

Castlepoint Ins. Co. v Bernardini Bldrs. Enters., Inc.
2022 NY Slip Op 32120(U)
July 6, 2022
Supreme Court, New York County
Docket Number: Index No. 450919/2016
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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CASTLEPOINT INSURANCE COMPANY AS SUBROGEE
OF AREA ID, INC.,

Plaintiff,

- v -

BERNARDINI BUILDERS ENTERPRISES,
INC., ELIZABETH STONE LLC, JOHN DOE,

Defendant.

-----X

BERNARDINI BUILDERS ENTERPRISES, INC.

Plaintiff,

-against-

ELIZABETH STONE LLC, JOHN DOE

Defendant.

-----X

ELIZABETH STONE LLC

Plaintiff,

-against-

BERNARDINI BUILDERS ENTERPRISES, INC., ALBA
CARTING & DEMOLITION, INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 135, 153, 163, 165, 171, 172, 173, 174

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 154, 155, 156, 157, 158, 159, 160, 161, 162, 164, 166, 167, 168

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

BACKGROUND

The above-entitled action was commenced by plaintiff Castlepoint Insurance Company (Castlepoint) against Elizabeth Stone LLC (Elizabeth) and Bernardini Builders Enterprises, Inc. (Bernardini) seeking reimbursement of a loss payment that Castlepoint paid to its insured, Area ID, Inc. (Area) in the sum of \$127,920.86 for property damages. Area allegedly sustained the damages when a radiator in an apartment that was being renovated by Bernardini and Alba Carting & Demolition, Inc. (Alba), its demolition subcontractor, was left suspended over a subfloor tilted over onto the subfloor causing the hot water pipes that were connected to the radiator to break off and dislodge. This caused water to flow out of the pipes and down into the Area store and cause property damage. Castlepoint, as Area's insurer, subsequently paid Area for its property damage and is now seeking from the defendants' reimbursement of that loss payment.

PENDING MOTIONS

On March 22, 2022, Bernardini moved for an order, pursuant to CPLR §3212(b), for partial summary judgment dismissing those sections of the complaint and cross-claims alleging negligence associated with water damage on January 26, 2013.

On May 5th, 2022, Alba moved for an order pursuant to CPLR §3212 granting summary judgment and dismissal of all claims and cross claims against it.

On June 21, 2022 the motions were fully briefed, marked submitted and the court reserved decision. The motions are consolidated herein for disposition. For the reasons stated below, the motions are denied.

ALLEGED FACTS

Castlepoint's insured, Area, leased a store (Area Store) on the ground floor of the building located at 262 Elizabeth Street, New York, New York (262 Building). Area sells Mid Century furniture and art. The 262 Building has four floors and a basement; there are residential apartments located above the Area Store on floors two through four.

Area first leased the Area Store in 1998 from the former owner RAJ Elizabeth St, LLC a/k/a Marolda Property. The lease term was for ten years.

In 2005, Inga Davidson bought the Area Store. In 2007, the lease was amended and the term of the lease was extended to November 2018. Area maintained first party property insurance with plaintiff Castlepoint. On November 20, 2012, Elizabeth Stone purchased the five contiguous buildings (ES Buildings) known as 260-268 Elizabeth Street, which included the 262 Building.

Elizabeth was a single purpose entity created to purchase the ES Buildings with the purpose of renovating the ES Buildings in order to eventually sell them. Jeffrey Kay and Robert Morgenstern were both members of Elizabeth. Elizabeth was going to perform gut renovations to the unoccupied residential apartments in the ES Buildings. At the end of 2012, Elizabeth hired Bernardini as general contractor to perform the gut renovation work to the empty apartments within the ES Buildings.

David Bernardini is the owner of Bernardini. Bernardini, in turn was responsible for hiring any subcontractors it needed for the Renovation Work. Further, Jeffrey Kay and Robert Morgenstern both testified at their depositions that no one from Elizabeth directed Bernardini or any of its subcontractors how to perform the Renovation Work. There was no formal written contract between Elizabeth and Bernardini.

Upon being hired by Elizabeth, Bernardini assigned and paid one of its own employees, Danny Penna (Penna) to act as head superintendent for all of the ES Buildings during the period that the renovation work was being performed. Penna was supervised by David Bernardini. Penna replaced the prior superintendent, Jose Perez (Perez), who lived in an apartment across from the basement on the floor below the Area Store in the 262 Building.

Penna testified that upon Penna being assigned as head superintendent, Perez took him around the 262 Building and he thought that Perez had returned to him all of the keys that he had for the 262 Building. The basement door was located across from Perez' apartment. Upon entering the basement through the basement door, to the left was an open basement area and to the right was a door leading to the mechanical/boiler room. The boiler for the 262 Building was located in the boiler/mechanical room and the main water shut off valve for the HVAC system was located in the open basement area.

The Basement Door had a lock on it which required a key to open it. Upon taking over for Perez, Penna never changed the lock to the Basement Door. Penna did not live at the ES Buildings and was paid by Bernardini. Perez was allowed to continue living in his apartment until his kids finished with school for the 2013 year. Penna testified at his deposition that he thought that he and Inga Davidson had the only keys for the Basement Door.

Bernardini hired subcontractor Alba to perform the demolition work in each of the unoccupied apartments that were going to be renovated in the ES Buildings, including the 262 Building. Andrew Horan (Horan) is the owner of Alba. There was no written contract between Bernardini and Alba. Alba just billed Bernardini for its work.

The demolition work consisted of removing doors, walls, floors, ceilings kitchens and bathrooms down to the studs. David Bernardini testified that himself, Nick Gentile and John

Bernardini were assigned to supervise the demolition work performed by Alba. According to David Bernardini, the 262 Building contained a water based heating system in which the boiler would send hot water up through a riser pipe to the radiators in each apartment.

Horan testified at his deposition that the radiators were too heavy to be disconnected from the pipes and that it was Bernardini's responsibility to make sure that the riser pipe was either capped or that water to the radiator where demolition work was being performed was shut off. Horan testified that Bernardini was supposed to hire a plumber who was to come into the apartment before Alba and make sure the water to the radiator was turned off or that the pipe was capped. Horan stated that Alba would only perform its demolition work after the pipes were capped or when the water was shut off and that he assumed that if Bernardini asked Alba to perform any such demolition work in an apartment said plumbing work was already completed by Bernardini.

As for the demolition work at the radiator, David Bernardini testified that it was Alba's practice to cut out the floor underneath the radiators which caused the radiator to hang above the subfloor and that the radiator would be held in place only by the two pipes which were connected to riser pipe(s) to the boiler. Horan, on the other hand, contradicted David Bernardini's deposition testimony and stated that Alba did not move any of the radiators or cut out any flooring underneath the radiators and instead only cut out the floor around the radiators.

On January 26, 2013, at about 2:00 am, Penna received a telephone call from a tenant living in an apartment on the second floor of the 262 Building who told him that water was coming into her apartment through the ceiling. Penna went to the 262 Building and arrived at about 2:30 am and upon arriving, he went to the tenant's second floor apartment and observed water dripping down into the apartment from the ceiling. Penna then went to the third floor

apartment where Alba had just completed its demolition work that day and in that apartment he observed a puddle of water near the radiator; he also observed that the front end of the radiator was leaning/tilted over onto the subfloor. Penna did not observe the piping for that radiator at that time.

Penna then went down into the basement and shut off the main water for the radiator system and then went into the mechanical room and shut off and drained the boiler. Penna testified that the basement door may have already been open when he first arrived at the 262 Building. Penna exited the basement door--he thinks he shut it and locked it when he left--and went up to the second and third floor apartments and asserts that he saw that the leaking had stopped.

Penna left the 262 Building at about 4:30 am to go home. Penna called his boss, David Bernardini, to let him know about the leak. Penna did not notify Perez or any of the other tenants in the 262 Building that the water and heat had been turned off. Penna returned to the 262 Building that same morning at about 7:00 am with a plumber and when he arrived, he observed that there was water all over the first floor and inside the Area Store. Penna went back into the basement and mechanical room and saw that the main water valve and the boiler had both been turned back on. Penna turned the water and boiler off again.

Penna alleges that he subsequently saw a surveillance video of the basement area which showed that before he returned to the 262 Building that morning, Perez had opened up the basement door and presumably turned the water and boiler back on. There is no video inside the Basement Door so Penna cannot be sure what Perez did in there. Penna also never spoke to Perez to ask him if he turned the water and boiler back on. The alleged Video Footage was not preserved.

After the loss occurred, David Bernardini came to the 262 Building the next day and went into the third floor apartment where the subject radiator was located and upon looking at the radiator and the apartment he was able to confirm that Alba had in fact performed demolition work in that apartment the day before. It was also his opinion that the loss occurred because Alba removed the floor underneath the radiator and left the radiator suspended in air over the subfloor with no blocks of wood underneath to hold it in place. Mr. Bernadini stated that this caused pressure on the pipes which were connected to the radiator, which he said were the only things holding up the radiator and said that the pressure caused the radiator to eventually tip over and as a result caused the pipes to snap which caused the water to flow out and enter down into the Area Store.

DISCUSSION

Summary judgment is a drastic remedy which should only be granted when there is no doubt as to the absence of a triable issue of fact. *Andre v. Pomeroy* 35 N.Y.2d 361 (1974); *Lebedev v. Blavatnik* 193 A.D.3d 175 (1st Dept. 2021). When deciding summary judgment, the evidence must be construed in the light most favorable to the non-moving party and if there are genuine issues of material fact the motion must be denied. *Genesis Merchant Partners, L.P v. Gilbride Tusa, Last & Spellane, LLC*, 157 A.D.3d 479 (1st Dept. 2018).

There Are Numerous Issues of Material Fact as to Whether Bernardini was Negligent In Causing the Loss to The Area Store thus the Motion For Summary Judgment Must be Denied

There is an issue of fact of whether Bernadini was negligent in directing and/or allowing Alba to cut the flooring underneath the radiator so that the radiator would be suspended in air over the subfloor which caused the radiator to tip over which in turn caused the hot water pipe to snap and dislodge. Bernadini testified that Alba cut the flooring underneath the radiator while Alba claims it only cut around the radiator. This conflicting deposition testimony between

Bernardini and Alba presents an issue of credibility as to both witnesses that only a jury should decide.

Similarly, there is an issue of fact as to whether Bernadini was negligent in failing to properly supervise Alba's demolition work. Bernadini assigned three of its own people to supervise Alba's demolition work--David Bernardini, Nick Gentile and John Bernardini- - and yet all of those individuals somehow allowed Alba to cut the flooring underneath the radiator which resulted in the radiator being suspended merely by the supply and return lines in air over the subfloor. There is an issue of fact as to whether Bernadini, in its capacity as a general contractor or other supervisory capacity, should have inspected each apartment that was being demolished by Alba to make sure that Alba's work was done properly and safely.

There is also an issue of fact as to whether Bernadini was negligent in failing to cap the riser pipe from the boiler to the radiator and/or was negligent in failing to turn the water off to the subject third floor apartment which was being demolished. Alba testified that it would not have performed any demolition work in that apartment had it known that water from the boiler was still being sent to the radiator and that it expected Bernadini to make sure that the water had been capped or cut off. There is an issue of fact as to whether Bernadini's failure to cap the supply line to the radiators in the subject apartment was a negligent omission; had Bernadini capped the pipe and/or turned the water off, the loss would not have occurred.

There is also an issue of fact as to whether Penna, who was employed by Bernadini, was negligent in failing to notify the building tenants that the water and boiler had been turned off and that they should not attempt to turn it back on. Penna could have emailed everyone in the 262 Building, put up a sign on the basement door or tag the pipe notifying everyone not to turn

the water and boiler back on. However, Penna failed to do so, thus there is an issue of his negligence that must be decided by a jury.

Additionally, Penna stated that Perez was on video leaving his apartment and entering the boiler room around the time the second water leak began during the morning hours. However, there is no evidence establishing when the second water leak started. Additionally, Penna made conflicting statements as to what time he alleges Perez entered the boiler room. Stating at various points it was around seven, or he did not recall, or just sometime between when he left and when he returned. There is no explanation as to why the video footage was not preserved and no one ever asked Perez whether he turned on the water.

For all of the foregoing reasons the court finds there are questions of fact and Bernadini's motion for partial summary judgment is denied.

Alba's Motion for Summary Judgment is Denied as Untimely

CPLR §3212(a) provides that the Court may set down a date after which no dispositive motion can be made. *See* CPLR §3212(a); *Fofana v. 41 West 34th Street, LLC*, 71 A.D.3d 445 (1st Dept. 2010). The Courts have considerable discretion to fix a deadline for the filing of summary judgment motions as long as the deadline is not earlier than 30 days after the filing of the Note of Issue and no later than 120 days after the filing of the Note of Issue and no dispositive motion will be considered if it is filed after the deadline set down by the Court, except with leave of court on good cause shown. *Brill v. City of New York*, 2 N.Y.3d 648 (2004); *Dojce v. 1302 Realty Co, LLC*, 199 A.D.3d 647 (2nd Dept. 2021).

“Good cause” requires a showing of good cause for the delay in making the motion. *Bennett v. State Farm and Casualty Co.*, 198 A.D.3d 861 (2nd Dept. 2021). If a motion for summary judgment is filed after the deadline set down by the Court and good cause is not shown

for the delay, the motion is properly denied. *Id.*, *Appleyard v. G. Tigges*, 171 A.D.3d 534 (1st Dept. 2019); *See also, Miceli v. State Farm Mutual Automobile Ins. Co.*, 3 N.Y.3d 725 (2004); *Valiotis v. Bekas*, 191 A.D.3d 1037,(2nd Dept. 2021).

Here, the Court issued numerous orders, all of which directed that all dispositive motions be made within 60 days of the filing of the Note of Issue. Alba, however, did not file the instant motion for summary judgment until April 5, 2022, which is 66 days passed the deadline in the Area Action and 59 days passed the deadline in the Castlepoint Action. Further no “good cause” was shown by Alba for the late filing of the motion. Nor did Alba even request the Court to extend the deadline to file the motion. As such, the motion is denied.

CONCLUSION

WHEREFORE it is hereby:


ORDERED that the motions for summary judgment are denied; and it is further

ORDERED that, within 20 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.


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7/6/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE