

Anthone v Kashanco Intl., LLC
2020 NY Slip Op 30377(U)
February 7, 2020
Supreme Court, New York County
Docket Number: 153764/2015
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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RACHEL ANTHONNE,

Plaintiff,

- v -

KASHANCO INTERNATIONAL, LLC, KASHANCO
INTERNATIONAL, CORP., METRO REAL ESTATE
MANGEMENT CO., MANOCHERIAN BROTHERS, TOTAL
BOILER CARE, INC, ADVANTAGE PLUMBING AND
MERCHANICAL CORP.

Defendants.

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INDEX NO. 153764/2015
MOTION DATE 07/17/2019
MOTION SEQ. NO. 005 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 108, 110, 111, 113, 115, 119 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 006) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 109, 112, 114, 116, 117, 118, 120 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this personal injury action, the plaintiff, Rachel Anthonne, claims to have suffered injuries from being suddenly scalded by hot water while showering in her apartment on November 7, 2013. Defendants Total Boiler Care, Inc. (TBC) (SEQ 005) and Advantage Plumbing and Mechanical Corp. (APM) (SEQ 006) each move for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims as against them. No party opposes the motion by TBC. Defendants Kashanco International LLC (Kashanco), Metro Real Estate Management Co. (Metro), and Manocherian Brothers (MB) (collectively the Kashanco defendants) oppose the motion to dismiss the cross-claims by APM. The motion by TBC is granted. The motion by APM is granted in part.

On July 15, 2013, APM installed a new mixing valve in the apartment building located at 213 East 84th Street in Manhattan. A mixing valve blends hot water with cold water to ensure constant safe shower and bath outlet temperatures. Approximately four months after the installation, in late October or early November 2013, the superintendent of the building, Ayhan

Isik (Isik), received multiple phone calls from tenants complaining of extremely hot water in their apartments. The same day, Isik called APM about the hot water issue, and APM came to the building to inspect the plumbing. While inspecting the plumbing, APM determined that the mixing valve was malfunctioning, causing hot water issues throughout the building. APM told Isik that he would need to order another mixing valve, and that such an order would take at least three to four days. The same day, Isik posted a notice in the lobby of the building, warning tenants that the building's "hot water [was] very hot" and to "please be careful with hot water." The plaintiff claims that she saw the sign posted by Isik about a week before her alleged accident on November 7, 2013. On November 19, 2013, APM returned to replace the valve.

On April 16, 2015, the plaintiff filed her complaint alleging two causes of action, one for negligence and one for "public and private nuisance." TBC, the company that installed and occasionally performs maintenance on the boiler in the building, now moves for summary judgment arguing that it never worked on the mixing valve. APM also moves for summary judgment claiming that it did not owe a duty to the plaintiff, and that the fault lies with the owners and operators of the building, the Kashanco defendants, for failing to turn the hot water off in the building. The Kashanco defendants oppose APM's motion, arguing that APM should have told Isik to shut off the hot water in the building.

It is well settled that the movant on 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 Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

Both TBC and APM argue that they cannot be found negligent, as they do not owe a duty to the plaintiff. "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 138 [2002]). However, there are three situations in which a party who enters into a service contract may be said to have assumed a duty of care, and thus be potentially liable in tort to third parties: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies

on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Id.* at 140).

In support of its motion for summary judgment TBC submits, *inter alia*, the deposition transcripts of Isik, along with Frank Casaldi and Christopher Berge, the service department supervisor and installation supervisor of TBC, respectively, and the contracts between TBC and the Kashanco defendants. The submitted evidence demonstrates that TBC was an independent contractor and did not owe a direct duty to the plaintiff. It also establishes that TBC did not launch a force or instrument of harm, as it did not perform any work on the malfunctioning mixing valve that resulted in the sudden change in water temperature. The submitted contracts also show that TBC did not assume all other parties' duties to maintain the premises. As the plaintiff cannot establish that she determinately relied on TBC's continued performance, and even if she could, such reliance would be limited to the installation of the boiler and maintenance thereof, neither of which was responsible for the plaintiff's harm, TBC meets its burden on the motion. As no party opposes this motion, summary judgment dismissing the plaintiff's negligence claim is granted.

In support of its motion for summary judgment APM submits, *inter alia*, the deposition transcripts of Isik, along with the deposition of Edward Brockman, a manager for APM, and all of the contracts between APM and the Kashanco defendants. These submissions fail to establish APM's *prima facie* entitlement to judgment as a matter of law. Although the submissions do establish that APM did not owe a direct duty to the plaintiff, they fail to demonstrate that APM, in failing to exercise reasonable care in the performance of its duties, did not launch a force or instrument of harm upon the plaintiff. A party that "creates or exacerbates" a harmful condition may generally be said to have "launched" it, for the purposes of establishing liability. Espinal v Melville Snow Contractors, Inc., *supra* at 142. In this instance, APM does not establish that it did not exacerbate the harmful condition, *i.e.* the sudden hot water issues in the building, by failing to instruct Isik to turn off the hot water in the building when APM knew that it would be multiple days before a replacement mixing valve could be installed.

Furthermore, APM fails to establish that it was not negligent in the installation of the first malfunctioning mixing valve. Although it is undisputed that the mixing valve worked properly for four months after installation, APM relies solely on that point when arguing that it was not negligent in the initial installation, which is insufficient to establish that the valve was not negligently installed. Cf. Nichols v Agway, Inc., 280 AD2d 889 [4th Dept. 2001] [defendant

established proper installation by affidavit of employee who installed hot water heater in conformance with manufacturer's instructions and inspected it]. As APM provides no evidence supporting a conclusion that the first mixing valve was properly installed, and because there is no dispute that the mixing valve malfunctioned four months after installation, APM does not show that it did not 'launch' the harmful condition.

TBC and APM's motions for summary judgment on the plaintiff's second cause of action for public and private nuisance is granted. To establish public nuisance a party must show "a public right or privilege common to every person in the community is interrupted or interfered with" (People v Rubinfeld, 254 NY 245 [1930]), which is not the case here, where only the tenants of a single building were effected. Moreover, to establish private nuisance, a party must show "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564 [1977]), and here the plaintiff cannot establish that TBC or APM caused an interference that was intentional in origin.

TBC and APM each move for summary judgment dismissing all cross-claims for contribution and common-law and contractual indemnification as against them. To establish a claim for common law indemnification, a party must show that (1) it has been held vicariously liable without proof of any negligence or actual supervision on its part, and (2) the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work. See Naughton v City of New York, 94 AD3d 1 (1st Dept. 2012). Moreover, contribution is only available where two or more tortfeasors combined to cause an injury and is determined in accordance with the relative culpability of each such person. See Children's Corner Learning Ctr. v A. Miranda Contracting Corp., 64 AD3d 318 (1st Dept. 2009). As TBC has established that it was not negligent, all cross-claims for contribution and common-law indemnification are dismissed. As APM has not established that it was not negligent, its motion is denied, except to the extent that, as TBC cannot be found liable, its cross-claims for contribution and common-law indemnification are dismissed.

Turning to the claims for contractual indemnification, all of the contracts between TBC and the Kashanco defendants state that, "[TBC] shall indemnify and hold harmless [the Kashanco defendants] for any claims for property damage, personal injury or wrongful death with respect to any of the materials provided, or work being performed by [TBC] pursuant to this

contract." As none of the plaintiff's claims arise from the materials provided by TBC, i.e. the boiler, or the work it performed, all cross-claims for contractual indemnification are dismissed.

Similarly, APM's contracts with the Kashanco defendants all state that, "[APM] shall indemnify and hold harmless [the Kashanco defendants] for any claims for property damage, personal injury or wrongful death with respect to any of the materials provided, or work being performed by [APM] pursuant to this contract." However, as the materials or work provided by APM pursuant to said contract may be found to have caused the plaintiff's injuries, dismissal of the cross-claim for contractual indemnification is not proper at this time.

Accordingly, and upon the foregoing papers, it is,


ORDERED that the motion of the defendant Total Boiler Care, Inc. for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims as against it is granted, and the complaint and all cross-claims against it are dismissed; and it is further,

ORDERED that the motion of the defendant Advantage Plumbing and Mechanical Corp. for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims as against it is granted to the extent that the plaintiff's second cause of action for public and private nuisance is dismissed, and all cross-claims by defendant Total Boiler Care, Inc. are dismissed, and the motion is otherwise denied, and it is further,

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the Court.

2/7/2020
DATE


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART