

**Akhter v Hope Mgt. LLC**

2023 NY Slip Op 32598(U)

July 19, 2023

Supreme Court, Kings County

Docket Number: Index No. 521246/2021

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19<sup>th</sup> day July of 2023

HONORABLE FRANCOIS A. RIVERA

-----X  
FARIDA AKHTER,

Plaintiff,

-against-

HOPE MANAGEMENT LLC and  
4117 15TH AVENUE REALTY CORP.,

Defendants.  
-----X

**DECISION & ORDER**

Index: 521246/2021

Recitation in accordance with CPLR 2219 of the papers considered on the notice of motion, filed on September 9, 2022, under motion sequence number one, by defendants Hope Management LLC and 4117 15th Avenue Realty Corp. (hereinafter the movants), for an order pursuant to CPLR 3212 granting summary judgment in their favor on the issue of liability and dismissing the complaint of Farida Akhter (hereinafter the plaintiff).

- ◆ Notice of Motion
- ◆ Affirmation in Support
  - Exhibits A-H
- ◆ Statement of Material Facts
- ◆ Memorandum of Law in Support
- ◆ Counterstatement of Material Facts
- ◆ Affirmation in Opposition
  - Exhibits 1-3
- ◆ Affirmation in Reply

## BACKGROUND

On August 8, 2021, the plaintiff commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). The complaint alleges thirty-one allegations of fact in support of a single cause of action for damages for personal injuries.

The verified complaint and the plaintiff's bill of particulars allege the following salient facts. On January 23, 2019, at or about 9:00 pm, the plaintiff was in the bedroom of her apartment located at 4117 15th Avenue, Brooklyn, New York 11219 apartment C5 (hereinafter the subject property) when a portion of the ceiling therein collapsed on top of her. The plaintiff sustained personal injuries. The collapse was caused by the negligence of the defendants in the ownership, management, and repair of the subject property in causing, allowing, and permitting a hazardous, defective, dangerous and/or trap-like condition to exist in the ceiling of the subject property for an unreasonable length of time having notice of the condition. The plaintiff sustained physical injury caused by the subject accident

On September 4, 2021, the movants interposed and filed their joint answer with the KCCO.

## LAW AND APPLICATION

The movants seek summary judgment dismissing the verified complaint on the basis that they did not create nor have notice of the ceiling condition that caused the subject accident. In support of the motion they submitted, among other things, the

pleadings, and an affirmation of their counsel, plaintiff's bill of particulars and deposition testimony, the deposition testimony of the superintendent and an affidavit of the manager of the subject property.

The affirmation of the movants' counsel demonstrated no personal knowledge of any of the facts alleged in the complaint or in the movants' answer. An attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance (*Nerayoff v Khorshad*, 168 AD3d 866, 867 [2d Dept 2019], citing *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]).

The movants also proffered the deposition testimony of Besnik Kukiq (hereinafter Kukiq), the superintendent of the subject property. Kukiq testified that not all complaints regarding issues with the apartments in the subject property were memorialized. He testified that if a tenant complained directly to him and he fixed the issue it would not necessarily generate a work order. He also testified that the tenants were instructed to call the superintendent with complaints, but he did not record the complaints and repairs. Of those that were recorded, he did not maintain a permanent records of the work order and would discard them annually. As of the date of his deposition Kukiq no longer had any work orders for any period prior to 2019.

The movants also submitted the affidavit of Joseph Klein (hereinafter Klein), the manager of the subject property. Klein alleged the following facts. He was the property manager of the subject property from November 8, 2017, until February 22, 2019. During that time, if a complaint were made by a tenant after working hours, a message would be taken by a receptionist at an answering service called "Anserve", and they

would relay the message to the Hope Management LLC's receptionist, superintendent, and to Klein. A work order addressing the complaint would then be made the following business day. Klein claimed no awareness that Hope Management LLC ever received any complaints, including voicemails, about the ceiling in apartment C5 of the subject property on or prior to January 23, 2019.

The movants also submitted the plaintiff's deposition testimony. The plaintiff testified that she was a tenant of the subject property for approximately seven years and that the subject accident occurred while she was sitting on her bed and watching television. She said the ceiling was wet when it struck her. She testified that there was water dripping from the bedroom ceiling onto the heater for about one year prior to her accident and that there was a small hole in the ceiling above the heater which plaintiff noticed five to six months before her accident. This heater was located about two arm's length away from where she was sitting at the time of the accident. She stated that her co-tenant had told her that co-tenant had complained about the condition of the ceiling to the building management before the subject accident.

Both the superintendent and the building manager averred that they received no complaints about the ceiling in apartment C5 (hereinafter C5) of the subject property prior to the subject accident. The building manager further averred that he reviewed all work orders related to C5 from June 2015 to present and found no complaints about the ceiling from June 2015 through the date of plaintiff's accident on January 23, 2019.

The plaintiff pointed out the following facts in opposition. The movants did not annex any work orders. Neither the building manager nor the superintendent proffered

any evidence pertaining to work orders to address water leaks in the apartment directly above C5, namely apartment D5 (hereinafter D5). The superintendent also testified that not all complaints were memorialized by the movants. He testified that if a tenant complained directly to him and he fixed the issue it would not necessarily generate a work order. He testified that the tenants were instructed to call the superintendent with complaints, but the superintendent admitted that he did not record complaints and repairs which is in direct contradiction with building managers allegations. Also, the superintendent did not maintain a permanent records of work order and would discard them annually. Moreover, as of the date of his deposition the superintendent no longer had any work orders for any period prior to 2019.

The plaintiff also submitted work orders for D5. The plaintiff accurately noted the following facts. The workorders span from September 13, 2016, to February 20, 2019. The May 3, 2018 workorder references a “broken faucet.” An April 30, 2018 work order states, “bathtub is clogged has water in it is not draining.” Another workorder states, “issue with sink in bathroom” and reports “bathtub water not working properly.” On December 28, 2017, a workorder was generated stating “Kitchen sink is always running water, faucet doesn’t stop and its leaking.” On June 15, 2017, a complaint was memorialized in a workorder stating that the “kitchen sink is leaking through, then, eleven days later, another entry for the same work order states “when will someone come fix the kitchen sink?” Thirteen days after the initial complaint, the tenant complained again on June 28, 2017, about movants’ failure to repair the leak “tenant called again that the kitchen since has to be fixed, because the leaking is rotting all of the cabinets.” The

next day, the sink still was not repaired “the tenant called yelling ‘there’s a leak in the kitchen for a few weeks already’.”

In reply, the movants submitted an affirmation of counsel and annexed one exhibit, namely work orders for C5. To meet their prima facie burden, the movants could not rely on evidence submitted for the first time in their reply papers (*Catnap, LLC v Cammeby's Mgmt. Co., LLC*, 170 AD3d 1103, 1105 [2d Dept 2019], citing *L'Aquila Realty, LLC v Jalyng Food Corp.*, 103 AD3d 692, 692 [2d Dept 2013]).

The movants objected to the untimeliness of the plaintiff’s opposition papers. Pursuant to CPLR 2004, the Court disregarded the alleged untimeliness because the movants submitted a reply and were, therefore, not prejudiced by the delay. It is noted that the movants did not dispute the authenticity of the work orders submitted by the plaintiff.

In general, to impose liability for an injury caused by a ceiling collapsing 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 (*Ellisy v Eklecco, LLC*, 56 AD3d 517 [2d Dept 2008], quoting *Figueroa v. Goetz*, 5 A.D.3d 164, 165 [1<sup>st</sup> Dept 2004]). A defendant has constructive notice of a defect when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it could have been discovered and corrected (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837–838 [1986]). In addition, a defendant who has actual knowledge of a particular ongoing and recurring hazardous condition may be charged with constructive notice of each specific reoccurrence of that condition (*Toussaint v Ocean Ave. Apartment Assocs., LLC*, 144 AD3d 664, 664–65 [2d Dept 2016]).

The movants' evidentiary submissions did not eliminate all material issues of fact regarding their lack of notice of the ceiling condition which caused the plaintiff's injuries. The sworn testimony of their superintendent and building manager was inconsistent regarding the generation and maintenance of work orders. The superintendent kept no record of work orders prior to 2019. The building manager alleged facts that were not based on personal knowledge but rather on his review of business records. He claimed that his review of the business records yielded no work orders regarding the ceiling in C5 before the date of the subject accident. He did not annex a copy of any of the records he reviewed.

It is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted (*Citibank, N.A. v Potente*, 210 AD3d 861, 862 [2d Dept 2022]). Accordingly, evidence of the contents of business records is admissible only where the records themselves are introduced. Without their introduction, a witness's testimony as to the contents of the records is inadmissible hearsay (*Bank of New York Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). In sum, the testimony of the building manager regarding work orders was inadmissible hearsay. Had it been admissible, it would have been inconsistent or contradictory to the testimony of the superintendent.

As a result, the movants did not meet make a prima facie showing that they had no actual or constructive notice of the alleged hazardous condition of the ceiling in C5 (*see Quinones v Starret City, Inc.*, 163 AD3d 1020, 1022 [2d Dept 2018]). The motion for

summary judgment is denied, regardless of the sufficiency of the opposing papers

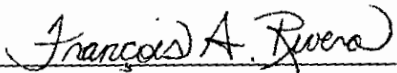
(*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

### CONCLUSION

The motion by defendants Hope Management LLC and 4117 15th Avenue Realty Corp. for an order pursuant to CPLR 3212 granting summary judgment in their favor on the issue of liability and dismissing the complaint of Farida Akhter is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

  
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J.S.C.

**HON. FRANCOIS A. RIVERA**  
**J.S.C.**