[* 1]

E 5-26-10

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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 604149/2006

73 WORTH STREET ACQUISITION

VS

A.D. WINSTON CORP.

Sequence Number : 007

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

FILED
MAY 26 2010
COUNTY CLERK'S OFFICE
NEW YORK

**Cross-Motion:** ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

The motions for summary judgment sequence number 007 (by plaintiff), 008 (by Platinum Wood Floors, Inc.), and 009 (by A.D. Plumbing Corp.) are consolidated for joint disposition and decided herein as follows:

ORDERED that the branch of the motion by plaintiff 73 Worth Street Acquisition LLC, pursuant to CPLR §3212 for summary judgment on the first cause of action for breach of contract is granted solely on the issue of liability; and it is further

ORDERED that the branch of the plaintiff's motion for summary judgment on the second cause of action for negligence is denied; and it is further

ORDERED that the branch of the plaintiff's motion for summary judgment on the issue of damages is denied; and it is further

ORDERED that the cross- motion by the defendant A.D. Winston Corporation pursuant to CPLR §3212 for summary judgment dismissing the complaint by the plaintiff 73 Worth Street Acquisition LLC is denied in its entirety; and it is further

ORDERED that the motion by the third-party defendant A.D. Plumbing Corporation pursuant to CPLR §3212 for summary judgment dismissing the complaint by the third-party plaintiff A.D. Winston Corporation is denied in its entirety; and it is further

Dated: _____ J.S.C.

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

**Check one:** ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

**Check if appropriate:** ☐ DO NOT POST ☐ REFERENCE

ORDERED that the motion by the second third-party defendant Platinum Wood Floors, Inc., pursuant to CPLR §3212 for summary judgment dismissing the complaint by the second third-party plaintiff A.D. Winston Corporation is denied in its entirety.

This constitutes the decision and order of the Court.



**Part 2 of 2**

**Dated** 5/25/10 **ENTER:** _____, **J.S.C.**

**HON. CAROL EDMEAD**

**Check one:** ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

**Check if appropriate:** ☐ **DO NOT POST** ☐ **REFERENCE**

[* 3]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

73 WORTH STREET ACQUISITION LLC,

Index No. 106653/08

Plaintiff,

-against-

A.D. WINSTON CORPORATION,

Defendant.

----------X

A.D. WINSTON CORPORATION,

Third-Party Plaintiff,

Index No. 07590801/07

- against -

A.D. PLUMBING CORP.,

Third-Party Defendant.

----------X

A.D. WINSTON CORPORATION,

Second Third-Party Plaintiff,

-against-

PLATINUM WOOD FLOORS, INC.,

Second Third-Party Defendant.

----------X



**HON. CAROL ROBINSON EDMEAD, J.S.C.**

MEMORANDUM DECISION[1]

This is an action to recover monetary damages arising from property losses following a water leak at the luxury condominium located at 65-77 Worth Street in New York, NY (the "premises").

[1] The motions for summary judgment sequence number 007 (by plaintiff), 008 (by Platinum Wood Floors, Inc.), and 009 (by A.D. Plumbing Corp.) are consolidated for joint disposition and decided herein.

Plaintiff 73 Worth Street Acquisition, LLC (the "plaintiff") moves for summary judgment against the defendant A. D. Winston Corp. ("Winston") for breach of contract and, in the alternative, for negligence and damages. Winston cross-moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiff's complaint and any cross-claims.

The court also has before it motions for summary judgment by third-party defendant A.D. Plumbing Corporation ("Plumbing") and second third-party defendant Platinum Wood Floors, Inc. ("Platinum"), to dismiss Winston's complaints against each of them.

For the reasons that follow, plaintiff's motion for summary judgment is denied as to its negligence and damage claims, and granted as to its breach of contract claim against Winston, and the cross-motion by Winston for summary judgment is denied. Further, the motions by Plumbing and Platinum to dismiss Winston's third-party complaints are also denied.

*Factual Background*

Plaintiff is a developer of the 73 Worth Street Condominium (the "project")[2]. Non-party Lehr Construction Corp. ("Lehr"), the general contractor for renovating the premises, entered into a subcontract with Winston to replace the old radiators at the premises with a new radiant floor heating system (the "subcontract"). According to plaintiff, in August 2006, Lehr assigned its rights under the subcontract to plaintiff. On or about November 2004, Winston commenced its work on floors 1 through 5, which it allegedly completed prior to April 8, 2006, when the leak occurred (the "leak").

[2] Plaintiff's predecessor in interest, Valdia Worth Street Partners, entered into voluntary Chapter 11 bankruptcy, as a result of which, 73 Worth Street Acquisition, LLC was formed as a single purpose entity to take over the development of the project.

There is no dispute that water from the pipe in unit 6B leaked into unit 5B causing certain property damage paid for by plaintiff. It is also undisputed that the source of the leak was an uncapped old radiator pipe located under the flooring of unit 6B (the "pipe"), which was marked with an "X" on the subcontract drawings.[3] Plaintiff claims that Winston breached its contract by failing to remove the pipe as required by the contract specifications and, that such failure constitutes negligence on the part of Winston. The reason why the pipe was or became uncapped is, however, sharply disputed, and is now at the core of plaintiff's motion.

*MOTION FOR SUMMARY JUDGMENT BY PLAINTIFF*

In the instant motion, plaintiff asserts that it is entitled to summary judgment on the breach of contract claim because Winston's representative testified in his deposition that the subject pipe is indicated with an "X" mark in the drawings attached to the subcontract and this mark usually means "to be demolished" (Murray, deposition, exhibit A to motion). Plaintiff asserts that, Winston's failure to remove the pipe proximately caused plaintiff's damages - the costs to repair the premises and to compensate the displaced tenants of unit 6B. Plaintiff also asserts that it was foreseeable that the leak could occur, since plaintiff's engineer testified that the very purpose of removing the pipes, as opposed to cutting and then capping them, was to prevent a later leak (Matthew Bendix, plaintiff's engineer, deposition, exhibit B, at 162).

In addition, plaintiff invokes the doctrine of *res ipsa loquitur*, stating that "pipe leaks ordinarily do not occur without someone's negligence, here, Winston's failure to remove the

[3] According to plaintiff, Winston's scope of work was based on drawings incorporated in the subcontract, one of which, labeled H3.06P, identified the piping under the floor of unit 6B to be removed (see testimony of Winston's General Mechanical Superintendent, Paul Murray, exhibit A, at 50).

pipe," Winston had an exclusive control over the pipe, and that plaintiff has not contributed to the pipe's leak.

Further, plaintiff claims that, as a result of the leak, it incurred more than $317,000 in damages. In support, plaintiff offers a detailed breakdown of the costs, including engineering, plumbing, security services, general construction labor, general construction subcontractor's costs and reimbursement of unit 5B owners and testimony of plaintiff's architect and managing agent Greg Shunick (Greg Shunick deposition, exhibit C, at 57, 71-85)[4]. Plaintiff also submits evidence that the payments for these losses were made from plaintiff's account managed by CB Richard Ellis Strategic Partners, L.P. ("CBLP"), which was the "funding vehicle for plaintiff" (John Gilb, plaintiff's Secretary and Treasurer, Affidavit, at ¶ 8).

In response, Winston cross-moves for summary judgment in its favor arguing that there is no privity of contract between plaintiff and Winston because it had a contract with Lehr; and, even if it did breach that contract, Lehr cannot recover since it did not suffer damages. Winston asserts that plaintiff has no proof that it actually suffered damages since plaintiff offered no evidence that it actually paid any of the money with respect to the leak and that there is any connection between plaintiff and the entities to whom plaintiff directed its invoices. Disputing the amount of damages, Winston points out that plaintiff's witness, testifying specifically on the issue of damages, could not state with certainty which of the funds paid by wire transfers from the plaintiff investor to plaintiff's subcontractors, were related to the claimed water damage (Greg Shunick deposition, exhibit N to cross-motion, at 63-65).

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[4] The exhibits to the motion also include invoices, time sheets, work orders, payroll records, receipts and lien waivers to contractors and subcontractors for the project (exhibit F).

Winston further asserts that plaintiff's alleged damages were caused by negligence of the third parties, Plumbing and/or Platinum. Specifically, Winston asserts that the repairs by Plumbing of a pin-hole leak in unit 5B that occurred on April 7, 2006, (the "prior leak") caused or contributed to the leak on April 8, 2006. Further, Winston asserts that during the time of Winston's work on the new heating system, Platinum installed the floor in unit 6B, including the area of the offending pipe, which also may have caused or contributed to the leak.

Winston does not dispute that it did not remove the pipe according to the drawings, but asserts that it cut and capped it. Winston points to the factual issue raised by the testimony and affidavit of Winston's representative, Mr. Murray, stating that during Winston's work on the project, "the riser pipes were cut at approximately six inches above the concrete slab," which is contradicted by the testimonies of Plumbing's president Richard Rivera and plaintiff's engineer Matthew Bendix, who each observed the pipe on April 8, 2006, after it was uncovered, and stated that the top of the pipe was "one-half inch below the concrete slab under the floor" (Rivera deposition), and "leveled with or just below the subflooring" (Bendix deposition).

Further, in opposition to plaintiff's motion, Winston argues that, even if Winston were negligent, plaintiff cannot establish that Winston's negligence proximately caused the damages. Finally, Winston argues that the doctrine of *res ipsa loquitur* cannot be invoked because there is a lapse of time of almost six months during which there was no leak from the pipe, leading to a possibility that another party was negligent. And, the second element of *res ipsa* - that the incident was caused by an instrumentality within the exclusive control of Winston - cannot be established since Winston did not own the pipes or had any contact with the pipe at the time of the incident.

Plumbing and Platinum each submit a partial opposition to plaintiff's motion on the issue of damages. They each contend that plaintiff cannot substantiate the amount of its damages and may have inflated the invoices for the repairs because, the invoices, among other things, do not itemize whether the four per cent profit fee was added by plaintiff's in-house construction company, and thus, the amounts may have been double-counted. Platinum opposes plaintiff's motion as to Winston's liability.

In reply[5] to all defendants and in opposition to Winston's cross-motion, plaintiff contends that Winston is sidestepping the main issue - its failure to remove the pipe, and that Winston has not offered any admissible non-conclusory evidence to establish a genuine issue of material fact.

Plaintiff asserts that the evidence submitted by plaintiff establishes a *prima facie* case of Winston's liability and is further supported by the statement of Winston's representative, Charlie Rodstrom, approximately one week after the incident, that "[they] will take care of [the problem]" (Shunick deposition, exhibit C to plaintiff's motion, at 34-35).

Further, plaintiff contends that, Winston's shifting of its liability to Plumbing and Platinum is speculative because Winston showed no admissible evidence of the connections between each of those parties and the damages from the leak.

Finally, plaintiff argues that its claim for damages is supported by the testimony and the documents detailing the repair work and the payments. In addition, plaintiff points out that certain payment amounts, which could not be ascertained by Mr. Shunick as relating to the leak, were specifically excluded from the damages calculation.

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[5] Plaintiff notes that Platinum's opposition was served two weeks after the return date for any opposition to plaintiff's motion and thus, should be rejected on that basis alone. In the absence of showing by plaintiff of any prejudice, the court accepts Platinum's opposition and considers the merits therein.

*MOTION FOR SUMMARY JUDGMENT BY PLUMBING AGAINST WINSTON*

Plumbing moves pursuant to CPLR 3212 to dismiss the third-party complaint by Winston together with all cross-claims on the ground that Winston has not provided evidence that Plumbing caused or contributed to the property damage caused by the leak. Plumbing states that on April 7, 2006, it was contacted by plaintiff's building manager regarding a water leak in unit 5B. After opening the wall, Plumbing discovered that a copper pipe had a leak apparently punctured by a nail. Plumbing repaired the pin-hole leak and, after turning on the water for testing the system, discovered a second leak, apparently coming from unit 6B, located above unit 5B. Having shut down the water, Plumbing left the premises and returned the next morning, Saturday, April 8, 2009 when it discovered the uncapped pipe in unit 6B.

Plumbing asserts that Winston has no evidence of liability on the part of Plumbing because although provided with the last known addresses of the two former employees of Plumbing who responded to the service call for the next day leak, Winston did not depose those witnesses. Thus, Plumbing asserts, summary judgment should be granted dismissing the third party action by Winston against Plumbing together with all cross-claims.

Winston opposes Plumbing's motion, arguing that even though the evidence submitted by Winston is circumstantial, it is sufficient to deny summary judgment by Plumbing because the leak occurred almost six months after Winston's completed its work on the subcontract, during which period of time there were no complaints of any leaks from the pipe. Further, Winston maintains that the leak occurred shortly after Plumbing's repairs of the prior, pin-hole leak in unit 5B, directly below unit 6B, and, that Plumbing, did not offer evidence, except for the work order, of what was done on the prior leak, which may have affected the pipe in unit 6B. Winston argues

that the affidavit of Mr. Barouh is deficient in that it has been tailored by counsel and is speculative. Winston further contends that the affidavit of Mr. Rivera stating that the work by plumbers responding on Friday night did not contribute to the Saturday leak contradicts Rivera's deposition testimony that he was not aware of "what was done on Friday night, April 7," and thus, argues Winston, is not credible.

In its reply, Plumbing reiterates its argument that Winston has not provided evidence of Plumbing's liability but Winston chose not to depose the two former employees of Plumbing who had first-hand knowledge of the work on the prior leak.

*MOTION FOR SUMMARY JUDGMENT BY PLATINUM AGAINST WINSTON*

Platinum moves pursuant to CPLR 3212 to dismiss the third-party complaint by Winston together with all cross-claims against Platinum on the grounds that (1) plaintiff asserted a claim against Winston and not against Platinum;[6] (2) Platinum's owner, Kevin Curran, and Platinum's foreman, Michael Ginty testified that Platinum's installation of the floors in Unit 6B did not involve any cutting or removing any pipes; (3) Winston neither provided an explanation of why the pipe was not removed according to the drawings, or submitted evidence "pointing to liability of any other party," and (4) there is no evidence of Platinum breaching any duty causing injury to plaintiff, for which Platinum would allegedly have to indemnify Winston or any connection to plaintiff's alleged damages.

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[6] In support of its motion, Platinum submits deposition testimonies of plaintiff's witness Matthew Bendix, Winston's representative Murray, president of Plumbing Richard Rivera and Platinum's owner and foreman Curran and Ginty, respectively (exhibits A-L).

Winston opposes summary judgment by Platinum, arguing that evidence submitted by Winston, while circumstantial, is nevertheless sufficient to raise a triable issue of fact. Specifically, Winston contends, Mr. Murray stated in his affidavit, that six months prior to the incident, Winston cut and capped the pipes at the height of at least six inches above the concrete slab level; however, on April 8, 2009, after the floor was removed in unit 6B, the pipe was found to be cut at or below the level of the concrete slab. Further, Winston contends that Platinum was the only entity working in the area of the pipe and it may have cut the pipe below the level of the concrete slab.

Winston further argues that Platinum's witnesses' testimonies have no evidentiary value because (1) Mr. Curran did not perform work in unit 6B, and (2) while Mr. Ginty simply could not recall seeing "a copper pipe coming up through the slab," "it does not mean that one does not exist." Winston also argues that: (1) it did not have an opportunity to depose additional workers of Platinum who might have shed more light on the nature of the work performed by Platinum in unit 6B and (2) Platinum did not produce additional documents requested by Winston on September 17, 2009, which may contain information on whether Platinum cut any pipes in unit 6B.

In its reply, Platinum argues that, absent direct evidence, Winston cannot defeat summary judgment against it. Platinum asserts that Winston as a contractor on the site, supervised Platinum's work during the floor installation, and that, other than conclusory statements by Winston's counsel, there is neither testimony that "the area [where the risers were allegedly] cut and capped by Winston" on the sixth floor, "was covered by wood floors," nor a testimony by an expert, "other than plaintiff's expert" as to the condition or measurements of the pipe.

Further, Platinum contends that Winston's demands that Platinum produce additional documents do not have a good faith basis as all the documents were produced during the depositions and "no request was made for those documents until after the [summary judgment motion]"[7].

*Discussion*

On a motion for summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003].

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562).

*BREACH OF CONTRACT*

As to plaintiff's breach of contract claim, plaintiff established its *prima facie* entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any

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[7] The court notes this statement by Platinum is not supported by the record, which shows that motion for summary judgment by Platinum was filed on January 22, 2010, while the record shows that the notice to produce additional documents by Winston is dated September 17, 2009.

material issue of fact that Winston failed to comply with its contractual obligation to remove the pipe.

As an initial matter, the court finds that privity of contract exists between plaintiff and Winston because the assignment of the contract by Lehr to plaintiff is valid.[8] Under New York law, "[n]o special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it (*Tawil v Finkelstein Bruckman Wohl Most & Rothman*, 223 AD2d 52, 646 NYS2d 691 [1996], *citing American Banana Co. v Venezo Internacional De Aviacion S.A. (VIASA)*, 67 AD2d 613, 411 NYS2d 889, *aff'd* 49 NY2d 848 [1980]). Contracts are freely assignable absent a contractual, statutory or public policy prohibition (*see Allhusen v Caristo Constr. Corp.*, 303 NY 446 [1952]; *Taylor Bldg. Management, Inc. v Global Payment Direct*, 19 Misc 3d 1133 (A), 866 NYS2d 96 (Table) [NY Sup Ct, New York County 2008]).

Here, the subcontract contains no provision expressly prohibiting its assignment. The language of the assignment agreement between, Lehr, plaintiff's predecessor, and plaintiff, clearly provides that Lehr assigns all of its "rights, title and interest in and to the Subcontract" to plaintiff (exhibit C to Gilb affidavit). Thus, the assignment is effective and plaintiff, as assignee, is in privity of contract with Winston, the assignor. Alternatively, Winston's unsubstantiated and speculative assertion that it has no privity of contract with plaintiff is insufficient to defeat summary judgment on the breach of contract cause of action.

Further, it has been long settled that a complete written contract contains all the terms agreed to by the parties (*Matco Electric Co. v American District Telegraph Co.*, 156 AD2d 840

[8] The copies of the subcontract and the assignment agreement are attached as exhibits to plaintiff's motion.

[3d Dept 1989] [contract between general contractor and subcontractor required subcontractor to comply with certain plans and specifications for the electrical system for the construction; the court held that subcontractor's failure to comply with those specifications was actionable in breach of contract]).

The subcontract clearly indicates that the work by Winston "shall be performed in accordance with the plans and specifications," - the drawings showing that the old pipe in unit 6B was to be removed from under the floor area. The record shows,[9] and Winston does not dispute, that it has not removed, but instead, cut and capped the pipe, which later became the source of the leak.

With respect to damages, Winston introduced evidence disputing the amount of plaintiff's alleged damages and that plaintiff's witness, testifying specifically on the issue of damages, could not state with certainty which of the funds paid by wire transfers from the plaintiff investor to plaintiff's subcontractors, were related to the claimed water damage (Shunik deposition, exhibit N to cross-motion, at 63- 65). This evidence is sufficient to raise an issue of fact requiring a trial.

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[9] The court notes that, although Winston argues that, pursuant to CPLR §3116 (a), the transcript of Winston's representative Mr. Murray is not admissible to support plaintiff's motion because Winston had not received it and the witness had not signed it, based on the affidavit of Mary McCormick, plaintiff's attorney who sent said transcript to Winston's counsel on September 25, 2009, the court is satisfied with good faith efforts made by plaintiff's counsel to expeditiously deliver the transcript to Winston in September, 2009 (*see* McCormick Affidavit) and Winston's counsel did not claim that he did not receive the transcript until the day before this motion's return date. Additionally, pursuant to CPLR §3116 (a), "If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed." Thus, Mr. Murray's transcript is admissible.

Consequently, plaintiff established as a matter of law that Winston failed to comply with its contractual obligation, warranting summary judgment solely on the issue of liability on plaintiff's breach of contract claim.

*NEGLIGENCE*

To establish a *prima facie* case of negligence, plaintiff must prove that the defendants owed her/him a duty of care, and breached that duty, and that the breach proximately caused her/ his injury (*Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]).

Where a party to a contract fails to comply with the duty imposed by the terms of the contract, a breach results for which an action may be maintained to recover the damages sustained thereby (*Somer v Federal Signal Corp.*, 79 NY2d 540 [1992], *citing North Shore Bottling Co. v Schmidtt & Sons*, 22 NY2d 171 [1968]; *Trans Carribean Airways, Inc. v Lockheed Aircraft Service International, Inc.*, 14 AD2d 749 [1st Dept 1961]). Thus, "a contract may create a duty, [ . . . ], from which negligence may arise, but the negligence arises not because of a breach in the contract, but because of the failure to perform the contractual duty with due care" (*F.W. Woolworth v Southbridge Towers et al.*, 101 AD2d 434 [1st Dept 1984]; *Trans Carribean Airways, Inc. v Lockheed Aircraft Service International, Inc.*, 14 AD2d 749 [1st Dept 1961] [A person undertaking to perform work is charged with the common law duty to exercise reasonable care and skill in the performance of the work. [ . . . ]. Failure to do what was required in the exercise of care or the alleged faulty performance of the work gives rise to an action in tort and for breach of contract for nonperformance]). Once negligence has been shown, the question of proximate cause is to be decided by the finder of facts (*Sweeney v Bruckner Plaza Associates*, 57

AD3d 347 [1st Dept 2008], *citing Equitable Life Assur. Soc. of U.S. v Nico Const. Co., Inc.*, 245 AD2d 194 [1st Dept 1997]). Furthermore, "where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the question [whether the defendant is liable] primarily turns upon whether the intervening act is a normal or foreseeable consequence of [ . . .] the defendant's negligence" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], *rearg. denied* 52 NY2d 784 [1980]). "[T]he inferences concerning what is foreseeable are resolved by the trier of fact" (*Pierre-Louis v DeLonghi America, Inc.*, 19 Misc 3d 1127, 866 NYS2d 95 [Sup Ct, Kings County 2008], *citing Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315; *see also Egan v A.J. Const. Corp.*, 262 AD2d 80 [1st Dept 1999]).

Here, while plaintiff offered sufficient proof that Winston breached its duty by failing to remove the pipe, there is an issue of fact as to whether Winston's failure to remove the pipe was a proximate cause of plaintiff's damages. While the testimony of plaintiff's engineer showed that mere cutting and capping the pipe, instead of removing it, might foreseeably result in a water leak (see Bendix deposition), a factual issue remains as to whether the intervening conduct of Plumbing and Platinum in performing the work related to the area of the pipe was a "normal and foreseeable consequence" of Winston's failure to remove the pipe. This issue should be resolved at a trial and not as a matter of law on this motion for summary judgment (*Rotz v City of New York*, 143 AD2d 301, 306 [1st Dept 1988], *citing Derdiarian v Felix Constr. Co., supra*).

*RES IPSA LOQUITUR*

As to the alternative theory of negligence advanced by plaintiff, the doctrine of *res ipsa loquitur* "does not create a presumption of negligence against the defendant. Rather, the circumstantial evidence allows but does not require the jury to infer that the defendant was

negligent . . . [and that it] does not ordinarily or automatically entitle the plaintiff to summary judgment or a directed verdict, even if the plaintiff's circumstantial evidence is unrefuted" (*Morejon v Rais Constr. Co.*, 7 NY3d 203 [2006]). For plaintiff to succeed on this theory, it must establish that the event: (1) is one of a kind that ordinarily does not occur in the absence of someone's negligence; (2) was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) was not due to any voluntary action or contribution on the part of the plaintiff (79 NY Jur 2d, Negligence §147 [2009]; *Banca di Roma v Mut. Of Am. Life Ins. Co., Inc.,* 17 AD3d 119 [1st Dept 2005]; *Ebanks v NYCTA*, 70 NY2d 621, 623 [1987]; *Dermatosian v New York City Transit Authority*, 67 NY2d 219, 223 [1986]).

"There must be a showing of sufficient exclusivity to fairly rule out the chance that any purported defect . . . was caused by some agency other than the defendant's negligence" (*American Guar. & Liability Ins. Co. v Federico's Salon, Inc.,* 66 AD3d 521 [1st Dept 2009], citing *Edmonds v City of Yonkers*, 294 AD2d 330, 743 NYS2d 117 [2d Dept 2002], *lv denied* 98 NY2d 612 [2002]). "When the accident-producing object is accessible by third persons, [ . . . ], the defendant does not have exclusive control of it (79 NY Jur 2d, Negligence §151). "Proof that third parties have had access to the instrumentality generally destroys the premise [of res ipsa loquitur], and [ . . .] negligence cannot be inferred" (*De Witt Prop., Inc. v City of New York*, 44 NY2d 417 [1978]; *Schachnow v Central Park Boathouse, LLC*, 26 Misc 3d 1235, Slip Copy, 2010 WL 917913, *7 [Sup Ct, New York County 2010]).

Here, plaintiff failed to offer sufficient evidence establishing that Winston was the sole party with access to subject pipe. The record indicates that at least both Plumbing and Platinum had access to the pipe. Further, Winston sufficiently raised a triable issue as to whether the pipe

was in its exclusive control, presenting evidence that the leak may have been caused or contributed by conduct of either Plumbing or Platinum, or both.

The cases cited by plaintiff are distinguishable because in each of those cases, the court found that defendant had the exclusive control of the "instrumentality" which caused the incidents. In *Dillenberger v 74 Fifth Ave. Owners Corp.* (155 AD2d 327, 547 NYS2d 296 [1st Dept 1989]), the building owner had the exclusive control of the water pipe that broke as he was required by the lease to maintain the plumbing, heating and sprinkler system and the inference of negligence was not rebutted by any admissible evidence. Similarly, in *Richard Equipment Corp. v Manhattan Indus. Contructing Co.* (9 AD2d 691, 191 NYS2d 587 [2d Dept1959]), the heavy piece of machinery which caused the accident was in the exclusive possession and control of the defendant's workers during the course of their work on it. Unlike in those cases, here, there is no evidence that Winston was required to maintain the pipes after the replacement of the old heating system, or that the pipe broke during the course of Winston's work at the premises. Thus, since the second element of *res ipsa* is not met, an inference of negligence may not be drawn from the mere occurrence of the leak. Accordingly, summary judgment as to Winston's negligence is denied.

*DAMAGES*

In light of the above-stated evidence introduced by Winston, rasing a factual issue as to the amount of plaintiff's alleged damages and the denial of summary judgment on plaintiff's negligence claim, the court does not reach the issue of damages on the cause of action for negligence.

*WINSTON'S CROSS-MOTION*

Winston cross-motion for summary judgment is based on the same grounds as discussed above in connection with plaintiff's motion, *i.e.*, that (1) there is no privity of contract between plaintiff and Winston; (2) plaintiff offered no proof of damages, and (3) plaintiff's alleged damage was caused by negligence of Plumbing and /or Platinum. Therefore, the cross-motion is denied in its entirety.

*PLUMBING'S SUMMARY JUDGMENT AGAINST WINSTON*

Plumbing moves for summary judgment dismissing the third-party complaint by Winston that plaintiff's damages were caused by the conduct of Plumbing, arguing that Winston "has produced no evidence [ . . . ] of liability on the part of Plumbing" for the leak. It appears from the record, that the complaint by Winston against Plumbing asserts a sole cause of action for common law indemnification and/contribution.

To establish a claim for common-law indemnification, "the one seeking indemnity must prove not only that it is free from any negligence, but [ . . . ] also [ . . . ] that the proposed indemnitor's negligence "contributed to the causation of the accident" (*Matz v Laboratory Institute Merchandizing, et al.*, 2010 WL 185 6009 [Sup Ct, New York County 2010], *citing Correia v Professional Data Management*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Medical Center/Einstein Medical Center*, 10 AD3d 493, 495 [1st Dept 2004]).

In the court's view, the conflicting evidence presented by Plumbing and Winston as to what happened during and after Plumbing's repairs of a pin-hole leak on the eve of the incident, creates a factual issue as to whether Plumbing's repairs caused or contributed to plaintiff's damages.

For example, the record shows that on Friday, April 7, 2006, Plumbing's employees repaired a pinhole leak in unit 5B, located directly under unit 6B, after which they discovered a second leak coming from unit 6B, which they returned to address only the next day. On the day of their return, they discovered the uncapped old pipe under the floor of unit 6B. That the pipe was uncapped, contradicts the testimony of Winston's representative Paul Murray, who, while not disputing that Winston failed to remove the pipe, nevertheless stated that Winston capped the sixth floor pipes. This testimony, coupled with the circumstantial evidence that, from the time the pipe was allegedly capped, no apparent leaks occurred from it[10] until after Plumbing did repairs in unit 5B on the eve of the April 8, 2006 leak, is sufficient to raise a triable issue of fact as to whether Plumbing improperly repaired the April 7 leak which may have caused or contributed to the April 8, 2006 leak. Therefore, summary judgment by Plumbing is denied.

*PLATINUM'S SUMMARY JUDGMENT AGAINST WINSTON*

Platinum asserts its entitlement, as a matter of law, to summary judgment dismissing Winston's complaint against it for common law indemnification and/or contribution, based on lack of any direct evidence of Platinum's negligence.

Although there is no evidence in the record to indicate that Platinum performed any work in unit 6B other than installing the floor, a question of fact exists as to whether Platinum employees cut the pipe before installing the floor. Specifically, the testimony of Mr. Murray indicating that the pipe was six inches above the floor ("the pipes on the sixth floor were cut, capped and left protruding at least six inches above the concrete slab") and the record indicating

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[10] Contrary to Platinum, circumstantial evidence may be used in opposition to summary judgment motion to raise a triable issue of fact (*Nussbaum Diamonds, LLC v Hanover Ins. Co.*, 64 AD3d 488 [1st 2009]; *Babich v R.G.T. Restaurant Corp.*, 71 AD3d 479 [1st Dept 2010]).

that the pipe was flush or below the concrete slab after Platinum installed the wood floors raises as issue as to whether Platinum employees cut the pipe before installing the floor.

Thus, in light of the factual issue as to whether any negligence on the part of Platinum may have contributed to the leak, Platinum is not entitled to summary judgment against Winston.

*Conclusion*

Accordingly, it is hereby

ORDERED that the branch of the motion by plaintiff 73 Worth Street Acquisition LLC, pursuant to CPLR §3212 for summary judgment on the first cause of action for breach of contract is granted solely on the issue of liability; and it is further

ORDERED that the branch of the plaintiff's motion for summary judgment on the second cause of action for negligence is denied; and it is further

ORDERED that the branch of the plaintiff's motion for summary judgment on the issue of damages is denied; and it is further

ORDERED that the cross- motion by the defendant A.D. Winston Corporation pursuant to CPLR §3212 for summary judgment dismissing the complaint by the plaintiff 73 Worth Street Acquisition LLC is denied in its entirety; and it is further

ORDERED that the motion by the third-party defendant A.D. Plumbing Corporation pursuant to CPLR §3212 for summary judgment dismissing the complaint by the third-party plaintiff A.D. Winston Corporation is denied in its entirety; and it is further

ORDERED that the motion by the second third-party defendant Platinum Wood Floors,

Inc., pursuant to CPLR §3212 for summary judgment dismissing the complaint by the second third-party plaintiff A.D. Winston Corporation is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: May 25, 2010

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD