Young v 9 E. 96th St. Apt. Corp.

2007 NY Slip Op 32567(U)

August 14, 2007

Supreme Court, New York County

Docket Number: 0111508/2004

Judge: Michael D. Stallman

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SCANNED ON 8/20/2007
[* 1]

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

HEIDI YOUNG,
Plaintiff,

- v -

9 EAST 96TH STREET APARTMENT CORPORATION, MITCHELL KRUPP and CINDY G. KRUPP,
Defendants.

INDEX NO. 111508/2004

MOTION DATE 1/12/07

MOTION SEQ. NO. 004

MOTION CAL. NO. 163

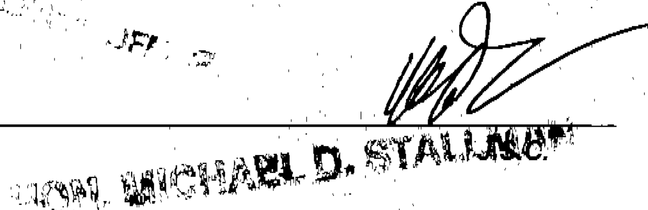
The following papers, numbered 1 to 11 were read on this motion and cross motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits 1-23	1-2
Answering Affidavits — Exhibits	3-4
Notice of Cross Motion — Exhibits A-CC	5-6
Answering Affidavits	7-9
Replying Affirmations	10-11

Cross-Motion: X Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

FILED
AUG 20 2007
NEW YORK
COUNTY CLERK'S OFFICE



Dated: 8/14/07
New York, New York

HON. MICHAEL D. STALLMAN

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE J.S.C.
DATED:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

---X

HEIDI YOUNG,

Plaintiff,

Index No.: 111508/2004
Action # 1

-against-

9 EAST 96TH STREET APARTMENT CORPORATION, MITCHELL KRUPP and CINDY G. KRUPP,

Defendants.

---X

DECISION and ORDER

BARKLY COVERAGE CORP. as Program Manager for GULF INSURANCE COMPANY a/s/o 9 EAST 96TH STREET APARTMENT CORPORATION,

Plaintiff,

Index No.: 400967/2005
Action # 2

-against-

MITCHELL KRUPP,

Defendant.

---X

FILED
AUG 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN, J.:

These two actions, joined for trial, arise from water damage to a cooperative apartment which occurred following the blackout of August 2003. In Action No. 1, plaintiff Heidi Young moves for partial summary judgment in her favor against defendants and for an order to sever the joined actions. In Action No. 1, defendant 9 East 96th Street Apartment Corporation cross-moves for summary judgment to dismiss both the complaint and the cross claims asserted against it, and for summary judgment in its favor on its cross claims.

BACKGROUND

Plaintiff Heidi Young is the shareholder of residential cooperative apartment # 10C in a cooperative building located at 9 East 96th Street in Manhattan. Young, her minor son, and her

companion, Patrick Cowden, reside in the apartment. Defendants Mitchell and Cindy Krupp were, at the time of the occurrence, the shareholders of Apartment 11C, one floor above Young's apartment. The Krupps have two children, now about 7 years and 4 years old. Defendant 9 East 96th Street Apartment Corporation (9 East Corp.) is the residential cooperative corporation that owns both the building and the land on which it sits.

On August 14, 2003, the northeastern United States suffered a massive power outage, which caused the building to lose both its electrical and its water service. Young and the Krupps left New York City the next day, August 15, 2003, before services were restored. Services to the building were allegedly restored later that day.

Young and Cowden returned to the building on August 16, 2003. When Cowden entered the apartment, he observed that it was flooded with water coming down the walls. Cowden thereupon immediately notified the building's doorman who, because the superintendent was not present, entered the Krupps' apartment and allegedly discovered that the bathroom faucets were open with water flowing out of them. The doorman then shut off the faucets; however, extensive flooding in Young's apartment had already damaged portions of the ceilings, walls, floors, a cedar closet, and some of her personal property. The Krupps returned to the building on August 17, 2003.

On August 18, 2003, Young contacted 9 East Corp.'s managing agent, Orsid Realty Management (Orsid), to notify it officially of the flooding and the damage to her apartment and property. Young also states that she contacted the Krupps, who allegedly apologized for the flooding to Young's apartment. Young states that she contacted her insurance carrier, but eventually opted not to make any claims against her own policy and to pursue her claims against defendants.

Young retained two contractors for estimates of the cost of repairing or replacing ceilings,

walls, and floors of her apartment. The first contractor gave an estimate of $73,800; the second gave an estimate of $112,750.00. Young thereafter forwarded these estimates to Orsid and to counsel for the Krupps, who, in turn, forwarded them to their respective insurance carriers.

On November 19, 2003, the Krupps' insurance carrier notified Young of its position that the bulk of the damage in Young's apartment, estimated at $23,992.49, was the responsibility of 9 East Corp. On January 12, 2004, 9 East Corp.'s insurance carrier sent Young an estimate of $8,542.11 to cover the cost of the damage to her apartment. Three days later, Young wrote to the co-op board expressing that the foregoing estimate was inadequate with regard to both the price and the scope of the proposed repair work.

On February 19, 2004, counsel for 9 East Corp. wrote Young expressing that the scope of the repair work proposed in Young's estimate exceeded 9 East Corp.'s responsibilities under the lease, and that, while 9 East Corp. was willing to discharge those responsibilities, she would have to pursue any other unresolved claims either against the Krupps or her own insurer.

Shortly thereafter, 9 East Corp. sent a building porter to Young's apartment to begin repair work. Young states that the porter began to dry scrape flaking lead-based paint from her walls, but that she directed him to halt this work after one day because the porter was neither trained nor licensed in lead paint abatement procedures. The parties have presented no evidence that anyone else from 9 East Corp. attempted to enter Young's apartment to remove the lead paint or to perform any other repairs.

Young hired an independent contractor, Microecologies, Inc., to test for and confirm the presence of an allegedly serious problem of mold growth on the walls of her apartment. Finally, Young maintains that she has repeatedly contacted the co-op board on numerous occasions to

I

Plaintiff's Motion for Summary Judgment

A. Summary Judgment against 9 East Corp.

As to the first cause of action, Young claims that 9 East Corp. breached her proprietary lease by failing to perform necessary repairs of the flood damage in her apartment. The lease states, in pertinent part:

> "Damage to Apartment or Building
> 4. (a) If the Apartment . . . shall be damaged by fire or other cause covered by multiperil policies commonly carried by cooperative corporations in New York City (any other damage to be repaired by Lessor or Lessee pursuant to paragraphs 2 and 18, as the case may be), the Lessor shall at its own cost and expense, with reasonable dispatch after receipt of notice of said damage, repair or replace or cause to be repaired or replaced, with materials of a kind and quality then customary in buildings of the type of the building . . . the Apartment, and the means of access thereto, including the walls, floors, ceilings, pipes, wiring and conduits in the apartment. Anything in this Paragraph or Paragraph 2 to the contrary notwithstanding, Lessor shall not be required to repair or replace, or cause to be repaired or replaced, equipment, fixtures, furniture, furnishings or decorations installed by the Lessee or any of his predecessors in title nor shall the Lessor be obligated to repaint or replace wallpaper or other decorations in the Apartment or to refinish floors located therein."

See Sigmond Affirm., Ex 6, at 3. In support of her motion, plaintiff cites excerpts from the deposition of Despina Leandrou, an Account Executive/District Manager for Orsid, which manages the building. See id., Ex 14 [Leandrou EBT]. Leandrou testified that it was the building's responsibility in the proprietary lease to repair original elements that were damaged as a result of the water leak in the Krupps' apartment during the blackout. Id. at 85, 141. Original elements in Young's apartment appear to be the cedar-lined closet, wood floors, bathroom floor, and wall tiles. Id. at 142. Young contends that 9 East Corp.'s attorney advised her, by letter dated February 19, 2004, that 9 East Corp. would not take any further action to repair her apartment as it appeared that

the Krupps were negligent. Sigmond Reply Affirm. ¶ 15.

An issue of fact arises as to whether 9 East Corp. breached its contractual duty to make repairs. Contrary to Young's contention, the letter dated February 19, 2004 does not state that 9 East Corp. would not make repairs to Young's apartment. See Sigmond Affirm., Ex 21. Moreover, by letter dated July 18, 2006 to Young's attorney, which is an exhibit to Young's motion, 9 East Corp. requested access to Young's apartment. See Sigmond Affirm., Ex 22.

Nevertheless, 9 East Corp. contends that it was excused from performing its duty to make repairs because Young materially breached the lease. According to 9 East Corp., Young did not name it as an additional insured on Young's policies, as required under the lease and under house rules. 9 East Corp. also claims that Young denied access for repairs, thus breaching the lease.

Paragraph 4 (e) of the lease, as well as the house rules, which were added as amendments in 1994, require Young to name 9 East Corp. as an additional insured on insurance policies covering damage to Young's apartment.[1] Paragraph 13 of the lease provides that, "Breach of a House Rule

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[1] Paragraph 4 (e) of the lease states,

> "The Lessee shall, at his or her own cost and expense, obtain and keep in full force and effect throughout the term of this lease (a) comprehensive public liability and property damage insurance ... against any and all claims for personal injury, death or property damage (including, but not limited to, loss due to water damage) occurring in, upon, adjacent to or connected with the apartment or any part thereof, and (b) comprehensive all risk property damage insurance ... in respect of property damage occurring in, upon, adjacent to or connected with the apartment or any part thereof (including, but not limited to, loss due to water damage) .... The insurance required in (a) above shall name the Lessor as an additional insured ... ."'

See Cestaro Affirm, Ex A [Amendment of Paragraph "4" of the Proprietary Lease].

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The relevant House Rules state:

"INSURANCE LIABILITY
With the recent passage of an amendment to the Proprietary Lease, shareholders are now responsible to maintain Property Damage Insurance. ...

In addition, each shareholder should maintain comprehensive insurance, including homeowner's insurance, for your apartment to cover losses due to fire, theft and water - and to safeguard the contents and interior structure of your apartment.

The following paragraphs supplement (but do not replace) the description of the respective responsibilities of the Corporation and each individual shareholder.

The Board of Directors believes that the Corporation is responsible for the following:

Structural Framework ...
Main drain pipes and electrical
All main and principal pipes
Conduits and wires for carrying water, gas, steam or electricity through the building ...

If an apartment is damaged by failure to maintain the above, it would be the Corporation's responsibility to repair such damage, and the Corporation carries insurance for this purpose. Thus, generally speaking, anything within the walls, ceilings and floors is the property and responsibility of the Corporation.

Shareholders are responsible for maintaining whatever is within their apartment, that is, outside the walls, beneath the ceilings, and above the floors. (Thus, if a pipe breaks within the walls, it would be the Corporation's responsibility to repair it, but if the pipe breaks outside the wall, or if damage is caused by something within a shareholder's control - including through-the-wall air conditioners, dishwashers, bathtubs or other fixtures installed by the shareholder - it and any damage that it causes would be the responsibility of the shareholder). ...
Maintenance of plumbing, gas and heating fixtures and equipment, and any appliances is the responsibility of the shareholder as well. ...

Any water penetration from the exterior of the building is the responsibility of the Corporation. ... If repairs to water damaged apartments are the responsibility of the Corporation, generally, only plastering is included. Thus, the shareholder would make an insurance claim, and have the area painted. In the event of a shareholder's "negligence" (i.e., bath tub overflow), the shareholder would be

shall be a default under this Lease. ..." See Sigmond Affirm., Ex 6 at 7. Young does not dispute that 9 East Corp. was not named as an additional insured on either her public liability or her property damage insurance policies. See Cestaro Affirm. ¶ 97; Sigmond Reply Affirm. ¶ 25. Young argues that this breach is not material, citing Metropolitan Transportation Authority v Kura River Management, Ltd. (292 AD2d 230 [1st Dept 2002]). In that case, the Appellate Division held that, under the circumstances presented, a tenant's failure to name the landlord as an additional insured on a property damage insurance policy, as required by the lease, does not constitute a material breach of the lease.

Having reviewed the decisions of the lower courts in Kura River Management, the Court finds the case inapposite. There, the landlord sought to evict a tenant on the ground that, among other things, the tenant's failure to name the landlord and others as additional insureds on liability policies constituted a breach of the lease. By a decision on the record, the Civil Court ruled that the breach was not material because the tenant had obtained the requisite amount of insurance coverage for the leased premises. On appeal, the Appellate Term, 1st Department affirmed the trial court's decision by 2-1. The majority reasoned that the lease violations were not "so substantial as to warrant the forfeiture of the tenant's valuable, long-term commercial lease." Metropolitan Transportation Authority v Kura River Management, Ltd., App Term, 1st Dept, Aug 31, 2000, Parness, McCoe, Gangel-Jacob, JJ., Index No. 570813/99, at 5.

Here, unlike Kura River Management, Young is not facing forfeiture of her proprietary lease. Thus, the concerns that were raised in Kura River Management are not present here. However, this

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responsible for its repair, as well as the repair of any resulting damage. ..."

See Cestaro Affirm., Ex A (emphasis added).

Court finds that Young's admitted breach of paragraph 4 (e) of the lease does not necessarily excuse 9 East Corp.'s obligation to repair, given the statutory warranty of habitability. Real Property Law § 235-b.

Turning to 9 East Corp.'s other arguments, paragraph 25 of the lease states, in relevant part:

> "Right of Entry: Key
> 25. The Lessor and its agents and their authorized workmen shall be permitted to visit, examine, or enter the Apartment and any storage space assigned to Lessee at any reasonable hour of the day upon notice, or at any time and without notice in case of emergency, to make or facilitate repairs in any part of the Building or to cure any default by the Lessee and to remove such portions of the walls, floors and ceilings of the Apartment and storage space as may be required for any such purpose, but the Lessor shall thereafter restore the Apartment and storage space to its proper and usual condition at Lessor's expense if such repairs are the obligation of Lessor or at Lessee's expense is such repairs are the obligation of Lessee or are caused by acts or omissions of the Lessee or any of the Lessee's family, guests, agents, employees or subtenants. ..."

See Sigmond Affirm., Ex 6 at 17. Young argues that she was justified in refusing access to her apartment because, on the one occasion when the building sent an employee to perform work there, he began to scrape flaking lead paint from her walls - a procedure that he was neither trained nor licensed to carry out. See Sigmond Reply Affirm. ¶ 44. Young submits Microecologies's report, which confirms the presence (although not the quantity or concentration) of lead-based paint in Young's apartment. Sigmond Affirm., Ex 23. Young also contends that paragraph 25 does not apply, because "it is intended for instances where it is imperative that the Owner enter the Apartment to conduct necessary actions and repairs impacting the Building ...," but "[h]ere, Owner never needed to access the Apartment for purposes of making any repairs to the Building or curing any default by plaintiff." Id. ¶ 43.

Contrary to plaintiff's interpretation of paragraph 25, nothing in the language of paragraph

25 of the lease suggests that it applies only to emergency situations. In fact, paragraph 25 plainly differentiates between normal and emergency access to apartments by providing that:

> "The Lessor and its agents and their authorized workmen shall be permitted to visit, examine, or enter the Apartment and any storage space assigned to Lessee at any reasonable hour of the day upon notice, or at any time and without notice in case of emergency, to make or facilitate repairs in any part of the Building [emphasis added]" ... .

See Sigmond Affirm., Ex 6, at 25. Moreover, paragraph 25 expressly does not limit 9 East Corp.'s access for repairs solely to cure a lessee's default. Thus, the Court rejects Young's proposed construction of paragraph 25, and finds that the lease provision requires her to provide 9 East Corp. with access to her apartment to make repairs.

"'[I]t is undisputedly the rule that one who frustrates another's performance cannot hold that party in breach'." Stardial Communications Corp. v Turner Constr. Co., 305 AD2d 126, 126 (1st Dept 2003), quoting Water St. Dev. Corp. v City of New York, 220 AD2d 289, 290 (1st Dept 1995). Lizbeth Stecher, the president of the building's co-op board at the time, testified at her deposition as follows:

> "**Q**: To the best of your knowledge, has Ms. Young ever stopped the building from repairing the walls in her apartment?
> **A**: My understanding is she stopped the beginning process of the repair work and no further repair work was allowed to be done in that apartment.
> **Q**: And what is the basis for that argument?
> **A**: That Kevin, the super, told me that he was informed by her that all work had to stop."

See Cestaro Affirm., Ex Z [Stetch EBT], at 96. Stecher later testified:

> "**Q:** You keep stating that you can't do any work in her apartment, but can you clairfy for me, please, why you equate Ms. Young stating one time to Jesus that she doesn't want him to scrape paint from the walls to, quote, you can never come in and do work in my apartment again?

> **A:** Because it's my understanding that what she said was: I don't want any more working [sic] done. And, obviously, it's in connection with the fact that there's this case going on.
> **Q:** Who is it that she allegedly made this statement, I don't want any more work being done to?
> **A:** Kevin reported that to me, that that's what she had said.
> **Q:** And when did he report this to you?
> **A:** I don't remember."

See Cestaro Affirm., Ex Z [Stetch EBT], at 190. Young does not dispute that she had such a conversation with the building's superintendent. Neither does Young contend that she responded to 9 East Corp.'s letter dated July 18, 2006, which requested access to her apartment to make repairs. Young's undisputed failure to provide access to her apartment to 9 East Corp. to effect repairs therefore compels the Court to find that she both materially breached that lease provision and thereby frustrated 9 East Corp.'s ability to discharge its repair obligations pursuant to paragraph 2.

That the porter's alleged dry scraping of paint in the walls of Young's apartment might have constituted a violation of Section 17-181 of the Administrative Code of the City of New York[2] is not a valid reason for Young to refuse access to the apartment under any circumstances. Thus, the Court must conclude that Young's breach of contract claim against 9 East Corp. fails as a matter of law. Accordingly, the Court denies the branch of Young's motion as seeks summary judgment in her

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[2] Administrative Code § 17-181 states:

"The dry scraping or dry sanding of lead-based paint or paint of unknown lead content in any dwelling, day care center or school is hereby declared to constitute a public nuisance and a condition dangerous to life and health. For the purpose of this section, dry scraping and dry sanding shall mean the removal of paint or similar surface-coating material by scraping or sanding without using water misting to reduce dust levels or other method approved by the department. The department [of health and mental hygiene] shall promulgate such additional rules as necessary for the enforcement of this section."

favor as to the first cause of action.

B. Summary judgment against the Krupps

The fourth cause of action against the Krupps sounds in negligence. Young contends that the Krupps had a duty to prevent damage to other apartments in the building, and that the Krupps breached such a duty when they failed to ensure that the bathroom faucets in their apartment were shut off before they left the apartment, and before services were restored. The Krupps argue that summary judgment should be denied because Young is impliedly relying on the doctrine of res ipsa loquitur, but she cannot establish that the Krupps had exclusive control of the apartment. At his deposition, Mitchell Krupp stated, "I think they [9 East Corp.] actually might have" copies of keys to the Krupps' apartment. See Smith Opp. Affirm., Ex A [Mitchell Krupp EBT], at 54. The Krupps also argue that summary judgment in plaintiff's favor in a case of res ipsa loquitur should be rare, citing Morejon v Rais Const. Co. (7 NY3d 203 [2006]). Finally, the Krupps contend that Young should not be allowed to invoke the doctrine of res ipsa loquitur, because it was not pleaded in the complaint.

