Slote v 200 W. 58th St.
2018 NY Slip Op 30693(U)
April 19, 2018
Supreme Court, New York County
Docket Number: 150346/16
Judge: Paul A. Goetz

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Paul A. Goetz, JSC
Justice

PART 47

Slote

INDEX NO. 150346/16

-v-

MOTION DATE

200 West 58th Street

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause – Affidavits – Exhibits ____ No(s). 1

Answering Affidavits – Exhibits ____ No(s). 2+3

Replying Affidavits ____ No(s). 4

Upon the foregoing papers, it is ordered that this motion is

From 1985 to 2012, plaintiffs lived in a large rent stabilized penthouse apartment overlooking Central Park. The apartment included a large glass enclosed living area which comprised a large part of the apartment. According to plaintiffs, the landlord defendant has sought to wrongfully evict plaintiffs from this apartment. Towards that end, the landlord defendant brought two housing court proceedings against plaintiffs. The first proceeding was dismissed on the merits and the second proceeding was ultimately settled by stipulation dated September 7, 2012, which is the basis of this lawsuit. Under the terms of this stipulation, plaintiffs agreed to temporarily relocate to another apartment in the building while the landlord demolished and replaced the terrace enclosure. Although the stipulation provides that the project would take approximately six months, the terrace enclosure has not been rebuilt. According to the landlord defendant, it is impossible to obtain permission from the Department of Buildings to rebuild the enclosure because it was built illegally in the first place. The landlord brought two motions to vacate the stipulation on this basis in housing court and the court denied both motions, finding that the landlord failed to make a genuine attempt to resolve the DOB's objections to its permit application.

Plaintiffs now bring this action against the landlord, claiming that the landlord fraudulently induced plaintiffs to enter into the stipulation by mispresenting to them that: (a) the terrace enclosure needed to be rebuilt because it was causing leakage into the apartment and (b) the terrace enclosure would be rebuilt after it was demolished. Plaintiffs have also brought claims against defendants Charles Marino and Braxton Engineering ("Braxton Defendants"), the engineers who initially represented that the enclosure needed to be demolished and who submitted the permit applications to the DOB to rebuild the enclosure. Plaintiffs claim that the Braxton Defendants conspired with the landlord to evict plaintiffs from their apartment by falsely reporting that it would be necessary to demolish the enclosure and by failing to obtain DOB approval to rebuild the enclosure.

SUBMIT ORDER IN ACCEPTABLE FORM REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: ____ ____, J.S.C.

see page 4

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

(1) of (4)

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Paul A. Goetz, JSC
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Upon the foregoing papers, it is ordered that this motion is

The Braxton Defendants now move for summary judgment seeking dismissal of plaintiffs' claims. The Braxton Defendants argue that they cannot be held liable because it was the landlord, and not them, that was responsible for replacing the enclosure. They argue that their sole involvement with the building was to perform Local Law 11 inspections, which included inspecting the plaintiffs' apartment to determine if the enclosure needed to be demolished in order to make repairs due to water leakage into the apartment. The Braxton Defendants claim that their recommendation to the landlord for removal of the enclosure was not false and was based on the condition of the property. In support, they submit an affidavit from defendant Marino, the engineer who performed the inspection, who states that his recommendation was based on his observations and is consistent with a prior recommendation from another engineer. In response, plaintiffs point out that the Braxton Defendants' letter to the landlord recommending demolishion of the enclosure due to water leakage is contradicted by their contemporaneous Local Law 11 report submitted to the DOB in which the Braxton Defendants state that there was "no water intrusion into the building." According to plaintiffs, one of these statements must be false and it is likely the statement made to the landlord rather than the DOB. Plaintiffs also submit an affidavit from their own engineer who performed an inspection of the property in 2016 and found that none of the repair work that had been performed by the landlord required removal of the enclosure. This evidence is sufficient to raise an issue of fact with respect to the Braxton Defendants' recommendation and accordingly plaintiffs' claims cannot be dismissed on this basis. *Mason v. Dupont Direct Fin. Holdings*, 302 A.D.2d 260, 262 (1st Dep't 2003)

Dated: ____

see page 4 , J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
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PRESENT: Hon. Paul A. Cocks JSC **PART** 47
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Replying Affidavits **No(s).** 4

Upon the foregoing papers, it is ordered that this motion is

The Braxton Defendants also argue that they are not responsible for the DOB's refusal to approve the permit application they submitted on behalf of the landlord to rebuild the enclosure. They argue that it was the landlord's obligation, not theirs, to obtain permission and rebuild the enclosure. However, the Braxton Defendants concede that the landlord requested that they file for such permission with the DOB, a responsibility the Braxton Defendants undertook. Thus, the Braxton Defendants cannot completely disavow all responsibility for the application process.

The Braxton Defendants also argue that at the direction of the landlord they duly submitted two permit application to the DOB, which were rejected, and there was nothing more they could do to obtain DOB approval. This argument hinges on the Braxton Defendants' claim that the enclosure was built illegally and thus the DOB would never approve their application. In response, plaintiffs argue that the enclosure was approved by the DOB at the time it was built and in support, submit a copy of a Building Notice which they claim was filed with the DOB prior to the construction of the original enclosure and which is stamped "Acceptable for Permits." This is sufficient to raise an issue of fact regarding the legality of the enclosure and whether the Braxton Defendants could have in fact obtained DOB approval for the enclosure. Accordingly, plaintiffs' claims cannot be dismissed on this basis.

The Braxton Defendants also argue that plaintiffs' claims are barred by the statute of limitations. However, contrary to the Braxton Defendants' argument, plaintiffs' claims do not arise from "injury to property" which is governed by CPLR 214 but rather are based on fraud and breach of contract, and as such are governed by a six year statute of limitations under CPLR 213. Thus, the Braxton Defendants' argument that these claims are barred by the statute of limitations is without merit.

Dated: _____

_____, **J.S.C.**
Hon. Paul A. Cocks JSC

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

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**

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. PAUL A. GOETZ JSC

PRESENT: _____ **PART** 47
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Upon the foregoing papers, it is ordered that this motion is

Finally, the Braxton Defendants also note in their motion papers that they seek dismissal of the landlord's cross-claims against them for contractual and common law contribution and indemnification. The Braxton Defendants do not assert any additional arguments with respect to these claims and for the reasons stated above, they will not be dismissed. Accordingly, it is

ORDERED that the Braxton Defendants' motion is denied.

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

Dated: 4/19/18

_____, J.S.C.
Hon. Paul A. Goetz. JSC

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
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