

**Delgado v Community Props., L.P.**

2008 NY Slip Op 32438(U)

September 3, 2008

Supreme Court, Suffolk County

Docket Number: 0027736/2004

Judge: William B. Rebolini

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK**

**I.A.S. PART 7 - SUFFOLK COUNTY**

PRESENT:

**COPY**

**WILLIAM B. REBOLINI**  
Justice

\_\_\_\_\_  
Nilsa Delgado,

Plaintiff,

-against-

Community Properties, L.P., Community  
Properties and Debski contracting, Inc.,

Defendants.  
\_\_\_\_\_

Motion Sequence No.: 003; MD

Motion Date: 5/2/08

Submitted: 6/13/08

Index No.: 27736/2004

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Upon the following papers numbered 1 - 27 read on this motion for summary judgment:  
Notice of Motion and supporting papers, 1 - 8; Answering Affidavits and supporting papers, 9 - 25;  
Replying Affidavits and supporting papers, 26; Other, 27.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff  
when she was struck by a falling portion of the ceiling in her apartment. The apartment is in a

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building owned by either defendant Community Properties, L.P. or defendant Community Properties (hereinafter these defendants collectively referred to as "Community"). In April, 2004, there had been a leak in the ceiling of the plaintiff's apartment and she notified the landlord's office of the leak. Community thereafter sent Mirosław Debski to the premises to fix the leak. A few days later, the ceiling fell, allegedly injuring the plaintiff.

Community now moves for summary judgment dismissing the complaint. In support thereof, Community submits, *inter alia*, the deposition testimony of the plaintiff wherein she explained that she rented the first floor apartment of a two family house pursuant to lease with Community and Mr. Pius<sup>1</sup>. She testified, in pertinent part that on Friday, April 16, 2004, water was dripping from her bedroom ceiling onto the floor and onto her bed, whereupon she called Mr. Pius's office and told his secretary she had a leak in the apartment. The plaintiff stated that the secretary told her that they would send someone right away, and that shortly thereafter, an individual whom she knew as "Mike," and who performed maintenance for Community, came to the apartment. The plaintiff alleged that Mike indicated the water was coming from an upstairs bathroom. She also testified that Mike drilled three holes into the ceiling and gave her plastic to put on the bed. She alleged that Mike told her to let it drain and that it would dry up. She stated that eventually the ceiling stopped leaking but it remained wet. In addition, the plaintiff explained that on Sunday, April 18, 2004, she was standing between her footboard and her dresser, when the ceiling fell on her. She alleged that the portion that fell was round and approximately two feet across.

Community also submits the deposition testimony of Donald Pius, who signed the lease with the plaintiff. Mr. Pius testified that during the week before the accident, a worker at his office, received a call concerning water coming from the ceiling of the plaintiff's apartment. He alleged that this worker then called their contractor, defendant Debski Contracting, Inc.(hereinafter "Debski") and he explained that Mirosław Debski, the president of Debski, is also known as Mike. Mr. Pius alleged that Mr. Debski was told to go to the plaintiff's apartment immediately. He testified in pertinent part that Mr. Debski was not an employee but was an independent contractor who submitted a bill and then got paid. Mr. Pius also stated that in 2004, Community owned approximately 50 to 60 properties and that Debski was used for their maintenance. Mr. Pius alleged that when he spoke to Mr. Debski concerning the leak, Mr. Debski informed him that: he put a hole in the ceiling; he drained out a little bit of the water; and that he was going to go back and spackle the ceiling, but because it was wet, he had to wait for the ceiling to dry out. After being shown a document, Mr. Pius further testified that on April 19, 2004, the day after the accident, Debski fixed the ceiling. He stated that he believed that Mr. Debski went back to the apartment on April 19<sup>th</sup> in response to his office calling Mr. Debski and telling Mr. Debski that the tenant had called and said that the ceiling had fallen down.

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<sup>1</sup>Donald Pius is a limited partner of Community.

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Additionally, Community submits the deposition testimony of Mr. Debski who testified that prior to April 18, 2004, he did not have any written or oral contract with Community or Mr. Pius, but he did do painting, remodeling, and carpentry work for Community and Mr. Pius. Mr. Debski testified that on April 12, 2004, he received a phone call from Community that there was some kind of leak from the upstairs at the plaintiff's premises. He stated that he arrived at the plaintiff's apartment within approximately a half hour and he saw that water was leaking from the plaster ceiling of her bedroom in an area about two feet by two feet. Mr. Debski testified that when he went upstairs to check why it was leaking, he found that there was a clogged toilet and some water on the floor. He explained that he unclogged the toilet and mopped up the water. He further alleged that he went back downstairs to the plaintiff's apartment, he put some plastic on the bed and the carpet, and punched three or four holes in the ceiling with a screwdriver where it was wet. Mr. Debski alleged that he caught the water with a bucket and that before he left the water had stopped leaking. He testified that he did not do any type of repair or reinforcement to the ceiling at that time, because the ceiling looked perfectly fine; nor did he give the plaintiff any instruction regarding the ceiling. He indicated that he was going to go back to fix the holes when the ceiling was completely dry. Mr. Debski alleged that he told Mr. Pius that he snaked the toilet, cleaned out the water, and drained it from the ceiling.

Mr. Debski stated that he did not work for anyone other than Community and Mr. Pius. He alleges that he got paid by the job or how much time he spent. He testified that for this particular job, he did not remember how much he billed, and he did not have a separate document which would show how much he billed. Later at his deposition, he testified to the effect that a certain document was the bill, but only Community knew how much to pay him. When Mr. Debski was then asked where on such document it would indicate how much to pay him or where his hours were, Mr. Debski responded, "I don't have it here." Mr. Debski stated in pertinent part that he usually got his materials from Community's garage, but when he needed material, he would buy it. In addition, Mr. Debski alleged that every day Mr. Pius would call Mr. Debski and ask Mr. Debski where he was working so that he could bring him the work orders. He maintained that neither Mr. Pius nor Community ever instructed him as to how to make repairs to toilets or to leaky ceilings.

Community argues that based upon all of the deposition testimony, there is no dispute that Debski is liable for the accident. Community contends that when it received notice of the leak, it remedied the situation by contacting its contractor and advising him to go to the premises immediately. It claims that Debski went to the premises and did nothing other than punching holes in the ceiling. It asserts that Mr. Debski did not reinforce the ceiling or advise the plaintiff to avoid the area. Community alleges that it is not a licensed contractor and has no knowledge regarding building repairs or integrity. It argues that it does not instruct Debski on how to perform repairs. Community maintains that it relied upon Debski to properly and safely perform repairs. It concludes that it is not liable for the happening of the subject accident as it fulfilled its duty to repair by promptly sending a licensed contractor to address the leaking and resulting damage.

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The plaintiff opposes Community's motion and argues that Community was both the owner and the landlord and retained control of the premises pursuant to its written lease. The plaintiff submits, among other things, a copy of the lease and points out numerous paragraphs which she alleges shows that Community retained control. Specifically, paragraph 8 of the lease provides in pertinent part, "Landlord will repair plumbing, heating and electrical systems." Further, paragraph 9 of the lease provides in pertinent part, "Tenant must give Landlord prompt notice of fire, accident, damage or dangerous or defective condition... Landlord need only repair the damaged part of the Apartment/ Room... Landlord shall have a reasonable time to repair." The plaintiff contends that Community, who admits to receiving notification of the water leak, was in control of the premises and was contractually obligated to repair an unsafe condition. In addition, the plaintiff argues that Debski was not an independent contractor, but was essentially Community's employee over whom it exercised control. She asserts that the deposition testimony clearly shows that Community controlled every aspect of Debski's work, including giving him his assignments each day and supplying all his materials. As such, claims the plaintiff, Community is vicariously responsible for Debski's work.

In reply, Community contends that it immediately acted upon the tenant's complaint by dispatching a repairman to address the problem. It asserts that it was under the impression that the repair had been made and that no further work aside from minor cosmetic repair would be necessary. Additionally, Community maintains that the deposition testimony demonstrates that Debski is an independent contractor who is paid for each individual job performed. It claims the fact that Mr. Pius prefers to use the same independent contractor for any maintenance issues does not make Debski an employee.

As a general rule, one who hires an independent contractor is not liable for the independent contractor's negligent acts (see, Chorostecka v. Kaczor, 6 AD3d 643 [2<sup>nd</sup> Dept., 2004]). This rule is premised upon the fact that an employer of an independent contractor has no right to control the manner in which the contractor's work is to be done and thus it is more sensible to place the risk of loss on the contractor (see, Metling v. Punia & Marx, Inc., 303 AD2d 386 [2<sup>nd</sup> Dept., 2003]). However, for public policy reasons, there are some well-settled exceptions to this general rule, wherein an employer will be liable for an independent contractor's negligence (see, Rosenberg v. Equitable Life Assurance Society of the United States, 79 NY2d 663 [1992]). One such well-recognized exception is where the employer of the contractor has assumed a contractual obligation to perform the repair (see, May v. 11 ½ East 49<sup>th</sup> Street Co., Inc., 269 AD 180 [1<sup>st</sup> Dept., 1945], *aff'd* 296 NY 599). Accordingly, where a landlord assumes a contractual duty to a tenant, the landlord may not escape performance by delegating the duty to an independent contractor (see, Hyman v. Barrett, 224 NY 436, 121 NE 271 [1918]; see, also, 3 Warren, *Negligence in the New York Courts* §57.05[6]). "One who is personally bound to perform a duty cannot relieve himself from the burden of such obligation by any contract which he may make for its performance by another person. Therefore, the fact that he may have used the utmost care in selecting an agent to perform this duty,

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or that he has entered into a contract with any person by which the latter undertakes to perform the duty, is no excuse to the person upon whom the obligation originally rested, in case of failure of performance. His obligation is to do the thing, not merely to employ another to do it" (Sciolaro v. Asch, 198 NY 77, 82; 91 NE 263, 264 [1910][internal quotation marks omitted]).

Even assuming for the sake of argument that Debski was an independent contractor, this case falls under the exception wherein a landlord assumes a contractual obligation. Paragraphs 8 and 9 of the lease specifically placed the duty of repairing the leaky ceiling on Community. Despite Community's argument to the contrary, it could not simply delegate its duty to repair to Debski so as to relieve itself from the consequences of an alleged non-performance (see, Sciolaro v. Asch, 198 NY 77, 82; 91 NE 263, 264 [1910]). Therefore, an issue of fact exists as to Community's alleged liability and its motion for summary judgment dismissing the complaint against it is denied.

Accordingly, it is

**ORDERED** that this motion by defendants Community Properties, L.P. and Community Properties for summary judgment dismissing the complaint is denied.

Dated: September 3, 2008

  
HON. WILLIAM B. REBOLINI, J.S.C.