

**DeJesus v 191st St. Assoc., LLP**

2007 NY Slip Op 31845(U)

June 18, 2007

Supreme Court, New York County

Docket Number: 0112753/2000

Judge: Rolando T. Acosta

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

HON. ROLANDO T. ACOSTA

PRESENT: \_\_\_\_\_  
Justice

PART 51

DeJesus, Rosalee

INDEX NO. 112753/00

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 3

MOTION CAL. NO. \_\_\_\_\_

- v -

191<sup>st</sup> Street Associates

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

see attached

Cross-Motion:  Yes  No

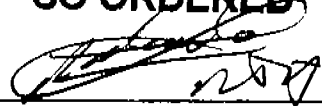
Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION.**

**FILED**

JUN 27 2007

NEW YORK  
COUNTY CLERK'S OFFICE  
SO ORDERED



ROLANDO T. ACOSTA J.S.C.

Dated: 6/18/07

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

Rosalee DeJesus, an infant by her Mother and Natural  
Guardian, Emilia DeJesus and Emilia DeJesus,  
Individually,

Plaintiffs,

– against –

191<sup>st</sup> Street Associates, LLP and Nydia DiMartini,

Defendants.

**DECISION/ORDER**

Index No. 112753/00

Seq. No. 3

Present:

**Rolando T. Acosta**

191<sup>st</sup> Street Associates, LLP and Nydia DiMartini,

Third-Party Plaintiffs

– against –

Star Industrial Service Co., Inc.,

Third-Party Defendant.

Third-Party

Index No. 591057/01

**FILED**

JUN 27 2007

NEW YORK  
COUNTY CLERK'S OFFICE

The following documents were considered in reviewing defendants/third-party plaintiffs' motion and third-party defendant's cross-motion for orders pursuant to CPLR 3212 granting summary judgment dismissing the complaints against them:

<b>Papers</b>	<b>Numbered</b>
<b>Notice of Motion, Affirmation &amp; Affidavit</b>	<b>1 (Exhibits A-I)</b>
<b>Affirmation in Opposition</b>	<b>2 (Exhibits A-J)</b>
<b>Third-Party Defendant's Affirmation in Opposition</b>	<b>3 (Exhibit A)</b>

<b>Notice of Cross-Motion &amp; Affirmation</b>	<b>4 (Exhibits A-C)</b>
<b>Defendants/Third-Party Plaintiffs Opposition to Cross-Motion</b>	<b>5 (Exhibit A)</b>
<b>Plaintiff's Opposition to Cross-Motion</b>	<b>6</b>
<b>Defendants/Third-Party Plaintiff's Reply Affirmation</b>	<b>7</b>
<b>Third-Party Defendants Supplemental and Reply Affirmations</b>	<b>8 (Exhibits D-E)</b>

### Background

In 1998, plaintiff Rosalee DeJesus and her family were living in her aunt Jacqueline Hidalgo's apartment located at 610 W. 191<sup>st</sup> Street, Apt. 42, in New York County. In July of 1998, the bathroom in the apartment was renovated. Among the renovations were the installation of a new tub, a new water nozzle (which directs the water flow into the tub) and a new lever that could be turned left or right to activate the water flow and control the water temperature.

On January 12, 2000, as ten-year-old DeJesus stepped into the tub to take a shower she slipped and grabbed a hold of the nozzle as she fell, causing the nozzle to fall off. Without the nozzle, the water shot straight out. At that point the water was not hot. As she got up, she reached for the lever and as she slipped again, she accidentally turned the lever to the hot position, resulting in burns to her body.

According to Hidalgo, the water was excessively hot for seven months prior to the accident and she had complained to the superintendent. In addition, two months before the accident, they were having problems with the nozzle falling off and the lever, which would "continually turn in a circle without stopping." Plaintiff's Exhibit E at ¶ 5. Hidalgo "complained to [the superintendent] repeatedly about the broken nozzle and handle in the bathtub before the accident occurred." *Id.* at ¶ 6. Her last complaint was a few weeks before the accident. Each time she complained about the problem, Hidalgo averred, the superintendent would state that he would fix it but he never did. *Id.*

Plaintiff asserted a negligence claim against defendants for, *inter alia*, failing to provide proper plumbing, resulting in a breach of defendants' duty to maintain the premises in a reasonably safe condition.

## Analysis

Viewing the evidence in the light most favorable to plaintiff, the party opposing summary judgment, Fundamental Portfolio Advisors v. Tocqueville Asset Management, 7 N.Y.3d 96, 106 (2006) , 191<sup>st</sup> Street Associates, LLP and Nydia DiMartini (“191<sup>st</sup> Street Associates”), defendants/third-party plaintiffs, have failed to establish their prima facie entitlement to summary judgment dismissing the complaint. Plaintiffs’ action is based on more than simply an allegation that the water temperature was excessively hot. See Williams v Jeffmar Management Corp., 31 A.D.3d 344 (1<sup>st</sup> Dept. 2006)(“a hot water temperature setting of 140 degrees [does not] violate defendant's common-law standard of care, which requires the maintenance of reasonably safe conditions in the building”).<sup>1</sup> Rather, her claim is premised, in part, on the superintendent failing to fix a potentially dangerous condition, a water nozzle that kept falling off and a water temperature control lever that did not work properly, notwithstanding the lease holder’s numerous complaints. Nor can it be said that ten-year-old plaintiff slipping as she got into the tub constituted an unforeseeable intervening act. See Rivera v. City of New York, 11 N.Y.2d 856 (1962)(such as a child balancing himself on the edge of the tub with wet boots); Cruz v City of New York, 249 361 (2<sup>nd</sup> Dept. 1998)(or an infant falling into tub as he reached for tooth brush that had fallen into tub). Accordingly, 191<sup>st</sup> Street Associates’s motion id denied.

Star Industrial Service Co., Inc.(“Star”), Third-Party Defendant, however, has established its prima facie entitlement to summary judgment dismissing the third-party complaint. There is no indication in the record that Star was negligent in maintaining the boiler nor did it receive any complaints about excessive hot water. Moreover, it had nothing to do with the renovation of the bathroom in question. Nor is there any indication in the record that it was contractually obligated to indemnify 191<sup>st</sup> Street Associates or procure insurance coverage on behalf of 191<sup>st</sup> Street Associates. Star having established its prima facie entitlement to summary judgment, the burden shifted to 191<sup>st</sup> Street Associates to raise triable issues of fact, which it has failed to do. Accordingly, Star’s cross-motion is granted. Thus, based on the foregoing, it is hereby

ORDERED that defendants/third-party plaintiffs, 191<sup>st</sup> Street Associates, LLP’s and Nydia DiMartini’s motion for an order pursuant to CPLR 3212 dismissing the complaint is denied; and it is further

---


1. Defendant, however, is correct in stating that Building Code Reference Standard RS-16, 16 NYCRR 255, P107.6(i), is inapplicable to the facts of this case inasmuch as the mixing valve was located on the boiler and not the individual shower. Williams v Jeffmar Management Corp., *supra*, 31 A.D.3d at 346.

ORDERED that third-part defendant, Star Industrial Service Co., Inc.'s cross-motion for an order granting summary judgment dismissing the third-party complaint is granted,

This constitutes the Decision and Order of the Court.

Dated: June 18, 2007

ENTER

**SO ORDERED**  
  
\_\_\_\_\_  
Rolando T. Acosta, J.S.C.  
**ROLANDO T. ACOSTA**  
J.S.C.

**FILED**  
JUN 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE