Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

CELESTE MIDDLETON,

Plaintiff,

-against-

ROCHDALE VILLAGE, INC.,
Defendant.

Index No. 9006/09

Motion
Date October 4, 2011

Motion
Cal. No. 24

Motion
Sequence No. 1

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Notice of Motion-Affidavits-Exhibits...	1-4
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Upon the foregoing papers it is ordered that this motion by defendant, Rochdale Village, Inc. ("Rochdale") for summary judgment and dismissal of plaintiff, Celeste Middleton's Complaint pursuant to CPLR 3212, on the grounds that plaintiff fails to establish a prima facie case of negligence is hereby granted.

On May 1, 2006, at about 2:30 a.m., plaintiff was allegedly injured after she slipped and fell in the bathroom of her apartment located at 168-24 127th Avenue, Jamaica, New York, which apartment was part of a cooperatively owned and operated housing cooperative condominium managed by defendant. Plaintiff asserts in her Verified Complaint that her accident arose out of the negligence of defendant in allowing "the plumbing to exist in a poorly maintained, damaged, dangerous and hazardous state". Plaintiff maintains that as a result of the negligence of the defendant, she sustained serious injuries.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be

construed in a light most favorable to the one moved against. (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]).

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see*, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

For defendant to be liable, plaintiff must prove that defendant either created or had actual or constructive notice of a dangerous condition (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v. Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it (*see, id.*).

It is well-established law that: "a landlord may be found liable for failure to repair a dangerous condition, of which it has notice, on leased premises if the landlord assumes a duty to make repairs and reserves the right to enter in order to inspect or to make such repairs . . .Alternatively, such a duty may be imposed by statute" (*Chapman v. Silber*, 97 NY2d 9 [2001]).

Defendant established its prima facie entitlement to summary judgment by showing that it neither created an unsafe condition nor had actual or constructive notice thereof *(see, Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2nd Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2nd Dept 1997]). In support of its motion, defendant provides, inter alia, plaintiff's own examination before trial transcript testimony, wherein she testified that: she saw hot water coming from a pipe under the sink in her bathroom, she tried to stop the water by climbing up on the toilet and attempting to turn off the valve, she climbed up on the toilet, kneeled on top of the toilet cover, and as she was coming down to put her feet on the floor, she slipped, other than a pipe that was replaced years before, she had no problems with the bathroom sink, she never had any problems with the bathroom sink before the date of the incident; an affidavit of Helen Coker, Administrative Assistant in the Risk Management Department of Rochdale Village, Inc., wherein she avers that: her duties include conducting searches of defendant's records, any type of complaint or request for repairs is logged with the Maintenance Department, she conducted a search of records for two years prior to the incident and her search did not reveal any

records of complaints made regarding a condition that would have caused or contributed to the incident, prior to the incident, defendant does not perform any type of inspections to the interior of the cooperator's apartment, the cooperators are each in sole and exclusive possession of their apartment; an incident report prepared by Rochdale Village Public Safety Department; and a copy of the Occupancy Agreement between entered into between plaintiff and defendant dated June 1, 1977, which indicates that defendant bears no liability for any injury or damage to persons resulting from water which may leak from any part of the building or from the pipes, unless caused by the negligence or carelessness of defendant, and no one from defendant is allowed to enter the cooperator's apartment unless it is at the request of the cooperator and with the permission of the cooperator.

Defendant established that it did not have actual notice via, inter alia, the testimony of plaintiff herself, wherein she testified that she did not have any problems with the sink in the bathroom in the apartment prior to her accident and via the affidavit of Helen Coker, Administrative Assistant in the Risk Management Department of Rochdale Village, Inc., who averred that she conducted a search of records for two years prior to the incident and her search did not reveal any records of complaints made regarding a condition that would have caused or contributed to the incident. As such, defendant established that it had no actual notice of the condition.

Defendant also established that it did not have constructive notice via the affidavit of Helen Coker, Administrative Assistant in the Risk Management Department of Rochdale Village, Inc., who avers that defendant does not perform any type of inspections to the interior of the cooperator's apartment, the cooperators are each in sole and exclusive possession of their apartment and the Occupancy Agreement which indicates that no one from defendant is allowed to enter the cooperator's apartment unless it is at the request of the cooperator and with the permission of the cooperator. Defendant establishes that it is well-settled law that a landlord's contractual right of entry may impart constructive notice when there is a significant structural or design defect that exists in direct violation of a statute, *Rhian v. Pabr Associates, LLC*, 38 AD3d 637 (2d Dept 2007), but in the instant case, plaintiff cannot establish that the pipe itself was a structural or design defect.

Finally, defendant established a prima facie case that it did not create any defective condition in that no claim is made by the plaintiff that defendant created the defective condition.

In opposition, plaintiff has failed to present sufficient evidence to demonstrate that there are triable issues of fact precluding summary judgment. Plaintiff failed to establish that defendant either created an unsafe condition or had actual or constructive notice thereof (*see, Rajgopaul, et. al. v. Toys "R" Us, supra; Cruz v. Otis Elevator Company, supra*). It is well-established law that an out-of-possession landowner is generally not liable for injuries occurring on its premises unless the landlord retains control of the premises or is contractually obligated to perform maintenance and repairs (*see, Brewster v. Five Towns Health Care Realty Corp.*, 59 AD3d 483 [2d Dept 2009]; *Chapman v. Silber*, 97 NY2d 9 [2001]; *Putnam v. Stout*, 38 NY2d 607 [1976]). In the instant case, it is undisputed that the plaintiff was in sole and exclusive possession of her apartment, and so defendant was not in possession of the apartment. Plaintiff has failed to establish that defendant had control of the apartment or that defendant was contractually obligated to perform maintenance and repairs. In the absence of any control, defendant owes no duty with respect to the apartment. The determinative factor in premises liability cases is control (*see, Siegel v. Hofstra University*, 154 AD2d 449 [2d Dept 1989]). While plaintiff maintains that defendant had a contractual duty via the Occupancy Agreement to examine or inspect the pipes in plaintiff's apartment and to maintain them or make necessary improvements to make them in good repair, this Court does not find that the Occupancy Agreement imposes such a duty upon defendant in the absence of any notice of a defective condition. Furthermore, while plaintiff contends that defendant is statutorily obligated to maintain the pipes in good repair pursuant to the Multiple Dwelling Law, it is well-settled that "the Multiple Dwelling Law only creates a statutory liability in an owner who retains control over the premises and has received actual or constructive notice of a defective condition" (*Oquendo v. Mid Mem Corporation*, 103 AD2d 705 [1st Dept 1984][internal citations omitted]). In the instant case, there is no evidence defendant retained control over the apartment or evidence of notice of a defective condition.

Accordingly, plaintiff's Complaint is dismissed.

This constitutes the decision and order of the Court.

Dated: November 14, 2011

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Howard G. Lane, J.S.C.

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