# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. SABRINA KRAUS **PART** 57TR

*Justice*

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MARGARET RODGERS,

Plaintiff,

- v -

JOSE VASQUEZ, 1819 WEEKS AVE. REALTY CORP., NANCY HABER

Defendant.

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**INDEX NO.** 159810/2019

**MOTION DATE** April 21, 2022

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for DISMISS.

## BACKGROUND

Plaintiff commenced this action against 1819 Weeks Ave. Realty Corp. (Landlord), her former landlord, Nancy Haber (Haber) their managing agent and Jose Vasquez (Vasquez) their alleged employee, seeking damages as a result of Vasquez surreptitiously videotaping plaintiff while she showered in a bathroom provided to her at the Subject Building. Vasquez has never answered or appeared herein.

## ALLEGED FACTS

On March 14, 2019, plaintiff resided at Apartment 4C, at 47 Perry Street, New York, New York owned and operated by Landlord and Haber. Plaintiff had been experiencing plumbing issues in her bathroom for over one year, rendering her bathroom unusable. Specifically, the bathroom had insufficient water pressure for showering. When that issue was finally addressed by the defendants, that resulted in a second dilemma in that dangerously hot

boiling water was now flowing from the shower faucet. Landlord and Haber and hired Vazquez to fix the plumbing and to do other repairs around the apartment complex. Haber had known Vazquez for decades and prior to the date of loss herein, had hired him to do repair work for her and Landlord on numerous occasions.

On March 14, 2019, as plaintiff's bathroom was unfit for showering, Vazquez recommended she use a shower in another unit in the building. While showering, plaintiff observed a hole in the wall close to the ceiling, where Vazquez was using his iPhone to record her. Plaintiff immediately ran from the shower into an adjacent room where she found Vazquez, who admitted to taping her. After the incident, plaintiff advised Haber of what had transpired, and that plaintiff was going to terminate her lease with the Landlord. Haber advised plaintiff that she would only receive her security deposit if she did not commence any legal proceedings.

**PENDING MOTION**

On November 1, 2021, Haber and Landlord moved for an order dismissing the action pursuant to CPLR §3211(a)(7). On April 21, 2022, this court heard oral argument, and reserved decision. For the reasons stated below the motion is granted in part and denied in part.

**DISCUSSION**

When determining a motion to dismiss pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory [*Bd. of Mgrs. of 285 Driggs Ave. Condominium v. 285 Driggs Ave., LLC*, 173 A.D.3d 821, 822 (2019)]. " … (A) motion to dismiss pursuant to CPLR 3211(a)(7) must be denied 'unless it has been shown that a material fact, as claimed by the pleader to be one, is not a fact at all, and unless it can be said that no significant dispute exists

regarding it' [*Quiroz v. Zottola*, 96 A.D.3d 1035, 1035 (2nd Dept. 2012)]". The burden never shifts to the nonmoving party and a plaintiff will not be penalized because she has not made an evidentiary showing in support of his or her complaint (*Id*).

The complaint asserts causes of action against Haber and Landlord for: negligence; negligent hiring and/or retention and supervision; liability based on *Respondeat Superior*; breach of warranty of habitability; breach of contract; and unfair and deceptive trade practices in violation of GBL §349(h).

***Negligence***

In order to state a claim for negligence plaintiff must allege a duty owed by defendants to plaintiff, breach thereof, and injury proximately caused by the breach (*Pasternack v Laboratory Corp. of America Holdings* 27 NY3d 817). Clearly, the landlord owed plaintiff a duty to give her a safe place in which to dwell and shower. The court takes judicial notice from the HPD website that as of 2018, Haber was listed as the Registered managing Agent for the Subject premises and Mason Lorenzo was listed as an Officer of Landlord.[1] As a Registered Managing Agent Haber also owed plaintiff a duty of care.

Plaintiff has alleged that these duties were violated resulting in her proximate injury. Based on the foregoing, the complaint adequately alleges a cause of action for negligence and the motion to dismiss this cause of action is denied.

***Negligent Hiring, Negligent Retention and Negligent Supervision***

There is no statutory requirement that causes of action sounding in negligent hiring, negligent retention, or negligent supervision be pleaded with specificity (see, *Jones v. Trane,* 153 Misc.2d 822, 831).

[1] The court further notes that the building has not been validly registered with HPD since 2018.

In instances where an employer cannot be held vicariously liable for its employee's torts, the employer can still be held liable under theories of negligent hiring, negligent retention, and negligent supervision (see, *Hall v. Smathers,* 240 N.Y. 486, 148 N.E. 654; Restatement [Second] of Torts § 317). However, a necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury (see, e.g., *Park v. N.Y.C. & H.R.R. Co.,* 155 N.Y. 215, 49 N.E. 674; *Gallo v. Dugan,* 228 A.D.2d 376, 645 N.Y.S.2d 7; *Mataxas v. North Shore Univ. Hosp.,* 211 A.D.2d 762, 621 N.Y.S.2d 683; *Detone v. Bullit Courier Serv.,* 140 A.D.2d 278, 528 N.Y.S.2d 575; *Di Cosala v. Kay,* 91 N.J. 159, 450 A.2d 508; Restatement [Second] of Agency § 213, comment d).

*Kenneth R. v. Roman Cath. Diocese of Brooklyn*, 229 A.D.2d 159, 161 (1997).

The amended complaint in this action makes no such allegation. Based on the foregoing the causes of action for negligent hiring, retention and supervision are dismissed.

***Respondeat Superior***

"In the absence of any negligent behavior by an employer, liability for acts of an employee may generally be imposed upon the employer pursuant to the doctrine of Respondeat superior if the employee was acting within the scope of his employment (Sauter v. New York Tribune, 305 N.Y. 442, 113 N.E.2d 790)".

Defendants allege that Vasquez was an independent contractor, but plaintiff alleges that Vasquez was an employee. Plaintiff's allegation is sufficient to defeat the motion as to that element.

However "New York courts consistently have held that sexual misconduct and related tortious behavior arise from personal motives and do not further an employer's business, even when committed within the employment context." *Doe v. Alsaud*, 12 F. Supp. 3d 674, 677–78 (S.D.N.Y. 2014); *See also Adorno v. Corr. Servs. Corp.,* 312 F.Supp.2d 505, 516–17 (S.D.N.Y.2004) (*New York courts have repeatedly found no vicarious liability for claims involving sexual misconduct, including sexual assault*); *Judith M. v. Sisters of Charity Hosp.,* 93 N.Y.2d 932 (1999) (*holding that a hospital orderly who was tasked with bathing the plaintiff was*

*acting outside the scope of his duties when he sexually abused her while doing so*); *Kirkman v. Astoria Gen. Hosp.,* 204 A.D.2d 401, 402 (1994) (*dismissing complaint alleging employer liability for rape of child patient by hospital security guard*); *Joshua S. v. Casey,* 206 A.D.2d 839, 839 (1994) (*upholding dismissal of respondeat superior claim for sexual abuse of a child by a priest*); *Koren v. Weihs,* 190 A.D.2d 560, 560–61 (1st Dep't 1993) (*dismissing claim alleging employer liability for hospital psychotherapist who engaged in "sex therapy" with a patient*).

Based on the foregoing the causes of action asserted pursuant to *Respondeat Superior* is dismissed.

***Breach of Warranty of Habitability***

Real Property Law §235-b provides in pertinent part:

> In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.

N.Y. Real Prop. Law § 235-b (McKinney).

Read broadly the complaint alleges that plaintiff was unable to use her bathroom for its intended purpose for a substantial period of time and that defendants were on notice of same, therefore the complaint does make out a claim for breach of warranty of habitability. The conditions plaintiff alleges in the complaint constitute a breach of the warranty of habitability and a breach of lease and if established would entitle plaintiff to appropriate damages for the time the conditions existed. *Bartley v. Walentas*, 78 A.D.2d 310, 312 (1980).

Based on the foregoing, the motion to dismiss the causes of action for breach of warranty of habitability and breach of contract are denied.

## CONCLUSION

WHEREFORE it is hereby:

ORDERED that the motion to dismiss is granted in part and the fourth, fifth, and tenth causes of action of the complaint are dismissed; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a virtual preliminary conference in on June 9, 2022, at 11:00 AM; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

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

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4/21/2022
DATE

SABRINA KRAUS, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |