of action for negligence is dismissed.

#### **Fourth Cause of Action for Constructive Eviction**

Defendant argues, *inter alia*, that the constructive eviction cause of action must be dismissed as a matter of law because, by withholding rent, Plaintiffs elected their remedies and lost the right to seek damages for constructive eviction. Defendant maintains that it is undisputed that Plaintiffs failed to pay any of their rent. In support, Defendant submits a rent ledge (NYSCEF 427) indicating that Plaintiffs did not pay their rent for the months of July 2008 through November 2010 and June 2011. Plaintiffs

maintain that they paid rent for four months after the Vacate Order was issued and submitted copies of cancelled rent checks from April 2008 through July 2008 (NYSCEF 456) in opposition. In light of the competing evidence, questions of fact exist regarding whether Plaintiffs withheld their rent and are thereby precluded from seeking damages for constructive eviction, and this portion of Defendant’s motion for summary judgment is denied.


I have reviewed all of the parties’ arguments, even if not specifically addressed herein, and find that they do not change my determination.

In accordance with the foregoing, it is hereby

ORDERED that defendant Apthorp Associates LLC motion for summary judgment is granted solely to the extent that the first cause of action is dismissed as moot, the third cause of action is dismissed, and the allegation in the fifth cause of action - that there is a threat of irreparable harm - is dismissed as moot, and the motion is otherwise denied.

This constitutes the decision and order of the Court.

7/13/2020  
DATE

  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: