

Kent v Bernstein

2025 NY Slip Op 32701(U)

July 11, 2025

Supreme Court, New York County

Docket Number: Index No. 152536/2022

Judge: Richard G. Latin

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

PRESENT: HON. RICHARD G. LATIN PART 46M

Justice

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HARVEY KENT, JANET KENT,

Plaintiff,

- v -

STEPHEN BERNSTEIN, GAYLE BERNSTEIN,

Defendant.

-----X

INDEX NO. 152536/2022

MOTION DATE 02/10/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for

JUDGMENT - SUMMARY

Defendant's motion sequence number 001 for summary judgment is decided as follows:

Background

Plaintiffs and defendants are residents of 120 East 81st Street, New York, New York, a co-operative building (NYSCEF Doc. No. 23, affirmation at 3). The Proprietary Lease and House Rules delegate the responsibility of keeping terraces free from debris to the tenants (NYSCEF Doc. No. 39, affirmation at 5, 6). However, building staff historically has been directed to maintain the terraces and the drains (NYSCEF Doc. No. 29, deposition at 6).

On September 1, 2021, Storm Ida hit New York City causing torrential downpours (*id.*). Either before or during the storm, the drain on defendant's terrace became covered with debris, causing it to clog (NYSCEF Doc. No. 23 at 3.). Because of the clogged drain, the rainwater from the intense downpour accumulated on defendant's terrace and leaked through compromised flashing on the terrace roof (*id.*). The leak then went through the pipe chase and flooded plaintiff's apartment, which was located directly below defendant's apartment (NYSCEF Doc. No. 39 at 2). The flooding caused a water sensor on defendant's terrace to beep, which defendant noticed

(NYSCEF Doc. No. 50 at 10). The building superintendent, Mark Lypen, discovered the flooding of both the terrace and plaintiffs' apartment (NYSCEF Doc. No. 39 at 2). Upon discovering the flood on defendant's terrace, Lypen pushed the debris off the terrace drain with his hands and the rainwater immediately began to drain (*id.* at 8). The leak from defendants' terrace caused significant property damage to plaintiff's apartment, including mold damage and flooding (*id.* at 7). Defendants now move for summary judgment pursuant to CPLR 3212.

Discussion

On a motion for summary judgment, the moving party must make a prima facie showing that there are no material issues of fact by presenting evidence in admissible form (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has made a prima facie showing, the burden shifts to the non-movant to provide admissible rebuttal evidence establishing that there are issues of material fact that require a trial (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]). Conclusory assertions, or unsubstantiated statements made in response to the motion will not be considered (*id.*). The court must view all evidence in the light most favorable to the non-moving party (*Vega v Restani Constr. Co.*, 18 NY3d 499, 503 [2012]). "Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]; *see American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]).

A risk reasonably perceived to be within the scope of a contractual obligation may define a duty under negligence law, even if the injured party is a third party to the contract (*Tushaj v Elm Mgt. Assoc.*, 293 AD2d 44 [1st Dept 2002]). Where the language of a proprietary lease is unambiguous, it will be upheld and enforced according to the plain language of its terms (*Goldenberg v 425 Park-S. Tower Corp.*, 151 A.D.3d 522, 522 [1st Dept 2017]). However, the

existence of a non-waiver clause does not in itself preclude waiver of a contract clause (*Kenyon & Kenyon v Logany, LLC*, 33 AD3d 538, 539 [1st Dept 2006], quoting *Dice v Inwood Hills Condominium*, 237 AD2d 403, 404 [2d Dept 1997]). Waiver can be constituted by express agreement or conduct that shows an intent not to claim the purported advantage (*Hadden v Consolidated Edison Co.*, 45 NY2d 466, 469 [1978]). In this case, there is a non-waiver clause in the Proprietary Lease (NYSCEF Doc. No. 47).

Here, defendants submit that it was always left to building staff to clear and maintain the roof drains (NYSCEF Doc. No. 23, affirmation at 6). Deposition from the building superintendent, Mark Lypen, maintained that it was “common procedure” for the building staff to maintain the drains (NYSCEF Doc. No. 29, deposition at 37). An email was sent to the building managers asking building staff to ensure that the drains were cleared before the storm (*id.* at 36). However, Plaintiff submits that the Proprietary Lease and House Rules explicitly provide that the drains and terraces are the responsibility of the tenants (NYSCEF Doc. No. 47 at 4). The non-waiver clause states that “failure of the Lessor to insist ... upon strict performance of any of the terms, covenants or agreements of this lease ... shall not be construed as a waiver” (*id.* at 16, 17). Thus, the Court finds that there is a sufficient dispute of material fact as to whether the conduct of the building staff waived defendant’s contractual duty to maintain the terrace.

To hold a defendant liable for a condition on his premises due to negligence, the plaintiff must show that defendant created the condition or had actual or constructive notice of the condition in time to remedy the condition before the claimed injury occurred (*Ceron v Yeshiva Univ.*, 126 AD3d 630, 632 [1st Dept 2015]). On a summary judgment motion, a defendant must make a prima facie demonstration that they did not create or have notice of the condition, thus shifting the burden to plaintiff to raise a triable issue of fact as to creation or notice of the defect (*id.*).


Here, defendants claim that there was no evidence that the drain was obstructed before the storm, and no prior similar backup of rainwater (NYSCEF Doc. No. 23, affirmation at 7, 8). Defendants submit that the clogged drain and subsequent flooding were not noticeable until the water sensor began to beep (*id.*). Defendants testified that upon hearing the water sensor beeping, they called the doorman and asked him to send the super who came to check the flooding (NYSCEF Doc. No. 44, deposition at 60). Contrastingly, plaintiffs submit that defendants did not go out on the terrace prior to the storm to check the drains (NYSCEF Doc. No. 50 at 10). Plaintiffs claim that upon the water sensor beeping, defendants did not go outside to check the terrace (*id.*). Plaintiffs submit deposition testimony from the building’s super saying that he was only made aware of the flooding when a different unit’s tenant called to report an ongoing leak (*id.* at 11, 12). As such, the Court finds that there is a sufficient dispute of material fact as to whether defendants negligently failed to notify the building of the clogged drain and flooded condition.

Conclusion

Accordingly, it is

ORDERED, that motion sequence number 001 for summary judgment is denied.

This constitutes the decision and order of the Court.

<p><u>7/11/2025</u> DATE</p>	 <hr/> RICHARD G. LATIN, J.S.C.	
<p>CHECK ONE:</p>	<p><input type="checkbox"/> CASE DISPOSED</p> <p><input type="checkbox"/> GRANTED</p> <p><input type="checkbox"/> SETTLE ORDER</p> <p><input type="checkbox"/> INCLUDES TRANSFER/REASSIGN</p>	<p><input checked="" type="checkbox"/> DENIED</p> <p><input checked="" type="checkbox"/> NON-FINAL DISPOSITION</p> <p><input type="checkbox"/> GRANTED IN PART</p> <p><input type="checkbox"/> SUBMIT ORDER</p> <p><input type="checkbox"/> FIDUCIARY APPOINTMENT</p>
<p>APPLICATION:</p> <p>CHECK IF APPROPRIATE:</p>	<p><input type="checkbox"/> OTHER</p> <p><input type="checkbox"/> REFERENCE</p>	