

**Alessandro v Higgins**

2007 NY Slip Op 32759(U)

August 27, 2007

Supreme Court, Nassau County

Docket Number: 4143-04/

Judge: Karen Veronica Murphy

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**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 25 NASSAU COUNTY**

**PRESENT:**

***Honorable Karen V. Murphy***  
**Justice of the Supreme Court**

\_\_\_\_\_ x

**ROSA ALESSANDRO,**

**Index No: 14143/04**

**Plaintiff,**

**Motion Dated: 4/06/07**

**Motion Submitted: 6/01/07**

**-against-**

**Motion Sequence: 001, 002**

**BRIAN HIGGINS, CHRISTINE HIGGINS,  
FRANCES PETZOLD and HELMUT PETZOLD,**

**Defendants.**

\_\_\_\_\_ x

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	XX
Answering Papers.....	XX
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Motion by defendants Brian Higgins and Christine Higgins to dismiss the complaint pursuant to CPLR § 3212 is granted and the complaint is hereby dismissed as against them.

This action arises from a fire that started in the basement apartment of a legal two-family house, located at 977 Maxwell Street, Franklin Square, New York, owned by defendants Brian Higgins and his wife Christine Higgins, which they purchased from Christine's parents, defendants Frances Petzold and Helmut Petzold, in May of 2001. At the time of the purchase, and at all relevant times thereafter, plaintiff resided in an illegal apartment in the basement space that was essentially a one-room studio consisting of a small bathroom and "kitchenette" equipped with a non-movable efficiency unit comprised of a sink, a cooktop (two hotplate burners with two dials imbedded in the unit itself) and a small refrigerator underneath the burners.

The fire occurred on November 1, 2002 at approximately 4:30 p.m. About fifteen minutes prior to the outbreak of the fire, plaintiff had placed a small pan of water on the front burner of the cooktop, which she turned on in preparation for making a cup of soup. She then left the kitchenette area to use the bathroom. As she was in the bathroom, she began to smell something burning and saw smoke coming into the bathroom through the open door. Her attempt to smother the fire with a towel was unsuccessful. She ran upstairs and exited the house.

In her complaint, plaintiff alleges that the fire was caused by defendants' negligence and that the defendants Brian Higgins and Christine Higgins were reimbursed by their insurance company for approximately forty items owned by her and located in the basement apartment [Contents Inventory Statement "basement"] as a result of which they were unjustly enriched.

Defendants' summary judgment motion is predicated on the two-pronged contention that 1) the record is devoid of any showing that the fire was caused by defendants' negligence and 2) plaintiff is not an insured under the unproduced State Farm policy of insurance [56-CV-6633-2] pursuant to which defendants were reimbursed for lost/damaged property. Defendants refute the latter allegation claiming that they were only reimbursed for the replacement value of their own damaged property—some of which was located in the basement storage area.

It is well established that a landlord has a duty to maintain its property in a reasonably safe condition under the extant circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk. (*Peralta v. Henriquez*, 100 N.Y.2d 139, 144, 790 N.E.2d 1170, 760 N.Y.S.2d 741 (2003), *Walters v. Northern Trust Co. of N.Y.*, 29 A.D.3d 325, 326, 816 N.Y.S.2d 18 [1<sup>st</sup> Dept., 2006]). For a plaintiff to show a breach of that duty, she is required to establish that the landlord either created or had actual or constructive notice of the hazardous condition, which precipitated the injury and failed to correct the condition within a reasonable period of time. (*Beck v. J.J.A. Holding Corp.*, 12 A.D.3d 238, 240, 785 N.Y.S.2d 424 (1<sup>st</sup> Dept., 2004), *lv to app den.* 4 N.Y.3d 705, 825 N.E.2d 1093, 792 N.Y.S.2d 898 [2005]). Proof of a general awareness that a dangerous condition may be present is not sufficient to establish notice of the particular condition which caused plaintiff's injury. (*Gonzalez v. Jenel Mgt. Corp.*, 11 A.D.3d 656, 784 N.Y.S.2d 135 [2d Dept., 2004]).

At her deposition, plaintiff testified that, in the two years she resided in the apartment, she never experienced any problem with the burners; she never lodged any complaints with the defendants, or anyone else (i.e., police, fire department), advising them that the burners were defective or did not operate properly. There is not a scintilla of evidence in the record to suggest, nor does plaintiff offer any specific allegations regarding same, that any negligence on the part of defendants was the proximate cause of the fire in plaintiff's apartment; that the fire was caused by some kind of malfunction in the cooktop unit or that defendants had notice—either actual or constructive of a dangerous condition *vis a vis* the subject cooktop. According to defendants' version of events, plaintiff told defendant Christine Higgins that she accidentally turned on the wrong burner of the cooktop causing a Tupperware container to catch on fire. For a plaintiff to sustain a claim based on common law negligence she must initially establish not only that the defendants were negligent but also that the alleged negligence was the proximate cause of the injuries. (*Dugue v. 1818 Newkirk Mgt. Corp.*, 301 A.D.2d 561, 756 N.Y.S.2d 51 [2d Dept., 2003]). The fact that the basement apartment was "illegal" was not the proximate cause of the fire. Given the factual record before this Court, and plaintiff's failure to raise a triable issue with respect to whether any specific acts of negligence on the part of the Higgins defendants caused the subject fire, plaintiff's negligence claim must be dismissed. The damages sustained by plaintiff did not result from any breach of the duty on the part of defendants to maintain the apartment in a reasonably safe condition.

Under the circumstances extant, plaintiff's unjust enrichment claim is similarly unavailing. The doctrine of unjust enrichment lies as a quasi-contract claim and is an obligation the law creates in the absence of an agreement. (*Goldman v. Metropolitan Life Ins. Co.*, 5 N.Y.3d 561, 572, 841 N.E.2d 742, 807 N.Y.S.2d 583 [2005]). An essential element of an unjust enrichment claim is the breach of a relationship, which is essentially contractual in nature. Courts may infer the existence of an implied contract to prevent one person who has obtained a benefit from another from unjustly enriching himself at the other party's expense. (*Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388, 516 N.E.2d 190, 521 N.Y.S.2d 653 [1987]). The doctrine of unjust enrichment does not require wrongful conduct by the one enriched, only that the enrichment is unjust. (*Ultramar Energy v. Chase Manhattan Bank*, 179 A.D.2d 592, 593, 579 N.Y.S.2d 353 [1<sup>st</sup> Dept., 1992]).

To prevail on a claim of unjust enrichment a plaintiff must show that defendant was enriched at plaintiff's expense and that it is against equity and good conscience to permit defendant to retain what is sought to be recovered. (*Cinquemani v. Lazio*, 37 A.D.3d 882, 883, 829 N.Y.S.2d 265 [3d Dept., 2007]; *Carriafielio-Diehl & Assoc., Inc. v. D&M Elec.*

*Contr., Inc.*, 12 A.D.3d 478, 479, 784 N.Y.S.2d 617 [2d Dept., 2004]). Here, there is no allegation that plaintiff is a named or additional insured on the State Farm policy under which the Higgins defendants recovered. A policy of fire insurance is a personal contract which does not attach to the property insured nor in any manner run with the land. (*Galante v. Hathaway Bakeries*, 6 A.D.2d 142, 149, 176 N.Y.S.2d 87 [4<sup>th</sup> Dept., 1958]), (citations omitted). Plaintiff is not in privity with the defendants' insurer nor is she a third party beneficiary of the contract between the Higgins defendants and their insurer. As a stranger to the insurance policy under which the Higgins defendants recovered, plaintiff has failed to show any viable claim to the insurance proceeds received by them. She acquired no rights either equitable or legal, under the contract of insurance.

Although determination of a summary judgment motion may be delayed to allow for further discovery, where evidence necessary to oppose the motion is unavailable to the opponent [CPLR § 3212(f)], a determination of the motion cannot be avoided by a claimed need for discovery in the absence of an evidentiary basis sufficient to suggest that discovery may lead to relevant evidence; (*Lambert v. Bracco*, 18 A.D.3d 619, 620, 795 N.Y.S.2d 662 [2d Dept., 2005]). A party's mere hope that further discovery will reveal the existence of triable issues of fact is insufficient to delay a determination of the motion. Plaintiff has failed to demonstrate an evidentiary basis sufficient to suggest that further disclosure might lead to relevant evidence.

Even affording plaintiff the benefit of every favorable inference, the Higgins defendants have made a *prima facie* showing of entitlement to judgment dismissing the complaint as a matter of law. In opposition plaintiff has failed to raise a factual issue which would preclude an award of summary judgment in favor of the Higgins defendants. (*Kidalso Gas Corp. v. Lancer Ins. Co.*, 21 A.D.3d 779, 781, 802 N.Y.S.2d 9 [1<sup>st</sup> Dept., 2005]).

With respect to defendants Frances Petzold's and Helmut Petzold's motion for summary judgment under Motion Sequence 002, a procedural analysis will be dispositive of this matter.

In opposition to the defendants' motion, plaintiff alleges that the defendants Petzold failed to file their summary judgment motion in a timely fashion. Defendants submitted no Reply opposing this position.

CPLR § 3212(a) provides that any party may move for summary judgment provided, however, that the Court may set a date after which no such motion may be made. The date set by the Court shall not be earlier than thirty (30) days after the filing of the note of issue.

Where no date is set by the Court, the motion shall be made no later than one hundred and twenty (120) days after the filing of the note of issue. For good cause shown, a Court may grant an extension of time to file summary judgment motions.

From the onset, it should be noted that defendants Petzold did not seek leave for extension of time to file their summary judgment motions. Note of Issue was filed by plaintiff on January 10, 2007. One hundred and twenty (120) days later, on May 10, 2007, the summary judgment motion under Motion Sequence 002 was filed. While plaintiff's counsel is correct that this Court requires motions for summary judgment to be filed within sixty (60) days, the certification order signed by this Court on November 17, 2006, did not indicate whether the motion was to be made within sixty (60) or ninety (90) days. However, the Preliminary Conference Stipulation and Order entered into by all counsel and So Ordered by Justice Steven Jaeger of this Court directed that all summary judgments shall be made on or before ninety (90) days after filing the Note of Issue.

Having failed to file their motions within this time frame, and not having sought an extension of time to do so, Motion Sequence 002, brought on behalf of defendants Frances Petzold and Helmut Petzold, is denied, without addressing the merits of the motion. (See, *Miceli v. State Farm Mut. Auto. Ins. Co.*, 3 N.Y.3d 725, 819 N.E.2d 995, 786 N.Y.S.2d 379 (2004); *Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431, 781 N.Y.S.2d 261 (2004); *Crespo v. Elrac, Inc.*, 40 A.D.3d 907, 837 N.Y.S.2d 182 [2d Dept., 2007]).

The foregoing constitutes the Order of this Court.

Dated: August 27, 2007  
Mineola, N. Y.

  
J. S. C.

**ENTERED**

SEP 04 2007

NASSAU COUNTY  
COUNTY CLERK'S OFFICE