

Davis v Angioletti

2023 NY Slip Op 34169(U)

November 29, 2023

Supreme Court, New York County

Docket Number: Index No. 162279/2014

Judge: James d'Auguste

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. James E. d'Auguste

PART 55

Justice

-----X

JONATHAN N. DAVIS,

Plaintiff,

- v -

AUGUSTO ANGIOLETTI, 88 GREENWICH OWNER LLC,
COOPER SQUARE REALTY, INC, BLACK DIAMOND, LLC,
LEHRER MCGOVERN BOVIS, INC.,

Defendants.

-----X

AUGUSTO ANGIOLETTI,

Plaintiff,

-against-

BLACK DIAMOND, LLC, LEHRER MCGOVERN BOVIS, INC.,

Defendants.

-----X

LEHRER MCGOVERN BOVIS, INC.,

Plaintiff,

-against-

MENSCH MILL & LUMBER CORP., NASTASI WHITE WEST
COMPANY, LLC,

Defendants.

-----X

88 GREENWICH OWNER LLC,

Plaintiff,

-against-

MENSCH MILL & LUMBER CORP., NASTASI WHITE WEST
COMPANY, LLC,

Defendants.

-----X

INDEX NO. 162279/2014

MOTION DATE 07/11/2023,
07/11/2023

MOTION SEQ. NO. 005 006

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595249/2015

Second Third-Party
Index No. 595603/2016

Third Third-Party
Index No. 595063/2017

The following e-filed documents, listed by NYSCEF document number (Motion 005) 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 286, 287, 288, 289, 290, 291, 292, 293, 294

were read on this motion to/for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 006) 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 279, 280, 281, 282, 283, 284, 285

were read on this motion to/for

STRIKE PLEADINGS

Defendant Lend Lease (US) Construction LMB Inc. f/k/a Bovis Lend Lease LMB Inc. f/k/a Lehrer McGovern Bovis, Inc. (“Lend Lease”) moves (Motion Seq. No. 005) for summary judgment, seeking to dismiss plaintiff’s claims and all crossclaims. Plaintiff Jonathan Davis (“plaintiff”) moves (Motion Seq. No. 006) for an order striking Lend Lease’s answer based this defendant’s failure to timely produce the project file from Lend Lease’s 1999 renovation of the subject property during most of the discovery process. Following supplemental briefs, Lend Lease’s motion for summary judgment is denied, and plaintiff’s motion to strike Lend Lease’s answer is granted to the extent set forth below.

This litigation involves an allegedly defective wooden loft ladder that cracked and failed when, on February 22, 2014, Davis was descending it in in his studio loft apartment (Unit 1713) located at 88 Greenwich Street. On May 30, 2019, Lend Lease made a limited document production that included: (1) a construction contract between Lend Lease and Black Diamond and (2) a letter between Lend Lease and Black Diamond referencing loft ladders and lofts being part of the project. On January 13, 2022, Lend Lease filed the still-pending motion for summary judgment asserting that the limited documents it produced failed to demonstrate a basis for imposing liability.

During a court conference, a now-retired attorney for Lend Lease disclosed the existence of an approximate 4,000-page project file. On April 5, 2022, this Court issued an order holding

in abeyance a decision on the summary judgment motion: “There is evidence that movant was involved in the installation of the subject ladder. However, movant has not appropriately cooperated with other parties and improperly interfered with a witness it produced from answering questions” (NYSCEF Doc. No. 256). At a court conference conducted on November 9, 2022, a Lend Lease attorney asserted that they located the privileged case file, but not the project file. The Court directed Lend Lease to provide an affidavit from the retired attorney as to the existence of the project file. On November 29, 2022, Lend Lease produced a 3,344-page project file. This project file makes plain that the original basis for Lend Lease’s motion (that the construction lofts and loft ladders were not part of the conversion project) is contradicted by documentary evidence.

The motion for summary judgment is denied. The main argument advanced by Lend Lease in support of summary judgment was the purported absence of evidence that it was involved in the construction or installation of the lofts and loft ladders (NYSCEF Doc. 198 at ¶¶ 42-43). Lend Lease defects responsibility based upon a now-disproved assertion that the lofts and loft ladders were not installed until a subsequent conversion of the subject building from a rental-residential to a condominium (id. at ¶¶ 45-48). But the project file plainly reveals that lofts and loft ladders were part of the residential conversion of 88 Greenwich Street from its original commercial usage. On the issue of the defective nature of the ladder itself, plaintiff’s expert contends that the loft ladder failed because it was defectively assembled using weak joints and improper screws. Moreover, he states “[i]f a subcontractor constructed this ladder, the Construction Manager or General Contractor would and should have been able to easily observe that the ladder was constructed below the standard of care for carpentry.” Aff. of Michael Panish, NYSCEF Doc. No. 241, at para. 7. Under the circumstances presented in this case, Lend

Lease failed to demonstrate the absence of potential liability under Espinal v Melville Snow Contractors, 98 NY2d 136 [2002].

Notably, in a prior decision dated May 17, 2022 (e-filed on May 18, 2022, NYSCEF Doc. Nos. 258 and 259), this Court denied motions (Motion Seq. No. 002 and 003) for summary judgment filed by defendants Black Diamond LLC (“Black Diamond”) and 88 Greenwich. The First Department affirmed this determination noting that Black Diamond and 88 Greenwich “failed to demonstrate their prima facie entitlement to summary judgment.” *Davis v. Angioletti*, 215 A.D.3d 552, 553 (1st Dep’t 2023). Black Diamond and 88 Greenwich, as former owners of the subject property, “failed to show that they were not responsible for the design, construction and installation of the defective loft ladder, and therefore they may be held liable for their roles in the conversion and renovation projects on the building if they affirmatively caused the alleged defect” *Davis* at 553. This prior determination was made on less evidence of potential liability as Black Diamond and 88 Greenwich litigated their application for summary judgment prior to Lend Lease producing the wrongly withheld discovery.

Next, the Court is required to address the issue of sanctions. As previously noted, Lend Lease wrongly withheld numerous highly relevant documents relating to its potential liability in this litigation. This failure was exasperated by the dilatory behavior of a covering Lend Lease attorney defending the deposition of a witness produced to identify the type of documents that would be expected to be contained in the missing project file (*e.g.*, NYSCEF 233 at Tr. 41:4-45:7) (attorney directing witness not to answer questions relating to the typical contents of Lend Lease project files). Under the circumstances presented in this matter, the Court would be well within its sound discretion to strike Lend Lease’s pleading and proceed to a damages-only trial. *See Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547 [2015]. However, the withheld documents addressed the limited issue of Lend Lease’s responsibility for potentially

launching an instrument of harm. As such, the Court will impose a more targeted sanction. This will be the imposition of liability on Lend Lease for any injury suffered by plaintiff in the subject accident if it is determined that accident was caused by a defective loft ladder. See *Siras Partners LLC v. Activity Kuafu Hudson Yards LLC*, 171 A.D.3d 680 [1st Dep't 2019].

Accordingly, it is hereby,

ORDERED that Lend Lease's motion for summary judgment (MS005) is denied, and it is further,

ORDERED that plaintiff's motion to strike Lend Lease's answer (MS006) is granted to the extent of imposing liability on Lend Lease for injuries suffered by plaintiff should the loft ladder be determined at trial to be defective.

This constitutes the decision and order of the Court.

James d'Auguste, J.S.C.

11/29/2023
DATE

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