

Fay v 325 E. 79th St. Owners Corp.
2021 NY Slip Op 31087(U)
March 25, 2021
Supreme Court, New York County
Docket Number: 157522/2017
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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INDEX NO. 157522/2017

VINCENT FAY and MARGARET FAY,

MOTION DATE

Plaintiffs,

MOTION SEQ. NO. 002

- v -

325 EAST 79TH STREET OWNERS CORP. and
DOUGLAS ELLIMAN LLC d/b/a DOUGLAS
ELLIMAN PROPERTY MANAGEMENT,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83

were read on this motion to/for REARGUMENT/RENEWAL.

In this property damage action, defendants move for an order (i) pursuant to CPLR 2221(d) and CPLR 2221(e) granting reargument or renewal of the court's prior order denying defendants' unopposed motion for summary judgment, (ii) upon granting reargument or renewal, granting summary judgment without opposition or, in the alternative, (iii) granting summary judgment dismissing the complaint upon consideration of the evidence. Plaintiffs oppose the motion, which is denied for the reasons below.

Plaintiffs are the proprietary lessees of Unit 13A ("the Unit") at the cooperative building located at 325 East 79th Street, New York, NY ("the Building"), which is owned by defendant 325 East 79th Street ("the cooperative"), and managed by defendant Douglas Elliman LLC d/b/a Douglas Elliman Property Management. This action for breach of contract and negligence arises out of an incident that occurred on or about February 23, 2016, when the hot water lever of the faucet in the shower of Unit's main bathroom shifted from the "off" to the "on" position, releasing hot water and creating steam that caused extensive damage to the Unit. There is no dispute that the subject faucet was installed by plaintiffs during a 1995 renovation. Plaintiffs allege, however, that the Building is responsible for the damage as the hot water lever shifted as the result of the vibration of plumbing pipes within the Building caused by plumbing work performed by the cooperative at the time of the incident.

Plaintiff Margaret Fay (“Fay”) testified at her deposition that the damage to the Unit was discovered by her son-in-law who was staying at the Unit while plaintiffs were out of town (NYSCEF # 24 at 46). After the son-in-law found water running from the shower faucet, he pulled the shower lever up to shut off the water by moving the lever from the “six position” to the “nine position” (*id.*, at 48, 49). Fay testified that she had been advised by the Building’s superintendent, Clifford Harrington, that during the time plaintiffs were away, the water on the “A” line was shut down due to freezing pipes on the ground floor apartments (*id.* at 47).

Reargument and Renewal

Defendants previously moved for summary judgment, and plaintiffs did not oppose the motion. In its decision and order dated February 10, 2020 (“the prior order”), the court noted that while electronic transmission of the notification of service of the document on the email service addresses constituted proper service, that plaintiffs’ email was returned to the court as “undeliverable,” and that “there is no indication that the instant motion was served via traditional means” (NYSCEF # 48). Accordingly, “in abundance of caution” the court denied the motion without prejudice (*id.*).

Defendants now move for reargument and renewal of the prior order, asserting that service of the summary judgment motion was made in compliance with efilings rules, and any service error was the result of the failure of plaintiffs’ new attorney to update his email address on the efilings system. Accordingly, defendants argue that their motion for summary judgment should be granted without opposition.

Plaintiffs oppose the motion for reargument and renewal and submit the affirmation of their prior counsel who states that he was not served with defendants’ prior summary judgment motion and did not have notice of it (NYSCEF # 73).

A motion for leave to reargue “is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the fact or law or for some reason mistakenly arrived at an earlier decision” (*William P. Pahl Equipment v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). As for a motion to renew, such a motion “is intended to bring to the court’s attention new facts or additional evidence which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore not brought to the court’s attention” (*Tishman Constr. Corp. of New York v City of New York*, 280 A.D.2d 374, 376 [1st Dept 2001]).

With regard to the motion to reargue the prior order, contrary to defendants’ argument, the court properly denied the unopposed summary judgment as it

appeared from the record that plaintiffs were not served with the motion. As for the renewal motion, the “new facts” offered on the motion regarding plaintiffs’ prior counsel’s history of using his NYSCEF account and his responsibility for updating the email address, do not provide a basis for granting renewal since there remains no evidence that plaintiffs were notified of the prior summary judgment motion. Under these circumstances, and in view of the public policy favoring the resolution of disputes on their merits (*Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept 2008]), the court properly denied the unopposed summary judgment motion without prejudice, and will now consider the defendants’ motion in light of plaintiffs’ opposition.

Summary Judgment Motion

On a motion for summary judgment, the moving party must “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the moving party makes this showing, the burden shifts to the opposing party to submit evidentiary proof sufficient to raise triable issues of fact (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]). “When deciding a motion for summary judgment, the court’s function is issue finding rather than issue determination...[and] [t]he evidence will be construed in the light most favorable to the moving party (*Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013] [internal citations omitted]).

Defendants argue that they are entitled to summary judgment as the record establishes that damage to the Unit was not the responsibility of the Building but was the result of the defective faucet installed by plaintiffs. With respect to the claim that defendants breached the proprietary lease, defendants argue that the claim is without merit as the terms of the proprietary lease and the Building’s House Rules establish that plaintiffs are responsible for all maintenance and repairs to plumbing fixtures, including the faucet and water levers at issue (NYSCEF # 30, ¶’s 2, 18 (a); NYSCEF # 31, Rule 13). As for the negligence claim, defendants argue that they owe no duty to plaintiffs with respect to maintaining the faucets installed by plaintiffs in the Unit, that the record shows that defendants were not negligent in maintaining the Building’s plumbing system, and that plaintiffs’ theory that shower lever was caused to fall downward by plumbing work in the Building, including vibrations, is speculative.

In support of their motion, defendants submit the affidavit of the Clifford Harrington (NYSCEF # 26), who was the Building’s Superintendent from 2015 to 2018. Harrington states that while plaintiffs were out of town, “[n]o work or services were performed in [the Unit] or on the Building’s ‘A’ plumbing water line...until the steam incident was first discovered on February 23, 2016” (*id.*, ¶’s 5-7). He also states that “there was no building wide shut down of the Building’s water supply

from the time the Fays were out of town up until [their daughter] advised [him] of the steam breach in [the Unit] ..." (*id.*, ¶ 7). He further states that the Building "did not have any notice of any plumbing issues, problems or conditions and/or defects pertaining to the Building's plumbing system...or problems or conditions in [the Unit] ...prior to the ...incident" (*id.*, ¶ 9).

Defendants also submit the affidavit of Gerald Gilligan, the Building's superintendent from 1984-2015, who avers that in the 31-year period that he was the superintendent, he "never witnessed or experienced a situation where a water valve within the Building moved and/or turned on by itself" (NYSCEF # 27, ¶ 4).

In addition, defendants support their motion with the expert affidavit of Leonard Williams (NYSCEF # 28), a licensed master plumbing, who inspected the tub/shower faucet in the Unit's master bathroom in December 2018. Williams describes the faucet as "a three-handle faucet, which includes a hot handle (right), cold handle (left) and diverter handle (in the middle)" (*id.*, ¶ 8). According to Williams, "[t]he handles on the faucet are lever handles as opposed to round or cross handles," and that "[t]he hot and cold faucet, and internal parts of the tub/shower faucets, were installed backwards and said condition allows the water to start from either the hot or cold side of the faucets by pushing down on the lever handles" (*id.*). He states that based on his inspection of the handles, "it takes very little force to open either side of the faucet due to the heavy weight of the decorative solid brass lever handles and the very smooth and easy operation of this type of faucet. Had the faucet been installed or assembled to allow the faucet to operate correctly, no amount of vibration would have caused the faucet to open unintentionally" (*id.*, ¶ 9). Williams opines, within a reasonable degree of professional certainty, that "the installation of the faucet does not comply with good and accepted industry standards" and that "the sole proximate cause of the faucet opening, and the resulting damages claimed by plaintiffs is due to the improper installation of the faucet during the last bathroom renovation" (*id.*, ¶¶ 10, 11).

As the above evidence submitted by defendants is sufficient to establish a prima facie defense that the damage in the Unit was not the responsibility of the cooperative, the burden shifts to plaintiffs to raise a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324).

In opposition to the motion and in support of their theory that plumbing work in the Building, and not any defect in the subject faucet, caused the hot water lever to shift to the "on" position, plaintiffs submit, *inter alia*, the affidavits of Fay, the Building's handyman Sacko Hadzovic, the Building's former superintendent, Gilligan, and an expert affidavit.

Fay avers that since the subject faucet was installed 21 years earlier, plaintiffs have "experienced no problems with its 'hot' and 'cold' levers in their

shower, never experienced any circumstances whereby the levers shifted from their 'off' position to the 'on' position," and that before their trip in February 2016, they "properly ensured that all faucets and levers were properly secured in the 'off' position" (Fay Aff. ¶¶ 6,7). According to Fay, upon their return, Hadzovic informed her that on or about February 16, 2021, extensive plumbing work was performed on the "A' line.

In his affidavit, Hadzovic states that in mid-February 2016, he specifically recalled "extensive plumbing work being performed by a contractor, Fred Smith Plumbing & Heating Company, on the Building's 'A' line to repair a leak in the basement unit which required the water to be turned off, and that upon completion it was turned back on" (NYSCEF # 71, ¶ 3). He further states that he told Fay of the plumbing work and "advised her that because the building has a 'water hammer' problem, upon turning the water back on, if such is done too quickly...such could well cause severe vibrations in the pipes thus causing levers or handles such as [plaintiffs'] hot water lever ...to shift from the 'off' position to the 'on' position." He also advised her that the "severe vibrations" were caused by "the pressure build-up in the pipes" (*id.*, ¶ 4).

As for Gilligan, he explains that the affidavit submitted in support of defendant's motion focused on water valves and not levers. Gilligan states that during his 31 years as superintendent of the Building he recalls "other proprietary lessees at the cooperative who have suffered very similar if not identical incidents," to that which occurred in plaintiffs' Unit and that the cooperative "was well aware" that the problem involved the building of pressure when the water was turned on too quickly (NYSCEF # 72, ¶¶ 4, 6).

Plaintiffs also rely on the affidavit of a plumbing expert, Russel Muli, who conducted an on-site inspection of the Unit and the sub-basement of the Building in December 2018 (NYSCEF # 69). After inspecting the faucets and hot and cold levers, Muli opines, to a reasonable degree of professional certainty, that "the hot and cold faucets, levers and internal parts of the shower and tub installed in 1995 were properly installed and that such installation more than complies with good and acceptable industry standards" (*id.*, ¶ 2). With regard to the sub-basement inspection, he opines that after such inspection he "was able to readily determine and conclude that the building has a 'water hammer' problem, which when the water in the building was turned off and then subsequently turned on too quickly, can cause severe vibrations in the pipes...[and] opines that [such] problem...is the most reasonable and plausible underlying cause of the shift in the hot water lever in [the] Unit...in February 2016 (*id.*, at ¶ 3).

Based on the above evidence submitted by plaintiffs supporting their claims that the plumbing work performed in the Building in February 2016, and the underlying water hammer problem, caused the hot water lever in the Unit's

bathroom to shift to the “on” position, plaintiffs have met their burden of controverting defendants’ showing. Accordingly, defendants’ motion for summary judgment must be denied (see *Friends of Thayler Lake LLC v Brown*, 27 NY3d 1039, 1043-1044 [2016] [summary judgment is not warranted when parties present “conflicting or inconclusive evidence with regard to a number of material facts and the inferences they wish to be drawn from those facts”]).

Conclusion

In view of the above, it is

ORDERED that defendants’ motion for reargument and renewal is denied; and it is further

ORDERED that defendants’ motion for summary judgment is denied.


MARGARET A. CHAN, J.S.C.

3/25/21
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
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