

Liu v DMHZ Corp.

2013 NY Slip Op 31323(U)

June 18, 2013

Sup Ct, New York County

Docket Number: 104930/09

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE
Justice

PART 12

Index Number : 104930/2009
LIU, YOU QUN
vs.
DMHZ CORP.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 104930/2009
MOTION DATE _____
MOTION SEQ. NO. 004

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 47
Answering Affidavits — Exhibits _____ | No(s). 81-103
Replying Affidavits _____ | No(s). 115-120

Upon the foregoing papers, it is ordered that this motion is

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

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

Dated: 6/18/13

BJ, J.S.C.

- 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 12

-----X
YOU QUN LIU, *et al.*,

Plaintiffs,

- against -

DMHZ CORP., *et al.*,

Defendants.

-----X
DMHZ CORP. and DAVID CHEN,

Third-Party Plaintiffs,

- against -

NEW GRAND ELECTRIC, INC.,

Third-Party Defendant.

-----X
BARBARA JAFFE, J.:

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By notice of motion dated May 14, 2012, defendants DMHZ Corp. (DMHZ) and David Chen move pursuant to CPLR 3212 for an order summarily dismissing the complaint against them. Several of the plaintiffs oppose, and defendant/third-party defendant New Grand Electric, Inc. (New Grand) partially opposes.

Index No. 104930/09

Mot. seq. nos.: 004, 005

Subm.: 1/9/13

DECISION AND ORDER

By notice of motion dated May 15, 2012, New Grand moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and third-party complaint against it. Several plaintiffs oppose.

The underlying facts in this case are not in dispute. On February 24, 2009, a fire occurred at the building located at 22 James Street in Manhattan (the premises), which resulted in the tragic deaths of several people and injuries to many others. DMHZ owns the premises; Chen is its president.

In his New York City Fire Department (FDNY) Fire Incident Report, the fire marshal reports that the fire started on the second floor of the premises, in apartment one, then leased by Tony Wong, and that the cause of the fire was an extension cord in the east bedroom, originating in combustible plastic materials set in overheated wiring. The fire extended to the surrounding contents, walls, and ceiling, and to other apartments in the premises through open apartment doors, open bays, and pipe chases and windows; the weather was cold.

The fire marshal's examination of the scene of the fire also revealed: (a) powerstrips and multi-plugs filled to capacity throughout the apartment; (b) low burn and charring "behind what should have been a protected area"; (c) two extension cords plugged into each other and then to an outlet behind the couch, with a fluorescent light plugged into one of the cords; and (d) heavy charring in the area where electrical components were found. No fires at the premises had been investigated by the FDNY over the preceding four years.

The day of the fire, the fire marshal interviewed Christopher Wong, Tony Wong's tenant, who told him, in pertinent part, that the building's electrical system had been upgraded approximately six months before the fire by electricians who may not have been licensed, and

that in his room were two “old style” electrical outlets. Wong plugged a television, a Direct TV cable box, a VCR, a DVD, and portable heater into one of those outlets. His surge protector had only shut down once, a few months before the fire, and there were numerous electrical interruptions in the building. Wong acknowledged to the fire marshal that he had had problems with his landlord, and that occasionally, there was insufficient heat in the apartment, which is why he used a portable heater. In his view, the building’s electricity “may have [had] something to do with his fire . . .”

The fire marshal also interviewed Chen, who allegedly told him that there had not been a fire in the building in the past 10 years, that the heat is “very good throughout the building,” that new electricity had been installed in the building in August 2008 by a licensed electrician, and that he upgraded the electricity to prevent a fire, understanding that many fires in Chinatown were caused by antiquated electrical systems. The new electrical work and the existing electric are both being used.

At an examination before trial held on January 10, 2012, the fire marshal testified, as pertinent here, that Wong’s extension cord had been plugged into an original outlet in the wall, not into a new or upgraded one, and that he saw nothing indicating that the new outlets caused the fire. Rather, he observed in the apartment outlets with multiple adapters and heavy-gauge extension cords which he characterized as “not so legit,” and that the extension cord was not part of the internal wiring of the building, nor was it in any way connected to it. He opined, based on his experience, that too many extension cords increase the chance of a fire, and that if he had believed that the fire had started elsewhere, such as in a shorted electrical outlet, he would have stated so in his report. He explained that he had described the cause of the fire as NFA, or “not

fully ascertained,” because he could not tell how the extension cord had caused the fire.

Chen testified at his EBT, as pertinent here, that DMHZ has been in business since 2000. He and his two sisters are the officers, and he is the president. The nature of DMHZ’s business is to manage the premises, and it has two employees to clean and repair, each of whom were paid by DMHZ. Before 2008, there were no complaints about the premises’ electricity or about the lack of sufficient outlets in the apartments, although in 2004, Chen received a complaint that the electrical fuses were blowing in apartment 13. In 2005, Chen received a complaint from the tenant in apartment one that there was not enough heat, but no other such complaints were made between 2005 and 2009.

In 2007, Chen decided to upgrade the building’s electrical system as part of an overall effort to upgrade it due to its age. In 2008, defendant New Grand performed the upgrade by installing new wiring, new electrical meters, and two new electrical wires/circuits in every apartment. After the work was complete, Chen received no complaints related to electricity in the building, such as power outages. Although a violation was issued against the premises in 2009, Chen denied having received notice of it and contends that he had remained unaware of it until after the fire.

By affidavit dated August 4, 2012, Joel Liebesfeld, a senior electrical engineering investigator, states that he reviewed FDNY photographs and reports, DOB and NYPD records, and depositions taken in this action, and concludes that before the fire, the building’s electrical system was antiquated and inadequate to handle the electrical load, that it was foreseeable that tenants would use extension cords due to the insufficient number of outlets in the apartments, that the building should have had a proper overcurrent protection system, and that the fire

originated from an electrical overload connected to an inadequate protection system which permitted the extension cord to overheat. He opines that defendants did not properly maintain the premises by: (1) failing to have a qualified, licensed inspection of the electrical system; (2) compelling the tenants' use of extension cords to compensate for the insufficient outlets; (3) failing to have qualified and duly-trained personnel performing electrical work; and (4) failing to have a proper and adequate overcurrent protection system in the premises.

II. DMHZ AND CHEN'S MOTION

A. DMHZ's liability

1. Contentions

Relying on the fire marshal's report and testimony that the fire was caused by the use of an extension cord in apartment one, defendants deny that the fire was caused by a defect with the building's electrical system. (Affirmation of Brian R. Masterson, Esq., dated May 14, 2012 [Masterson Aff.]).

Plaintiffs rely on evidence that tenants throughout the premises used extension cords and were forced to do so by a dearth of electrical outlets, that Chen was aware of the use of extension cords, or at least had constructive notice of it by virtue of the violations, or that defendants created the dangerous conditions by implementing an electrical upgrade without addressing the inadequate number of outlets in each apartment. They also rely on Liebesfeld's expert opinion that the fire would not have occurred if defendants had installed an overcurrent protection system in the building. (Affirmation of Douglas E. Hoffer, Esq., dated Aug. 10, 2012 [Hoffer Aff.]).

Other plaintiffs argue that even if the fire was caused by the use of an extension cord, defendants may still be found negligent for permitting the use of extension cords and/or failing to

inspect and address the inadequate electrical system. (Affirmation of Marie Ng, dated Aug. 8, 2012 [Ng Aff.]).

2. Applicable law

To establish a *prima facie* claim of negligence, a plaintiff must demonstrate: (1) a duty owed by the defendant to the plaintiff; (2) a breach thereof; and (3) injury proximately resulting therefrom. (*Solomon v City of New York*, 66 NY2d 1026 [1985]). When it is alleged that there exists a dangerous or defective condition on the premises, a duty arises from occupancy, ownership, control, or a special use of the premises. (*Balsam v Delma Engineering Corp.*, 139 AD2d 292 [1st Dept 1998], *lv denied* 73 NY2d 783).

a. Duty and breach

“A duty of reasonable care owed by a tortfeasor to an injured party is elemental to any recovery in negligence.” (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 [1994]).

“Unlike foreseeability and causation, which are issues generally and more suitably entrusted to fact finder adjudication, the definition of the existence and scope of an alleged tortfeasor’s duty is usually a legal, policy-laden declaration reserved for Judges to make prior to submitting anything to fact-finding or jury consideration.” (*Id.* at 584-585; *see also St. Paul Travelers Cos., Inc. v Joseph Mauro & Son, Inc.*, 93 AD3d 658 [2d Dept 2012]). Whether duty exists is question of law for the court “which must consider the social consequences of imposing a duty and then tailor the duty in order to limit the legal consequences to a controllable degree.” (*St. Paul Travelers*, 93 AD3d 658).

As a general rule, a landlord is not liable to a tenant for dangerous conditions on the leased premises unless a duty to repair the premises is imposed by statute, regulation, or contract.

(*Rivera v Nelson Realty, LLC*, 7 NY3d 530 [2006]). Thus, in *Zvinys v Richfield Inv. Co.*, the Appellate Division, First Department, vacated a jury verdict holding a landlord liable for a fire caused by a tenant's use of an overloaded power strip, which was easily removable and not part of the building's wiring system, holding that the prevention of the tenant's use of the overloaded power strip did not fall within the landlord's duty to maintain the building in a safe condition. (25 AD3d 358 [1st Dept 2006], *lv denied* 7 NY3d 706; *see also Isaacs v W. 34th Apts. Corp.*, 36 AD3d 414 [1st Dept 2007], *lv denied* 8 NY3d 810 [landlord owed no duty to tenant to insulate exposed pipes in tenant's bathroom]).

Here, as in *Zvinys*, plaintiffs rely on a landlord's general duty to keep premises in a safe condition, but cite no rule, regulation, statute, or caselaw that imposes on a landlord a duty to provide "sufficient" electricity and a specific number of outlets per apartment, prevent tenants from using objects within their apartments that may become dangerous if misused, or install an overcurrent protection system. Absent a duty, there is, of course, no breach.

While the fire resulted in the tragic loss of life and in personal injuries which may go uncompensated, there are unacceptable social consequences entailed in imposing a duty on landlords to monitor tenants in their homes in order to prevent them from endangering themselves and their neighbors by their negligent use of extension cords. The imposition of such a duty is best left to the Legislature. (*Cf Rivera*, 7 NY3d at 536 ["the decision whether radiator covers must be supplied by landlords is thus left to legislators and regulators, who are in the best position to balance the harm prevented by this safety measure against its cost . . . "]).

Rivera is analogous. There, the Court addressed whether a landlord breached a duty to its tenant to maintain the premises in a safe condition by failing to furnish tenants with radiator

covers, where the landlord knew that young children lived in the apartment, that the radiators were not covered and could become extremely hot, and that the children's parents believed that the radiators presented a danger. In fact, the landlord refused the parents' request for radiator covers, citing the expense, and thereafter one of the children was seriously burned when he climbed onto a radiator. The Court held that the landlord did not breach its duty to keep the premises safe absent any allegation or evidence that the radiator itself was in need of repair or was defective. Rather, any duty to protect children from uncovered radiators remained that of the tenant. (*See Rodriguez v City of New York*, 20 AD3d 327 [1st Dept 2005] [landlord's failure to provide cover for radiator did not constitute actionable negligence, as there was no evidence that radiator was malfunctioning or improperly installed and building code did not require covering; thus injuries suffered by infant plaintiff did not result from any breach of duty to maintain apartment in reasonably safe condition]; *Utikan v Szuwala*, 60 AD3d 755 [2d Dept 2009] [same]).

Here too, it was the tenant in apartment one who owed a duty, namely, a duty of care to the landlord and to the other tenants with respect to his use of the extension cord, an instrumentality that, like a radiator, is not inherently dangerous. (*See 92 Ct. St. Holding Corp., LLC v Monnet*, 106 AD3d 1404 [3d Dept 2013] [tenant owned propane grill, assembled it, and positioned it on apartment's balcony with knowledge of dangers of placing grill too close to vinyl siding of building; tenant had duty of care with respect to placement of grill on balcony]).

b. Cause or create

A premises owner, in moving a for summary dismissal must establish, *prima facie*, that it maintained the premises in a reasonably safe condition and neither created nor had actual or constructive notice of a dangerous condition. (*Black v Kohl's Dept. Stores, Inc.*, 80 AD3d 958

[3d Dept 2011]; *Mitchell v City of New York*, 29 AD3d 372 [1st Dept 2006]). An “investigating fire marshal’s deposition testimony” and report may constitute *prima facie* evidence of a party’s entitlement to summary judgment. (*Delgado v New York City Hous. Auth.*, 51 AD3d 570, 571 [1st Dept 2008]).

Here, the tenant in apartment one admitted that he plugged the extension cord into an old outlet and used the cord with several appliances, the fire marshal opined that the fire was caused by the tenant’s use of the extension cord, and there was no evidence that the wiring in the apartment or premises caused or contributed to the fire. Thus, defendants have satisfied their *prima facie* burden of establishing that they did not proximately cause the fire. (*See Robertson v New York City Hous. Auth.*, 58 AD3d 535 [1st Dept 2009] [fire marshal report, which showed that fire originated in electrical cords on apartment floor, demonstrated absence of factual issue as to whether building’s wiring was defective]; *Andrews v New York City Hous. Auth.*, 66 AD3d 619 [2d Dept 2009] [defendant entitled to summary judgment based on fire and incident report and investigating fire marshal’s report, as marshal determined cause of fire was electrical cord that ignited combustible materials and that nearby outlet and receptacles were not cause of fire]; *Delgado*, 51 AD3d at 570 [defendant submitted evidence that fire caused by problematic extension cord situated in combustible material, rather than defect in wiring system or outlet]; *Butler-Francis v New York City Hous. Auth.*, 38 AD3d 433 [1st Dept 2007] [fire marshal concluded that fire started when electrical cord of plaintiff’s dryer shorted and ignited clothes, and no evidence that fire started in stove or as result of gas leak]; *Graham v New York City Hous. Auth.*, 42 AD3d 323 [1st Dept 2007], *lv denied* 9 NY3d 816 [fire department found no evidence that building’s wiring contributed to fire’s origin]; *Oquendo v Rosgro Realty Corp.*, 117 AD2d

528 [1st Dept 1986] [defendant landlord showed *prima facie* lack of responsibility for fire by submitting proof that fire caused by tenant's misuse of heat source on furniture]; *see also Adika v Dramitinos*, 74 AD3d 848 [2d Dept 2010] [defendant submitted affidavit from expert that fire caused by tenant and not by any action or inaction of landlord]; *Strnad v Garvin*, 64 AD3d 1230 [4th Dept 2009] [owner established that his acts or omissions did not cause fire but rather that tenant's careless smoking caused fire]; *Colon v H&B Plumbing & Heating, Inc.*, 305 AD2d 235 [1st Dept 2003], *lv denied* 1 NY3d 506 [2004] [fire marshal concluded that fire was caused by faulty refrigerator motor rather than gas leak, thereby absolving from liability contractor who turned gas on in apartment]).

That the building had an inadequate electrical supply and/or an insufficient number of outlets, that the tenants' only means of obtaining sufficient electricity was by using extension cords, that it was foreseeable that a tenant might overload an extension cord and that an overloaded wire would cause a fire, and that an overcurrent protection system would have prevented the cord from causing the fire, at most, raise an issue as to whether defendants' actions furnished the occasion for or circumstances leading to the fire. They raise no issue as to whether defendants caused the fire, and courts sharply distinguish the two. (*Lee v New York City Hous. Auth.*, 25 AD3d 214 [1st Dept 2005], *lv denied* 6 NY3d 708 [2006]; *D'Avilar v Folks Elec. Inc.*, 67 AD3d 472, 472 [1st Dept 2009]; *see eg Sanchez v Biordi*, 259 AD2d 434 [1st Dept 1999], *lv denied* 94 NY2d 754 [landlord granted summary judgment where tenant fainted in bathroom and came into contact with uninsulated riser, causing burns; "where negligence complained of does not cause 'the occurrence of the accident from which the injuries flow,' and an intervening act occurs which is not foreseeable in the normal course of events, proximate cause is lacking as a

matter of law.”]).

In *Martinez v Lazaroff*, for example, tenants sued their landlord for injuries sustained by their child who was burned by boiling water that had spilled from a pot that was being used to heat the apartment due to the landlord’s failure to provide hot water. The Court of Appeals affirmed the dismissal of the action by the Appellate Division, finding that as a matter of law, the landlord’s failure to supply hot water was not the proximate cause of the injuries as it merely “gave rise to intervention on the part of the infant’s father to provide a substitute supply of hot water.” (48 NY2d 819 [1979]; *see also Horn v Hires*, 84 AD3d 1025 [2d Dept 2011] [defendant’s failure to provide heat and hot water to tenant was not proximate cause of plaintiff’s accident that occurred when her chair struck the stove, causing pot of boiling water to burn her]; *Abreu v Stratford Realty Assocs.*, 208 AD2d 465 [1st Dept 1994] [landlord’s failure to provide heat and hot water was not proximate cause of tenant’s injuries caused when she stumbled while carrying pot of hot water that she had heated]; *Laureano v Louzoun*, 165 AD2d 866 [2d Dept 1990] [while defendant’s conduct in failing to provide heat and hot water gave rise to plaintiff’s attempt to provide substitute supply of heat by boiling water, act of boiling water itself was not cause of injuries]).

In an analogous case, the plaintiff in *Lam v Neptune Assocs.* sued her landlord for injuries her child sustained when the child fell into a bathtub of hot water. The plaintiff alleged that because a window in the bathroom was broken, she was required to run hot water in the bathtub in order to heat the bathroom, and she thus claimed that defendant was negligent in that its failure to maintain the bathroom window required her to run hot water in the bathtub in order to heat the bathroom. On appeal, the claim was dismissed on the ground that “the infant’s injuries were not

a foreseeable consequence of the defendant's alleged failure to maintain the bathroom window properly. Rather, the alleged defective condition of the window would have merely furnished the occasion" for the injuries. (203 AD2d 334 [2d Dept 1994]).

Similarly, in *Wells v Finnegan*, as the apartment rented by the plaintiffs had no working stove, the landlord gave the plaintiff a hot plate for cooking. The plaintiffs' daughter was injured when she hit the table on which the hot plate was placed and knocked over a pan of boiling water that had been on the plate. The plaintiffs argued that the defendant was negligent in failing to provide a stove and that such negligence was a proximate cause of the injury as the failure to provide the stove forced plaintiffs to use the hot plate, which was a more hazardous method of cooking. On appeal, the court held that the failure to provide a stove was not the proximate cause of the plaintiff's injuries, nor could the landlord be liable for providing the hot plate absent any evidence that the plate was dangerous or defective. The court observed that a hot plate is a commonly-used appliance, and that "while accidents can be foreseen with its use, as with any other household appliance, the mere happening of an accident does not give rise to liability." (177 AD2d 893 [1991]; *see also Villegas-Muniz v Calogero*, 24 AD3d 129 [1st Dept 2005] [landlord's alleged failure to repair leak was not proximate cause of injuries where plaintiff, in attempt to fix leak, installed board over kitchen counter, and was injured when she ran her hand over board while cleaning it and cut herself]; *Siso v Tawil*, 2AD3d 828 [2d Dept 2003] [while landlord's alleged negligence in failing to provide outlet in kitchen above counter rather than at floor level may have created occasion for accident, child's pulling of cord attached to pot from outlet, which led to pot contents spilling on her, was proximate cause]; *Napoli v Menicucci*, 299 AD2d 466 [2d Dept 2002], *lv denied* 99 NY2d 510 [2003] [defendant's alleged failure to provide

railing adjacent to stairwell with protective safeguards did not cause accident; while open railing may have created occasion for accident, cause was plaintiff tripping over her shoes and going over railing]; *Murray v New York City Hous. Auth.*, 269 AD2d 288 [1st Dept 2000] [proximate cause of injury was not defendant's failure to repair door by hanging it back on its hinges but plaintiff's decision to place door upright and unbraced in doorway, where it fell on her]; *Barragan v Mathai*, 253 AD2d 508 [2d Dept 1998] [landlord's failure to repair leak in apartment was not proximate cause of plaintiff's injuries sustained when she fell while carrying bucket of water which had filled from leak]; *Gomez by Cruz v City of New York*, 249 AD2d 362 [2d Dept 1998] [allegedly defective plumbing in bathtub, which caused hot water to accumulate therein, was not proximate cause of injuries to child who was burned when she fell into tub while attempting to retrieve a bathtub that had fallen into tub]; *Tigulla v Porzio*, 255 AD2d 504 [2d Dept 1998] [plaintiff alleged that defendant failed to fix clogged drain in bathtub and that he thus filled a bucket of hot water in order to fix drain himself, and after he left bucket unattended in bathroom, child tipped it over and burned himself; clogged drain merely created occasion for accident, which was caused by tenant leaving bucket unattended]).

That plaintiff's expert concluded that the electricity was insufficient or inadequate was not based on an inspection of the premises, and was thus unduly speculative. (*See Baumgardner v Rizzo*, 35 AD3d 223 [1st Dept 2006], *lv denied* 8 NY3d 806 [2007] [opinion of plaintiff's engineer, made without on-site inspection, was based on speculation and insufficient to rule out other causes of accident]). His opinion that the fire would or should have been prevented had the premises been equipped with an overcurrent protection system is also speculative and conclusory, and he cites no rule, regulation, or statute that required defendants to inspect the

building's electrical system or provide an overcurrent protection system. (*See Andrews*, 66 AD3d at 620 [plaintiff's expert asserted that fire originated from electrical fault within outlet but provided no factual support for conclusion]; *Zvinys*, 25 AD3d at 359-360 [expert affidavit was speculative and conclusory; expert never visited premises or inspected circuit breakers that he alleged were defective and did not cite any statutes, codes, or industry standards allegedly violated with respect to breakers]; *Robertson*, 58 AD3d at 536 [plaintiff failed to raise triable issue as to whether alleged defects in building's electrical system caused fire rather than electrical cords on floor of apartment; expert did not identify specific defect in circuit breaker or internal wiring that could have caused fire]; *IDE Pontiac v D.V.G. Elec. Gen. Contr.*, 298 AD2d 912 [4th Dept 2002] [expert's opinion that gas leak resulted from defendants' failure to inspect and maintain natural gas appliances and piping at premises was speculative, remote, and lacked adequate factual foundation]).

There is also no authority supporting the expert's assertion that a certain number of outlets is required, and in the absence of any evidence that the existing electrical work in the premises caused or contributed to the fire, it is irrelevant that defendants failed to have qualified and duly-trained personnel performing the work. (*See also Flagship Intl. Corp. v Dannelisse Corp.*, 38 AD3d 307 [1st Dept 2007] [contractor's failure to obtain required permits, in and of itself, did not cause or contribute to plaintiff's damages]).

B. Chen's liability

Chen denies that he may be held personally liable for plaintiffs' injuries as he acted as an ordinary officer of DMHZ, and did not assume personal liability by managing and overseeing the building's maintenance. (*Masterson Aff.*).

Plaintiffs maintain that Chen may be held personally liable as he participated in the commission of a tort and was in exclusive control of the management and operation of the premises. (Hoffer Aff.; Ng Aff.).

Here, plaintiffs allege that DMHZ, through Chen, acted negligently by failing to keep the premises in a reasonably safe condition, which constitutes an act of nonfeasance rather than malfeasance. None of the acts alleged to have been committed, such as failing to inspect the premises or hiring unlicensed workers to perform electrical work at the premises, can be deemed or inferred to have been committed by Chen individually and apart from his employment relationship to DMHZ, and indeed, it is undisputed that DMHZ paid for the electrical work. (*See Palomo v 175th St. Realty Corp.*, 101 AD3d 579 [1st Dept 2012] [in case involving injuries from defective condition in apartment, there was no evidence that individual corporate officers personally participated in malfeasance or misfeasance constituting affirmative tortious act]; *Robles v Palazzolo Realty Corp.*, 66 AD3d 417 [1st Dept 2009] [in action based on allegations of negligence in maintaining apartment building, claim against building owner's president dismissed as conduct attributed to him amounted to nonfeasance, for which he bore no liability as corporate officer]; *see also A.L. Eastmond & Sons, Inc. v Keevily, Spero-Whitelaw, Inc.*, 2013 WL 2631207, 2013 NY Slip Op 04434 [1st Dept] [complaint alleged no acts or omissions by defendant's chief executive officer independent of any acts he performed within scope of employment for defendant]; *Peguero v 601 Realty Corp.*, 58 AD3d 556 [1st Dept 2009] [personal liability may be imposed on corporate officer for malfeasance, or affirmative tortious act, but not for nonfeasance, or failure to act]; *Worthy v New York City Hous. Auth.*, 21 AD3d 284 [1st Dept 2005] [liability could not be imposed on defendant who was president and sole shareholder of

corporate owner of building as he acted in his capacity as agent for corporate owner]; *Bernstein v Starrett City, Inc.*, 303 AD2d 530 [2d Dept 2003] [defendant's president established that he did not act in individual capacity or commit tort outside of scope of corporate capacity as president]; *Mendez v City of New York*, 259 AD2d 441 [1st Dept 1999] ["Where there is no evidence of independently tortious conduct on the part of individual defendants, and nothing in the record raises a triable dispute that they acted at all times within the scope of their employment, those individuals are entitled to summary dismissal of the action"]).

III. NEW GRAND'S MOTION

Absent any dispute that the cause of the fire was the use of the extension cord, and that any work performed by New Grand neither caused nor contributed to the fire, and as plaintiffs' allegations that the inadequate supply of electricity caused tenants to use extension cords have nothing to do with New Grand, there is no ground upon which to hold it liable. (*See Katz v Eastern Constr. Developing & Custom Homes, Inc.*, 100 AD3d 830 [2d Dept 2012] [contractor entitled to dismissal by showing that cause of fire was unrelated to its work at premises and that it committed no act from which it could be inferred that it negligently caused fire]; *Baumgardner*, 35 AD3d at 224-225 [as contractor's work on boiler had nothing to do with water temperature, it was not liable for injuries sustained when scalding water emanated from bathroom sink]). That its work may have been done by unlicensed workers is irrelevant absent any connection between the work and the fire. (*See eg Colon v H&H Plumbing & Heating*, 305 AD2d 235 [1st Dept 2003], *lv denied* 1 NY3d 506 [2004] [contractor's conceded violations of various Building Code provisions, even if negligence per se, did not contribute to fire as it did not arise from contractor's work at building]).

Moreover, plaintiffs cite no authority for the proposition that New Grand had a duty to report any violations to defendants, to the extent that New Grand even had notice of violations.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants DMHZ Corp. and David Chen's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED, that defendant/third-party defendant New Grand Electric, Inc.'s motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER:



Barbara Jaffe, JSC

DATED: June 18, 2013
New York, New York