

**Nationwide Prop. & Cas. Ins. Co. v Client 2318
Living Trust**

2021 NY Slip Op 31432(U)

April 28, 2021

Supreme Court, New York County

Docket Number: 152157/2013

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES **PART** **IAS MOTION 59EFM**

Justice

-----X

NATIONWIDE PROPERTY & CASUALTY INSURANCE
CO. and LEONARD STEINBERG,

Plaintiffs,

INDEX NO. 152157/2013

MOTION DATE 07/30/2020

MOTION SEQ. NO. 001 002

- v -

THE CLIENT 2318 LIVING TRUST, NICOLE MARY,
GREENSCAPE GARDEN DESIGN LLC, and NEW
INDUSTRIES, INC.,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

GREENSCAPE GARDEN DESIGN LLC,

Plaintiff,

Third-Party
Index No. 590389/2013

-against-

NEW INDUSTRIES, INC.,

Defendant.

-----X

GREENSCAPE GARDEN DESIGN LLC,

Plaintiff,

Second Third-Party
Index No. 595753/2016

-against-

MUELLER DESIGN, INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 88, 90, 91, 92, 93, 94, 95, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 114, 115

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89, 96, 97, 98, 113, 116, 117

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

ORDER

Upon the foregoing documents, it is

ORDERED that the motion for summary judgment of defendant Greenscape Garden Design, LLC (motion sequence number 002) is granted and the complaint is dismissed against it; and it is further

ORDERED that the cross-claims against such defendant by defendants The Client 2318 Living Trust, Nicole Mary, and New Industries, Inc. are dismissed; and it is further

ORDERED that the first and second third party complaints of third-party plaintiff Greenscape Garden Design, LLC are dismissed, by operation of law; and it is further

ORDERED that the such claims, including third party claims by defendant/third party plaintiff Greenscape Garden Design LLC against third party defendants New Industries, Inc. and Mueller Design, Inc., and cross-claims against defendant/third party plaintiff Greenspace are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Greenscape Garden Design, LLC dismissing the claims and cross-claims made against it in this action and dismissing the first and second third-party complaints against defendants New Industries, Inc. and Mueller Design, Inc., respectively, together with costs and disbursements to be taxed by

the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion of defendant The Client 2318 Living Trust for summary judgment dismissing the complaint and the cross motion of plaintiff Nationwide Property and Casualty Insurance Co. for partial summary judgment of liability in its favor (motion sequence number 001) are denied.

DECISION

Defendant Greenscape Garden Design, LLC, has come forward with prima facie evidence that it "did not launch a force or instrument of harm where its affirmative act create[d] a dangerous condition" by failing to advise defendant The Client 2318 Living Trust to shut off the water. Plaintiff raises no issues of fact that refutes such lack of evidence of any affirmative act. See Trawally v City of New York, 137 AD3d 492 (1st Dept 2016). Nor has plaintiff, in opposition, or the moving co-defendant The Client 2318 Living Trust (motion sequence number 001) come forward with any evidence that plaintiff detrimentally relied on the continued performance of the defendant Greenspace Garden Design, LLC's contractual duties. See Espinal v Melville Snow Contractors, LLC, Inc., 98 NY2d 136, 140-141 (2002).

Moreover, by its terms, the contract dated March 16, 2011, between Greenscape Garden Design LLC dba Jeffrey Erb Landscape

Design and defendant Mueller Design Inc., the landscape design firm hired by 2318 Living Trust, provides, in pertinent part,

"Irrigation Services

JELD does not assume any responsibility for plant or property damage incurred from water being turned on or off, . . . broken or leaking pipes, or any other water related damage to Client's property, or Client's neighboring properties. It is Client's responsibility to inform building or house staff of irrigation turn of and off times and dates."

Thus, the cross claims of co-defendants The Client 2318 Living Trust and Mueller Design, Inc., against co-defendant Greenscape Garden Design, LLC, by operation of law and fact, also fail. See Great Northern Ins Co v Estelle Irr Corp, 124 AD3d 431, 432 (1st Dept 2015).

For the foregoing reasons, the motion of defendant Greenscape Garden Design, LLC for summary judgment dismissing the complaint and cross claims against it shall be granted in its entirety.

Clearly, as against defendant Greenscape Garden Design, LLC, plaintiff's motion for partial summary judgment of liability fails, for the foregoing reasons. Likewise, as plaintiff comes forward with no evidence that New Industries, Inc. took any affirmative action that resulted in water damages to plaintiff's property or that plaintiff reasonably relied on defendant New Industries' reasonably relied upon such company's contractual duties, it has not established entitlement to summary relief against that defendant corporation.

Finally, "Where damages are caused by a leak or break in an ordinary household pipe, strict liability does not apply and the abutting owner is not responsible unless he has been negligent (see Prosser, Law of Torts (4th ed.), p. 510)." Berliner v Kacov, 51 AD2d 962, 963 (2nd Dept 1976). Plaintiff has not come forward with prima facie proof that defendant The Client 2318 Living Trust was negligent with respect to the alleged freezing of the copper pipe and/or leaking shut off valve, including that such defendant had actual or constructive notice of the expansion by freezing of the copper pipes and/or triggering of the shut off valve. As to its own motion for summary dismissal of the complaint against it, defendant The Client 2318 Living Trust comes forward with no admissible evidence that tends to show that it, as opposed to its co-defendant contractors, lacked actual or constructive notice of the frozen pipe and/or the consequent triggering of shut off valve.

Debra A. James

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4/28/2021			DEBRA A. JAMES, J.S.C.	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE