Onetti v Gatsby Condominium
2012 NY Slip Op 33471(U)
May 29, 2012
Sup Ct, NY County
Docket Number: 450493/12
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

Onetti, Fabian

-v-

Gatsby Condominium

INDEX NO. 450493/12
MOTION DATE 5.17.12
MOTION SEQ. NO. 005

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

Defendant The Gatsby Condominium ("defendant") moves to reargue this Court's decision dated March 8, 2012, and upon reargument, for summary judgment dismissing the complaint of the plaintiffs, Fabian A. Onetti and Maria P. Onetti ("plaintiffs").

Factual Background

This actions stems from a fire in plaintiffs' condominium apartment located at 65 E. 96th Street. Plaintiffs assert claims against defendant for breach of contract, negligence, and breach of fiduciary duty.

The Court's March 8, 2012 decision dismissed the breach of fiduciary duty claim against defendant. However, the Court declined to dismiss the remaining claims against defendant. The Court held that plaintiffs' failure to purchase adequate insurance in compliance with the condominium bylaws pursuant to Real Property Law 339-j was irrelevant and did not foreclose their claims against defendant, and that the two Second Department cases cited by defendant failed to suggest otherwise. Further, defendant's argument that it had no duty to inspect the electrical wiring which caused the fire, as it was not the landowner with respect to the electrical wiring, lacked merit, and defendant failed to show that it had a program of inspection in place to inspect the electrical wiring in plaintiffs' apartment.

In support of reargument, defendant argues that the Court overlooked its arguments that (1) the bylaws limited+plaintiffs' recovery to insurance proceeds and (2) defendant had no duty to inspect the wiring contained within the interior walls of subject

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

Dated: _____ _____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
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

apartment. Defendant argues that the Court overlooked caselaw cited in its reply papers and Real Property Law 339-j that permit a potentially liable party to shift the risk of loss to an insurer. Defendant shifted the risk by virtue of Sec. 6.2.6 of the condominium's bylaws, which required plaintiffs to obtain adequate insurance and to look solely to such insurer for any losses. Subsequent to the Court's decision, on March 22, 2012, the Court of Appeals held that the same clause at issue therein was enforceable to limit an insured to seek damages from its insurer for any loss. Further, argues defendant, the extent of the duty to inspect imposed by the Court is unreasonable and contrary to precedent. The fire started "in the living room wall" and a reasonable, visual inspection would not have uncovered a defect within the wall. An observation of the wall and outlet would not disclose any problem inside the walls. Testing of circuitry within the walls is, absent complaints, unreasonable, and, there were no complaints by plaintiffs of any problems with the wiring.

In opposition, plaintiffs argue that defendant cannot seek reargument based on arguments in raised in its reply papers, where this Court, in a decision in a related subrogation action, has previously determined that the bylaws' insurance provisions did not allocate liability for loss and permitted Admiral Indemnity, standing in defendant's shoes, to maintain a suit against plaintiffs for damages caused by the fire. To permit reargument would violate the law of the case doctrine and to change course and foreclose plaintiffs from asserting claims (identical to counterclaims and cross-claims in the prior action) against defendant. The bylaws merely require unit owners and their tenants to make claims under the personal liability and tenant's all risk insurance before looking to defendant for any additional recovery, which is what happened here. Where plaintiffs have accrued over $660,000 in property damages based on defendant's wrongdoing, it defies logic to read the section as a waiver of all claims against defendant, especially where their damages exceed the limits on the amount of insurance they were directed to purchase and where the defendant's conduct in failing to repair known electrical defects at the Building evinced a reckless indifference to the rights of others.

Further, the cases cited by defendant are distinguishable. There is no language in Sec. 6.2.6 purporting to expressly "waive" anything or "solely" look to insurance. In light of this Court's November 18, 2008 determination in the related action that defendant had not waived subrogation, plaintiffs should not be precluded from pursuing claims against defendant based on Bylaw §6.2.6.

And, defendant offered no evidence that it had any program of inspection to determine whether the electrical wiring in the walls of plaintiffs' apartment, or any other apartment, was deteriorating prior to the November 2005 fire. In fact, defendant's discovery responses indicate that it had done nothing to repair, maintain or replace defective portions of the building's then 75-year old electrical system from the time of the 2000 condominium conversion.

Moreover, the evidence shows the owner knew about similar defects in other areas of the multiple dwelling. The building superintendent admitted to defendant's fire investigator that: (1) defendant knew the Sponsor's 2000 electrical "upgrade" remained incomplete and inadequate, leaving electrical service described as "marginal" in the red herring of the condominium plan, unchanged in plaintiffs' apartment, and (2) that prior to the fire, neighbors had been complaining of circuit breakers tripping when air conditioning units were plugged in. Also, in 2004, Ruth Jody complained to the NYC Division of Housing and Community Renewal that she experienced

"constant problems" due to faulty electricity. Further, there is no rule defining the scope of the duty to inspect, much less any that limits the duty to inspect to visual inspections by non-professionals. Defendant ignores that the scope of the duty to periodically inspect and the level of inspection required under the law will necessarily vary depending on all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk. And, the cases cited by defendant are distinguishable, especially since defendant had a warning and was on notice.

In reply, defendant argues that the decision in the related case did not address the legal consequence of plaintiffs' breach of the insurance requirement of the bylaws. Such decision cannot be law of the case, as it occurred in a different case. And, defendant did not raise new arguments in its earlier reply papers, but simply rebutted the opposition papers. The last sentence of Sec. 6.2.6 must be read in conjunction with the rest of the bylaw. As indicated by the very first sentence, which states the condominium is not required to obtain insurance as to the units, the purpose of the bylaw is to allocate the risks of loss to the unit owner's insurance companies. and thereby relieve defendant of liability.

Discussion

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*,182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [lst Dept 1979] ("A party cannot raise questions, advance new arguments, or assume a position inconsistent with that taken on the original motion"); *William P. Pahl Equipment Corp. v Kassis, supra*).

Given that defendant argues that the Court overlooked a Court of Appeals case that was issued weeks after the Court's decision, reargument is granted. However, reargument, the Court adheres to its earlier determination.

Bylaw §6.2.6 states that:

> The Condominium Board is not required to obtain or maintain any insurance with respect to any person or property contained in a Unit. A Unit Owner shall, at the Unit Owner's own cost and expense, obtain and keep in full force and effect (a) Comprehensive Personal Liability Insurance against any and all claims for personal injury, death or property damage . . . occurring in, upon or from the Unit or any part thereof, with the minimum combined single limits of liability of $300,000.00 for each bodily injury or death arising out of anyone occurrence including $300,000.00 for damage to property and (b) tenant's "all-risk" property insurance in respect to of property damage occurring in, upon, or from the apartment or any part thereof (including, but not limited to appropriate

coverage for additions, alterations improvements and betterments and loss due to water damage.) . . . . *To the extent either party is insured for loss or damage to property, each party will look to their own insurance policies for recovery.* (Emphasis added).

Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc. (18 NY3d 675 [2012]) on which defendant relies, does not support defendant's claim that the above section allocated responsibility and risk to plaintiffs, such that plaintiffs cannot look to defendant to recover their losses from the fire. This case is distinguishable in that the contract between plaintiff, a bank, and Diebold Inc. ("Diebold") to provide a back up alarm system for plaintiff's bank branch provided for plaintiff to look "solely" to its insurer, and that plainitff "waives any and all claims" for losses against Diebold. Therefore, dismissal of the complaint against Diebold was upheld. It is noted that the breach of contract claim against defendant ADT Security Services ("ADT") was reinstated, given that plaintiff's contract with ADT did not contain a similar waiver-of-subrogation clause or a waiver of rights for all damages covered by insurance it may have obtained. Therefore, since the bylaw at issue does not indicate an agreement between the parties for plaintiffs to look "solely" to their insurer for any losses, the Court adheres to its earlier determination on this issue.

Further, reargument as to the negligence claims is granted to the extent that defendant argues that the Court misapprehended the caselaw regarding the scope of defendant's duty to inspect. However, upon reargument, the Court adheres to its determination to deny dismissal of the negligence claim against defendant.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant's motion for leave to reargue this Court's decision dated March 8, 2012 is granted. However, upon reargument, the Court adheres to its determination; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 5.29.12 **ENTER:** _____, **J.S.C.**

HON. CAROL EDMEAD

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**