

Ehrenberg v Regier

2014 NY Slip Op 33656(U)

December 17, 2014

Supreme Court, New York County

Docket Number: 111964/07

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

ROGER EHRENBERG and
CARIN LEVINE-EHRENBERG,

Plaintiffs,

Index No.: 111964/07

Motion Date: 11/15/2013

Motion Seq. No.: 005

- v -

HILDA M. REGIER

Defendant.

HILDA M. REGIER,

Third Party Plaintiff,

- v -

MANUEL ZEITLIN ARCHITECTS,
ADVANCED PROFESSIONAL ENGINEERING, P.C.,
LMA GROUP, INC., MARK BIXLER, and BRUCE
MERDJAN

Third Party Defendant

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COUNTY CLERKS OFFICE

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

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No (s) .	1
Notice of Cross Motion/Answering Affidavits - Exhibits	No (s) .	2
Replying Affidavits - Exhibits	No (s) .	3

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiffs husband and wife, Roger Ehrenberg and Carin
Levine-Ehrenberg (the Ehrenbergs), allege that their house was

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

damaged by defendant Hilda M. Regier (Regier)'s failure to maintain a party wall. Regier counterclaims that the Ehrenbergs damaged her house in the process of renovating theirs, and seeks a declaration with respect to the obligation of the Ehrenbergs to maintain the structural integrity of such party wall.

It is apparent that due to the appearance of counsel on the defense of negligence claims and counterclaim different from counsel on the claims that do not sound in negligence, the pace of this lawsuit has been stultifying and the motion papers at bar a procedural morass.

Plaintiffs move for summary judgment dismissing defendant's counterclaims. Defendant cross-moves for a declaration that plaintiffs have a nondelegable duty to ensure the structural integrity of the party wall. Plaintiffs then "cross move" for summary judgment on their complaint and in opposition to the defendant's cross motion.

Defendant contests the evidence offered by the plaintiffs, arguing that none of the parties in the third party action have been deposed. In resolution of a subsequent motion of defendant to strike the action from the trial calendar, by stipulation dated May 20, 2014 between and among the parties, the note of issue and certificate of readiness filed by the plaintiffs on March 28, 2013 were vacated, and the time for dispositive motions extended to September 26, 2014. Counsel apparently never filed

such stipulation with notice of entry and/or with proof of service with the Clerk of Trial Support, and therefore the action remains on the trial calendar.

The following allegations are taken from the parties' affidavits, deposition testimony, pleadings, and documentary evidence, and are undisputed unless otherwise indicated.

The Ehrenbergs and Regier own contiguous properties on West 22nd Street. The party wall is Regier's eastern wall and the Ehrenbergs' western wall.

Regier has owned and lived in her house since 1977. She resides in the apartment on the main floor and tenants inhabit two other floors.

The Ehrenbergs purchased their house in 2005, at which time the house was a three-unit building. The Ehrenbergs hired three contractors to convert the house into a single family home. The contractors are the third-party defendants: Bruce Merdjan and his employer, Advanced Professional Engineering, P.C. (Merdjan); Mark Bixler and his employer, Manuel Zeitlin Architects, P.C. (Architects) and LMA Group, Inc. (LMA).

Merdjan, the engineer, submits two reports addressing the renovations at the Ehrenbergs' house and the effect on Regier's house: the first report is dated May 18, 2006 and addressed to the New York City Department of Buildings, and the second, including a cover letter by Merdjan dated December 8, 2006 and

addressed to the Ehrenbergs' attorney, which cover letter states that the Architects asked Merdjan to write the report.

The properties were built around 1854.

Regier's house has three floors.

The Ehrenbergs' house has four floors. The Ehrenbergs' fourth floor was added in the 1920s.

The party wall is twelve (12) inches thick and consists of three (3) wythes¹ of unreinforced 163 year old common brick. There are two chimneys inside the party wall, the south and the north chimney.

The north chimney, which is nonfunctional, is attached to a fireplace in Regier's house. The south chimney houses the flue² pipe from Regier's boiler.

Before the work in the Ehrenbergs' house started, the engineer and the contractor discovered that the party wall in the Ehrenbergs' basement was bulging outward. Investigation revealed that the bulge was next to the section of the party wall where Regier's south chimney was located, and that the flue pipe in the south chimney was perforated and deteriorated. The Ehrenbergs' party wall next to the south chimney was in a crumbling state and

¹ A wythe is a vertical section of bricks or other masonry that is one unit thick.

² A flue is a duct, pipe, or opening in a chimney for conveying exhaust gases from a fireplace, furnace, water heater, boiler, or generator to the outdoors.

the bricks could be removed by hand. Merdjan concludes that gas escaping from the flue eroded the brick of the party wall.

The contractor LMA, with Regier's agreement, installed a new steel flue in the south chimney. Regier paid for this work. According to the Ehrenbergs, the major damage to the party wall caused by the lack of maintenance and the failed flue was almost exclusively on their side. Over the course of several months, the Ehrenbergs repaired their side of the party wall.

Further defects found in the party wall led the Ehrenbergs' contractors to determine that the wall needed strengthening and that the best way to do this was by installing steel beams. During placement, one of the steel beams came through Regier's side of the party wall, next to her north chimney, where it remains visible. Merdjan states that placing the beam within the wall dislodged part of the innermost wythe, which was already in poor shape. He states that ultimately the protruding beam will be fireproofed and the visible parts of it will be painted and then covered with cement.

Merdjan states that the reconstruction of the south chimney caused the mantle to fall off the wall of Regier's fireplace. The mantle was adhered to the dilapidated brick of the party wall. The wythes are no longer connected to each other in many places. He believes that the separation of brick at the south chimney was precipitated by boiler exhaust gases emitting through

a defective flue pipe and 163 years of chimney exhaust into an unlined chimney.

Also, during the repair of the party wall, a section of a wythe crumbled into Regier's firebox³ in the north chimney, leaving a hole in the party wall. Merdjan states that the mortar in the party wall had turned to dust due to Regier's failure to maintain the north chimney and the fire box. He opines that the party wall's "structural integrity around the chimney" was compromised and the required 2-hour fire rating between the adjacent residential structures was eliminated "before the wall was unavoidably breached by" Ehrenbergs' contractor, and that from such preexisting hole in the chimney, one could see the party wall. He states that bricks that should have been there to provide support and fire separation, and contain smoke are missing. Merdjan says that the Ehrenbergs did the repairs needed to attain the fire separation at that location and restore the structural integrity of the wall. He posits that there remain other "pre-existing instances of disintegration further up" on Regier's side of the party wall.

Regier claims that the Ehrenbergs' renovation work caused cracks in her walls, caused one fireplace to separate from the wall, caused the marble mantle to fall off another fireplace, and

³ The firebox is the part of the fireplace where the fire is lit.

caused a steel beam to protrude into her house. She asserts that due to the renovations, her bathroom door does not close, floor joists were lifted up, bricks fell when the Ehrenbergs took out their staircase, and severe cracking appeared near her fireplaces. The Ehrenbergs admit to the condition of the steel beam and the mantle, but they attribute such damage to the already poor condition of the party wall, which they blame on Regier. In addition, the Ehrenbergs claim that both houses had other damage apart from the party wall, due to age and poor maintenance.

Merdjan discusses other damage that Regier claims was caused by the Ehrenbergs' construction activities, such as the upheaval of her baseboard, unlevel floors, and separation of her kitchen counter top from the wall.⁴ He says that the construction did not cause this damage, which already existed before the Ehrenbergs' work began, based on his inspection of Regier's house before the work began, when he discovered that the staircase leaned, the floors were not completely level, the plaster was cracking in many places, there were large gaps between the floorboards, the baseboards did not meet the floor, and the masonry on the north fireplace was severely cracked. He found that the party wall had no stud wall or furring strips or

⁴Some of these defects are alleged in neither Regier's deposition nor her bill of particulars.

metal lathe applied to it. Merdjan's report describes the work that he believes needs to be done in Regier's house.

Merdjan states that the renovation in the Ehrenbergs' house did not entail a wall to wall gut, and that demolition was calculated to preserve certain parts. The Ehrenbergs' contractor dismantled the mechanical, electrical, and plumbing equipment, took down and replaced a staircase, and demolished the nonload bearing interior walls. Merdjan's May 2006 report states that the party wall is in jeopardy of failure; that on the Ehrenbergs' fourth floor, a preexisting crack on the party wall in the area of Regier's north chimney sheared the wall vertically into two sections, with one section going backward. His details the corrections to be performed. Addressing possible damage to Regier's house, the report states that the interior finish on the party wall on defendant's side is plaster applied to failing brickwork, and that given the condition of the wall and lack of separation between the mortar and the plaster, cracking and flaking is expected on that side. He also advised that vibrations from drilling to stabilize the party wall could cause cracking and cause bricks to fall inside Regier's house.

The Ehrenbergs moved into their house sometime in late 2008, after renovation was completed. The Ehrenbergs claim that Regier's failure to maintain the party wall and the chimneys caused them to expend money repairing their side. The Ehrenbergs

seek damages and an injunction ordering Regier to repair her side of the party wall. Regier counterclaims for negligence and compensatory and punitive damages, and for an injunction compelling the Ehrenbergs to repair and restore the structural integrity of the party wall, to remove the steel beam, and to repair her ceiling, walls, and other parts damaged by the Ehrenbergs' construction.

The Ehrenbergs argue for summary judgment dismissing the counterclaims on the basis that they are not responsible for the acts of the independent contractors, here third party engineer, architect, and contractor.

The Ehrenbergs allege that they did not know about the bulge in the party wall when they purchased the house, never having seen such bulge beforehand. Husband Ehrenberg asserts that the walls of the house were covered with personalty such as bookcases and artwork, with objects in every nook and cranny apparently hiding the bulge. Husband Ehrenberg states that he and his wife did not perform, direct, or control the work on the building, and that he does not have any training in construction or home renovation. Though the Ehrenbergs were concerned about the ultimate design, style, decor, and layout of the house, they did not perform construction work or direct the contractors in the performance of their work. The Ehrenbergs did not know the specifics of how the work was completed, only what it should look

like at the end. Husband Ehrenberg alleges that he acted on the recommendations of the contractors and that he had to approve the recommendations before the contractors could do the work, and deferred to their judgment.

As stated above, the Ehrenbergs' motion seeks dismissal of the counterclaims, based on the argument that the Ehrenbergs are not responsible for the acts of their independent contractors. The Ehrenbergs' cross motion seeks summary judgment on the complaint, and dismissal of the counterclaims on different grounds than those advanced in the initial motion. The court will not consider two motions seeking to dismiss the same claims. Plaintiffs' cross motion will be considered only insofar as it seeks summary judgment on the complaint.

Regier's answer does not contain a request for a declaratory judgment, so her motion seeking one is denied.

Regier disputes the accuracy of plaintiffs' conclusion that flue gases damaged the party wall. She points out that Merdjan does not claim that the flue was tested to see if gas was escaping. However, Regier does not deny that the flue had holes in it and she testified that she never had it or the party wall maintained or repaired.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law"

(Dallas-Stephenson v Waisman, 39 AD3d 303, 306 [1st Dept 2007]). The party opposing the motion for summary judgment is given the benefit of all favorable inferences (Cetindogan v Schuyler, 95 AD3d 577, 578 [1st Dept 2012]). The function of the court is one of issue finding, not issue determination (Ferrante v American Lung Assn., 90 NY2d 623, 630 [1997]). Upon the movant proffering evidence that establishes a prima facie case for summary judgment, the party opposing the motion must produce evidence sufficient to require a trial of material questions of fact (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions" will not defeat a prima facie showing (*id.*). Nonetheless, the opposing party can defeat the motion by demonstrating an acceptable excuse for failing to produce the necessary evidence (*id.*).

The court assumes that the party wall straddles both sides' property, so that each owns the part of the wall on its property. Nothing different is alleged. The "land covered by a party wall remains the several property of the owner of each half, yet the title of each owner is qualified by the easement to which the other is entitled" (Brooks v Curtis, 50 NY 639, 642-643 [1873]; Sakele Bros., LLC v Safdie, 302 AD2d 20, 25 [1st Dept 2002]). A party wall exists for the mutual convenience of both property owners, and neither may use it to the detriment of the other

(Sakele Bros., 302 AD2d at 26; 25 W. 74th St. Corp. v Wenner, 268 AD2d 387, 387-388 [1st Dept 2000]). A property owner may make changes, additions, and repairs to a party wall within the limits of its own premises, provided that the use of the wall by the other party is not impaired (Wechsler v Elbeco Realty Corp., 119 Misc 178, 180 [Sup Ct, NY County 1922], *affd* 213 AD 820 [1st Dept 1925]). The cost of repairing a damaged wall should be divided proportionately among the parties whose properties touch upon the damaged parts (230-79 Equity, Inc. v Mancuso, 95 AD3d 785, 785 [1st Dept 2012]). The owners are obligated to share the costs of necessary repairs, but not other kinds of work.

In Brooks (50 NY at 643), the court discussed a previous case in which a party wall, standing equally on two lots, had become ruinous. Against the will of the adjacent owner, the owner on one side pulled down the wall and rebuilt it higher than it was before. It was held that the objecting owner had to contribute to the cost of the new wall, but not to the extra cost of making it higher (see also Sakele Bros., 302 AD2d at 28).

If an owner damages its side of the wall, it is responsible for repairs (see 12 W. 31st St. Corp. v Consolidated Edison Co. of N.Y., Inc., 17 Misc 3d 1140[A], 2007 NY Slip Op 52350[U], *5 [Sup Ct, NY County 2007]). In 12 W. 31st St. Corp., the defendant's predecessor demolished its building, leaving the party wall in an unsightly and potentially dangerous condition.

As the present owner of the property on which the defective side of the party wall stood, the defendant had to repair it. The plaintiff, owner of the other side of the party wall, did not have to share in the cost of repair.

Regier is responsible for the south chimney since she makes a special use of it. Such chimney services Regier's property, not the Ehrenbergs, and therefore Regier has a duty to repair it. To the extent that not repairing the south chimney caused damage to the Ehrenbergs' side of the wall and other parts of their property, Regier is liable. Work done on one side that benefits both must be shared by both, unless the necessity for the work was caused by one side's negligence. The one who caused the damage is responsible for its damage.

As for the north chimney, Regier did not make special use of it, and it stood within the wall, providing support for the entire party wall. Unless the north chimney was particularly on Regier's side, both sides are responsible for maintaining it.

The Ehrenbergs' cross motion for summary judgment on the complaint is based on the argument that Regier alone was responsible for the damage to their side of the party wall. The party wall was defective when the Ehrenbergs purchased their house and not just the part around the south chimney. It is not shown that all the defects on the Ehrenbergs' side were entirely Regier's fault. The Ehrenbergs' predecessors had a duty to

maintain the party wall, just as Regier has and had.

The Ehrenbergs do show that the renovations did not involve any negligence. In response, Regier does not raise any issues of fact, but the parties submissions raise questions concerning whether relief may be obtained even in the absence of negligence. In 12 W. 31st St. Corp. (17 Misc 3d 1140[A], 2007 NY Slip Op 52350[U]), no negligence was involved when the defendant's predecessor demolished a building on one side of a party wall, thus exposing it to the elements. The plaintiff, owner of the building on the other side of the party wall, sought to compel the defendant to repair its side of the party wall. The court granted the injunctive relief, ordering defendant to repair its side of the party wall.

The Ehrenbergs' motion for summary judgment is based on the claim that they are not liable for the acts of the independent contractors. In general, the employer of an independent contractor is not liable for the acts of the independent contractor because the employer does not control the manner in which the work is performed (Chainani v Board of Educ. of City of N.Y., 87 NY2d 370, 380-381 [1995]; Saini v Tonju Assoc., 299 AD2d 244, 245 [1st Dept 2002]). Thus, the contractor bears the risk of loss and the employer is not vicariously liable (Kleeman v Rheingold, 81 NY2d 270, 274 [1993]).

This rule is subject to a number of exceptions which fall

into three broad categories. A principal can be held vicariously liable for the acts of the independent contractor when: 1) the principal is negligent in choosing, instructing, or supervising the contractor; 2) the principal has hired the contractor to do work that the principal knows is inherently dangerous; or 3) the principal bears a specific, nondelegable duty to ensure the work is done safely (Saini, 299 AD2d at 245; see also Rosenberg v Equitable Life Assur. Socy. of U.S., 79 NY2d 663, 668 [1992]).

Regier does not allege that the Ehrenbergs were negligent in retaining the contractors. The Ehrenbergs' evidence shows that they did not maintain direct supervision over or control the activities of the independent contractors.

An employer's general supervisory power over an independent contractor's work is insufficient to warrant imposition of liability (Goodwin v Comcast Corp., 42 AD3d 322, 322 [1st Dept 2007]; Davies v Contel of New York Inc., 187 AD2d 898, 900 [3d Dept 1992]; People v Gaydica, 122 Misc 31, 66 [County Ct, Kings County 1923]). The fact that husband Ehrenberg visited the site and approved the work before it was done does not indicate supervision enough for liability. He states that he has no experience in construction and that he acted on the contractors' advice. Regier produces no evidence to counter the Ehrenbergs' showing, but argues that evidence about control and supervision is lacking because the testimony of the independent contractors

has not been submitted on this motion, as at the time of the motion such persons had not been deposed.

As to the question whether the work on plaintiff's house constituted an inherently dangerous activity, such activity is defined as "dangerous in spite of all reasonable care" (Chainani, 87 NY2d at 381 [quotation marks and citation omitted]), or "'work necessarily attended with danger, no matter how skillfully or carefully it is performed'" (Carmel Assoc. v Turner Constr. Co., 35 AD2d 157, 158 [1st Dept 1970], quoting Janice v State of New York, 201 Misc 915, 920 [NY Ct Cl 1951]). For activity to fall into the inherently dangerous category, the danger must be characteristic of the work itself and not a danger which arises solely from the methods which the contractor adopts in performing the work (Lockowitz v Melnyk, 1 AD2d 138, 140 [1st Dept 1956]; May v 11 ½ E. 49th St. Co., 269 AD 180, 186 [1st Dept 1945], *affd* 296 NY 599 [1946]).

Activities recognized as inherently dangerous include blasting, reservoir construction (Chainani, 87 NY2d at 381), demolition along a public street (Janice, 201 Misc at 920-921), excavation adjacent to a building (Hixon v Congregation Beit Yaakov, 57 AD3d 328, 328 [1st Dept 2008]; Klein v Beta I LLC, 10 AD3d 509, 510 [1st Dept 2004]), and construction of a sidewalk bridge over an area frequented by pedestrians (Tytell v Battery Beer Distrib., 202 AD2d 226, 227 [1st Dept 1984]).

The engineer's statement shows that the work done in the Ehrenbergs' house was not inherently dangerous. The fact that the adjoining property was in fact damaged does not indicate that the job was inherently dangerous (see Bologna v Battisto, 36 Misc 2d 297, 300 [Albany County Ct 1962]). Merdjan describes the many steps taken to reduce risk and ensure safety. For instance, the contractors canvassed several options to strengthen the party wall, among them a complete reconstruction and pouring a reinforced concrete wall. The first was rejected because it would have meant evacuating defendants' house and the second because the party wall was too defective to support concrete. It was decided to replace brick with brick, tying new brick to existing brick. Where the damage was more extensive, steel beams were installed. As for the employer having notice, husband Ehrenberg shows that he did not know about any risk posed by the work before the contract was signed (see Rosenberg, 79 NY2d at 669). Regier points to nothing that raises an issue of fact about inherent danger.

Regarding a nondelegable duty, the inherently dangerous nature of the work that the principal hired the independent contractor to perform may impose a nondelegable duty upon the principal (Chainani, 87 NY2d at 381; De Stefano v Piccolomini, 29 Misc 3d 1229[A], 2010 NY Slip Op 52091[U], *6 [Sup Ct, Richmond County 2010]). The nondelegable duty exception may also be

invoked where a statute or regulation imposes a particular responsibility upon a principal (Chainani, 87 NY2d at 381).

The issue of the Ehrenbergs having a nondelegable duty will not be decided now, since it is not known whether defendants are liable for anything. Regier cites USAA Cas. Ins. Co. v Permanent Mission of the Republic of Namibia (681 F3d 103 [2d Cir 2012]), which determined that the employer of an independent contractor bore a nondelegable duty under Administrative Code § 3309.8 to maintain the structural integrity of a party wall. However, such regulation was not effective at the time that the Ehrenbergs' work was done.

Accordingly, it is

ORDERED that plaintiffs' motion and cross motion for summary judgment and defendant's motion for summary judgment are denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference in IAS Part 59, 71 Thomas Street, Room 103, on January 27, 2015, 2:30 PM.

This is the decision and order of the court.

Dated: December 17, 2014

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Debra A. James
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J.S.C.