

Samson v 91st St. Tenants Corp.

2012 NY Slip Op 30950(U)

April 10, 2012

Supreme Court, New York County

Docket Number: 112284/06

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 112284/2006
SAMSON, JAMES G.
vs.
91ST STREET TENANTS CORP.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is is decided in
accordance with the original summary
decision and order.

**ORDERED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

APR 11 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

Dated: Apr 10, 2012

[Signature], J.S.C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
JAMES G. SAMSON and DONNA A. SAMSON,

Plaintiffs,

Index No.: 112284/06

-against-

DECISION

91st STREET TENANTS CORP., SHARON
WEINSTEIN, CONNIE MADDEN, REBECCA
FLYNN, STEVEN DOLAN, HENRY DUNN III,
JAMES DUNHAM, ELENA KORNBLUTH,
JULIE PRUNIER, THE WAVECREST
MANAGEMENT TEAM, LTD., JANE ZASH and
JAY YABLONSKY,

Defendants.

-----X

ANIL C. SINGH, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

In motion sequence number 003, defendant Jane Zash (Zash) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint asserted as against her.

In motion sequence number 004, defendants 91st Street Tenants Corp. (Tenants Corp.) and the Wavecrest Management Team, Ltd. (Wavecrest) (together, moving defendants) move, pursuant to CPLR 3211 and 3212, for summary judgment dismissing the complaint asserted as against them.

By decision filed on July 30, 2010, this action was dismissed as asserted against the other individual defendants.

FILED

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COUNTY CLERK'S OFFICE

* 3]

This is an action for property damage that plaintiffs allegedly suffered when water flowed into their apartment, located at 108 East 91st Street, Apt. 9A, New York, New York, on November 17, 2005. Zash resides in the apartment immediately above plaintiffs' unit. According to the bill of particulars, plaintiffs assert that Zash allowed water to leak from her bathtub, accumulate, and escape into plaintiffs' unit. Motion, Ex. B. Zash contends that she is entitled to summary judgment because there is no evidence that the source of the leak emanated from her apartment.

Plaintiff James G. Samson (James) was deposed four times in this matter (March 17 [D1], April 9 [D2], April 16 [D3] and September 25, 2008 [D4]), and testified that, on November 17, 2005, he returned home to find water on the floor of his apartment. Motion, Ex. D2, at 70-71. James stated that he did not know what caused the leak. *Id.* After discovering the water in his apartment, he went to Zash's apartment, accompanied by the superintendent, Juan Alvarado (Alvarado), and he said that, although he did not enter Zash's apartment, he did not see any water on her floor. *Id.* at 76-77; D3, at 180-181. At some point after the incident, James was informed that there was no water overflowing from Zash's bathtub. D3 at 185. James said that he did not believe that the leak that occurred on November 17, 2005, was caused by an overflowing bathtub, but that it was caused by some problem underneath the Zash's bathtub. D3, at 192-193. James

stated that he had the "distinct impression" that Zash's tub did not overflow, and that he has no indication that her tub did overflow. D3, at 198, 201-202; D4, at 13-14.

Plaintiff Donna A. Samson (Donna) was deposed in this matter and testified that she learned about the leak from her husband James and that she does not know what caused the leak. Donna EBT at 59-60, 68, 87.

Zash appeared for a deposition and testified that she was away on a trip on the date of the incident but, on her return home, she did not see any water damage to the floors of her bathroom or any other portion of her apartment. Zash EBT, at 46, 52-53.

Jay Yablonsky (Yablonsky), the director of property management for Wavecrest, the building's managing agent at the time of the incident, testified on behalf of Tenants Corp. Yablonsky averred that he was never able to identify the source of the leak that caused damage to plaintiffs' apartment. Yablonsky EBT, at 38. Yablonsky said that, typically, the cooperative's shareholders are responsible for plumbing inside of their units but not for plumbing inside of the walls. *Id.* at 168-170.

Alvarado was also deposed in this matter and testified that, in November of 2005, he noticed water leaking into plaintiffs' unit. Alvarado EBT, at 29-31. Alvarado said that, after seeing the leak in plaintiffs' apartment, he went to Zash's apartment and used the emergency key to enter because no one was at home. *Id.* at 31-32. Alvarado said that he noticed water in the bathtub but that

the floor in the bathroom was not wet, nor were the floors wet anywhere else in Zash's apartment. *Id.* at 32, 34, 89. Further, Alvarado stated that there were no signs of water having flowed over the top of Zash's tub. *Id.* at 34, 89. Additionally, Alvarado averred that he did not observe water leaking from Zash's apartment into plaintiffs' unit. *Id.* at 100. However, Alvarado testified that the handle on the bathtub faucet was not working and that there was tape holding the handle in the closed position. *Id.* at 32.

