Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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DAVID SAMOVAL and LIYA SAMOVAL,
Plaintiff(s),

Index No.:2607/07

Motion Date:12/4/12

Motion Cal. No.: 10

- against -

Motion Seq. No: 8

DORADO HOUSE FLUSHING CONDOMINIUM CORP., JOHN B. LOVETT & ASSOCIATES, LTD., and TOP TEN CONSTRUCTION, INC.,
Defendant(s).

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The following papers numbered 1 - 17 read on this motion by the defendants Dorado House Flushing Condominium Corp. and John B. Lovett & Associates, Ltd. for an order granting summary judgment; and a cross-motion by defendant Top Ten Construction, Inc. for an order granting leave to reargue their prior motion for an order granting summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
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Upon the foregoing papers it is **ORDERED** that the motion and cross-motion are considered together and decided as follows:

This is an action for personal injuries allegedly sustained by the plaintiff David Samoval ("Samoval") on October 17, 2006 when he fell inside of the premises located at 140-55 34th Avenue, Flushing, New York. At the time of the accident, Samoval was the President of the building Board of Directors. It is alleged that, at the time of the accident, defendant Dorado House Flushing Condominium Corp. ("Dorado House") and John B. Lovett ("Lovett") managed the premises and hired defendant Top Ten Construction, Inc. ("Top Ten") to perform structural repairs to the building's roof.

Defendant Dorado House and Lovett's Motion

Defendants Dorado House and Lovett now move, pursuant to CPLR §3212, for summary judgment. It is first noted that, by order dated September 21, 2009, this court denied the movant's motion for summary judgment on the grounds that the motion was filed after time period set forth in the CPLR (see, CPLR §3212, see *also Miceli v State Farm Mut. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004]; *Rivera v Toruno*, 19 AD3d 473 [2005]; *Thompson v Leben Home for Adults*, 17 AD3d 347 [2005]). Defendants Dorado House and Lovett now seek an order rearguing the court's September 21, 2009 order. It is noted that, while the attorney's affirmation submitted in support of the instant motion includes a request for reargument, the annexed Notice of Motion does not so state. However, in the interest of justice, this court will deem the instant motion as one, pursuant to CPLR §2221(d) for leave to reargue and, upon reargument, pursuant to CPLR §3212, for summary judgment.

A motion for reargument allows a party to establish that the court "overlooked or misapprehended the relevant facts" or "misapplied any controlling principle of law". (*Foley v. Roche*, 68 AD2d 558, 567 [1st Dept. 1979], *leave denied* 56 NY2d 507 [1982] *see*, CPLR §2221[d]). Defendants Dorado House and Lovett assert that this court erred in its September 21, 2009 order when it stated that their prior motion was untimely. In its prior order, this court stated that the defendants' time to move for summary judgment expired on March 31, 2009, one day before their motion was served. Pursuant to CPLR §3212[a], if no date is set by the court, a summary judgment motion must be made no later than 120 days after the filing of the note of issue, except with leave of court with good cause shown (see, *Brill v. City of New York*, *supra*). In the instant action, it is clear that this court miscalculated the date that the 120 day time period expired as the movants actually had until April 1, 2009 to make their motion. Accordingly, pursuant to CPLR §2221[d], the instant application for leave to reargue is granted.

Upon reargument, this court will now consider defendants Dorado and Lovett's motion, pursuant to CPLR §3212, for summary judgment and dismissal of the claims against it. CPLR §3212(b) requires that for a court to grant summary judgment it must determine that the movant's papers justify holding as a matter of law, that the cause of action or defense has no merit. The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant (*see, Grivas v. Grivas*, 113 AD2d 264, 269 [2d Dept. 1985]; *Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 AD2d 68 [4th Dept. 1980]; *Parvi v. Kingston*, 41 NY2d 553, 557 [1977]).

In support of their motion, defendants Dorado House and Lovett submit, *inter alia*, the affirmation of their attorney, the pleadings, the amended pleadings, the Verified Bill of Particulars, the deposition transcript of plaintiff David Samoval, the deposition transcript of the defendant John B. Lovett & Associates, Ltd., by its witness Janice Panaro, Ms. Panaro's affidavit, a copy of a climatological report for the date of plaintiff's accident and the deposition transcript of defendant Dorado Flushing Condominium Corp. by its witness Chaudhry Jasarat. In order to impose liability upon defendants Dorado House and Lovett, there must be evidence tending to show the existence of a dangerous or defective condition, and that the defendants either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time (*see, Brown-Phifer v. Cross County Mall Multiplex*, 282 AD2d 564 [2d Dept. 2001], *appeal denied* 96 NY2d 721 [2001]; *Christopher v. N.Y.C.T.A.*, 752 NYS2d 76 [2d Dept. 2002]; *Gloria v. MGM Emerald Enterprises, Inc.*, 298 AD2d 355 [2d Dept. 2002]).

In his deposition, plaintiff testified that, on the date of the accident, he went to the roof because he was notified that it had sustained a leak. In his capacity as President of the Board of Directors, plaintiff accompanied the building's superintendent to the roof. Plaintiff further testified that, as he walked on the roof, he stood on the door frame leading to the roof's bulkhead. While standing on the door frame, he slipped on the door saddle or steps, fell down a flight of stairs and struck several rolls of roof paper that had been stored on the landing. Finally, plaintiff testified that it was raining at the time of his accident.

In her deposition, Janice Panaro stated that, at the time of the accident, she was employed by defendant Lovett as a property manager at the subject premises. Ms. Panaro also testified that, on the evening of plaintiff's accident, she attended a meeting at the premises where she was informed that a leak had occurred in various apartments that originated from the roof, that she accompanied plaintiff to the roof, that it was raining at the time and that she did not see any defects on the door saddle or steps. Finally, Ms. Panaro testified that defendant Lovett had not received any complaints regarding the door saddle or any steps on the premises. Thus, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*see, Gaddy v. Eyler*, 79 NY2d 955 [1992]).

In opposition to the instant motion, plaintiffs submit the affirmation their attorney and rely on the previously submitted deposition transcripts. It is well-settled that the affirmation of an attorney is insufficient to meet the burden of proof on a summary judgment motion (see, *Palo v. Principio*, 303 AD2d 478 [2d

Dept. 2002]; and *Falkowitz v. Peters*, 294 AD2d 330 [2d Dept. 2002]). Moreover, plaintiff David Samoval's deposition testimony does not demonstrate that any triable issues of fact remain as to the defendants Dorado House and Lovett's notice of the alleged defective condition. Thus, plaintiffs have failed to demonstrate that summary judgment is not warranted. Accordingly, the instant motion is granted and the complaint is hereby dismissed as against defendants Dorado House and Lovett.

It is noted that, by service of an amended answer dated March 27, 2007, defendants Dorado House and Lovett served cross-claims against defendant Top Ten. Inasmuch as the complaint has been dismissed as against defendants Dorado House and Lovett, the cross-claims served by these defendants are also dismissed.

Defendant Top Ten's Cross-Motion for Leave to Reargue its prior Motion for Summary Judgment

Defendant Top Ten now cross-moves, pursuant to CPLR §2221[d], for leave to reargue this court's February 22, 2010 order which denied it's motion for summary judgment and dismissal of the complaint and cross-claims against it. In support of this motion, the cross-movant asserts this court erred when it denied the motion solely on the grounds that the movant failed to prove that it either caused or created the alleged dangerous condition which caused plaintiff's fall. Defendant Top Ten asserts that this court failed to address those portions of the motion which asserted that defendant Top Ten owed no duty to the plaintiff, that plaintiff's claims are improperly speculative and that plaintiff fails to establish violation of any code provision. Defendant Top Ten also asserts that this court erred when it failed to address that portion of the prior motion which sought dismissal of defendant Dorado House and Lovett's cross-claims.

A review of the February 22, 2010 order reveals that this court did not address those portions of the prior motion which asserted that defendant Top Ten owed no duty to the plaintiff, that plaintiff's claims are improperly speculative, that plaintiff failed to establish violation of any code provision or that defendants Dorado House and Lovett's cross-claims. Thus, pursuant to CPLR §2221[d], the instant motion for leave to reargue is hereby granted. Upon reargument, this court will now consider the above-referenced portions of defendant Top Ten's prior motion.

Defendant Top Ten contends that summary judgment is warranted because it owed no duty to the plaintiff. It is well-settled that 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 (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]). Failure to make such a showing requires denial of the motion.

CPLR §3212(b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law that the cause of action or defense has no merit. The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant (*see, Grivas v. Grivas*, 113 A.D.2d 264, 269 [2d Dept. 1985]; *Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68 [4th Dept. 1980]; *Parvi v. Kingston*, 41 N.Y.2d 553, 557 [1977]).

In support of its motion, Top Ten submits the affirmation of its attorney, the pleadings, the Verified Bill of Particulars, the deposition transcript of plaintiff David Samoval, the deposition transcript of the defendant Lovett by its witness Janice Panaro and the deposition transcript of defendant Dorado by its witness Chaudhry Jasarat. It is uncontested that defendant Top Ten was hired by defendants Dorado and Lovett to perform structural repairs to the subject roof.

It is well-settled that a construction company owes no common-law duty to protect the public from a third-party. Moreover, an injured party, who is not a party to a contract, may not recover as a third-party beneficiary for failure to perform a duty imposed by a construction company absent a contractual provision clearly indicating that the parties intended to confer a direct benefit on the third-party to protect him/her from injury (*see, Buckley v. I.B.I. Security Service Inc. et al.*, 157 AD2d 645 [2nd Dept. 1990]; *Murshed v, New York Hotel Trades Council*, 71 AD3d 578 [1st Dept. 2010]; *Anokye v. 240 East 175th Street Housing Development Fund Corporation*, 16 AD3d 287 [1st Dept. 2005]). The fact that a non-party would benefit from the enforcement of a contract does not mean that the non-party is an intended third-party beneficiary (*see, generally, Board of Managers of Riverview Condominiums, et al v. Schorr Brothers Development Corp., et al*, 182 AD2d 664 [2d Dept. 1992]; *Amin Realty v. K & R Construction Corp., et al*, 306 AD2d 230 [2d Dept. 2003]).

In the instant action, it is clear that plaintiff was not a party to the underlying contract between the defendants. Plaintiff does not submit proof, or even assert, that he was an intended third-party beneficiary to the contract or that the parties contracted to confer a benefit to him directly. Thus, plaintiff has failed to demonstrate that summary judgment is not warranted. Accordingly, that portion of the instant cross-motion which seeks summary judgment for plaintiffs' failure to prove that defendant

Top Ten owed plaintiffs a duty of care is granted. The complaint is hereby dismissed as against defendant Top Ten. As this court has now dismissed the complaint against the cross-moving defendant, Top Ten's remaining contentions as to dismissal of the complaint and dismissal of the counterclaims are denied as moot. Accordingly, it is,

ORDERED, that the complaint is hereby dismissed as against all defendants. The foregoing constitutes the decision, judgment and order of this court.

Dated: May 10, 2013

JANICE A. TAYLOR, J. S. C.

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