

DSSR Realty Corp. v President Sai II, LLC

2023 NY Slip Op 31912(U)

June 1, 2023

Supreme Court, Kings County

Docket Number: Index No. 508479/2020

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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 DSSR REALTY CORP. AND ORTOV LIGHTING, INC.,
 Plaintiffs,

Decision and order
 Index No. 508479/2020

- against -

PRESIDENT SAI II, LLC, TRIBOROUGH CONSTRUCTION
 SERVICES, INC., AND JUSL DEVELOPMENT, INC.,
 Defendants,

June 1, 2023

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 PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #6

The plaintiff has moved pursuant to CPLR §2221 seeking to reargue a decision and order dated January 17, 2023 which denied plaintiff's request for partial summary judgement. The defendants President Sai II and Triborough Construction Services oppose the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in the prior order, in 2015 the defendant President Sai II hired defendant Triborough Construction Services as the general contractor of a construction project located at 561 President Street in Kings County. During August 2016 the construction at the site caused damage to the neighboring property owned by the plaintiff DSSR Realty Corp. located at 608 Union Street. Specifically, the excavation work at the site caused damage to defendant's walls, floor and roof. The plaintiff instituted this lawsuit seeking recovery of the damage caused. The court denied the plaintiff's motion that sought

summary judgement and held there were questions of fact whether the defendant's excavation work damaged the plaintiff's property. The plaintiff has moved seeking to reargue that determination arguing the court has overlooked certain findings of fact and conclusions of law which compel summary judgement in plaintiff's favor.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

Preliminarily, the plaintiff asserts the court erred in failing to dismiss the defendant's answer on the grounds it failed to adequately engage in discovery.

It is well settled that the trial court maintains broad discretion concerning the discovery process and any sanction for any violation (Bouri v. Jackson, 177 AD3d 947, 113 NYS3d 232 [2d Dept., 2019]). The severe sanction of striking a pleading is appropriate where it can be demonstrated that the failure to comply with discovery was the result of wilful and contumacious conduct (Rosenblatt v. Franklin Hospital Medical Center, 165 AD3d 862, 85 NYS3d 488 [2d Dept., 2018]). Such conduct may be

inferred from a party's actions, specifically a long period of time passing without complying with the discovery coupled with the absence of any reasonable excuse to explain such failure to comply (Morson v. 5899 Realty LLC, 171 AD3d 916, 98 NYS3d 127 [2d Dept., 2019]). Generally, the failure of either party to provide sought after discovery and to follow the express order of the court demonstrates a pattern of wilful default and neglect concerning the outstanding discovery (Espinal v. New York City Health and Hospitals Corp., 115 AD3d 641, 981 NYS2d 569 [2d Dept., 2014]).

On March 10, 2022 the court granted the plaintiff's request to compel the deposition of John Hsu prior to April 8, 2022 (NYSCEF Doc. No. 42). The day before the deposition was scheduled to take place the defendant informed the plaintiff they were "unable to produce" Mr. Hsu (see, Email dated April 7, 2022 [NYSCEF Doc. No. 68]). On August 30, 2022 Paul Martin a branch manager and independent adjuster at Frontier Adjusters tasked with trying to locate Mr. Hsu submitted an affidavit wherein he stated that Mr. Hsu could not be located (see, Affidavit of Paul Martin [NYSCEF Doc. No. 85]). The plaintiff does not dispute the conclusions reached that Hsu could not be located, rather, they argue the delay in informing the plaintiff of that fact constituted "dilatory and obstructive conduct that no court should tolerate" (see, Memorandum in Reply, ¶20 [NYSCEF Doc. No.

166]). However, a careful examination of the discovery sought demonstrates the defendant did not engage in any dilatory tactics at all and surely not to the extent to warrant any sanction. The day before the deposition was scheduled to take place the plaintiff was informed Mr. Hsu could not be produced. While no explanation was offered at the time and perhaps the inability to locate the witness should have been divulged to the plaintiff, the tardiness in doing so cannot constitute any discovery violation since in fact no specific order was ever violated. Therefore, the failure to notify the plaintiff that Hsu could not be located did not warrant any sanction at all and that portion of the motion to reargue is denied.

Substantively, the plaintiff argues the court failed to consider the plaintiff's arguments that they are entitled to summary judgment.

First, the court held there were questions of fact whether any discrete acts were done more than three years before the filing of the summons and complaint which would then bar the action based upon the statute of limitations. Upon reargument the plaintiff insists they sufficiently demonstrated they suffered excavation damage that was proximately caused by the defendant. They further argue that any pre-existing conditions cannot raise any questions of fact since "preexisting conditions have no bearing upon liability in a strict liability excavation

case" (Memorandum of Law in Support, ¶26 [NYSCEF Doc. No. 125]). It is true that strict liability applies whenever excavation work is done that proximately causes damage to the adjacent building (Lam v. 993 60th Street Realty Inc., 69 Misc3d 1202(A), 130 NYS3d 926 [Supreme Court Kings County 2020]). Further, if proximate cause is established then any pre-existing conditions do not raise any questions of fact concerning such liability (Yenem Corp., v. 281 Broadway Holdings LLC, 18 NY3d 481, 941 NYS2d 20 [2012]). Of course, these principles do not in any way conflict with the rules enunciated in the prior decision that the statute of limitations begins when a discrete act is performed and that such date is not extended by any consequential damages that accrue thereafter.

In this case the plaintiff's expert Thomas Ingram stated that the plaintiff's representative David Kabasso informed him that "in August 2016 the southwest wall of his building (the wall adjacent to 561 President Street) 'collapsed' and that he heard a loud noise and felt shaking in that portion of his building. Exhibit 2, pp. 32-33. Based upon our inspections of the building, that wall did not collapse and it is still there. However, assuming that testimony from his oral deposition is accurate, it is my opinion, within a reasonable degree of engineering certainty, that the loud noise and shaking described by Mr. Kabasso would be consistent with the beginning of damage to the

foundation under the wall" (see, Affidavit of Thomas Ingram, ¶6 [NYSCEF Doc. No. 54]). Mr. Ingram further explained that as the construction progressed "the stress on, and damage to, the foundation at 608 Union Street progressed. This, in turn, caused additional damage to the walls, floors, and roof at 608 Union Street over the subsequent years" (*id.*, at ¶7). Mr. Ingram concluded that "any suggestion by the defendants that the damage to the plaintiffs' premises was caused by a single incident in August 2016, is incorrect and physically impossible. The damage began in August 2016, but there was additional damage to the building as described above and in our attached report, all through the construction at 561 President Street (which was not completed until October 2021)" (*id.*, at ¶7).

However, the defendant's expert Robert Fuchs directly challenged those conclusions noting that pursuant to an examination conducted by LMW Engineering, the company hired to conduct pre-construction surveys, the building had been stable since 2017 (see, Engineering Report of Robert Fuchs, ¶6 [NYSCEF Doc. No. 75]). Further, Mr. Fuchs independently disputed the conclusions of Mr. Ingram and noted that "my inspections found no evidence that any settlement-related movement allegedly caused by the adjoining construction project has compromised the stability or structural integrity of the building in any whatsoever" and that "there is no objective evidence whatsoever that indicates

the building experienced movement after April 2017. (see, id at ¶7(a)(b)).

Thus, there are clearly questions of fact whether any damage occurred within three years of filing the lawsuit and whether the defendants activities even proximately caused the damage. Thus, notwithstanding the fact any pre-existing conditions do not raise questions of fact, the existence of contradictory expert reports concerning proximate cause and the continuing damage alleged necessitate a denial of the summary judgement motion.

The plaintiff argues that "conflicting expert reports are not sufficient to defeat a motion for partial summary judgment on liability, as they would, for example, in a medical malpractice action. Rather, in an excavation/construction case, such as this one, defendants will be strictly liable for any damage arising from their excavation and/or construction work which proximately caused damage to plaintiffs' building...Plaintiffs, through the engineering expert affidavit of Mr. Ingram, have demonstrated that defendants' caused excavation and/or construction work to be done, pursuant to a license under § 3309.4, and that such work proximately caused the damage to plaintiffs' premises" (see, Memorandum in Support, ¶25 [NYSCEF Doc. No. 125]).

Section 28-3309.4 of the Administrative Code of the City of New York imposes strict liability for excavation work that damages an adjoining property. Thus, to succeed upon a motion

for summary judgement the plaintiff must demonstrate the excavation work proximately caused damage to the plaintiff's adjacent property (see, Dfaweast LLC v. Friedland Properties Inc., 211 AD3d 462, 181 NYS3d 11 [1st Dept., 2022]). Thus, strict liability causes of action also require proof of causation. Indeed, in strict liability cases culpable conduct is not an issue and really the only relevant issue is one of causation. Therefore, without evidence connecting the acts to the damage sustained no award of summary judgement is possible (New Jersey Turnpike Authority v. PPG Industries, Inc., 16 F.Supp2d 460 [DNJ 1998]).

In this case, as noted, an expert has opined the defendant's actions damaged the plaintiff's property. Another expert has disputed those opinions. Therefore, there are surely questions of fact concerning causation and that cannot be summarily decided. To be sure, expert opinions may create questions of fact in cases pursuant to this statute as well as any issue requiring expert testimony. The only difference distinguishing the experts in this case between experts in a medical malpractice case, as argued by the plaintiff, is the nature of the expert testimony. In medical malpractice cases experts usually opine whether the medical professional did or did not commit malpractice. In this case the experts present evidence whether the conduct of the plaintiff, which carries strict liability,

proximately caused the damages suffered within the three year statutory time period.

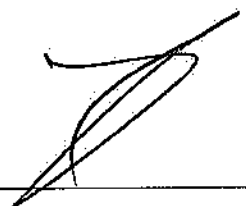
The plaintiff further insists that there are no questions of fact the defendants were still working at the site in 2021. While that may be true that has no bearing on whether any damage was done to the plaintiff's property at any time after 2016.

Therefore, there are questions of fact which cannot be summarily determined. Thus, the motion seeking reargument is denied.

So ordered.

ENTER:

DATED: June 1, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC