| **Gordon v 476 Broadway Realty Corp.** |
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| 2017 NY Slip Op 31230(U) |
| June 7, 2017 |
| Supreme Court, New York County |
| Docket Number: 152076/14 |
| Judge: Robert D. Kalish |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: IAS PART 21**

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ANTHONY GORDON and MARTINA GORDON,

Plaintiffs,

- against -

476 BROADWAY REALTY CORP., BOARD OF MANAGERS OF 476 CONDOMINIUM and DERMER MANAGEMENT INC.,

Defendants.

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Index No. 152076/14

Seq. 001

**Decision and Order**

**HON. ROBERT D. KALISH, J.:**

Motion by Defendants 476 Broadway Realty Corp., Board of Managers of 476 Condominium and Dermer Management Inc. for summary judgment, pursuant to CPLR 3212, dismissing the complaint, is denied as follows:

## BACKGROUND

Plaintiff Anthony Gordon alleges that, on March 11, 2011, he slipped and fell on water that had leaked into his cooperative apartment located at 476 Broadway, Apartment 10R in Manhattan. (Spiro Affirm. ¶ 3; Ex. A [Complaint] ¶¶ 37-38; Ex. C [Bill of Particulars] ¶¶ 1-2; Ex. E [Gordon EBT] 94:13-24, 112:09-117:13, 122:11-124:09, 129:21-140:19.)

Plaintiff testified that he and his wife first acquired the apartment in 1998 and began residing there in 2000. (Gordon EBT at 45:06-09, 284:05-285:14.) Plaintiff states that before he and his wife moved into the apartment in

October 2000, the apartment was essentially an "empty shell" with no walls and that he and his wife paid a contractor roughly $600,000 to $700,000 to renovate the apartment. (Gordon EBT 285:04-321:10.)

Plaintiff asserts that he had complained to Defendants about ongoing leaks since he moved into the building and that it was generally understood that these leaks resulted from the inadequate waterproofing of the exterior wall on the north side of the building. (*See* Bill of Particulars ¶¶ 3-6; Gordon EBT at 18:03-19:16, 199:07-202:19, 217:16-220:16; *see also* Cheverie Opp. Affirm., Ex. A [2010 Emails].) Plaintiff further asserts that these ongoing leaks made conditions "unlivable" and he began withholding payment of maintenance fees. (Gordon EBT at 18:03-19:16.) Plaintiff states that Defendants sued him in Housing Court for said unpaid maintenance fees. (*Id.*)[1]

Defendants admit that they—as the building owner—own the exterior walls and that they received complaints from Plaintiff concerning leaks in his apartment from roughly the time that Plaintiff and his wife moved in. (Spiro Affirm. ¶¶ 3, 14-17.) However, Defendants contend that the ongoing leaks resulted from Plaintiff's contractors removing waterproofing as part of renovations to Plaintiff's apartment between 1998 and 2000. (*Id.*) Defendants argue in their memorandum of law that,

[1] Defendants discontinued the Housing Court proceeding, and instead evicted Plaintiff at a shareholders' meeting. (*See Gordon v. 476 Broadway Realty Corp.*, 2014 N.Y. Slip Op. 31291[U] [Sup Ct, NY County 2014], *affd* 129 AD3d 547 [1st Dept 2015].)

during the renovation work on Plaintiff's apartment in 2000, the building superintendent Jesus Ramirez "observed that the waterproofing layer was being removed and that he warned plaintiff Anthony Gordon at the time of the renovation that it was improvident to remove the waterproofing protection and that water leaks would occur." (Def. Mem at 6-7; *see also* Spiro Affirm. ¶ 14.)

Defendants contend that they spent roughly $360,000 on renovating and waterproofing the exterior wall in an effort to remedy the leaks.[2] (Spiro Affirm. ¶¶ 14-17; Spiro Reply Affirm. ¶¶ 4-11; Oral Arg. Tr. at 13:13-14:07.) Defendants further contend that Plaintiff refused them access to his apartment, thereby preventing them from inspecting and remedying any conditions within the apartment that may have been causing the leaks. (*Id.*) Defendants further state that no other apartment experienced any water leaks. (Spiro Reply Affirm. ¶ 10.) In addition, Defendants state that it was only after being allowed into Plaintiff's apartment to inspect and after doing extensive exterior renovation work, that Defendants learned that the leaks were caused by Plaintiff's prior renovation work. (Spiro Affirm. ¶ 17; Spiro Reply Affirm. ¶ 11.)

[2] However, Defendants do not clarify when these renovations were performed. In addition, aside from Defendants' counsel's conclusory statement that it was his "understanding" that these monies were spent on remediation efforts exclusively for Defendant's apartment, Defendants fail to rule out that these monies were spent to remediate leak conditions affecting other apartments or locations in the building. (*See* Oral Arg. Tr. at 13:13-14:07.)

Defendants further assert that a majority of Plaintiff's fellow shareholders voted to evict Plaintiff due to Plaintiff's lack of cooperation, refusal to pay maintenance fees, and based on the shareholders' conclusion that Plaintiff caused the leaks. (Spiro Affirm. ¶ 6; Spiro Reply Affirm. ¶¶ 6-7.) Plaintiff brought a separate proceeding in Supreme Court, seeking a declaration that the termination of his tenancy was illegal and for an order barring enforcement of the termination. (*Gordon v. 476 Broadway Realty Corp.*, 2014 N.Y. Slip Op. 31291[U] [Sup Ct, NY County 2014], *affd* 129 AD3d 547 [1st Dept 2015].) Plaintiff argued that the shareholders' determination was made in bad faith and without cause. (*Id.*) Specifically, Plaintiff argued that the shareholders' voted to evict him in retaliation for his complaints about the leaks. (*Id.*)

The court handling the declaratory judgment matter granted Defendants summary judgment, dismissing Plaintiff's claims. The court indicated that although "there are disputed facts concerning which party was responsible for which delays with respect to the access issue, it does not find evidence of bad faith on 476 Broadway's part." (*Id.*) As such, the court deferred to the shareholders' determination under the business judgment rule.

## WRITTEN ARGUMENT

In the instant matter, Defendants move for summary judgment, arguing that Plaintiff cannot establish a prima facie case of negligence against Defendants.

(Def. Mem. at 5.) Specifically, Defendants argue that they did not cause the chronic leaks in Plaintiff's apartment. (Def. Mem. at 5-6.)

Defendants assert that the chronic leaks were caused by the "substantial renovations" undertaken by Plaintiff between 1998 and 2000 in which Defendants allege that "the waterproofing layers between the walls and the outside brick walls were removed and never replaced." (Def. Mem. at 5-6.) Therefore, Defendants argue, in effect, that Plaintiff's injuries were solely a result of Plaintiff's own negligence.

Defendants further argue that Plaintiff's instant action is precluded pursuant to the doctrines of equitable estoppel, collateral estoppel and the law of the case. (Def. Mem. at 6-7.) Specifically, Defendants argue that the court in the eviction proceeding "found *inter alia* that the leakage problem—the issue in the within action, was caused by the plaintiffs as a result of the initial renovation work conducted by the plaintiffs during which the waterproofing layer in the walls of the apartment were removed in 2000 and never replaced." (Def. Mem. at 6-7.) As such, Defendants assert that this Court should award summary judgment in their favor, dismissing the complaint.

In opposition, Plaintiff argues that Defendants clearly had actual notice of the leaks in his apartment. Plaintiff further contends that there is no evidence that his contractors removed any waterproofing from the walls in his apartment.

Moreover, Plaintiff argues that regardless of whether his contractors may have removed any waterproofing, Defendants still had a duty to repair the leaks in his apartment. (Chevrie Opp. Affirm. ¶¶ 13-16, 30-31.) Finally, Plaintiff contends that the prior landlord-tenant proceeding has "no bearing" on the personal injury claims he now brings. (*Id.* ¶ 30.)

In reply, Defendants reiterate their arguments that Plaintiff caused and created the leak conditions that led to the Plaintiff's injuries, and that Plaintiff's relief is precluded by the findings of the court in his eviction proceeding. (Spiro Reply Affirm. ¶¶ 5-10.)

## ORAL ARGUMENT

At oral argument, Defendants argued that they did not cause and create the alleged defect, and that Plaintiff refused Defendants access to his apartment, thereby preventing them from ameliorating the leaks. Defendants reiterated their argument that Plaintiff moved into the apartment in 1998 and had extensive renovations done, which included removal of the waterproofing layers, which Defendants argue caused the leaks. (Oral Arg. Tr. at 3:22-4:06.) Defendants further argued that they spent between $300,000 to $600,000 in renovations to the exterior walls, attempting to remedy the leaks. (Oral Arg. Tr. at 13:13-14:07.) Defendants stated that—while there may have been leaks in other apartments over the years—it was their understanding that this money was only spent for the

purposes of remedying the leaks in Plaintiff's apartment. (*Id.*) Defendants state that they were ultimately prevented from fixing the leaks before the accident because Plaintiff prevented them from entering his apartment and fixing the leaks from the inside. (*Id.*)

Defendants further argued that the prior eviction proceeding addressed issues intertwined with issues in the instant action—specifically, that the court found there was an ongoing leak and that Plaintiff prevented Defendants from accessing his apartment—and, as such, that that was the basis for the eviction. (*Id.* at 5:20-7:11.) As such, Defendants argued that the eviction court determined that Plaintiff was responsible for the leak conditions, and that this Court should not permit Plaintiff to relitigate that issue, pursuant to the doctrine of collateral estoppel. (*Id.* at 10:23-11:10.)

Defendants conceded that there was no indication in the eviction proceeding decision that Plaintiff refused access to Defendants *prior* to his March 11, 2011 accident. (Oral Arg. Tr. at 26:23-30:04.) Defendants further conceded that the eviction court did not mention the date for when Defendants first requested and were refused access to Plaintiff's apartment. (*Id.*) Separate from the eviction proceeding, Defendants could not independently point to a date when they first requested access and were refused.

Despite Defendants' claims that Mr. Ramirez witnessed Plaintiff's contractors remove waterproofing from Plaintiff's apartment, Defendants were unable to point to the page in Mr. Ramirez's deposition where he testified that he witnessed such an event. (*Id.* at 3:22-5:19.) Neither were Defendants able to point to other sources of evidence to uphold these allegations regarding waterproofing removal, aside from their allegations that the eviction court somehow found that Mr. Ramirez's supposed observations happened as a matter of fact.

Defendants assert that they submitted expert affidavits in the prior eviction proceeding, which determined that the source of the ongoing leaks resulted from plaintiff's renovations. (*Id.* at 6:13-9:11.) Defendants assert that the eviction court adopted these determinations in upholding Plaintiff's eviction. (*Id.*)

In opposition, Plaintiff reiterated his argument that there is no dispute that Defendants had actual notice of the ongoing leaks in his apartment, and failed to correct these conditions. Plaintiff also disputed the assertion that Plaintiff caused the leaks and prevented Defendant from fixing the leaks. Specifically, Plaintiff stated that there was no evidence that he had refused Defendants access to inspect and repair the leak conditions. (*Id.* at 29:14-30:08.) Instead, Plaintiff pointed to a November 2010 email from building representative Daniel Dermer to Plaintiff, purporting to show that Defendants had access to the apartment prior to the accident. (*Id.* 16:02-19:05.) In addition, Plaintiff stated his contention that Mr.

Ramirez had received complaints about leaks in other apartments. (*Id.* at 20:05-15.) Plaintiff reiterated that, regardless of whether Plaintiff created the leak conditions, Defendants still owed a duty to repair such conditions. (20:20-24.)

Plaintiff argued in sum and substance that the eviction court could not have found that Plaintiff was wholly at fault in causing the leaks because there was ample proof that Plaintiff had in fact allowed Defendants access to his apartment.

## ANALYSIS

### I. Summary Judgment Standard

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) [internal quotation marks and citation omitted].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) If there is any doubt as to the existence of a triable issue of fact, summary judgment must be

denied. (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

**II. Defendants Fail to Establish a Prima Case for Summary Judgment.**

In the instant action, there is no disppute that Defendants had actual notice of leaks in Plaintiff's apartment via Plaintiff complaining about said leaks. (Spiro Affirm. ¶¶ 3, 14-17.) Further, there is no dispute that Defendants own the exterior walls. (Spiro Affirm. ¶ 3.) The dispute—as argued in the papers and at oral argument—is who was responsible for remedying said leaks.

Defendants argue that Plaintiff was responsible for fixing the leaks because Plaintiff's contractors allegedly removed and never replaced the waterproofing between the interior walls and the exterior brick walls around 2000; and that, therefore, plaintiff would be solely responsible for any injuries that he sustained due water entering his apartment. (Def. Mem. at 5-6.) However, Defendants submit no admissible evidence to support this allegation. Notably, Defendants' assertions that Mr. Ramirez witnessed the removal of the waterproofing and advised Plaintiff against said removal lack citations to Mr. Ramirez's deposition or other sources.[3] (*See e.g.* Spiro. Affirm. ¶ 16; Def. Mem. at 7; *see also* Oral Arg. Tr. at 3:22-5:19.)

[3] The court in the eviction proceeding mentioned that Defendants submitted "the affidavit of the superintendent who asserts that he observed that the waterproofing layer was being removed and warned plaintiff Anthony Gordon at that time of the renovation that it was improvident to remove the waterproofing protection and that water leaks would occur." (*Gordon v. 476 Broadway Realty Corp.*,

In addition, there is no proof that any of the alleged removal of waterproofing by Plaintiff's contractors caused the leaks which apparently started sometime after Plaintiff moved into his apartment in 2000. Moreover, even if Defendants did submit some admissible proof that Plaintiff's contractors contributed to the chronic leak conditions, Defendants submit no proof, nor cite to any authority, to support their contention that such actions would absolve them of liability as a matter of law.

Defendants also assert that Plaintiff refused them access to his apartment, thereby preventing them from inspecting and remedying any conditions within the apartment that may have been causing the leaks. (Spiro Affirm. ¶¶ 14-17; Spiro Reply Affirm. ¶¶ 4-11.) However, Defendants fail to pinpoint when they first requested access to Plaintiff's apartment and were first refused. (*See* Oral Arg. Tr. at 26:23-30:04.) Assuming, arguendo, that Defendants did request access and Plaintiff refused, such refusal would only have bearing if it occurred *before* Plaintiff's accident. Defendants provide no proof that this alleged request and refusal occurred before Plaintiff's accident. In fact, Plaintiff submits a November 2010 email chain between himself and the management company's president, Daniel Dermer, which suggest that Plaintiff granted Defendants – at least some

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2014 N.Y. Slip Op. 31291[U] [Sup Ct, NY County 2014], *affd* 129 AD3d 547 [1st Dept 2015].) However, that court never stated that it adopted the statements in said affidavit as true. Neither have Defendants submitted a copy of this affidavit. Rather, Defendants appear to be asking this Court to adopt that affidavit as true based on their reference and the eviction court's reference to it.

level of – access to inspect the leakage conditions in his apartment. (Cheverie Opp. Affirm., Ex. A [2010 Emails].) Moreover, there does not appear to be any evidence to support that Defendants spent $360,000 in remediation efforts *exclusively* on Plaintiff's apartment, other than Defendants' counsel's conclusory statement that this was his "understanding." (Oral Arg. Tr. at 13:13-14:07.)

As such, Defendants fail to make out a prima facie case, and the sufficiency of Plaintiff's opposition is not relevant.

**III. Plaintiff is Not Estopped from Bringing the Instant Action Based Upon the Prior Eviction Enforcement Proceeding.**

The doctrine of collateral estoppel bars the relitigation of issues actually and necessarily previously decided in another action. A party invoking the doctrine must show: 1) an identity of issues which were necessarily decided in the prior action that are decisive in the present action; and 2) a full and fair opportunity by the party against whom collateral estoppel is being invoked to have contested the issue previously decided and now claimed to be controlling. (*Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 455 [1985]; *Vera v Low Income Mktg. Corp.*, 145 AD3d 509, 510 [1st Dept 2016].) In addition, collateral estoppel may not be invoked where the party seeking to invoke it previously obtained relief under a lower or "more lenient" standard of proof. (*Balcerak v County of Nassau*, 94 NY2d 253, 261 [1999].)

The issue before this Court in the instant action is different from the issues addressed in the eviction proceeding. In the instant action, the ultimate issue is whether Defendants are liable for causing Plaintiff's injuries under a theory of negligence. In contrast, the eviction proceeding concerned a question of corporate governance: whether the shareholders' vote to evict Plaintiff was a legal exercise of corporate discretion under the business judgment rule.

The court in the eviction proceeding ruled that "[i]n the absence of sufficient proof of a retaliatory motive behind 476 Broadway's determination, this court must defer to 476 Broadway's decision under the business judgment rule." (*Gordon v. 476 Broadway Realty Corp.*, 2014 N.Y. Slip Op. 31291[U] [Sup Ct, NY County 2014], *affd* 129 AD3d 547 [1st Dept 2015].) Said ruling was confined to finding that Plaintiff failed to present sufficient evidence of bad faith on the part of the cooperative to overcome the strong deference that courts traditionally afford to residential cooperatives on eviction decisions. (*See generally 40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 153 [2003].)

Contrary to Defendants' assertions, nowhere in that decision does it state that "the leakage problem . . . was caused by the plaintiffs as a result of the initial renovation work conducted by the plaintiffs during which the waterproofing layer in the walls of the apartment were removed in 2000 and never replaced." (Def. Mem. at 6-7.) The eviction court's determination that "there was competent

evidence of plaintiffs' objectionable conduct to sustain such a vote" (*Gordon*, 2014 N.Y. Slip Op. 31291[U]) does not constitute an affirmative finding that Defendants were not liable as to the leaks that allegedly caused Plaintiff's injuries.[4]

Because Defendants' argument that the law of the case doctrine bars the instant action is based on the same flawed assumptions about the findings in the eviction proceeding, this argument is likewise unavailing. This Court is not re-examining issues previously litigated and decided in the eviction proceeding. This Court is examining claims of negligence between the parties that have never been litigated.

As such, there are material issues of fact for trial, including, but not limited to, the cause of the leaks in Plaintiff's apartment and which party (or parties) were responsible for remedying the leaks. Furthermore, this Court finds that Plaintiff is not estopped from bringing the instant action.[5]

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[4] This Court recognizes that the eviction court dismissed Defendants' counterclaims against Plaintiff that "involve[d] the alleged removal and concealment of a waterproofing layer which occurred in 1998 or 2000." (*Id.*) Said dismissal was based on the statute of limitations, and was not a determination of fault as to either of the parties for violating the lease.

[5] The Court notes that Defendants also claim that the instant action is barred by the doctrine of equitable estoppel. (*See* Def. Mem. at 6-7.) However, Defendants do not make any substantive arguments for the application of this doctrine, and there appears to be no basis whatsoever for its application.

## CONCLUSION

Accordingly, it is hereby ordered that Defendants' 476 Broadway Realty Corp., Board of Managers of 476 Condominium and Dermer Management Inc.'s motion for summary judgment is denied.

**Dated:** June 7, 2017
**New York, New York**

**ENTER:**

HON. ROBERT D. KALISH
J.S.C