

Villanueva v Heckerling

2009 NY Slip Op 30579(U)

March 13, 2009

Supreme Court, New York County

Docket Number: 102969/05

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. W. Blevins
Justice

PART 11

Index Number : 102969/2005

VILLANUEVA, ALFREDO

vs

SASHA DURCAN INC

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 11

MOTION DATE 11/20/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Is motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision Order & Judgment, and ~~it~~ is ~~referred~~ transferred to Civil Court as per 325-d order issued by this court.

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: March 13, 2009

J.S.C.

Check one: FINAL DISPOSITION

~~NON-FINAL DISPOSITION~~

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X

ALFREDO VILLANUEVA,

Plaintiff,

Index No. 102969/05

-against-

JEREMY HECKERLING, 250 WEST 15th STREET
OWNERS CORP., C.T.A. PLUMBING AND HEATING,
INC., CARMINE DiMEGLIO and SASHA DURCAN,

Defendants.

-----X

JEREMY HECKERLING,

Third-Party Plaintiff,

-against-

C.T.A. PLUMBING AND HEATING, INC.,
CARMINE DiMEGLIO and SASHA DURCAN,

Third-Party Defendants.

-----X

MADDEN, J.:

The summary judgment motions before the court, motion
sequence numbers 002 and 003, are consolidated for disposition.

In this negligence action, plaintiff Alfredo Villanueva
(Villanueva) seeks recovery for his damaged glass art collection,
which was allegedly caused by work performed on the common wall
of an adjacent apartment in the cooperative corporation located
at 250 West 15 Street, New York, New York 10011 (Building).

Villanueva has resided in apartment 5C of the Building for
more than 30 years (Villanueva Aff., ¶ 4). In December 2003,

UNFILED JUDGMENT
This judgment has been entered by the County Clerk
and hereon. To be effective must
be filed with the County Clerk (Floor 11)

[* 3] .

defendant Jeremy Heckerling (Heckerling) purchased shares in the co-op, and, in October 2004, he began residing in apartment 6C of the Building (Heckerling Dep., 7-8). Apartment 6C is a duplex, and the bathroom of apartment 6C shares a common wall with the living room of apartment 5C. Villanueva displayed a portion of his glass art collection on shelves that were mounted on the common wall.

In his affidavit, Heckerling states that, on May 26, 2004, prior to moving into apartment 6C, he hired defendant Sasha Durcan (Durcan) to perform renovation work inside his apartment, including the demolition of the bathroom. Durcan worked for defendants CTA Plumbing and Heating, Inc. (CTA) and Carmine DiMeglio (DiMeglio) (Durcan Dep., at 9, 13, 72-73). On June 1, 2004, Durcan sent a memorandum to the residents of the Building (Durcan Memo). Because many of the parties' arguments concern the Durcan Memo, the substance of this document is reproduced, as follows:

To: Residence of 250 West 15th Street
From: Sasha Durcan
Re: Renovation of Apartment 6C
Date: June 1, 2004

Starting on or about June 2, 2004, we will begin renovation of Apartment 6C, recently purchased by Mr. Jeremy Heckerling. The job should take between 7-10 weeks to complete. Demolition may run a week to ten days. We will make every effort to keep the common areas as clean as possible. The noise may last a few days and we will try to work as quickly as possible to limit any

inconvenience.

The management company, Lawrence Properties, has suggested that I take photos of common walls in adjoining apartments for their records. I will contact you in the next few days regarding this matter.

Thank you in advance for your patience. If you have any questions, please do not hesitate to contact me at the above numbers.

Villanueva admitted that he received the Durcan Memo. It is undisputed that photos were never taken of the common walls in adjoining apartments.

The demolition work took place on June 3, 2004. At her deposition, Durcan conceded that she supervised the work performed at apartment 6C, that she and her workers chose the tools to use on the work inside the apartment, and that Heckerling had no input concerning the process of the workers who performed the work (Durcan Dep., at 86).

The amended complaint alleges that defendants were negligent in performing the renovation work. Heckerling answered the amended complaint, asserting affirmative defenses. The cooperative, defendant 250 West 15th Street Owners Corp. (250 W15 St), also answered the complaint, asserting affirmative defenses and three cross claims for indemnification. Heckerling commenced a third-party action against CTA, DiMeglio and Durcan, seeking common-law indemnification. CTA, DiMeglio and Durcan answered the third-party complaint, asserting affirmative defenses.

[* 5]

Heckerling now moves (in motion sequence number 002) for summary judgment dismissing all claims against him, and for costs and attorneys' fees. 250 W15 St moves (in motion sequence number 003) for summary judgment dismissing the complaint and all cross claims; or, alternatively, granting summary judgment against CTA, DiMeglio and Durcan, based upon common-law indemnification.

To the extent that additional facts are necessary to the resolution of these motions, those facts are stated in the discussion below.

Discussion

Heckerling's Summary Judgment Motion (002)

Heckerling argues that the claims against him should be dismissed, because he had nothing to do with the incident that caused the damage to Villanueva's property, and because he cannot be held liable for the acts of the independent contractor hired to perform the work. Villanueva counters that Heckerling, as the owner of apartment 6C, had a non-delegable duty to maintain his premises in a reasonably safe condition and protect Villanueva's property from damage caused by the renovation work.

"[A]s a general rule, an employer is not liable for the negligence of independent contractors he has hired" (*Roter v Wexler*, 195 AD2d 323, 324 [1st Dept 1993]). However, exceptions exist "where the employer interferes with and assumes control over the work" (*Fischer v Battery Bldg. Maintenance Co.*, 135 AD2d

[* 6]

378, 379 [1st Dept 1987]), where the proprietary lessee of a cooperative corporation "is under a duty to keep premises safe" for other tenants, and where the employer "has assumed a specific duty by contract" (*Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992]).

As discussed above, Durcan testified that she supervised the work performed at apartment 6C, that she and her workers chose the tools to use on the work inside the apartment, and that Heckerling had no input concerning the process of the workers who performed the work (Durcan Dep., at 86). She also testified that she was licensed by the New York City Department of Consumer Affairs just before starting the renovation work in Heckerling's apartment.¹

Durcan's testimony is consistent with Heckerling's affidavit and deposition testimony, stating that he never managed, controlled, supervised, oversaw, or in any way participated in the renovation work; that he was not present when the incident occurred on June 3, 2004; and that, on the day of the incident, he had not yet moved into the Building. Heckerling's affidavit states that he had no knowledge that Villanueva's glass art collection was displayed on shelves on the other side of the

¹ The court notes that, in support of his motion, Heckerling also submits a copy of a "Home Improvement Agreement" between CTA and Heckerling. That agreement contains signature lines for Heckerling, DiMeglio and Durcan, but it is not signed by any of these parties.

[*7]

common wall. These facts make a prima facie showing in support of Heckerling's motion for summary judgment dismissal (see *Fischer*, 135 AD2d at 379-80 [granting summary judgment dismissal to landowner, where landowner had no notice of dangerous condition, "did not direct, supervise or control [the independent contractor's] work and ... a ... supervisory employee [of the contractor] had responsibility for inspecting the completed work"]; see also *Mosher v St. Joseph's Villa*, 184 AD2d 1000, 1001 [4th Dept 1992] [affirming summary judgment dismissal of negligence claim against landowner where the record demonstrated that the landowner "neither exercised supervision or control over the work nor had actual or constructive knowledge of a dangerous condition on the site").

Villanueva's opposition relies primarily upon the Durcan Memo, arguing that the testimony of Durcan and Heckerling conflict as to whether Heckerling insisted that Durcan "not put[] anything substantive into the memo that could be disconcerting, constitut[ing] a breach of his duty to those neighbors" (Villanueva Opp. Mem. of Law, at 8). Specifically, Durcan testified that she wrote the Durcan Memo and distributed it to the tenants of the Building (Durcan Dep., at 15-16). She testified that the memo was reviewed by DiMeglio and Tammy Carney, a representative of the Building's managing agent, prior to Durcan handing it out (*id.* at 16). Durcan testified as

follows:

Q. Did either Mr. DiMeglio or Ms. Carney have any input into the [Durcan Memo] --

A. Almost entirely.

Q. Okay. What input did they have?

A. ... one suggested that I take photos of the adjoining walls, um, and [DiMeglio] initiated the, uh, the letter saying that, you know, this is a great idea, I should do that. I checked with Ms. Carney to see what other things they wanted to add. I reviewed it on the phone with both of them and they agreed that this was correct. I was going to go ... door to door, uh, knocking on each - well, I did hand this out to hand to people, but Mr. Heckerling didn't want me to, um, startle or alienate any of his neighbors, as he had not moved into the building and didn't want to get off onto the wrong foot.

Q. Did Mr. Heckerling ask you not to distribute that?

A. I - it wasn't up to him. This was my choice.

Q. I understand that, but did he -

A. He was very clear that he wanted a fine line of not startling anyone or upsetting anyone, and, um, and but, you know, clarifying that this work would be done

(*id.* at 16-17). Durcan also testified that she remembered discussing with Heckerling:

that he did not want - he wanted to make a fine line. He did not want to, in any way, scare people about the renovation or he didn't want to make a bad impression because

he was moving into the building, completely understandably, and he was very concerned that if I put too much in or if I went bang, you know, knocking door to door, requesting to come in, that this might, um, make people uncomfortable or not set a good, um first impression of him. So, I was aware that he was concerned about limiting everything.

Q. Okay. But do you have a specific recollection of a specific instruction or item that you wanted to include in the memo and you were told not to include it, by anybody?

A. By anybody? I'm sure I put a lot of things out there, and then this was the edited version.

Q. Do you remember what some of those things that you put out there that did not make it into this memo were?

A. Based on my conversations with Monica, [Heckerling], [DiMeglio], Tammy [Carney], *I felt we had covered as many issues as possible, and I was - it was clear from everyone what should be in that letter, whether it was up to me or not*

(*id.* at 43 [emphasis added]). When asked whether he had any input into the contents of the Durcan Memo, Heckerling testified: "I don't think so. It's possible. I don't think so."

(Heckerling Dep., at 15). Heckerling also testified that he did not recall whether he had seen the memo before it was distributed by Durcan (*id.*).

According to Villanueva, the testimony of Durcan and Heckerling conflicts, thereby raising a question of fact that requires denial of Heckerling's summary judgment motion.

However, Durcan's testimony makes clear that she believed that the individuals involved had covered as many issues as possible in the Durcan Memo, and she could not recall any item that she wanted to include in the Durcan Memo but did not, or any item that Heckerling prevented her from including in the memo. Durcan also testified that the distribution of the memo was her choice and not something that Heckerling had any control over.

Furthermore, Durcan testified that the memo was "[a] courtesy to tell ... neighbors that we would be doing" the renovation work (Durcan Dep., at 40). Durcan testified: "I stated exactly what I was told in the memo by Carney and [DiMeglio]. That also was reviewed by, I believe [Heckerling]. *I told him what I would be putting in and he approved that*" (Durcan Dep., at 41 [emphasis added]). Durcan's testimony then reiterated that she went door-to-door in the Building to distribute the Durcan Memo prior to beginning the renovation work, thereby disregarding any purported concerns of Heckerling, and Heckerling did not stop her from doing so (*id.* at 89).

In short, none of the evidence suggests that "Heckerling insisted that the memo be deliberately vague so as to not arouse tension in [the Building] he had yet to occupy" (Villanueva Opp. Mem. of Law, at 11). Significantly, nothing contained in the testimony suggests that Heckerling exercised any control over, or in any way altered, the contents or distribution of the Durcan

Memo, or prevented the inclusion of any item that Durcan or anyone else wanted to include in the memo. Therefore, neither the Durcan Memo, nor the testimony of Durcan and Heckerling, rebuts Heckerling's prima facie showing.

Villanueva cites *532 Madison Ave. Gourmet Foods v Finlandia Ctr.* (96 NY2d 280 [2001]) and *Gayden v City of Rochester* (148 AD2d 975 [2d Dept 1989]) in support of his argument that Heckerling had a non-delegable duty to prevent injury or damage to his neighbor's property. In *532 Madison Ave. Gourmet Foods*, the Court stated that "[a] landowner who engages in activities that may cause injury to persons on adjoining premises surely owes those persons a duty to take reasonable precautions to avoid injuring them" (96 NY2d at 290). However, in *532 Madison Ave. Gourmet Foods*, the plaintiffs sued for economic losses sustained due to store closings, which were caused by a building collapse during a construction project. The Court dismissed the plaintiffs' negligence claims, holding that the claims were based on economic loss alone, and fell beyond the scope of the duty owed by the defendants. In essence, this case illustrates an example of the Court limiting a duty owed to members of the general public, particularly in cases that would result in a landowner's limitless exposure if it "owe[d] a duty to protect an entire urban neighborhood against purely economic losses" (*id.*). Accordingly, *532 Madison Ave. Gourmet Foods* is distinguishable on

the law and on its facts.

Gayden is a wrongful death action involving a seven-year-old boy who drowned when he fell into Brown's Race, a concrete waterway situated in the defendant City of Rochester that carries water from the Genesee River to a hydroelectric power plant operated by the defendant Rochester Gas & Electric Corporation (RGE). The decedent gained access to the wall along Brown's Race by walking through a hole in a wrought-iron fence situated on property owned by the defendant Consolidated Rail Corporation (Conrail). The defendants moved separately for summary judgment dismissal. The Second Department affirmed Special Term's denial of the motions of Conrail and RGE, holding that "Conrail owed a duty to exercise reasonable care in the maintenance of its property to prevent foreseeable injury that might occur on the adjoining property," and that, "[a]s the party in control of use and maintenance of Brown's Race, RGE had a similar duty to exercise reasonable care to those persons who ventured onto its project area" (*Gayden*, 148 AD2d at 975). However, the Court affirmed summary judgment dismissal as to the City of Rochester, in part, because "RGE had exclusive control over the operation, use and maintenance of Brown's Race" (*id.* at 976).

Here, there is no indication that Heckerling knew of any unreasonably dangerous condition on his property, failed to maintain his property, or failed to prevent injury to neighboring

property by doing or not doing anything in particular.

Significantly, the evidence before the court makes clear that the Durcan Memo and the renovation work were not controlled by Heckerling. As discussed above, Durcan testified that she supervised the work performed at apartment 6C, that she and her workers chose the tools to use on the work inside the apartment, and that Heckerling had no input concerning the process of the workers who performed the work. Heckerling never managed, controlled, supervised, oversaw, or in any way participated in the renovation work; he was not present when the incident occurred on June 3, 2004; and on the day of the incident, he had not yet moved into the Building. Therefore, *Gayden* does not rebut Heckerling's prima facie showing, and Villanueva fails to rebut Heckerling's showing that the general rule applies and he should not be held "liable for the negligence of independent contractors he has hired" (*Roter*, 195 AD2d at 324).

250 W15 St also opposes Heckerling's motion, arguing that Heckerling agreed to 250 W15 St's condition that electric and air hammers would not be used in his renovation work, and that a question of fact exists as to whether the demolition work in Heckerling's bathroom involved the use of a jackhammer or a pneumatic hammer. This argument is based upon a document signed by Heckerling, and Villanueva's testimony. The document, dated March 29, 2004, stated that there would be "no objection to

[Heckerling] proceeding with [his proposed alterations] provided that [he] comply with the following: ... 16. The use of electrical or air hammer is not permitted due to the noise factor unless special permission is granted" (Frank Aff., Ex. C). Villanueva testified, "[t]he workers told me that they had used a jackhammer to dislodge the tile" (Villanueva Dep., at 91).

However, Durcan testified that no jackhammer or pneumatic hammer was used, but rather, that the workers used a ceramic circular saw, a "Sawzall," and crowbars, and that there were no other power tools used on the site (Durcan Dep., at 27). In fact, Durcan testified, "[w]e don't own a jackhammer," and stated that "[a] jackhammer weighs about 45 pounds. It's for work down below. To lift it up ... to do a wall is ridiculous" (*id.* at 92). Moreover, Villanueva did not identify which worker told him that a jackhammer had been used, and when he was asked how many of the workers told him that they had used a jackhammer, he responded that, "[a]t the time everybody was talking at the same time" (*id.*).

Furthermore, Heckerling testified that he was not aware that a jackhammer would be used, and that he was not informed by Durcan or DiMeglio about the use of a jackhammer. Thus, Heckerling neither knew, nor had reason to know, of the use of a jackhammer in his apartment. Moreover, the contractual provision upon which 250 W15 St relies does not impose any affirmative duty

on Heckerling to monitor his apartment for the use of jackhammers, but merely states that "[t]he use of electrical or air hammer is not permitted due to the noise factor unless special permission is granted" (Frank Aff., Ex. C).

Significantly, the agreement at issue was between Heckerling and 250 W15 St (the co-op), not between Heckerling and Villanueva. The agreement does not provide that Villanueva is a third-party beneficiary to this agreement. "A third party seeking to recover on a contract must establish that a binding contract exists between other parties; that this contract was intended for his benefit; and that the benefit to him was direct rather than incidental" (*Internationale Nederlanden (U.S.) Capital Corp. v Bankers Trust Co.*, 261 AD2d 117, 123 [1st Dept 1999]; see also *Williams v Progressive Northeastern Ins. Co.*, 41 AD3d 1244, 1245 [4th Dept 2007] ["it is well settled that '[a] third party is entitled only to those rights which the original parties to the contract intended the third party to have'"] [citation omitted]).

Here, the purpose of the contractual prohibition on the use of electrical and air hammers was "due to the noise factor" (Frank Aff., Ex. C, ¶ 16), not property damage. Thus, allowing Villanueva's property damage claims to proceed based upon this contractual language would create an incidental benefit to Villanueva, not a direct benefit based upon the contractual

language. For the foregoing reasons, 250 W15 St's argument fails to rebut Heckerling's prima facie showing that he is entitled to dismissal of Villanueva's claims.

250 W15 St also argues that its cross claims based upon contractual indemnification against Heckerling should not be dismissed, because he contractually agreed to indemnify 250 W15 St for damages arising out of the work, and that this agreement applies to all claims for injury to property resulting from the work. 250 W15 St argues that Heckerling's motion does not explain why the indemnification cross claim should be dismissed, and that he does not address the issue of contractual indemnification in his motion.

"[I]n a motion for summary judgment, the moving party has the burden of setting forth evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law; anything less requires a denial of the motion even where the opposing papers are insufficient" (*Coley v Michelin Tire Corp.*, 99 AD2d 795, 795-96 [2d Dept 1984]).

Here, Heckerling's notice of motion seeks summary judgment dismissal "on all claims against him" However, Heckerling's initial moving papers contain neither a request for dismissal of the indemnification cross claims, nor any legal argument in support of dismissal of these claims. Thus, here, Heckerling fails to make a prima facie showing.

Moreover, while the issue of indemnification is raised in the opposition papers of 250 W15 St, presumably, this argument is raised by 250 W15 St in an effort to preserve its rights concerning these claims, because Heckerling's initial moving papers were silent with respect to indemnification. Heckerling's legal argument in support of dismissing the indemnification claims is raised for the first time in his reply brief, and, as a result, 250 W15 St has not had an opportunity to respond to this argument. Therefore, in addition to Heckerling's failure to make a prima facie showing, his request for dismissal of the indemnification claims is denied because "[t]he consideration of arguments advanced at a time when the opposing party has no opportunity to respond is a procedure that this Court condemned" (*Schultz v 400 Coop. Corp.*, 292 AD2d 16, 21 [1st Dept 2002]; see also *Leeds v Lenox Hill Hosp.*, 6 AD3d 232 [1st Dept 2004]). In any event, Heckerling's arguments that he cannot be required to indemnify 250 W15 St for its own negligence and that any agreement to do so would be void under General Obligations Law § 5-322.1(1) is unavailing since it is premature to determine the nature and extent of 250 W15 St's liability. For the foregoing reasons, Heckerling's motion for summary judgment dismissal of the cross claims against him is denied.

Heckerling also requests costs and attorneys' fees after May 15, 2008, under 22 NYCRR § 130-1.1. While Heckerling ultimately

prevailed on his motion for summary judgment dismissal of the amended complaint, Heckerling fails to demonstrate that Villanueva's conduct was frivolous within the meaning of 22 NYCRR § 130-1.1. Therefore, Heckerling's request for costs and attorneys' fees is denied.

250 W15 St's Summary Judgment Motion (003)

250 W15 St argues that it is entitled to summary judgment dismissal, because it did not cause or create the condition that led to the accident. CTA, DiMeglio and Durcan counter that 250 W15 St's argument ignores an independent basis for negligence, based upon its failure to sufficiently warn Villanueva that vibrations caused by the demolition work could damage his glass collection, and that he should take measures to safeguard his property. Villanueva counters that the co-op had a duty to adequately warn him of impending demolition work in Heckerling's apartment but failed to safeguard Villanueva's premises as required by the propriety lease and the renovation agreements.

A negligence claim is subject to summary judgment dismissal where a "defendant did not cause or create the allegedly dangerous condition" that led to the accident (*Gafner v Chelsea Piers, L.P.*, 27 AD3d 353, 354 [1st Dept 2006]), or where the defendant was not responsible for directing, controlling or supervising the performance of a contractor's work at the job site (*Carty v Port Auth. of NY and NJ*, 32 AD3d 732 [1st Dept

2006]; see also *Brown v New York City Economic Dev. Corp.*, 234 AD2d 33, 33 [1st Dept 1996] ["common law negligence claims must be dismissed in the absence of proof of the owner's actual control"]).

Here, the deposition testimony demonstrates that CTA, DiMeglio and Durcan were hired to renovate Heckerling's apartment, including the demolition of his bathroom (Heckerling Dep., at 9-10, 34; Durcan Dep., at 8-9, 13, 72-73). Durcan testified that she supervised the renovation work in Heckerling's apartment, and that she and her workers chose the tools that would be used for individual projects within his apartment (Durcan Dep., at 86). Eduardo Castro testified that he has been the superintendent at 250 W15 St for 31 years, and that he was not responsible for repairs in the apartments, or for overseeing any repairs or renovations of the individual apartments in the Building (Eduardo Castro Dep., 8-11). This evidence demonstrates that no one from 250 W15 St performed the demolition work in Heckerling's apartment, and that 250 W15 St did not direct, supervise or control the actual renovation work that caused the damage to Villanueva's property.

However, Durcan testified that, prior to commencing any renovation work, she "had an hour meeting with the super, who is named Monica" (Durcan Dep., at 18). Monica is another name used by Elvira Castro, the wife of Eduardo Castro (Elvira Castro Dep.,

at 31). Durcan testified that Eduardo and Elvira Castro "had super'd for, I believe 20 years," and that she "reviewed every detail of the process with Monica, while standing in apartment 6C" (Durcan Dep., at 18). Durcan testified:

And most importantly, I asked her was there any extenuating circumstances of adjoining apartments ... she said, no, there was no problems with any of the adjoining apartments. I came to find out later, through Monica, that she had known about Mr. Villanueva being there for 25 years with that much glass, but was afraid to tell me because it was against, um, co-op board policy to have a business run out of your residence and she was - and everybody was aware of it

(*id.*). Durcan stated that Elvira Castro "had been a super for many, many years, knew, and of course we found out Mr. Villanueva was also a tenant for many, many years. So, she was, in my estimate, a representative of the co-op, of the building, and I was told there's no problem" (*id.* at 41-42). Durcan also testified that, "the next day after the incident," she "had come to learn, from Monica, that there - in all the apartments was a buffer wall, and she wanted to let me know that years and years ago this buffer wall had been taken out so that Mr. Villanueva could put in a curio cabinet" (*id.* at 31, 69).

Elvira Castro testified that she had no memory as to whether, "in May or June 2004, [she] had any conversations with anybody about renovation to apartment 6C" (Elvira Castro Dep., at 33). Therefore, the conflicting testimony of Durcan and Elvira

Castro raises questions of fact that preclude summary judgment. Specifically, this testimony raises questions as to whether Elvira Castro, and, in turn, 250 W15 St, knew of Villanueva's glass art collection and that a buffer wall directly opposite the bathroom had been removed so that Villanueva could install a curio cabinet to exhibit his collection, and whether these facts were concealed while Elvira Castro affirmatively indicated that she knew of no potential problems. In other words, a jury could find that, had this information been disclosed, 250 W15 St could have taken steps to ensure that Villanueva understood the nature of the risk to his glass art collection and safeguarded it.

250 W15 St also argues that, at the time of the incident, Elvira Castro was not an employee, and that Eduardo Castro was the superintendent. According to 250 W15 St, Elvira Castro was hired subsequent to the injury to Villanueva's property. Both Elvira and Eduardo Castro testified that she was not an employee of the Building at the time of the incident (Elvira Castro Dep., at 14-15, 17; Eduardo Castro Dep., at 53, 56). However, Durcan's testimony of her discussions with Elvira Castro, together with the conflicting testimony that Elvira Castro was not employed by 250 W15 St at the time of the incident, creates a question of fact as to whether Elvira Castro was an employee of 250 W15 St, or held herself out as a co-super with Eduardo Castro, at the time of the incident, thereby precluding summary judgment.

250 W15 St also seeks dismissal of the indemnification cross claims asserted against it. However, "[c]ommon-law indemnification is predicated on 'vicarious liability without actual fault,' which necessitates that 'a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine'" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006]). Here, because it is possible that 250 W15 St may be found responsible to some degree for the damage to Villanueva's property, 250 W15 St is not entitled to summary judgment dismissal of the common-law indemnification cross claims.

Accordingly, it is hereby

ORDERED that defendant Jeremy Heckerling's motion for summary judgment (motion sequence number 002) is granted to the extent that the amended complaint is hereby severed and dismissed as against defendant Jeremy Heckerling, and the motion is otherwise denied; and it is further

ORDERED that defendant 250 West 15th Street Owners Corp.'s motion for summary judgment (motion sequence number 003) is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: *March 13, 2009*



FILED
 County Clerk
 by the County Clerk
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 representative must
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