71 Montrose Ave. Corp. v Montrose Park LLC
2017 NY Slip Op 31074(U)
May 11, 2017
Supreme Court, Kings County
Docket Number: 504944/14
Judge: Carl J. Landicino
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of May, 2017.

P R E S E N T:

HON. CARL J. LANDICINO,
Justice.

----------X

71 MONTROSE AVENUE CORP.,

Plaintiff,

- against -

Index No. 504944/14

MONTROSE PARK LLC, UNIQUE DEVELOPERS HOLDING CORP. d/b/a Unique Developers and YIDEL HIRSCH,

Defendants.

----------X

The following papers number 1 to 6 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4-5
Reply Affidavits (Affirmations)	6
Memorandum of Law	7

Upon the foregoing papers 71 Montrose Avenue Corp. (the "plaintiff"), moves for an order, pursuant to CPLR 3212, granting it partial summary judgment on the issue of liability against defendants, Montrose Park LLC, Unique Developers Holding Corp. d/b/a Unique Developers and Yidel Hirsch (the "defendants").

Background

Plaintiff commenced the instant action by electronically filing a summons and complaint on May 30, 2014. The complaint alleges that plaintiff, a State of New York business corporation, is the owner of the improved premises known as 71 Montrose Avenue in Brooklyn. Plaintiff asserts that defendants collectively owned and/or operated the adjacent lot, known as 73 Montrose Avenue.

The complaint states that the adjacent lot housed a construction site and that during the construction activities, on or about December 16, 2013, defendants and their agents proximately caused damage to plaintiff's premises. Plaintiff thus asserts five causes of action, sounding in: 1) negligence; 2) damage to real property; 3) damage to personal property; 4) interference with plaintiff's use of property; and 5) nuisance. Plaintiff seeks damages as a result.

Defendants interposed an answer and discovery ensued. On January 22, 2016, plaintiff filed a note of issue with a jury demand, thereby asserting that the action is ready for trial (although the court permitted limited post-note discovery). Plaintiff now moves for partial summary judgment on the issue of liability.

Plaintiff's Arguments In Support Of Its Motion

Plaintiff first argues that it is entitled to summary judgment because no relevant facts are disputed. Plaintiff points out that it owns the improved premises adjacent to the lot owned by defendants; therefore, reasons plaintiff, defendants owe plaintiff the common-law duty of lateral support. More specifically, plaintiff states that a landowner may not change his land in a manner that weakens the support of his neighbor's land. Plaintiff contends that

the failure of an adjoining landowner to maintain such support results in absolute liability for damage to the neighbor's property, irrespective of negligence. In other words, plaintiff continues, an adjoining landowner is strictly liable for damages as soon as they are caused by removal of lateral support. Plaintiff maintains that there is no dispute that defendants (the landowner and its agents)[1] are adjoining landowners who excavated approximately 20 feet of their land. Plaintiff argues that, coupled with the evidence of damage to plaintiff's premises, this showing is sufficient for the purposes of partial summary judgment on the issue of liability.

Alternatively, plaintiff claims that the record establishes both that defendants negligently excavated the adjoining property, and that this negligence caused the specified damages. Plaintiff notes that the duty to maintain lateral support for adjoining land is nondelegable. More specifically, plaintiff asserts that the partial collapse of its premises would not have happened if defendants performed their construction work in accordance with good and accepted practices. Plaintiff points out that applicable building codes require protection against damaging adjoining property during excavation work; nevertheless, plaintiff continues, the City of New York issued a stop-work order as a result of defendants' construction practices. Plaintiff claims that defendants are jointly and severally liable for their negligence and concludes that summary judgment is warranted on this alternate ground.

---

[1] More specifically, plaintiff claims that the doctrine of lateral support also imposes the applicable duty on an owner's agent, an owner's licensee, or a party that is actually responsible for removing support. Plaintiff reasons that the non-owner defendants—whether they are contractors, engineers or architects—are thus also strictly liable.

Lastly, plaintiff invokes the doctrine of *res ipsa loquitur*. Plaintiff points out that its significant property damage occurred during defendants' excavation activities; plaintiff maintains that such damage does not occur in the absence of negligence. Plaintiff adds this as yet another alternate ground for partial summary judgment on the issue of liability. Finally, plaintiff's submissions include an affidavit from a building inspector, who examined the property and concludes substantially the same as plaintiff has.

Defendants' Arguments In Opposition To Motion

In opposition to the motion, defendants first assert that plaintiff has not established *prima facie* liability for judgment as a matter of law. They point out that plaintiff's deposition witness testified that in 2002—eleven years before the alleged damage occurred—the subject building had cracks that caused leaking. They further note that the witness testified that the subject building underwent structural renovations even earlier. Also, defendants state that the witness (as of the deposition date) resides in the subject building, thus undermining claims that any building damage rendered it uninhabitable.

Defendants turn to the testimony of their witness, who testified that proper underpinning, support and bracing of plaintiff's building was maintained during the subject construction project. He further testified that although a stop-work order was issued, contrary to plaintiff's insinuation, no government agency ever concluded that the subject construction work caused damage to plaintiff's building. Defendants also submit the affidavit of a licensed professional engineer, who inspected the premises and opines that defendants performed the subject work in accordance with accepted construction practices.

Also, defendants assert that plaintiff has not demonstrated the absence of issues of fact as to causation. Defendants claim that applicable appellate decisions hold that the issue of causation should generally be resolved by a trier of fact, even in cases of alleged lateral support failures. Assuming, *arguendo*, that plaintiff has demonstrated prima facie entitlement to judgment as a matter of law with respect to causation, defendants note that their engineer opines that cracks in plaintiff's building are the likely result of either natural settlement of the building or past construction activity. Therefore, defendants argue, there is a difference of opinion between the parties' witnesses, and the trier of fact must decide what testimony to credit. Accordingly, conclude defendants, summary judgment must be denied.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "[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 demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d941 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is

presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]).

If a movant meets the initial burden, parties opposing the motion for summary judgment must demonstrate evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324, citing *Zuckerman*, 49 NY2d at 562). Parties opposing a motion for summary judgment are entitled to "every favorable inference from the parties' submissions" (*Sayed v Aviles*, 72 AD3d 1061, 1062 [2d Dept 2010]; *see also Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Indeed, in deciding a motion for summary judgment, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas*, 305 AD2d at 385; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Lastly, "[a] motion for summary judgment 'should not be granted . . . where conflicting inferences may be drawn

from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

Here, plaintiff correctly notes that defendants,[2] as an adjoining property owner and its agents, had the nondelegable duty to maintain lateral support of plaintiff's property and that the deprivation of lateral support results in absolute liability, irrespective of negligence (*Levine v City of New York*, 249 App Div 625 [2d Dept 1936]; *see also* Administrative Code of the City of New York § 28-3309.4; *American Sec. Ins. Co. v Church of God of St. Albans*, 131 AD3d 903, 905 [2d Dept 2015]). By submitting the report of a building inspector, who both examined plaintiff's building after construction activities were undertaken and concluded that visible property damage was caused by neighboring construction, plaintiff has demonstrated *prima facie* entitlement to judgment as a matter of law.

However, by submitting the report of their engineer, defendants have raised an issue of fact as to causation. The court notes that this is not an instance where defendants, in essence, concede that construction activities caused the claimed damage (*cf. Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 491 [2012] [plaintiffs entitled to summary judgment where defendants' affidavits and engineer report expressly state that excavation undermined foundation of building]). Here, to the contrary, defendants' engineer inspected

[2] For the purposes of this decision, and in light of the fact that defendants have not asserted otherwise, the court assumes, but without finding, that defendants are collectively the adjoining property owner and agents thereof.

plaintiff's building and concluded that the visible damage was not caused by defendants' construction activities.[3] Since this opinion was based on evidence in the record and an examination of the subject premises, the opinion is not conclusory or unsubstantiated (*see e.g. Mills v Department of Educ. of City of N.Y.*, 109 AD3d 643, 644 [2d Dept 2013] ["Contrary to [defendant's] contention, the expert's opinion was based upon evidence in the record, and was not conclusory or unsubstantiated"]; *cf. Santiago*, 83 AD3d 814 [upholding trial court that refused to consider expert affidavit]; *but see Rios v New York City Hous. Auth.*, 48 AD3d 661, 662-663 [2d Dept 2008] [engineer's opinion conclusory and unsubstantiated because engineer never visited subject area]).

To the extent that relevant professionals—such as building inspectors and engineers—reach different conclusions about whether defendants' construction and excavation activities caused the claimed damage to plaintiff's building, it is the province of the trier of fact to make such conclusions (*see e.g. Barnett v Fashakin*, 85 AD3d 832, 835 [2d Dept 2011]; *Deutsch v Chaglassian*, 71 AD3d 718 [2d Dept 2010]; *Colao v St. Vincent's Med. Ctr.*, 65 AD3d 660, 661 [2d Dept 2009]). Also, "[g]enerally, it is for the trier of fact to determine the issue of proximate cause" (*Kalland v Hungry Harbor Assoc., LLC*, 84 AD3d 889, 889 [2d Dept 2011]). Since "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment" (*Forrest v Jewish Guild for the Blind*, 3 NY3d

---

[3] Specifically, the engineer discussed the role that prior renovations—including the installation of an elevator—had in causing damage.

295, 314-315 [2004], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]; *see also Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997] ["[i]t is not the court's function on a motion for summary judgment to assess credibility"]; *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]), this court cannot conclude that defendants, as a matter of law, proximately caused damage to plaintiff's building. Instead, and resolving all inferences in favor of the nonmoving party (*see e.g. Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010]), this court thus denies the instant motion for summary judgment. Accordingly, it is

ORDERED, that the motion of plaintiff, 71 Montrose Avenue Corp., is denied.

The foregoing constitutes the decision and order of the court.

Date: May 11, 2017

ENTER:

Carl J. Landicino, J.S.C.