

QSB N. LLC v Speyer
2020 NY Slip Op 32535(U)
July 27, 2020
Supreme Court, New York County
Docket Number: 150402/2018
Judge: Verna Saunders
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 36

Justice

INDEX NO. 150402/2018

QSB NORTHERN LLC, Plaintiff,

MOTION SEQ. NO. 002

- against-

TISHMAN SPEYER, ABC CORPORATIONS 1-10 (fictitious entities), and JOHN DOES 1-10 (fictitious persons),

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 96

were read on this motion to/for DISMISSAL/SUMMARY JUDGMENT

Plaintiff commenced this action to recover damages arising from a sewer blockage in the Jackson Avenue sewer line allegedly caused by defendant Tishman Speyer ("Tishman") and other unknown entities/individuals. Plaintiff alleges that Tishman and other unknown contractors blocked the subject sewer line with concrete causing increased, significant costs and extensive delay to plaintiff's construction project.

Plaintiff is the owner of the premises located at 29-22 Northern Boulevard, Long Island City, New York where plaintiff commenced a construction project to develop a mixed-use residential building. In relation to the construction project, plaintiff obtained a permit from the New York City Department of Environmental Protection to use the Jackson Avenue sewer line as a means of dewatering its project site. At the time of incident, Tishman also had an ongoing construction project located in Long Island City, New York.1 Tishman now moves pursuant to CPLR § 3211(a)(7) seeking an order dismissing the complaint for failure to state a claim. Alternatively, Tishman moves the court pursuant to CPLR § 3212 seeking an order for summary judgment in its favor, dismissing the complaint on the same grounds. Specifically, Tishman denies the allegations and argues that plaintiff is not entitled to relief as plaintiff's alleged damages are solely and exclusively economic in nature, without any accompanying physical injury or property damage as required by law.

In opposition, plaintiff contends that the instant motion to dismiss violates the single motion rule as defined by CPLR § 3211(e) since Tishman previously, under Mot. Seq. 001 in the instant matter, cross-moved for dismissal of the complaint. Plaintiff also opposes the motion on other grounds arguing that Tishman's motion to dismiss should be denied as an untimely motion to reargue; that Tishman's summary judgment motion is premature; that the amended complaint

1 It is unclear from the record the exact address of the Tishman site.

makes allegations of physical damages to plaintiff's property rights; that plaintiff suffered physical damage to its property; and finally, that the record demonstrates that Tishman is liable. Additionally, plaintiff cross-moves pursuant to CPLR §§ 3124 and 3126 for an order compelling Tishman to produce outstanding discovery or to strike Tishman's answer for its purportedly willful failure to provide discovery. Lastly, plaintiff cross moves pursuant to CPLR § 3025 for leave to amend its complaint to set forth additional facts.

In reply, Tishman reaffirms its earlier arguments and maintains that it has complied with discovery; its initial cross motion for dismissal was not decided on the merits; and no further discovery will alter the fact that plaintiff did not sustain physical property damage.

As a preliminary matter, this court finds that the instant motion to dismiss does not violate the single motion rule prescribed by CPLR § 3211(e) as the prior cross-motion to dismiss, which was denied for failure to contain an Affirmation of Good Faith,² was not decided on the merits. (See *Rivera v Board of Educ. of the City of New York*, 82 AD3d 614 [1st Dept 2011]).

When considering a defendant's motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Normally, a court should not be concerned with the ultimate merits of the case. (*Anguita v Koch*, 179 AD2d 454, 457 [1st Dept 1992]).

Under the economic loss rule, there can be no recovery in tort for purely economic harm where plaintiff has alleged neither physical injury nor property damage. (*On v BKO Express LLC*, 148 AD3d 50 [1st Dept 2017]; citing *532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 288 [2001]).

After a careful review of the papers submitted, defendant's motion to dismiss the amended complaint is granted.

Plaintiff avers that Tishman's purported negligence interfered with its property right to the Jackson Sewer Line and thus, it is entitled to damages. The court finds that this argument is flawed at best as plaintiff's "right" is not a property right or an exclusive right equal to that of the owner and instead must be construed as a privilege. While plaintiff further contends that the permit should be treated like an easement, the court finds this line of reasoning equally flawed. Unlike a permit which can be revoked or given to another qualified applicant, an easement is a nonpossessory interest that travels with the land and can be binding on subsequent landowners. Based on the record before the court, plaintiff has no such possessory interest in the subject sewer line. Further, any privity arising from plaintiff's permit would exist between plaintiff and the entity issuing the permit thus, any cause of action for damages would potentially lie against the permitting entity and not a third-party. Moreover, any entitlement to relief for physical damages to the Jackson Sewer Line would presumably lie with a party who has a possessory interest in same.

² See *NYSCEF Document No. 39*.

Plaintiff also argues that as a result of Tishman's negligence, it suffered physical damages and that additional discovery can prove same, but the court finds these arguments unavailing. Plaintiff relies upon the affidavit of Andrew Till³ who attests that "[he] learned that the Defendant, Tishman Speyer, and/or its subcontractors had clogged up the Sewer with concrete and debris" but does not provide any additional facts as to how or where this information was obtained or why the blockage should be attributed to Tishman who denies same. (See Plaintiff's Exhibit *Till Affidavit*). Plaintiff also relies upon log records which detail increased waterflow but as the project entailed dewatering it is unclear what damage, if any, would have been caused to the site by such flow. Furthermore, as Tishman points out, plaintiff's own records fail to support a finding that there was physical damage to its property as there are seemingly no invoices, proof of payments, or other evidence of repair and/or repair costs for any alleged damage. (See Movant's *Exhibit F*). Instead, plaintiff's records suggest that it incurred additional costs to create an alternative method to dewater its project site due to the blockage in the Jackson Avenue Sewer List which, in and of itself, does not amount to physical damage. Without a showing of accompanying physical damages, plaintiff is unable to recover for a purely economic loss. (See *On v BKO Express LLC*, supra). Lastly, plaintiff's requests for additional discovery to prove Tishman's liability are without merit as plaintiff simultaneously maintains that the record, as is, is sufficient to establish Tishman's liability.

With regard to Tishman's motion for summary judgment, that application is denied as moot. As to plaintiff's cross-motion for an order compelling Tishman to produce outstanding discovery or to strike Tishman's answer for its willful failure to provide discovery, those applications are likewise denied as moot.

Finally, pertaining to plaintiff's cross-motion for leave to amend the complaint that application is also denied as plaintiff failed to attach a copy of the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading as required.

By virtue of the foregoing, Tishman has established entitlement to dismissal of the complaint. Accordingly, it is hereby

ORDERED that defendant Tishman Speyer's motion to dismiss plaintiff's amended complaint is GRANTED; and it is further

ORDERED that defendant Tishman Speyer's motion for summary judgment and plaintiff's cross-motions for discovery or to strike Tishman's answer are DENIED as moot; and it is further

ORDERED that plaintiff's cross-motion for leave to amend the complaint is DENIED; and it is further

³ Andrew Till affirms that he is the Chief Operating Officer for Simon Baron Development which wholly owns plaintiff QSB Northern LLC.

ORDERED that that this action is dismissed in its entirety and the Clerk is directed to enter judgment in favor of the movant Tishman Speyer; and it is further

ORDERED that the movant shall serve a copy of this order with notice of entry upon plaintiff within thirty days of the date hereof and file proof of same with the Clerk of the Court; and it is further

ORDERED that any relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

July 27, 2020


HON. VERNA L. SAUNDERS, JSC

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