Kanic Realty Corp. v Suffolk County Water Auth.

2013 NY Slip Op 32446(U)

October 3, 2013

Sup Ct, Suffolk County

Docket Number: 10-11356

Judge: Joseph Farneti

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.

SHORT FORM ORDER

COPY

INDEX No. 10-11356

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 10-3-12 (#005)
MOTION DATE 11-28-12 (#006)
ADJ. DATE 5-9-13
Mot. Seq. # 005 - MD
006 - MotD

KANIC REALTY CORP.,

Plaintiff,

- against -

SUFFOLK COUNTY WATER AUTHORITY,

Defendant.

DAVID I. ABOULAFIA, ESQ.
Attorney for Plaintiff
60 East 42nd Street, Suite 2231
New York, New York 10165

SHEARER & DWYER LLP
Attorney for Defendant
1581 Franklin Avenue
Mineola, New York 11501

Upon the following papers numbered 1 to 65 read on this motion to, inter alia, strike pleadings ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 36 ; Notice of Cross Motion and supporting papers 37 - 53 ; Answering Affidavits and supporting papers 56 - 61 ; Replying Affidavits and supporting papers 64 - 66 ; Other memorandum of law,54 - 55, 62 - 63, 64 -65 ; it is,

ORDERED that this motion by plaintiff Kanic Realty Corp. for, *inter alia*, an Order striking defendant's answer under CPLR 3126 and for partial summary judgment on the issue of liability is denied; and it is further

ORDERED that this cross-motion by defendant Suffolk County Water Authority for, *inter alia*, summary judgment dismissing plaintiff's causes of action for private and public nuisance and for an Order amending a So-Ordered Stipulation is determined as follows.

On January 23, 2009, a building on premises known as 29 Little Neck Road, Centerport, which is owned by plaintiff Kanic Realty Corp., became inundated with water following multiple sprinkler pipe breaks that occurred throughout the building. The complaint alleges that the breaks in the sprinkler pipes were caused by a surge of water pressure emanating from the equipment, water lines, pipes and plants owned by defendant Suffolk County Water Authority ("SCWA"). The complaint also asserts causes of action for public and private nuisance.

Plaintiff now moves for an Order striking SCWA's answer or precluding it from submitting proof denying that it was on notice of the condition that proximately caused the property damage.

Specifically, plaintiff contends that defendant's intentional delay and failure to comply with demands to identify and produce for deposition a witness named Robert Wilbur has prejudiced plaintiff, as Mr. Wilbur has moved out of state and is unavailable to plaintiff. Alternatively, plaintiff seeks an Order granting partial summary judgment in its favor on the issue of liability. In support of its motion, plaintiff submits, among other things, a copy of the pleadings; affidavits of William Seevers, Roger Piacentini, and Albert Machlin; transcripts of the deposition testimony of Nicole Bubolo and Paul Kuzman; computer printouts of service orders by SCWA pertaining to the subject premises; and correspondence between the parties' counsel.

Defendant opposes the motion and cross-moves for partial summary judgment dismissing plaintiff's causes of action for private nuisance and public nuisance. Defendant also seeks an Order amending a So-Ordered Conference Stipulation/Order to reflect the correct date of such Order, and directing the issuance of an Open Commission in the State of North Carolina pursuant to CPLR 3108 and 3111. In support of its cross-motion, defendant submits, among other things, an affidavit and report of Russell Fleming, a report from the Fire Marshal regarding the subject incident, computer printouts of its service orders pertaining to the subject premises, and excerpts of the transcripts of the deposition testimony of Katherine Bubolo and Paul Kuzman. Plaintiff opposes defendant's application for summary judgment on the causes of action for private and public nuisance.

