SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ROBERT LAX and ORLY LAX,

Plaintiffs,

-against-

HUDSON CONTRACTING, LLC, KENNETH A. BERKOWITZ, MPC PLUMBING & HEATING, INC.

Defendants.

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HUDSON CONTRACTING, LLC,

Third-party Plaintiff,

-against-

MPC PLUMBING & HEATING, INC., and MOISES ALVES,

Third-party Defendants.

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HUDSON CONTRACTING, LLC,

Second Third-party Plaintiff,

-against-

99 JANE STREET CONDOMINIUM and MAXWELL-KATES, INC.,

Second Third-party Defendants.

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Index No. 151541/16
Motion Seq. No. 007, 008, and 009

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In this property damage case involving a water leak that travelled between floors in a condominium, second third-party defendant 99 Jane Street (99 Jane) and defendant/third-party defendant Maxwell-Kates, Inc. (Kates) move, pursuant to CPLR 3212, for summary judgment dismissing all claims as against them (motion seq. No. 007). Defendant Kenneth A. Berkowitz

(Berkowitz) moves for summary judgment dismissing all claims and cross claims as against him, as well as for summary judgment on his common-law negligence claim against defendant/third-party plaintiff/second third-party plaintiff Hudson Contracting, LLC (Hudson) (motion seq. No. 008). Plaintiffs Robert Lax and Orly Lax (Plaintiffs) cross-move against Berkowitz for summary judgment. Plaintiffs also move for summary judgment on their negligence claim as against Hudson and for damages in the amount of $460,307.46 (motion seq. No. 009). The motions are consolidated for disposition.

BACKGROUND

Plaintiffs own a Manhattan condominium unit on 99 Jane Street directly below a unit owned by Berkowitz. The apartments present a wet over dry situation, as the master bathroom in Berkowitz's apartment is located above a living area in the Plaintiffs' apartment. Prior to the date of loss, there was a leak in the Berkowitz master bathroom that infiltrated the Plaintiffs' apartment.

Berkowitz elected to renovate the master bathroom at the same time as he repaired the leak. The work involved remediation of the existing leak, which required workers to open a hole in Plaintiffs' ceiling, as well as relocating bathroom fixtures in Berkowitz's bathroom, including the installation of a new shower. Berkowitz retained Larry Duggan (Duggan), of LD Designs, to produce plans and drawings for the renovation.

When Duggan had completed the plans, Berkowitz hired Hudson, a general contracting company based in New Jersey, to oversee the project. Hudson retained nonparty IDG to cut a hole in the ceiling of Plaintiffs' apartment, while it retained defendant MPC Plumbing to do the plumbing work on the project, and it hired Moises Alves (Alves), a tileworker who ordinarily works for nonparty Maximo Tiles, to perform the retiling of the master bathroom.

99 Jane owns the common areas of the condo, while Kates is the managing agent of the building. The condominium's bylaws provide, at section 6.1.1.1, that "[e]xcept as otherwise provided in the Declarations, no Unit Owner shall make any structural alteration, addition, improvement or repair in or to his Unit without the prior written approval of the Residential Board for Residential Units" (NYSCEF doc No. 269). Berkowitz did not get written approval for the subject work. However, Hudson's owner, Damon Luter, testified that he provided a certificate of insurance to 99 Jane and Berkowitz, and that a representative from 99 Jane told him that the certificate was "fine" (NYSCEF doc No. 255 at 47-48).

On September 30, 2015, Alves was performing retiling work when he removed a "set screw," also known as the shower body valve, without first shutting off the water supply. This caused flooding that infiltrated Plaintiffs' unit and damaged their property. The superintendent of the building, Luis Alfonseca (Alfonseca), testified that after being called about the flood he immediately left his office in the building and inspected the situation (NYSCEF doc No. 275 at 28-37). After talking to Alves, and learning the source of the problem, Alfonseca called a handyman and directed him to shut off the water from the controls in the lobby (*id.*).

Plaintiffs filed their summons and complaint on February 24, 2016, alleging six causes of action. The first cause of action alleges negligence against Hudson, while the second is for negligence against Berkowitz, the third is for breach of contract against Berkowitz, the fourth is for misrepresentation against Berkowitz, the fifth is for equitable estoppel against Berkowitz, and the sixth is for trespass against Hudson and Berkowitz.

Plaintiffs have obtained a default judgment against Alves. Two subrogation actions, arising out of this set of facts, *Admiral Indemnity Company v Hudson Contracting*, index No.

152606/17 and Automobile Insurance Company of Hartford Connecticut, index No. 156228/17, have both been discontinued pursuant to stipulation.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. 99 Jane and Kates's Application for Summary Judgment

The branch of 99 Jane and Kate's motion that seeks summary judgment dismissing the second third-party complaint is not opposed by Hudson, the second third-party plaintiff. Accordingly, that branch of the motion is granted and the second third-party complaint is dismissed (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as bases of liability]).

As to Plaintiffs' claims against Kates, 99 Jane and Kates argue that neither 99 Jane nor Kates had notice of the subject defect and thus cannot be held liable for it. Plaintiffs, it must be noted, do not have any claims against 99 Jane.

A property owner may be held liable where it created a defect or had actual or constructive notice of it (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Kates does not own the building. Even if Plaintiffs had claims against 99 Jane or if Kates were an owner owing a duty, there is no evidence that either had constructive

notice of a suddenly arising defect that was caused by the removal of a set screw while the water supply was turned on. Accordingly, the branch of the motion that seeks dismissal of Plaintiffs' claims as against Kates must be granted. The Court rejects Plaintiffs' argument that there is an issue of fact as to whether an alleged delay in turning off the water supply, after the flooding began, contributed to Plaintiffs' damage, as Plaintiffs provide no evidentiary support that any alleged delay existed or increased the damage their property.

II. Berkowitz's Application for Summary Judgment

A. Plaintiffs' Claims Against Berkowitz

1. Negligence

Plaintiffs' negligence claims against Berkowitz are a multi-headed hydra. Plaintiffs allege that Berkowitz was negligent in: hiring Hudson, negligent supervision of the project, as well as failure to properly maintain and repair the pipes.

"The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts" (*Kleeman v Rheinold*, 81 NY2d 270, 273 [1993]). There are three categories of exception to this rule: "negligence of the employer in selecting, instructing or supervising the contractor; employment for work that is especially or inherently dangerous; and, finally, instances in which the employer is under a specific nondelegable duty."

Plaintiffs argue that all three exceptions are applicable. Hudson argues that the third exception is applicable. As to negligent hiring and supervision, Berkowitz argues that Hudson was recommended to him by Duggan and that Hudson has acknowledged that it supervised the project. Plaintiffs argue that Berkowitz was negligent in hiring a contractor licensed out of state that had not performed any work in New York City.

In reply, Berkowitz cites to the deposition testimony of Hudson's Luter, who testified that Hudson had performed other renovation contracts in New York City, including one involving Tavern on the Green (NYSCEF doc No. 255. 17-19).

A claim of negligent hiring requires a showing that "when the employer has either hired or retained the employee with knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm" (*Sandra M. v St. Luke's Hosp. Center*, 33 AD3d 875 [2d Dept 2006] [internal quotation marks and citation omitted]). Here, Plaintiffs make no showing that Berkowitz knew that Hudson had a propensity for negligent work. Moreover, the record is clear that Hudson, rather than Berkowitz, supervised the project. Thus, Berkowitz does not qualify for the exception for negligent hiring and supervision.

As to nondelegable duty, Plaintiffs argue, without elaborating, that such a duty flows from the bylaws. Such a conclusory argument is insufficient to make a *prima facie* showing that an exception to the general rule that parties are not liable for the negligence of their contractor's.

Finally, Plaintiffs and Hudson each argue that there is a question of fact as to whether the exception for inherently dangerous work is applicable. Neither of these parties, nor Berkowitz, provides an expert affidavit on the relative dangerousness of the subject work. Courts have long held that "the owner is not liable where the danger arises merely because of negligence of the independent contractor or his employees which is collateral to the work and which is not reasonably to be expected, but that he is liable where, from the nature of the work, the danger is readily foreseeable" (Wright v Tudor City Twelfth Unit, Inc., 276 NY 303 [1938]).

The Court of Appeals has also held that the question of "[w]hether the work is inherently dangerous is normally a question of fact to be determined by the jury" (*Rosenberg v Equitable Life Insurance Soc.*, 79 NY2d 663, 670 [1992]). As none of the circumstances before the Court

provide a basis to diverge from this general rule, the question of whether the subject work was inherently dangerous, as a leak was reasonably to be expected, is best left for the jury. Thus, as there is a question of fact as to the applicability of the exception, for inherently dangerous work, to the general rule that parties who retain independent contractors are not liable for their contractor's negligent acts, the Court must deny the branch of Berkowitz's motion that seeks dismissal of Plaintiffs' negligence claim against him.

Breach of Contract

Section 6.1.1.1 of the bylaws states that "[e]xcept as otherwise provided in the Declarations, no Unit Owner shall make any structural alteration, addition, improvement or repair in or to his Unit without the prior written approval of the Residential Board for Residential Units." Despite providing a certificate of insurance to Kates, the building's managing agent, Berkowitz did not get written approval for the subject renovation work. But the work, he argues here, was not structural.

In support, Berkowitz offers the testimony of Daniel Adams (Adams), Kates' assistant property manager. Adams testified that he did not "remember the full scope of work" (NYSCEF doc No. 258 at 67). But Adams testified that he recalled that "there was relocations, but there was no relocation of piping," and concluded Kates "would have considered it cosmetic, because there's nothing structural being done" (*id.*). While Adams testified that typically wet-over-dry construction requires board approval, that is not the case where "the piping's already there" (*id.* at 69). That would indicate, Adams testified, that the bathroom "would have already been installed so even though the toilet or the shower was moved the toilet is still a wet fixture, so that wet fixture was still already there, so the wet over dry would have already been in place prior to this work taking place" (*id.*; *see also id.* at 82-83). Thus, Adams' testimony suggests that the fact

that the subject bathroom renovation took place over the Plaintiffs' dining room does not push the project out of the cosmetic into the structural.

Plaintiffs do not offer any testimony that the subject project was structural. Instead, Plaintiffs argue that the adjective "structural" is not distributed through the phrase "any structural alteration, addition, improvement or repair." Plaintiffs posit that the list is actually disjunctive and that the adjective only modifies alteration and that any addition, improvement or repair in the building. The Court cannot adopt Plaintiffs' construction of this provision, as it not only flies in the face of a well-known industry standard, but would allow for an absurd result (*Greenwich Financial Products, Inc. v Negrin*, 74 AD3D 413 [1st Dept 2010] ["a contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties"]). It cannot be that the unit owners in 99 Jane must receive written authority each time they plaster a hole, oil a creaky door hinge, or hang a poster, all which would qualify under Plaintiffs' urged reading of the bylaw.

As Berkowitz has made a *prima facie* showing that he did not violate the section of the bylaws requiring written prior approval for structural work on the apartment, and as Plaintiffs have failed to raise an issue of fact on this issue, the branch of Berkowitz's motion that seeks dismissal of Plaintiffs' claim against him for breach of contract premised on this provision is granted.

Plaintiffs also argue that Berkowitz violated another provision in the bylaws, § 6.9.2.1, which states that "In the event of any painting, decorating, maintenance, repairs or replacements to the Property or any part thereof is necessitated by the negligence, misuse or neglect of any (a) any Unit Owner, the entire costs thereof shall be borne by such Unit Owner." There is a question of fact as to whether this provision applies, as the Court has already determined that there is an

issue of fact as to the question of Berkowitz's liability for negligence. Accordingly, the Court denies the branch of Berkowitz's motion that seeks dismissal of Plaintiffs' claim for breach of contract against him.

2. Misrepresentation

Plaintiffs' claim for misrepresentation is based their unsupported claim that the subject work constituted structural changes to the unit. Thus, the branch of Berkowitz's motion seeking its dismissal must be granted, as a misrepresentation is, of course, a required element of a claim for misrepresentation (*see Meyercord v Curry*, 38 AD3d 315 [1st Dept 2007] [dismissing claims for fraudulent inducement and negligent misrepresentation as the plaintiff could not show detrimental reliance on the alleged misrepresentations]). Accordingly, and as Plaintiffs do not address the misrepresentation claim in their opposition, the branch of Berkowitz's motion seeking dismissal of the misrepresentation claim is granted.

3. Equitable Estoppel

"[I]n the absence of evidence that a party was misled by another's conduct or that the party significantly and justifiably relied on that conduct to its disadvantage, an essential element of estoppel [i]s lacking" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 106-107 [2006]). As Plaintiffs cannot show that Berkowitz misled them, as discussed above, they cannot make a showing that they are entitled to equitable estoppel. Accordingly, the branch of Berkowitz's motion that seeks dismissal of Plaintiffs' claim for equitable estoppel against him is granted.

4. Trespass

"Trespass is the invasion of a person's right to exclusive possession of his land" (*Berenger v 261 West LLC*, 93 AD3d 175, 181 [1st Dept 2012]). It "does not require an intent to

produce the damaging consequences, merely intent to perform the act that produces the unlawful invasion (*id.*). However, not every intentional act that results in an invasion of another's property qualifies: "the act done must be such as will to a substantial certainty result in the entry of the foreign matter" (*id.* [internal quotation marks and citation omitted]).

Here, the relevant intentional act was Berkowitz's commencement of bathroom renovations. Plaintiffs raise a question of fact as to whether, given the circumstances of the renovation, this act was substantially certain to result in leaks. Accordingly, the branch of Berkowitz's motion that seeks dismissal of Plaintiffs' claim for trespass against him must be denied.

B. Common-law Indemnification Against Hudson

Berkowitz fails to make a *prima facie* showing of entitlement to summary judgment against Hudson. Common-law indemnification "is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other" (*Mas v Two Bridges Assoc.*, 75 NY2d 680, 690 [1990]). Consistent with the equitable underpinnings of common-law indemnification, our case law imposes indemnification obligations upon those actively at fault in bringing about the injury, and thus reflects an inherent fairness as to which party should be held liable for indemnity (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]).

Here, Berkowitz's application is premature as there has been no finding that he is liable for the negligence of Hudson; nor has there been a finding that Hudson was negligent (*see McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090 [2d Dept 2018] [holding that an application for common-law indemnification was premature where there had been no finding of negligence against the putative indemnitor]; *see also Escobar v GFC Fifth Ave. Owner LLC*, 2013 NY Slip

Op 33226 [U] [holding that common-law indemnification is premature absent a finding of negligence]).

III. Plaintiffs' Applications for Summary Judgment Against Berkowitz and Hudson

Plaintiffs' applications for summary judgment are slender and insufficient. The notice of cross motion as against Berkowitz does not identify on which claims Plaintiffs seek summary judgment as against Berkowitz. As to Plaintiffs' motion against Hudson, Plaintiffs rely on a memorandum of law submitted by an insurance company in one of the discontinued related subrogation actions.

"Negligence cases do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*Noody v Facer*, 105 AD2d 1112 [4th Dept 1984]). The circumstances presented to the Court do not counsel for a exception to this general rule. As discussed in relation to Berkowitz's motion for summary judgment, many questions of fact relating to negligence remain. The remaining questions of fact as to negligence, for the claims against Berkowtiz and the claims against Hudson, must be decided by a jury. Accordingly, Plaintiffs' applications for summary judgment against Hudson and Berkowitz must be denied.

CONCLUSION

Accordingly, it is

ORDERED that second third-party defendant 99 Jane Street and defendant/third-party defendant Maxwell-Kates, Inc.'s joint motion for summary judgment dismissing all claims as against them is granted; and it is further

ORDERED that defendant Kenneth A. Berkowitz motion for summary judgment is granted only to the extent that Plaintiffs' claims for misrepresentation, equitable estoppel, as well as Plaintiff's allegations relating to section 6.1.1.1 of the bylaws, are dismissed; and it is further

ORDERED that the Clerk of the Court is respectfully requested to enter judgment accordingly and the remaining claims are severed to continue; and it is further

ORDERED that Plaintiffs' motion and cross motion for summary judgment are both denied; and it is further

ORDERED that counsel for 99 Jane and Kates are to serve copies of this decision, along with notice of entry, on all parties within 10 days of entry

Dated: November 15, 2019

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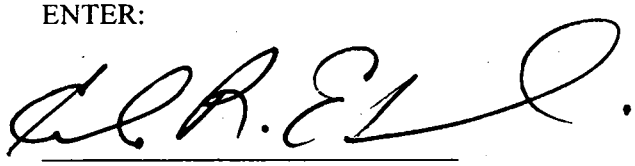

Hon. CAROL R. EDMEAD, JSC

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J.S.C.