

Jefferson v New Life Tabernacle, Inc.

2022 NY Slip Op 30282(U)

January 24, 2022

Supreme Court, Kings County

Docket Number: Index No. 520804/2016

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 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 24th day of January, 2022

PRESENT:

HON. WAVNY TOUSSAINT,

Justice.

-----X

ISABELLE R. JEFFERSON,

Index No. 520804/2016

Plaintiff,

DECISION AND ORDER

- against -

NEW LIFE TABERNACLE, INC

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) Annexed

47-90; 110-114

Opposing Affidavits (Affirmations)

115-118

Reply Affidavits (Affirmations)

121

Upon the foregoing papers, defendant New Life Tabernacle Inc seeks an order pursuant to CPLR 3212, granting it summary judgment, dismissing the plaintiff's complaint (Motion Seq. 4). Plaintiff Isabelle R. Jefferson cross moves for an order, pursuant to CPLR 3025 (b), granting leave to amend her complaint (Motion Seq. 5).

Background

Plaintiff Jefferson is the owner of the premises known as 538 Hendrix Street, Brooklyn, N.Y. Defendant New Life is the owner of the abutting premises, known as 540-550 Hendrix Street, Brooklyn, N.Y. Plaintiff alleges that commencing in May, 2012, the defendant performed certain construction work at its premises, including but not limited to installing drains and pouring cement over the yard. Plaintiff further alleges that the work was done in a negligent manner, in violation of New York City Building Codes and without first obtaining the required permits. As a result, the plaintiff allegedly sustained flooding damage, which is continuous and ongoing.

Procedural History:

The plaintiff commenced this action by filing a summons and complaint on November 23, 2016. Issue was joined by service of a verified answer on April 5, 2017. The answer included 11 affirmative defenses, which included a defense that the action is time barred under the applicable statute of limitations.

Plaintiff filed a Note of Issue on September 23, 2019. On October 11, 2019, the defendant moved to strike the Note of Issue. Pursuant to order dated October 29, 2019, the note of issue was stricken, and discovery continued.

On June 18, 2020, plaintiff again filed a note of issue. Defendant filed the instant motion for summary judgment on July 20, 2020. On October 16, 2020, the parties executed a stipulation to adjourn this motion to 1/20/2021.¹ On January 25, 2021, the parties again executed a stipulation to adjourn defendant's motion to April 14, 2021. On April 12, 2021, plaintiff filed a consent to change attorney. Simultaneous with that filing,

¹ The motion was adjourned to 1/27/2021.

plaintiff's new counsel filed an affidavit of actual engagement, seeking an adjournment of the April 15, 2021 motion date. The Court, thereafter, adjourned the defendant's motion to May 12, 2021, marking the matter final. On April 21, 2021, plaintiff filed the instant cross motion, seeking to amend the complaint.

Defendant's Summary Judgment Motion:

Defendant alleges that the plaintiff's claims are time barred, in that the plaintiff claims that the damage to her property first occurred in 2012 and this action was not commenced until 2016, four years later. Additionally, defendant contends that the plaintiff failed to establish the defendant negligently caused the damage sustained by the plaintiff. According to defendant, the plaintiff's complaint is predicated on the fact that the defendant performed construction work without the requisite building permits and in violation of its filed plan and improperly installed drains on its premises. These assertions defendant argues, are speculative and untrue.

Further, the defendant argues that the plaintiff cannot maintain her negligence claim, as the defendant owed no duty to the plaintiff to keep water from flowing onto her property. Further, based upon the affidavit of Donald Erwin, R.A., plaintiff will not be able to establish that her alleged damage was proximately caused by defendants repaving project, as there was no evidence of water infiltration from defendant's property into plaintiff's cellar.

In opposition, plaintiff alleges that the action is not time barred, as ongoing wrongs to property interests can keep the statute of limitations running continuously and would permit the plaintiff to recover damages that accrued within three years of the commencement of the action. Plaintiff contends that the harm sustained by the plaintiff is not exclusively traced to the day the defendant commenced the subject work. According

to plaintiff's verified interrogatories, during a constant rainfall, water comes off defendant's "roof and surface, and come through the earth, through the cellar walls and floods Plaintiff's cellar." Plaintiff's expert, Neil Schmelkin, P.C. opined that the water infiltration in plaintiff's basement was coming from defendant's property, as a direct result of the repaving work and a drainage system installed on defendant's property.

Plaintiff's Cross Motion to Amend the Complaint:

Plaintiff's proposed amended complaint alleges four causes of action: 1) trespass; 2) injunctive relief (compelling defendants to remedy the alleged condition); 3) nuisance; and 4) property damage. Plaintiff alleges that no prejudice or surprise will befall the defendant, as the theories of the case remain the same and the amendment serves to clarify the nature of plaintiff's claims.

In opposition, defendant argues that on August 22, 2018, all Department of Buildings violations relative to this construction project were vacate and all fines refunded to the defendant. Therefore, plaintiff's assertion that defendant's repaving project was commenced without proper permits is speculative and not correct. Defendant further argues that plaintiff's motion to amend is unduly delayed and is therefore, prejudicial to the defendant; the original complaint does not allege either nuisance or trespass causes of action and does not seek injunctive relief. Additionally, plaintiff does not explain the delay in seeking this amendment. Lastly, the defendant argues that the proposed amended complaint lacks merit.

Discussion

The Court will initially address the plaintiff's motion to amend the complaint. "While leave to amend a pleading shall be freely granted (see CPLR § 2035 [b]), a motion to amend is committed to the broad discretion of the court . . . 'and the resulting

determination will not be likely set aside' "(*McGowan v RPC Realty Corp*, 46 AD 3d 771 [2d Dept 2007]); citing *Citrin v Royal Insurance Co.*, 172 AD 2d 795 [2d Dept 1991])

"While leave to amend a complaint . . . ordinarily, should be freely granted, "lateness in making a motion to amend, coupled with the absence of a satisfactory excuse for the delay, and prejudice to the opposing party, justified denial of such a motion" (*Albany-Plattsburgh United Corp v Bell*, 307 AD 2d 416, 420 [3d Dept 2003]). Where a plaintiff files a Note of Issue, certifying that a case is ready for trial and then subsequently seeks to amend the complaint "a trial court's discretion to grant a motion to amend should be exercised with caution" (*Bailey v Village of Saranac Lake, Inc.*, 100 AD3d 1089, 1090 [3d Dept 2012]).

In the instant case, while the plaintiff sought to amend her complaint 10 months after filing the note of issue, certifying that all discovery was complete, nine months after the defendant filed the motion for summary judgment and five years after the filing of the original complaint, the respective theories of the two complaints remains the same. The new claims clarify the arguments made in the original complaint and the answers to interrogatories submitted by the plaintiff. The court does however agree with the defendant that it would be prejudiced by the inclusion of a claim for injunctive relief at this late stage (*Tribeca Space Managers, Inc v. V Tribeca Mews*, 2021 WL 6120039 *2 [1 Dept. 2021]; citing *Heller v Louis Provenzano*, 303 AD2d 20, 23 [1 Dept 2003]). Accordingly, the court, in its discretion, will permit the plaintiff leave to amend her complaint, however, disallowing any claim for injunctive relief (*Worthen-Caldwell v Special Touch Home Care*, 78 AD3d 822, 823 [2d Dept. 2010]).

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of

triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment 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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]).

“A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], citing *Scott v Long Island Power Auth.*, 294 AD2d 348 [2d Dept 2002]). In the instant case, there is conflicting expert testimony as to whether the repaving work conducted by the defendant caused damage to the plaintiff’s property and whether there was continuous harm to the plaintiff’s property, creating issues of fact which should be determined by a jury. Applying the continuous wrong doctrine to this action would permit the plaintiff to recover for those damages which accrued within three years from the commencement of the action. (*Capruso v Village of Kings Point*, 23 NY3d 631, 639 [2014]). No recovery is available for any damages that accrued prior to November 23, 2013 (CPLR § 214).

Accordingly, it is

ORDERED, the defendant's motion for summary judgment is granted solely to the extent of dismissing any claims that accrued prior to November 23, 2013, and is otherwise denied; and it is further

ORDERED, that plaintiff's cross motion to amend the complaint is granted, to the extent that it seeks to add causes of action for trespass, nuisance, and property damage, and is otherwise denied; and it is further

ORDERED, that the defendant shall serve an answer to the amended complaint within 30 days of service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

ENTER

J. S. C.

**HON. WAVNY TOUSSAINT
J. S. C.**

**KINGS COUNTY CLERK
RECEIVED
JAN 26 11:10 AM '22
KINGS COUNTY CLERK
FILED
JAN 26 11:10 AM '22**