

Chunn v New York City Hous. Auth.

2009 NY Slip Op 31317(U)

June 15, 2009

Supreme Court, New York County

Docket Number: 116764/06

Judge: Louis B. York

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

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

PART 2

Index Number : 116764/2006
CHUNN, CHRISTOPHER
vs.
HOUSING AUTHORITY
SEQUENCE NUMBER : 005
ENFORCE/EXEC JUDGMENT OR ORDER

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 _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

Dated: 6/15/09

Lly
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
CHRISTOPHER CHUNN,

Plaintiff,

DECISION/ORDER

-against-

Index No.: 116764/06

NEW YORK CITY HOUSING AUTHORITY, and
AMERICAN SECURITY SYSTEMS, INC.,

Defendants.

-----X

NEW YORK CITY HOUSING AUTHORITY,
Third-Party Plaintiff,

Index No.: 590332/07

-against-

AMERICAN SECURITY SYSTEMS, INC.,
Third-Party Defendant

-----X

NEW YORK CITY HOUSING AUTHORITY,
Second Third-Party Plaintiff,

Index No.: 590870/07

-against-

NATIONAL CASUALTY COMPANY, and
SCOTTSDALE INSURANCE COMPANY,
Second Third-Party Defendants.

-----X

HON. LOUIS B. YORK, J.S.C.:

In this personal injury action, the defendant/third-party plaintiff moves for an order to compel the two second third-party defendants to assume its defense (motion sequence number 005). That same defendant/third-party plaintiff also moves separately for summary judgment to dismiss the complaint, while one of the third-party defendants cross-moves to dismiss both the complaint and the third-party complaint (collectively, motion sequence number 007). For the following reasons, the first motion is granted in part and denied in part, the second motion is denied, and the cross motion is granted in part and denied in part.

BACKGROUND

The Parties

On December 31, 2005, plaintiff Christopher Chunn was visiting his sister, who resides in apartment 4F in the Taft Houses, a public housing facility located at 1735 Madison Ave. in New York City (the building). Upon returning to the building after he had gone out to buy cigarettes, Chunn was attacked, injured and rendered comatose by a number of unknown individuals who, he alleges, had improperly gained access to the building as a result of a defective intercom system.

The defendant/third-party plaintiff New York City Housing Authority (NYCHA) owns and manages the building. Defendant and third-party defendant American Security Systems, Inc. (ASSI) is the entity to which NYCHA had contracted for intercom maintenance and repair. Third-party defendants National Casualty Company (National) and Scottsdale Insurance Company (Scottsdale collectively, the Scottsdale defendants) are ASSI's insurers. The policies that the Scottsdale defendants issued to ASSI name NYCHA as an additional insured. On June 5, 2007, Chunn served an amended complaint that named both NYCHA and ASSI as defendants, and also set forth a single cause of action for negligence. Exhibit H. NYCHA and ASSI served their amended answers with cross claims. NYCHA served a second third-party complaint on National and Scottsdale. National and Scottsdale served their combined answer on December 14, 2007.

On February 29, 2008, this court issued a decision that found that "[ASSI] and [the Scottsdale defendants] are obligated to defend and indemnify [NYCHA] in the main action." ASSI and the Scottsdale defendants thereafter filed notices of appeal. At this juncture, however,

the Scottsdale defendants agreed to assume NYCHA's defense, and sought to assign said defense to their own counsel. NYCHA objected to what it perceived as a conflict, and demanded that the Scottsdale defendants permit NYCHA to choose its own counsel, and reimburse NYCHA for its prior legal expenses. The Scottsdale defendants would not agree to this.

NYCHA moves pursuant to CPLR 5101, for an order to compel the Scottsdale defendants to permit NYCHA to choose its own counsel, and to reimburse NYCHA for its extant legal expenses (motion sequence number 005). Shortly thereafter, on July 18, 2008, NYCHA also moved for summary judgment to dismiss the complaint, and ASSI cross moved to dismiss both the complaint and the third-party complaint on July 25, 2008 (motion sequence number 007).

Before the court could decide these motions, the Appellate Division, First Department, issued a decision on October 23, 2008, that disposed of NYCHA's first summary judgment motion (motion sequence number 001), and made the following findings:

The comprehensive general liability (CGL) policy issued by [National] to ASSI provides for insurance for NYCHA as an additional insured with respect to liability for, inter alia, bodily injury caused, in whole or in part, by ASSI's "acts or omissions." The complaint asserts that plaintiff's injury was caused, in whole or in part, by ASSI's acts or omissions with respect to the NYCHA building's systems. Therefore, NYCHA is entitled to a defense under the policy. Contrary to the insurers' contention that they have demonstrated as a matter of law that "there is no possible factual or legal basis on which [they] might eventually" be obligated to indemnify NYCHA, the affidavit by plaintiff's sister, a tenant in the building, which asserts that the intercom had been broken for several months before the incident in which plaintiff was assaulted, presents an issue of credibility that precludes summary judgment.

NYCHA is also entitled to a defense under the excess policy issued to ASSI by [Scottsdale], because that policy follows the form of [National]'s CGL policy, under which NYCHA is an additional insured.

The insurers' ground for disclaiming coverage under the owners and contractors protective (OCP) policy issued by [Scottsdale], i.e., late notice, is

belied by the record, as is their contention that notice to [National] did not constitute notice to [Scottsdale] as well. However, in any event, any delay in notice was due to misleading statements by the [National] claims department concealing the existence of the OCP policy.

While the duty to defend is clear, issues of fact as to liability in the underlying personal injury action render premature the conclusion that the insurers have a duty to indemnify NYCHA.

The second third-party action should be severed to avoid the prejudice to the second third-party defendants that would result from the jury's awareness of the existence of liability insurance.

It would be premature to declare that the indemnification provisions of the contract between NYCHA and ASSI are void and unenforceable under General Obligations Law § 5-322.1.

Chunn v New York City Hous. Auth., 55 AD3d 437, 437-438 (1st Dept 2008) (citations omitted).

With these findings in place, the court now turns its attention to the three instant motions.

DISCUSSION

NYCHA's First Motion

NYCHA's first motion commences with a request for an order, to compel ASSI and the Scottsdale defendants to both permit NYCHA to choose its own counsel, and to reimburse NYCHA for said counsel's costs. The rules regarding the retention of counsel of one's choice have been developed through case law. A quick perusal of the statute discloses that CPLR 5101 affords no basis for the relief that NYCHA seeks. This provision is applicable only to judgments for money.

NYCHA cites the Court of Appeals holding in *Public Service Mut. Ins. Co. v Goldfarb* (53 NY2d 392 [1981]) for the proposition that, where there is a conflict between an insurer and an insured, the insured is entitled to defense by counsel of the insured's choosing. *See* Notice of

Motion, Lazar Affirmation, ¶ 14. NYCHA offers, as proof of the existence of a conflict here, a letter dated April 9, 2008 in which the Scottsdale defendants reserve their appellate rights regarding the issue of whether or not they are obligated to defend and/or indemnify NYCHA. *Id.*, ¶ 15; Exhibit C. New York State law does indeed hold that an insurer's offer to defend, which is conditioned on a reservation of rights with respect to its obligation to indemnify, entitles the insured to both retain counsel of its own choosing, and to receive reimbursement of the reasonable cost thereof from the insurer. *See e.g. First Jeffersonian Assocs. v Insurance Co. of North America*, 262 AD2d 133 (1st Dept 1999). Nonetheless, the Scottsdale defendants here deny that the April 9, 2008 letter contains a reservation of their appellate rights. *See Mitchell Affirmation in Opposition*, ¶ 11. The court does not believe that there is any need to examine the exact language of that letter, however, because the Appellate Division, First Department's, October 23, 2008 decision has rendered moot the Scottsdale defendants' reservation (if any) of their appellate rights. The decision disposing of that appeal now makes it clear that "NYCHA is ... entitled to a defense under the excess policy issued to ASSI by [Scottsdale],"¹ but that "[w]hile the duty to defend is clear, issues of fact as to liability in the underlying personal injury action render premature the conclusion that the insurers have a duty to indemnify NYCHA." *Chunn v New York City Hous. Auth.*, 55 AD3d at 438. Thus, as matters now stand in the wake of the Appellate Division's decision, it is clear that the Scottsdale defendants must assume NYCHA's defense against Chunn's claims, but it is also clear that the issue of whether the Scottsdale defendants must indemnify NYCHA, if Chunn succeeds on those claims remains open. Thus,

¹ The court notes that the Appellate Division, First Department's, October 23, 2008 decision also found that NYCHA was entitled to be defended under the policy issued to ASSI by National.

the operative question here is whether a possible conflict between NYCHA and the Scottsdale defendants exists regarding indemnification which would justify NYCHA being represented by counsel of its own choosing. After carefully reviewing the controlling case law, the court believes that such a conflict is disclosed.

In *225 East 57th Street Owners, Inc. v Greater New York Mut. Ins. Co.* (187 AD2d 360, 360-361 [1st Dept 1992]), the Appellate Division, First Department, found that the interests of an insurer that had alleged that the insured's conduct (which was the basis of the underlying lawsuit) might have been intentional and, thus, outside the scope of the policy's coverage, were in conflict with the interests of the insured, and that the insurer must, therefore, pay the insured the costs of retaining counsel of the insured's own choosing. Here, NYCHA points out that, in the opposition papers that the Scottsdale defendants submitted in connection with the earlier summary judgment motion (motion sequence number 001), the Scottsdale defendants did attempt to disclaim coverage on the ground that NYCHA's willful failure to perform its own safety inspections was the cause of Chunn's injuries. See Notice of Motion (motion sequence number 005), Exhibit G. Pursuant to the holding of *225 East 57th Street Owners, Inc. v Greater New York Mut. Ins. Co.*, this allegation indicated the existence of a conflict that would justify that NYCHA obtain its own counsel at the Scottsdale defendants' expense.

Further, in *Major Builders Corp. v Commercial Union Ins. Co.* (155 AD2d 267, 267 [1st Dept 1989]), the Appellate Division, First Department, found that the plaintiff insured, as a result of the insurer's unwarranted "disclaimer [of coverage], has had an attorney of its choosing for three years," and held that "because of potential conflicts between plaintiff and defendant on how the case should be pursued, we deem it appropriate that plaintiff choose its own counsel." Here,

it is also the case that the Scottsdale defendants' initial disclaimer of coverage was found to have been improper by the Appellate Division, First Department, and that NYCHA has been represented by its own counsel² since the commencement of its action on October 31, 2006. Pursuant to the holding of *Major Builders Corp. v Commercial Union Ins. Co.*, these facts also indicate the existence of a conflict that would justify that NYCHA continue being represented by its own counsel at the Scottsdale defendants' expense.

Finally, as the Court of Appeals explained long ago in *Prashker v U.S. Guarantee Co.* (1 NY2d 584, 593 [1956]), a conflict exists in any situation where an attorney's "duty to the [insured] would be to endeavor to defeat recovery [by the plaintiff] on any ground, whereas their duty to the insurance company would be to defeat recovery only upon such grounds as might render the insurance company liable." See also *69th Street and 2nd Ave. Garage Associates, L.P. v Ticor Title Guarantee Co.*, 207 AD2d 225 (1st Dept 1995). Here, the Appellate Division, First Department has specifically found that "[w]hile the duty to defend is clear, issues of fact as to liability in the underlying personal injury action render premature the conclusion that the insurers have a duty to indemnify NYCHA." *Chunn v New York City Hous. Auth.*, 55 AD3d at 438 (1st Dept 2008). Thus, there exists the possibility that counsel retained by the Scottsdale defendants might seek to defend the issue of indemnification vigorously (to the Scottsdale defendants advantage) while neglecting the issue of liability (to NYCHA's detriment). In light of the guidance afforded by the foregoing case law, the court believes that the facts of this case disclose a potential conflict between the respective interests of NYCHA and the Scottsdale defendants

² NYCHA has been represented by the law firm of Herzfeld & Rubin, P.C., while the Scottsdale defendants seek to assign NYCHA's defense to their own counsel, Milber, Makris, Plousadis & Seiden, L.L.P.

whose existence warrants an order permitting NYCHA to retain counsel of its choosing in this action, and requiring defendants to bear the reasonable costs of such representation.

Accordingly, the court grants the first branch of NYCHA's first motion.

The remainder of NYCHA's first motion seeks an order directing defendants to reimburse NYCHA for its past defense expenses. *See* Notice of Motion (motion sequence number 005), Lazar Affirmation, ¶¶ 35-26. The Scottsdale defendants point out, however, that NYCHA has not submitted any legal bills in connection with its request, and that there has not yet been a hearing to determine whether the expenses that NYCHA has incurred are reasonable. *See* Mitchell Affirmation in Opposition, ¶ 4. These points are well taken. The trial of Chunn's claims has not yet been held, and, as previously mentioned, the Appellate Division, First Department has specifically found that the issue of indemnification also remains open. Under these circumstances, there do not appear to be any grounds to grant NYCHA's request. The case that NYCHA cited in support of its argument, *U. S. Fidelity and Guaranty Co. v Copfer* (48 NY2d 871 [1979]), is inapposite, in that the court there calculated the reimbursement of the insured's legal expenditures *after* the trial of the underlying action had been concluded. The court will do the same here, if necessary. Accordingly, the court denies the second branch of NYCHA's first motion.

NYCHA's Second Motion

NYCHA's second motion seeks summary judgment to dismiss Chunn's complaint. When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v*

Lacher, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Because it deprives the litigant of his or her day in court, summary judgment it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of such triable issues. *See e.g. Andre v Pomeroy*, 35 NY2d 361 (1974); *Pirrelli v Long Island R.R.*, 226 AD2d 166 (1st Dept 1996). Here, the court finds that such triable issues do exist, and that NYCHA's motion should be denied.

As previously mentioned, Chunn's amended complaint sets forth one cause of action for negligence. *See* Notice of Motion (motion sequence number 007), Exhibit H. Pursuant to New York law, "the traditional common-law elements of negligence" are: "duty, breach, damages, causation and foreseeability." *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 (1st Dept 2005). Here, NYCHA argues that there are no triable factual issues with respect to the proximate causation element of Chunn's negligence claim. NYCHA relies on the Court of Appeals holding in *Burgos v Aqueduct Realty Corp.* (92 NY2d 544, 551 [1998]) that:

In premises security cases ... the necessary causal link between a landlord's culpable failure to provide adequate security and a tenant's injuries resulting from a criminal attack in the building can be established only if the assailant gained access to the premises through a negligently maintained entrance. Since even a fully secured entrance would not keep out another tenant, or someone allowed into the building by another tenant, plaintiff can recover only if the assailant was an intruder [emphasis added].

Here, NYCHA argues that "plaintiff is unable to offer any evidence that his assailant was an intruder," because "plaintiff admitted that he saw the individual's face, [that] he did not

recognize him, and ... that he would not have recognized any other tenant in the building ... [or] the invitees of other tenants who would have been visiting for New Years Eve.” Memorandum of Law in Support of Motion, at 4. Chunn responds that “although the assailants were not apprehended, the circumstances permit an inference that they were intruders.” See Memorandum of Law in Opposition to Motion, at 7. The court notes that the law does permit a plaintiff to use such an inference to prove proximate causation in certain circumstances. In *Brewster v Prince Apartments, Inc.* (264 AD2d 611, 613 [1st Dept 1999]), the Appellate Division, First Department, held that:

To recover in premises security cases where the defect alleged is a negligently maintained entrance, the plaintiff must show that the assailant was an intruder. However, a “plaintiff need not conclusively prove that the assailant was an intruder.” Rather, a plaintiff can satisfy the proximate cause burden at trial “if the evidence renders it more likely or more reasonable than not that the assailant was an intruder who gained access to the premises through a negligently maintained entrance [internal citations omitted].”

Here, Chunn has presented the affidavit of his sister, Nina Morgan (Morgan), who states that the building’s magnetic door lock had been broken and inoperable for a week before Chunn was attacked, and that the building’s intercom been broken and inoperable for three months before Chunn was attacked. *See* Morgan Affidavit in Opposition to Motion, ¶¶ 3, 5-6. Chunn also presents a copy of a work request, dated September 8, 2005, that Morgan made to NYCHA regarding the intercom. *Id.*; Exhibit A. Oddly, although it did not submit any reply papers in support of its own motion, NYCHA’s opposition papers to ASSI’s cross motion argue that Morgan’s affidavit “is more than sufficient to require a trial of fact to resolve [the] issues” of whether or not the intercom and door locks were, in fact, broken. The court thus deems that NYCHA has conceded that there is a triable issue of fact as to whether Chunn’s assailants gained

access to the building through a negligently maintained entrance, so as to permit Chunn to raise the inference that said assailants were “intruders,” and to, thereby, prove the proximate causation element of his negligence claim. Accordingly, the court denies NYCHA’s summary judgment motion.

ASSI’s Cross Motion

As an initial matter, the court notes that the Appellate Division, First Department, specifically directed in its October 23, 2008 decision that:

The second third-party action should be severed to avoid the prejudice to the second third-party defendants that would result from the jury’s awareness of the existence of liability insurance.

Chunn v New York City Hous. Auth., 55 AD3d at 438. Accordingly, even though it did not request this relief, the court grants ASSI’s cross motion to the extent of ordering that the second third-party action, in which that motion was made (i.e., Index No. 590870/07), be severed from the underlying action (i.e., Index No. 116764/06) and the first third-party action (i.e., Index No. 590332/07) so that it may be tried separately, in accordance with the order of the Appellate Division, First Department.

ASSI’s cross motion also seeks summary judgment to dismiss Chunn’s amended complaint. Unlike NYCHA, ASSI argues that there are no triable issues of fact with respect to the duty of care element of Chunn’s negligence claim.³ ASSI specifically argues against Chunn’s

³ ASSI does assert in passing that Chunn has failed to present any proof to support the proximate causation element of his claim. *See* Memorandum of Law in Support of Cross Motion, at 17-18 (pages not numbered). However, as previously discussed, this argument is belied by Chunn’s evidentiary submissions. Conclusory assertions, such as these, which are unsupported by evidence are insufficient to sustain a motion for summary judgment. *See e.g. Mason v Dupont Direct Financial Holdings, Inc.*, 302 AD2d 260 (1st Dept 2003).

claim that the law does not impose a duty of care on it with respect to third parties with which it has no contractual relationship. *Id.* This is a generally correct statement of the law. As the Court of Appeals recently reiterated in *Church ex rel. Smith v Callanan Industries, Inc.* (99 NY2d 104, 111-112 [2002] [internal citations omitted]):

Beginning with Chief Judge Cardozo's landmark decision in *H.R. Moch Co. v Rensselaer Water Co.*, we have consistently held that, ordinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to noncontracting third parties upon the promisor. Rather, the injured party is relegated to contractual remedies, if any. This reflects generally accepted legal principles, largely derived from *Moch*. "[I]f the alleged obligation to do or not to do something that was breached could not have existed but for a manifested intent [to contract], then contract law should be the only theory upon which liability would be imposed."

As more extensively discussed in *Espinal v Melville Snow Contrs.*, our cases have nevertheless thus far identified three sets of circumstances, as exceptions to the general rule, in which a duty of care to noncontracting third parties may arise out of a contractual obligation or the performance thereof. In such cases, the promisor is subject to tort liability for failing to exercise due care in the execution of the contract. The first is where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk ("a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury."). *Moch* describes that conduct, subjecting the promisor to tort liability, as "launch[ing] a force or instrument of harm."

The second set of circumstances giving rise to a promisor's tort liability is where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation.

Third, we have imposed tort liability upon a promisor "where the contracting party has entirely displaced the other party's duty to maintain the premises safely." In contrast to the first exception, the promisor under such circumstances may indeed be liable for failing to make conditions safer for the injured party.

Here, ASSI argues that Chunn does not fall into any of the three categories outlined above. *See* Memorandum of Law in Support of Cross Motion, at 6-13 (pages not numbered). Chunn replies that ASSI's three-month failure to repair Morgan's intercom, and protracted failure to discover

and repair the broken intercoms of the building's other tenants "are affirmative acts of negligence" that "created or increased the hazard to tenants or guests that would arise from an inoperable ... security system." See Memorandum of Law in Opposition to Cross Motion, at 9-10. This argument does not specify which of the three *Church ex rel. Smith v Callanan Industries, Inc.* exceptions Chunn seeks to assert. Thus, the court must examine all three. See e.g. *Palka v Servicemaster Management Services Corp.*, 83 NY2d 579, 585 (1994) ("Unlike foreseeability and causation, which are issues generally and more suitably entrusted to fact finder adjudication, the definition of the existence and scope of an alleged tortfeasor's duty is usually a legal, policy-laden declaration reserved for Judges to make prior to submitting anything to fact-finding or jury consideration.").

The Court of Appeals described the first such exception succinctly in *Esplna v Melville Snow Contractors, Inc.* (98 NY2d 136, 140 [2002]) as existing "where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm.'" The Court of Appeals' analysis quoted the holding by Justice Cardozo in *H.R. Moch Co. v Rensselaer Water Co.* (247 NY 160, 168 [1928]) that "[t]he query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good." Here, as previously mentioned, Chunn argues that ASSI's failure to repair Morgan's and the other tenants' intercoms were "affirmative acts of negligence." See Memorandum of Law in Opposition to Cross Motion, at 9-10. ASSI disputes this, asserts that, pursuant to its contract with NYCHA, it was incumbent upon NYCHA to collect intercom-related complaints from its tenants, to follow them up with inspections, and to pass on to ASSI only those

complaints that involved physical damage to the building's telephone-based intercom system. NYCHA's superintendent at the building, Kevin Cropley (Cropley), confirmed this procedure. See Notice of Motion (motion sequence number 007), Exhibit I. ASSI also presents repair records and the testimony of one of its managers, Andrea Yearwood (Yearwood), that it never received notification of a complaint pertaining to Morgan's intercom. *Id.*; Exhibit J. Cropley also confirmed that he was unable to determine whether NYCHA had ever transmitted that particular complaint to ASSI. *Id.*; Exhibit I. Under these circumstances, the court must disagree with Chunn's characterization of the failure to repair Morgan's intercom as an "affirmative act of negligence." The available evidence suggests that there may even have been a reasonable explanation for why ASSI did not perform repairs to Morgan's intercom, which would, thus, make it more appropriate to characterize its failure to do so as an "omission" rather than "the launch of a force of harm." Therefore, the court finds that Chunn has not borne his burden of proving that he is entitled to the first of the *Church ex rel. Smith v Callanan Industries, Inc.* exceptions.

The second of the aforementioned exceptions exists "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation." 99 NY2d at 112. Here, again, the Court of Appeals cited its decision in *Espinal v Melville Snow Contractors, Inc.*, which, in turn, referred to its earlier decision in *Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.* (76 NY2d 220, 226 [1990]), wherein the Court held that "the proper inquiry is simply whether the defendant has assumed a duty to exercise reasonable care to prevent foreseeable harm to the plaintiff," and that, in this regard, "it remains for the courts to determine the fundamental question whether, as a matter of policy, the alleged

negligence should result in liability.” In this action, there is no doubt that ASSI had a “continuing contractual obligation” to perform repairs on the building’s intercoms. Further, it might also be reasonable to foresee that tenants and their invitees could sustain some form of injury by detrimentally relying upon ASSI to discharge that obligation. Thus, the operative question is whether public policy dictates that ASSI’s duty of care ought to extend to Chunn and/or other similarly situated potential plaintiffs. The court finds that it does not. On the one hand, there is an interest in protecting the safety of legitimate invitees into public housing. However, following the rationale enunciated in *Eaves Brooks*, to force ASSI to be answerable for personal injuries sustained by a non-contracting third party such as Chunn, would also be to: 1) in effect force outside contractors such as ASSI to insure against a risk, the amount of which they could neither calculate nor control, and as to which contractual limitations of liability might be ineffective or illegal; 2) force such contractors to raise its prices to NYCHA in order to continue to provide services in public housing; and 3) inequitably expand a contractor’s potential liability beyond the bounds of the limited contractual relationship that it had initially contemplated entering into with NYCHA. The court believes that the relationship between Chunn and ASSI is too attenuated here to justify a public policy that would hold ASSI liable for Chunn’s injuries as a matter of course. Had there been some more culpable conduct on ASSI’s part, then Chunn would be compensable pursuant to the first exception. However, for the public policy reasons discussed herein, the court finds that Chunn has not borne his burden of proving that he is entitled to the second of the *Church ex rel. Smith v Callanan Industries, Inc.* exceptions.

The third exception exists “where the contracting party has entirely displaced the other party’s duty to maintain the premises safely.” 99 NY2d at 112, citing *Palka v Servicemaster*

Management Services Corp., 83 NY2d at 589. This exception is clearly inapplicable, however, since ASSI's contract was only for repair and maintenance of the building's intercoms, and not for its door locks or the other elements of its security system. Therefore, the court finds that Chunn has not borne his burden of proving that he is entitled to the benefit of the third of the *Church ex rel. Smith v Callanan Industries, Inc.* exceptions either. Accordingly, the court also finds that there exist no triable issues of fact with respect to the duty of care element of Chunn's negligence claim against ASSI, and that the first branch of ASSI's cross motion for summary judgment to dismiss the amended complaint as against it should, therefore, be granted.

The balance of ASSI's cross motion seeks summary judgment to dismiss NYCHA's third-party complaint. Here, ASSI argues that NYCHA has not presented any proof that ASSI created the condition that allegedly caused Chunn's injuries. *See Memorandum of Law in Support of Cross Motion*, at 13-17 (pages not numbered). However, as previously mentioned, the Appellate Division, First Department has specifically found that "[w]hile the duty to defend is clear, issues of fact as to liability in the underlying personal injury action render premature the conclusion that the insurers have a duty to indemnify NYCHA." *Chunn v New York City Hous. Auth.*, 55 AD3d at 438. In light of the Appellate Division's finding, the court declines to address ASSI's argument at this juncture, and will instead permit ASSI to assert it at the separate trial of the third-party action that the Appellate Division ordered. Accordingly, the court finds that the second branch of ASSI's cross motion for summary judgment should be denied.

DECISION

Accordingly, for the foregoing reasons, it is hereby:

Ordered that the first motion of the defendant/third-party plaintiff New York City

Housing Authority (motion sequence number 005) is granted solely to the extent of entering an order permitting said defendant/third-party plaintiff to retain the counsel of its choice to defend it in this action, with the reasonable costs of such defense to be borne by the third-party defendants herein, but is otherwise denied; and it is further

Ordered that the second motion of the defendant/third-party plaintiff New York City Housing Authority, which seeks summary judgment to dismiss the complaint (motion sequence number 007), is denied; and it is further


Ordered that the cross motion of defendant/third-party defendant American Security Systems, Inc., which seeks summary judgment to dismiss the amended complaint (motion sequence number 007), is granted to the extent that: 1) the amended complaint is dismissed as to American Security Systems, Inc.; and 2) the second third-party action (i.e., Index No. 590870/07) is hereby severed from the underlying action (i.e., Index No. 116764/06) and the first third-party action (i.e., Index No. 590332/07) for separate trial in accordance with the order of the Appellate Division, First Department; but is otherwise denied.

Settle order.

Dated: New York, New York

~~May~~ 15, 2009
June

ENTER:



Hon. Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.