

John v 1410 Holdings LLC
2023 NY Slip Op 35138(U)
January 31, 2023
Supreme Court, Bronx County
Docket Number: Index No. 25302/2020E
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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CHRISTINA JOHN,

Plaintiff,

DECISION and ORDER
Index No. 25302/2020E

-against-

1410 HOLDINGS LLC, CENTURY HOLDINGS,
LLC, CHILDREN’S RESCUE FUND, and PILGRIM
REALTY, LLC,

Defendants.

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HON. MARY ANN BRIGANTTI

Upon the foregoing papers, the defendant Children’s Rescue Fund (“CRF”) moves for an order pursuant to CPLR 3212, granting it summary judgment, dismissing the second amended complaint and dismissing all crossclaims against it asserted by the codefendants 1410 Holdings, LLC (“1410”), Century Holdings, LLC (“Century”), and Pilgrim Realty, LLC (“Pilgrim”) (collectively, the “Building Defendants”), and ordering CRF be indemnified and held harmless by Pilgrim for all expenses incurred by CRF relating to this litigation, including attorney’s fees, together with such other and further relief as this Court deems just and proper.

The plaintiff Christina John (“Plaintiff”) opposes the motion and cross-moves for summary judgment on the issue of liability against CRF, and dismissing C.R.F.’s affirmative defenses, and setting this matter down for trial as to damages only, and such other and further relief as this Court deems just and proper.

The Building Defendants oppose the motion and cross-motion. CRF opposes the cross-motion.

I. Background

This matter arises out of an alleged ceiling collapse that occurred inside of an apartment bathroom within the premises located at 1410 Grand Concourse, Bronx, New York (the “Building”), which is owned and managed by the Building Defendants. Plaintiff was residing in the apartment at the time of the incident and was allegedly struck by the falling debris and sustained injuries. She thereafter commenced this action against CRF and the Building Defendants.

CRF is a non-profit corporation that provides transitional housing services to homeless families in New York through an agreement with the New York City Department of Homeless Services (“DHS”). Prior to this incident, CRF had entered into a memorandum of understanding (“MOU”) with Pilgrim wherein Pilgrim would make available certain apartment units in the Building for CRF to use as transitional housing for homeless families. At the time of this incident, Plaintiff and her family were residents of an apartment unit that CRF provided pursuant to its agreements with DHS and Pilgrim.

CRF now moves for summary judgment, dismissing all claims asserted against it. CRF argues that, as a “managing agent” and not an “owner” of the premises, it owed no duty of care to maintain and repair the apartment. Further, the MOU agreement with Pilgrim specifically provided that Pilgrim would assume the responsibility to maintain and repair Plaintiff’s apartment. CRF adds that none of the exceptions of *Espinal v. Melville Snow Contractors* (98 N.Y.2d 136 [2002]) apply here. In addition, CRF argues that it is entitled to summary judgment on its contractual indemnification claim against Pilgrim pursuant to the relevant provision found in the MOU.

In opposition to the motion, Plaintiff argues that the evidence shows that CRF had control over the subject apartment, therefore it owed a duty to Plaintiff. Plaintiff asserts that the agreements demonstrate that CRF retained the responsibility to maintain the premises. Plaintiff and the Building Defendants further point to the parties’ deposition testimony indicating that CRF was solely responsible for inspecting the apartments and reporting the need for repairs to the Building employees. Building employees would not take any action to make repairs unless specifically instructed to by CRF employees. Plaintiff and Building Defendants assert that there is no evidence here that the Building Defendants were ever made aware of the need for repairs inside of Plaintiff’s apartment before the incident. Plaintiff further asserts that in the event the Court finds CRF was not in possession or control of the premises, Plaintiff detrimentally relied on CRF to provide maintenance and ensure that the apartment units were maintained in compliance with applicable laws and regulations.

In support of her cross-motion, Plaintiff points to deposition testimony and various inspection records created by CRF establishing that it had actual notice of a leak in Plaintiff’s bathroom ceiling in the months prior to this incident. Plaintiff argues that while the records

indicate that CRF requested repairs to be made, there is no indication that any repairs were ever performed on the bathroom ceiling prior to its collapse.

In opposition to the cross-motion, the Building Defendants submit an incident report drafted by CRF personnel indicating that Plaintiff reported she was sleeping in her bed when the bathroom ceiling collapsed, and it "could have hit her." Building Defendants assert that this statement, coupled with evidence that Plaintiff was suffering from Schizophrenia at the time, raises fact issues as to Plaintiff's credibility. CRF argues that Plaintiff is not entitled to summary judgment against it because the admissible documentary evidence establishes that it discharged its duty to notify Pilgrim of the defective condition prior to the incident, and CRF cannot be held liable because they were not required to actually perform the repairs within the unit.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Importantly, a defendant-movant cannot establish their entitlement to summary judgment by pointing to gaps in the plaintiff's proof (*see Bryan v. 250 Church Associates, LLC*, 60 A.D.3d 578 [1st Dept. 2009]; *Harvey v. Henry 85 LLC*, 176 A.D.3d 443 [1st Dept. 2019]).

III. Applicable Law and Analysis

A. CRF's Motion

It is well-settled that “[l]iability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises” (*Balsam v. Delma Eng'g Corp.*, 139 A.D.2d 292, 296–297 [1st Dept. 1988], *lv. dismissed and denied* 73 N.Y.2d 783 [1988]). “The existence of one or more of these elements is sufficient to give rise to a duty of care” (*id.*). “The determinative factor is one of possession or control” (*Huth v. Allied Maintenance Corp.*, 143 A.D.2d 634, 635 [2d Dept. 1988]). “This principle recognizes that the person in possession and control of property is best able to identify and prevent any harm to others” (*Butler v. Rafferty*, 100 N.Y.2d 265, 270 [2003]).

In this case, CRF failed to demonstrate that it “lacked ‘any authority to maintain or control the area in question, or to correct any unsafe condition’” (*Reid v. City of New York*, 168 A.D.3d 447, 448 [1st Dept. 2019], quoting *Gibbs v. Port Auth. of N.Y.*, 17 A.D.3d 252, 254 [1st Dept. 2005]). In its contract with DHS dated January 9, 2009, CRF agreed to operate a transitional residence for homeless families and provide temporary housing units. The contract also provided that CRF, “or its landlord,” in accordance with the terms of its lease, would ensure that those units and the buildings were “maintained in a good state of repair and sanitation and in conformance with applicable State and City laws, regulations, and codes.” The MOU between CRF and Pilgrim states that CRF “is desirous of *gaining access to and control of certain portions of the Premises...*” (emphasis added). It further provides that Pilgrim was responsible for “maintaining the Premises¹ internally and externally to comply with all relevant municipal, State and Federal codes and other legal requirements. This shall include, but not be limited to HVAC, roof, plumbing, exterior, interior hallways and walls.” The MOU also states that Pilgrim will “keep the Premises, both internally and externally, *excepting only the apartments*, in a clean and orderly state to conform to relevant municipal codes and the requirements of the Agreement, except if caused by, or arise from the negligence, vandalism, or other affirmative act of any person(s) residing in any apartment, or any invitee of such resident(s).” (MOU at Par. 6). This paragraph concludes: “[i]t shall be the responsibility of [CRF] to cause the apartments to be kept

¹The MOU annexed to the moving papers does not define or describe the “Premises.” Such description is apparently found in “Schedule A” to the MOU, but that schedule is not provided with this document.

in a clean and orderly fashion” (*id.*). The MOU thus provides that Pilgrim was to maintain the premises, but it was not obligated to keep the apartment units themselves in a clean and orderly state.

Notwithstanding the language in the MOU purportedly obligating Pilgrim to maintain the internal portions of the Building, it is apparent from the parties’ actual practice that CRF retained significant control over the apartment units, including where Plaintiff resided. The issue of control may be established by the parties’ course of conduct demonstrating that a party assumed the responsibility to maintain a particular portion of the premises (*Colon v. Mandelbaum*, 244 A.D.2d 292, 293 [1st Dept. 1997]; *see also Hernandez v. East Boy, Inc.*, 104 A.D.3d 435 [1st Dept. 2013]; *Luck v. Rockledge Scaffold Corp.*, 159 A.D.3d 660, 661 [1st Dept. 2018]). In this case, CRF employees would conduct regular inspections of the apartment units. As part of this inspection, CRF would make note of whatever repairs were needed. CRF’s president and CEO, Orlando Ivey (“Ivey”), confirmed that CRF would be responsible for ensuring that units were “prepared and ready” for residents, meaning that they were inspected and in “turnkey” condition. After a client was provided a unit, there would be subsequent regular inspections by CRF employees. Plaintiff testified that residents had to cooperate with these inspections or risk jeopardizing their stay at the facility.

While Pilgrim would perform actual repairs, CRF was solely responsible for fielding complaints from residents, performing the unit inspections, and requesting that repairs take place. Ivey testified that an “operations manager” from CRF would act as a liaison between the building superintendent and CRF for the purpose of reporting needed repairs. Joseph Halpert (“Halpert”) property manager for Century and 1410, testified that if a resident complained directly to the Building superintendent or handyman, they were instructed to refer the complaint to CRF, and the building personnel would take no further action until someone from CRF instructed them to do so.

The record also indicates that CRF had a physical office inside of the premises. Ivey confirmed the existence of the office but was unaware if it was ever occupied. Plaintiff, however, testified that she made regular complaints to “the office and the super” in her building. She was also assigned a case worker from CRF, and she would make complaints about the condition of her unit to that person as well. Halpert further testified that the building

superintendent would be in touch with “people from [CRF] who had an office on the first floor of [the premises].”

The above demonstrates that although CRF had no ownership interest in the building, CRF failed to carry their burden of demonstrating that they lacked possession or control over Plaintiff’s unit. CRF therefore has not demonstrated that they owed no duty of care to Plaintiff (*see Matias v. New Yorker Hotel Mgt. Co., Inc.*, 201 A.D.3d 592, 594 [1st Dept. 2022])[fact issues as to whether hotel retained substantial control over building and pipe that burst and created a hazardous condition]; *Reid*, 168 A.D.3d at 448; *Keane v. 85-87 Mercer St. Assoc.*, 304 A.D.2d 327 [1st Dept. 2003][issue of fact as to whether lessee assumed control over building steps by undertaking in their lease to maintain but not structurally repair them]; *Arce v. 1681 Realty Holding Corp.*, 276 A.D.2d 328 [1st Dept. 2000]).

In light of the foregoing, Court does not reach the issue of whether the *Espinal* exceptions apply here since CRF did not demonstrate that their liability is only predicated on a contractual obligation (*Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136 [2002]). Accordingly, CRF is not entitled to summary judgment dismissing Plaintiff’s complaint or the crossclaims asserted against it.

Because CRF has not established that the accident was not caused by its own active negligence, CRF is not entitled to summary judgment against Pilgrim on its contractual indemnification claims (*see Correia v. Professional Data Mgt.*, 259 A.D.2d 60, 65 [1st Dept. 1999])[party seeking contractual indemnity must establish that it was free from negligence]). In addition, the indemnification provision states:

Pilgrim shall indemnify and hold [CRF] harmless from and against any and all claims, actions, damages, liability and expenses (including attorney fees) in connection with loss of life, and/or personal injury caused by the negligence of the building owner. This includes injury or death to residents caused by faulty workmanship, falling debris due to lack of building upkeep, and exposed radiator pipes (MOU at Par. 14).

This provision is triggered only in the event of a finding of negligence on the part of Pilgrim. CRF, however, failed to demonstrate as a matter of law that Pilgrim’s negligence was the cause of this accident (*see, e.g., Shala v. Park Regis Apartment Corporation*, 192 A.D.3d 607 [1st Dept. 2021]; *Taylor v. Bande Real Estate Corp.*, 278 A.D.2d 404, 405 [2d Dept. 2000]).

B. Plaintiff's Cross-Motion

Plaintiff's cross-motion for summary judgment on the issue of CRF's liability is denied.

In opposition, Building Defendants submitted a copy of the incident report generated after the accident. The report states, in pertinent part:

"On Tuesday December 3, 2019 at approximately 11:00AM client Christina John ... who resides at 1410 Grand Concourse unit 46 came to the Building Operations Office stating that a piece of plaster fell in her bathroom and woke her up from her sleep, Ms. John stated that if she was sitting on the toilet the piece of plaster could have hit her. I Operations Manager Newton Cabreja asked Ms. John if anyone was hurt she replied that one was hurt and her children were not in the unit at the time. I then told Ms. John that I will contact the Superintendent (John) to repair the ceiling. I Operations Manager Newton Cabreja called the Superintendent (John) at approximately 11:08AM and informed him of the needed repair in Ms. John bathroom in which John replied 'I'm going up right now.' I then informed Ms. John the superintendent (John) is on his way up to her unit."

Plaintiff does not object to the admissibility of this document or the statement it contains (see *Shinn v. Catanzaro*, 1 A.D.3d 195, 198 [1st Dept. 2003]). In any event, Ivey testified that the incident report was made in the ordinary course of business (Ivey EBT at 86), and the statements constitute admissions against Plaintiff's interest (*Thompson v. Coca-Cola Bottling Co.*, 170 A.D.3d 588, 588 [1st Dept. 2019]). Plaintiff was the sole witness to her accident. The report raises bona fide issues as to Plaintiff's credibility and as to how this accident occurred, therefore Plaintiff is not entitled to summary judgment on the issue of CRF's liability (see *Muhammad v. George Hyman Const.*, 216 A.D.2d 206 [1st Dept. 1995], citing *Urrea v. Sedgewick Ave. Assoc.*, 191 A.D.2d 319 [1st Dept. 1993]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that CRF's motion for summary judgment is denied, and it is further,

ORDERED, that Plaintiff's cross-motion for summary judgment is denied.

This constitutes the Decision and Order of this Court.

E N T E R

Dated: January 31, 2023



Mary Ann Briganti, J.S.C.