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| <b>Jones v Riverside Bldrs. Inc.</b>                                                                                                                                                                                           |
| 2023 NY Slip Op 31662(U)                                                                                                                                                                                                       |
| May 17, 2023                                                                                                                                                                                                                   |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: Index No. 150842/2019                                                                                                                                                                                           |
| Judge: Arlene P. Bluth                                                                                                                                                                                                         |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

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

PRESENT: HON. ARLENE P. BLUTH PART 14

*Justice*

-----X

GRACE JONES,

Plaintiff,

- v -

RIVERSIDE BUILDERS INC., RIVERBANK APARTMENT  
CORP, THE ANDREWS ORGANIZATION, VILLA ART, LLC.

Defendant.

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INDEX NO. 150842/2019

MOTION DATE 05/09/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220

were read on this motion to/for JUDGMENT - SUMMARY.

Defendant Villa Art, LLC (“Villa”)’s motion for summary judgment is granted in part and denied in part. Plaintiff’s cross-motion for summary judgment on all causes of action against all defendants is denied. Defendants Riverbank Apartment Corp. and the Andrews Organization’s (collectively, the “Co-op”) cross-motion for summary judgment is granted in part and denied in part. Plaintiff’s second cross-motion, which is to amend, is denied.

**Background**

This action arises out of plaintiff’s assertion that the construction of a penthouse apartment on the floor above her apartment caused significant damage to her unit. She insists that the construction work in the apartment above led to dust and debris in her apartment, the creation of a large hole in her ceiling, water damage, and portions of her apartment were

rendered uninhabitable. Villa owned the penthouse apartment and contracted with defendant Riverside Builders, Inc. (“Riverside”) to do a gut renovation of the apartment. Plaintiff brings eight causes of action against the defendants. Defendants Riverbank Apartment Corp. and the Andrews Organization are the owner of the premises and the managing agent, respectively.

As an initial matter, the Court observes that, for some reason, the parties made numerous cross-motions that are not really cross-motions. These cross-motions do not seek relief solely as against the original moving party-- Villa. Although the Court will overlook this procedural error, the Court will therefore organize this opinion largely by cause of action rather than the varying cross-motions.

### **Claims Against Villa**

Plaintiff brings three causes of action against Villa (the first, third and fourth claims). These causes of action are not labeled, but appear to be for negligence (first), constructive eviction (third), and damage to personal property (fourth).

The Court denies Villa’s motion for summary judgment on these claims. As plaintiff points out, in a similar set of circumstances, the Appellate Division, First Department found issues of fact surrounding negligence claims alleged against an apartment owner doing renovation work on a unit above a plaintiff’s unit (*see 905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 927, NYS2d 29 [1st Dept 2011]).

The First Department noted that “While a party who employs an independent contractor is generally not liable for the negligent acts of that contractor, plaintiffs have established the existence of triable issues of fact as to the applicability of an exception to this general rule, where the employer's duty is nondelegable. As property owners, [defendants] had a duty of care which extended to those who suffered property damage as a result of construction on their property and

included a duty to take reasonable precautions to avoid injuring persons on adjoining premises. This duty was reinforced by the proprietary lease and alteration agreement, both of which recognized the need to protect other shareholders from damages caused by the [defendants'] use of their unit” (*id.* at 667-68).

Similarly, here, there was an alteration agreement that required Villa to hold other shareholders harmless (NYSCEF Doc. No. 175). That raises an issue of fact about Villa’s negligence, the constructive eviction claim, and the damage to personal property.

Villa’s assertion that it neither created nor had notice of the conditions about which plaintiff complains does not compel the Court to grant its motion. The alteration agreement obligated Villa to take reasonable steps to protect the building and fellow shareholders. It matters not that plaintiff was not a party to that agreement. In other words, Villa wanted to do a renovation of the apartment and the Co-op permitted it to do so as long as it indemnified fellow shareholders. Villa cannot avoid liability at the summary judgment stage by simply blaming the contractor (Riverside).

#### **Plaintiff’s Cross-Motion (the first one)**

The Court denies plaintiff’s cross-motion (the first one) to the extent that she seeks summary judgment on her complaint. Plaintiff’s moving papers did not contain a single specific citation to a deposition transcript, document, or include an affidavit from the plaintiff herself. For instance, plaintiff alleges in paragraph 14 of the affirmation in support that “Robin Miller said at her deposition . . .” but does not include a citation to that deposition transcript (NYSCEF Doc. No. 153, ¶ 14). Without any specific citations, plaintiff did not meet her burden on a cross-motion for summary judgment as against any defendant. It is not this Court’s role to review the deposition transcripts or documents to look for support for plaintiff’s arguments.

**The Co-op's Cross-Motion**

The Court grants the Co-op's cross-motion for summary judgment to the extent it seeks to dismiss the fifth cause of action (which seeks damages against only Andrews Organization [the managing agent] for monitoring the construction project). The record here does not establish how plaintiff could recover from the managing agent for simply approving a construction project. Plaintiff did not submit anything to suggest that the project itself should have been rejected; instead, she alleges that the completion of the project was not done properly. And there is no basis to find that the managing agent should be held liable for not properly monitoring a construction project especially where it made sure Villa sign an alteration agreement.

The Court observes that the Co-op's notice of motion and moving papers contends it is also seeking to dismiss plaintiff's complaint for damages alleged to have occurred on or about March 2016. But the Co-op did not expound upon this claim (there is only a single mention of March 2016 in the affirmation in support) and so the Court cannot grant that requested relief. The Court also observes that this affirmation (NYSCEF Doc. No. 174) mentions a memorandum of law but no such document was uploaded in these moving papers (NYSCEF Doc. Nos. 172-176).

**Plaintiff's Second Cross-Motion to Amend**

Plaintiff filed another cross-motion, this one to amend to add Riverbank Apartment Corp. on the fifth cause of action and to add a ninth cause of action for an order directing the remediations of the alleged water penetration into plaintiff's apartment.

The Co-op argues in opposition (but does not make a motion) that counsel for plaintiff should be disqualified because she is acting as a fact witness.

The Court denies the cross-motion to amend as plaintiff did not submit anything from the plaintiff herself to establish that these amendments state cognizable causes of action. Nor did plaintiff include specific citations to deposition transcripts or other documents to support her proposed claims. Moreover, plaintiff apparently confused defendants Riverside and Riverbank, as evidenced by her submission of a revised proposed amended complaint in reply to this second cross-motion. And, in any event, plaintiff failed to include proposed amended pleadings that clearly show the changes and additions as required by CPLR 3025(b). This is another basis to deny this cross-motion.

### **Cross-Claims**

Villa also moves for summary judgment on its cross-claims and to dismiss the cross-claims alleged against it.

With respect to Villa's claim for contractual indemnity against Riverside, the Court denies that branch of the motion. "In contractual indemnification, the one seeking indemnity need only establish that it was free from negligence . . . Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

As the Court found above, there are issues of fact about whether Villa had an obligation to plaintiff, a fellow shareholder, to take reasonable steps to prevent damage to plaintiff's apartment. Because the Court has not found that Villa is free of any negligence, the Court is unable to find that Villa is entitled to contractual indemnity at this stage.

However, the Court grants this motion to the extent that it seeks summary judgment on its breach of contract against Riverside for failure to procure insurance. The parties' contract required Riverside to obtain insurance and name Villa as an additional insured. Riverside did not

produce an insurance policy naming Villa as an additional insured in opposition. Instead, it argues that there is a discrepancy regarding the identity of the owner and, therefore, who should be named as an additional insured.

To be sure, the contract (NYSCEF Doc. No. 151) names Villa as the owner on page 2 and also names the managing member, Alan Tisch, as the owner on page 15. But Riverside did not submit any evidence to show that it obtained an insurance policy naming either Villa or Mr. Tisch as an additional insured. Riverside could also have, theoretically, obtained a policy naming both parties as additional insureds or shown that it reached out to Villa and Mr. Tisch if it truly was unsure. In other words, this is not a situation in which Riverside produced an insurance policy in opposition and the parties are fighting about whether the right party was named as an additional insured.

Instead, Riverside appears to argue it did not have to get any insurance to protect the owner of the apartment because the owner was identified as a corporate entity in one instance and as a natural person in another. That conclusion does not follow from the contract and the Court finds that whatever uncertainty this discrepancy may have created, it did not permit Riverside to fail to get insurance in favor of Villa (or Tisch) altogether.

To the extent that Villa seeks to dismiss any cross-claims alleged against it, that branch of the motion is denied as Villa did not meet its prima facie burden. It did not specify what those claims are.

To the extent that the Co-op also seeks summary judgment on its cross-claims, that branch of the cross-motion is denied as it also failed to meet its prima facie burden. The Co-op did not specifically cite the cross-claims it seeks to dismiss. And while it claims that it wants affirmative summary judgment on its cross-claims for contractual indemnification and breach of

contract against Villa, it failed to make any substantive arguments for this relief in its affirmation in support in NYSCEF Doc. No. 174. It only offers a conclusory statement regarding the relief it wants.

Accordingly, it is hereby

ORDERED that Villa Art, LLC's motion is granted only to the extent that its claim for summary judgment on its cross-claim for breach of contract by defendant Riverside Builders, Inc. for failure to procure insurance is granted and denied with respect to the remaining relief requested; and it is further

ORDERED that both of plaintiff's cross-motion are denied; and it is further

ORDERED that defendants Riverbank Apartment Corp. and the Andrews Organization's cross-motion is granted only to the extent that the fifth cause of action against The Andrews Organization is severed and dismissed and denied with respect to the remaining relief requested.

5/17/2023

DATE

CHECK ONE:

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CASE DISPOSED

GRANTED

☐

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☒

OTHER

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REFERENCE

ARLENE P. BLUTH, J.S.C.