Heritage Funding, LLC v Doyle Bros. Plumbing & Heating Inc.
2021 NY Slip Op 31409(U)
April 26, 2021
Supreme Court, New York County
Docket Number: 151695/2019
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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HERITAGE FUNDING, LLC,

Plaintiff,

- v -

DOYLE BROS. PLUMBING & HEATING INC., RIP CONSTRUCTION CONSULTANTS, JMJ CROSS ENTERPRISES, MIA CONTRACTING, INC., ROBERT NOVOGRATZ

Defendants.

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INDEX NO. 151695/2019

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for JUDGMENT - SUMMARY.

In this negligence action, Heritage Funding, LLC ("Plaintiff") alleges that Defendants Doyle Bros Plumbing & Heating Inc., RIP Construction Consultants[1], JMJ Cross Enterprises, MIA Contracting, Inc., and Robert Novogratz negligently performed plumbing work which resulted in pipes bursting and causing damage to Plaintiff's premises. In motion sequence 003, Defendant Doyle Bros Plumbing & Heating Inc. ("Defendant") moves for summary judgment. The motion has been fully submitted.

Background

Plaintiff alleges that on or about February 15, 2016, it retained Defendant to perform certain plumbing work at its property, 1 Center Market Place, New York, New York 10013 (the "premises"). (NYSCEF Doc No. 1, Cmplt, at ¶ 7.) Plaintiff alleges that RIP Construction

[1] The court granted RIP Construction Consultants' motion to dismiss by decision and order dated January 24, 2020. (NYSCEF Doc No. 42.)

Consultants were also hired as a coordinator, MIA Contracting, Inc. as a subcontractor, JMJ Cross Enterprises as an engineering consultant, and Robert Novogratz as a general contractor. (*Id.* at ¶¶ 8-11.) Plaintiff alleges that on or before February 15, 2016, the Defendants negligently installed a water line through an unheated cavity, and that on or about the same day, frigid air caused the pipe to burst, releasing water and damaging Plaintiff's property. (*Id.* at ¶¶ 11-16.) The loss was discovered on February 16, 2016. (NYSCEF Doc No. 51, Bill of Particulars at 3.) Plaintiff commenced this action on February 14, 2019, seeking $249,269.69 in damages. (NYSCEF Doc. No. 1 at ¶ 17.) There has been no discovery in this action and to date, a Preliminary Conference has not been held.

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) "Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted].) Upon proffer of evidence establishing a prima facie showing of entitlement by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

CPLR 3123 [a] ("Notice to admit; admission unless denied or denial excused") provides that:

> At any time after service of the answer or after the expiration of twenty days from service of the summons, whichever is sooner, and not later than twenty days before

> the trial, a party may serve upon any other party a written request for admission by the latter of . . . the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry. . . . Each of the matters of which an admission is requested shall be deemed admitted unless within twenty days after service thereof or within such further time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.

"[The First Department has] consistently held that the purpose of a notice to admit is to eliminate from the litigation factual matters which will not be in dispute at trial, not to obtain information in lieu of other disclosure devices." (*Taylor v Blair*, 116 AD2d 204, 205–06 [1st Dept 1986].) "A notice to admit, pursuant to CPLR 3123 [a], is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, and not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial." (*The Hawthorne Grp., LLC v RRE Ventures*, 7 AD3d 320, 324 [1st Dept 2004].) Thus, questions that seek admissions that go to the heart of a matter are improper. (*Sherman v Michael Anthony Contracting Corp.*, 2020 WL 2115493 [Sup Ct, NY County 2020].)

Here, Defendant served the notice to admit upon Plaintiff on December 5, 2019. (NYSCEF Doc No. 52.) The notice sought admission of the following:

> 1. That the occurrence which is the subject of the instant action occurred at 1 Center Market Place, New York, New York 10013.
>
> 2. That the occurrence which is the subject of the instant action occurred on the 4th Floor of 1 Center Market Place, New York, New York 10013.
>
> 3. That Robert Novogratz was the owner of 1 Center Market Place, New York, New York 10013 in or about the calendar year 2005.
>
> 4. That the "new plumbing installations on the 4th floor of the premises" as indicated in ¶ 12 of plaintiff's Complaint, were done prior to 2008.

5. That the alleged installation and running of a water line through an unheated cavity, as indicated in ¶ 13 of plaintiff's Complaint, was done prior to 2008.

6. That the alleged incomplete sealing and installation of the water line pipe within the unheated cavity on the 4th floor of the premises, as indicated in ¶ 14 of the plaintiff's Complaint, was done prior to 2008.

7. That the alleged "new plumbing installations on the 4th floor of the premises" as indicated in ¶ 12 of plaintiff's Complaint, were completed prior to 2008.

(*Id.*)

Defendant argues that Plaintiff's failure to respond to the notice to admit establishes each of the above statements as "FACT". (NYSCEF Doc No. 47 at ¶¶ 24-31.) Defendant further argues that it is not a proper party, "[s]ince DOYLE BROS PLUMBING & HEATING INC did not exist prior to October 5, 2011 it could not be responsible for the negligent acts which form the basis of the plaintiff [sic] claim in as much as such acts took place prior to 2008." (*Id.* at ¶ 37.) In support, Defendant submits an affidavit of Edward Doyle, the president of Defendant, who attests to the Defendant's incorporation date and avers that it "did not perform any plumbing work, or any work whatsoever at [the premises] prior to February 15, 2016." (NYSCEF Doc No. 54.) Defendant argues that it has established that there are no issues of material fact and seeks summary judgment.

In opposition, Plaintiff argues that its failure to respond to the notice to admit and the self-serving affidavit of Mr. Doyle do not eliminate the factual issues that must be resolved at trial and are thus insufficient to establish summary judgment in favor of Defendant. In addition, Plaintiff submits an NYC Department of Buildings plumbing permit issued to Mr. Doyle for work at the premises on October 13, 2005. (NYSCEF Doc No. 61.) Plaintiff notes that although the business listed on the permit is "Doyle & Son Plumbing & Heating", further discovery is needed to investigate the relationship between Doyle & Son Plumbing & Heating and the current Defendant, Doyle Bros. Plumbing & Heating. (NYSCEF Doc No. 58 at ¶¶ 16-19.) Lastly, Plaintiff submits

an email sent to Defendant on December 23, 2019, wherein Plaintiff states that it had called Defendant multiple times over the prior week and sought an extension of time to respond. (NYSCEF Doc No. 63.)

Defendant's contention that Plaintiff's failure to respond to the notice to admit demonstrates that it is entitled to summary judgment, is unavailing, as Defendant has failed to meet its burden demonstrating that no genuine issue of material fact exists. (*See Sherman*, 2020 WL 2115493 [A notice to admit is improper where it seeks admissions of material facts "that go to the heart of this matter"].) Namely, Defendant seeks admission of whether the burst pipe was installed "prior to 2008", which is a fundamental factual issue that Plaintiff is entitled to explore through discovery. A notice to admit "is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, and not for the purpose of compelling admission of fundamental material issues or ultimate facts that can only be resolved after a full trial." (*The Hawthorne Group* 7 AD3d at 324; *see also New Image Constr., Inc. v TDK Enters. Inc.* 74 AD3d 680, 681 [1st Dept 2010].) Nor may it "be employed as a substitute for other disclosure devices, such as examinations before trial, depositions upon written questions or interrogatories. (*Taylor*, 116 AD2d at 205-06.)

The self-serving affidavit submitted by Mr. Doyle in support of summary judgment is insufficient to demonstrate that there are no triable issues of material fact. Plaintiff is entitled to discovery to explore these issues and the relationship between Doyle & Son Plumbing & Heating and the current Defendant, Doyle Bros. Plumbing & Heating.

As such, it is hereby

ORDERED that motion sequence 003, Defendant Doyle Bros. Plumbing & Heating, Inc.'s motion for summary judgment, is denied.

04/26/2021
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE