Vigilant Ins. Co. v KNS Bldg. Restoring Inc.
2016 NY Slip Op 31596(U)
August 22, 2016
Supreme Court, New York County
Docket Number: 151694/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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VIGILANT INSURANCE COMPANY
A/S/O DEBRA ROSENFELD,

Plaintiff,

Index No.
151694/2015

DECISION and ORDER

- against -

KNS BUILDING RESTORATION INC.,

Mot. Seq. 002

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Vigilant Insurance Company ("Vigilant" or "plaintiff") brings this action against defendant KNS Building Restoration Inc. ("KNS" or "defendant") to recover damages arising from the allegedly negligent performance of façade and roofing work at a residential apartment building in Manhattan.

According to the complaint, KNS entered into a contract to perform façade and roofing work at 433 East 51st Street, New York, New York, a building in which plaintiff's subrogor, Debra Rosenfeld ("Rosenfeld"), resided as the owner and occupant of Apartment 12E (the "Rosenfeld premises"). Plaintiff alleges that KNS negligently "blocked drains on the building's roof causing large amounts of water to pour into the Rosenfeld premises." Plaintiff further alleges that Vigilant paid Rosenfeld the sum of $360,185.07 for the damages sustained as a result of the incident under an insurance policy (the "Policy") issued to Rosenfeld. Plaintiff seeks judgment against KNS in the amount of $360,185.07, together with interest, costs and disbursements.

Defendant now moves for an order, pursuant to CPLR 3211(a)(1), (a)(3) and (a)(7), dismissing the complaint on the grounds that plaintiff has not legal capacity to sue, that the complaint fails to state a cause of action, and that documentary evidence establishes a defense as a matter of law. In support, defendant submits the affidavit of Apostolos Malatos, Vice President of KNS, and the attorney affirmation of Jason S. Samuels, Esq., annexing (i) the complaint, dated February

10, 2015; and (ii) the agreement (AIA Document A101 – 2007) made on February 3, 2012 between KNS and the owner of the building, Southgate Owners Corp. ("Southgate") for "Repairs to Correct Defective Conditions Causing Leaks into Apartments 12C and 12E @ 433 East 51st Street, NYC" (the "Contract").

In opposition, plaintiff submits the attorney affirmation of John A. Serio, Esq., annexing: (i) a "Report of Property Damage or Accident" prepared by John Robertelli, resident manager, on July 17, 2012; (ii) NYC Department of Buildings' work permit data regarding the work performed by KNS; and (iii) a July 30, 2012 letter from The Walters Nixon Group, Inc., a third-party administrator for ProSight Specialty Insurance, KNS's insurance carrier.

Oral argument was heard on May 17, 2016. At oral argument, both parties acknowledged that plaintiff has withdrawn the Second Cause of Action for breach of contract. The only remaining claim is the First Cause of Action for negligence.

Defendant argues that it is entitled to dismissal of plaintiff's negligence claim on the following grounds. First, defendant contends that, under New York law, an apartment owner fails to state a claim for relief against a construction contractor for property damage from water infiltration unless it pleads and proves privity of contract. Defendant suggests that Vigilant's subrogated claim fails as a matter of law because Rosenfeld lacked privity of contract with KNS. In response to plaintiff's argument that KNS can still be liable because it "created an unreasonable risk of harm to others, or increased that risk," defendant contends that the narrow exception to which Vigilant refers does not apply to water infiltration property damage cases, citing *Bd. of Managers of A Bldg. Condominium v. 13th & 14th St. Realty, LLC* (1st Dept. 2014). Second, defendant argues that Vigilant's claims are barred by the waiver-of-subrogation provision in KNS's contract. Third, defendant argues that Vigilant failed to allege the existence or breach of a legal duty separate and apart from KNS's contractual obligations, and thus, the negligence cause of action is duplicative of the now-withdrawn claim for breach of contract. Finally, defendant argues that its motion to dismiss is not premature because Vigilant failed to demonstrate an evidentiary basis for its assertion that discovery will reveal further facts or evidence essential to opposing defendant's motion.

Plaintiff argues that it has the capacity to sue KNS for negligence without a contractual relationship because KNS owed Rosenfeld a duty of care and caused the defect that damaged Rosenfeld's apartment. Plaintiff further argues that defendant's motion to dismiss is premature because no discovery has taken place

and a question of fact exists as to whether KNS was negligent in the performance of its work.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. *See* CPLR § 3026. The court will "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994). To defeat a pre-answer motion to dismiss, the opposing party need only assert facts of an evidentiary nature, which "fit within any cognizable legal theory." *See Bonnie & Co. Fashions v. Bankers Trust Co.*, 262 A.D.2d 188, 189 (1st Dept. 1999).

Dismissal is warranted pursuant to CPLR 3211(a)(1) "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal citations omitted).

In assessing a motion under CPLR 3211(a)(7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Leon*, 84 N.Y.2d at 88 (citing *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 (1976)). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one." *Davis v. S. Nassau Communities Hosp.*, 26 N.Y.3d 563, 572 (2015) (internal citation removed).

In order to set forth a prima facie case of negligence, plaintiff is required to prove (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury. *See Merino v. New York City Transit Auth.*, 218 A.D.2d 451, 457 (1st Dept. 1996), *aff'd* 89 N.Y.2d 824 (1996) (citations omitted).

The existence and scope of a duty of care is a question of law for the courts entailing the consideration of relevant policy factors. *Church ex rel. Smith v. Callanan Indus., Inc.*, 99 N.Y.2d 104, 110–11 (2002); *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232 (2001) ("Courts traditionally fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability"). New York law is clear, however, that foreseeability alone does not give rise to a duty. *Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d 579, 586 (1994) ("[T]he boundaries of duty are not simply contracted or expanded by the notion of foreseeability[.]").

Ordinarily, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party. *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 226 (1990); *Martinez v. Nat'l Amusements, Inc.*, 50 A.D.3d 302, 302 (1st Dept. 2008) ("[I]t has long been the rule that the duty of care owed by a contractor does not extend to noncontracting third parties[.]"); *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 168, 159 N.E. 896, 899 (1928) (J., Cardozo) (opining that "liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty").

In certain circumstances, however, "parties outside a contract are permitted to sue for tort damages arising out of negligently performed or omitted contractual duties." *Palka,* 83 N.Y.2d at 586. The Court of Appeals has identified three sets of circumstances, as exceptions to the general rule, in which a duty of care to non-contracting third parties may arise out of a contractual obligation or the performance thereof.

First, "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk." *Church*, 99 N.Y.2d at 111 (internal citations omitted); *see H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160 (1928) (observing that tort liability to a third person may arise where "the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm").

Second, "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation." *Church*, 99 N.Y.2d at 111–12; *see Eaves Brooks*, 76 N.Y.2d at 226 (identifying "detrimental reliance" as a basis for a contractor's liability in tort to third parties, but refusing to extend liability to defendant companies that were under contract with property owner to inspect and maintain the sprinkler system where tenant sued for property damages caused by defective sprinkler).

Third, "where the contracting party has entirely displaced the other party's duty to maintain the premises safely." *Church*, 99 N.Y.2d at 12; *see Palka*, 83 N.Y.2d at 589 ("[W]hen a party contracts to inspect and repair and possesses the exclusive management and control of real or personal property which resulting in negligent infliction of injury, its assumed duty extends to noncontracting individuals reasonably within the zone and contemplation of the intended safety services.").

In these limited circumstances—launching a force or instrument of harm, detrimental reliance, and displacement of duty—the promisor may be subject to

tort liability to third persons for "failing to exercise due care in the execution of the contract." *Church*, 99 N.Y.2d at 111.

Plaintiff asserts that the first exception is applicable because KNS "create[d] an unreasonable risk of harm to others" while KNS was engaged affirmatively in discharging its contractual obligation to repair the roof. *Church*, 99 N.Y.2d at 111. As the Court of Appeals explained in *Espinal*, "a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury." *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 141–42 (2002). The *Espinal* Court noted that the "creation or exacerbation" test has the same criteria as *Moch*'s "launching a force or instrument of harm" formulation, and that the concepts have been applied interchangeably. *Id.* at 142; *see also* Restatement [Second] of Torts § 324A(a).

Defendant relies on *Bd. of Mgrs. of A Bldg. Condominium v. 13th & 14th St. Realty, LLC*, 121 A.D.3d 432 (1st Dept. 2014). In *Bd. of Mgrs. of A Bldg. Condominium*, the board of managers of a condominium and its residents sued those allegedly responsible for the design, manufacture, and installation of the condominium's curtain wall and windows, claiming that defects led to water leaking into their units. While the case involved water leaks, defendant's contention that the case stands for the proposition that "the exceptions in *Church* do not apply to water infiltration cases" reaches too far. The First Department simply noted the general rule that a contractor does not owe a duty of care to a noncontracting third party and stated: "There are three exceptions, but none is applicable here." Thus, the Court held that defendants owed no duty to plaintiffs and could not be liable for negligence.

Here, the record shows that the contractor may have performed its work in a manner that "create[d] or exacerbate[d] a hazardous condition" causing extensive water damage to Rosenfeld's apartment. *See Vega v. S.S.A. Props., Inc.*, 13 A.D.3d 298, 302 (1st Dept. 2004) (reinstating the complaint where the defendant-contractor "may have performed its work in a manner which created extensive lead dust and debris, exposing plaintiffs to a dangerous, toxic environment"); *Argentina v. 681 Fifth Ave. LLC*, 127 A.D.3d 440, 441 (1st Dept. 2015) (while defendant owed no contractual duty to plaintiffs regarding the performance of its work, it may nevertheless be liable to them in tort to the extent that its negligent performance of the duties that it performed, pursuant to its contract with defendant building owner, created a dangerous condition that injured plaintiff). In the July 17, 2012 report of property damage, the resident manager, John Robertelli, states that Rosenfeld's apartment "had water pouring in above her living room window" at 4:40 p.m. Robertelli immediately contacted Dimitri Malatos (the owner, vice

president, and onsite supervisor for KNS), who "had his men come back by 5pm and readjust the covers and clear the drains[;] the drain was covered with Blue insulation foam and plywood on top." Further, in the letter from the third-party administrator for KNS's insurance carrier, the administrator describes the water damage and circumstances surrounding the leaks in detail, reporting that Malatos "freely admits the damage in apartment 12E was caused by KNS' work."

Accepting the facts as alleged in the complaint as true and according plaintiff the benefit of every possible favorable inference, plaintiff has stated a claim that KNS "create[d] or exacerbate[d] a dangerous condition" by blocking drains on the building's roof while performing its contractual obligation to repair "defective conditions causing leaks into Apartments 12C and 12E." Accordingly, because defendant-contractor KNS may be liable in tort to plaintiff under an exception to the general rule that a contractor owes no duty of care to a non-contracting third party, plaintiff has stated a claim for negligence and dismissal prior to discovery is inappropriate.

Wherefore, it is hereby

ORDERED that defendant KNS Building Restoration's motion to dismiss plaintiff Vigilant Insurance Company's complaint is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: AUGUST 22, 2016

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EILEEN A. RAKOWER, J.S.C.