

MSG Natls. Props., LLC v Skyline Windows, LLC

2012 NY Slip Op 32174(U)

August 17, 2012

Supreme Court, New York County

Docket Number: 102386/2010

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
J.S.C. Justice

PART 10

Index Number: 102386/2010
MSG NATIONAL PROPERTIES, LLC
vs.
SKYLINE WINDOWS, LLC
SEQUENCE NUMBER: 006
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

AUG 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/17/12

[Signature], J.S.C.
HON. JUDITH J. GISCHE

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Supreme Court of the State of New York
County of New York: Part 10

-----X
MSG NATIONALS PROPERTIES, LLC F/K/A
MSG BEACON, LLC,

Plaintiff,

-against-

SKYLINE WINDOWS, LLC, SKYLINE WINDOWS,
INC., S. KRAUS, INC. D/B/A SKYLINE WINDOWS
and HOBO CONSTRUCTION CO.,

Defendants.
-----X

Decision/Order

Index No.: 102386/10

Seq. No. : 006

Present:

Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

FILED

Numbered

Papers

Def Hobo n/m [3212] w/ CWY affirm, JR affid, exhs. **AUG 20 2012** 1, 2

Hon. Judith J. Gische, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff, MSG National Properties ("MSG"), commenced this action seeking \$500,000 in damages for negligence, private nuisance, and trespass against defendants Skyline Windows, LLC, Skyline Windows, Inc. (collectively "Skyline"), and Hobo Construction Co. ("Hobo"). Defendant, Hobo, now brings this unopposed motion for summary judgment. Since issue has been joined and plaintiff has filed the note of issue, this motion will be considered on the merits. CPLR § 3212, Brill v. City of New York, 2 N.Y.3d 648 (2004).

Facts and Arguments

Plaintiff, MSG, is the owner of the Beacon Theater in Manhattan. Adjacent to the

Beacon Theater stands the Beacon hotel. The south side of the Beacon Hotel looks or hangs over the roof of the Beacon Theater.

Plaintiff commenced this action seeking \$500,000 in damages for negligence, private nuisance, and trespass against defendants Skyline and Hobo. In the complaint, plaintiff alleges that on April 20, 2009, as a result of construction undertaken by the defendants on the south side of the Beacon Hotel, debris fell on the Beacon Theater and pierced the water sealant. This allegedly resulted in leaking and damage to the theater from rain water. Specifically, the complaint alleges that the work was done without any scaffolding, netting, or anything else that would have assured that the work was safely performed.

Defendant, Hobo, brings this unopposed motion for summary judgment. Hobo asserts that it entered into a contract with the Beacon Hotel to perform a restoration of the facade and that work was completed on October 1, 2009. Hobo relies on the testimony of its President, Jesus Rico ("Rico"). In an affidavit, Rico states that Hobo took precautions to prevent harm to surrounding buildings. Rico claims that not only did Hobo use scaffolding and netting but also placed plywood on the Beacon Theater Roof to prevent harm to the structure in the event that debris would land on the theater. Rico also claims that none of the debris that purportedly caused damage to the roof resulting in the leakage and damage to the theater was associated with the type of materials Hobo used during the facade restoration. Lastly, Rico claims that although caulking of the hotel windows was part of the work done by Hobo for the restoration project, Skyline subsequently ripped out and replaced the windows after Hobo completed its work pursuant to a contract between the Beacon Hotel and Skyline.

Hobo claims that according to a Window Replacement schedule uncovered during discovery, work was to be performed on the Beacon Hotel windows by Skyline from December 2008 through May 2009, well after the time Hobo had finished its work. Hobo also relies on the testimony of John Hall, the Chief Engineer of the Beacon Theater, who testified that there were no complaints or incidents prior to April 20, 2009, and the testimony of Joseph Wittman, Director of Building Operations at the Beacon Theater, who never states that Hobo is the entity responsible for the leaks and damage to the building.

Discussion

In deciding whether the defendant is entitled to the grant of summary judgment in its favor, the court considers whether defendant has tendered sufficient evidence to eliminate any material issues of fact from this case. " E.G. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]; Zuckerman v. City of New York, 49 N.Y. 2d 557, 562 [1980]. If met, the burden then shifts to plaintiff who must then demonstrate the existence of a triable issue of fact in order to defeat these motions. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, *supra*. When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. See, Hindes v. Weisz, 303 A.D.2d 459 [2d Dept. 2003].

To establish a cause of action sounding in negligence, a plaintiff must establish (1) the existence of a duty on defendant's part to plaintiff, (2) breach of the duty and (3) damages. Akins v. Glens Falls City School Dist., 53 N.Y.2d 325, 333 (1981). When proof of any "element falls short, the case should go no further." Id. at 331.

The elements of the tort of private nuisance are (1) an interference, substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with plaintiff's right to use and enjoy land, (5) caused by defendant's conduct. Copart Indus., Inc. v Consol. Edison Co. of New York, Inc., 41 N.Y.2d 564 (1977).

Trespass is an intentional entry onto the land of another without justification or permission. The necessary elements to prove trespass to land are (1) intent or recklessness, (2) entry by a person or thing upon land, (3) in the actual or constructive possession of another. Woodhull v Town of Riverhead, 46 AD3d 802, 804 (2d Dept 2007).

Hobo claims that it took extensive precautions to prevent debris from falling on the roof of the Beacons Theater, that it cleaned up its debris at the end of each day and that it never received complaints from anyone that any debris from Hobo caused any clogged roof drains on the roof of the Beacon Theater. Furthermore, Hobo claims that none of the debris was of the type generated by Hobo's work. As this motion is unopposed and based on a review of the record defendant has established that no material issue of fact exists here. Based on the submissions, Hobo has established freedom from negligence and that it neither trespassed or created a private nuisance. Plaintiff has failed to come forward to show any disputed issue of fact. The motion for summary judgment and to dismiss the plaintiff's complaint and all cross claims against Hobo is granted.

Conclusion

Based on the foregoing, it is

ORDERED that defendant Hobo Construction Co.'s motion for summary

* 6]
judgment and dismissal of the plaintiff's complaint and all cross claims against Hobo is granted; and it is further


ORDERED that this case is ready for trial. Plaintiff shall serve a copy of this decision/order on the office of Trial Support so that the case can be scheduled; and it is further

ORDERED that any relief not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
August 17, 2012

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED

AUG 20 2012

NEW YORK
COUNTY CLERK'S OFFICE