

176 W. 87th St. Owners Corp. v Guerico

2022 NY Slip Op 31999(U)

June 28, 2022

Supreme Court, New York County

Docket Number: Index No. 151822/2019

Judge: Lori Sattler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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176 WEST 87TH STREET OWNERS CORP.,
Plaintiff,

- v -

MATTHEW GUERICO, DEIRDRE RISI, JOHN FRANCO
CONTRACTORS INC.,S.J. VISION & SON PLUMBING &
HEATING INC.,D & B ENGINEERS AND ARCHITECTS,
P.C.

Defendant.

INDEX NO. 151822/2019

MOTION DATE 03/23/2022,
04/15/2022

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

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HON. LORI SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In Motion Sequence 001 in this action seeking compensation for property damage, defendant D&B Engineers and Architects, P.C. (“D&B”) moves for summary judgment dismissing all claims and crossclaims against it with prejudice pursuant to CPLR 3212. In Motion Sequence 002, Defendant John Franco Contractors Inc. (“Franco”) moves pursuant to CPLR 3025(b) for leave to amend its Answer to insert crossclaims for common law indemnification and contribution against all defendants. These motions are hereby consolidated for joint disposition.

BACKGROUND

This action arises out of an alleged gas leak and damage to the natural gas delivery system at the premises owned by Plaintiff 176 West 87th Street Owners Corp. (“Plaintiff”).

Plaintiff is a cooperative housing corporation that owns the premises at 176 West 87th Street, New York, New York (“The Building”). Shareholders of the Plaintiff, Defendants Matthew Guercio and Deirdre De Risi (collectively “Lessees”), entered into an Alteration Agreement on May 23, 2017 for construction and renovation to be performed at apartments 4A and 5J (“Apartments”) in the Building.

Per the Alteration Agreement between Lessees and Plaintiff, the plan for the construction and renovation work was to combine the Apartments into a duplex (NYSCEF Doc. No. 161, “Alteration Agreement”). The renovation plan involved the construction of a staircase from the Apartment 4A dining room to 5J, switching the location of the stove and sink in Apartment 4A’s kitchen, installing a washer and dryer in the 4A kitchen space, and combining the kitchen in Apartment 5J with the existing bathroom in 5J.

Lessees retained Defendant John Franco Contractors Inc. (“Franco”) to perform the renovation and construction work on the Apartments (NYSCEF Doc. No. 162, “Franco Agreement”). The Franco Agreement summarized the work as “Demo 4A and 5J kitchens, half bath, existing wood flooring, wall as per plan, new stairwell, 1st floor full Bath tile as needed to repair, 2nd floor bath, all demo to complete work as per plans.” Franco specifically indicated that it would provide “[p]lumbing new master bath, kitchen, move gas meter, ½ bath 1st floor full bath fix” as part of the alteration project. Franco subsequently retained defendant S.J. Vision & Son Plumbing & Heating Inc. (“S.J. Vision”) to perform the plumbing work for the Apartments’ renovation (NYSCEF Doc. No. 172, Franco EBT, at 13).

Franco also retained D&B to provide architectural and engineering services for the work on June 27, 2017. The agreement between Franco and D&B indicated that the scope of D&B’s involvement in the project was “Structural Design” work (NYSCEF Doc. No. 163, “D&B

Agreement”). The agreement specified that the structural design work would involve (1) a “[s]ite visit to the apartments to review the existing conditions and determine the structural layout,” (2) communication “with the Property Manager/Architect to answer all comments from June 19, 2017 document,” (3) provision of “structural design and details for new stairway connecting” the apartments, and (4) provision of “inspection during installation of new structural elements” (*id.*). D&B also performed additional work on the Apartments project for Franco that was not specified in their agreement. This additional work included “[s]pecial inspection and construction oversight” and “[p]ermitting documentation and coordination” (NYSCEF Doc. No. 176).

According to Plaintiff, the incident giving rise to this action occurred on or around October 18, 2018 as a result of the renovation work in the Apartments. Plaintiff alleges that, pursuant to the Lessees’ work plans, S.J. Vision caused a gas line and gas meter to be removed from the former kitchen area of Apartment 5J, which resulted in a gas leak (NYSCEF Doc. No. 156, Complaint, at 6). The Complaint alleges that the gas leak occurred in the following manner:

“As part of the Construction, the Lessees constructed a new bathroom, which was located in an area that had previously been a full working kitchen (the “Old Kitchen” [5J kitchen]), including a gas supply system customary for the Building. In constructing such bathroom, Defendants, among other things, removed a wall which supported the gas meter and connective piping to the stove in such Old Kitchen. As a direct result of this new bathroom construction, Defendants improperly removed and disconnected such gas meter and piping as defendants did not intend to utilize the gas supply in the Old Kitchen location.”

(*id.*)

Plaintiff further alleges that S.J. Vision’s removal of the gas line and meter in the Apartments was done at the direction of Franco and with the construction oversight of D&B. As a result of the alleged gas leak resulting from the work, Plaintiff maintains that the gas delivery system for the entire Building was damaged. Plaintiff avers that it is the owner of this natural

gas delivery system, that the rules of the cooperative prohibited the removal of any portion of the delivery system, and that it did not authorize any of the defendants to perform work on the delivery system. As a result of the alleged gas leak, Plaintiff was required to replace the entire gas delivery system for the Building.

Plaintiff subsequently commenced this action against the Lessees, Franco, D&B, and S.J. Vision. Plaintiff's complaint alleges, *inter alia*: negligence by the Lessees; trespass to land and/or private nuisance against Franco and S.J. Vision; vicarious liability of the Lessees for trespass to land and/or private nuisance; negligent construction by Franco and S.J. Vision; property damage by the Lessees, Franco, and S.J. Vision; and negligence and negligent supervision by D&B.

DISCUSSION

D&B's Motion for Summary Judgment (MS 001)

In Motion Sequence 001, D&B moves for summary judgment pursuant to CPLR 3212 dismissing with prejudice all claims and crossclaims against it. The movant 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once the movant makes this prima facie showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact" such that trial of the action is required (*id.*). The facts presented "must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

“[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to meet this burden (*Gilbert Frank Corp. v Federal ins. Co.*, 70 NY 2d 966, 967 [1988] [internal citations and quotation marks omitted]). “[B]ald, conclusory assertions or speculation and [a] shadowy semblance of an issue are insufficient to defeat summary judgment (*Stonehill capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016], quoting *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974] [internal quotation marks omitted]).

Plaintiff’s Claims for Negligence and Negligent Supervision

D&B argues that it is entitled to summary judgment dismissing Plaintiff’s negligence and negligent supervision causes of action against it because there of a lack of dispute of material facts that D&B did not owe a duty to Plaintiff. “In the absence of a duty, as a matter of law, there can be no liability” in negligence (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016] [citing *Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). D&B maintains that it was retained by the Lessees to prepare structural details for the design of the Apartments’ staircase, perform project and special inspections of the staircase, and to provide permitting assistance with respect to structural filings, but that it did not perform any work related to the gas or plumbing systems.

The Court finds that there are material issues of fact with respect to D&B’s role in overseeing the work on the gas system in the Apartments. Although D&B presents facts showing that work on the gas system was outside the scope of its subcontract with Franco, Plaintiff presents evidence showing a material issue of fact as to whether D&B’s additional construction administration and oversight encompassed work on the gas line and meter.

D&B presents an affidavit and testimony from its structural engineer, Chris Desmond (“Desmond”), in support of its position that it did not participate in work on the Apartments’ gas

system. Desmond states in his affidavit that D&B's responsibilities for structural design work involved the preparation of structural design drawings, filing a Technical Report Statement of Responsibility, and inspection work prior to and during construction of the staircase (NYSCEF Doc. No. 154, "Desmond Affidavit" ¶ 4-6). According to Desmond, D&B also provided permitting assistance for structural filings related to the work services not specified in its original agreement with Franco but that these additional services did not involve supervision of the work on the gas system (Desmond Affidavit ¶ 3, 7-11).

In response, Plaintiff argues that D&B performed oversight for the gas system work. In support of its position, Plaintiff submits D&B's monthly statements to Franco from June through December of 2017 and for February 2019. These statements mention "Special inspection and construction oversight (Not part of original scope – requested by Client)" performed by (NYSCEF Doc. No. 176). These statements do not, however specify the scope of D&B's additional inspection and oversight work. Plaintiff further avers that D&B's original agreement with Franco included matters related to work on the Apartments' gas system. Plaintiff's vice president maintains in his affidavit that Franco requested D&B to provide a demolition plan for the Apartment 5J kitchen in response to prior comments furnished by Plaintiff's architect to Franco. (NYSCEF Doc. No. 175, Leichtling Affidavit, ¶ 22, citing D&B Agreement). Plaintiff argues that the area subject to the demolition plan provided by D&B included the gas meter and piping allegedly removed by the defendants that caused the gas leak and subsequent damage to the Building's gas delivery system (*id.*). Read together, these documents show the existence of questions of material fact relating to the scope of D&B's construction oversight and whether its demolition plan addressed work on the gas system in Apartment 5J. D&B's motion for summary

judgment dismissing Plaintiff's claims for negligence and negligent supervision against it is therefore denied.

Lessees' and S.J. Vision's Crossclaims for Contribution and Indemnification

Because there are material issues of fact relating to whether D&B's purported negligence and negligent oversight with respect to work on the Apartments' gas system, the Court denies the branch of its motion for summary judgment dismissing the crossclaims of other defendants as against it.

Franco's Motion to Amend Pleadings (MS 002)

Defendant Franco moves, pursuant to CPLR 3025(b), to amend its Answer to insert crossclaims for common law indemnification and contribution against all defendants. Discretionary leave to amend pleadings under CPLR 3025(b) should be "freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v Booz Allen Hamilton, Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). Leave to amend a pleading "will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law" (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]).

The Court denies Franco's motion to insert crossclaims for common law indemnification into its answer against all other defendants. "Common-law indemnification is predicated on 'vicarious liability without actual fault,' which necessitates that 'a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine'" (*Edge Mgt. consulting, inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006], quoting *Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003]). Here, Plaintiff's Complaint does not state any cause of action for vicarious liability against Franco. Rather, every cause of action stated against Franco is premised on theories of direct liability, namely negligent

construction, property damage, trespass to land, and private nuisance. Franco's proposed crossclaims for common law indemnification against the other defendants are therefore "palpably insufficient or devoid of merit" because it is not being sued under any theory of vicarious liability (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]).

Franco's motion to add crossclaims for contribution against the other defendants is granted. A defendant found jointly liable for an injury may seek contribution against other parties that contributed to or augmented the injury (*see Dole v Dow Chem. Co.*, 30 NY2d 143, 153 [1972] ["Right to apportionment of liability or to full indemnity, then, as among parties involved together in causing damage by negligence, should rest on relative responsibility and to be determined on the facts"]). Here, Plaintiff asserts causes of action in negligence against the defendants in its Complaint for damages to the Building's gas system and other costs associated with their respective acts of negligence. Consequently, the Court cannot say that Franco's crossclaims for contribution would be "palpably insufficient as a matter of law" (*Thompson* at 205).

Accordingly, it is hereby:

ORDERED that the motion for summary judgment (MS 001) of defendant D&B Engineers and Architects, P.C. dismissing all claims and crossclaims against it is denied; and it is further

ORDERED that the branch of defendant John Franco Contractors Inc.'s motion to amend its answer to insert crossclaims for indemnification against all defendants (MS 002) is denied; and it is further

ORDERED that the branch of defendant John Franco Contractors Inc.’s motion to amend its answer to insert crossclaims for contribution against all defendants (MS 002) is granted; and it is further

ORDERED that defendant John Franco Contractors Inc. shall serve its amended answer upon the parties; and it is further

ORDERED that the defendants shall respond to the amended answer within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a status conference via Microsoft Teams, on August 9, 2022 at 12:00 PM.

6/28/2022
DATE


LORI SATTLER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE