

Shimunov v Ashirov
2022 NY Slip Op 35129(U)
August 12, 2022
Supreme Court, Queens County
Docket Number: Index No. 717745/2017
Judge: Ulysses B. Leverett
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

NISON SHIMUNOV and SVETLANA SHIMUNOV,
as Trustees under the SHIMUNOV FAMILY TRUST,

Plaintiff,

-against-

ARTEM ASHIROV and ANGELA BORUKHOVA,

Defendants.

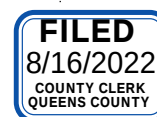
ARTEM ASHIROV and ANGELA BORUKHOVA,

Third-Party Plaintiffs,

-against-

VICTORY CONSTRUCTION OF NY CORP.,
MISHAEL SADYKOV, MAMAT CONSTRUCTION
a/k/a MAMAD CONSTRUCTION, MIRMAKHMAD
and LOJA CONSTRUCTION CORP.,

Third-Party Defendants



MOTION SEQUENCE 11

Index No. 717745/2017

ORDER

PRESENT: HON. ULYSSES B. LEVERETT, J.S.C.

The following electronically filed (EF) papers read on this motion for summary judgment
by defendants Artem Ashirov and Angela Boukhova by for an Order dismissing the complaint as
against them:

	Document Numbered
Notice of Motion-	Doc. 324
Defendants' Statement of Facts.....	Doc. 325
Defendants' Affirmation in support of motion.....	Doc. 326
Defendants' Exhibits A-Q.....	Docs. 327-343
Plaintiffs' Affirmation in opposition.....	Doc. 361
Plaintiffs' Exhibits A-B.....	Docs. 362-363
Affidavit of Mani Shimunov in opposition.....	Doc. 364
Plaintiffs' Response to Defendants' Statement of Facts.....	Doc. 365
Plaintiffs' Memorandum of Law in opposition.....	Doc. 366

Defendants' Reply Affirmation.....Doc. 367

Upon the foregoing papers it is Ordered that Defendants' motion is determined as follows:

Plaintiffs filed the complaint in this action alleging that various construction activities by Defendants caused damage to Plaintiffs' property by, among other things, directing water onto Plaintiffs' property, directing construction debris onto Plaintiffs' causing drainage pipes to clog and causing severe flooding to Plaintiffs' home. Plaintiffs also allege that Defendants removed Plaintiffs' fence that was between the properties, and replaced it with a wall which encroaches on Plaintiffs' property.

Following the close of discovery, Defendants' move for summary judgment dismissing the complaint against them. Defendants argue that even if Plaintiffs were damaged due to Defendants' construction, Defendants are not liable because the construction work was not done by them but rather by their independent contractors. In support of their motion Defendants cite the general rule that a party who hires an independent contractor is not liable for the independent contractor's negligent acts since the party has no right to control the manner in which the work is done. See e.g. *Weinfeld v HR Photography, Inc.*, 149 A.D.3d 1014, 52 N.Y.S.3d 458 (2d Dept 2017).

In opposition, Defendants note that there are many exceptions to this general rule, including when a party was notified of the negligent act and failed to remedy. See e.g. *Gerinshteyn v Lower Manhattan Dev. Corp.*, 19 Misc 3d 1109(A) (Civ. Ct. 2008) ("For instance, [the exception relieving a property owner for work done by an independent contractor] does not apply in cases where the owner knows of a dangerous condition created by the independent contractor and fails to correct it"; *Blanche, Verte & Blanche, Ltd. v. Joseph Mauro & Son, Inc.*,

2010 NY Slip Op 30145. Plaintiffs note that in this case they allege that the injury was continuing. Plaintiffs also argue that there is a disputed issue of fact of the degree of control and supervision that Defendants exercised over their contractors.

In this case, the record shows that there is at least a disputed issue of fact as to whether the moving Defendants had actual or constructive notice of the conditions and failed to correct them. Plaintiffs' son, Mani Shimunov, who was and is currently living at the premises, testified at his deposition that first flooding occurred in February 2015 (Plaintiffs' Exhibit "P", p. 34) and there were numerous floods thereafter, including in September and January 2020 (Exhibit "P", pp.58, 77). Shimunov testified that he informed Defendant Ashirov of the flooding in February 2015 and again in May 2017. (Exhibit "P", p.104). Shimunov also testified that his mother called 311 to complain about the flooding in 2016 and that he and other family member called 311 a total of 14 times. (Exhibit "P", p.151). Shimunov testified that in response to those calls, Defendant Ashirov sometimes received violations and fines. (Exhibit "P", p.151) Shimunov also testified that after the initial flooding he told Ashirov to "stop sending the water" onto the property (Exhibit "P", p.153). Finally, Shimunov testified that after there was some flooding on the Plaintiff's property that included sand and mortar from Defendants' construction, he brought Ashirov onto the property and asked him to stop it (Exhibit "P", pp.156-157).

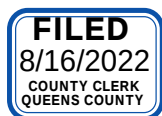
With respect to the wall allegedly encroaching on Plaintiffs' property, Plaintiffs submit a survey allegedly showing such encroachment. (Plaintiffs' Exhibit "B" to Affirmation in Opposition). In Reply, Defendants submit their own survey. (Defendants' Exhibit "Q").

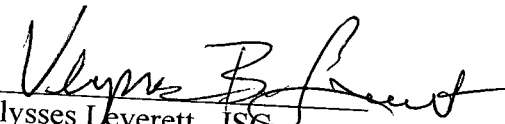
Accordingly, there are disputed issues of fact as to whether Defendants had actual or constructive notice of conditions and failed to correct them. There is also a disputed issue of fact

as to whether Defendants' wall encroaches on Plaintiffs' property. Accordingly, Defendants' motion for summary judgment must be denied.

This shall constitute the Decision and Order of the Court.

Dated: August 12, 2022




Ulysses Leverett, JSC

Hon. Ulysses B. Leverett