William Seevers, an environmental hydrologist, states in his expert affidavit that he inspected the subject premises on February 24 and March 29, 2012 with his partner, Albert Machlin. He states that on his first visit, he observed severe water damage and ruptured cast iron sprinkler lines throughout the home, and that the most severe damage to piping was found on the upper levels of the house. He opines that such damage is unlikely where there have been any "freeze-up" conditions, because heat rises, and the damage from freezing is most often more severe on lower levels. Seevers states that during his second visit, he observed very little damage to piping in the basement, which is generally where more pipe damage would occur in a "freeze-up" situation. Seevers states that he observed damage to sheetrock and wall covering at places where fire line piping passed through walls from room to room, which is consistent with pipe movement caused by surges in pressure or flow. He also states that he observed a water pressure reducing device installed on the premises and opined that the failure of the 50 pound pressure reducer to prevent the casualty indicates massive pressure in the fire line. He states that based on the temperature on the day of the incident, with a minimum of 24 degrees and a maximum of 28.5 degrees, pipe freezing generally does not occur. He explains that the threshold temperature for plumbing freeze-ups is 20 degrees according to the Building Research Council at the University of Illinois. He concludes that breaks in the piping were caused by pressure surges of the sort that were investigated by the SCWA, rather than by freezing.

Albert Machlin, a registered professional engineer, states in his expert affidavit that there are a number of pumping stations feeding the subject premises, including the Meade pump station located less than half a mile from the premises. He states that well pumps are "centrifugal pumps with a specific characteristic curves, which result in an initial high pressure spikes when turned on." He explains that high pressure surges are more likely to affect homes in close proximity to a pumping station and that these surges can cause pipes to rattle as well as rupture. He states that the damage in the piping at the

premises appeared confined to the sprinkler piping, making any other cause for the rupture other than a pressure surge unlikely. He concludes that the likely cause of the pipe breakage was a spike in water pressure from the operation of the centrifugal pumps where the water originated. He further states that if the fire water valve had been shut off by the SCWA before the subject incident, the pressure in the "main would not have impacted the sprinkler system and the only water that would have been released into the house would have been water stored in the sprinkler pipes instead of the huge amounts of water that continuously flowed under pressure into the house."

Russell Fleming, an engineer, states in his expert affidavit that he conducted a forensic examination of the subject premises on August 12, 2010. He opines that the break in the pipes occurred as a result of freezing of the sprinkler system due to lack of sufficient heat, not because of elevated water pressure supplied by SCWA. He states that under the provisions of the New York State Fire Code, a building owner is responsible for properly maintaining a fire sprinkler system, and the Code provides that part of the maintenance responsibility is ensuring all water-filled piping is maintained at a minimum temperature of 40 degrees.

At her examination before trial, Nicole Bubolo testified that she was living at the subject premises with her husband and a friend at the time of the incident. She testified that her parents, Katherine and Nicholas Bubolo, are the principals of Kanic Realty, which owns the subject premises. She testified that the premises, which previously had been used as an adult care facility, has three floors and an elevator. She testified that prior to the incident, she called SCWA to complain about the sound of pipes banging behind the walls. She testified that an employee of SCWA who came to inspect the pipes stated that the water pressure was too high in the house and that the water pressure exceeded what was considered a safe maximum water pressure in the house. Bubolo testified the heat was never turned off in the subject premises.

At his examination before trial, Paul Kuzman, Director of Production Control of SCWA, testified that his review of the SCWA's computerized records revealed complaints regarding hammering sounds and pipes banging at the subject premises. He testified an employee of SCWA, Robert Wilbur, went to inspect the subject premises prior to the incident. He testified the computerized records indicates that a fire line needed to be shut off and that a valve box needed to be repaired at the premises and that this was a routine request. He further testified that he does not know whether SCWA took steps to mitigate the water pressure at the premises.

Parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]). This provision has been liberally construed to require disclosure "of any facts bearing on the controversy which will assist [the parties'] preparation for trial by sharpening the issues and reducing delay and prolixity" (***Allen v Crowell-Collier Pub. Co.***, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered 'evidence material * * * in the prosecution or defense' " (***Allen v Crowell-Collier Pub. Co.***, *supra*, at 407, 288 NYS2d 449, quoting CPLR 3101). Nonetheless, litigants do not have carte blanche to demand production of any documents or other tangible items that they

speculate might contain useful information (*see* ***Beckles v Kingsbrook Jewish Med. Ctr.***, 36 AD3d 733, 830 NYS2d 203 [2d Dept 2007]; ***Smith v Moore***, 31 AD3d 628, 818 NYS2d 603 [2d Dept 2006]; ***Vyas v Campbell***, 4 AD3d 417, 771 NYS2d 375 [2d Dept 2004]). Thus, a party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information, or are otherwise improper (*see, e.g.* ***Astudillo v St. Francis-Beacon Extended Care Facility***, 12 AD3d 469, 784 NYS2d 645 [2d Dept 2004]; ***Bettan v Geico Gen. Ins. Co.***, 296 AD2d 469, 745 NYS2d 545 [2d Dept], *lv dismissed* 99 NY2d 552, 754 NYS2d 204 [2002]; ***Crazytown Furniture v Brooklyn Union Gas Co.***, 150 AD2d 420, 541 NYS2d 30 [2d Dept 1989]; ***Herbst v Bruhn***, 106 AD2d 546, 483 NYS2d 363 [2d Dept 1984]).

Although actions should be resolved on the merits whenever possible (*see* ***Simpson v City of New York***, 10 AD3d 601, 781 NYS2d 683 [2d Dept 2004]; ***Bach v City of New York***, 304 AD2d 686, 757 NYS2d 759 [2d Dept 2003]; ***Cruzatti v St. Mary's Hosp.***, 193 AD2d 579, 597 NYS2d 457 [2d Dept 1993]), a court may strike a pleading or impose other sanctions against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds should have been disclosed" (CPLR 3126; *see* ***Nicolia Ready Mix, Inc. v Fernandes***, 37 AD3d 568, 829 NYS2d 704 [2d Dept 2007]; ***Mendez v City of New York***, 7 AD3d 766, 778 NYS2d 501 [2d Dept 2004]). The penalties authorized by CPLR 3126 are designed "to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefitting from the unavailability of the proof" during a civil action (***Oak Beach Inn Corp. v Babylon Beacon***, 62 NY2d 158, 166, 476 NYS2d 269 [1984]).

A party seeking the extreme sanction of striking a pleading and preclusion has the initial burden of coming forward with evidence clearly showing that the failure to comply with disclosure orders or discovery demands was willful, contumacious or in bad faith (*see* ***Conciatori v Port Auth. of New York & New Jersey***, 46 AD3d 501, 846 NYS2d 659 [2d Dept 2007]; ***Shapiro v Kurtzman***, 32 AD3d 508, 820 NYS2d 311 [2d Dept 2006]). Willful and contumacious conduct may be inferred from a party's repeated failure to respond to discovery demands or to comply with disclosure orders, coupled with inadequate excuses for such default (*see* ***Bomzer v Parke-Davis, Div. of Warner Lambert Co.***, 41 AD3d 522, 839 NYS2d 110 [2d Dept 2007]; ***Powell v Cipollaro***, 34 AD3d 551, 824 NYS2d 409 [2d Dept 2006]; ***Devito v J & J Towing, Inc.***, 17 AD3d 624, 794 NYS2d 74 [2d Dept 2005]).

Plaintiff's application for an Order striking the answer and precluding defendant from submitting proof denying that it was on notice of the condition that proximately caused the property damage is denied absent a clear showing that defendant was willful and contumacious in delaying the disclosure of certain witnesses and in failing to produce such witnesses sought by plaintiff (*see* ***Polsky v Tuckman***, 85 AD3d 750, 924 NYS2d 830 [2d Dept 2011]; ***A.F.C. Enters. v New York City School Constr. Auth.***, 33 AD3d 737, 822 NYS2d 775 [2d Dept 2006]; ***Pepsico, Inc. v Winterthur Intl. Am. Ins. Co.***, 24 AD3d 742, 806 NYS2d 711 [2d Dept 2005]; *cf.*, ***Reidel v Ryder TRS, Inc.***, 13 AD3d 170, 786 NYS2d 4887 [1st Dept 2004]). Contrary to plaintiff's assertion, the Order dated April 20, 2011, does not specify a definite date when Robert Wilbur and Steve Dalton were to be produced for deposition. In addition, plaintiff fails to submit evidence that a notice of deposition was served on defendant.

As to plaintiff's application for partial summary judgment on the issue of liability, a party seeking summary judgment bears the initial burden of proof and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Here, summary judgment in favor of plaintiff on the issue of liability, is denied. Both parties have submitted conflicting expert affidavits as to the cause of the pipes breaking, and, thus, there remains a question of fact as to the cause of the breakage (*see* ***Cregan v Sachs***, 65 AD3d 101, 879 NYS2d 440 [1st Dept 2009]; ***Gleeson-Casey v Otis Elevator Co.***, 268 AD2d 406, 702 NYS2d 321 [2d Dept 2000]).

With regard to defendant's cross-motion for summary judgment on the causes of action for public and private nuisance, to recover damages based on the tort of private nuisance, a plaintiff must establish an interference with his or her right to use and enjoy land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by the defendant's conduct (*see* ***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 394 NYS2d 169 [1977]). Discomfort and inconvenience caused by the disturbance of property are valid grounds for recovery in an action for nuisance (*see* ***Dixon v New York Trap Rock Corp.***, 293 NY 509, 58 NE2d 517 [1944]). To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property or to render its enjoyment specially uncomfortable or inconvenient (*see* ***Copart Indus. v Consolidated Edison Co. of N.Y.*** *supra*). A cause of action to abate a public nuisance "exists for conduct that amounts to a substantial interference with the exercise of the common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons" (***532 Madison Ave. Gourmet Foods v Finlandia Ctr.***, 96 NY2d 280, 292, 727 NYS2d 49 [2001]). A public nuisance is considered a violation against the State, and is actionable by a private person only if it is demonstrated that the person seeking relief suffered special injury beyond that suffered by the community at large (***532 Madison Ave. Gourmet Foods v Finlandia Ctr.***, 96 NY2d 280, 292, 727 NYS2d 49; *see* ***Matter of Agoglia v Benepe***, 84 AD3d 1072, 924 NYS2d 428 [2d Dept 2011]).

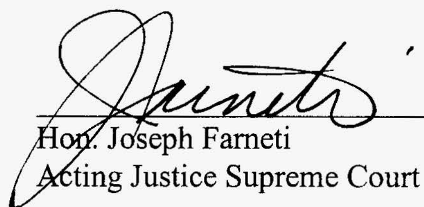
Here, defendant has failed to establish its *prima facie* entitlement to summary judgment as a matter of law as to the causes of action for public and private nuisance. Defendant asserts that plaintiff is "incapable of pointing to any testimony" by any witness which supports intentional and unreasonable actions by defendant with respect to the bursting of the water pipes in plaintiff's premises. However, a defendant cannot obtain summary judgment by pointing to gaps in plaintiff's proof; rather, it must adduce affirmative evidence that its actions were not intentional and unreasonable (*see* ***Vittorio v U-***

Haul Co., 52 AD3d 823, 861 NYS2d 726 [2d Dept 2008]; ***Pappalardo v Long Is. R.R. Co.***, 36 AD3d 878, 829 NYS2d 173 [2d Dept 2007]). Accordingly, defendant's cross-motion for summary judgment as to the aforementioned causes of action is denied.

With regard to defendant's application for an Order, pursuant to CPLR 3108 and CPLR 3111, directing the issuance of an open commission enabling defendant to issue a subpoena for the deposition of nonparty witness, Robert Wilbur, under the circumstances, defendant's request to subpoena Mr. Wilbur for a deposition is appropriate (*see* ***Kekis v Park Slope Emergency Physician Serv.***, 244 AD2d 463, 664 NYS2d 609 [2d Dept 1997]; ***Goldblatt v Avis Rent A Car Sys.***, 223 AD2d 670, 637 NYS2d 188 [2d Dept 1996]; ***Stanzione v Consumer Bldrs.***, 149 AD2d 682, 540 NYS2d 482 [2d Dept 1989]; ***Wiseman v American Motor Sales Corp.***, 103 AD2d 230, 479 NYS2d 528 [2d Dept 1984]). However, the motion for an open commission must be denied at this time, as defendant failed to establish which court in North Carolina has the appropriate jurisdiction to receive the commission and issue a subpoena to Mr. Wilbur directing him to appear for a deposition.

Lastly, defendant's unopposed application for an Order amending the So-Ordered Conference Stipulation/Order dated April 20, 2010, referenced in the affirmation to reflect the date of April 20, 2011, is granted, as a search of the Court's computerized records confirm that April 20, 2011 is the date such conference was held.

Dated: October 3, 2013



Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION