

**Sanchez v 230 Seaman Assoc., L.L.C.**

2023 NY Slip Op 34990(U)

October 2, 2023

Supreme Court, Bronx County

Docket Number: Index No. 27280/2020E

Judge: Veronica G. Hummel

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, IAS PART 20

<p>JACKAYRA SANCHEZ,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>230 SEAMAN ASSOCIATES, L.L.C., and LEMLE &amp; WOLFF PROPERTY MANAGEMENT, INC.,</p> <p style="text-align: center;">Defendants.</p>
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Index No. 27280/2020E  
HON. VERONICA G. HUMMEL, A.J.S.C.

Mot. Seq. No. 2

In accordance with CPLR 2219(a), the decision herein is made upon consideration of all of the papers filed in NYSCEF in connection with the motion of plaintiff JACKAYRA SANCHEZ (Mot. Seq. 2) for an order, pursuant to CPLR 3212, granting plaintiff summary judgment against defendants 230 SEAMAN ASSOCIATES, L.L.C. (230 Seaman) and LEMLE & WOLFF PROPERTY MANAGEMENT, INC. (Lemle & Wolff) on the issue of liability and dismissing all affirmative defenses related to comparative negligence.

This is an action to recover for personal injuries allegedly occurring when a bathroom ceiling collapsed causing plaintiff injury on August 5, 2019 (the Accident). Plaintiff alleges that the ceiling collapsed because of a water leak from the plumbing for

the toilet in the apartment above. 230 Seaman owns the relevant multiple unit dwelling apartment building, which is located at 230 Seaman Avenue, in New York County (the Building).

On the motion, the deposition transcripts of John Paul Richey (the Tenant), plaintiff, the Building's Superintendent (Raphael Lajara), and the Property Manager (Manual Felix) are submitted. In addition, defendants submit affidavits from a forensic analyst (Dan Gutierrez), and a leasing supervisor at Lemle & Wolff (Melissa Rosario). Copies of the Management Agreement, emails, D&I responses, photographs, and EBT Exhibits are also provided to the court.

The undisputed facts are as follows: 230 Seaman owed the Building on the date of the Accident. By management agreement contract commencing on June 13, 2012, Lemle & Wolff entered into an agency agreement with 230 Seaman to exclusively rent, lease, operate and manage the Building.

By a lease agreement dated December 14, 2018, Lemle & Wolff entered into a lease agreement for apartment 2E (the Apartment) with non-party Tenant which was in effect on the date of the Accident. The lease for the Apartment allowed the owner access to make repairs and inspect the apartment.

On the date of the Accident, plaintiff, who was a guest, arrived at the Apartment with the permission of the Tenant. Plaintiff was using the toilet in the Apartment when the ceiling above the toilet collapsed.

At deposition, plaintiff testified that she was in the Apartment two days before the Accident and many times over seven years. On the date of the Accident, she and her

mother (Ms. Garcia) arrived around 12:00 p.m. in the Apartment. She was there to help set up the Apartment for a small religious ceremony. Between 12 pm and 1 pm while she was using the toilet, the ceiling above the toilet collapsed. Plaintiff testified that she did not observe any water leak or discoloration in the bathroom ceiling two days before the Accident or on the date of the Accident.

Plaintiff testified that one or two years before the Accident, she verbally complained to the superintendent "Jose" about a leak in the Apartment bathroom ceiling. She stated that the Tenant put a bucket in the bathroom due to the leak, but she had not seen a bucket in the bathroom for over two years.

The Tenant testified that he first made complaints about his bathroom ceiling in February of 2019. He claimed the water was sporadic and that the superintendent (named Jose) came to the Apartment each time he made a verbal complaint. The Tenant made no complaints about the bathroom from April of 2016 to the end of 2018.

The Tenant stated that he made a complaint in writing over two months before the Accident on May 23, 2019 ( the May 2019 Email). He stated that he referred to "Jose" in this email because it was a nickname for the Superintendent (Rafael Lajara). The Tenant admitted at his deposition that he only knew of the superintendent as Rafael and had him saved in his phone as "Rafael Super 230". The May 2019 Email allegedly emailed to [info@lemlewoff.com](mailto:info@lemlewoff.com) read as follows:

*"To whom it may concern, This is John Paul Richey of 230 Seaman Ave, Apt 2E. I have asked Jose repeatedly to do something about the persistent leak from my bathroom ceiling and nothing has happened! Thus the coming rent payment will be my last until these issues are addressed".*

The Tenant was not home at the time of the Accident. He was informed by Ms. Garcia of the Accident in early evening. Four days after the Accident, on August 9, 2019, the Tenant sent another email to the managing agent at [info@lemlewoff.com](mailto:info@lemlewoff.com) (the August 2019 Email).

*"I have had issues with my apartment for several months. There's been issues with both bathroom and kitchen ceilings and faucets. The super and property manager came to the apartment several times. They documented the damage with photos and promised repair. The only thing they've repaired is the bathroom faucet and that took over a week. Every time I see the super, I remind him of the remaining issues. As of today August 9th 2019, I have had severe damage in my bathroom for over 72 hours. There is a massive hole in the ceiling and EVERY time the tenant above flushes their toilet, dirty water comes falls into my bathroom. There have been multiple visits of plumbers and I've communicated with the super every day...I have tried to be patient, but after 72 hours of my bathroom being in disrepair and unsanitary I can no longer allow this to continue. I am withholding rent and will report this issue to 311 Emergency Services on Monday August 12th if there is no improvement done".*

The Superintendent testified that he does not have any nicknames and is not called Jose. He stated that he never received any emails about repairs and or requests for repairs to the toilet in the Apartment or the apartment above before the Accident. If the Tenant made a complaint about the ceiling above his toilet, the Superintendent would have gone to the Apartment to verify the complaint. The Superintendent was shown the purported May 2019 Email and stated that if such a complaint was received, he would have been notified to fix it immediately. He never saw this email at any point and only learned of the leak after the Accident.

The Property Manager testified on October 11, 2022. He started managing the Building on March 3, 2019 and remained the property manager through August of 2019. As the Property Manager he would address any tenants' complaints that came through the Lemle & Wolff complaints departments. The Property Manager did not have any nicknames and he would only be called "Raf" sometimes. If a complaint was made about

a toilet or a leak in the bathroom, the Property Manager would first call the Superintendent to go into the bathroom and check it out. The Property Manager confirmed he never saw the May 2019 Email.

Defendants submit the affidavit of Ms. Melissa Rosario on behalf of Lemle & Wolff, who attests that she was in charge of the email account of info@lemlewolff.com, where the Tenant allegedly sent the May 2019 Email. She did not have any recollection of receiving the May 2019 Email. She also attested that she never deleted any emails out of the email account.

Defendants submit the affidavit of Dan Gutierrez, a digital expert who did a full forensic analysis of the email account of info@lemlewolff.com, including all inbox messages, send messages and deleted messages. The expert avers that no email was received to info@lemlewolff.com from the Tenant on May 23, 2019.

#### *Legal Analysis*

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidence sufficient to eliminate any material issues of fact from the case. *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). When deciding a summary judgment motion, a court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957). In making this determination, the court must view the evidence in the light most favorable to the party opposing the motion, and must give that party the benefit of every inference that can be drawn from the evidence. *Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22

N.Y.3d 470, 475 (2013); *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 (2012). Every available inference must be drawn in the nonmoving party's favor. *De Lourdes Torres v. Jones*, 26 N.Y.3d 742, 763 (2016). If there is any doubt as to the existence of a triable issue, summary judgment should be denied. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

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 A.D.3d 517 (2d Dep't 2008); *Figueroa v. Goetz*, 5 A.D.3d 164, 165 (1st Dep't 2004); *See, e.g., Dunn v 6-8 St. Nicholas Realty Corp.*, 204 A.D.3d 466 (1st Dep't 2022) (plaintiff established his *prima facie* entitlement to summary judgment by submitting evidence that the hotel had actual notice of the defect that caused his injury and that the defect was not repaired). Here, plaintiff argues that defendants had actual and constructive notice of the alleged ceiling defect.

*Actual Notice:*

It is undisputed that a timely email from a tenant to a landlord or managing agent concerning a defective condition may constitute actual notice. Here, plaintiff established her *prima facie* entitlement to judgment as a matter of law by submitting evidence demonstrating that the defendants had actual notice of the recurring leak in the bathroom. *Dunn v. 6-8 St. Nicholas Realty Corp.*, 204 A.D.3d 466 (1st Dep't 2022). According to testimonial and documental evidence, the ceiling had a leak months before the Accident, an employee of defendant had been by to examine the condition, the Tenant made numerous complaints about the leak, including two months before the Accident in the May 2019 Email, but the leak was never properly remedied. *Id*; *Figueroa v. Goetz, supra*; *Toussaint v. Ocean Ave. Apt. Assoc., LLC*, 144 A.D.3d 664 (2d Dep't 2016).

In opposition, defendants raise an issue of fact. See *Lozano v. Mt. Hope Place Properties, Inc.*, 141 A.D.3d 455 (1<sup>st</sup> Dep't 2016). Even plaintiff's testimony confirms that she saw no leaks in apartment two days before the Accident or on the day of Accident. In addition, the Superintendent and the Property Manager deny having any knowledge of the alleged leak prior to the Accident and deny receiving the May 2019 Email. Furthermore, the affidavits submitted generate an issue of fact as to whether the May 2019 Email was in fact sent and received by defendants. The deposition testimony and affidavits showing that defendants did not receive any prior complaints about the subject area of the ceiling raise issues of credibility which cannot be determined on a motion for summary judgment. *Correa v. Matsias*, 153 A.D.3d 1312 (2d Dep't 2017); *Best v. 1482 Montgomery Estates, LLC*, 114 A.D.3d 555, 556 (1<sup>st</sup> Dep't 2014); *Dunson v. Riverbay Corp.*, 103 A.D.3d 578 (1<sup>st</sup> Dep't 2013). It cannot be said that defendants' testimony is incredible as a matter of law, or that it consists only of feigned issues of fact. *Best v. 1482 Montgomery Estates, LLC, supra*.

#### *Constructive Notice*

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. *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 (1986). In addition, a defendant who has actual knowledge of a particular ongoing and recurring hazardous condition may be charged with constructive notice each specific reoccurrence of that condition. *Toussaint v. Ocean Ave. Apartment Associates, LLC.*, 144 A.D.3d 664 (2d Dep't 2016). Mere notice of a general or unrelated condition, however, is

insufficient to constitute constructive notice of the specific condition that caused plaintiff's injuries. *Id.*; *Willis v. Galileo Cortlandt, LLC.*, 106 A.D.3d 730 (2d Dep't 2013).

Based on the submissions, for the reasons set forth above, plaintiff sets forth a *prima facie* showing that the defendants had constructive notice of the alleged defect and the defect existed for a sufficient length of time before the Accident such that it could have been discovered and corrected.

In opposition, defendants demonstrate that they had no notice of the alleged defect condition that caused the ceiling to collapse by submitting the deposition testimony of the Superintendent and Property Manager stating that there were no leaks before the Accident and they received no notice of any leak or defective condition before the Accident. Hence if the trier of fact believes the defendants' witnesses, including defendants' expert, there is no evidence of notice. Defendants thereby generate an issue of fact warrant denial of the motion. *See, Lozano v. Mt. Hope Place Props., Inc.*, 141 A.D3d 455 (1st Dep't 2016). On a summary judgment motion the court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility. *Dauman Displays Inc. v. Masturzo*, 168 A.D.2d 204 (1st Dep't 1990); *Dunson v. Riverbay Corp.* *supra* (precluding summary judgment for plaintiff after the ceiling collapsed as there was a triable issue of fact as to notice); *see Breton v. Dishis*, 206 A.D.3d 446 (1st Dep't 2022); *Goodwin v. Sam One Realty, LLC*, 25 Misc. 3d 1213(A) (Sup. Ct. 2009); *Best v. 1482 Montgomery Ests., LLC*, *supra*. Hence, that part of the motion that seeks summary judgment on liability is appropriately denied.

In contrast, that part of the motion that seeks the dismissal of the affirmative defenses related to comparative negligence is granted. Plaintiff sets forth a showing that

her actions did not contribute to the Accident and the relevant affirmative defenses lack merit, and defendants do not offer opposition to that showing. In any event, there are no triable question of fact raised as to the issue.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby:

**ORDERED** that the part of the motion of plaintiff JACKAYRA SANCHEZ (Mot. Seq. 2) that seeks an order, pursuant to CPLR 3212, granting plaintiff summary judgment against defendants 230 SEAMAN ASSOCIATES, L.L.C. (230 Seaman) and LEMLE & WOLFF PROPERTY MANAGEMENT, INC. (Lemle & Wolff) on the issue of liability is denied; and it is further

**ORDERED** that the part of the motion of plaintiff (Mot. Seq. 2) that seeks an order dismissing all affirmative defenses related to comparative negligence (first, second, tenth, fifteenth, sixteenth, twentieth, twenty-first, twenty-fifth, twenty-sixth, and twenty-eighth affirmative defenses) is granted without opposition; and it is

**ORDERED** that the Clerk shall mark the motion (Mot. Seq. 2) decided in all court records.

This constitutes the Decision and Order of the Court.

Dated: October 2, 2023

Hon.   
HON. VERONICA G. HUMMEL, A.J.S.C.

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| 1. CHECK ONE.....            | <input type="checkbox"/> CASE DISPOSED IN ITS ENTIRETY  | <input checked="" type="checkbox"/> CASE STILL ACTIVE |
| 2. MOTION IS.....            | <input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |   |
| 3. CHECK IF APPROPRIATE..... | <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> SUBMIT ORDER   | <input type="checkbox"/> SCHEDULE APPEARANCE          |
|                              | <input type="checkbox"/> FIDUCIARY APPOINTMENT  | <input type="checkbox"/> REFEREE APPOINTMENT          |