

**Lora v The Improvement Council Hous. Co. L.P.**

2015 NY Slip Op 30187(U)

January 5, 2015

Supreme Court, Bronx County

Docket Number: 300674/2011

Judge: Sharon A.M. Aarons

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 24

-----X  
VINCENTA LORA,

Plaintiff,

-against-

THE IMPROVEMENT COUNCIL HOUSING  
COMPANY L.P., MEREDA REALTY CORP.,  
EXCEL BRADSHAW MANAGEMENT GROUP, LLC,  
and SMITH PEST CONTROL, INC.,

Defendants.  
-----X

Index No. 300674/2011

**DECISION and ORDER**

Present:

**Hon. SHARON A.M. AARONS**

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of motion, as indicated below:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause and Exhibits Annexed-----	1
Affirmation in Opposition-----	2
Reply Affirmation-----	3

*Upon the foregoing papers the Decision and Order on the motion are as follows:*

Defendant Smith Pest Control, Inc. (Smith) moves for summary judgment pursuant to CPLR 3212 dismissing all claims and cross-claims against it. Defendants the Improvement Council Housing Company L.p., Mereda Realty Corp., Excel Bradshaw Management Group, LLC (collectively, defendant Improvement), represented by the same counsel, submit written opposition. Plaintiff 's counsel appeared at the call of the motion calendar and took no position on the motion.

Plaintiff, a resident of premises owned by defendant Improvement, alleges that she sustained personal injury when she was bitten by a rat on May 4, 2010.

In support of the motion, defendant Smith submits the pleadings; the unsworn, certified deposition testimony of the plaintiff taken on September 5, 2013; the unsworn, certified deposition testimony of James Smith, for defendant Smith; the unsworn, certified deposition testimony of Raul

Pinerro, Improvement's building superintendent; and the contract between defendant Smith and defendant Improvement.

In opposition, defendant Improvement submits the continued deposition testimony taken of the plaintiff on July 18, 2013, with a letter of transmittal of the transcript; discovery responses; and defendant Improvement's verified answer to the verified complaint.

The plaintiff's testimony was that the premises had been infested with rats for six to seven years before she was bitten, since the inception of her tenancy, and that she had complained to defendant Improvement of the situation.<sup>1</sup> She was not aware of who hired the exterminators in the building, nor had she ever heard of defendant Smith. The exterminators would spray her apartment and set poison; plaintiff herself attempted to catch the rodents, had personally set traps and applied poisons, and had hired a neighbor to cover the rodent holes.

Raul Pinerro, the building superintendent, testified that defendant Smith was under contract to exterminate the premises. Defendant Smith treated the common areas of the premises, and would, if requested, treat individual apartments.

James Smith testified that a pest control agreement existed between defendant Smith and defendant Improvement. The agreement was for rodent "control," meaning treating for rodents which have entered the premises. As opposed to rodent "proofing," meaning preventing the entry of rodents.

It is well settled, that a contractor hired to perform work is generally not liable in tort to a non-contracting third-party when it breaches a contract and said breach causes injury to a third-party.

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<sup>1</sup>It is not disputed that defendant Smith's services were first contracted some two years after the plaintiff took occupancy.

(*Stiver v Good & fair Carting & Moving, Inc.*, 9 NY3d 253[2007]; *Church v Callanan Industries, Inc.*, 99 NY2d 104[2002]; *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136[2002]). This is because, contractors are generally hired to perform work pursuant to contract and “[u]nder our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party.” (*Id. at 138.*) When there is a breach, such contractors are generally only liable to the person who hired them, the promisee, and are not liable to third parties for any injuries resulting from a breach of their contractual obligation. (*Id.*) Consequently, if a contractor is to be held liable for injury to a third-party as a result of their work, one of three scenarios must exist. First, a contractor is liable for injury to a third-party when said contractor causes or creates the condition alleged to have caused injury. (*Church v Callanan Industries, Inc.*, 99 NY2d 104[2002]). Second, a contractor is responsible for a non contracting third-party's injury when the third-party detrimentally relies on the contractor's continued performance and the contractor's failure to perform, positively and actively, causes injury. (*Id. at 111; Espinal* , 98 NY2d at 136.) Lastly, the service contract is so comprehensive and exclusive that the contractor's obligations completely displace and absorb the landowner's responsibility to maintain the premises safely. (*Church* , 99 NY2d at 112; *Espinal.*, 98 NY2d at 140; *Palka v Servicemaster Management Services Corporation*, 83 NY2d 579,589[1994]; *Bugiada v Iko*, 274 AD2d 368.)

Applying the foregoing principals to the facts pattern presented by the parties, this Court finds that failure to perform a contract is not at issue here. Defendant Improvement argues that the first two exceptions could apply. However, first, the work performed by defendant Smith has not been shown to have exacerbated the rodent condition at the premises. Second, there is no showing that the plaintiff relied on defendant Smith's extermination services. By her own testimony, the

apartment had been continually infested for many years, and she had attempted on her own to remedy the problem. Thus, she did not take any action or refrain from taking any action in reliance on defendant Smith's services.

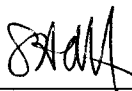
Defendant Improvement argues that it should be entitled to common law indemnification against defendant Smith. "Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine." (*Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449, 492 N.Y.S.2d 371 [1st Dept. 1985].) Because defendant Improvement's liability in this action, if any, is based on its own failure to maintain the premises, and not wholly on the failure of defendant Smith to perform the contract, common law indemnification is not available to defendant Improvement.

Accordingly, the motion is granted. It is

**ORDERED** that all claims and cross claims against defendant SMITH PEST CONTROL, INC., are dismissed, and it is

**ORDERED** that defendant SMITH PEST CONTROL, INC.'s counsel shall serve a copy of this order with Notice of Entry upon counsel for all parties hereto.

Dated: 1/5/15

  
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SHARON A. M. AARONS, J.S.C.