

**Kent v 2301 7 Ave. Hous. Dev. Fund Corp.**

2010 NY Slip Op 32854(U)

October 8, 2010

Supreme Court, New York County

Docket Number: 110391/01

Judge: Cynthia S. Kern

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

CYNTHIA S. KERN

PRESENT: J.S.C.

PART 52

Index Number : 110391/2001

KENT, BARBARA

vs

2301

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO.

110391/01

MOTION DATE

MOTION SEQ. NO.

006

MOTION CAL. NO.

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

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision. This action is hereby transferred to a non-City part.

**FILED**

OCT 14 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/8/10

CYNTHIA S. KERN J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 52

-----X  
BARBARA KENT,

Plaintiff,

Index No. 110391/01

-against-

**DECISION/ORDER**

2301 7 AVENUE HOUSING DEVELOPMENT  
FUND CORPORATION, WANDA Y. BYERSON, as  
President of 2301 7 AVENUE HOUSING  
DEVELOPMENT FUND CORPORATION, DELCOR  
ASSOCIATES INC., and ANTHONY LOCKE,

Defendants.

-----X  
2301 7 AVENUE HOUSING DEVELOPMENT  
FUND CORPORATION, WANDA Y. BYERSON, as  
President of 2301 7 AVENUE HOUSING  
DEVELOPMENT FUND CORPORATION,

Third-Party Plaintiffs,

-against-

THE CITY OF NEW YORK,

Third-Party Defendant,

-----X  
DELCOR ASSOCIATES, INC. and ANTHONY LOCKE,

Second Third-Party Plaintiff,

-against-

POPULAR CONTRACTING, INC.,

Second Third-Party Defendant.  
-----X

**FILED**  
OCT. 14 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

2<sup>nd</sup> Third-Party Index  
No.: 590238/08

**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>          </u>
Affirmations in Opposition to the Cross-Motion.....	<u>          </u>
Replying Affidavits.....	<u>2</u>
Exhibits.....	<u>3</u>

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Plaintiff commenced the instant action to recover damages based on her allegation that the adjoining property owner performed unauthorized construction on the roof of her building at 2303 Seventh Avenue. Defendants 2301 Seventh Avenue Housing Development Fund Corporation and Wanda Y. Byerson as President of 2301 Seventh Avenue Housing Development Fund Corporation (“movants”), who purchased the adjoining property in 1996 from the City of New York (the “City”), now move for summary judgment dismissing the complaint and any cross-claims against them on the ground that they did not perform work on either the roof of plaintiff’s building or the adjoining building. For the reasons set forth below, movants’ motion is granted.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter

of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

In the instant case, movants have established their prima facie right to summary judgment because they have produced sufficient evidence to demonstrate that they did not perform any construction work on the roof of plaintiff's building and that any construction work that was performed on the roof occurred before they purchased the building in 1996. Initially, it is undisputed that movants purchased their property in 1996. Alstead Williams, a deputy director of construction in the New York City Department of Housing Preservation and Development, testified that the City owned the property until 1996. Moreover, movants have made a prima facie showing that the work that caused the alleged damage took place before 1996. Anthony Locke, who worked as a construction manager for Delcor Associates Inc. from 1988 to 2000, testified that Delcor was the manager for work that was performed on the roof of 2301 Seventh Avenue in 1993 or 1994. Movants have also submitted a letter dated December 1, 1993 from the City to defendant Wanda Y. Byerson, who was then the president of the building tenants association, informing her that a contract for roof work on the building would be awarded soon. At her deposition, Ms. Byerson testified that no work has been performed on the roof of the building since the 2301 Seventh Avenue Housing Development Fund Corporation took over possession of the building from the City in 1996. The foregoing is sufficient to establish a prima facie showing that movants did not perform any work on the roof of plaintiff's building.

Plaintiff has failed to meet her shifting burden to produce evidentiary proof in admissible form sufficient to require a trial as to whether movants performed any work on the roof of her

building. She submitted no evidence indicating that any work took place on the roof of her building after 1996, when movants purchased the property. Indeed, plaintiff admitted in her affidavit that she first began receiving complaints about problems with the boiler that she attributes to the alleged construction work on her roof in 1994. Liability for damage that allegedly took place in 1994 cannot be imputed to movants, who purchased the building two years later and therefore had no role in selecting the contractors or managing the work.

Accordingly, movants' motion for summary judgment is granted and plaintiff's complaint and any cross-claims are dismissed as against defendants 2301 Seventh Avenue Housing Development Fund Corporation and Wanda Y. Byerson as President of 2301 Seventh Avenue Housing Development Fund Corporation only. This constitutes the decision and order of the court.

Dated: 10/8/10

Enter: CK  
J.S.C.

CYNTHIA S. KERN  
J.S.C.

**FILED**  
OCT 14 2010  
NEW YORK  
COUNTY CLERK'S OFFICE