Kain v Board of Directors of the 109 Greene St. Condominium
2017 NY Slip Op 32479(U)
November 20, 2017
Supreme Court, New York County
Docket Number: 153197/2016
Judge: Norman St.George
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34

----------X

GABRIEL KAIN and ANDREA KAIN,

Plaintiffs,

Index No. 153197/2016
Motion Sequence 001

-against-

Decision and Order

THE BOARD OF DIRECTORS OF THE 109 GREENE STREET CONDOMINIUM, COLBREN PLUMBING & HEATING INC. a/k/A COLBREN MECHANICAL CORP., DAVID H. FORD, SHAWMUT WOODWORKING & SUPPLY, INC. and VERSATILE MECHANICAL SERVICES CORPORATION a/k/a VERSATILE MECHANICAL, INC.,

Defendants.

----------X

ST. GEORGE, J.S.C.:

Currently, plaintiffs Gabriel Kain and Andrea Kain move for partial summary judgment, on the issue of liability, against co-defendant David H. Ford. In addition, plaintiffs seek to sever the first cause of action, which relates to Mr. Ford, and to direct an immediate trial or hearing on the issue of damages. Both Mr. Ford and defendant Versatile Mechanical Services Corporation a/k/a Versatile Mechanical, Inc. (Versatile) oppose. The remaining defendants take no position on the motion. For the reasons below, the Court grants the motion in its entirety on the condition that, within 30 days of this order, plaintiffs submit and file an authenticated copy of the Demar work order.

According to Mr. Kain's affidavit in support of the motion, he and his wife own Unit 5-A in the 109 Greene Street Condominium (the condominium). In addition, plaintiffs have a home in Illinois. On January 6, 2016, when they were in Illinois, condominium superintendent Gerard Berto contacted them to notify them that their apartment, along with Units 4-A and 3-A and the first-

floor retail store, had been flooded. Mr. Berto informed them that during the renovation of Mr. Ford's penthouse apartment, which was immediately above their unit, the contractors removed a radiator without bypassing it and as a result a pipe froze and cracked, causing the flooding. The condominium's security officer filed an incident report which stated that the flood resulted from the failure to bypass the radiator when it was removed. The condominium engaged Delmar Plumbing Corporation (Delmar) to make emergency repairs. Delmar echoed the conclusion that the cause of the flooding and damage was the failure to bypass the radiator, which would have provided heat circulation to the remaining branch piping.

Plaintiffs commenced this action seeking recovery for the damages to their apartment. As stated, Mr. Ford owns Unit PH-A, where the renovation work occurred. As is relevant here, defendant Versatile Mechanical Services Corporation (Versatile) was a subcontractor involved in the renovation work. In their current motion for partial summary judgment, plaintiffs allege that documentary evidence conclusively establishes Mr. Ford's liability. Initially, they point to evidence showing that the renovation work in Mr. Ford's apartment caused the damages. As Exhibit D to this motion, plaintiffs submit the incident report filed by the condominium's security officer; this document explains that the flood resulted from the failure to bypass the radiator when it was removed. As Exhibit E, plaintiffs annex a copy of Delmar's work order, which sets forth Delmar's conclusion that the cause of the flooding and damage was the failure to bypass the radiator.

Additionally, plaintiffs point to documents relating to the renovation work itself. When Mr. Ford commenced the renovation work, he entered into an alteration agreement (the agreement) with the condominium which requires the contractor to obtain an insurance policy and, at paragraph six, states:

> "Owner hereby indemnifies and holds harmless the Board, the Board's architect or engineer, and other Owners and residents of the [condominium] against any damages suffered to persons or property as a result of the Work, whether or not caused by negligence, and for any and all liabilities arising therefrom or incurred in connection therewith. Owner shall reimburse the Board, the Board's architect or engineer, and other owners and residents of the [condominium] for any losses, costs, fines, fees and expenses (including, without limitation, reasonable attorneys [] fees and disbursements) incurred as a result of the Work."

Plaintiffs also cite paragraph ten of the agreement, which asserts that Mr. Ford, as owner, assumed the risks of damage attributable to the renovation work, and indicates that he assumed the risk of damage resulting from the modification of the electrical, plumbing, or heating systems and he was liable for the any necessary repairs to these systems. Finally, plaintiffs cite paragraph thirty of the agreement, which explicitly places upon Mr. Ford the responsibility to

> "bear any and all costs for any plumbing, leaks or other conditions which cause damage to adjacent apartments or other apartments in the [condominium], if such leakage or damage results from the alterations made or equipment installed as part of the Work."

Plaintiffs argue that, based on these provisions, the alteration agreement into which Mr. Ford entered places upon him a binding obligation to pay for plaintiff's damages including attorney's fees.[1]

Mr. Ford opposes the motion. For one thing, he states, plaintiffs – who are not parties to the alteration agreement – cannot authenticate the document so they cannot rely on it. Moreover, the photographs, accident report, and work order are inadmissible as well. He further argues that the alteration agreement is void as against public policy and General Obligations Law (GOL) § 5-

[1] Plaintiffs incorrectly refer to this defendant as "Roth" in the Argument section of their memorandum of law, but refer to him by his actual name, Ford, in the remainder of this document and in their other papers.

322.1 (1) as it purportedly indemnifies the Board, its architect or engineer, and other residents of the building against their own negligence. He contends that, although this provision "arguably" makes plaintiffs third-party beneficiaries of the agreement, it also indemnifies them for their own negligence relating to the renovation. Although GOL § 5-322.1 (1) may not apply where the moving party is not negligent, Mr. Ford states, plaintiffs do not make some prima facie showing that they were not negligent and therefore the exception does not apply. Mr. Ford additionally states that the motion is premature as there have been no depositions.

Co-defendant Versatile also opposes plaintiffs' motion. Like Mr. Ford, Versatile argues that Gabriel Kain's affidavit and the supporting documents are inadequate because Kain "lacks personal knowledge of the factual background of the alleged flooding incident, including its cause" (Battisti Aff., ¶ 4). In addition, like Mr. Ford, it argues the documentary evidence is not authenticated in the manner required by CPLR § 4518.[2]

In reply, plaintiffs claim that they need not authenticate the alteration agreement because when, in paragraph six of his affirmation, Mr. Ford's counsel states the agreement is inadmissible by plaintiffs, he implicitly acknowledges its existence and execution by his reference to the "Alteration Agreement executed between FORD and the CONDO BOARD." In addition, they point to the affidavit of Robert Harris, president of co-defendant Colbren, in support of Colbren's separate motion for summary judgment.[3] That affidavit refers to, and effectively authenticates, Colbren's subcontract with defendant Shawmut, the general contractor.[4] The subcontract, in turn, acknowledges the existence of the general contract between Shawmut and Mr. Ford, referring to

---

[2] Plaintiffs seek to exclude consideration of Versatile's arguments as it is not the subject of their motion. The Court does not need to address this issue, as Versatile adopts Mr. Ford's position.
[3] That substance of that motion, sequence number 002, is not discussed in this decision.
[4] For future reference, the parties, including Colbren, must point to the specific paragraph or paragraphs of the contracts and other documents on which they rely.

it at the start of the subcontract and, at paragraph H, provision one, of the rider entitled "General Project Requirements" referring expressly to the alteration agreement. Plaintiffs state that based on the above, the alteration agreement is admissible under CPLR § 4518 (a), even though it was not authenticated by Mr. Ford or Shawmut. Additionally, plaintiffs submit a copy of the work permit application Shawmut filed with the Department of Buildings in October 2015, which plainly states that Shawmut would be performing alteration work on PH-A, Mr. Ford's apartment. Plaintiffs argue that the superintendent's January 6, 2016 incident report and Demar Plumbing's January 6, 2016 work order are admissible because they "clearly were made and maintained, as required, in the regular course of . . . business at or immediately after the . . . events they described" (Reply Mem. of Law, p. 2).

Furthermore, plaintiffs claim, they have shown their entitlement to relief on the merits of their arguments. Contrary to Mr. Ford's allegations, they assert, the fact that they had been in Illinois for the week prior to and including the date of the flood establishes they were not negligent, and the superintendent's report and Demar's work order establish that the flood was caused by the renovation work in Mr. Ford's apartment. They note that GOL § 5-322.1 (1) is inapplicable here because the alteration agreement provides that Mr. Ford's indemnification obligations are limited to damages relating to his renovation work. They reject Mr. Ford's argument that their motion is premature because the issue of Mr. Ford's liability is clear cut and, in support of his argument, Mr. Ford does not submit any evidence or specify what if any information must be exchanged to further elucidate the issue in controversy here. They stress that Mr. Ford does not challenge the substance of their argument – that the renovation work caused the damage and the alteration agreement therefore obligates him to indemnify them – but instead resorts to evidentiary challenges to documents whose authenticity he does not deny.

DISCUSSION

The standard for granting summary judgment is not in dispute. "[T]he moving party has the initial burden of establishing its entitlement to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact" (*Schmidt v One New York Plaza* (153 AD3d 427, 428 [1st Dept 2017] [quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1985)]). The Court considers the facts "in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The Court must deny summary judgment if any triable issue of fact exists (*Schmidt*, 153 AD3d at 428 [citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985)]).

Utilizing this standard, the Court determines that plaintiffs have set forth a prima facie case. The alteration agreement establishes Mr. Ford's liability for damages flowing from the work in his apartment, and Mr. Ford's references to it are deemed acknowledgments of its authenticity. As plaintiffs argue, this is not a situation in which the agreement at issue seek to indemnify any party against its own negligence. Instead, the agreement provides that Mr. Kain must indemnify other parties for damages caused by his renovation work. The affidavit of Mr. Kain states that their apartment flooded when he and his wife were living at their house in Illinois at the time of the incident.

The additional documents on which plaintiffs rely – that is, the incident report filed by the condominium's security officer and Demar's work order – are sufficient to show that the flooding in their apartment was due to the failure of the workers to bypass a radiator in Mr. Ford's apartment when they removed it. As Mr. Ford notes, the documents are not authenticated as required under CPLR § 4518 (a). Plaintiffs' arguments to the contrary are not persuasive, as no party has attested that they are documents made in the regular course of business. However, the substitution, *nunc*

pro tunc, of properly authenticated documents which bring the documents into compliance is permitted (*Bank of America, National Association v Brannon*, -- NYS3d –, --, 2017 NY Slip Op 07578 [1st Dept 2017]; *see Gyamfi v Citywide Mobile Response Corp.*, 146 AD3d 612, 612 [1st Dept 2017). Here, it is appropriate to allow plaintiffs to file properly authenticated documents within thirty days of this order. The Court does not address the challenge to the admissibility of the photographs, which show the damage to plaintiffs' apartment, because they relate to the question of damages only. Mr. Kain's affidavit is sufficient to establish that plaintiffs' apartment sustained damages.

Finally, Mr. Ford does not satisfy his burden to raise a triable issue in opposition. His suggestion that plaintiffs may have caused the damage at issue is not based on any facts but rather is completely speculative. His argument that the motion should be denied because depositions have not been held is not persuasive. Mr. Ford has not pointed to any evidence that would be adduced from this discovery which, in turn, would impact this motion.

The Court has considered the parties' additional arguments and they do not change its conclusion. Accordingly, it is

ORDERED that the motion for partial summary judgment is granted on the condition that, within thirty days of this order, plaintiffs file -- and to submit to this Part, 80 Centre Street room 308 – properly authenticated copies of the security officer's report and work order, which shall be deemed filed *nunc pro tunc*; and it is further

ORDERED that judgment on the issue of is granted as against Mr. Ford, and these claims are severed from the action; and it is further

ORDERED that the claims against Mr. Ford are referred to a Special Referee to hear and report with recommendations, or hear and determine, if the parties so stipulate pursuant to C.P.L.R. § 4317, the amount due in damages; and it is further

ORDERED that counsel for plaintiffs shall, within 15 days from the filing of the authenticated documents, serve a copy of this order with notice of entry, together with a completed Special Referee Information Sheet upon the Special Referee Clerk in the Motion Support Office to arrange a date for the reference to a Special Referee.

Dated: November 20th, 2017

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.