Zash argues that there is no evidence that she was in any way responsible for the leak that allegedly caused damage to plaintiffs' apartment.

In opposition to this motion, plaintiffs assert that, contrary to Zash's argument, at the time of the incident Zash's apartment was not unoccupied but was occupied by a housekeeper who was looking after Zash's dogs. Zash EBT, at 48. Further, according to Zash's testimony, she learned of the incident when she called the housekeeper the night of November 17, 2005; the housekeeper informed her that, when she returned to the apartment the evening of the incident, James and Alvarado approached her and had her look at plaintiff's apartment, whereupon she discovered water in Zash's bathtub. *Id.* at 51. Zash testified that she did not know how water came to be in the tub, but admitted that there was a leaky faucet handle that sometimes dripped water. *Id.* at 51-52. Zash said that it was never determined that the cause of the leak to

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plaintiffs' apartment came from that drip. *Id.* at 52. In an e-mail sent by Zash to the proprietary tenant in the unit below plaintiffs' apartment, Zash said:

"My tub didn't overflow. My faucet was dripping and filled my tub. The pipes in my bathroom sink and tub constantly backup which apparently effect the overflow-my guess is that this back-up caused the water damage from a pipe in the walls."

Opp., Ex. 2.

Moreover, in his deposition, Alvarado stated that, two weeks before the incident, Zash told him about the leaky faucet, and he told her that she would have to call a plumber because he could not fix it. Alvarado EBT, at 34, 37, 100.

According to plaintiffs, the e-mail, along with her testimony and Alvarado's deposition, provide evidence that Zash was aware of a problem with her faucet for a sufficient amount of time in which she could have remedied the problem, and her failure to do so resulted in the damage to their apartment.

It is plaintiffs' contention that, based on the foregoing, there are sufficient questions of fact so as to defeat Zash's dispositive motion. In addition, plaintiffs also argue the application of the doctrine of *res ipsa loquitur* to the instant facts so as to hold Zash liable for their damages.

In reply, Zash maintains that, even if the faucet in her bathtub was not working, there is no evidence to substantiate the claim that this leaky faucet caused the damage to plaintiffs' apartment. Further, Zash says that the affidavit submitted by

James in support of plaintiffs' opposition supposing that the water could have been running for a long period of time in her bathtub, but that opinion is only conjecture and speculation, and is unsupported by any evidence.

Moreover, Zash points out that James consistently says that he does not believe that the leak was caused by Zash's tub overflowing, but that it resulted from a problem underneath the bathtub. D3, at 192-193. Additionally, Zash argues that plaintiffs have failed to adduce any evidence linking the leak into their unit with her bathtub. Zash points out that plaintiffs have not provided the affidavit of a plumber or any other expert that fills that logical gap.

Lastly, Zash contends that the doctrine of *res ipsa loquitur* is inapplicable to the facts of this case, because plaintiff has failed to identify the instrumentality that caused the leak.

Motion sequence number 004 is based on the seven causes of action asserted as against moving defendants: (1) Tenants Corp.'s negligence in failing to maintain, or causing Zash to maintain, the plumbing in Zash's apartment; (2) Tenants Corp.'s negligence based on the proprietary lease requiring Tenants Corp. to maintain the premises in good repair; (3) Tenants Corp.'s failure to repair the damage to plaintiffs' apartment; (4) Tenants Corp.'s breach of the warranty of habitability; (5) Tenants Corp.'s failure to pay \$750.00 in settlement of a prior action for leaks occurring to plaintiffs' unit in and before January, 2003; (6) damages based on

the cost of plaintiffs' relocating during the period of the reconstruction; and (7) damages based on plaintiffs' paying their contractor for work the contractor performed on behalf of moving defendants to remedy the structural problems caused by a finding that the steel supports under plaintiffs' ceiling were deteriorating.

In addition to the claims involving Zash, moving defendants state that, during January of 2003, while addressing prior leaks, exterior work was being performed on the building, which allegedly caused damage to one of plaintiffs' windows and air conditioning units. This claim was settled for \$750.00.

In addition, in May of 2003, plaintiffs began renovation work on their apartment to correct damage from a prior leak which occurred in June of 2001. James testified that he was compelled to proceed with these renovations because of the flood; however, he also averred that he planned to renovate a portion of the apartment regardless of the flood. D4, at 50-51. During the renovations, plaintiffs relocated for six months, paying \$3,000.00 per month for the alternate housing, in addition to paying their maintenance charges on the unit, plus incurring \$200.00 a month storage charges. While the renovations were in progress, an engineer determined that the roof slab over plaintiffs' master bedroom had dropped three inches and that the roof structure was unstable and needed reinforcement. During this reinforcement, a portion of the ceiling slab in plaintiffs' apartment collapsed. According to the

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complaint, plaintiffs allege that they suffered additional leaks during the renovations.

Moving defendants argue that the causes of action asserted as against them relating to the leak in Zash's apartment must be dismissed because there is no allegation that moving defendants either caused the drain blockage in Zash's apartment or had actual or constructive notice of such a problem, and because there is no evidence that they are responsible for damages resulting from improper maintenance of adjacent apartments. Paragraph 18 of the proprietary lease specifically states:

"The Lessor shall not be held answerable for any repairs in or to [the interior of the apartment] except as hereinabove specifically provided, or for any damage to the Apartment, or to any of its contents, cause by electric current or by the leakage or overflow of water, gas or steam from any water pipe, gas pipe, steam pipe, drain pipe, basin, tub or other receptacle belonging or appertaining to any other apartment in the building, unless the damage shall have been caused by the act or neglect of the Lessor or of its employees."

Motion, Ex. F.

Moving defendants also argue that plaintiffs lack standing to assert any breach of Zash's proprietary lease. Moving defendants say that the portion of the proprietary lease upon which plaintiffs base this cause of action states:

"(18) The Lessee shall keep the interior of the Apartment ... in good repair ... and shall be responsible for the maintenance, repair and replacement of plumbing

(19) If the Lessee shall fail for 30 days after notice to make repairs to any part of the Apartment, its fixtures or equipment as herein required, or shall fail to remedy a condition which has become objectionable to the Lessor ... or if the Lessee or any person dwelling in the Apartment shall request the Lessor, ... the Lessor

may make such repairs without liability on the Lessor." Motion, Ex. F.

According to moving defendants, these provisions do not indicate that anyone other than the named lessee of the subject apartment is an intended beneficiary of this agreement.

Moving defendants maintain that the cause of action asserted as against them for breach of the warranty of habitability must be dismissed because the alleged damage does not rise to the level of being unfit for human habitation. Moreover, plaintiffs do not allege that they could not reside in the unit, but only assert aesthetic flaws.

Moving defendants also provide letters from James in which he returned their check for \$750.00 in settlement of the prior dispute and so, claim moving defendants, in the interests of justice, the cause of action seeking this sum should be dismissed based on plaintiffs' refusal to accept the check. Motion, Exs. H & I.

Moving defendants maintain that the cause of action for their alleged failure to pay plaintiffs' contractor for assisting in repairing the structural problems with the building should be dismissed because plaintiffs have never provided any proof that they paid the contractors for this work.

Moving defendants claim that they cannot be held responsible for the structural repairs plaintiffs claim that they made during their renovation because such repairs were made voluntarily by plaintiffs and plaintiffs did not notify moving defendants of these

alleged repairs until three years after the fact.

Moving defendants aver that plaintiffs are not entitled to damages for injury to the renovated portions of their apartment due to leaks prior to the November 2005 leak because plaintiffs have made no showing that moving defendants were negligent. Similarly, moving defendants state that plaintiffs are not entitled to reimbursement for their relocation expenses since they voluntarily decided to move out of the apartment while it was being renovated, and James testified that renovations were planned before any alleged leak.

Moving defendants also claim that any damages due to leaks predating September 1, 2003, three years prior to the institution of the present action, is time-barred.

Lastly, moving defendants contend that plaintiffs maintain liability insurance but have refused to submit a claim to their insurer. Motion, Ex. L. Moving defendants declare that it would be unjust to seek reimbursement from them rather than their insurer.

In opposition to this motion, plaintiffs again assert that the doctrine of *res ipsa loquitur* demands a finding in their favor, the same argument posited in opposition to motion sequence number 003.

Plaintiffs also argue that, according to paragraph 4(d) of the proprietary lease:

"In the event that the Lessee suffers loss or damage for which Lessor would be liable, and Lessee carries insurance which covers such loss or damage and such insurance policy or policies contain a waiver of

subrogation against the Landlord, then in such event Lessee releases Lessor from any liability with respect to such loss or damage."

Motion, Ex. F.

Plaintiffs' position is that their insurance policy is excess over that carried by the co-op for similar losses covered by both policies and that they were unable to obtain insurance that waived subrogation.

Plaintiffs also claim that their relocation was caused by warped doors and chipping paint, which made it impossible to keep the unit clean, and that extensive structural work needed to be done to make the apartment safe.

James avers that he refused the check for \$750.00 because it was sent on condition that he sign a general release, which he never agreed to do as part of the settlement.

James also states that he and his wife made the co-op aware of building problems as soon as they became aware of them. In addition, plaintiffs have provided a statement of account from their contractor indicating that all payments were made. Opp., Exs. 8 & 9.

Lastly, plaintiffs challenge the allegation that they have failed to provide any evidence as to the actual source of the leak. Plaintiffs say that moving defendants' own engineer, Joseph K. Blum (Blum), wrote to Tenants Corp. in April of 2004 stating:

"We advised Jay Yablonsky back in February that the penthouse roof needed to be replaced since it was readily apparent that water permeated underneath the various old roof membranes on the penthouse making

them no longer reliable. At the same time we believed that the active leakage into 9AB closet area was due to the readily apparent ice damage to the thru-wall drain scupper caused by the sub-zero winter weather. We did not have direct knowledge that the general roof condition was also causing leakage, which is now clear, but advised Jay that the poor condition of the membrane clearly represented a risk of leakage in the future. At this time, we are strongly of the opinion that the recent ongoing wetness in the vicinity of the 9AB closet areas is the result of water permeation of the penthouse roof membranes. We do not believe the leakage is from seepage through the masonry wall as there are no observable deficiencies in these walls and there are no historical precedents for this type of masonry leakage in the many years we have been engineer for the building."

Opp., Ex. 10.

Based on the letter written by Blum more than a year prior to the incident in question, plaintiffs maintain that moving defendants were aware of the leakage problem to their unit caused by a building problem and that they failed to rectify it.

In reply, moving defendants say that plaintiffs' objections must be rejected as untimely, based on a stipulation between the parties that answering papers "shall be served so as to be received by the attorneys for the moving parties at or before 5:00 PM on July 6, 2011." Reply, Ex. A. Moving defendants' attorney affirms that the opposition was not received until July 8, 2011, being served on him by hand on that day. Moving defendants declare that plaintiffs have failed to make any excuse for the delay.

Regardless, moving defendants still assert that their motion should be granted because plaintiffs have failed to show any negligent act on their part that caused them damage and, for the

reasons noted above with respect to motion sequence number 003, the doctrine of *res ipsa loquitur* is inapplicable to the facts of the instant case.

Moving defendants have provided a copy of a check made out to plaintiffs in the sum of \$11,590.00, dated March 29, 2006, for the work performed by plaintiffs' contractor, but assert that plaintiffs refused to accept the payment. Moreover, moving defendants contend that this claim for work performed by plaintiffs' contractor overlaps with plaintiffs' claim for building repairs, since the work was performed to repair the problems plaintiffs allege were building-wide, as indicated in plaintiffs' own exhibit 8 in opposition to this motion.

Moving defendants also say that they cannot be held responsible for any damage to the renovated portions of plaintiffs' apartment, since the work recommended by Blum was performed and there is no evidence of the actual cause of the leak.

Lastly, moving defendants reiterate their argument regarding insurance coverage.

DISCUSSION

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present

evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

"As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense [internal quotation marks and citation omitted]." *Calderone v Town of Cortlandt*, 15 AD3d 602, 602-603 (2d Dept 2005); *Velasquez v Gomez*, 44 AD3d 649 (2d Dept 2007). Based on the evidence and arguments presented, the court finds that Zash has not met this burden and, therefore, her summary judgment motion (motion sequence number 003) is denied.

In her deposition, Zash has admitted that she was aware of having a leaky faucet in her bathtub and, as a result of that leaky faucet, water dripped and accumulated in her tub. In her e-mail to another resident in the building, Zash opined that the cause of the leak in plaintiffs' apartment was her leaky faucet that caused a back-up in the pipes in the walls. Further, several weeks prior to the incident in question, Zash informed Alvarado of the problem with the faucet and was told to contact a plumber; there is no evidence that Zash did contact a plumber to solve the problem.

As the owner of a co-operative unit, Zash has an obligation to

maintain her unit in a reasonably safe condition so as not to cause damage to other units or the building as a whole. See generally *Golden v Manhasset Condominium*, 2 AD3d 345 (1st Dept 2003). To defeat Zash's motion for summary judgment, it is enough for plaintiffs to show facts and conditions from which the negligence of Zash (or the moving defendants) may be reasonably inferred. *Bernstein v City of New York*, 69 NY2d 1020 (1987).

As indicated above, enough facts have been presented so as to raise a question as to Zash's leaky faucet being the cause of the damage to plaintiffs' apartment, and these facts have not been completely rebutted by Zash. Therefore, Zash's motion must be denied.

For the reasons stated above, that portion of moving defendants' motion (motion sequence number 004) seeking to dismiss the first and second causes of action asserted as against Tenants Corp. for negligence is denied.

The exact cause of the leak is unknown; however, some evidence had been presented that the cause may have been the internal water pipes beneath Zash's apartment, for which Tenants Corp. would be responsible, or the membranes on the roof above Zash's apartment, which previously caused flooding to plaintiffs' unit. Therefore, since "[t]here is evidence in the record that the defendant[s] made repairs [to the roof's membranes] in an attempt to cure the problems[,] [w]hether its efforts were sufficient constitutes a triable issue of fact for the jury to determine." *34-35th Corp. v*

1-10 *Industry Associates, LLC*. 16 AD3d 579, 580 (2d Dept 2005).

Based on the foregoing, the court cannot conclude that Tenants Corp. would not be responsible for repairing plaintiffs' apartment, the third cause of action, if Tenants Corp. were to be found negligent and such negligence necessitated plaintiffs' repairs. Hence, that portion of moving defendants' motion seeking to dismiss the third cause of action is denied.

The court finds plaintiffs' arguments regarding the doctrine of *res ipsa loquitur* to be inapplicable to the case at bar, since, as indicated above, the cause of the leak is undetermined and, therefore, could not be said to be within the exclusive control of either Zash or moving defendants. See *Morejon v Rais Construction Co.*, 7 NY3d 203 (2006).

Similarly, that branch of moving defendants' motion seeking to dismiss the fourth cause of action for breach of the warranty of habitability, and the sixth cause of action for plaintiffs' costs in relocating caused by the alleged breach of the warranty of habitability, is denied.

A warranty of habitability mandates

"first, that the premises are fit for human habitation; second, that the condition of the premises is in accord with the uses reasonably intended by the parties; and, third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety."

Park West Management Corp. v Mitchell, 47 NY2d 316, 325, cert denied 444 US 992 (1979). Further, the warranty of habitability

applies to co-operative shareholder-tenants. *Frisch v Bellmarc Management, Inc.*, 190 AD2d 383 (1st Dept 1993).

However, it remains a question of fact as to whether the conditions in the unit were so severe that a reasonable person would find that the warranty of habitability had been breached. *Park West Management Corp. v Mitchell*, *supra* at 329; see also *Birch v Ryan*, 281 AD2d 786 (3d Dept 2001); *Molloy v Li*, 235 AD2d 342 (1st Dept 1997). This finding would also affect whether plaintiffs are entitled to damages for the costs they incurred in residing elsewhere during the period of reconstruction.

Consequently, the court cannot dismiss the fourth and sixth causes of action at this time.

That branch of moving defendants' motion seeking to dismiss the fifth cause of action based on a stipulation of settlement of a previous action is granted.

Not only is the underlying matter time-barred, based on alleged negligence occurring more than three years prior to the institution of the present case (CPLR 214), but evidence has been presented that, at least twice, moving defendants tendered a check in settlement of that issue but plaintiffs refused payment. The court finds that plaintiffs' argument, that they did not realize that their stipulation of settlement involved their signing a release, is both specious and unpersuasive.

Lastly, the branch of moving defendants' motion seeking to dismiss the seventh cause of action asserted as against them for

reimbursement for fees paid by plaintiffs to contractors for building remediation is denied. A question of fact exists as to whether the work was performed at the request of moving defendants for repairs for which they are obligated, or whether the work was performed as part of the general renovation of plaintiffs' apartment.

Based on the foregoing, it is hereby

ORDERED that defendant Jane Zash's motion for summary judgment (motion sequence number 003) is denied; and it is further

ORDERED that the branch of defendants 91st Street Tenants Corp.'s and Wavecrest Management Team, Ltd.'s motion for summary judgment (motion sequence number 004) seeking to dismiss the fifth cause of action asserted as against them is granted and the fifth cause of action is dismissed; and it is further

ORDERED that the remainder of 91st Street Tenants Corp.'s and Wavecrest Management Team Ltd.'s motion for summary judgment (motion sequence number 004) is denied.

Dated: April 10, 12

ENTER:

ACS
Anil C. Singh, J.S.C.

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HON. ANIL C. SINGH
SUPREME COURT JUSTICE