Board of Mgr. of Bridge Tower Place Condominium v Starr Assoc., LLP
2013 NY Slip Op 33445(U)
December 20, 2013
Supreme Court, New York County
Docket Number: 600934/10
Judge: Melvin L. Schweitzer

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

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

BOARD OF MANAGERS OF BRIDGE TOWER PLACE CONDOMINIUM

- v -

STARR ASSOCIATES, LLP, et al

INDEX NO. 600934/10

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by defendants for summary judgment dismissing the complaint is DENIED.

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

Dated: December 20, 2013

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

THE BOARD OF MANAGERS OF BRIDGE TOWER PLACE CONDOMINIUM, Plaintiff, -against- STARR ASSOCIATES, LLP, ALLAN STARR, EVAN SCHIEBER, and ANDREA L. ROSCHELLE, Defendants.	Index No. 600934/10 DECISION AND ORDER Motion Sequence No. 003

MELVIN L. SCHWEITZER, J.:

In this action alleging legal malpractice, defendants Starr Associates, LLP, Allan Starr, Evan Schieber and Andrea L. Roschelle (defendants) move for summary judgment dismissing the complaint brought by plaintiff The Board of Managers of Bridge Tower Place Condominium (Condominium). This action has been the subject of a prior motion for summary judgment brought by defendants, which resulted in a decision dated December 12, 2012 (prior decision). As such, familiarity with the facts is assumed.

Background

In the prior decision, this court granted the Condominium's motion for summary judgment on liability, finding that defendants committed malpractice when they failed in their attempt to find a way to allow the Condominium to wash the windows throughout the building from the penthouse terrace (terrace) of one of its tenants. Defendants had intended that a stipulation between the condominium and the tenant which they drafted would eventually result in giving the Condominium this right, but, instead, arranged for the Condominium to execute a

stipulation which permanently precluded use of the terrace for the purpose of washing the windows.

Discovery then proceeded to determine the Condominium's damages, as the Condominium claimed that it would be very expensive to wash the windows from the ground, presumably the only method available.

Defendants now move for summary judgment dismissing the complaint on the ground that the Condominium cannot prove the damages element of a legal malpractice claim, because evidence brought to light in discovery allegedly establishes that washing the windows with a scaffold dropped from the terrace (as plaintiff has always intended would be done) is legally impossible under federal and state law. As a consequence, defendants argue that any malpractice they might have committed in failing to procure the Condominium the right to wash the windows from the terrace did not cause the Condominium to be damaged. This court agrees with defendants that, if the Condominium would not be permitted by law to use the terrace as a platform from which to wash the building's windows, even if defendants had been successful in obtaining that permission or right, the Condominium cannot claim to have been injured by any failure on defendants' part to obtain that permission or right.

Discussion

Summary judgment is a "drastic remedy." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012). "[T]he '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 eliminate any material issues of fact from the case.'" *Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 (1st Dept 2010), quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d

851, 853 (1985). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v Rozbruch*, 91 AD3d 147, 152 (1st Dept 2012), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224 (1st Dept 2002). In support of their motion, defendants provide the affidavit of an expert witness, Lakrham Brijmohan (Brijmohan), a licensed professional mechanical engineer, who professes to have spent "32 years in the design, development, manufacture and installation of building maintenance and window washing equipment and custom construction products for high rise buildings." Brijmohan Aff., at 1. He claims to have "worked on or supervised directly the installation or repair of window washing equipment servicing more than 600 high rise buildings for clients in most major US cities and internationally, 200 in New York alone." *Id.* Brijmohan bases his opinion on, among other things, an inspection of the building, including the terrace.

Brijmohan testifies that the use of exterior window washing systems, "including suspended scaffold systems with work platforms," is governed by regulations of the United States Department of Labor Occupational Safety & Health Administration (OSHA), the standards of the American Society of Mechanical Engineers (ASME), and the standards of the New York State Department of Labor (DOL). Brijmohan recites OSHA Regulation 190.66 (f) (3) (ii) (A) as providing that "Transportable outriggers may be used as a method of support for ground rigged working platforms where the point of suspension does not exceed 300 feet (91/5 m) above a safe

surface." Brijmohan Aff., at 3. Brijmohan explains that "outrigger" is defined by OSHA as a "device, used singly or in pairs, for suspending a work platform from work, storage and rigging locations on the building being serviced. . . ." *Id.*

Brijmohan states that the drop from the terrace to the third-floor setback is 358 feet. Therefore, he explains, under OSHA, a scaffold suspended from the terrace could not be used to wash windows on the building.

Brijmohan further states that, in order to use a suspended outrigger for washing windows from a height in excess of 130 feet above a safe surface or ground, a building must be fitted with a "continuous stabilization system." *Id.* Therefore, such a system would have to be in place before the terrace could be used as a platform for suspending a scaffold. Brijmohan explains that a continuous stabilization system is made up of "guide tracks fitted to the face of the building" upon which the scaffold is attached, which keeps the scaffold "continuously stabilized as it travels up and down the building." *Id.* at 4. According to Brijmohan, the building does not have, and was not designed to have, such a system. He opines that "to the extent that the penthouse terrace was used previously to suspend scaffold to wash windows on the Building, such activity was in violation" of OSHA. *Id.*

Brijmohan next addresses DOL Industrial Code Rule, Part 21, and DOL Advisory Standard 101. Brijmohan claims that use of a suspended scaffold system to wash windows requires DOL approval "if the height of the suspension point is more than 75 feet from the street or ground surface." *Id.* at 5, quoting DOL Rule 21.9 (c) and Advisory Standard 101-1.1. He explains that the DOL also requires the presence of a continuous stabilization system, as well as

an "anchor system," as the scaffold would be suspended more than 75 feet above the ground. *Id.*, citing DOL Advisory Standard 101-3.9 (a) (1).

Brijmohan communicated with the DOL via email, asking it if the DOL would "grant a variance for ground rigging over 300 feet if continuous stabilization is provided." Brijmohan Aff., Ex. C. The DOL responded "NYS will not grant approval to ground rig a platform even with continuous stabilization over 300 feet, and definitely would not grant approval to ground rig over 300 feet without stabilization." *Id.* Brijmohan claims in his affidavit that "ground rigging" is "the use of a suspended scaffold system using an outrigger system. . . ." *Id.* at 5.

Brijmohan also refers to the requirements of ASME, which he claims are similar to the requirements of OSHA and DOE with regard to outrigger suspension systems, with or without a continuous stabilization system, as being unlawful in a structure over 300 feet.

The Condominium responds with the affidavit of its expert, Vincent Boccia (Boccia), a licensed professional engineer with 25 years' experience, "including but not limited to the field of building façade inspections." Bolton Aff., Ex B. Boccia also inspected the building.

Boccia describes the most reasonable means of cleaning the windows if there is no access to the terrace, as being the installation of a Building Maintenance Unit [BMU] at the upper roof of the Building adjacent to the water tank." *Id.* at 2. A BMU is a "static mount (stationary base) 75' telescopic boom BMU with a rotating turret." *Id.* He describes more fully the components of the BMU in his affidavit, and includes the cost, of $1.7 million. *Id.*

Boccia writes that "[i]nstallation of a BMU would not be necessary if the Condominium were able to access [the tenant's] terrace for purposes of washing windows because the terrace allows for access to the entire façade of the Building." *Id.* at 2. In other words, Boccia does not

agree that the use of the terrace for suspension of a scaffold would not be legal. In fact, he does not address this matter at all, and does not refer to any legal standards, either from OSHA, the DOL or ASME. Boccia is more focused on explaining how expensive it would be to wash the windows without the involvement of the terrace.

Instead of providing any expert opinion on the feasibility of using the terrace to wash the building's windows, the Condominium, in its memorandum of law, attempts to discredit Brijmohan's testimony. The Condominium first claims that "the mere submission of an affidavit containing an opinion does not warrant summary judgment." Memo. of Law, at 2. It argues that it can use Brijmohan's deposition testimony against him, claiming that he did not say that there were absolutely no circumstances under which the terrace could be used, in that, perhaps, the building could be retrofitted to install a continuous stabilization system and tie downs. It suggests that Boccia testified "that continuous stabilization units would be installed on the building as part of the installation of a building maintenance unit." *Id.* at 3. The Condominium mainly faults Brijmohan with discussing only one way to wash the windows, when, allegedly, other methods are available. The only methods suggested in the Condominium's memorandum of law for washing the windows from the terrace, however, apparently require retrofitting the building with systems it does not have.

Nowhere in Boccia's affidavit does he say that the building could be retrofitted to wash windows from the terrace; he is focused on the BMU system. Although the Condominium claims that Boccia mentions a continuous stabilization system, those words do not appear in his affidavit, nor is there mention of any methods which require altering the facade of the building.

The Condominium has never, even on this motion, suggested that it would actually consider retrofitting the building to allow it to wash the windows from the terrace.

The court is puzzled by Brijmohan's testimony. He discusses OSHA regulations concerning a "ground rig," yet OSHA defines "ground rigging" as "a method of suspending a working platform *starting from* a safe surface *to* a point of suspension *above* the safe surface [emphases added]." OSHA Regulations § 190.66 (d). This sounds as if the scaffold is not suspended from a point above the scaffold (as if from a terrace), but, from the ground, or some other safe horizontal surface, such as a building setback. On the other hand, OSHA defines "suspended equipment" as "building maintenance equipment that is suspended and raised and lowered *to* its working position by means of ropes or combination cables attached to some anchorage *above* the equipment [emphases added]." *Id.* This section, more than the definition of "ground rigging," appears applicable here.

Similarly, in his email conversation with the DOL (assuming it to be admissible), Brijmohan asks if the DOL would allow "ground rigging" to be used. According to the DOL Advisory Opinion definitions, "ground rigging" is "a method of suspending a self-powered working platform *from* a safe horizontal surface *to* an acceptable point of suspension *above* the safe surface [emphases added]." Advisory Opinion § 101-2.1 (y). This appears to be describing a rigging system emanating from the ground up, not suspended from a point *above* the scaffold. Indeed, Advisory Opinion § 101-2.1 (jjj) describes "suspended equipment (suspended scaffold)" as "any building maintenance equipment that is *suspended* or moved to its working position by means of ropes or cables attached to some point *above* the equipment [emphases added]." Again, this definition appears to have more applicability to the present situation. Thus, it is not

clear if Brijmohan asked if Brijmohan is citing the correct regulatory sections, or that he asked the DOL the right question, as the terrace was to be above the scaffold, not suspended from some "safe surface" below the terrace. Therefore, the court cannot, at this time, determine the applicability of defendants' evidence.

Where the movant on a motion for summary judgment fails to make a prima facie case, the motion must be denied regardless of the sufficiency of the opponent's evidence. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985). Therefore, the sufficiency of the Condominium's evidentiary showing will not be addressed here.

To establish causation in a malpractice action, "a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence." *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 (2007). The evidence shows that there is still a factual question as to whether the Condominium could wash the building's windows from the terrace, and summary judgment is denied.

Accordingly, it is

ORDERED that the motion brought by defendants Starr Associates, LLP, Allan Starr, Evan Schieber and Andrea L. Roschelle for summary judgment dismissing the complaint is denied.

Dated: December 30, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER