Kim v Baybridge at Bayside Condo 11
2012 NY Slip Op 31438(U)
April 24, 2012
Supreme Court, Queens County
Docket Number: 18422/09
Judge: Kevin Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Deuk S. Kim and Sun H. Kim,

Plaintiffs,

- against -

Baybridge at Bayside Condo 11, The City of New York, The New York City Fire Department, New York City Water Board and NYC Department of Environmental Protection, Suk Kim and Gam Kim,

Defendants.

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Index Number: 18422/09

Motion Date: 4/10/12

Motion Cal. Number: 11

Motion Seq. No.: 6

The following papers numbered 1 to 15 read on this motion by defendant, The City of New York, (sued herein as The City of New York, The New York City Fire Department, New York City Water Board and NYC Department of Environmental Protection), for summary judgment; and "cross-motion" by defendant, Baybridge at Bayside Condo 11, for leave to make a late motion for summary judgment and for summary judgment.

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As a preliminary matter, the notice of "cross-motion" by Baybridge is deemed a notice of motion, since plaintiff is not a moving party (see CPLR 2215). Moreover, since the New York City Fire Department, New York City Water Board and NYC Department of Environmental Protection (DEP) are not separate entities but merely City agencies, they are not cognizable parties. Therefore, the Court, sua sponte, dismisses the complaint as against these defendants.

Upon the foregoing papers it is ordered that the motions are

decided as follows:

Motion by the City for summary judgment dismissing the complaint against it is granted.

Plaintiffs sustained property damage resulting from a fire that destroyed their residence, 207-24 Jordan Drive, Unit 94, in Queens County, a condominium unit owned by them, on January 30, 2009. Plaintiffs allege that a proximate cause of their loss was the negligence of the City in maintaining the closest fire hydrant to the premises, which allegedly did not provide adequate water pressure and which necessitated the use of another hydrant, causing delay in putting out the fire.

Plaintiffs' claim against the City in this regard is specifically based upon the deposition testimony of plaintiff Sun Mak Kim in which she stated that she watched the FDNY's efforts to extinguish the fire and stated, "When the firemen came and tried to extinguish the fire, there was no water, so water had to be brought in from somewhere else and people were shouting that we did not have any water." She stated that she was told by a neighbor, one Mr. Oh, who resided "behind the fence", that "the firemen used the fire hydrant located in front of his house." She also stated that the FDNY also used an additional hydrant around the corner from her unit.

Even if Kim's testimony established that the closest hydrant to her premises did not supply water, thereby necessitating the FDNY to use other hydrants further away, she fails to allege or establish that this caused any consequential delay in putting out the fire and, therefore, that the malfunction of the hydrant closest to her premises was a proximate cause of her damages.

Ciro Migliore, FDNY Battalion Chief, testified in his deposition that the alarm was received at 6:31 p.m. The FDNY first arrived at the scene at 6:39 p.m. and Migliore was "right behind them", arriving at 6:40 p.m. He stated that when they arrived they saw smoke pushing out of the upper floor windows. The first engine company on the scene had already called a "1075" signal over the radio, meaning that there was a working fire, which resulted in the response of four engine companies. They automatically stretched a hand line from the engine companies and gained access to the premises. The rescue companies also determined at that time that there was no one in the premises to be rescued. They found fire in the subject premises and also in the adjoining premises. Therefore, Migliore gave instructions to stretch additional hand lines into the adjoining building and to the rear of the complex. These hand lines were from the fire trucks which carried 500 gallons of water

and were able to be used within three minutes. He stated that they also used the hydrants on the premises and they were functioning.

Contrary to plaintiff's counsel's bare speculative conclusion from Migliore's testimony that the four hours it took to put out the fire completely, which length of time he testified was not typical, was the result of the delay caused by the lack of water pressure from the hydrant in front of the premises, Migliore testified that the length of the operation was the result of the conflagration being a three-alarm fire, called because the fire spread to the adjoining building and its roof. He testified that the spread of the fire resulting in the calling of a three-alarm was caused because the structure was not fire-proof. When asked, "other than the fire spreading, due to the fact that the building was not made of fireproof materials, did you encounter any other difficulties in putting out the fire?", he replied, "No." In response to the question, "So everything, basically, went routine?", he replied, "Yeah, pretty much." His only qualification of this statement was, "The only thing I would say is, because it's a gated community, it does put a little strain, because this unit happened to be at the very back of the complex, and behind it it's fenced in. So, in other words, if this was in your typical regular neighborhood, I would have the world on every side. But being that it's closed off, it did put a little hampering, I would say, just on the geography of the way of the structure."

Also, when asked whether a mound of snow that blocked another gated area (presumably other than the main entrance) through which one of the units tried to get in inhibited his ability to put out the fire as quickly or efficiently as possible, he responded that it was not a major factor but only a minor issue. Migliore testified that the first arriving fire fighters already had started fighting the fire when he arrived at 6:40 and they never complained to him about having had any problems accessing the location or the hydrants. Also, when asked, "Other than the one gate that was, you had trouble getting access to because of the snow, did you have any trouble getting into the community with the other gate with any locks or anything like that?", he replied, "When the guards see us coming in, they have the gates open, the front guard there."

Migliore also explained that in multiple-alarm fires, as additional alarms are called, units respond from further and further away in sequence, so that the increasing length of time that transpired for the units responding to the second and third alarms to arrive was attributable to the distance they had to travel.

No evidence whatsoever is submitted by plaintiff in opposition

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so as to raise any issue of fact as to whether the lack of water pressure which plaintiff stated caused the FDNY to use hydrants further away was a proximate cause of the property damage sustained as a result of the fire or that the City was negligent in any respect in the manner in which it responded to or fought the fire.

Even if, arguendo, there were an issue of fact as to whether the City was in any way negligent in the maintenance of its hydrant and whether its negligence was a substantial factor in causing plaintiff's loss, there is no showing that the City had a special duty to plaintiff so as to overcome its immunity from suit for acts of negligence committed in the performance of its governmental functions (see Pelaez v.Seide, 2 NY 3d 186 [2004]; Blanc v. City of New York, 223 AD 2d 522 [2nd Dept 1996]). The burden of establishing a special relationship rests upon the plaintiff, and said burden is a heavy one (see Pelaez v.Seide, supra; Dixon v. Village of Spring Valley, 50 AD 3d 943 [2nd Dept 2008]). Plaintiff has failed to proffer any evidence of a special relationship so as to defeat the City's prima facie entitlement to summary judgment.

Accordingly, the City's motion is granted and the complaint is dismissed as against it.

As to Baybridge's motion for summary judgment, the Court notes that the instant motion is untimely and Baybridge has not sought leave to file a late motion for summary judgment, but, improperly, has filed the instant summary judgment motion and in its affirmation in support of the motion requests that the Court accept it, notwithstanding its untimeliness, for good cause shown.

However, since neither plaintiffs nor co-defendants oppose the granting of leave, in the interest of judicial economy, this Court deems the instant motion a motion for leave to file a late summary judgment motion and for summary judgment.

Pursuant to the stipulation of the parties, so-ordered by this Court on August 9, 2011, the parties' time to move for summary judgment was extended to November 16, 2011. Baybridge's instant motion was served on December 6, 2011.

Pursuant to CPLR 3212(a), a motion for summary judgment must be made within 120 days after the note of issue is filed, unless a different date is set by the Court, "except with leave of court on good cause shown." "Good cause" means a satisfactory explanation for the delay in making the motion (see Brill v. City of New York, 2 NY 3d 648 [2004]). Good cause may be found where there was outstanding discovery (see Gonzalez v 98 Mag Leasing Corp, 95 NY 2d 124 [2000]).

Baybridge has shown sufficient good cause for its delay in moving for summary judgment as a result of the existence of the failure of plaintiffs' counsel to furnish it with a copy of the deposition transcript of Baybridge's witness. Neither plaintiffs nor co-defendants oppose the motion upon the ground that it is untimely.

Accordingly, Baybridge's motion for leave to make a late motion for summary judgment is granted. Moreover, its motion for summary judgment dismissing the complaint against it is also granted.

The undisputed evidence, on this record, is that the fire that destroyed plaintiffs' residence was caused by the careless disposal of a cigarette in a plastic pail on the deck of defendants' Duk and Gam Kim's adjoining premises. No evidence is proffered in opposition so as to raise an issue of fact as to any negligence on the part of Baybridge.

Plaintiffs' counsel's unspecified and unsupported contention that plaintiffs' loss was attributable to Baybridge's "negligence in their maintenance of the fire alarms" fails to raise an issue of fact. Moreover, Sun Kim's hearsay deposition testimony that she was told by a neighbor that the latter made a complaint to the condominium office about cigarette butts being strewn around the entrance to an unspecified condominium unit is inadmissible. The Court may consider hearsay proffered in opposition to a motion for summary judgment only where it is not the only evidence submitted in opposition and does not become the sole basis for the Court's denial of the motion (see DiGiantomasso v City of New York, 55 AD 3d 502 [1st Dept 2008]; Candela v City of New York, 8 AD 3d 45 [1st Dept 2004]; Matter of New York City Asbestos Litigation, 7 AD 3d 285 [1st Dept 2004]; see generally Phillips v Joseph Kantor & Co., 31 NY 2d 307 [1972]). Here, no other competent, relevant, probative or admissible evidence is proffered so as to raise an issue of fact to defeat the granting of summary judgment. Moreover, even if such testimony were admissible, it is irrelevant, since it was not a complaint about fire safety concerning a possible fire hazard of smoking on defendants' deck, which is where the fire originated, but, according to plaintiff Kim, was only a complaint concerning littering and the smell of cigarette smoke at the entrance.

Likewise, Sun Hak Kim's hearsay testimony that the security guard at the main gate "could not handle the red box" in that "According to what I was told, if that box were opened promptly, then firemen should have located where the fire was starting", and that the neighbor who started the fire, Maggie, told her that she called 911 to report the fire in and of itself is inadmissible and

fails to raise an issue of fact as to Baybridge's negligence. Moreover, even if there were competent admissible evidence presented that a security guard failed to pull a fire alarm box upon seeing the fire and that the fire was, instead, reported by the neighbor, no evidence was presented that such was the cause of any consequential delay in the FDNY's response to and extinguishment of the fire. Indeed, as plaintiff herself testified, the neighbor who allegedly told her that she called 911 was the very neighbor who started the fire. Counsel's speculative suggestion that a security guard at the main entrance to the community should have detected the fire and alerted the FDNY any faster than the very individual in whose unit the fire originated and who was present when the fire started and who ran into the street to escape it, after she had called 911, is not only unsupported by any evidence, on this record, but borders upon the frivolous. Likewise, the allegation in plaintiffs' bill of particulars that Baybridge's security guard force failed to inspect, maintain and test its fire extinguishers and was not trained in firefighting procedures and how to use fire extinguishers is without merit. No evidence is proffered so as to raise an issue of fact as to whether the duties of the security guards included firefighting and fire equipment maintenance, and no evidence was presented that a three-alarm fire involving many fire companies and equipment could have been extinguished by the use of a fire extinguisher by a security guard.

Plaintiffs' contention that Baybridge's negligent failure to maintain the gate at which it allowed snow to pile up was a proximate cause of plaintiffs' loss is also without merit. As heretofore noted, Migliore testified that the snow pile at this one entrance was only a minor issue and that the FDNY had no trouble gaining access to the premises other than the "little hampering" inherent in the nature of the area as a gated community. There is no testimony or evidence that the presence of snow at this one gate caused any consequential delay so as to raise an issue of fact as to whether it was a substantial factor in causing or contributing to plaintiffs' loss.

Finally, Migliore's testimony that the building was constructed with non-fireproof materials fails to raise an issue of fact. Plaintiffs fail to cite what specific statutes or regulations were violated that required the condominium to be constructed with fireproof materials.

Accordingly the motions are granted and the complaint is dismissed as against the City, the FDNY, New York City Water Board, DEP and Baybridge.

Dated: April 24, 2012

KEVIN J. KERRIGAN, J.S.C.