

**Rosenblatt v BLK Iron & Constr. Works**

2009 NY Slip Op 32605(U)

October 28, 2009

Supreme Court, New York County

Docket Number: 101333/09

Judge: Doris Ling-Cohan

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

PRESENT: Justice DORIS LING-COHAN  
*Justice*

PART 36

Index Number : 101333/2009  
ROSENBLATT, STACY  
vs.  
BLK IRON & CONSTRUCTION WORKS  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

PAPERS NUMBERED  
1, 2  
3  
4

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 *to dismiss by defendants*  
*is granted in accordance with the attached memorandum*  
*decision. PC on 11/2/09 is*  
*Cancelled.*

**FILED**  
NOV 09 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/28/09 **JUSTICE DORIS LING-COHAN**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

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 36

-----X  
STACY ROSENBLATT, PETER GOLIA and 2649  
FREDERICK DOUGLAS BLVD. CORP.,

Plaintiffs,

Index No.: 101333/09

-against-

Motion Seq. No.: 001

BLK IRON and CONSTRUCTION WORKS, and  
TARSEM LALL,

Defendants.

**FILED**  
NOV 09 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
DORIS LING-COHAN, J. :

Defendants move to dismiss the complaint pursuant to CPLR 3211(5) and (3).

Plaintiffs claim to be the owners of property located at 2649 Frederick Douglas Boulevard, New York, New York (premises). On July 18, 2003, the New York City Department of Housing Preservation and Development (HPD) entered into a contract with defendants in which defendants were to perform an "emergency repair" of the roof of the premises. Such a repair was necessary because HPD found that the roof was substantially open to elements, without covering or weather proofing. On July 18-19, 2003, defendants completed the repair by placing plywood planks across the top of the premises, taping said planks as a method of creating a temporary roof to secure the premises. Subsequently, the planks collapsed, causing damages.

Plaintiffs brought this action, alleging negligence and property damage as well as breach of contract. Defendants move to dismiss the complaint on two grounds. First, defendants argue that plaintiffs are precluded from bringing this action due to the three- year statute of limitations for negligence and property damage. The action was commenced on January 30, 2009, almost six years after the incident occurred. Defendants contend that the breach of contract claim is

actually based on negligence and should be treated as a negligence claim.

Second, if the court should uphold the action despite the statute of limitations, defendants assert that plaintiffs have no standing to bring this action because plaintiffs have no contractual relationship with defendants. The contract at bar refers to defendants and HPD as the parties and plaintiffs are allegedly not intended to benefit from the terms of the contract.

In opposition to the motion, plaintiffs argue that there are issues as to whether an implied-in-fact or implied-in-law contract exists between the parties. Thus, based on the conduct between the parties or the matter of equity, plaintiffs conceive of circumstances that could be deemed contractual.

In reply, defendants, who state that the claims of implied contract are not raised in the complaint, deny any evidence in the conduct of the parties which would implicate an implied-in-fact contract. Defendants contend that they had no intention of entering into a separate contract with plaintiffs. Defendants argue that plaintiffs were responsible for creating an unsafe condition at the premises in the first place. It was plaintiffs' failure to correct unsafe conditions, in violation of the Building Code, that allegedly led to the contract between HPD and defendants. Defendants assert that equity does not favor plaintiffs with the grounds for an implied-in-law contract.

CPLR 214 provides that actions in negligence or property damage carry a three-year statute of limitations. The first two causes of action in the complaint allege negligence on the part of defendants which resulted in damages and lost rent. These causes of action are precluded as untimely by the statute of limitations, as they were not asserted within three years. The third cause of action, alleges breach of contract by defendants for failure to perform work in a

workmanlike manner. It also alleges that defendants negligently placed a faulty temporary roof on the premises.

The parties did not enter into an express contract. “[I]n order to have standing to challenge a contract, a non-party to the contract must either suffer direct harm flowing from the contract or be a third party beneficiary thereof”. *Decolator, Cohen & DiPrisco, LLP v Lysaght, Lysaght & Kramer, P.C.*, 304 AD2d 86, 90 (1<sup>ST</sup> Dept 2003). There is no indication that HPD and defendants intended plaintiffs to be the beneficiaries of the contract.

The argument raised by plaintiffs is that an implied contract between the parties, if found to exist, legally binds defendants. There are two kinds of implied contracts, namely those that are implied in fact, as where the actions of the parties and not their words indicate that they intend to perform an actual contract, and those that are implied in law, also called quasi-contracts, which the law implies from the circumstances, even though the parties never intended to form an actual contract, so as to prevent an unjust enrichment. *Matter of Kummer*, 93 AD2d 135, 182-3 (2d Dept 1983).

The facts alleged in this case do not show that the parties, through their actions, intended to form a separate contract from the one at bar. As for the possibility of a quasi contract, the evidence provided by defendants shows that plaintiffs were on record as failing to remedy the roof on the premises, which resulted in HPD entering into an emergency contract with defendants. Thus, plaintiffs were responsible in part for creating a defective condition and should not benefit from their conduct.

The court therefore dismisses the third cause of action on the ground that plaintiffs lack standing to bring a claim based in contract.

Accordingly, it is

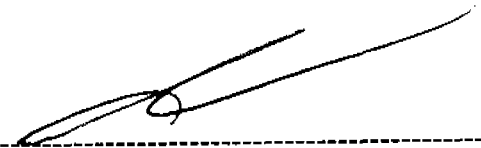
ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiffs, with notice of entry.

DATED:

10/28/09



Hon. Doris Ling-Cohan, J.S.C.

**FILED**  
NOV 09 2009  
NEW YORK  
COUNTY CLERK'S OFFICE