East 66th St. Assoc. #1 LLC v New York Heating Corp.
2023 NY Slip Op 33755(U)
October 5, 2023
Supreme Court, New York County
Docket Number: Index No. 655437/2020
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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EAST 66TH STREET ASSOCIATES #1 LLC,
Plaintiff,

- v -

NEW YORK HEATING CORP., A.B.C. TANK REPAIR & LINING INC., ROCKWAY FUEL OIL CORPORATION, 333 EAST 66TH STREET CORPORATION, and MARIN MANAGEMENT CORPORATION,
Defendants.

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INDEX NO. 655437/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86 were read on this motion to/for **PARTIAL SUMMARY JUDGMENT**.

The facts of this case, as alleged in the complaint, are as follows: On or about August 8, 2019, plaintiff, the owner of the property located at 321 East 66th Street, New York, NY 10065 ("building"), acting by and through its managing agent, defendant Marin Management Corp. ("Marin"), retained defendant New York Heating Corp. ("NY Heating") to convert the building's heating and hot water system from #4 heating oil to a combination system of natural gas and #2 heating oil. Pursuant to the contract executed between the parties, NY Heating agreed to (i) "pump out and remove existing #4 heating oil from [the] storage tank"; (ii) "fully squeegee clean oil tank walls to prepare for delivery of fresh #2 oil"; and (iii) "to perform a tank tightness test on oil tank after it had been pumped and cleaned of all #4 oil." Defendant A.B.C. Tank Repair & Lining Inc. ("ABC") was hired by NY Heating to perform the pumping out and cleaning of the storage tank.

In October 2019, NY Heating disconnected the existing boiler and, prior to ABC pumping out and cleaning the storage tank, performed a tank-tightness test of the storage tank. NY heating advised Marin that the storage tank passed the pre-cleanout tank-tightness test and that it was not leaking oil. NY Heating represented to Marin that the storage tank passed a second tank-tightness test after the storage tank was cleaned by ABC and that it was ready to be filled with #2 heating oil.

Plaintiff alleges that, in reliance on NY heating's representation that the storage tank had passed the tank-tightness test, it ordered 2,589 gallons of #2 heating oil from defendant Rockway Fuel Oil Corporation ("Rockway"). The new boiler began operating on October 7, 2019, with the #2 heating oil that was delivered to the storage tank. Between October 8, 2019, and October 21, 2019, the tenant of the apartment directly above the tank room complained of an oil odor in her apartment. Upon inspection of the tank room by both the building's superintendent and NY Heating, no oil was observed in the tank room.

On or about October 21, 2019, the building's superintendent noticed that the petrometer/gauge for the storage tank showed that, of the 2,589 gallons of #2 heating oil delivered, only 500 gallons of heating oil remained in the storage tank, which NY Heating confirmed during its visit to the tank room on October 22, 2019. However, NY Heating represented to Marin that the storage tank was not leaking oil but, rather, that the amount of oil in the storage tank was due to the operation of the new heating system and that the petrometer/gauge needed to be replaced. NY Heating furnished a proposal to Marin for the replacement of the petrometer/gauge. On October 23, 2019, Marin ordered 1,500 more gallons of #2 heating oil from Rockway.

On October 23, 2019, the superintendent of a neighboring building, owned by defendant 333 East 66th Street[1] ("333 East" or "neighboring building"), complained about an oil odor in the pool and fitness area in the basement and reported oil in the neighboring building's sump pit. Thereafter, Marin and NY Heating confirmed the existence of the spill and reported same to the New York State Department of Environmental Conservation ("NYSDEC"), which assigned spill number 19-07459 to the spill.

Plaintiff alleges that the spill was caused by NY Heating's, ABC's, and/or Rockway's failure to detect one or more corrosion holes located at the bottom of the Storage Tank that were exposed when the #4 heating oil and sludge was removed from the bottom of the Storage Tank and/or after the amount of #2 heating oil in the Storage Tank dropped precipitously over a period of approximately two (2) weeks. It asserts claims based on Navigation Law § 181, breach of contract, negligence, negligent misrepresentation, public nuisance, private nuisance, and common law/statutory indemnification/contribution. (NYSCEF Doc. No. 1, *summons and complaint*).

As relevant to this motion, 333 East asserts a counterclaim and cross-claim against plaintiff, Marin and NY Heating Corp., alleging that said parties are strictly, jointly, and severally liable to it under Navigation Law Article 12. It further asserts that they are liable for negligence, trespass and nuisance. 33 East seeks to recover direct and indirect damages resulting from the spill, including "response costs, removal costs, property damages, loss of income, attorneys' fees and costs, and such monetary and equitable relief as may be available at law and in equity to stem the flow of oil onto 333 Corp.'s property and into its building, and mitigate the impacts thereof." (NYSCEF Doc. No. 10, *333 East's answer*).

333 East now moves the court, pursuant to CPLR 3212(e), seeking partial summary judgment on the issue of liability against plaintiff and Marin. It also seeks, pursuant to CPLR 3212(g) and Navigation Law § 181(2), an order determining that 333 East is entitled to seek the following categories of damages: (i) costs 333 East has or will incur in the future to investigate the spill and to cleanup and remove the fuel oil released onto its property; (ii) costs 333 Corp. has or will incur in the future to restore, repair, or replace its personal property damaged by the fuel oil released onto its property, including any related lost income; (iii) other costs 333 East has or will incur in the future as a result of the spill, including attorneys' fees and costs.

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[1] Plaintiff alleges that 333 East 66th Street Corporation ("333 East") is a necessary party in this action based on claims it has asserted against plaintiff arising from the alleged spill. (NYSCEF Doc. No. 1 ¶ 9, *summons and complaint*).

333 East argues that it is entitled to summary judgment against plaintiff and Marin on its first cause of action under Navigation Law Article 12 ("New York Oil Spill Law"), which imposes strict liability on those who, knowing that fuel oil is stored on their property, have the ability to control activities on their property where the oil spill occurred. Specifically, they argue that both plaintiff and Marin knew that fuel oil was stored in its tank, and they had control over the activities on the property, including, specifically, the conversion of the storage tank that led to the spill. Thus, plaintiff and Marin are strictly liable for the impacts of the oil spill on its immediate neighbor's property, and they are responsible for all cleanup and removal costs, and direct and indirect damages (NYSCEF Doc No. 53, *memorandum of law in support*).

In support of its application, 333 East submits the affidavit of its superintendent Guy Rogers, who affirms that in October 2019, the basement of 333 East developed an odor of fuel oil. After visiting plaintiff's building located at 321 East 66th Street, a building known as "The Berk," he observed that a large basement fuel oil tank was leaking oil to the ground surface. Rogers describes that the buildings are on an incline and that the Berk is on the uphill side of the 333 Building. Rogers averred that, for more than nineteen (19) months, fuel oil released from the former fuel tank in the basement of plaintiff's property has migrated to, and entered, the neighboring property (NYSCEF Doc. No. 50, *Rogers affidavit*).

333 East also proffers the affidavit of its president, Dr. Ellyn Berk, who affirms, among other things, that a spill notification was filed by or on behalf of plaintiff and its managing agent with NYSDEC. Dr. Berk proffers a February 23, 2020, environmental report filed with NYSDEC, wherein Marin and plaintiff acknowledge the oil release at the Berk, as well as the migration of the fuel oil to the basement of the 333 Building. (NYSCEF Doc. Nos. 48-49, *Berk affidavit and Report filed with NYSDEC*).

Plaintiff and Marin oppose the motion. In opposition, Marin submits the affidavit of Evan Hollander, its vice president, and Noel Devine, its property manager, who set forth the timeline of events giving rise to this litigation. They affirm that plaintiff and Marin could not, did not, and were not able to supervise NY Heating's work, or exercise any control over the means and methods used by NY Heating to perform the work, insofar as the work was highly technical and specialized. They also maintain that NY Heating had represented to plaintiff and Marin that the oil tank had been successfully installed. Following reports of oil odor in the basement and oil in 333 East's sump pit, NY Heating confirmed the oil leak and the same was reported to NYSDEC. Annexed to Hollander's affidavit are the signed agreements with NY Heating, as well as, proof of the two deliveries of #2 fuel oil to The Berk's oil tank (NYSCEF Doc. Nos. 65-70, *Hollander affidavit and exhibits*; 71, *Devine affidavit*). Marco Mendez, the building superintendent for plaintiff, asserts same.

William Schlageter, vice president and senior hydrogeologist of Preferred Environmental Services ("Preferred"), a full-service environmental consulting firm, affirms that on or about October 30, 2019, Preferred was retained by Marin, to provide environmental consulting services in response to the spill. He opines that the corrosion holes at the bottom of the tank had been clogged with #4 heating oil sludge prior to the clean-out of the tank by ABC. The cleanout of the sludge from the bottom of the oil tank, likely exposed the holes from the interior of the tank

and, when the less viscous #2 heating oil was placed in the cleaned-out tank, it apparently leaked out of the exposed corrosion holes at the bottom of the tank. Schlageter maintains that Preferred has worked closely with plaintiff and Marin, with the oversight of NYSDEC, to investigate, delineate, and remedy the spill (NYSCEF Doc. No. 73, *Schlageter's affidavit*).

By stipulation dated September 29, 2020, plaintiff, without admitting any fault, agreed to investigate, clean up and remove the discharge of petroleum that was reported on October 24, 2019, by taking steps in accordance with a Corrective Action Plan agreed to by plaintiff and NYSDEC (NYSCEF Doc. No. 75, *stipulation*). Plaintiff also submits a preliminary inspection report from Pool Operations Management (POM), in support of its position that 333 East's swimming pool was in a pre-existing decrepit condition that allowed for pool's infrastructure in the basement to come in contact with the oil-infiltrated groundwater (NYSCEF Doc. No. 76, *POM's report dated April 9, 2021*).

Plaintiff also submits proof that, on or about October 2020, an application for damage compensation was filed by 333 East with the New York Environmental Protection and Spill Compensation Fund ("Oil Fund"), which plaintiff has opposed (NYSCEF Doc. Nos. 79-81).

In their joint memorandum of law in opposition, plaintiff and Marin argue that this court should stay 333 East's counterclaim against them pursuant to the doctrine of primary jurisdiction, premised on the fact that 333 East filed a claim with the Spill Fund Administrator under Navigation Law § 181(2) and 182, alleging that plaintiff was "primarily responsible" for the spill and that Marin and NY Hearting were additional responsible parties. Insofar as the Spill Fund and this court have concurrent jurisdiction over the issues, they maintain the court should stay 333 East's claim against plaintiff and Marin, pending the final resolution of the administrative proceedings before the Spill Fund.

Furthermore, plaintiff and Marin argue that they have undertaken extensive investigative and cleanup efforts to remediate the spill (NYSCEF Doc No. 63). They contend that while they have cleaned out defendant's basement and the oil residue from the swimming pool in defendant's basement, they have yet to reach completion of their remediation due to defendant's interference. The Berk asserts that defendant's failure to grant it access to defendant's building and allow for installment of air ventilation and further investigation of the cause of the oil in the basement, prevents it from completion of key work required to remediate. Further, they contend that they are entitled to third-party defense pursuant Navigation Law § 181.

Plaintiff and Marin also argue that 333 East has not met its *prima facie* burden for summary judgment insofar as there are genuine issues of material fact as to whether they are responsible for the spill. First, they dispute that they controlled the events that led to the oil spill. Plaintiff and Marin also maintain that there is a question of fact as to whether they qualify for the third-party contractor defense under Navigation Law § 181(4)(a)(ii). According to plaintiff and Marin, 333 East substantially interfered with their investigation and cleanup, delaying the cleanup and contributing to the duration of the spill on the neighboring property. 333 East's interference with their investigation and remediation renders it a discharger, warranting denial of the motion. Alternatively, plaintiff and Marin contend that the motion is premature, and that

they should be permitted to obtain pre-trial discovery to "shed further light" on the alleged interference.

Further, in opposition to the claim for damages, plaintiff and Marin argue that 333 East failed to show any proof that it suffered any damages from the spill. Thus, its claim for damages is hypothetical since it is contingent on further proof at trial. They assert that defendant did not submit any incurred expenses related to the cleanup, investigation, or monitoring of the oil spill.

NY Heating also submits partial opposition to the extent 333 East seeks a determination of fact or findings that would affect the liability or damages posture of the case. It maintains that 333 East has failed to meet its *prima facie* burden of entitlement to summary judgment at this early stage in the litigation because its motion was filed before a preliminary conference was held in this action and, therefore, the parties have not had an opportunity to conduct document discovery, inspect the premises involved or the subject oil tank, review testing results that may determine the age of the spill or whether there are several potential sources, or conduct depositions. NY Heating also asserts that issues of fact with respect to damages remain outstanding (NYSCEF Doc. No. 83, *NY Heating's opposition*).

In reply, 333 East argues that plaintiff and Marin improperly rely on Navigation Law § 181(4) to argue that the acts of their contractors provide a defense for liability; however, Navigation Law § 181(4) does not provide for a defense to responsible parties who have a contractual relationship with third parties that are alleged to have caused the spill. 333 East also clarifies that the standard is not whether Marin and plaintiff controlled the events that led to the spill, but, rather, whether they *could* control the activities occurring on the property and had reason to believe that petroleum was stored there. As it relates to the argument regarding primary jurisdiction, 333 East argues that primary jurisdiction does not apply where an action raises threshold legal issues. Furthermore, it asserts that 333 East's fund claim does not deprive this court of jurisdiction because 333 East is a defendant in this action defending itself against an action instituted by plaintiff. Thus, plaintiff opened itself up to counterclaims by doing so and its argument regarding primary jurisdiction should therefore be rejected. As to the issue of interference, defendant argues that, in addition to it being a false allegation, it is not relevant to this motion on liability, but, rather, the diminishment of damages.

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (See *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." (*Anderson v Liberty Lobby, Inc.*, 477 US 242, 247–48 [1986].)

New York Navigation Law § 181(1) provides that "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained." (Navigation Law § 181[1]). Strict liability "need not be premised on ownership of land or a petroleum system at the time a discharge occurs; instead, such liability may be founded either upon a potentially responsible party's capacity to prevent spills before they occur *or* the ability to clean up contamination thereafter." (*State v C.J. Burth Servs., Inc.*, 79 AD3d 1298, 1300 [3d Dept 2010].) "A finding of liability requires a plaintiff to demonstrate that (1) defendant is a discharger under the statute; (2) a discharge occurred; and (3) the discharge contaminated plaintiff's property." (*Alprof Realty LLC v Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 2011 WL 13294960, 2011 US Dist LEXIS 174865, *6 [EDNY 2011].) "The owner of the legal title ... can control the use of the property, and the activities which occur there, through the terms of the land contract. This degree of control is all that is required for liability." (*State of New York v B & P Auto Serv. Ctr., Inc.*, 29 AD3d 1045,1047 [3d Dept 2006].) A discharge is defined as "any intentional or unintentional action or omission" that results in the release of petroleum (Navigation Law § 172[8].) The Court of Appeals has broadly defined discharger to include a landowner that "can control activities occurring on its property and has reason to believe that petroleum products will be stored there." (*State of New York v Green*, 96 NY2d 403, 405 [2001].)

Here, when applying the law to the facts in this case, the court determines that 333 East has satisfied its *prima facie* burden for partial summary judgment, pursuant CPLR 3212(e). Construing the Navigation Law provisions liberally to effect their legislative purpose (See Navigation Law § 195; *State v Green*, 96 NY2d at 406), this court concludes that plaintiff and Marin are dischargers under Navigation Law § 181(1), and their argument that they cannot be rendered dischargers, due to their lack of control over the events that led to the oil spill, is unpersuasive. To be a discharger, a party must be in control of *potential sources of contamination* on its property. Plaintiff and Marin cannot persuasively argue that they were not in control of the oil tank located on plaintiff's property and the activities occurring thereon (see *State v Green*, 96 NY2d at 407). Moreover, the court rejects defendants' argument that 333 East has rendered itself a discharger, precluding summary judgment. They cite to no relevant authority to support their contention that 333 East's alleged interference with the cleanup renders it a discharger due to its contribution to the harm on its property. Furthermore, to the extent there are issues of fact as to whether 333 East interfered with the cleanup and, if so, the impact of said actions, this is a question of damages and not liability. Additionally, to the extent they argue that the oil spill resulted from the acts/omissions of other defendants, this court's finding in no way precludes them from seeking contribution from the responsible parties (see Navigation Law § 181[5]; *White v Long*, 85 NY2d 564, 568-569 [1995]).

The court also rejects plaintiff and Marin's argument with respect to primary jurisdiction. "The doctrine of primary jurisdiction is intended to co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective the statutes with which both are concerned, and to the extent that the matter before the court is within the agency's specialized field, to make available to the court in reaching its judgment the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency" (*Davis v Waterside Hous.*

Co., 274 AD2d 318, 317-318 [1st Dept 2000], quoting *Capital Tel. Co. v Pattersonville Tel. Co.*, 56 NY2d 11, 22 [1982]). "[W]hile concurrent jurisdiction does exist, where there is an administrative agency which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort to a judicial tribunal should be withheld pending resolution of the administrative proceeding" (*Davis v Waterside Hous. Co.*, 274 AD2d at 317-318 [1st Dept 2000], quoting *Haddad Corp. v Redmond Studio*, 102 AD2d 730 [1st Dept 1984]). Here, while it is undisputed that an administrative proceeding was commenced before the Oil Fund prior to the initiation of this action, plaintiff had notice of said filing before commencement of this matter and cannot now use same as a shield to stay this action to prevent summary judgment on liability in favor of 333 East. Since it does not appear a decision has been rendered by the Oil Fund since the commencement of this action, this court, in the spirit of efficiency towards resolution of this action, declines to exercise its discretion in staying this matter under the doctrine of primary jurisdiction. The parties shall proceed with discovery with respect to the remaining claims, including damages incurred by 333 East. Accordingly, it is hereby

ORDERED that defendant 333 EAST 66TH STREET CORPORATION's motion for partial summary judgment, pursuant to CPLR 3212(e), on its claim pursuant to Navigation Law § 181(2), is granted as against plaintiff EAST 66TH STREET ASSOCIATES #1 LLC and defendant MARIN MANAGEMENT CORPORATION; and it is further

ORDERED that, pursuant to Navigation Law § 181(2), defendant 333 EAST 66TH STREET CORPORATION shall be entitled to all cleanup and removal costs and all direct and indirect damages, resulting from the oil released from plaintiff's property within the categories set forth in the notice of motion, as against plaintiff EAST 66TH STREET ASSOCIATES #1 LLC and defendant MARIN MANAGEMENT CORPORATION, jointly and severally; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for movant shall serve a copy of this decision and order, with notice of entry, upon all parties; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the parties are directed to participate in a discovery conference on January 10, 2024, details which shall be provided that January 8, 2024.

October 5, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

[X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER