Century 21, Inc. v Broadway & Cortandt Realty, Co., LLC

2012 NY Slip Op 32145(U)

August 9, 2012

Supreme Court, New York County

Docket Number: 106731/08

Judge: Stallman

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[* 1] SCANNED ON 8/15/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN, *Justice* — PART 21

CENTURY 21, INC.,

Plaintiff,

- v -

BROADWAY AND CORTANDT REALTY, CO., LLC, CITNALTA CONSTRUCTION CORP., METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, CITY OF NEW YORK, FELIX ASSOCIATES, LLC,

Defendants.

INDEX NO. 106731/08

MOTION DATE 4/19/12

MOTION SEQ. NO. 003

FILED
AUG 14 2012
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 16 were read on this motion for summary judgment

Notice of Motion— Affirmation — Exhibits A-D, E [Affidavit], F [Affidavit], G [Affidavit]	No(s). 1-5
Affirmation in Opposition — Exhibit A [Affidavit]; Affirmation in Opposition –Exhibits A-C, D [Affidavit]; Affirmation in Opposition	No(s). 6-7; 8-9; 10
Replying Affirmation	No(s). 11
Letter dated February 29, 2012—Exhibits	No(s). 12
Affidavit; Affirmation–Exhibits A, B; Affidavit	No(s). 13; 14; 15
Supplemental Reply Affirmation	No(s). 16

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant Broadway and Cortlandt Realty Co., LLC is decided in accordance with the annexed memorandum decision and order.

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

Dated: 8/9/12
New York, New York

FILED
AUG 14 2012

, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

1. Check one: .... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if appropriate: .... MOTION IS: ☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

---X

CENTURY 21, INC.,

Plaintiff,

Index No. 106731/2008

- against -

BROADWAY AND CORTLANDT REALTY CO., LLC, CITNALTA CONSTRUCTION CORP., METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, ,

Decision and Order

FILED

AUG 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

---X

HON. MICHAEL D. STALLMAN, J.:

Plaintiff Century 21, Inc. sues for property damage to merchandise that it stored in the sub-basement of a building located at 173 Broadway in Manhattan. The claimed property damage, which allegedly amounted to slightly over $200,000, was purportedly caused by flooding following a sprinkler pipe break on October 19, 2007. Defendant Broadway and Cortlandt Realty Co., LLC, the owner of 173 Broadway, moves for summary judgment dismissing the action as against it.

BACKGROUND

Plaintiff allegedly entered into a five year lease agreement with defendant Broadway and Cortlandt Realty Co., LLC (Broadway) for the entire sub-basement of the building located 173 Broadway in Manhattan. Charles J. Gengler, the President of David M. Baldwin Realty Co., testified at his deposition that David Baldwin

Realty oversees six buildings, including 173 Broadway. (Miller Affirm., Ex D [Gengler EBT], at 8-10.) According to Gengler, the sub-basement area "actually extended beyond the building line and into the vault underneath the sidewalk along Cortlandt Street and a small portion of a vault underneath Broadway." (*Id.* at 32.)

Gengler also testified that plaintiff's lease was "interrupted" when the New York City Fire Department purportedly mandated the installation of a pressurized sprinkler system. (*Id.* at 42.) According to Gengler, plaintiff allegedly terminated the lease instead of undertaking the improvement, and the landlord made the improvements to the sprinkler system. (*Id.* at 42-43.) Gengler stated that some modifications extended into the vault area, that there was "a new connection made between the street city main and the building," and the project was completed in the early part of 2004. (*Id.* at 49.) Gengler also testified that the sprinkler controls were later relocated "from the vault area to a point inside the building line," which occurred "sometime in 2006 or maybe the beginning of 2007." (*Id.* at 50-51.) According to Gengler, this second modification was required by the Metropolitan Transportation Authority (MTA).

