

<b>Torres v 29 Sickles St. LLC</b>
2019 NY Slip Op 32662(U)
September 4, 2019
Supreme Court, New York County
Docket Number: 155207/2016
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN E. FREED** PART IAS MOTION 2EFM

*Justice*

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INDEX NO. 155207/2016

MERCEDES TORRES,

Plaintiff,

MOTION SEQ. NO. 003

- v -

29 SICKLES STREET LLC and A & E REAL ESTATE  
MANAGEMENT LLC,

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 75, 76 were read on this motion to/for SUMMARY JUDGMENT

In this personal injury action, plaintiff Mercedes Torres moves, pursuant to CPLR 3212, for summary judgment on liability as against defendants 29 Sickles Street LLC ("29 Sickles") and A&E Real Estate Management LLC ("A&E"), which oppose the motion, and scheduling the matter of damages for trial. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is denied.

**FACTUAL AND PROCEDURAL BACKGROUND:**

This case, filed June 21, 2016, arises from an incident on February 25, 2016 in which plaintiff was allegedly injured when the ceiling of the bedroom in her apartment, Unit 4R, at 45 Sickles Street, New York, New York collapsed on her. Doc. 1. The building was owned by 29 Sickles and managed by A&E, which joined issue by their answer filed September 9, 2016. Docs. 1, 4.

In her bill of particulars, plaintiff alleged that defendants created the dangerous condition and had actual and/or constructive notice of the same. Doc. 17.

Plaintiff was deposed in January 2018. Doc. 56. At her deposition, she stated that she had rented Unit 4R at 45 Sickles Street for 40 years. Doc. 56 at 8, 15-16. Her granddaughter, Heavenly Torres (“Heavenly”), 20, has lived with plaintiff her entire life. Doc. 56 at 9-10. Marco Suarez (“Suarez”) has been the superintendent of the building for 2-3 years, including on the date of the alleged incident. Doc. 56 at 12-13.

On February 25, 2016, at approximately 3 a.m., plaintiff was sleeping in her bedroom when half of the bedroom ceiling fell on her. Doc. 56 at 18-20, 28. Shortly thereafter, Heavenly, who was sleeping in an adjacent room, came into the bedroom to help remove some of the debris which had fallen on plaintiff. Doc. 56 at 20-22. Plaintiff called Suarez at approximately 7 a.m. and he responded soon thereafter to clean up the debris and put plastic on the ceiling. Doc. 56 at 25-26, 33-38.

Prior to the incident, plaintiff complained about the ceiling in her bedroom on three occasions. Doc. 56 at 39. The first time, prior to Thanksgiving of 2015, she told Suarez by telephone that her bedroom ceiling was “opening up or splitting.” Doc. 56 at 39-41; 45-47. As of that time, nothing was leaking or falling from the ceiling. Doc. 56 at 41. After plaintiff told Suarez that the ceiling was not leaking, the latter responded that it “can wait” because he was “busy.” Doc. 56 at 41. At or about Thanksgiving 2015, plaintiff told Suarez in person that the ceiling was splitting or opening even further. Doc. 56 at 47. Although there was still no leak, “bits of paint” were falling from the ceiling. Doc. 56 at 43-44. At or about Christmas 2015, plaintiff made a third complaint to Suarez. Doc. 56 at 44-45, 47. Approximately two months after the third complaint, the ceiling collapsed. Doc. 56 at 45. Prior to that time, plaintiff had never seen the

ceiling leak. Doc. 56 at 62. None of plaintiff's complaints about her bedroom ceiling were in writing. Doc. 56 at 51-52.

Prior to the accident, Suarez came to plaintiff's apartment to fix plaintiff's bathroom sink. Doc. 56 at 54. Plaintiff made her third complaint about the bedroom ceiling to Suarez when he came to fix the sink. Doc. 56 at 54-56, 58. Specifically, she told Suarez that the opening in the ceiling was getting larger and Suarez looked at the opening. Doc. 56 at 58-59. However, Suarez did not perform any work on the opening and did not return to the apartment until after the ceiling collapsed. Doc. 56 at 59.

Plaintiff conceded that she did not know what caused the ceiling to collapse. Doc. 59 at 60.