Young claims that she is not relying on the doctrine of res ipsa loquitur, because she believes that she has direct and circumstantial evidence of the Krupps' negligence.

The record indicates that six people were in the Krupps' apartment on the night of the blackout before the Krupps left their apartment: Mitchell and Cindy Krupp; their children, Jack and Ellie; Beverly Allen, the Krupps' full-time babysitter; and the Krupps' cleaning lady, Alice (see Mitchell Krupp EBT, at 4, 19; Cindy Krupp EBT, at 31-32). Young's theory of negligence is based on the argument that the Krupps should have ensured that the bathroom faucets in their apartment were shut off before they left the apartment, and before water service was restored. Under this

theory, Young need not prove which of the six people in the Krupps' apartment had left the bathroom faucet open.[1] Rather, she need only establish that the Krupps did not check that the faucets in their apartment were shut off before they left. Inasmuch as Young relies on the fact of the open faucet in the Krupps' bathroom as evidence that the Krupps violated their duty to maintain their premises in a reasonably safe condition, Young's motion is based on circumstantial evidence.

In Morejon, the Court of Appeals addressed the issue of whether the Court may grant summary judgment in plaintiff's favor based on circumstantial evidence, in the specific instance of res ipsa loquitur. The Court rejected the proposition that "circumstantial evidence (res ipsa) may never justify summary judgment for the plaintiff." Morejon, 7 NY3d at 206. However, the Court emphasized that summary judgment would be granted to plaintiff in "only the rarest of res ipsa loquitur" cases, "would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable." Id. at 209.

Here, Young does not contend that the Krupps were aware or should have been aware that any faucet in their apartment was left open before they left their apartment. Thus, to the extent that Young argues that the Krupps should have inspected the faucets of their apartment irrespective of whether the Krupps had notice that any faucets were left open, an issue of fact arises as to whether

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[1] Under Young's theory, the Court need not address whether the Krupps may be held liable for the actions of their son, Jack Krupp, whom the Krupps believed had left the faucet open. See Rozell v Rozell, 281 NY 106, 109 (1939)("An infant is generally responsible for his own torts"). The Court also need not address whether Jack Krupp, who was 3½ years old at the time (see Mitchell Krupp EBT, at 56), would be non sui juris as a matter of law, i.e., conclusively presumed incapable of negligence due to his age. See Verni v Johnson, 295 NY 436, 438 (1946). Young did not name Jack Krupp as a defendant.

a reasonable inspection would have disclosed that the faucet at issue was left open. Cindy Krupp stated at her deposition,

> "In that bathroom, the faucets – if you look at them and there is no water running– I can't describe them. They had just like four (indicating.) It's not like an on position and off position just by looking at them. There is no way to – unless there is water running out of them. Does that make sense?
>
> Some faucets you can say that is on and that's off because the line goes that way. These could have spun around and around and you couldn't be able to tell. Looking at them, you can't tell.
>
> If someone turned it on in the morning and though they turned it off, if there wasn't water running, there is no way to tell if it is in the on or off position."

Cestaro Affirm., Ex T [Cindy Krupp EBT], at 44-45. If a reasonable inspection would not have disclosed the allegedly hazardous condition, then the Krupps' alleged failure to inspect would not have been causally related to the damage caused by the open faucet. Hayes v Riverbend Hous. Co., Inc., 40 AD3d 500, 591 (1st Dept 2007). An inference of defendant's negligence solely from the fact that the faucet was left often is therefore not inescapable.

Thus, summary judgment against the Krupps is denied.

C. Severance of the actions joined for trial

Young argues that Actions No. 1 and No. 2 should be severed and tried separately because discovery is complete in the first action but not in the second. However, Barkly, the plaintiff in Action No. 2, asserts that discovery in the second action is, in fact, complete. See Wenig Affirm. ¶¶ 3-4.

Justice Feinman previously ordered that the actions be joined for trial; that decision is law of the case, and there is insufficient basis of changed circumstances or substantial prejudice for vacating it here. However, the Court notes that Barkly has not filed either a Request for Judicial Intervention (RJI) or a Note of Issue in Action No. 2. Although the actions ought to be tried

together, the actions will proceed separately if Barkly does not file the RJI and Note of Issue in Action No. 2 before Action No. 1 is tried. This decision is without prejudice to the discretion of the trial justice to direct that certain issues, such as damages and indemnification, be separately determined, i.e., after verdict.

II

Defendant 9 East Corp.'s Cross Motion for Summary Judgment

9 East Corp. seeks summary judgment dismissing all of the claims and cross claims asserted against it.

A. Summary judgment dismissing the complaint

As discussed above, Young's breach of contract claim against 9 East Corp. fails because Young admittedly refused 9 East Corp. access to her apartment to make repairs. Therefore, the first cause of action is dismissed.

As to the remaining causes of action, for breach of the warranty of habitability and for negligence, 9 East Corp. argues that they must be dismissed pursuant to paragraph 29 of the lease, which states:

> "LESSORS IMMUNITIES
>
> 29. (a) The Lessor shall not be liable, except by reason of Lessor's negligence, for any failure or insufficiency of heat, or of air conditioning...water supply, electric current, gas, telephone, or elevator service or other service to be supplied by the Lessor hereunder, or for interference with...other interests of the Lessee. **No abatement of rent or other compensation or claim of eviction shall be made or allowed because of the making or failure to make or delay in making any repairs**, alterations or decorations to the building, or any fixtures or appurtenances therein, or for space taken...or for interruption or curtailment of any service agreed to be furnished by the Lessor, due to accidents, alterations or repairs, or to difficulty or delay securing supplies or labor or other cause beyond Lessor's control, unless due to Lessor's negligence."

See Sigmond Affirm., Ex 6, at 18 (emphasis added by 9 East Corp.). Paragraph 29 recognizes an exception to 9 East Corp.'s immunity by reason of its negligence. Under General Obligations Law § 5-321, any agreement to exempt a lessor from liability for damages for injuries to person or property resulting from the lessor's negligence is void and unenforceable. As set forth in the discussion that follows, issues of fact arise as to whether 9 East Corp. acted negligently. Thus, 9 East Corp. does not establish, as a matter of law, that it has no liability to Young pursuant to paragraph 29 (a) of the lease.

The second cause of action asserts that 9 East Corp. breached the warranty of habitability by "failing to timely address the damage to plaintiff's apartment and have the habitability impairing conditions repaired and/or remedied in a timely fashion." Cases interpreting Real Property Law § 235-b have held that water leakage from an upstairs apartment that causes damage to a downstairs apartment can constitute a breach of the warranty of habitability. See e.g. Spatz v Axelrod Mgt. Co., 165 Misc 2d 759 (Yonkers City Ct 1995) (collecting cases).

9 East Corp. argues that this cause of action fails because: (1) the Krupps' alleged misconduct in leaving their bathroom faucet open was the "sole proximate cause" of the damage to Young's apartment; (2) Young has made no showing that she is unable to live in her apartment; and (3) breach of the warranty of habitability does not lie where the plaintiff is claiming damage to personal property.[2]

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[2] 9 East Corp. does not argue that Young's cause of action for breach of warranty of habitability should be dismissed because she did not provide it with access to make repairs. See e.g. Callender v Titus, 4 Misc 3d 126A (App Term, 2d Dept 2004) (warranty of habitability is not a defense to nonpayment when the tenant has denied the landlord access to make repairs). Therefore, the Court does not reach this issue on this cross motion. To the extent that this Court's decision respecting lack of access may be a bar under the law of the case doctrine, that issue may be raised before the trial court.

9 East Corp.'s arguments are unpersuasive. That someone else caused damage or created dangerous conditions or hazards to the building detrimental to life, health or safety is not a defense to a cause of action for breach of the warranty of habitability, because that would not excuse any obligation that 9 East Corp. would have to remedy such damage or hazards. Second, a tenant need not claim to have been forced to vacate the premises to pursue a claim for breach of warranty of habitability. See e.g. Park West Mgt. Corp. v Mitchell, 47 NY2d 316 (1979). Third, the pleadings make it clear that Young does not seek to recover damages solely for losses to her personal property. Therefore, summary judgment dismissing this cause of action is denied. Fourth, the parties to a lease or a contract may not exempt themselves from the warranty of habitability, which is statutory. Real Property Law § 235-b (2).

Young's third cause of action alleges the negligence of 9 East Corp., in that it either failed to warn the building's tenants to close all of their water faucets in the event of a blackout, or failed to ensure that such faucets were, indeed, shut after the blackout on August 14, 2003. Young contends that 9 East Corp. "had actual notice of the power outage and [was therefore] obligated to post signs advising tenants to be certain to keep their faucets in the off position when the power came back on." 9 East Corp. responds that it owed no such duty to warn, and that it had neither actual nor constructive notice that there were any open faucets in the building at the time of the blackout.

"Landowners have a duty to maintain their property in a reasonably safe condition, and to warn of latent hazards of which they are aware." Delia v 1586 Northern Blvd. Co., LLC, 27 AD3d 269 (1st Dept 2006). "The scope of any such duty of care varies with the foreseeability of the possible harm." Reynolds v Atlantis Marine World, LLC, 29 AD3d 770, 771 (2d Dept 2006).

However, "a property owner has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous." Kaufmann v Lerner New York, ___ AD3d ___, 838 NYS2d 181, 182 (2d Dept 2007). "Where a danger is readily apparent as a matter of common sense, there should be no liability for failing to warn someone of a risk or hazard which he [or she] appreciated to the same extent as a warning would have provided." Westbrook v WR Activities-Cabrera Markets, 5 AD3d 69, 71 (1st Dept 2004) (internal quotation marks omitted).

The warning that Young argues that 9 East Corp. ought to have given does not relate to any contemporaneous danger then present. It is debatable whether flooding from an open faucet is a foreseeable harm, because an open faucet does not necessarily cause flooding. Flooding would occur only if the water from the open faucet is flowing faster than the sink can drain the accumulating water (assuming the drain is open). Water running from a faucet poses no inherently dangerous condition, and it is open and obvious. It is a matter of common sense that flooding may occur if one were to leave one's apartment with a faucet left on, when the water is flowing faster than the sink can drain the accumulating water (assuming the drain is open). Thus, building residents would appreciate the risk or hazard to the same extent as a warning would have provided. Following Young's logic, the building would have an ongoing duty to warn building residents not to leave their stove or oven on, because one could argue that it is foreseeable that a fire could result from it. The warning that Young argues the building ought to have given is not intended to warn building residents of any risk or danger that they themselves could not appreciate through common sense. Rather, Young is arguing that building residents ought to have been given a reminder, under the guise of a warning.

Even though water was not then flowing through the faucets when the Krupps left their

apartment, any reasonable person would have expected that power would eventually be restored, and the water would eventually begin flowing. Therefore, Young may not assert a cause of action against 9 East Corp. for negligence based on a failure to warn building residents to turn off their faucets during the blackout.

Nevertheless, summary judgment dismissing the third cause of action is denied. Young argues that 9 East Corp. should have made sure that faucets in the building were shut off before water services were restored. The Court of Appeals has held that a landlord's duty of care to maintain the building in a reasonably safe condition also includes the duty to inspect for possible water overflows where a building's water supply is turned off and later restored at a time when tenants are not present. Arthur Richards, Inc. v 79 Fifth Ave. Co., 88 AD2d 517 (1st Dept), reversed for the reasons set forth in the dissent 57 NY2d 824 (1982); see also Hayes v Riverbend Hous. Co., 40 AD3d 500 (1st Dept 2007) (while the extent of a landlord's duty to maintain property varies, generally it is one of reasonable inspection).

In Arthur Richards, Inc., the landlord shut off the building's water supply to effect repairs. The superintendent notified tenants that the water would be shut off for the day, and that they should check their toilets. A faucet was left open in the premises of a tenant on the sixteenth floor, which was apparently the source of the water which damaged the plaintiff's property on the fifteenth and twelfth floors. The water leaked from the sixteenth floor down to the fifteenth and fourteenth floors, and then down to the twelfth floor (there being no thirteenth floor). By a 3-2 decision, the Appellate Division, First Department, set aside a jury verdict holding the tenant on the sixteenth floor 80% liable, and landlord and managing agent 20% liable. The majority reasoned that the tenant on the sixteenth floor was 100% responsible for the flood damage because its premises were locked for the

weekend. The dissent reasoned that the verdict should be upheld because the landlord or the management company did not examine or inspect any part of the building after the water had been turned on. Had the landlord or managing agent inspected the fourteenth floor, which was not locked, the dissent argued that steps might have been taken which could have reduced or eliminated the damage.

The Court of Appeals reversed the decision of the Appellate Division for the reasons stated in the dissent. The Court of Appeals stated,

> "we add only that the testimony of the building superintendent that his usual practice was to tell the tenants when the water was to be turned back on and that he knew when he turned the water back on on August 27 that everyone had left the L & D premises and that he could not get into those premises, establishes a sufficient basis for the jury's finding to negligence on the part of the owner and management company."

Arthur Richards, Inc., 57 NY2d at 824.

9 East Corp. does not establish, as a matter of law, that it was not negligent even if it did not inspect for water overflows after services were restored to the building. A jury must decide whether 9 East Corp. should have inspected individual apartments (or at least Young's and the Krupps' apartments) for overflowing, open faucets under the circumstances. Young and the Krupps live in a doorman building, and it is reasonable to infer on this cross motion that the doormen on duty would have been aware that Young and the Krupps had left the building before services were restored.

9 East Corp. also argues that "the Krupps' misconduct of leaving the bathroom sink faucet in the on position is ... the sole proximate cause of the damage to Young's cooperative apartment unit." Cestaro Affirm. ¶ 12. However, questions of "foreseeabilty and causation . . . are generally factual issues to be resolved by [a jury]." See McNulty v City of New York, 295 AD2d 42, 48 (1st

Dept 2002). As in Arthur Richards, an inspection of Young's and the Krupps' apartment (if such a duty to inspect arose) might have resulted in steps that could have reduced or eliminated the damage to Young's apartment.

B. Summary Judgment in 9 East Corp.'s favor against the Krupps

The balance of 9 East Corp.'s cross motion seeks summary judgment on its cross claim against the Krupps for indemnification, based on an indemnification provision contained in paragraph 11 of the Krupps' lease, which purportedly states:

> "INDEMNITY
> 11. The Lessee [the Krupps] agrees to save the Lessor [9 East Corp.] harmless from all liability, loss, damage and expense arising from injury to person or property occasioned by the failure of the Lessee to comply with any provision hereof, or due wholly or in part to any act, default or omission of the Lessee .... This Paragraph shall not apply to any loss or damage when Lessor is covered by insurance which provides for waiver of subrogation against the Lessee."

See Sigmond Affirm., Ex 6.[3] 9 East Corp. also seeks indemnification pursuant to paragraph 28 of the lease, which purportedly states:

> "REIMBURSEMENT OF LESSOR'S EXPENSES
> 28. If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense (whether paid or not) in performing acts which the Lessee is required to perform, . . . or defending, or asserting a counterclaim in, any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including reasonable attorneys' fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent."

Ibid. 9 East Corp. maintains that, like Young, the Krupps did not name 9 East Corp. as an additional insured under their insurance policy with AIG, as required under paragraph 4 (e) of the lease and the

[3] Neither the Krupps nor 9 East Corp. has been able to locate a copy of the Krupps' lease. However, both claim that the standardized provisions of the Krupps' lease are identical to the standardized provisions of Young's lease. Smith Opp. Affirm. to Cross Motion ¶ 14; Cestaro Affirm. ¶ 132.

house rules.

The Krupps argue that paragraph 11 does not apply because 9 East Corp. has insurance which should have carried a waiver of subrogation clause, as required under paragraph 4 (d) of the proprietary lease.[4] However, Orsid, which manages the building, did not find any copies of its multiperil policy after conducting a search of its files. See Smith Opp. Affirm., Ex B. The Krupps maintain that they did not name 9 East Corp. as an additional insured because they claim that they never received a copy of the amended lease or the new house rules. In any event, the Krupps believe that 9 East Corp. incurred no out-of-pocket losses, given that its losses were purportedly covered by insurance. 9 East Corp. received $6,042.11 in insurance proceeds from Barkly (see Cestaro Affirm., Ex O). Consequently, the Krupps argue that 9 East Corp. may not recover defense costs pursuant to paragraph 28 of the lease, citing Inchaustegui v 666 5th Ave. L.P., 96 NY2d 111 (2001).

Summary judgment against the Krupps is denied. An issue of fact arises as to whether the proprietary lease that the Krupps received when they purchased their apartment in 2002 contained the amendments to the proprietary lease and house rules that were enacted in 1994. The Krupps deny 9 East Corp.'s contention that they received a copy of those amendments, and both the Krupps and 9 East Corp. have been unable to locate a copy of the Krupps' lease to substantiate each other's contentions. Although 9 East Corp. claims that the books and records indicate that the Krupps

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[4]Paragraph 4 (d) states, in relevant part:

"Lessor agrees to use its best efforts to obtain a provision in all insurance policies carried by it waiving the right of subrogation against the Lessee; and, to the extent that any loss or damage is covered by the Lessor by any insurance policies which contain such waiver of subrogation, the Lessor releases the Lessee from any liability with respect to such loss or damage."

See Sigmond Affirm., Ex 6.

received a copy of the amendments and house rules, it did not submit copies of those records with its papers.

An issue of fact also arises as to whether 9 East Corp.'s insurance policy contains a waiver of subrogation clause, rendering paragraph 11 inapplicable. Because 9 East Corp. has not produced a copy of its insurance policy, the Court exercises its discretion to deny this branch of 9 East Corp.'s motion pursuant to CPLR 3212 (f).[5] An issue of fact also arises as to whether 9 East Corp. incurred any out-of-pocket costs not covered by insurance. It is unclear from the record how much of the attorneys' fees that 9 East Corp. has incurred is attributable to defending against Young's claims for its failure to make repairs, which should not be attributed to any default by the Krupps to obtain insurance on 9 East Corp.'s behalf. Even if the Krupps' insurer had paid claims instead of Barkly, the dispute between Young and 9 East Corp. would remain.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendant 9 East 96th Street Apartment Corporation is granted solely to the extent that the first cause of action set forth in the complaint of plaintiff Heidi Young in the first action is dismissed as against said defendant, and is

[5] The Court notes that the fact that Orsid has not located a copy of the policy in no way prevented 9 East Corp. from requesting a copy of the policy from Barkly.

otherwise denied; and it is further

ORDERED that the remainder of these actions shall continue.

Dated: 8/14/07
New York, New York

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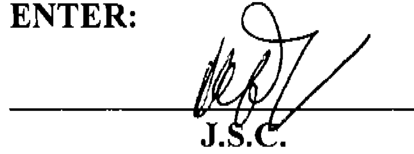

J.S.C.

FILED
AUG 20 2007
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