

Ventre v 45 Plaza Owners Corp.
2021 NY Slip Op 31284(U)
March 23, 2021
Supreme Court, Kings County
Docket Number: 503305/15
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 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 23rd day of March, 2021.

P R E S E N T:

HON. KAREN B. ROTHENBERG,

Justice.

-----X

FRANCES and ROBERT VENTRE,

Plaintiffs,

- against -

Index No. 503305/15

45 PLAZA OWNERS CORP.,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____

268-309, 341-350

Opposing Affidavits (Affirmations) _____

312-319, 327-339

Reply Affidavits (Affirmations) _____

320-326, 356-358

Defendant, 45 Plaza Owners Corp. (the Co-op), moves (mot. seq. nine) for an order, pursuant to CPLR 3212: (1) extending its time to move for summary judgment; (2) dismissing the first, fifth and tenth causes of action in the complaint; (3) granting it summary judgment on liability on its third and fourth counterclaims; and (4) scheduling a hearing before a referee regarding the Co-op's damages.

Plaintiffs Frances and Robert Ventre move (mot. seq. 10) for an order, pursuant to CPLR 2004 and 2005, granting them leave to file late papers in opposition to the Co-op's foregoing summary judgment motion.

Background

Plaintiffs are the owners of Apartment 6D in the residential cooperative apartment building located at 45 Grand Army Plaza (the Building). This action arises out of plaintiffs' installation of new gas service piping inside the ceiling of a public corridor in the Building leading to Apartment 6D in connection with their kitchen renovation project.

The parties entered into a May 26, 2011 "Agreement for Apartment Alteration" (Alteration Agreement) in connection with the renovation, which provides that plaintiffs are liable, and must indemnify the Co-op, for any damage caused by their renovations. In May 2012, plaintiffs' contractor turned off the gas at the service meter and conducted a pressure test on the gas riser for Apartment 6D, which indicated that there was a gas leak. The Co-op asserts that plaintiffs were not authorized to shut off their gas nor to perform the pressure test, and that the pressure from the test itself and/or the vibrations from plaintiffs' renovations and demolition work caused the leak in the riser.

Plaintiffs, on the other hand, assert that the Co-op is liable because the pressure test revealed a preexisting gas leak. Essentially, the remaining dispute in this litigation is whether the Co-op or the plaintiffs are responsible for the gas leak. The court refers to its March 28, 2017 decision and order for a more detailed description of the parties' dispute,

the pleadings, the relevant provisions of the proprietary lease for Apartment 6D and the terms of the Alteration Agreement.

On March 23, 2015, plaintiffs commenced this action against the Co-op seeking damages, injunctive relief and declaratory relief. The complaint originally asserted 15 causes of action against the Co-op, the majority of which were previously dismissed by an October 20, 2016 order. Plaintiffs' only remaining causes of action are: (1) the first, which alleges that the Co-op breached the Proprietary Lease by refusing to provide gas service to plaintiffs (complaint at ¶¶ 82-85); (2) the fifth, which alleges that the Co-op breached its warranty of habitability to plaintiffs because "[t]he gas riser which supplied gas to [plaintiffs'] home, Apartment 6D, was defective, broken, faulty or otherwise unfit for safe use" (*id.* at ¶¶ 106-111); and (3) the tenth, which alleges that the Co-op unlawfully converted \$1,000.00 of plaintiffs' property by requiring them to deposit \$1,000.00 security with the Co-op, pursuant to the terms of the Alteration Agreement (*id.* at ¶¶ 132-136).²

The Co-op answered the complaint, denied the material allegations therein and asserted nineteen affirmative defenses and four counterclaims. The Co-op's first and second counterclaims sought specific performance requiring plaintiffs to "correct and repair their work . . . by restoring all or part of the affected areas in the apartment and building to their original condition" in accordance with the Alteration Agreement and the

²Under paragraph 13 of the Alteration Agreement, plaintiffs were required to deposit \$1,000.00 with the Co-op "[a]s security for its compliance in full with [the] Agreement . . ."

Proprietary Lease due to plaintiffs' "faulty work and installation of an illegal gas riser in the building in violation of the New York City Fuel Gas Code" (answer at ¶ 1, page 23 and ¶¶ 69-81). The Co-op's third and fourth counterclaims seek monetary damages in an amount not less than \$100,000.00 for plaintiffs' breach of the Alteration Agreement and Proprietary Lease (*id.* at ¶¶ 83-100), including reimbursement of about \$350,000.00 in professional and attorneys' fees.

By a March 28, 2017 decision and order, this court granted the Co-op summary judgment on its first and second counterclaims "to the extent that this court finds that plaintiffs' installation of gas service piping in the ceiling of the 6th Floor common hallway violates the New York City Fuel Gas Code § 404.1 (5)." Importantly, this court also held that:

"[the Co-op] explicitly concedes that it has a general obligation to maintain the Building's gas lines in the Building and to provide gas service to its shareholders. However, [the Co-op's] general obligation to maintain the gas lines is not in dispute in this case. As [the Co-op] correctly argues, both the Proprietary Lease and the Alteration Agreement require the plaintiffs to repair property damage caused by their renovation work, without regard to [the Co-op's] general obligation to maintain the gas lines in the Building."

This court denied plaintiffs' summary judgment cross motion for a declaration that the Co-op is liable to repair the gas line to Apartment 6D as "premature before the parties conduct discovery regarding the actual cause of the gas leak."

Now that discovery is complete, the Co-op moves for an order extending its time

within which to move for summary judgment,³ dismissing plaintiffs' first, fifth and tenth causes of action and granting it summary judgment on its third and fourth counterclaims for contractual indemnification.

The Co-op submits an affidavit from Robert Pavone (Pavone), the president of the Co-op from 2000 through 2017, who asserts that:

“the evidence clearly establishes that Plaintiffs’ damages are a direct result of their decision to shut off gas service to their apartment and perform a gas pressure test [on May 3, 2012] in contravention of the parties’ alteration agreement.”

Pavone explains that:

“The gas pressure test itself – which required the seventy-plus-year-old gas riser be pressurized at twelve times the normal gas pressure – and/or the vibrations and impact from Plaintiffs’ kitchen renovations is what ultimately caused the line to fail; the decision to turn off the gas precipitated the failure, thus making Plaintiffs responsible for the costs of repair under the terms of their alteration agreement.”

The Co-op asserts that “neither Plaintiffs nor any other shareholders ever informed the Co-op that they smelled gas emanating from a gas riser.” The Co-op submits affidavits from each of the Co-op’s five shareholders who reside in apartments on the “D” line in the Building: (1) Janet Gochman (Gochman) of apartment 3C/D; (2) Monique M. Jn-Marie of apartment 1D; (3) Steven Nuzzi of apartment 5D; (4) Tommy M. Taylor of apartment 4D; and (5) Ella Yang of apartment 5D. Each of these

³The Co-op asserts that it had good cause for its delay in moving for summary judgment based on: (1) plaintiffs’ failure to timely serve their expert report; (2) plaintiffs failure to produce insurance claim documents; and (3) the COVID-19 pandemic.

shareholders, except for Gochman,⁴ attest that they “never detected the smell of gas” in their apartments or anywhere in the Building.

The Co-op also submits an affidavit from Scott E. Derector (Derector), the General Manager and President of Affiliated Engineering Laboratories, Inc. (Affiliated), which was engaged by the Co-op to prepare a report regarding the May 3, 2012 integrity pressure test of the gas riser that serviced Apartment 6D. Derector attests that Kenneth M. Garside, P.E., an employee of Affiliated, “conducted a physical inspection of [the] Building’s natural gas distribution piping system, reviewed documents relevant to the May 3, 2012 integrity pressure test and applicable codes and prepared a report of his findings . . .” (Garside Report). In this regard, the Garside Report, provided, in part, as follows:

“4. The integrity pressure test performed on the Original Gas Riser *may have caused the leak* that resulted in the failed pressure test. The utility pressure system in this section of New York City operates at a normal ¼ psig pressure. An integrity pressure test of all existing gas piping to 3 psig is excessive, at approximately 12 times the rated gas pressure provided by the utility company. The existing gas piping is threaded and likely dated back to 1941. Thus, over its approximate 70-year service life, corrosion due to environmental conditions such as moisture, foreign matter and thermal gradients can result in localized material loss and embrittlement and the associated inability of the screw thread connected piping system to contain higher pressure. Additionally, physical properties of pipe joint sealants (breakdown/embrittlement), together with added pipe strain

⁴Although Gochman attests that “[s]ometime prior the May 2012, I began noticing at times a faint smell of gas near the stove in our Apartment[,]” National Grid conducted a test and advised her that the gas odor was a result of an issue with her stove.

associated with excessive pipe pressure loads, *may have resulted in leakage*.

“5. Given the age of the existing gas piping, the stress and strain associated with excessive internal pressure, vibration, movement and/or impact associated with demolition/renovation activity *cannot be discounted as the causal factor in the discovery of leakage* during the failed 3 psig integrity pressure testing that occurred on or about 5/3/12. As set forth above, pre-renovation, the Original Gas Riser was connected to the stove via an underfloor gas connection. The demolition of the kitchen floor that had housed the Apartment 6D gas piping *may have* negatively impacted the physical integrity of the Original Gas Riser and *cannot be discounted as a causal factor* in the failed Original Gas Riser pressure test at issue” (emphasis added).

The Co-op argues that plaintiffs’ first cause of action for breach of the proprietary lease should be dismissed because “[t]he evidence conclusively establishes that the leak to the Original Gas Riser was not preexisting but, rather, was the direct result of the Renovation Project and Plaintiffs’ own breaches of the Alteration Agreement and the Proprietary Lease.”

The Co-op contends that plaintiffs’ fifth cause of action for breach of the warranty of habitability is subject to dismissal because “Plaintiffs caused the damage to the Original Gas Riser and are responsible for its repair without regard to the Co-op’s general obligation to maintain the Building’s gas line. Moreover, “Plaintiffs’ fifth cause of action fails because Plaintiffs are ‘not entitled to compensation for breach of warranty of habitability during the period in which [they were] not living’ in the Apartment” (quoting *Genson v Sixty Sutton Corp.*, 74 AD3d 560, 560 [1st Dept 2010]). The Co-op submits plaintiffs’ deposition testimony, which reveals that they were not residents of Apartment

6D at any time relevant to this action, and their daughter, Sara, who is not a shareholder in the Co-op, vacated Apartment 6D in 2012 (before the failed gas pressure test).

The Co-op seeks dismissal of plaintiffs' tenth cause of action on the ground that it was entitled to retain plaintiffs' \$1,000.00 security deposit under paragraph 13 of the Alteration Agreement and asserts that it has expended hundreds of thousands of dollars in legal and professional fees in connection with plaintiffs' renovation project.

Finally, the Co-op seeks summary judgment regarding liability on its third and fourth counterclaims for contractual indemnification under the Alteration Agreement and the proprietary lease, respectively. The Co-op argues that "regardless of the resolution of the rest of the Co-op's motion, the Co-op is presently entitled to summary judgment on liability, and a hearing on damages, with respect to the legal fees and costs it has incurred on its successful motions in this action . . ."

Specifically, the Co-op asserts that under paragraph 5 of the Alteration Agreement, it "has the right to be indemnified for the costs associated with hiring [Cowley Engineering and RAND] to review Plaintiffs' proposed and completed work." Additionally, the Co-op argues that it is entitled to indemnification for the cost of hiring LGI to investigate and report whether plaintiffs' renovation work was illegal, pursuant to paragraphs 5, 9 and 10 of the Alteration Agreement and paragraphs 11, 19 and 28 of the proprietary lease. The Co-op further contends that it is entitled to indemnification under those same provisions for the costs it incurred to gain access to Apartment 6D, disconnect the illegal gas line and install legal gas services to Apartment 6D. Finally, the Co-op

asserts that it is “entitled to recover its legal fees and costs associated with retaining legal counsel and successfully obtaining . . . affirmative relief from this Court . . .”

Plaintiffs, in opposition, argue that defendants have failed to prove that plaintiffs’ pressure test caused the gas leak. Plaintiffs argue that the Garside Report is inadmissible because it was submitted “as an exhibit to an affidavit by a Scott E. Derector [and] Mr. Garside [does not] swear to or affirm his own report.” Even if the court considers the Garside Report, plaintiffs argue that “Garside hypothesizes that the gas piping serving plaintiffs’ apartment *might* have been deteriorated such that it could not withstand the pressure from the pressure test . . .” (emphasis added). Plaintiffs note that, other than “a series of conjectures” in the Garside Report, “defendant’s only ‘evidence’ is the testimonials of some residents that they do not recall smelling natural gas in their apartments 9 or 10 years ago.” Plaintiffs dismiss those witnesses as biased, and argue that “[a]s defendant never ascertained the location of the leak, we have no way of knowing which, or if any, of these tenants might have been expected to detect a gas odor . . .”

Plaintiffs submit their own expert affidavit from Kevin Fagan (Fagan), a gas utility worker, supervisor and manager at Consolidated Edison, who attests that “the pressure test at issue in this case... did not cause a failure in the integrity of the gas piping supplying apartment 6D...but rather revealed the existence of a leak in the piping.” However, plaintiffs also argue that they “were unable to take any actions to identify the

location and cause of the leak” because “[d]uring the course of the lawsuit, defendant continued to prevent access to the gas piping . . .” Plaintiffs argue that

“defendant disregarded the Court’s direction [to access Apartment 6D “for the purpose of conducting an inspection to locate and determine the source and cause of the gas leak and to formulate a plan to repair the leak and restore service to the apartment . . .”] and unilaterally substituted its own solution to delivering gas services by re-routing the new gas line onto the roof . . .”

Thus, plaintiffs submit an expert report opining that the gas leak was not caused by their pressure test yet admit that the location and cause of the gas leak was never determined.

Notably, plaintiffs do not oppose those branches of the Co-op’s motion for summary judgment dismissing plaintiffs’ fifth and tenth causes of action or for summary judgment on the Co-op’s counterclaims for indemnification.

The Co-op, in reply, argues that “by performing the gas pressure test, Plaintiffs spoiled the only evidence that could establish whether any hazardous leaks were present prior to the Renovation Project”, and that plaintiffs’ first cause of action must be dismissed because “Plaintiffs have not, and cannot, demonstrate that the Original Gas Riser contained a hazardous leak (or any leak) prior to Plaintiffs’ Renovation Project.”

The Co-op also notes that plaintiffs do not address or refute its motion to dismiss plaintiffs’ fifth and tenth causes of action or that branch of its motion seeking summary judgment on its third and fourth counterclaims for indemnification.

Discussion

“[T]he proponent of a summary judgment motion 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 issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “It is well-settled that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment” (*Bendik v Dybowski*, 227 AD2d 228, 228 [1996]). “To obtain summary judgment it is necessary that the movant establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor (CPLR 3212, subd. [b]), and he must do so by tender of evidentiary proof in admissible form” (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “If the moving party fails to meet this initial burden, summary judgment must be denied regardless of the sufficiency of the opposing papers” (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014] [internal quotations omitted]).

That branch of the Co-op’s motion for summary judgment dismissing plaintiffs’ first cause of action for breach of the proprietary lease is denied as the Co-op’s evidence does not conclusively establish that the gas leak was caused by plaintiffs’ renovation work. The Co-op has failed to satisfy its prima facie burden of establishing that the integrity pressure test performed by plaintiffs’ contractor or plaintiffs’ renovation work actually caused the gas leak. Indeed, the Co-op admits that it was unable to determine the location and cause of the gas leak. Thus, there remains a triable issue of fact regarding

the cause of the gas leak, which precludes granting the Co-op summary judgment dismissing the first cause of action.

The Co-op's summary judgment motion dismissing plaintiffs' fifth cause of action for breach of the warranty of habitability is granted because the evidence reflects that plaintiffs did not reside in Apartment 6D during the relevant time (*see Genson v Sixty Sutton Corp.*, 74 AD3d 560, 560 [1st Dept 2010]). Furthermore, plaintiffs have not opposed this branch of the Co-op's motion, and therefore, it is deemed abandoned.

The Co-op's summary judgment motion dismissing the tenth cause of action for conversion of plaintiffs' \$1,000.00 security deposit is also granted, without opposition.

Plaintiffs also fail to address or oppose that branch of the Co-op's motion seeking summary judgment on its third and fourth counterclaims for indemnification under the Alteration Agreement and the Proprietary Lease, respectively.

Under the terms of those agreements, the Co-op is entitled to reimbursement for legal and professional fees and costs that it incurred in connection with plaintiffs' Renovation Project. Under paragraph 5 of the Alteration Agreement, the Co-op is entitled to indemnification for the costs associated with hiring professionals to review plaintiffs' proposed and completed work. While the Co-op is also entitled to indemnification for the fees and costs its incurred when it resolved the issue with the gas piping in the public corridor, it is unclear prior to trial whether the Co-op will be entitled to further fees and costs. Thus, the Co-op is entitled to summary judgment on its third

and fourth counterclaims, however, a hearing regarding the Co-op's damages must await the conclusion of trial. Accordingly it is

ORDERED that the Co-op's motion is granted to the extent that the Co-op's time to move for summary judgment is extended, the fifth and tenth causes of action in the complaint are dismissed and summary judgment on liability is granted regarding the Co-op's third and fourth counterclaims for contractual indemnification; the motion is otherwise denied; and it is further

ORDERED that plaintiffs' motion is granted without opposition.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.