

**Gregory v City of New York**

2007 NY Slip Op 33112(U)

September 26, 2007

Supreme Court, New York County

Docket Number: 0104139/2003

Judge: Eileen A. Rakower

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

PRESENT: EILEEN A. RAKOWER  
J.S.C.

PART Part 5

Index Number : 104139/2003

GREGORY, GARY

vs

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

1 \_\_\_\_\_ 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

1, 2

3, 4

5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

OCT 02 2007

NEW YORK  
COUNTY CLERKS OFFICE

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 9/26/07



**EILEEN A. RAKOWER** J.S.C.

Check one:  FINAL DISPOSITION  NON FINAL DISPOSITION

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 5

-----X

GARY GREGORY and JOYCE GREGORY,

Plaintiff,

Index No.  
104139/03

- against -

Decision and  
Order

**FILED**

OCT 02 2007

NEW YORK  
COUNTY CLERK'S OFFICE

THE CITY OF NEW YORK, NEIGHBORHOOD  
PARTNERSHIP HOUSING DEVELOPMENT FUND  
COMPANY, INC., T&M REALTY MANAGEMENT  
INC. and PASCAL REALTY MANAGEMENT  
CORPORATION,

Mot. Seq. 002

Defendants.

-----X

HON. EILEEN A. RAKOWER

Plaintiff Gary Gregory, a firefighter, brings this action for personal injuries he suffered while fighting a fire at premises located at 50 West 129<sup>th</sup> Street on October 1, 2001. Specifically, while moving a hose line on the stairway between the 5<sup>th</sup> and 6<sup>th</sup> floors, he tripped on a five gallon spackle bucket and tumbled down the steps along with two of his comrades. Joyce Gregory, Gary's wife, brings a derivative action. The subject building was owned by the City of New York (City), and leased by a net lease to Neighborhood Partnership Housing Development Fund Company, Inc. (NPHDFC). T&M Realty Management, Inc. (T&M) managed the premises on October 1, 2001. The plaintiffs, NPHDF, and T&M, by stipulation dated January 26, 2007, proposed to discontinue the action as against defendant Pascal Realty Management Corporation (Pascal), conceding that Pascal "had no direct or indirect interest or involvement in the premises located at 50 West 129<sup>th</sup> Street, New York, New York at any time." City did not sign the stipulation.

Defendants NPHDFC and T&M seek to dismiss plaintiff's complaint for failure to state a cause of action under New York General Municipal Law Section 205-a, and for failing to set forth a prima facie case of negligence. Alternatively, defendants seek

summary judgment dismissing the action as against them. Plaintiffs oppose. City cross moves for summary judgment based on contractual indemnity as against NPHDFC and T&M, who oppose. The court notes that, while City did not consent to the discontinuance as against Pascal only, it makes no mention of Pascal in its answer, nor in its motion for summary judgment.

Initially, plaintiff is precluded from bringing claims of common law negligence by the “firefighter’s rule,” which states

Where some act taken in furtherance of a specific police or firefighter function exposes the plaintiff to a heightened risk of sustaining the particular injury, he or she may not recover damages for common law negligence. (*Zanghi v. Niagara Frontier Transp. Comm’n*, 85 NY2d 423[1995]).

GML §205-a, however, creates a right of action for a firefighter where a failure to comply with requirements of statutes, ordinances or rules caused the firefighter’s injury. Such a claim can only be asserted against property owners or others having control of the premises where the firefighting takes place. *9Id.*, at 444). The plaintiff

must identify the statute or ordinance with which defendant failed to comply, describe the manner in which the firefighter was injured, and set forth those facts from which it may be inferred that the defendant’s negligence directly or indirectly caused the harm to the firefighter. (Citation omitted, *Id.*, at 441.)

When considering a motion to dismiss for failure to state a cause of action, the court in *Leon v. Martinez*, (84 N.Y.2d 83 [1994]), held that:

the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit.

Further, the court found that when assessing the sufficiency of the complaint in stating a cause of action:

a court may freely consider affidavits submitted by the plaintiff to

remedy any defects in the complaint...and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one. (*Id.*)

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Defendants NPHDFC and T&M, in support of their motion, provide the pleadings, the net lease agreement between NPHDFC and City, plaintiffs' verified bill of particulars, numerous discovery orders issued at compliance conferences during the litigation along with the Note of Issue, a proposed stipulation of discontinuance as against Pascal only, the testimony of plaintiff Gary Gregory at his GML 50(h) hearing, a New York Fire Department member injury report, the deposition testimony of John Hear, a fellow firefighter and witness, the deposition testimony of Richard Leonard, a fellow firefighter and witness, the deposition testimony of Vincent Rosado, superintendent of the subject building and employee of T&M, the deposition testimony of Cora Taitt, Manager for T&M, a fire and incident report, a fire marshal complaint follow up report, and a letter from Dr. Peter A. Godsick regarding his patient, Gary Gregory.

City, in support of its motion seeking contractual indemnification, provides a notice of claim and the pleadings, and refers to the lease between it and NPHDFC provided in the original moving papers.

Plaintiffs, in opposition, provide the affidavit of Gary Gregory, the affidavit of Eugene West, an expert in fire origin, a Fire Department report showing the origin and extension of the subject fire, a Fire Department operations report, a lead paint disclosure regarding the subject building, an amendment to the net lease, and building department records.

Defendants argue that plaintiff himself admits that he “. . . lost my balance, fell into two fire fighters, and the three of us fell, and I was the guy that fell on the bottom of the pile . . .” (Gary Gregory 50(h) testimony, page 10, lines 19-22). Defendants artfully omit the beginning of the statement, which was “I came entangled in the bucket, lost my balance . . .” Defendants assert that plaintiff brought about his own accident, and that no violation of statute or ordinance was the precipitating cause of Gary Gregory’s fall.

Defendants assert that Mr. Leonard and Mr. Hear, both at the scene of the accident, do not completely corroborate plaintiff’s version that he tripped on the spackle bucket. Both say there was a heavy smoke condition on the stairs; both saw the bucket on the stairs; but neither saw plaintiff trip on the bucket.

Plaintiffs, in the complaint and in their bill of particulars, cite the statutes the owner or person in control of the property allegedly violated in support of their § 250-a claim. Plaintiffs charge that debris including 5 gallon spackling buckets was left on the stairway, impeding the firefighters bringing a hose through the stairs. Further, an unblocked and unsealed dumbwaiter on the 5<sup>th</sup> floor allowed the fire to spread to the 6<sup>th</sup> floor through the dumbwaiter shaft.

Plaintiff asserts he tripped on a bucket, which was in the stairwell. His fellow firefighters also saw buckets in the stairwell. The superintendent of the building concedes that he uses such buckets and keeps them in the basement. He was not using them at the time of the fire, and does not recall seeing them in the stairway.

The fire department investigation of the fire revealed that “Lt. Creispin, Ladder 30, stated that upon arrival, he found a heavy fire in Apartment 29, in the kitchen and the two front rooms. He stated that there was no covering over the dumbwaiter shaft when he got into the kitchen of Apartment 29, and fire was extending via the dumbwaiter.”

The tenant of Apartment 29 had a clothes dryer, although no tenant was permitted to have a clothes dryer. The fire originated from that clothes dryer. The superintendent of the building had no knowledge of the clothes dryer before the fire, and believed all of the dumbwaiters were sealed. He admits that after the fire, he was able to access one of the sealed apartments through the dumbwaiter on the sixth floor, and concluded that it was unsealed by the fire department at the time of the fire. He was unable to say how the dryer had been vented.

Plaintiff points out that there are issues of fact as to whether defendants failed to seal the dumbwaiter shaft in Apartment 29, in violation of New York City Administrative Code § 27-987, permitting the fire to spread from the fifth floor to the sixth floor. Further, there are issues of fact as to whether defendants left construction debris on the stairway from the fifth floor to the sixth floor in violation of New York City Administrative Code §§ 27-221, 27-370 and 27-361.

Plaintiff provides an expert affidavit and various fire department reports which attribute the spread of this fire from Apartment 29 on the fifth floor to Apartment 35 on the sixth floor through the unsealed dumbwaiter shaft opening in Apartment 29. He explains that this open shaft became a flue, drawing the fire upwards.

While defendants urge that the dumbwaiters were sealed and only opened by the fire department, Lt. Creispin, a member of the team first on the scene, found the shaft open in Apartment 29. Clearly there is an issue of fact as to whether the shafts were properly sealed. Defendants point out that plaintiff still needs to establish that the spread of the fire to the 6<sup>th</sup> floor through the dumbwaiter shaft caused his injury. Plaintiffs rely on a heavy smoke condition, allegedly caused by the spread of the fire through the shaft and into the cockloft, (the area above the ceiling of the sixth floor,) as contributing to this accident.

Regarding the debris, defendants argue it is unknown who left it there. Nevertheless, evidence supports the fact that painting and spackling was being done in the building at or around the time of the fire. The testimony of the outside contractor who was performing that work was not provided, but the super admitted he loaned the worker painting equipment like the 5 gallon buckets. While the super does not recall debris on the stairs, the fact that work was being done in the building consistent with the debris found is sufficient to raise an issue of fact for the finder of fact as to whether this spackle bucket was left on the stairwell in violation of statute.

A decision whether to grant summary judgment based on an indemnification clause can properly be conditioned upon a finding of negligence of the party who is responsible under the clause. (*Crimi v. Neves Associates*, 306 A.D.2d 152 [1<sup>st</sup> Dept. 2003]). If issues of fact exist as to the negligence of the party responsible for indemnification, summary judgment must be denied. (*Zeigler-Bonds v. Structure Tone, Inc.*, 245 A.D.2d 80 [1<sup>st</sup> Dept. 1997]). The right to contractual indemnification depends upon the specific language of the contract. (*Moss v. Mcdonald's Corp.*, 34 A.D.3d 656 [2<sup>nd</sup> Dept. 2006]).

Initially, NPHDFC and T&M argue that the City's indemnification clause would not apply, since it only took over responsibility for the property nineteen days before the fire occurred. Thus, the time was insufficient for it to have inspected and discovered that all of the dumbwaiters were sealed. A question of fact remains as to whether an actual inspection took place which should have revealed that the dumbwaiters were sealed. Ms. Taitt testified that T&M did inspect the premises after taking over but before the fire, but the person who inspected is since deceased, and the scope of that inspection is unclear. Further, as noted before, if spackling work was being performed, initiated by T&M, then a question of fact remains as to whether T&M's agent left the debris on the stairs. There is evidence that a report of peeling paint and the presence of lead paint may have prompted T&M to undertake immediate repairs. Until there has been a finding of negligence on the part of NPHDFC or T&M, summary judgment is premature.

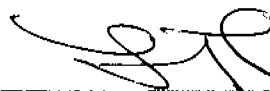
Wherefore, it is hereby

ORDERED that defendants' motion for summary judgment dismissing all claims is denied; and it is further

ORDERED that City's cross motion for summary judgment on the issue of indemnification is denied.

This constitutes the decision and order of the court.

DATED: September 26, 2007



EILEEN A. RAKOWER, J.S.C.

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