Nancy Gonzales was deposed on behalf of defendants in July 2018. Doc. 57. As of the date of the incident, she was employed by A&E as a property manager and 45 Sickles Street was one of the buildings she managed. Doc. 57 at 9-10. Any complaint regarding the building would be directed to her. Doc. 56 at 19. Gonzales explained to Suarez that it was A&E's policy that he was to record every single complaint in a work order and provide it to her. Doc. 57 at 19-20. Gonzales stated that, after work was performed in an apartment, the tenant would sign a work order confirming that the job had been completed. Doc. 57 at 44. Gonzales admitted that, if plaintiff advised Suarez that the ceiling was cracked, he should have prepared a work order even if there was no leaking water. Doc. 57 at 84-85. She further stated that the building was sold after the alleged incident. Doc. 57 at 44-45.

On or about July 9, 2018, defendants subpoenaed Heavenly for deposition. Doc. 65. To date, she still has not complied with the subpoena.

On August 14, 2018, a status conference was held at which this Court directed, inter alia, that Heavenly's non-party deposition be conducted on or before October 4, 2018 and that the note

of issue was to be filed by December 18, 2018. Doc. 68. However, plaintiff filed the note of issue on November 6, 2018. Doc. 69. Defendants then moved, on August 30, 2018, to vacate the note of issue since discovery remained outstanding. Doc. 37.

On October 17, 2018, plaintiff filed the instant motion for summary judgment on liability, arguing, inter alia, that defendants were liable since they had actual and/or constructive notice of the crack in plaintiff's ceiling and failed to address it. Doc. 52.

Defendants opposed the motion, arguing, in principal part, that Gonzales admitted that there were no work orders corroborating plaintiff's complaints about the ceiling.

Defendants' motion to strike the note of issue was resolved by so-ordered stipulation, dated December 11, 2018, which provided that the note of issue would not be vacated; that Heavenly's deposition was to be conducted on or before January 15, 2019, that argument of plaintiff's motion for summary judgment was to be adjourned until March 5, 2019, and that supplemental papers, if any, based on Heavenly's testimony were to be submitted by February 22, 2019. Doc. 73.

#### LEGAL CONCLUSIONS:

"In the case of a ceiling collapse, it is the plaintiff's burden to show actual or constructive notice of a defect prior to the collapse; otherwise the complaint must be dismissed. *Pulley v McNeal*, 240 A.D.2d 913 (3d Dept 1997). If the claim is that the ceiling collapsed because of a leak, a plaintiff must show that the defendant had prior notice, actual or constructive, of the leak and that the leak was never repaired. *see Govan v Ft. Sheri Realty Co.*, 267 A.D.2d 99 (1<sup>st</sup> Dept 1999)." *Figueroa v Goetz*, 5 AD3d 164, 165 (1st Dept 2004).

Here, although there is no evidence of a leak preexisting the alleged incident, plaintiff nevertheless established her prima facie entitlement to summary judgment by submitting her

deposition testimony, which reflects that she complained about her bedroom ceiling “opening up” or “splitting”, on three occasions prior to the alleged incident. This testimony proves that Suarez had actual notice of a defect prior to the occurrence. However, Gonzales’ testimony raises a triable issue of fact, since she testified that A&E required any complaint by a tenant to be reduced to writing, and that none of the work orders relating to plaintiff’s apartment involved an opening or splitting in the plaintiff’s bedroom ceiling.

Although defendants maintain that plaintiff’s motion is premature because Heavenly, who lived in the apartment and thus may have critical knowledge regarding the condition of the ceiling, has not been deposed, there is no indication that they have moved to compel her to comply with the subpoena and/or hold her in contempt for failing to comply with the same. Curiously, defendants instead seek to blame plaintiff’s counsel for Heavenly’s failure to appear. Specifically, they argue that an order to show cause filed by plaintiff’s counsel, which sought to quash the subpoena served on Heavenly, was rejected by the court and that Heavenly will not appear for her deposition unless that application is decided. However, defendants not only fail to cite any authority supporting this contention, but also disregard the fact that, aside from moving to strike the note of issue, they took no affirmative steps to enforce the subpoena they served on Heavenly.

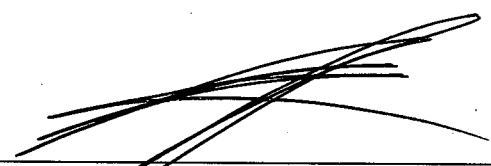
Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Mercedes Torres for summary judgment pursuant to CPLR 3212 is denied; and it is further

ORDERED that the parties are to appear for a previously scheduled settlement conference before Miles Vigilante, Esq. at 80 Centre Street, Room 106, on November 8, 2019 at 9:30 a.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

9/4/2019  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER  REFERENCE

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT