

**905 5th Ave. Assoc., Inc. v Weintrab**

2010 NY Slip Op 30721(U)

April 2, 2010

Supreme Court, New York County

Docket Number: 100662/06

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART ~~22~~ 7

905 5<sup>th</sup> Associates, Inc. and  
Pamela Lipkin, M.D.,  
Plaintiffs,

-against-

Richard and Liane Weintraub, My Home  
Remodeling, Inc., RDM Renovation  
Corp. and Rick Kramer,  
Defendants.

**FILED**

APR 02 2010

NEW YORK  
COUNTY CLERK'S OFFICE

INDEX NO. 100662/06

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

MOTION SEQ. NO. 17, 18, 19, 20

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

The following papers, numbered 1 to 4 were read on this Motion by plaintiff(s) for leave to amend, /defendant(s) Weintraub's motion for summary judgment, plaintiff(s) motion for partial summary judgment on liability and defendant (s) Kramer's motion for summary Judgment.

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

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

<u>4</u>

Cross-Motion:  Yes  No

Plaintiffs move for leave to amend the complaint to add My Home LLC (LLC) as an additional defendant. Richard Weintraub (Richard) and Liane Weintraub (Liane) (together, the Weintraubs) move for summary judgment dismissing the complaint as against them or, alternatively, limiting plaintiffs' damages and granting indemnification against My Home Remodeling, Inc. (My Home or the general contractor) and RDM Renovation Corp. (RDM or the subcontractor). Plaintiffs move for partial summary judgment on liability against Richard on the seventh cause of action. Rick Kramer (Kramer or the architect) moves for summary judgment dismissing the complaint as against him. These motions (motion sequence 17, 18, 19 and 20) are consolidated for

disposition and decided as noted below.

### **Parties**

Pamela Lipkin (Lipkin) is the sole shareholder of 905 5<sup>th</sup> Avenue Associates, Inc. She is a doctor whose practice is located at 905 5<sup>th</sup> Avenue (the Building), New York, Apartment 1-C (the Office). The Weintraubs live in the Building, Apartment 2-E (the upstairs apartment). The upstairs apartment is located directly above the Office. The Weintraubs hired My Home as the general contractor to perform renovation work (the renovation) in the upstairs apartment. They hired Kramer as the architect for the renovation. My Home engaged RDM as the subcontractor to perform the demolition work as part of the renovation.

### **Parties' Contentions**

Lipkin alleges that she first became aware of the construction in the upstairs apartment on January 13, 2006 when debris came down from the ceiling into the Office (Lipkin EBT, at 40-41). She states that Brad Pitt, an employee of RDM, came to the Office and she complained about the debris (*id.*, at 41) and that the dust, debris and noise were so severe that she could no longer continue to practice medicine in the Office. The Office was 2,000 square feet. Lipkin claims that it would have been impossible to prevent dust and debris from falling into the Office by using plastic sheeting (*id.* at 270), since there were holes in the ceiling between the Office and the upstairs apartment (*id.* at 248). She further claims that she had two conversations with Richard and that, in retrospect, it was "obvious" that Richard knew that debris would fall into the Office (*id.* at 60).

Lipkin had property insurance with National Fire Insurance Company of Hartford

(National Fire) and she submitted a claim for property damage. National Fire paid \$531,655.68 (the insurance proceeds) pursuant to the claim (Weintraubs' motion, Exhibit L). She further states that she received a letter to adjacent owners (the alteration letter) signed by Richard (*id.*, Exhibit F). The alteration letter states that Richard agreed to indemnify her for "any damage whatsoever to your apartment caused by the alterations." She also contends that the Weintraubs received access to the Office as required by the alteration letter (Murphy EBT ,at 38).

Lipkin further claims that she took all precautions to prevent dust (Bill of Particulars, Item 6). She commenced this action on January 18, 2006, seeking an injunction restraining the renovation and for damages. Justice Faviola Soto denied the motion for an injunction by order dated February 22, 2006. The renovation has since been completed.

Plaintiffs' complaint seeks a permanent injunction against the renovation (1st cause of action), and damages for negligence against all defendants (2nd, 3rd and 4th causes of action), tortious interference with the proprietary lease and house rules against the Weintraubs and My Home (5th cause of action), negligence against RDM (6th cause of action), indemnification under the alteration letter against Richard (7th cause of action) and architectural malpractice against Kramer (8th and 9th causes of action). Plaintiffs also seek to amend to add LLC as a defendant.

The Weintraubs contend that Richard spoke with Lipkin twice prior to beginning the renovation. He sent her the alteration letter in accordance with the cooperative corporation's requirements. He states that Lipkin sought to get him to purchase the Office (Richard EBT, at 21, 34). He further contends that Lipkin refused access for

inspection to the Office (*id.* at 43; Pitt EBT, at 38). The Weintraubs also allege that they hired My Home as the general contractor pursuant to a contract of September 2005 (the renovation contract). They further state that they had no control over the renovation (Richard EBT, at 65) and that they never saw the hole through which debris and dust purportedly fell into the Office (*id.* at 31).

The Weintraubs also state that RDM was hired by My Home, not by them and, to the extent that they are liable to plaintiffs, My Home and RDM should indemnify them. Finally, if plaintiffs' complaint is not dismissed, the Weintraubs seek to limit plaintiffs' claim pursuant to indemnification under the alteration letter to property damages and to a setoff for the insurance proceeds.

LLC contends that it signed the renovation contract (Weintraubs' motion, Exhibit G) and that it is a "legally distinct and different entity" from My Home (Piotraut affidavit, ¶ 5). It therefore contends that it should not be added as a defendant. Lipkin notes that Mr. Piotraut stated that he is an officer of LLC, as well as being an officer of My Home. She also notes that My Home testified that it did the renovation (Pitt EBT, at 10) and that the relationship between the two entities are unclear at this stage.

Kramer alleges that he was the architect for the renovation pursuant to a contract with the Weintraubs (Kramer motion, Exhibit A), and he was noted as the architect on the renovation contract. He further states that he was not responsible for the construction means or methods and that he visited solely to ascertain whether the renovation was proceeding in accordance with the drawings (Kramer affidavit, ¶ 7). He also states that a crack under a drain which was hidden under a concrete slab in the upstairs apartment was probably the result of a prior renovation, and it was through this

hole that debris and dust likely fell into the Office (Kramer EBT, at 40, 42, 64-65). He further states that plastic sheeting might not have stopped the dust and debris from falling into the Office (*id.* at 224).

Kramer also notes that the New York City Department of Buildings (DOB) issued a stop work order (SWO) on January 20, 2006. He wrote to DOB, stating that there was no hazardous condition and the SWO was lifted on January 27, 2006 (*id.*, ¶ 5). A second SWO was issued on February 24, 2006 and, after Kramer wrote to DOB after inspecting the area, DOB lifted the SWO on March 30, 2006. A third SWO was issued May 19, 2006, the hole was repaired in the spring of 2007, and the third SWO was lifted (*id.*, ¶ 6).

RDM asserts that Kramer was involved in the renovation since he was at the work site (Dobrzanski EBT at 40). It further states that the demolition was done in accordance with Kramer's plans (*id.* at 114) and that the architect was "overseeing the whole process" (*id.* at 227). RDM also contends that there was no access to the Office (Pitt EBT, at 38). It asserts that while the Weintraubs did not perform any physical work at the site, conditional indemnification should not be granted since they might be responsible under the alteration letter.

### **Amendment**

Generally, leave to amend pleadings is freely granted unless there is prejudice (*Fahey v County of Ontario*, 44 NY2d 934 [1978]). The proposed new defendant, LLC, signed the renovation contract. LLC contends that it is a separate entity from My Home (Piotraut affidavit, ¶ 5). However, plaintiffs have presented evidence that there is overlap between My Home and LLC. They assert that there is evidence that My Home

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did the renovation that LLC contractually agreed to perform (Pitt EBT, at 10). They further note that Mr. Piotraut states that he is an officer of both entities. LLC retains the right to seek summary judgment dismissing the complaint. However, since it has not shown prejudice or surprise resulting from the delay, plaintiffs' motion for leave to amend to add LLC as an additional defendant is granted (*Murray v City of New York*, 51 AD3d 502, 503 [1st Dept 2008]).

### **Owners' Liability**

Initially, the court notes that plaintiffs' first cause of action seeks an injunction restraining the renovation. Since the renovation has been completed, this cause of action is moot and it is therefore dismissed against all defendants.

The Weintraubs seek dismissal of the negligence and tortious interference causes of action as against them. They assert that they had no personal involvement with the renovation and that they merely hired My Home as the general contractor and Kramer as their architect.

"The general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts" (*Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992]). There are exceptions if the employer is under a specific nondelegable duty to perform or control the work, or for especially or inherently dangerous work or for negligence in selecting or supervising the contractor (*Kleeman v Rheingold*, 81 NY2d 270, 275 [1993]).

Lipkin stated that it was "pretty obvious" that the Weintraubs knew of the problems with the renovation (Lipkin EBT, at 60). This is patently insufficient to rebut the Weintraubs' denial of any personal involvement in the renovation. "The retention of

general supervisory authority over the acts of an independent contractor is generally insufficient for the imposition of ... vicarious liability" (*Laecca v New York Univ.*, 7 AD3d 415, 416 [1st Dept 2004]).

Similarly, plaintiffs have not shown that the renovation was either inherently or especially dangerous (*Montano v O'Connell*, 186 AD2d 461 [1st Dept 1992]). Plaintiffs have also not shown that the Weintraubs had a nondelegable duty. Plaintiffs have failed to raise a factual issue showing malicious conduct sufficient to warrant a claim of tortious interference (*Carvel Corp. v Noonan*, 3 NY3d 182 [2004]). Therefore, the negligence claims (2nd, 3rd and 4th causes of action) and tortious interference cause of action (5th) against the Weintraubs are dismissed.

#### **Architect's Liability**

Kramer has presented evidence that he was hired by the Weintraubs and that he was not responsible for the means and methods used by the contractor. Similar to the Weintraubs, he had no authority over the renovation. RDM states that he was present in the upstairs apartment, but his mere presence does not make him responsible for My Home's actions. My Home was the subcontractor who actually performed the work and Kramer had no specific authority over the subcontractor. The negligence causes of action (2nd, 3rd and 4th) are dismissed as against him.

Plaintiffs' complaint also has two causes of action against Kramer (8th and 9th) for architectural malpractice under his contract with the Weintraubs. Generally, a contractual obligation runs only to the promisee and an intended third party beneficiary (*Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]). A party may also be held liable if its relationship with a plaintiff is so close as to approach privity

(*Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 425 [1989]). Neither of these situations is applicable in this action. The intention of the promisee is crucial in determining whether a party is considered an intended beneficiary (*Caprer v Nussbaum*, 36 AD3d 176, 201 [2nd Dept 2006]; *Key Intl. Mfg. v Morse/Diesel, Inc.*, 142 AD2d 448, 455 [2nd Dept 1988]).

Kramer's duty under its contract ran to the Weintraubs and plaintiffs have not raised a material issue of fact that would show that Lipkin was an intended beneficiary of this contract or that she had a relationship with Kramer approaching privity. The eighth and ninth causes of action against Kramer are dismissed.

#### **Alteration Letter**

Under the cooperative corporation's proprietary lease and house rules, Richard sent Lipkin the alteration letter. It provided for indemnification of the "reasonable cost of repair" of "any damages whatsoever to your apartment caused by the alterations." However, this indemnification is conditioned by requiring Lipkin "to permit (his representatives) ... to inspect (the Office) prior to the commencement of (the renovation)."

Generally, agreements are to be construed in accordance with the parties' intentions and their written agreement is the best evidence of their intentions (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). However, indemnity contracts are strictly construed to avoid reading into them a duty that the parties did not intend to be assumed (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

In this action, there is a factual conflict between Lipkin, who alleges that she permitted access to the Office (Murphy EBT at 38), and Richard, who contends that

Lipkin barred such access (Richard EBT, at 43, Pitt EBT, at 43). This factual conflict as to whether Richard received access to the Office precludes summary judgment on this cause of action (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

However, Richard's motion also seeks to limit Lipkin's claim for damages. The alteration letter states that "damage to your apartment" will be repaired at Richard's cost. This phrase should be interpreted according to its normal and natural meaning (*Riverside South Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Damage to the apartment which was capable of being repaired means damage to property and not lost business. Additionally, Lipkin received the insurance proceeds amounting to \$531,665.68 from National Fire for damage to the Office. There should be a credit for the insurance proceeds against plaintiffs' recovery to avoid a double recovery.

Finally, since there is a factual issue as to Richard's responsibility under the alteration letter, conditional indemnity against My Home (contractual) or against RDM (common law) is denied (*Owens v Stevenson Commons Assoc., L.P.*, 64 AD3d 517 [1st Dept 2009]; *Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553 [1st Dept 2009]).

#### **Order**

It is, therefore,

ORDERED that plaintiffs' motion for leave to amend to add My Home LLC as a defendant in the form annexed to said motion is granted and plaintiffs are directed to serve a copy of this order with notice of entry upon all parties appearing and upon the Trial Support Office and the County Clerk and a copy of all prior pleadings on My Home

LLC; and it is further

ORDERED that plaintiffs' first cause of action is dismissed against all defendants; and it is further

ORDERED that Richard and Liane Weintraub's motion for summary judgment is granted to the extent of severing and dismissing the complaint and any cross claims against Liane Weintraub and the Clerk is directed to enter judgment accordingly, together with costs and disbursements; and is granted to dismiss the second, third, fourth and fifth causes of action against Richard Weintraub, and denied as to the seventh cause of action against him; and it is further

ORDERED that plaintiffs' motion for partial summary judgment against Richard Weintraub on the seventh cause of action is denied; and it is further

ORDERED that damages against Richard Weintraub are limited to property damages and said damages are to be set off in the amount of \$531,665.68; and it is further

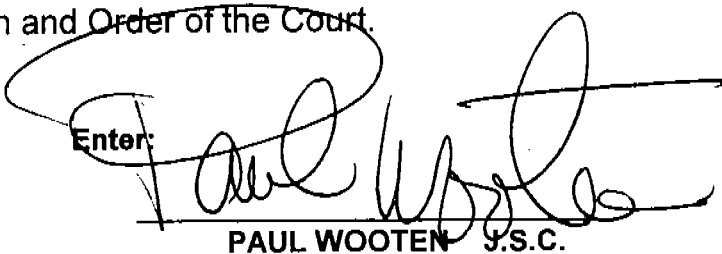
ORDERED that Richard and Liane Weintraub's motion for conditional indemnification against My Home Remodeling, Inc. and RDM Renovation Corp. is denied; and it is further

ORDERED that Rick Kramer's motion for summary judgment dismissing the complaint and any cross claims against him is granted and the Clerk is directed to enter judgment dismissing the complaint and any cross claims against Rick Kramer, together with costs and disbursements and severing the remaining action; and it is further

ORDERED that the remaining action shall continue.

This constitutes the Decision and Order of the Court.

Dated:

Enter:   
PAUL WOOTEN J.S.C.

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