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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: DIANE A. LEBEDEFF Justice PART 8

012049512003

ROBINSON,III E.C.
VS
CANNIFF, BRYAN

INDEX NO.

MOTION DATE 2/17/04

MOTION SEQ. NO.

MOTION CAL. NO. 30

SEQ 1

DISMISS ACTION

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

	PAPERS NUMBERED
Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

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

[illegible] DECIDED IN ACCORDANCE WITH
[illegible] MEMORANDUM DECISION.

FILED
MAR 30 2004
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: MAR 22 2004

[signature]

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8

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E.C. ROBINSON, III,

Plaintiff,

-against-

Index No. 120495103
Mot. Seq. No. 001

BRYAN CANNIFF, DENISE CANNIFF, and THOMAS **A.** POLLACK,

Defendants,

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E.C. ROBINSON, III,

Plaintiff,

-against-

Index No. 110995/02
Mot. Seq. No. 002

FRIEDMAN MANAGEMENT CORP., 281 WEST 11TH OWNERS CORP., PENMARK **REALTY** CORPORATION, JUDITH BLOOMFIELD, Individually and **as** a Partner of **SIRA** PROPERTIES, **ADELE** COHEN, Individually and as a Partner of **SIRA** PROPERTIES, **MAY** Z. COHEN, Individually and as a Partner of **SIRA** PROPERTIES, and **SIRA** PROPERTIES, an Unincorporated Business Entity,

Defendants,

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FRIEDMAN MANAGEMENT COMPANY, **281** WEST 11TH **OWNERS** CORP., PENMARK REALTY CORPORATION, and **SIRA** PROPERTIES, an Unincorporated Business Entity,

Third-party Plaintiffs,

-against-

Index No. 590815/03

THOMAS A. POLLAK,

Third-party Defendant,

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THOMAS A. POLLAK,

Third-party Counterclaiming Defendant,

-against-

FRIEDMAN MANAGEMENT COMPANY, SIRA PROPERTIES, 281 WEST 11TH OWNERS CORP., **PENMARK** REALTY CORPORATION and ATLANTIC MUTUAL INSURANCE COMPANY,

Defendants and
Additional Counterclaim Defendant.

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DIANE A. LEBEDEFF, J.:

In two related cases, the motions before the court are consolidated for disposition. Under Index Number 120495/03 (motion sequence number 001), defendant Thomas A. Pollak ("Pollak") s/h/a Thomas A. Pollack moves for an order dismissing the complaint (CPLR 3211 [a] [7]), or, alternatively, directing plaintiff to correct his pleadings **(CPLR** 3024 **[a]).**[1] Under Index Number 1100995/02 (motion sequence number 002 and **third** party index number 590815/03), Pollak, as third party defendant, moves for partial summary judgment dismissing the third party complaint to the extent third party defendants

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Defendant also invokes CPLR 3211 (a)(6), but fails to state plainly in his notice of motion that he is seeking dismissal of the cross-claim as well, and no basis is shown in the motion papers for dismissal of the cross-claim asserted by co-defendants. Accordingly, to the extent such relief is sought, the motion is denied.

seek indemnification or contribution in relation to a slip and fall claim of plaintiff E. C. Robinson, III, or, alternatively, ordering separate trials of the claims relating to damage caused by airborne dust (first and third causes of action) and of the claim relating to plaintiff's slip and fall (second cause of action).

In the first action, plaintiff asserts claims for personal and property damage caused by dust entered into his apartment through the building's ventilation system on or about December 5, 2000. The dust allegedly originated from other apartments undergoing renovation (motion, exhibit **4).**

Some three months later, on February 24, 2001, the plaintiff fell on the building's staircase while he and a friend were carrying his television – which he pleads was damaged by the dust – out of the building to be repaired. His second complaint centers upon the **knee** injury he allegedly sustained at the time of the fall due to a "defective appurtenance" on the stair ***(id.;*** see also Robinson dep., p. 150; Slavin opposition affirmation, para. 3). Attributing his presence on the stairs to the dust damage, he adds an additional personal injury claim.

Pollak was a contractor allegedly retained by the sponsor to renovate unit L-C in the building located at 281 West 11th Street in New York. At the same time, a separate construction project was being undertaken to combine apartments 1A and 1B, which involved modifications of the ventilation systems. Apartments 1A and 1B were owned by defendants Bryan and Denise Canniff. The complaint alleges that the ventilation ducts ran from unit L-C up past apartments 1A and 1B to the roof, picking up construction dust from the latter two units and permitting dust to enter into apartment **4B,** which is owned by

plaintiff (complaint, paras. 6-9).

The complaint in the first action contains extensive allegations concerning the ownership of unit L-C by the sponsor, the existence of plans to renovate and sell unit L-C, and the ownership of the sponsor corporation (*id.* paras. 15, 17, 20-30, 47-66, 71-72). However, there is no single allegation in the complaint which would connect any renovations of unit L-C to any harm allegedly suffered by plaintiff; instead, the complaint alleges that plaintiff was harmed by "dust, debris and noxious materials" emanating from apartments 1A and 1B (*id.* paras. 74-79).

It is on this basis that Pollak requests dismissal of plaintiff's claims in the first action. He urges that, while no great detail is required at the pleading stage (CPLR 3013, 3014), plaintiff is obliged to at least plead the existence of a duty on the defendant's part to the plaintiff, the breach of the duty, and that the breach of the duty was a proximate cause of an injury to the plaintiff (see, *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325 [1981]). Pollak correctly contends that the complaint against him is deficient because it fails to make such allegations. The plaintiff does not refute this argument, but merely objects to the motion with the use of a colorful phrase not to be utilized in a courthouse (see affirmation in opp., para 4).

Based on the foregoing, the motion to dismiss the complaint as to defendant Pollak is granted with leave to move to replead within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry, should plaintiff be so advised, with such motion to be supported by an amended complaint and an affidavit of merit. In the event that plaintiff fails to serve a motion to amend his complaint within such time, the plaintiff's

claims against Pollak shall be deemed dismissed with prejudice.

In relation to the second action, the third party complaint does allege that Pollak's demolition and renovation work in a ground floor apartment in the building on or before December 5, 2000, contributed to the dust or debris that allegedly harmed plaintiff Robinson. In seeking dismissal of the third-party claims, Pollak argues that – whether or not he can be held responsible for causing damage to plaintiff's television by releasing dust in unit LC, which traveled up through the building's ventilation system and into plaintiff's apartment – his actions in December of 2000, cannot, as a matter of law, be considered the proximate cause of the knee injury plaintiff sustained two months later when he tripped while carrying the television down the steps. Plaintiff and defendants argue the issue is a factual one.

Although proximate cause is normally an issue of fact, "where only one conclusion may be drawn from the established facts * * * the question of legal cause may be decided as a matter of law" (*Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 315 [1980], rearg. denied 52 N.Y.2d 784 [1980]). Based on consideration of all factors, including the lack of legal relationship between the parties and the long passage of time between the alleged negligent conduct and the injury, the court concludes that to hold plaintiff's fall on the stairway to be a foreseeable consequence of Pollak's construction activities would be to "stretch the concept of foreseeability beyond acceptable limits" (*Ventricelli v. Kinney System Rent A Car, Inc.*, 45 N.Y.2d 950 [1978], lessor of a car with a defective trunk lid was not liable as a matter of law to the lessee, who was struck by another car as he attempted to close the defective trunk on the side of the road).

In *Rodriguez v. **Pro** Cable Services Co. Ltd. **Partnership,** 266* A.D.2d **894** (4th Dept. 1999), a case highly similar to the instant one, plaintiff alleged that defendant cable company negligently damaged his roof while installing cable, and then eight months later he fell from a ladder as he was inspecting the damage done to his roof. The court granted summary judgment for defendant, concluding as a matter of law that the cable company's alleged negligence in damaging plaintiff's roof was not a proximate cause of the injury plaintiff suffered when he later fell from the ladder. Although plaintiff would not have been on the ladder "but for" defendant's negligence, the court concluded that "the risk of plaintiff's falling from the ladder was a different kind of **risk** from that created by defendants' negligence in damaging the roof and was not a foreseeable consequence of defendants' negligence" *(id.)*. The same analysis applies here. Although it is pleaded that plaintiff would not have been carrying his television down the steps but for the alleged negligence of third party defendant, his tripping on the steps was simply not a foreseeable consequence of that negligence.

As to the further argument raised, the court observes that there is no general rule that a contractor working within one cooperative apartment has no duty to avoid damage to neighboring apartment owners (see, e.g., *Roter v. Wexler*, 195 A.D.2d *323* [1st Dept. 1993], recognizing cooperative owners' claim that they suffered water damage as a direct result of ordinary negligence on the part of defendant contractors). Defendant Pollak cites *Hunter v. Lehrer McGovern Bovis, Inc.*, **299** A.D.2d 175 (1st Dept. 2002), lv. denied 100 N.Y.2d 509 (2003), and argues that the case stands for the proposition that a contractor has no liability for harm caused to areas outside the physical area of its work by the discharge

of dust. However, in that case, the harm was caused when a newly-installed fan system was turned on, causing dust in the existing ducts to be blown out into apartments. Summary judgment was granted in favor of the moving defendants, a general contractor and subcontractor, upon their showing that they had no duty, contractual or otherwise, to clean out the ducts. The court concludes that this argument does not support the requested relief.

Accordingly, as to the third-party complaint, the motion for partial summary judgment is granted as to the claims for contribution and indemnity in connection with plaintiff's second cause of action. The alternate branch of the motion is denied, as the claims may be tried together as a convenient unit without undue prejudice.

Both cases are added to the preliminary conference calendar on April 13, 2004, at 9:45 a.m., in Part 8.

This decision constitutes the order of the court.

Dated: March 22 ,2004

J.S.C.