Matter of 370 Lexington, LLC v Consolidated Edison Co. of N.Y., Inc.
2017 NY Slip Op 31504(U)
July 14, 2017
Supreme Court, New York County
Docket Number: 768000/08
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

IN RE: STEAM PIPE EXPLOSION AT 41st STREET AND LEXINGTON AVE — Index no. 768000/08

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370 LEXINGTON, LLC, — Index no. 113009/07

Plaintiff,

Motion seq. nos. 001, 002

-against-

DECISION AND ORDER

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and THE CITY OF NEW YORK,

Defendants.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., — Index No. 590515/2008

Third-Party Plaintiff,

-against-

TEAM INDUSTRIAL SERVICES, INC., and THE CITY OF NEW YORK,

Third-Party Defendants.

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This negligence action arises from plaintiff's claim that it is entitled to damages for economic loss it sustained as a result of a steam pipe explosion that caused property damage to a

building it owned. It is conceded that plaintiff has been compensated by insurance proceeds.

In motion sequence 001, defendant City moves pursuant to CPLR 3211(a)(7) for an order dismissing plaintiff's third amended complaint (complaint), all third-party claims, and all cross claims as against it. In motion sequence 002, defendant Con Ed moves pursuant to CPLR 3211(a)(7) for an order dismissing the complaint. By cross motion, third-party defendant Team cross-moves pursuant to CPLR 3211(a) for an order dismissing the complaint, the related third-party complaint, and the related cross claims as against it. Plaintiff opposes the motions and cross motion. The motions are consolidated here for decision.

I. BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff previously owned and operated the building located at 370 Lexington Avenue, at the southwest corner of Lexington Avenue and 41st Street in Manhattan. The building contains "approximately 300,000 square feet of commercial office space, with approximately 100 tenants occupying 27 floors." (Con Ed's exh. 1, complaint, ¶ 14).

On July 18, 2007, a steam pipe exploded at the intersection of 41st Street and Lexington Avenue. Plaintiff describes the explosion as sending, "upon information and belief, a plume of 400-degree steam, and many thousands of pounds of rocks, mud, flame, asphalt, concrete, and toxic asbestos, hundreds of feet into the air . . . ." (*Id.*, ¶ 17). The steam pipe is owned and operated by Con Ed. Con Ed had contracted with Team to perform leak sealing on the pipe.

The steam pipe had been installed close to a City sewer system, and it is alleged that the sewer was leaking on Con Ed's "steam pipe which failed, which caused or contributed to the Steam Explosion of July 18, 2007." (Con Ed's exh. 3, Allianz Global Risks US Insurance Company's amended complaint, ¶ 23).

After the explosion, plaintiff filed claims with its insurers, Allianz Global Risks US Insurance Company and Illinois Union Insurance Company (Illinois Union). Based on their payments to plaintiff, the insurance companies brought subrogation actions against Con Ed and City. In one of the actions, Illinois Union alleged that plaintiff had submitted a claim to it for reimbursement under the subject policy "for the full amount of the asbestos clean-up, remediation and damages" sustained as a result of the explosion and that it reimbursed plaintiff over $5 million pursuant to its obligations under the insurance policy. (Con Ed's exh. 4, Illinois Union's complaint, ¶ 37).

On October 17, 2008, plaintiff served the instant complaint on Con Ed and City, alleging that, as a result of defendants' conduct, the building was damaged. Among the extensive damage alleged, plaintiff alleges that most of the offices from floors 1 to 14 on the northeast side of the building were destroyed, causing a two-day suspension of electrical services and a week-long suspension of water. Given the damage, plaintiff had to hire various contractors and specialists to assess the damage and repair the building. It seeks compensation beyond the insurance proceeds, in the form of a lost business opportunity and the diminution of the building's value.

Plaintiff also alleges that the asbestos released by the explosion contaminated the building and thereby stigmatized it. According to plaintiff, "whereas prior market interest in acquiring the Building makes clear that it was worth at least $180,000,000 before the Explosion, as a result of the Explosion, Plaintiff sold the Building in or about August 2008, for only $155,000,000." (Complaint, ¶ 28).

In its response to defendants' demand for a bill of particulars, plaintiff maintains that, as a result of the explosion, it could not sell the building which had been on the market and had

attracted interest and offers. (Con Ed's exh. 8, Pl.'s responses and objections, at 5). It asserts that it marketed and/or listed the building for recapitalization with a sales price of $180,000,000, the market value at the time, argues that the building's value was diminished due to the explosion and subsequent economic downturn, and that it sold the building for "significantly less" than it would have had sold it had the explosion not occurred. (*Id.*).

According to plaintiff, it took approximately one year to repair and restore the building to its pre-explosion condition (*id.* at 11), although it is not claiming property damage or lost income. (*Id.* at 7). Thus, plaintiff's sole claim is for the diminution in value of the building in the amount of $25 million, representing the difference between the building's market value ($180,000,000) immediately before the steam pipe explosion on July 18, 2007, and the market value "after repairs were completed and at the time of the sale ($155,000,000) in September 2008." (*Id.* at 6-7).

II. CONTENTIONS

Plaintiff's first cause of action is for negligence as against Con Ed. Among other things, plaintiff contends that Con Ed owed it a duty to provide safe steam pipes and to repair faulty ones, and claims that Con Ed had actual and constructive notice of the defective pipe and could have prevented the explosion by replacing it. It also argues that absent its own negligence, Con Ed must be held liable for the explosion given its exclusive control over the steampipe. Plaintiff seeks the same damages in relation to this cause of action as it seeks with all of the other causes of action, namely, for a lost business opportunity and the diminution in the building's value. (Complaint, ¶ 182).

In its second cause of action, plaintiff alleges that City was negligent for failing to

exercise reasonable care in maintaining its underground facilities in and around the pipe.

In the third cause of action, plaintiff alleges that Con Ed was grossly negligent, that it engaged in willful, wanton, and reckless conduct when it failed to implement adequate safeguards that could have prevented the explosion, and seeks punitive damages.

In the fourth cause of action, plaintiff contends that City was grossly negligent, and engaged in willful, wanton, and reckless conduct when it failed to maintain or repair its underground facilities properly. It claims entitlement to punitive damages as a result of City's conduct, which it alleges reflected a "conscious disregard" of plaintiff's rights and of the risk to public safety. (Complaint, ¶ 206).

In the fifth and sixth causes of action, for public nuisance against Con Ed and City, plaintiff claims that it is entitled to punitive damages because they created the public nuisance.

In its seventh and eighth causes of action, plaintiff alleges that, by its acts and omissions, Con Ed and City interfered with its right to use and enjoy its property. As a result of creating this alleged private nuisance, plaintiff seeks punitive damages.

Defendants' arguments for dismissal coalesce in the claim that as compensable damage is an essential element of every cause of action alleged in the complaint, absent entitlement to recovery for additional damages, the complaint must be dismissed. They observe that plaintiffs conceded that the building was completely restored to its pre-loss condition and that it was compensated for its lost business income. Thus, according to defendants, plaintiff may not recover for its additional outstanding claim for a diminution of the building's market value as it has already been fully compensated through the insurance proceeds.

Even if plaintiff were able to recover for the diminution in market value, defendants

maintain that plaintiff's calculation is wrong, and contend that the value must be calculated by subtracting the value immediately after the explosion from the value immediately before the explosion, whereas plaintiff relies on the value in August 2008, over a year after the explosion.

Defendants also argue that although plaintiff frames its claim as one for a lost business opportunity, such damages are duplicative of the claim for a diminution in market value, and in any event, observe that plaintiff may not plead that it had a business opportunity to sell the building when no contract for sale was ever executed just before the explosion.

Plaintiff opposes defendants' motions and argues that it has pleaded a nonduplicative cause of action for damages for a lost business opportunity, and that the building's pre-explosion value may be offered as evidence of such damages because it eventually sold the building at a $25 million loss. According to plaintiff, the explosion delayed the sale of the building because it had to wait until the building was repaired before placing it on the market. As its damages stem directly from defendants' negligence, plaintiff maintains, it should be able to offer proof of damages as "the valuation of damages is largely a question of fact . . . ." (Pl.'s Mem. at 16).

In support, plaintiff provides the affidavit of an expert in the sale, acquisition, and recapitalization of Manhattan properties, who opines that based on comparable sales, the building could have sold in 2007 for $187 million, and if the explosion did not occur, the building would have easily sold in 2007. (Affidavit of Scott Latham, dated Aug. 10, 2016, ¶¶ 3, 7).

Plaintiff also offers the affidavit of the president and founding principal of one of its members, who states that in 2007, plaintiff placed the building on the commercial real estate/capital market and sought investors to enter into a joint venture fee simple ownership of the building, or "recapitalization." (Affidavit of Raymond Chalme, dated Aug. 9, 2016, ¶ 10).

Chalme recounts that a valuation model was created that valued the building at $175 to 180 million, resulting in five "intent/joint venture proposals of 100% membership interest at the $180 million valuation . . . ." (*Id.*, ¶ 13). On June 19, 2007, after the latest offer of intent expired, plaintiff took the building off the market based on a decision to maximize profit by remarketing it for sale as opposed to recapitalization. (*Id.*, ¶ 15). He moreover, asserts that just before the explosion, the building was being prepared for being placed back on the market in July 2007 or soon thereafter, and that although plaintiff was indemnified for property damage, asbestos contamination, and lost business income, the insurance proceeds did not "make it whole" with respect to the lost sale opportunity in 2007. (*Id.*, ¶ 18). As a result of the explosion, the sale of the building had to be postponed.

III. ANALYSIS

A. Dismissal

On a motion to dismiss pursuant to CPLR 3211, "the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." (*Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007]). Pursuant to CPLR 3211(a)(7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Leon v Martinez*, 84 NY2d 83, 88 [1994] [internal quotation marks and citations omitted]). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." (*Silverman v Nicholson*, 110 AD3d 1054, 1055 [2d Dept 2013] [internal quotation marks and

citation omitted]).

B. Plaintiff's alleged damages

Although property damages "incurred as a result of a defendant's negligence may be measured in different ways" (*Fisher v Qualico Contr. Corp.*, 98 NY2d 534, 539 [2002]), "the proper measure of damages for permanent injury to real property is the lesser of the decline in market value and the cost of restoration" (*Jenkins v Etlinger*, 55 NY2d 35, 39 [1982]). Evidence of the lesser amount of damages presented by a defendant "ensures that a plaintiff receives no more than is reasonably necessary to remedy fully the injury while avoiding uneconomical efforts." (*Fisher,* 98 NY2d at 539 [internal quotation marks and citations omitted]).

Pursuant to CPLR 4545 (a), which applies to claims for property damage, damages must be reduced by amounts received from certain collateral sources, such as insurance.

Here, it is undisputed that, after the explosion, plaintiff received insurance proceeds for the damages resulting from the explosion, that the building was restored to its pre-accident condition, and that plaintiff does not seek damages for lost income from the building's operation. Rather, its sole claim is for diminution of market value.

Having been compensated for the cost of restoration, plaintiff may not recover for damages for diminution in market value. (*Fisher*, *supra*). The Court in *Fisher* observed that negligent defendants obtain no windfall by allowing them to avoid liability where an owner has insured against the loss of real property. "Rather, a defendant still may be held responsible in subrogation to the homeowner's insurer." (*Id.*; *see eg Parkoff v Stavsky*, 109 AD3d 646, 648 [2d Dept 2013] [complaint dismissed as repairs fully restored vehicle to pre-accident condition, and only basis of claim for difference in value immediately before and immediately after accident

was that after repair, resale value diminished because of accident]).

Milliken & Co. v City of New York is significantly distinguishable as there, the plaintiffs had not already recovered for lost business income and repairs, and did not also seek to recover for a diminution in market value. (210 AD2d 49, 51 [1st Dept 1994], *affd as mod* 84 NY2d 469).

Moreover, neither plaintiff's claim for lost business opportunity nor its identical claim for diminution in market value claim have been adequately pleaded. According to plaintiff, it did not have a buyer, and the property was not on the market at the time of the explosion. Consequently, there was no business opportunity to be lost, and it is speculative that the building would have been sold and for what amount. In any event, although plaintiff argues that factual issues concerning the amount of damages are for a jury to resolve, for purposes of this motion to dismiss, the actual amount is not relevant.

C. Plaintiff's causes of action for negligence

To prove a cause of action for negligence, the plaintiff must establish: "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof." (*Rodriguez v Budget Rent-A-Car Sys., Inc.*, 44 AD3d 216, 221 [1st Dept 2007] [internal quotation marks and citation omitted]). "[A]ctual damages are an essential element of a negligence action." (*Igen, Inc. v White*, 250 AD2d 463, 465 [1st Dept 1998]).

Again, having been compensated for its loss, plaintiff is not entitled to any additional recovery, and as plaintiff may not plead that it is entitled to additional damages, it may not plead a viable claim for negligence. Although plaintiff does not address in its opposition the allegations advanced in support of its claim based on *res ipsa loquitur*, there is no such cause of action. (*See eg States v Lourdes Hosp.*, 100 NY2d 208, 213 [2003] [*res ipsa loquitur*,"an

evidentiary doctrine," "does not relieve a plaintiff of the burden of proof"]).

Absent any allegation or evidence of "moral culpability or evil and reprehensible motives," plaintiff cannot claim entitlement to punitive damages. (*See Walker v Sheldon*, 10 NY2d 401, 404 [1961]).

D. Public and private nuisance claims

Compensable damage is also an essential elements of plaintiff's causes of action for public and private nuisance. (*See eg 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 292 [2001] ["A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large"]; *see also Guzzardi v Perry's Boats*, 92 AD2d 250, 254 [2d Dept 1983] [to sustain a claim for private nuisance, in which "liability is based upon the interference with the use or enjoyment of land . . . , the plaintiffs must demonstrate their entitlement to monetary damages or injunctive relief").

As plaintiff cannot plead entitlement to damages, it likewise cannot establish causes of action for public or private nuisance. Moreover, plaintiff is unable to plead a claim for public nuisance absent any evidence that it is the only plaintiff who suffered harm from defendants' conduct. In its complaint, plaintiff alleges that numerous buildings and other people were affected by the explosion.

IV. CONCLUSION

For all of these reasons, the third amended complaint is dismissed in its entirety, and thus, the third-party action is dismissed, absent any basis for the cross claims. (*See eg Turchioe v AT&T Communications*, 256 AD2d 245, 246 [1st Dept 1998] [third-party actions and all cross claims dismissed as necessary consequence of dismissal of complaint]).

Accordingly, it is hereby

ORDERED, that the motion (sequence 001) of the City of New York to dismiss plaintiff's third amended complaint, all third-party claims, and all cross claims as against it is granted, and the third amended complaint, third-party claims, and cross-claims are dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED, that the motion (sequence 002) of Consolidated Edison Company of New York, Inc., to dismiss plaintiff's third amended complaint is granted, and the third amended complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED, that the cross motion of Team Industrial Services, Inc., to dismiss plaintiff's third amended complaint, the third-party complaint, and any cross claims as against it, is granted, and the third amended complaint, third-party complaint and cross claims are dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE

Dated: July 14, 2017
New York, New York