

**Jagopat v Rao's City Views, LLC**

2008 NY Slip Op 30317(U)

January 31, 2008

Supreme Court, New York County

Docket Number: 0116582/2005

Judge: Carol R. Edmead

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

PRESENT: CAROLE DMEAD  
J.S.C.  
*Justice*

PART 35

Rajpattie Jagopat

INDEX NO. 116582/05

MOTION DATE 11/9/07

MOTION SEQ. NO. 002

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

- v -

Rao's City Views

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 002 is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that in motion sequence no. 002, the motion is denied; and it further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

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

**FILED**

FEB 05 2008

NEW YORK COUNTY CLERK'S OFFICE

**RECEIVED**  
JAN 31 2008  
MOTION SUPPORT OFFICE

Dated: 1/31/08

*[Signature]*

**CAROLE DMEAD** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

\_\_\_\_\_  
RAJPATTIE JAGOPAT,

x

Plaintiff

Index No. 116582/05

-against-

**DECISION/ORDER**

RAO'S CITY VIEWS, LLC, THE VICI  
GROUP, LTD., d/b/a VICI GROUP B&R  
BUILDING & RENOVATIONS, INC.,  
And R&L CONSTRUCTION MANAGEMENT  
CORP.,

Defendants.

\_\_\_\_\_  
EDMEAD, J.S.C.

x

**FILED**  
FEB 05 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

**MEMORANDUM DECISION**

Motion sequence nos. 002 and 003 are consolidated for disposition. In motion sequence no. 002, defendant R&L Construction Management Corp. (R&L) moves, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint and all cross claims alleged against it, or in the alternative, for summary judgment on its cross claim for common-law indemnification against co-defendant The Vici Group LTD d/b/a Vici Group (Vici).

In motion sequence no. 003, defendants Rao's City Views, LLC (Rao's) and Vici move for summary judgment dismissing the complaint and all cross claims alleged against them.

This action arises out of a construction project (Project) to demolish an existing building down to the ceiling of the first floor and to build thereupon, and on two adjoining lots, a seven-story condominium building. The first floor of the then-existing building houses Rao's Restaurant. The condominium building is owned by Rao's. Acting as the construction manager for the

project, albeit as the agent of Rao's, Vici subcontracted with R&L to perform the masonry work on the new building. For logistical reasons, the brickwork and the application of EIFS, an artificial stucco-like substance, to the north wall of the building under construction, above the level of the roof of the adjoining building to the east, which is owned by a person who was then known to the parties only as Nick, had to be performed from a scaffold erected on the roof of Nick's building. Vici requested and was granted permission to use Nick's roof. Accordingly, a pre-condition survey of the roof of Nick's building was performed, and subsequently, construction materials were stored thereon and scaffolding was erected.

Rocky Meli, who was the president of Vici, as well as the project manager for the Project, testified at his deposition that, in order to support and distribute the weight of the scaffold, planking was placed over Nick's roof, and steel beams were placed along the width of the roof. Mr. Meli testified that the steel beams were placed either by R&L, or by HMR, to which R&L had subcontracted the EIFS work, that he had agreed with R&L's decision to place steel beams across the roof, and that the beams were on the roof for several months. Plaintiff is the owner of the building that adjoins Nick's building on the east. To the east of her building there is an empty lot. The steel beams that were placed on Nick's roof extended across the width of plaintiff's roof to the edge of the roof that was adjacent to the empty lot. It is undisputed that, although plaintiff's identity as the owner of her

building could easily have been ascertained, neither Vici, nor R&L, sought plaintiff's permission to use her roof.

Robert DeBenedetto, who was, and remains, a project superintendent at R&L, testified at his deposition that R&L did not place the steel beams on the two roofs, that he does not know who did place them there, and that, in any event, contrary to the testimony of Mr. Meli, the beams were wholly unrelated to the scaffolding that was erected on Nick's roof. He also testified that the scaffolding, which was made of aluminum, was erected by HMR, that it was built on top of 3 by 10 inch ten-foot wooden planks which protected the roof, that the frames were held together by cross braces, with planks on top of each six feet of scaffolding, and that the entire scaffolding was not attached to the roof. Again contradicting Mr. Meli, Mr. DeBenedetto testified that R&L performed both the brick work and the EIFS work, and that it subcontracted with HMR solely for the construction of the scaffolding. Finally, Mr. DeBenedetto testified that it is the responsibility of the general contractor to obtain pre-condition surveys and to verify the ownership of rooftops that may be impacted by construction, and that the only contexts in which he has seen steel beams with cross-pieces of metal affixed to them, such as those across the roofs of Nick's and plaintiff's buildings, are as a permanent base for heavy equipment such as an air conditioning unit, or as a platform suspended over an open space. Mr. DeBenedetto's testimony was unclear as to whether he and his crew entered upon plaintiff's roof. See Marcantonio Affirm., Exh.

I, at 38-41.

Plaintiff testified at her deposition that, in February 2005, she received a call from one of her tenants informing her that the fourth-floor tenant was complaining of leaks from her ceiling and noise on the roof. Plaintiff, who was living in Florida, arrived and found one cracked window, where a wall was collapsing, and other window frames damaged by water. She saw the steel beams crossing her roof, resting on the parapet wall, and extending across the roof of Nick's building, as well as "steel stuff" that supported the beams, and the cross pieces of metal on top of the beams. She saw bricks that had been dislodged from the walls of her building resting on the ground. She testified that the cement on her roof had been destroyed and that she saw bulky construction materials, such as bags of cement, plywood sheets, and boards being lifted from the adjacent empty lot onto her roof by ropes, to be moved over Nick's roof to the construction site. There was water coming down in her building from all different angles. She testified that she complained to Mr. Meli, who came to look at her roof, and repeatedly promised to fix her building, but ultimately did no more than have one of his workers repair the flashing at one spot on her roof, a matter that he testified to having performed as a courtesy. Finally, plaintiff testified that, while she had hired people to do some patchwork, while waiting for Mr. Meli's promised assistance, by April 2005 water was running between the drywall and the outer wall, the drywall got soaked, swelled and punctured, making holes in the apartment walls and causing massive damage to

the four apartments in the building. On October 5, 2005, she gave up on Mr. Meli and hired a contractor to replace her roof. Her complaint alleges trespass and negligence.

Mr. Meli testified that, while he had been willing to help plaintiff out somewhat, her demands became wildly excessive. He also testified that when he went to look at plaintiff's roof he noticed that it was in very poor condition due, in his opinion, to longstanding neglect; that there was no type of hoist mechanism on plaintiff's roof on the side adjacent to the empty lot, and that no one who was working on the construction project had placed ropes hanging from plaintiff's roof; and that, although he periodically inspected the conditions on Nick's roof, he had failed to notice that the steel beams running across that roof extended over the entire width of the roof of plaintiff's adjoining building and learned that they did so only when plaintiff complained to him.

Defendants argue that plaintiff cannot prove that any of the damage to her building was proximately caused by the placement of the steel beams across its roof. That argument, and the supporting reports of defendants' experts, Harold Greve, P.E. and Gary Panariello, Ph.D., P.E., ignore plaintiff's deposition testimony that heavy construction materials were raised onto, and transported over, her roof. While that testimony is contradicted by the testimony of Mr. DeBenedetto, that all of the construction materials that R&L and HMR used were stored either on the street or in the building under construction, and the testimony of Mr. Meli, that no ropes were hung from the roof of plaintiff's building in

connection with the Project, on a motion for summary judgment evidence in admissible form submitted in opposition to the motion must be accepted as true. Patrolmen's Benevolent Assn. of City of New York, Inc. v City of New York, 27 NY2d 410 (1971); Cerreta v New Jersey Tr. Corp., 267 AD2d 128 (1st Dept 1999). Mr. Greve found that one leak inside plaintiff's building was correlated with a leaking radiator in the apartment directly above. With regard to other leaks, however, such as those attributed to damaged window frames, defendants have not shown that the window frames in question were not damaged as a result of leaks caused by the construction activities that plaintiff testified that she observed on her roof. Similarly, a leak that Mr. Greve attributed to a masonry wall leak was not shown ultimately not to have resulted from the construction activities that plaintiff testified to having seen. Mr. Greve opines that the damage that he observed was not related to the placement of the steel beams on plaintiff's roof, but rather, to long-term neglect. However, he does not address the question of whether a significant portion of the damage may have been caused by a raising of construction materials onto, and their transportation across, that roof. In sum, defendants have not carried their burden to show that, as a matter of law, such causation cannot be proven. To be sure, in order to recover consequential, and perhaps exemplary, damages (see Golonka v Plaza at Latham LLC, 270 AD2d 667 [3d Dept 2000]), plaintiff will have the burden of proving at trial that she suffered damages as the proximate result of defendants' acts, but proof of damages is an

issue of fact, and the prospective difficulty of such proof is not a ground upon which to dismiss a complaint on a motion for summary judgment. A.W. Fuir Co. v Ataka & Co., 71 AD2d 370 (1st Dept 1979).

Thus, because there is a dispute between Rao/Vici and R&L as to who placed the steel beams on the roofs, neither is entitled to a dismissal of the complaint, nor is R&L entitled to a dismissal of Rao's and Vici's claim of breach of contract against it. The contract between Vici and R&L required R&L to purchase commercial general liability insurance, as well as excess or umbrella bodily injury and/or property damage liability, and to have Rao and Vici named as additional insureds. R&L has not shown that it did so.

Accordingly, it is hereby

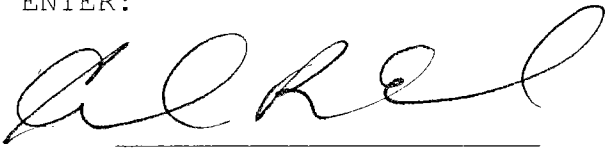
ORDERED that in motion sequence no. 002, the motion is denied; and it further

ORDERED that in motion sequence no. 003, the motion is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: January 31, 2008

ENTER:



Carol Robinson Edmead, J.S.C.

**FILED**  
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