

**Minus Tags, Inc. v Woodard & Greenstein**

2023 NY Slip Op 34973(U)

March 28, 2023

Supreme Court, Queens County

Docket Number: Index No. 700254/20

Judge: Carmen R. Velasquez

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This opinion is uncorrected and not selected for official publication.

SHORT-FORM ORDER

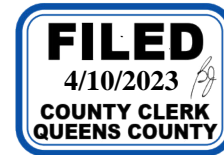
NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38  
Justice

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MINUS TAGS, INC.,	Index No. 700254/20
Plaintiff,	Motion
-against-	Date: January 9, 2023
	M# 1

WOODARD & GREENSTEIN,  
Defendant.



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The following papers numbered EF 19-48 read on this motion by the plaintiff for summary judgment; and cross motion by the defendant for summary judgment.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion - Affidavits - Exhibits.....	EF 19-31
Notice of Cross Motion - Affidavits - Exhibits.	EF 32-40
Affirmation in Opposition - Exhibits.....	EF 41-45
Replying Affirmation.....	EF 46-48

Upon the foregoing papers it is ordered that this motion by the plaintiff for summary judgment and cross motion by the defendant for summary judgment are decided as follows:

Plaintiff alleges that defendant negligently maintained and installed an air conditioner in its commercial unit at premises located at 37-24 24th Street in Long Island City, New York on July 8, 2019. Plaintiff states that it contracted with Millennium Imports, a company located in Pakistan, via an invoice for clothing in the amount of \$281,844.00, deliverable on September 1, 2019. The inventory was kept in defendant's unit. According to the plaintiff, the negligent installation and maintenance of the air conditioner in the unit above the defendant's caused water damage to this inventory when the air conditioner leaked. Plaintiff now moves for summary judgment on the complaint. Defendant cross moves for summary judgment on the

ground that it did not have any notice of any defective condition with the air conditioner. Defendant also contends that it did not create any defective condition with the unit.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993].) Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (*Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2d Dept 2005].)

In addition, in a premises liability case, a defendant property owner, or a party in possession or control of real property, who moves for summary judgment, has the initial burden of making a prima facie showing that it neither created the alleged defective condition nor had actual or constructive notice of its existence. (*Kyte v Mid-Hudson Wendico*, 131 AD3d 452, 453 [2d Dept 2015].) A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it. (*McDonnell v Our Lady of Mercy R.C. Church*, 209 AD3d 729 [2d Dept 2022]; *Zimmer v County of Suffolk*, 190 AD3d 898, 898 [2d Dept 2021].) In order to sustain the burden on the issue of the lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the accident. (*Francis v Super Clean Laundromat, Inc.*, 117 AD3d 898, 898-899 [2d Dept 2014]; *Campbell v New York City Tr. Auth.*, 109 AD3d 455, 456 [2d Dept 2013]; *Musachio v Smithtown Cent. School Dist.*, 68 AD3d 949, 949-950 [2d Dept 2009].) A defendant moving for summary judgment dismissing a complaint cannot satisfy its initial burden merely by pointing to gaps in the plaintiff's case. (*Seedat v Capital One Bank*, 170 AD3d 769, 769 [2d Dept 2019].)

The court will first consider plaintiff's argument that the cross motion for summary judgment is timely. It is well settled that a motion or cross motion for summary judgment must be made within 120 days after the filing of the note of issue, except with leave of court on good cause shown. (CPLR 3212[a]; *Miceli v*

*State Farm Mut. Auto Ins. Co.*, 3 NY3d 725, 726-727 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004].) The note of issue herein was filed on June 23, 2022, and the motion by the plaintiff was timely filed on October 20, 2022. The cross motion for summary judgment was filed on November 14, 2022, beyond the 120-day period. A cross motion for summary judgment, made more than 120 days after the filing of a note of issue, however, may be considered on its merits if there is a timely pending motion for summary judgment made by another party on nearly identical grounds. (*Dojce v 1302 Realty Co., LLC*, 199 AD3d 647 [2d Dept 2021]; *Bicounty Brokerage Corp. v Burlington Ins. Co.*, 101 AD3d 778, 780 [2d Dept 2012].) Here, the cross motion is based on nearly identical grounds as the motion since both the motion and cross motion deal with whether defendant created the defective condition of the air conditioner and had notice of any defective condition. Thus, the court will consider both the motion and cross motion.

Plaintiff submits the affidavit of Edward Simionello, a licensed Professional Engineer, who inspected defendant's unit and the air conditioner unit that allegedly caused the leak. Mr. Simionello explains that "condensation from operation of the air conditioner accumulated in the pan. Debris in the drip pan clearly blocked the weep holes that are designed to allow the condensate to drain safely to the exterior. This caused the condensate to accumulate until it overflowed the bottom pan unabated to the interior where it flowed over the interior window-sill into the gap along the wall and down into suites 104 and 002 directly below." Thus, Mr. Simionello avers that the leak from the air conditioner was caused by improper installation and faulty maintenance.

Defendant asserts that it did not install the air conditioning unit. Rather, defendant maintains that the unit was installed by the building's manager. However, Defendant's warehouse manager, Victor Cruz, testified at his deposition that every year defendant would perform cleaning on the air conditioner units at the beginning of spring. Specifically, he stated that he would change the air filter and brush down the part that is behind the air filter and take out any dust that was collected. He also testified that he cleaned off the coils. This testimony raises a triable issue of fact as to whether defendant created the defect when it performed maintenance on the unit.

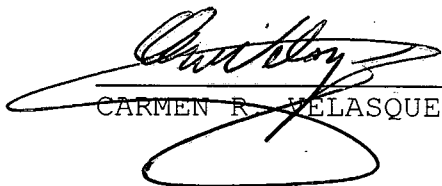
Defendant also seeks summary judgment on the ground of spoliation of evidence. Defendant asserts that plaintiff

discarded the allegedly damaged items and did not preserve or take photos of the clothes plaintiff alleges were damaged. Based upon the evidence presented, summary judgment on this ground is not warranted. The court finds, though, that any sanctions for spoliation of evidence shall be left to the discretion of the Justice presiding at the trial.

Accordingly, this motion by the plaintiff for summary judgment and cross motion by the defendant for summary judgment are denied.

To the extent the cross motion by defendant seeks sanctions for spoliation of evidence, such application is denied without prejudice to renewal before the Justice presiding at the trial of this matter.

Dated: March 28, 2023

  
CARMEN R. VELASQUEZ, J.S.C.

