

Clark v City of New York

2022 NY Slip Op 34530(U)

April 4, 2022

Supreme Court, Kings County

Docket Number: Index No. 504214/2018

Judge: Ingrid Joseph

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At IAS Part 83 of the Supreme Court, State of New York, County of Kings, held at the Courthouse thereof at 360 Adams Street, Brooklyn, New York on the 4th day of April 2022.

P R E S E N T: HON. INGRID JOSEPH, J. S. C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
SHA-SHA CLARK,

Index No.: 504214/2018

Plaintiff,

-against-

Decision and Order

CITY OF NEW YORK and NEW YORK
CITY HOUSING AUTHORITY,

Defendants.

-----X
NEW YORK CITY HOUSING AUTHORITY,

Third-Party Plaintiff,

-against-

RAZ INTERIORS LTD,

Third-Party Defendant.

-----X

The following e-filed papers considered herein:

NYSCEF E-filed doc

Notice of Motion/Affirmation/Affidavit/Exhibits.....	192 - 212; 214 - 228
Opposition.....	229 - 232; 233; 236 - 238
Reply.....	239; 241 - 242

In this matter, defendant/third-party plaintiff, New York City Housing Authority (“NYCHA”), moves by notice of motion (Motion Seq. 7) pursuant to CPLR § 3212 for an order granting summary judgment in its favor and against third-party defendant, Raz Interiors LTD

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(“Raz”), on its third-party claim for contractual indemnification. Plaintiff moves for summary judgment (Motion Seq. 8) on the issue of liability against NYCHA, the owner of the premises located at 130 3rd Avenue, Apartment 7J, Brooklyn, New York 11217 (“Wyckoff Gardens”).

Plaintiff commenced this matter against NYCHA by the filing of a Summons and Verified Complaint on March 1, 2018 to recover damages for personal injuries she allegedly sustained when a portion of the bathroom ceiling in her apartment collapsed on her head. NYCHA filed a third-party Summons and Complaint against Raz, alleging that Raz, which undertook to paint and repair apartments at the premises, including plaintiff’s apartment, is contractually obligated to indemnify NYCHA.

A predecessor justice (Partnow, J.) denied plaintiff’s first motion for summary judgment without prejudice with leave to file a second motion within ninety (90) days from the date of entry of the decision and order. The order, dated April 9, 2021, was entered on April 16, 2021; however, there is no corresponding notice of entry showing that NYCHA served a copy of the order with notice of entry upon plaintiff. In any event, plaintiff filed the instant, second motion for summary judgment on July 16, 2021, one day after the 90-day period elapsed. The court will consider plaintiff’s second motion for summary judgment, since it is based upon nearly identical grounds as the previous motion (*Homeland Ins. Co. of New York v National Grange Mut. Ins. Co.*, 84 AD3d 737 [2d Depot 2011]).

In support of her motion, plaintiff contends that NYCHA had actual and constructive notice of the dangerous condition of her bathroom ceiling and failed to remedy it. Plaintiff submitted, among other documents, her deposition testimony, copies of NYCHA work orders¹,

¹Plaintiff’s Exhibit H, consisting of multiple work orders documenting plaintiff’s calls regarding issues with the ceiling in her bathroom.

WO#32363966: Line 1: 7/2/2014: “Plaster paint,” Line 2 “in bathroom;”

and an email dated August 3, 2016 with a picture depicting the condition of her bathroom ceiling that she purportedly sent to NYCHA. Plaintiff also contends that the doctrine of *res ipsa loquitur* applies for purposes of awarding summary judgment in her favor, because the collapse of her bathroom ceiling is an event that would not occur in the absence of negligence.

NYCHA argues that material issues of fact exist, including the credibility of plaintiff, whose version of events, after the alleged ceiling collapse, differs from her daughter's account of what occurred. NYCHA further argues that there was no hole in plaintiff's ceiling and that the condition of the ceiling was not recurrent, or ongoing, and there were no active ceiling leaks in the bathroom contemporaneous with the collapse that allegedly occurred on April 12, 2017. Additionally, NYCHA contends that the alleged defective condition of plaintiff's bathroom ceiling was latent and not discoverable upon pre-painting inspection and consequently, NYCHA did not have actual or constructive notice of the condition. NYCHA asserts that the evidentiary inference of *res ipsa loquitur* is inapplicable in this case, because there exist issues of fact.

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 in admissible form to demonstrate the absence of any material issues of fact (*Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]). Failure to make such prima facie showing requires a

WO#38901612: Line 1: 8/26/2015: "Can you see where the water is coming from?: Yes. Does it leak when it rains?: No. Has this happen before?: Yes.: Is it leaking right now?: Yes. Is the flow constant, dripping or flooding?: Dripping. Line 2: "Leak from above - Main leak from above - Maint" Line 3 Wayne Bailey, Started 8/27/2015 Ended 8/27/2015 unfounded;"

WO#44230648: Line 1: 6/6/2016: in pertinent part, "Is it leaking right now? Yes, is the flow constant, dripping or flooding?: Constant," Line 3: "Res sts part of ceiling came down due to leak from abv res sts part of ceiling came down due to leak from abv, Line 4: "Resident refused to let worker in," Line 5: Wayne Bailey started 6/6/2016, Ended 6/6/2016 "RESREFUSED;"

WO#44292104: Line 1: 6/11/2016: in pertinent part, "Is the flow constant, dripping or flooding?: Dripping," Line 3: dated 6/13/2016: "Failureclass = Leak from above, Problemcode = Overtoilet," "[i]s the flow constant, dripping or flooding?: Constant," Line 5: "res staes still waiting for svs in need water is pouring down over toilet [from] apt above;"

WO#4470526: Line 2: 6/27/2016: "Ceiling need to be plastered," Line 4: 7/24/2016, "I've called to schedule but was told that approval was needed. I am still waiting for my bathroom ceiling to get fix."

WO#45059886: Line 2: 8/3/2016: "CementRepaired," Line 3: "Brklayer ceiling."

denial of the motion, regardless of the sufficiency of the opposing papers (*Id.*). The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v. New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

It is understood that an owner of realty owes a duty to maintain the property in a reasonably safe condition” (*Farror v Teicholz*, 773 AD2d 674, 676 [2d Dept 1991]). To establish a prima facie case of negligence, plaintiff must establish that NYCHA either created or had actual or constructive notice of the condition (*Piacquadio v. Recine Realty Corp.*, 84 NY2d 967; *Lewis v. Metropolitan Transportation Authority*, 99 AD2d 246, *affd.* 64 NY2d 670 [1984]). In order to satisfy this burden, plaintiff must demonstrate by proof in admissible form that the defect in her ceiling was visible, apparent, and existed for a sufficient length of time prior to the accident to permit NYCHA’s employees to discover and remedy it” (*Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

In this case, plaintiff has failed to establish that NYCHA caused the defect in her bathroom ceiling, or that NYCHA had actual or constructive notice of the defect. Plaintiff’s reports of a leaking/dripping ceiling in her bathroom began in 2014 and ceased in 2016, according to the NYCHA work orders and email annexed to her motion. In fact, the work order from August 3, 2016 indicates that the brick, cement ceiling in plaintiff’s bathroom was repaired. There is conflicting testimony as to whether a hole existed when Raz undertook to paint plaintiff’s apartment/bathroom, and whether Raz’s painter, Leobardo Ramirez (“Mr. Ramirez”),

filled a hole, plastered and painted, or just painted plaintiff's bathroom ceiling. It is undisputed, however, that the alleged collapse occurred after Mr. Ramirez completed work in plaintiff's apartment on April 12, 2017. NYCHA's expert, Edward A. Gray, opined with a reasonable degree of engineering certainty that there was no evidence that the bathroom ceiling fragments which fell on April 12, 2017 fell as a result of an active, ongoing or recurrent water leak. He further opined that there were no water marks or structural defects in plaintiff's bathroom ceiling, and the fallen debris was from the outer layer of the ceiling, not from its concrete core.

The parties also provided discrepant testimony about the scope of Mr. Ramirez's work. Specifically, it is unclear whether he filled a hole in plaintiff's bathroom ceiling and then painted, or if he merely painted the ceiling. Additionally, plaintiff is the sole witness of the collapse and consequently, the salient facts of what occurred are exclusively within her knowledge (*Hirsch v Greenridge Associates, LLC*, (26 AD3d 411 [2d Dept 2006] citing *Donohue v Elite Assoc.*, 159 AD2d 605, 606 [2d Dept 1990])[proper basis for denying a plaintiff's motion for summary judgment]). In fact, plaintiff provided few details about the alleged collapse, other than it happened while she was utilizing the toilet. It should be noted that plaintiff's account of what occurred after the ceiling fell also differs from her daughter's version of the sequence of events. Therefore, the court finds that plaintiff has failed to establish entitlement to summary judgment as a matter of law.

Plaintiff also seeks summary judgment based upon an inference of negligence that would be afforded under the doctrine of *res ipsa loquitor*. The court is cognizant that *res ipsa loquitor* is often applied in cases of falling objects (*Cole v Mandell Food Stores, Inc.*, 93 NY2d 34 [1999])[jury properly instructed on *res ipsa loquitor* in case where supermarket customer sustained injury when roll-up security gate fell and struck him on the head]). The Court of

Appeals has held that the criteria for *res ipsa loquitor* is (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of plaintiff (*Morejon v Rais Const. Co.*, 7 NY3d 203, 209 [2006]). Here, the court finds that the plaintiff has failed to satisfy this criteria for purposes of establishing entitlement to summary judgment as a matter of law. The happening of the ceiling collapse, whether it fell on plaintiff's head, the issue of whether NYCHA had exclusive control at the time of the alleged collapse, and the allegation that Mr. Ramirez, rather than a NYCHA employee, was the last person to interact with the ceiling, all present material issues of fact.

Regarding NYCHA's motion, a party's right to contractual indemnification depends upon the specific language of the relevant contract (*Goodlow v 724 Fifth Ave. Realty, LLC*, 127 AD3d 1138, 1140 [2d Dept 2015] citing *Desena v North Shore Hebrew Academy*, 119 AD3d 631, 636 [2d Dept 2014]), and the promise to indemnify should be found if it can be clearly implied from the language and purpose of the entire agreement and surrounding circumstances (*Id.*).

It is undisputed that Raz submitted the prevailing bid and undertook NYCHA's "Three (3) Coat Paint System Modernization for Apartments" ("modernization project") at Wyckoff Gardens that involved repairing, plastering and painting the interiors of apartments at Wyckoff Gardens. An indemnification clause with broad terms was incorporated by reference in the Contract Terms and Conditions ("CTC") to the purchase order, which constituted NYCHA's acceptance of Raz's bid to complete the project at Wyckoff Gardens. The CTC provides, under subsection (c), Section 16,

“[i]f any person sustains injury or death . . . resulting directly or indirectly from the Work of the Contractor . . . in the performance of this Contract, or from the Contractor’s failure to comply with any of the provisions of this Contract or of law, or for any other reason whatsoever, the Contractor, to the fullest extent permitted by applicable law, shall indemnify and hold [NYCHA] harmless for any and all claims and judgments for damages and from cost and expenses to which the Authority may be subjected or which it may suffer or incur by reason thereof.”

Raz’s painter, Mr. Ramirez, did perform work in furtherance of the modernization project in plaintiff’s apartment on April 10th, 11th and 12, 2017. The parties do not dispute that a portion of the work performed by Raz involved painting the plaintiff’s bathroom ceiling. However, Mr. Ramirez and plaintiff have differing accounts of whether he filled a hole in her bathroom ceiling, or just painted, and it is unclear what caused a portion of the ceiling to collapse. The court finds that the opinions proffered by NYCHA’s expert, Mr. Gray, are insufficient to attribute the collapse solely to Mr. Ramirez’s work. He equivocated that Mr. Ramirez caused some degree of disruption to the underlying coating of plaster, or to the concrete itself. He also opined that the fragments that fell hours after Mr. Ramirez completed his work on April 12th resulted from the activity of Mr. Ramirez, but failed to rule out whether the work done by NYCHA contributed to the collapse. Further, there is no account of the location of the collapsed area versus the area that NYCHA repaired, or if it was the same section of ceiling. These issues must be resolved before it is determined whether the alleged collapsed ceiling was caused directly or indirectly by Raz, triggering its obligation to indemnify NYCHA.

Accordingly, it is hereby,

ORDERED, that the motion of defendant/third-party plaintiff, New York City Housing Authority (Motion Seq. 7), for summary judgment as against third-party defendant, Raz Interiors LTD, on its third-party complaint for contractual indemnification is denied, and it is further

ORDERED, that plaintiff's motion (Motion Seq. 8) for summary judgment on the issue of liability against NYCHA is denied.

This constitutes the decision and order of the court.

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HON. INGRID JOSEPH, J. S. C.

**Hon. Ingrid Joseph
Supreme Court Justice**

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