

**Freedman v Zeigler**

2009 NY Slip Op 30870(U)

March 25, 2009

Supreme Court, New York County

Docket Number: 110462/06

Judge: Louis B. York

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

PRESENT: **LOUIS B. YORK**  
J.S.C.

PART 2

Index Number : 110462/2006

**FREEDMAN, RICHARD**

VS.

**ZIEGLER, FRED**

SEQUENCE NUMBER : 006

SUMMARY JUDGMENT

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

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

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

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

this motion to/for \_\_\_\_\_

PAPERS NUMBERED \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**

Cross-Motion:  Yes  No

MAR 30 2009

Upon the foregoing papers, it is ordered that this motion

COUNTY CLERK  
NEW YORK

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: 3/26/09

*Luy*  
\_\_\_\_\_  
J.S.C.

**LOUIS B. YORK**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

-----X  
Richard Freedman and Kate Freedman,

Plaintiffs,  
-against-

Index No.:110462/06

Fred Zeigler,

Defendant.

-----X  
Fred Zeigler,

Third-Party Plaintiff,  
-against-

Index No.:590898/06

Matthew Schwartz, New Phase  
Renovations, Inc., Northeastern  
Group, Ltd., and Atlantic Casualty  
Insurance Company,

Third-Party Defendants,

-----X  
Matthew Schwartz and New Phase  
Renovations, Inc.,

Second Third-Party Plaintiffs,  
-against-

Index No.:590763/07

60 East 9th Street Owners Corp., Board of  
Managers of 60 East Ninth Street Condominium,  
Rose Associates, Inc., "John Doe #1", John  
Doe #2", "John Doe #3", and "Mary Doe #1, their  
names being fictitious and unknown to the  
second third-party Plaintiffs,

Second Third-Party Defendants,

-----X  
Judge Louis B. York:

Motions bearing sequence numbers 005 and 006 are consolidated herein for the purpose

**FILED**

MAR 30 2009

COUNTY CLERK'S OFFICE  
NEW YORK

of disposition.

This is an action to recover property damages caused by water leaking into the plaintiffs' only bathroom.

### PARTIES

At all times relevant to the underlying incident of this action, the following descriptive information about the parties is deemed correct for the purposes of these motions.

Plaintiffs Richard and Kate Freedman (the Freedmans) are the owners and residents of residential cooperative apartment, #362 (Apt 362), located at 60 East Ninth Street (the Building).

Defendant, third-party plaintiff Fred Zeigler (Zeigler) is the new owner and, soon-to-be resident of residential cooperative apartment #562 (Apt 562) in the Building.

Third-party defendant, second third-party plaintiff Matthew Schwartz (Schwartz) is the president/CEO of third-party defendant, second third-party plaintiff New Phase Renovations, Inc. (New Phase), the contractor hired by Zeigler to renovate Apt 562.

Third-party defendant Northeastern Group Ltd. (Northeastern ), is the insurance broker that obtained liability coverage for New Phase and provided a certificate of insurance listing Zeigler as an additional insured<sup>1</sup>.

Third-party defendant Atlantic Casualty Insurance Company (Atlantic), is the insurance carrier that provided the above indicated insurance coverage<sup>2</sup>.

Second third-party defendant 60 E. 9<sup>th</sup> Street Owners Corp. (Coop) is the corporate entity

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<sup>1</sup>Case was dismissed with prejudice as against Northeaster pursuant to February 26, 2007 stipulation.

<sup>2</sup>That portion of the third-party action seeking relief from Atlantic is severed pursuant to this Court's March 21, 2007 order.

consisting of unit owners in the Building that holds title to that portion of the Building not owned by the individual unit owners, and is charged with, and has the authority to, enforce compliance with the various existing and amended rules of the Coop.

Second third-party defendant Board of Managers of 60 East Ninth Street Cooperative (Coop Board of Managers) consists of elected members (including co-plaintiff Mrs. Freedman) from a pool of Building unit owner candidates that is charged with, and has the authority to, enforce the various rules of the Coop.

Second third-party defendant Rose Associates, Inc., is the managing agent (Managing Agent) charged with, and authorized to, supervise the fiscal and physical status of the Building.

Second third-party defendant "Mary Doe #1", subsequently identified as Rebecca Nelson (Nelson), is the owner and resident of Apt. #462 (Apt 462) in the Building.

Second third-party defendants "John Doe #1, #2 and #3" their names being fictitious and unknown to the Second third-party plaintiffs Schwartz and New Phase.

### **Facts**

In early 2004, Zeigler purchased Apt 562. In late March 2004, prior to moving in and after interviewing a few contractors, Zeigler decided to follow his real estate broker's recommendation and hire New Phase to renovate Apt 562 (Renovation) before he actually began residing there. The Managing Agent approved New Phase as the contractor to perform the work in Zeigler's apartment. Unbeknownst to Zeigler, neither Schwarz nor New Phase was licensed by the Department of Consumer Affairs as a home improvement contractor or by the Department of Buildings to perform any of the contracted for plumbing or electrical work. However, New Phase did have licensed sub-contractors perform those portions of the Renovation requiring a

plumber (e.g., the bathroom) and/or an electrician.

Zeigler occasionally visited his apartment during the course of the Renovation, but solely for the purpose of viewing the progress being made towards completion. Other than hiring the contractor, Zeigler had nothing to do with the actual work. New Phase provided all of the supplies/materials, labor and tools necessary to perform and complete the Renovation. New Phase also scheduled and supervised all of the work of its employees and sub-contractors. New Phase provided Workers Compensation insurance for its employees, as well as liability insurance listing Zeigler as the additional insured.

In late August 2004 and on various subsequent occasions, two times during (August 26 & 30, 2004) and two times after [one attributed to Apt 462 and the other to Apt 642] the Renovation was underway, water leaked through the bathroom ceiling and walls of Apt 362. Apartment numbers 362, 462 and 562 share the same vertical plumbing line for their similarly located bathrooms. Nelson's Apt 462 is directly above the Freedmans' Apt 362, and Zeigler's Apt 562 is directly above Apt 462 and two floors above the Freedmans' Apt 362. However, upon contemporaneous inspection of the complained of leak, there was no indication of a water leak in Apt 562. Moreover, even though there was a significant accumulation of water on the bathroom floor in Apt 462, there was no indication that the bathroom ceiling in Apt 462 had been wet.

At the time of the initial leaks, Building personnel were blaming New Phase. However, prior to removing the sink, toilet and tub in the Zeigler apartment, the Building water riser had to be turned off, and the pipes drained from somewhere below Zeigler's apartment. This type of preparatory work was the responsibility of the Building, and, as such, would be performed either

by in-house Building personnel or outsourced agents of the Coop. Subsequently, issues arose as to: (1) whether the Building handyman or Nelson may have caused the flood in the bathroom of Apt 462, and (2) whether the flood in Apt 462 was the cause of the Freedmans' water damage in Apt 362. While the Building handyman does not identify anyone else who might have performed the draining of the riser, he does deny that he was working on the bathroom plumbing in Apt 462. Nelson claims that she was not present in her Apt 462 at any time relevant to the complained of leak(s).

Shortly after the initial complained of water leaks, Schwartz, without admitting liability, offered to repair the water damage to the Freedmans' bathroom so long as the repair was not extensive. Nonetheless, the Freedmans rejected Schwartz's offer despite having received an October 18, 2004 estimate of damages from their insurance carrier in the amount of \$916.27. Similarly, a professional engineer's report, elicited sometime later by Schwartz/New Phase, concluded that the total needed repair was about \$1,300.00.

Nonetheless, the Freedmans never made any repairs. Instead, after cleaning their only bathroom, they lived with the complained of damages to their bathroom and waited some four years (July 2006) to commence this action solely against Zeigler seeking in excess of \$250,000 in property damages. However, the Freedmans' elicited other estimates, one as much as \$28,000 [dated November 30, 2006]) appears to be for the installation of a completely new bathroom. The complaint, predicated upon assertions that the complained of water leak(s) emanated from Apt 562 during, and subsequent to, the performed Renovation, asserts for its first cause of action a claim sounding in negligence, and for its second cause of action a claim sounding in negligent supervision.

Thereafter, various third-party actions were commenced seeking relief predicated upon claims sounding in negligence, insurance coverage, as well as contractual and common law indemnification against the various parties indicated and identified above (see, "PARTIES")

Motions have been made both during and after the discovery/disclosure phase of this action. The motions presently before me, sequence nos. 005 and 006, seek some form of dispositive relief, as well as sanctions.

Zeigler moves (sequence #006): (1) pursuant to CPLR 3212, for an order granting summary judgment dismissing the Freedmans' complaint in its entirety, and (2) pursuant to §130-1.1 of the Rules of the Chief Administrator, for an order granting sanctions in his favor and against the Freedmans and their counsel.

The Coop, Coop Board of Managers, Managing Agent, John Doe #1 and John Doe #2 move (sequence #005), (1) pursuant to CPLR 3212, for an order granting summary judgment dismissing the Freedmans' complaint in its entirety, as well as the second third-party action and all cross claims asserted against the movants.

#### Analysis

The drastic remedy of summary judgment will only be granted if there are no material and triable issues of fact. (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Inasmuch as the resolution of justiciable issues of fact by trial is preferred, a court, when confronted with a motion for summary relief, must engage in issue identification rather than issue determination (*Ibid.*). Thus, it is imperative that a plaintiff opposing a defendant's motion for summary judgment "assemble, lay bare and reveal his proofs, in order to show that the matters set up in his [complaint] are real and capable of being established upon a trial" (*Di Sabato v*

*Soffes*, 9 AD2d 297, 301 [2<sup>nd</sup> Dept 1959]). However, “only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment.” (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

As to the Freedmans’ first cause of action sounding in negligence, there is no evidence that other than hiring a contractor to renovate his apartment, Zeigler had nothing to do with the actual work. There exists no doubt that Schwartz and New Phase were performing the Renovation as a hired independent contractor. “An independent contractor is one who was hired to perform services for another, according to his or her own skills and judgment as to the manner or method of the performance, free from the control and direction of the person for whom the services are being performed, except as to when and where, in general, it should be done and the result or product of the work” (NYPJI 2:255). None of the pertinent portions of the NYPJI mention a licensing requirement as a factor to be considered as to whether a contractor is independent.

As such, Zeigler can only be held liable for the complained of water damage where, unlike here, he was either individually negligent or vicariously negligent under one of the exceptions to the generally accepted legal principle that an employer is not liable for the wrongful acts of the hired independent contractor (*see Chainani v Board of Educ of the City of N.Y.*, 87 NY2d 370 [1995]). It is well settled that “a principal is not liable for the acts of an independent contractor because principals ordinarily do not control the manner in which independent contractors, as opposed to employees of the principal, perform their work (*Goodwin Comcast Corp.*, 42 AD3d 322 [1st Dept 2007]). “[W]here [,as here,] the proof on the issue of control presents no conflict in evidence the matter [as to whether a party was treated and acted as

an independent contractor] may properly be determined by the court as a matter of law” (*Lazo v Mak’s Trading Co.*, 199 AD2d 165, 166 [1st Dept 1993, affd 84 NY2d 896 [1994]).

There are a limited number of situations where the general rule that “a principal is not liable for the acts of an independent contractor” (*Goodwin v Comcast Corp.*, 42 AD3d at 322) does not apply. These exceptions have been set forth as the: “(1) negligence of the employer selecting, instructing or supervising the contractor, (2) employment for work that is especially or inherently dangerous, and (3) instances in which the employer is under nondelegable duty” (*Maristany v Patient Support Servs.*, 264 AD2d 302-303 [1<sup>st</sup> Dept 1999]; see also *Rosenberg v Equitable Life Assur. Soc. of the U. S.*, 79 NY2d 663 [1992]).

As further discussed below, the first exception is inapplicable because Zeigler was not shown to be negligent in selecting, instructing and/or supervising New Phase. As to the second exception, none of the complained of work being performed was either inherently or abnormally dangerous. There is no special risk of harm associated with the type of routine plumbing performed by New Phase in connection with the Renovation. Lastly, as to the third exception, assuming arguendo that Zeigler did assume a specific non-delegable contractual duty by way of his proprietary lease, Coop By Laws, House Rules, Renovation package, and Alteration Agreement, such duty was owed to the Coop and not to the individual coop unit owner. These writings were entered into by and between the Coop and Zeigler. As strangers to these agreements, the Freedmans lack standing to raise an issue as to compliance (See *85 Fifth Ave. 4<sup>th</sup> Floor, LLC. v I.A. Selig, LLC.*, 45 AD3d 349 [1<sup>st</sup> Dept 2007]).

As to the Freedmans’ second cause of action sounding in negligent supervision, it must be established that the defendant knew or should have known of the contractor’s propensity for

conduct which caused the harm (*Bellere v Gerics*, 304 AD2d 687 [2d Dept 2003]). However, the Freedmans have failed to make a showing sufficient to either irrefutably demonstrate Zeigler's negligent supervision or, at least, raise a material and triable issue of fact. To the contrary, he interviewed three contractors, including New Phase/Schwartz, and decided to hire New Phase not only because of the interview. His decision also rested upon New Phase being highly recommended by someone believed to have some experience in renovations and realty, who was more than satisfied with her direct and indirect experiences with New Phase's work. There was no indication from either the interview or the recommendation that a problem existed as to hiring New Phase to perform the Renovation. Moreover, no causal connection has been set forth as between New Phase's/Schwartz's lack of license and the complained of leaks. In fact, New Phase did use licensed plumbers and electricians to work on the Renovation. Furthermore, the various statutory licensing requirements are measures for the protection of the direct consumer and not to impose liability upon the consumer should the contractor, unbeknownst to the consumer, lack licensing (see *B & F Bldg. Corp. v Lebig*, 76 NY2d 689, 692 [1990]; *Young's L& M Const., Inc. v Kelly*, 13 Misc 3d 307, 310 [Sup. Ct. NY County 2006]).

Upon review of the facts and circumstances as recited herein, together with the applicable law, it is apparent that there exists no material and triable issue of fact as to Zeigler's lack of liability concerning the Freedmans' complained of water damaged bathroom. Accordingly, summary judgment dismissing of the action in chief is granted in all respects and the complaint is dismissed in its entirety.

Notwithstanding the foregoing, there are issues of fact here that cannot be resolved upon the papers presently before me and would ordinarily require a plenary trial for proper disposition.

These issues concern: (1) who and/or what caused water leaks in Nelson's Apt 462, and (2) whether the leaks in Apt 462 were a cause of the water damage to the Freedmans' Apt 362 bathroom. However, these issues need not, and, therefore will not be addressed, in that they have been rendered moot inasmuch as the Freedmans never brought a direct action against anyone other than Zeigler.

Hence, as with a line of dominos, as the first falls so must those thereafter (i.e., action in chief, third-party action and second third-party action). As such, the summary judgment dismissal of the claims against Zeigler extinguishes Zeigler's remaining third-party claims against Schwartz and New Phase. Likewise, the extinguishing of Zeigler's third-party claims against Schwartz and New Phase extinguishes any second third-party claims asserted by Schwartz and New Phase against the remaining second third-party defendants. Accordingly, the third-party action and the second third-party action are dismissed in all respects, as well as any counter and/or cross claims arising out of, or in connection with, the asserted actions.

As to that portion of Zeigler's motion seeking sanctions, pursuant to §130-1.1 of the Rules of the Chief Administrator, it is quite apparent that the Freedmans (as well as legal counsel) were, at best, remiss in not naming Schwartz, New Phase and Mary Doe #1 (Nelson) as co-defendants in the action in chief, or, at worst, frivolous, malicious, and contumacious, if not extortionist, in seeking plenary relief solely from Zeigler. However, though the Freedmans' claims have, at this juncture, been adjudged as lacking merit, the Freedmans' less than appropriate prosecution of this action does not sufficiently satisfy the element of frivolity to warrant sanctions.

Likewise, that portion of Zeigler's motion seeking to recover legal fees and expenses, the

Freedmans' conduct in prosecuting this action does not rise to the level of impropriety to warrant such relief.

Accordingly, it is hereby

**ORDERED** that so much of defendant Zeigler's Motion (sequence number 005) as seeks summary judgment is granted and the action in chief is dismissed with prejudice in its entirety; and it is further

**ORDERED** that the motion of 60 E. 9<sup>th</sup> Street Owners Corp., Board of Managers of 60East Ninth Street Condominium, Rose associates, Inc., "John Doe #1" and "John Doe #2" (sequence number 006) for summary judgment is granted and the third-party action and the second third-party action are dismissed with prejudice in their entirety; and it is further

**ORDERED** that statutory costs and disbursements are awarded to defendant against plaintiffs, and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

Dated: 3/25/09

ENTER:

*Luy*

J.S.C.  
**LOUIS B. YORK**  
J.S.C.

**FILED**  
MAR 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK