

**Heintz v Irgang**

2012 NY Slip Op 32284(U)

August 30, 2012

Supreme Court, New York County

Docket Number: 103146/2010

Judge: Geoffrey D. Wright

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

JUDGE GEOFFREY D. WRIGHT

PRESENT: \_\_\_\_\_  
Justice

PART 62

Index Number : 103146/2010  
HEINTZ, CARLOS  
vs.  
IRGANG, MARK  
SEQUENCE NUMBER : 003  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 3, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

Upon the foregoing papers, It is ordered that this motion is decided in accordance  
with the hereto annexed decision.

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

**FILED**  
**SEP 05 2012**  
**COUNTY CLERK'S OFFICE**  
**NEW YORK**

G  
**GEOFFREY D. WRIGHT**  
**AJSC**, J.S.C.

Dated: August 30, 2012

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 62

-----X  
CARLOS HEINTZ,

Plaintiff,

-against-

Index No.

MARK IRGANG, JAY IRGANG, 148 WEST 124<sup>TH</sup> ST.  
LLC, 148 WEST 124<sup>TH</sup> STREET REALTY CORP., THE  
CITY OF NEW YORK and NEW YORK CITY  
DEPARTMENT OF HOUSING PRESERVATION  
DEVELOPMENT and BASIC HOUSING, INC.,

103146/10

Defendants.

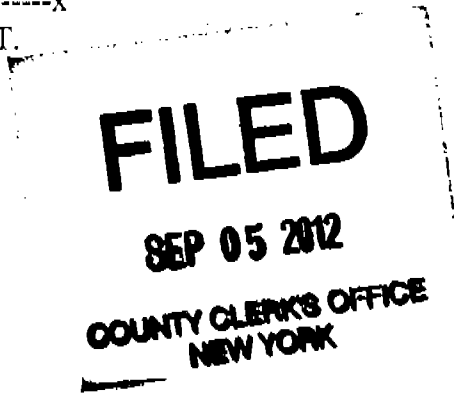
-----X  
MARK IRGANG, JAY IRGANG, 148 WEST 124<sup>TH</sup> ST.  
LLC, 148 WEST 124<sup>TH</sup> STREET REALTY CORP.,

Third-Party Plaintiffs,

-against-

BASIC HOUSING, INC.,

Third-Party Defendant.



-----X  
RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the  
review of this Article 78.

Papers	Numbered
Notice of motion and Affidavits Annexed.....	_____ 1 _____
Order to Show Cause and Affidavits Annexed.....	_____
Answering Affidavits.....	_____ 2 _____
Reply Affidavits.....	_____ 3 _____
Exhibits.....	_____
Other..cross-motions.....	_____
.....	_____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendants The City of New York and New York City Department of Housing

Preservation Development (the City Defendants) move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint and all cross claims, or, alternatively, for summary judgment, dismissing the complaint and all cross claims.

This is a trip and fall action. Plaintiff alleges that on December 17, 2008, at approximately 5:00 pm, he was walking down the steps from his apartment located at 148 West 124<sup>th</sup> Street, New York, New York (premises), when, as he approached the basement, he was caused to trip and fall due to a defect in the first floor landing before the first step leading from the first floor to the basement. The complaint alleges that the City of New York (City) failed to “control and maintain the steps in a proper manner.” The complaint also alleges that City maintained, controlled and managed the premises at issue.

The City Defendants move for dismissal on the ground that they did not own, manage, maintain or control the premises. They provide some documentary evidence as to the ownership of the premises. An affidavit from David Schloss, a Title Examiner from the New York City Law Department, is submitted. Schloss avers that he conducted a search for the record owner of the premises on December 8, 2008, the date of the accident. The search revealed that the property was owned by defendant 148 West 124<sup>th</sup> Street LLC (LLC). Another defendant, 148 West 124<sup>th</sup> Street Realty (Realty), admitted ownership in its answer. The City Defendants also submit a copy of the lease agreement (lease) between defendant/third-party defendant Basic Housing, Inc. (Basic) and defendant/third-party plaintiff Realty. This lease provides that Basic assumed the responsibility for maintaining the premises in a good and clean condition. The lease does not include the City Defendants as parties. The third document submitted is a copy of a contract between the New York City Department of Homeless Services (DHS) and Basic,

whereby Basic was authorized to create a Neighborhood Temporary Residence program, but assumed the responsibility of maintaining any premises it leased or used for temporary shelter for homeless parents, pursuant to the contract. The City Defendants argue that, due to their lack of control over or ownership of the premises, they have no premises liability and therefore, no duty of due care with respect to what occurred at the time of the accident.

Alternatively, the City Defendants seek dismissal on the ground of collateral estoppel. They state that a second suit was brought against City, entitled *Heintz v Irgang*, Index No. 102782/10. That suit was before Supreme Court, New York County. The plaintiff in that suit was plaintiff's infant son, Angelo, and involved a separate accident occurring on the same day, in which the child slipped and fell due to an accumulation of water in the apartment. The action was filed on March 11, 2011 and City moved for dismissal via summary judgment, on the same ground brought in this action, lack of premises liability. An order, dated January 6, 2011, held that City did not own or control the premises and was not a proper party in the action, granting summary judgment. A copy of the order is submitted.

The City Defendants contend that the court order prevents further litigation with respect to their liability in this action. The record allegedly reveals that these defendants lack any liability with respect to the premises and any activities happening there.

Plaintiff opposes the motion, claiming that granting said motion would be premature, in the absence of any discovery proceedings. Plaintiff submits an affirmation from his attorney, who asserts that, while Basic leased the premises from Realty, Basic, at the time, subcontracted with DHS to run the premises as a homeless shelter. Plaintiff argues that there is an issue as to the relationship between Basic and a City agency, specifically whether or not DHS had a role

regarding the maintenance of the premises.

In addition, plaintiff contends that the documentary evidence is not conclusive as to the ownership of the premises, or the level of responsibility over the premises.

Basic submits “partial” opposition to the motion. While it does not object to the City Defendants moving for dismissal, Basic questions their assertion that the lease was entered into by Basic and Realty. Basic claims that Realty had entered into the lease with a separate entity, Bronx Addiction Services Integrated Concepts System, Inc. a/k/a Basics Inc. Basic requests that this court do not make a ruling that finds Basic a party to this lease.

In their reply, the City Defendants claim that the evidence submitted by them is sufficient to ensure their dismissal. They state that plaintiff’s attorney affirmation was the one submitted in opposition to City’s summary judgment motion in the suit brought by Angelo Heintz, prior to its granting. They claim that in the absence of any substantial opposition to the motion, the motion must be granted.

The City Defendants provide an affidavit from a DHS official which asserts that DHS and Basic executed a contract in which Basic was authorized to operate a residence for homeless families at the address of the premises. The contract allegedly did not impose on DHS any direct obligations towards the premises. It is the City Defendants’ contention that the additional evidence provided in their reply papers is admissible whereas it does not raise new issues or arguments not previously made in the motion papers.

The City Defendants are seeking dismissal by means of CPLR 3211 (a) (7) and/or CPLR 3212, which are based on very different principles. “[A] motion to dismiss under CPLR 3211 (a) (7) for failure to state a cause of action, which addresses merely the sufficiency of the pleadings,

is distinct from a motion for summary judgment pursuant to CPLR 3212, which searches the record and looks to the sufficiency of the underlying evidence.” *Del Castillo v Bayley Seton Hosp.*, 232 AD2d 602, 604 (2d Dept 1996). Moreover, these defendants, although not referring to it, are also applying CPLR 3211 (a) (1) here, with their use of documentary proof. “Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v Martinez*, 84 NY2d 83, 88 (1994).

This court notes that the holding in *Heintz v Irgang*, Index No.102782/10 does not bar litigation of the issue of City’s ownership of the premises. Under the rules of collateral estoppel, plaintiff herein never had a “full and fair” opportunity to litigate the matter in this case. *See Ryan v New York Telephone Co.*, 62 NY2d 494, 450 (1984).

The court finds that the information provided by the City Defendants is sufficient to preclude them from any liability based upon ownership or control of the subject premises. They are not parties to the lease nor is there any indication that they had any involvement in activities pertaining to the premises. While it is conceded that a City agency has a contract with Basic, this contract provides that Basic is to assume responsibility for the maintenance of the premises and to hold City harmless from liability related to the premises.

In its reply papers, the City Defendants acknowledge that Basic is not a party to the lease. The court shall take notice of this matter. Moreover, while this case is in an early discovery stage, discovery is not necessary and this motion need not be postponed in order to yield additional material facts. Plaintiff has not offered evidence that would make further discovery necessary. *See Bailey v New York City Transit Auth.*, 270 AD2d 156, 157 (1<sup>st</sup> Dept 2000).

Accordingly, it is

ORDERED that defendants City of New York and New York City Department of Housing Preservation's motion to dismiss is granted and the complaint and cross claims brought against these defendants are dismissed in their entirety.

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 30, 2012

  
**GEOFFREY D. WRIGHT**  
**AJSC**

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JUDGE GEOFFREY D. WRIGHT  
Acting Justice of the Supreme Court

**FILED**

**SEP 05 2012**

**COUNTY CLERK'S OFFICE**  
**NEW YORK**