Gengler testified at his deposition that he attended meetings with MTA personnel (whose names he did not recall), where it was explained to him that the "area of the vault extending from the building line to the end of the vault under the

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street was going to be utilized by the MTA. It required us to install a cinder block wall along the building line to separate the vault area from the building area." (*Id.* at 57.) At his deposition, Gengler was shown a three page letter dated October 11, 2004, wherein Broadway and Cortlandt Realty Co., LLC purportedly revoked Century 21's license to use the vault area. (*Id.* at 61.) Gengler further testified that installation of the cinder block wall commenced "[i]n the latter months of 2005" and "probably took three to four weeks." (*Id.* at 63-64.) A letter dated January 4, 2006 from Gengler addressed to "John Liszczak, New York City DOT" states, in pertinent part: "Please be advised that pursuant to vacate orders from your office and the MTA, the above space has been cleared, services adapted, walls erected, and is presently ready for your project work." (*See* Miller Affirm. ¶ 13; *see also* exhibits to letter dated February 29, 2012.)

It is undisputed that, on October 19, 2007, the sub-basement area of 173 Broadway became flooded. According to Broadway, the cause of the water leak was determined to be a "stress crack failure at the 4 inch fire sprinkler curb valve caused by inadequate support of the piping between the valve and the NYC/DEP main water pipe." (Miller Affirm. ¶ 20; *see also* Miller Affirm., Ex E [McAndrew Aff.] ¶ 5.)

It is not disputed that, prior to October 19, 2007, a slab of concrete was underneath the piping between the main water line, and that the concrete slab was

later demolished during excavation of the vault area. Defendant Citnalta Construction Corp. (Citnalta) allegedly performed the excavation work, and MTA allegedly hired Citnalta. Citnalta allegedly backfilled and compacted the excavated areas.

DISCUSSION

Broadway argues that it should be granted summary judgment dismissing the action as against it because: (1) "the subject proper[t]y including the damage[d] valve and pipe were no longer under the ownership, dominion, or supervision of Broadway on the date of the incident"; (2) Broadway had "completely relinquished any access to the subject area where the sprinkler pipe valve failed much prior to the date of loss"; and (3) Broadway could not have reasonably foreseen or anticipated that the support for the sprinkler pipe and valve could have been excavated and removed by Citnalta. (Mem. at 3.)

Broadway submits an affidavit from Peter D. Holden, a professional engineer. Holden states, "I believe, to a reasonable degree of engineering certainty, that at the time the sprinkler system was installed by KBM Brand Plumbing of behalf of Broadway & Cortlandt Realty Company in 2004, the system was functioning properly and consistent with good engineering practice." (Miller Affirm., Ex G [Holden Aff.]. ¶ 17.) Broadway also submits an affidavit from Alan C. Grossman, another professional engineer, who states,

> "In my review of the CITNALTA depositions, the MTA depositions and the CITNALTA daily construction reports, there is no indication that compaction testing was done to confirm that the compaction of the backfill was adequately performed to achieve the necessary support of the sprinkler piping as it ran from the water main to the curb valve that stress cracked and became the source of the water leak when it failed. . . .
>
> [I]t is my professional opinion. . . that the weight of the backfill above the sprinkler pipe, the roadway and the vehicles utilizing the roadway exerted downward pressure on the inadequately supported 4 inch sprinkler pipe causing a bending downward of the pipe with adequate force to crack the cast iron sprinkler valve body at its flanged connection, causing the water from the NYC/DOT water main to flood the basement and sub-basement at 173 Broadway."

(Miller Affirm., Ex F [Grossman Aff.] ¶¶ 14-15.) Grossman argues that, "If a contractor as part of its work is required, as in this case, to remove the support of an existing piping system to perform its scope of work required by its contract, the contractor is obligated to take appropriate action to support the piping system." (*Id.* at 19.)

Plaintiff contends that Broadway failed to properly maintain and repair the sprinkler pipe, in that the sprinkler pipe "was resting on the floor prior to excavation by CITNALTA without additional support." (Parash Opp. Affirm., Ex B [Verified Bill of Particulars ¶ 5 (a)].) Plaintiff submits an affidavit from Stephen Morrison, a structural and mechanical engineer, who states that "pursuant to the International Mechanical Code Sections 1206.10 and 305[,] the 4 inch sprinkler pipe gate valve

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and the connecting 4 inch sprinkler pipe were required to be provided independent support. [Broadway] failed to fulfill this obligation at the time the work was done to relocate the pipe and valve." (Parash Opp. Affirm., Ex D [Morrison Aff.] ¶ 5; *see also* Mason 3/23/12 Affirm., Ex B [excerpts from 2003 and 2006 International Mechanical Codes].) Morrison opines that "the pipe was improperly installed and no independent pipe support or hangers were installed. Instead of installing the requisite independent support, [Broadway] provided no independent support but rather rested the pipe on the slab of the vault area at 173 Broadway, which in turn was the pipes [*sic*] only support." (*Id.* ¶ 6.) According to Morrison, "It is my opinion within a reasonable degree of professional certainty that if the sprinkler pipe and gate valve's independent support had been provided as required under the International Mechanical Code, such support should have been intact and remained intact throughout the demolition and construction activities. Furthermore, the installation of the support would have prevented the failure which occurred in October 2007." (Morrison 3/24/12 Aff. ¶ 14.)

Defendant Felix Associates, LLC submits an affidavit from Steven Pietropaolo, a professional engineer, who states,

> "I assert with a reasonable degree of engineering certainty that . . . initially when Broadway and Cortlandt Realty, LLC installed the 4-inch shut off valve the only support for the valve was the downstream side of the slab of the vault; that relying only on the slab of vault to support the valve was improper and insufficient to support the load of the discharge

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piping; and that while the lack of adequate support was later exacerbated by the removal of the subject vault, the valve was never properly supported when in [*sic*] it was installed."

(Eschmann Opp. Affirm., Ex A [Pietropaolo Aff.] ¶ 4.)

Co-defendants Citnalta and MTA also oppose summary judgment, arguing that Broadway should have also installed a shut off valve in the sidewalk, and that its failure to install a shut off valve exacerbated the flood. Citnalta and MTA submit an affidavit from George Andersen, a professional engineer, who states that the installation of such a curb valve was required under 15 RCNY 20-03 (k).[1] According to Andersen, a shut off valve installed in the sidewalk "could have stopped the leak

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[1] 15 RCNY 20-03 (k) states:

"(1) Curb valves shall be full port ball valves or non-rising stem gate valves designed for a minimum of 150 psi of working pressure.

(2) Curb valves shall be required on all domestic water service pipes larger than two (2) inch in size and on any water service pipe that provides for fire protection. All curb valves shall be set in the service pipe in the sidewalk area, and shall be located eighteen (18) inches from the curb or other such locations as may be approved by the Department.

(3) All curb valves shall be provided with a tar coated iron extension box with a cover which is flush with the sidewalk. Each curb valve larger than two (2) inches in diameter shall be equipped with an operating nut at least one and one quarter (11/4) inch square. Curb valves two (2) inches and smaller in diameter may be full port ball valves equipped with a quarter turn shutoff nut.

(4) The property owner shall protect the curb valve/box from any damage and shall promptly report in writing to the Department any circumstances that may adversely affect the operation of the curb valve."

in a manner [*sic*] of minutes." (Andersen Aff. ¶ 7.)

"Before a claimed industry standard is accepted by a court as applicable to the facts of a case, the expert must do more than merely assert a personal belief that the claimed industry-wide standard existed at the time the design was put in place." (*Cassidy v Highrise Hoisting & Scaffolding, Inc.*, 89 AD3d 510, 511 [1st Dept 2011], citing *Hotaling v City of New York*, 55 AD3d 396 [1st Dept 2008], *affd* 12 NY3d 862 [2009].) Here, Stephen Morrison, plaintiff's structural and mechanical engineer, states that "the 2003 International Mechanical Code was the industry standard at the time of the relocation of the sprinkler controls in 2006 while the 2006 International Mechanical Code was the industry standard at the time of the failure of the 4 inch sprinkler pipe and 4 inch sprinkler pipe gate valve." (Morrison 3/24/12 Aff. ¶ 5.) Plaintiff's counsel states, "The International Mechanical Code has been adopted by 43 states including New York State, the District of Columbia, the City of New York, Guam, Puerto Rico and the U.S. Virgin Islands." (Mason Affirm. ¶ 5.)[2]

Plaintiff's submissions raise disputed issues of fact as to whether the sprinkler

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[2] Broadway's counsel asserts that Morrison's "citation to the International Code instead of simply referring to the New York Code further demonstrates his lack of knowledge in the area of engineering relevant to the subject accident." (Miller Suppl. Reply Affirm. ¶ 32.) However, "[a]ny purported shortcomings in the affidavit went merely to the weight of the opinion." (*Espinal v Jamaica Hosp. Med. Ctr.*, 71 AD3d 723, 724 [2d Dept 2010]; *Corcino v Filstein*, 32 AD3d 201 [1st Dept 2006][court appropriately rejected attack on the qualifications of plaintiffs' expert, because such qualifications generally go to the weight of the expert's testimony, not its admissibility].)

pipe and gate valve controls were installed to code in connection with improvements to the sprinkler system at 173 Broadway. Stephen Morrison's and Steven Pietropaolo's opinions appears to contradict Holden's opinion that installation of the sprinkler system in 2004 was consistent with good engineering practice.[3]

Moreover, the affidavit of George Anderson, Citnalta and MTA's professional engineer, also raises issues of fact as to whether the Broadway should have installed a curb shut off valve pursuant to 15 RCNY § 20-30 (k).

Broadway objects to the consideration of Andersen's affidavit as a belated submission and improper expert witness exchange. However, the affidavit may properly be considered in opposition to summary judgment, in the absence of any wilfulness or prejudice. (*See e.g. Downes v American Monument Co.*, 283 AD2d 256 [1st Dept 2001].) Counsel for Citnalta and the MTA claims that the affidavit was not initially submitted with the opposition papers "due to personal and professional reasons." (Fink Opp. Affirm. ¶ 4.) The Court accepts the explanation as good cause for why the affidavit was not initially timely served and submitted.[4]

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[3] Broadway asserts that concrete slab complied with any code requirements that the piping be supported (Miller Suppl. Reply Affirm. ¶ 37), but Holden's affidavit did not specifically state the sprinkler piping was installed in compliance with the International Mechanical Code provisions that plaintiff claims were applicable.

[4] At a court conference on the motion on February 23, 2012, counsel for Citnalta and the MTA gave details about the personal and professional reasons, which need only be summarized

Notwithstanding the above, Broadway contends that, by virtue of eminent domain, the MTA assumed ownership of valve and piping that connected the sprinkler system of 173 Broadway to the water main prior to October 19, 2007.

> "As a general rule, liability for dangerous conditions on land does not extend to a prior owner of the premises. A narrow exception exists, however, and liability may be imposed where a dangerous condition existed at the time of the conveyance and the new owner has not had a reasonable time to discover the condition, if it was unknown, and to remedy the condition once it is known."

(*Bittrolff v Ho's Dev. Corp.*, 77 NY2d 896, 898 [1991].) "In those rare instances where the exception is sustained, '[u]ntil liability passes to the new owner, the onus should remain with the old.'" (*Armstrong v Ogden Allied Facility Mgt. Corp.*, 281 AD2d 317, 318 [1st Dept 2001], citing *Farragher v City of New York*, 26 AD2d 494, 496 [1st Dept 1966], *affd.* 21 NY2d 756 [1968].)

Here, Broadway has not its burden on this motion of demonstrating that, by virtue of eminent domain, the MTA assumed ownership of valve and piping that connected the sprinkler system of 173 Broadway to the water main. The valve and piping at issue were apparently located in a vault area, and a property owner does not hold title to a sidewalk vault; rather, the construction of the vault is granted pursuant to a license by the City of New York. (Administrative Code of the City of NY § 19-

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here as a serious family health emergency.

117 [a].) Gengler stated at his deposition, "Technically, we were never the owner of any portion of the vault." (Gengler EBT, at 181.)

Broadway does not include the order of condemnation with its motion. Thus, it is not known on this record the extent of the interest that the MTA took through eminent domain, i.e., whether condemnation was an unqualified appropriation of the vault area in fee, thereby acquiring everything annexed thereto; whether the order of condemnation sought to extinguish private interests in the sidewalk vault located at 173 Broadway; or whether the taking was only temporary. Broadway also does not include the vacate orders that were purportedly issued by the City's Department of Transportation and the MTA, which were referenced in Gengler's letter dated January 4, 2006. In short, Broadway seeks an adjudication of its rights and interests in the fixtures in the vault area, i.e., the sprinkler valve and piping, based solely on Gengler's deposition testimony.

Thus, to the extent that Broadway argues that its liability as the licensee of the vault for any sprinkler piping and valve code violations ended upon the purported transfer of title to the MTA through eminent domain, there is an unresolved question as to whether Broadway was the owner of the sprinkler valve and piping on the date of the flood, and therefore had a legal duty to maintain the sprinkler valve and piping up to code. The unrebutted testimony that construction of a cinder block wall cut off

access to the sprinkler valve and piping is consistent with Broadway's contention that it did not own or control the sprinkler valve and piping. However, that Broadway had no access to the sprinkler valve and piping does not establish, in itself, that it no longer had a legal duty to maintain the sprinkler valve and piping up to code.

"Foreseeability, alone, does not define duty-it merely determines the scope of the duty once it is determined to exist." (*Matter of New York City Asbestos Litigation*, 5 NY3d 486, 493 [2005].) As plaintiff and co-defendants point out, Gengler's testimony appears to cast doubt on Broadway's contention that it could not have foreseen or anticipated that the concrete slab underneath the sprinkler valve and piping would have been excavated and removed by Citnalta. Gengler testified at his deposition that he attended several meetings with the MTA, where he was told the work that the MTA would undertake:

> "The basis for the work was the Fulton Street transportation hub and several subway modifications relating thereto, and those renovations necessitated the relocation of the main sewer line traveling down Broadway and intersecting with the sewer line in Cortlandt Street to make room for improvements in the subway system. They told me they would be digging to a depth of about 40 feet to install a receptor pit for sewage. It required several sewer ejector systems along the street line. They gave me a basic map of where the new sewer system would travel, which was through our vault, and why it necessitated their taking of the vault area."

(Gengler EBT, at 72-73.) Gengler's testimony raises a triable issue of fact as to

whether, during Gengler's meetings with the MTA, Broadway was informed that the vault area, including the concrete slab underneath the sprinkler valve and piping, would be demolished during excavation.

Although Broadway contends that only the MTA and Citnalta were aware that the piping did not have proper pre-existing support when the concrete slab was demolished (Mem. at 4), Gengler also testified that he observed the excavation of the street area in front of 173 Broadway, and that he observed that the excavation exceeded the depth of the sub-basement vault area. (*Id.* at 73-75.) A reasonable inference may be drawn from Gengler's testimony that Broadway might have had actual notice that the concrete slab that Broadway expected to support valve and piping was removed. Because there is an unresolved question as to whether ownership and control of the sprinkler valve and piping had been transferred to the MTA by virtue of eminent domain, the Court cannot here rule, as a matter of law, that Broadway had no legal duty to take steps to maintain the sprinkler valve and piping up to code when Gengler might have observed that the concrete slab had been demolished.

"Under New York law, the issue of foreseeability is usually analyzed in considering whether one member of society owes a duty of care to another. . . . However, foreseeability also plays a key role in the doctrine of superseding

causation." (*Lapidus v State of New York*, 57 AD3d 83, 95 [2d Dept 2008].) Here, Broadway contends that the proximate cause of the subject damage to the sprinkler valve was the alleged negligent conduct of the MTA and its subcontractors, in that they removed the concrete slab under the sprinkler piping and left the sprinkler piping with no independent support. (Miller Affirm. ¶ 55.) However, Broadway views the question of causation too narrowly. Citnalta and MTA contend that the installation of a curb valve would have prevented the flooding or minimized the amount of the water leak, based on Anderson's affidavit. This raises an issue of fact as to whether Broadway's failure to install a curb valve was a substantial factor of the flooding that damaged plaintiff's property. No expert opinion supports Broadway's contention that the location of the pipe break would have rendered a curb valve ineffective to shut off the flow of water. (*See* Miller Sur-Reply Affirm. ¶ 19.)

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Broadway and Cortlandt Realty Co., LLC is denied.

Dated: August 9, 2012
New York, New York

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J.S.C.

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HON. MICHAEL D. STALLMAN