

Rolon v Zevrone Realty Hous. Dev. Fund Co., Inc.
2024 NY Slip Op 35212(U)
May 8, 2024
Supreme Court, Bronx County
Docket Number: Index No. 20656/2019E
Judge: Kim Adair Wilson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK: Part IA-12

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SAMARIS ROLON,

Plaintiff,

-against-

ZEVRONE REALTY HOUSING DEVELOPMENT
FUND COMPANY, INC., ZEVRONE REALTY
CORP., LANGSAM PROPERTY SERVICES
CORP., TOTAL NY CONSTRUCTION CORP.
and SEAN'S CONSTRUCTION OF NY, INC.,
Defendants.

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ZEVRONE REALTY HOUSING DEVELOPMENT
FUND COMPANY, INC., ZEVRONE REALTY
CORP., LANGSAM PROPERTY SERVICES
CORP.,

Third-Party Plaintiffs,

-against-

TOTAL NY CONSTRUCTION CORP.
and SEAN'S CONSTRUCTION OF NY, INC.,
Third-Party Defendants.

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Kim Adair Wilson, J.:

"NOTICE OF MOTION FOR SUMMARY JUDGMENT" (NYSCEF Doc 187) dated and filed July 24, 2023, respectively, by Jason Aaron, Esq., (Fullerton Beck LLP), counsel for defendant/third-party defendant Total NY Construction Corp., seeking an Order "Pursuant to CPLR §3212 granting Defendant/Third-Party Defendant TOTAL NY CONSTRUCTION CORP. summary judgment dismissing the Third-Party Complaint against it in its entirety; [and] [p]ursuant to CPLR §3212 granting Defendant/Third-Party Defendant TOTAL NY CONSTRUCTION CORP. summary judgment dismissing the Complaint in its entirety;" and "NOTICE OF CROSS-MOTION" dated and filed October 20, 2023, respectively, by John P. Grill, Esq. (Law Offices of John P. Grill, PC), counsel for plaintiff Samaris Colon, seeking an Order "(1) [p]ursuant to CPLR section 3212, granting plaintiff summary judgment on liability against ZEVRONE REALTY HOUSING DEVELOPMENT FUND COMPANY, INC., ZEVRONE

DECISION AND ORDER

Index No. 20656/2019E

Motion Seq. #: 003

HON. KIM ADAIR WILSON

J.S.C.

REALTY CORP. and LANGSAM PROPERTY SERVICES CORP and (2) denying defendant TOTAL NY CONSTRUCTION CORP's motion for summary judgment [;]" is consolidated for the purpose of disposition and decided as set forth below.

The procedural history of the instant matter is extensive. The main action was commenced on January 16, 2019, by the filing of plaintiff Samaris Rolon's Verified Complaint, seeking monetary damages for personal injuries allegedly sustained on or about December 28, 2018, when plaintiff alleges that she was caused to slip in a stairwell and sustain serious injuries, on the premises located at 561 Cauldwell Avenue, in the Bronx, New York, allegedly owned and/or controlled by defendants Zevrone Realty Housing Development Fund Co., Inc., ("Zevrone Development") and Langsam Property Services Corp. ("Langsam"). The Verified Complaint alleges a single cause of action sounding in negligence. On March 6, 2019, plaintiff filed an Amended Verified Complaint (NYSCEF Doc 5) which added defendant Zevrone Realty Corp. ("Zevrone Realty"). Defendants Zevrone Development, Zevrone Realty, and Langsam (hereafter referred to collectively as "Zevrone") filed their joint Verified Answer (NYSCEF Doc 6) on April 9, 2019, asserting a general denial and thirteen affirmative defenses. Thereafter, Zevrone filed their Third-Party Complaint, dated August 26, 2020, asserting eight causes of action sounding in indemnity and contribution against third-party defendants Total NY Construction Corp. ("Total NY"), and Sean's Construction of NY Inc. (Sean's Construction"). Plaintiff subsequently twice amended their Verified Complaint (NYSCEF Docs 90 and 93) to add third-party defendants Total NY and Sean's Construction as defendants in the main action, and also to reflect the commencement of the third-party action. Defendants/third-party defendants Sean's Construction joined issue in the third-party action on September 17, 2020, by filing its Verified Answer to the Third-Party Complaint (NYSCEF Doc 97), asserting a general denial of all third-party claims, eleven affirmative defenses, and a cross-claim for contribution from third-party co-defendant Total NY. On September 18, 2020, Sean's Construction also filed its Answer (NYSCEF Doc 106) to plaintiff's Third Amended Verified Complaint, also denying all allegations, asserting eleven affirmative defenses, and asserting a cross-claim for contribution from all co-defendants on the main action. Zevrone subsequently amended their Answer (NYSCEF Doc 115) to include a total of 13 affirmative defenses and to assert cross-claims for contribution, common law

and contractual indemnification, and for costs, disbursements and attorney's fees, against all other co-defendants in the main action. Sean's Construction thereafter filed a Reply (NYSCEF Doc 116) to Zevrone's amended Answer denying all cross-claims. On October 15, 2020, defendant Total NY interposed an Answer (NYSCEF Doc 118) to plaintiff's Third Amended Verified Complaint denying all allegations, asserting fifteen affirmative defenses, and raising a cross-claim for contribution. Soon thereafter, on October 22, 2020, Total NY also filed an Answer (NYSCEF Doc 124) to Zevrone's Third-Party Complaint, asserting a denial of all third-party allegations, sixteen affirmative defenses, a counter-claim against Zevrone for contribution, and also a cross-claim against Sean's Construction for contribution. On that same date, Sean's Construction filed a Reply (NYSCEF Doc 130) to Total NY's Answer denying the allegations raised in that third-party defendant's cross-claim. On January 9, 2023, all parties consented to a Stipulation (NYSCEF Doc 184) partially discontinuing the action without prejudice, as against Sean's Construction. Plaintiff subsequently filed a Note of Issue (NYSCEF Doc 185) on May 22, 2023.

As to the instant motion, movant Total NY moves seeking summary judgment, pursuant to CPLR 3212, dismissing both plaintiff's Complaint, and Zevrone's Third-Party Complaint, as against Total NY. In its "AFFIRMATION IN SUPPORT" (NYSCEF Doc 189) movant asserts that plaintiff's claims must be dismissed as a matter of law because Total NY, as an independent contractor, owed no duty to plaintiff, who was a third-party to movant's contract with Zevrone, the owner of the subject premises, that Total NY did not launch a "force of harm" that caused plaintiff's injuries, nor did Total NY assume ongoing obligations so as to incur plaintiff's detrimental reliance on the continued performance of its duties. Movant asserts that Total NY did not own, control, or have special use of the stairs on the premises, that it had completed its work in 2017, over a year prior to plaintiff's alleged accident, and that it did not create, nor had notice of, the condition that allegedly caused the accident. They also argue that Total NY made no warranties as to the work completed, that the building superintendent, Victor Martinez, stated that he inspected the roof after the work was done and found no leaks, and that the building manager, Chris Barbieri, attested to having no issues with Total NY's completed work. Movant also cites the deposition testimony of one Raghbir Singh (NYSCEF Doc 205), president of Total NY, who testified that Total NY

was never notified by Zevrone of any complaints about the condition of the roof following the completion of the work. They further contend that third-party plaintiff Zevrone cannot establish any negligence by Total NY, that no contracts or agreements existed that required Total NY to procure insurance on Zevrone's behalf, or that otherwise evince an "unmistakable intention" to indemnify Zevrone, nor has Zevrone has proven itself free from negligence, as is prerequisite to any entitlement to indemnity, therefore requiring that Zevrone's claims for contribution and indemnification be dismissed as well.

In opposition to the movant's motion, and in support of plaintiff's cross-motion for summary judgment on liability, plaintiff submits her "AFFIRMAITION IN SUPPORT OF CROSS MOTION AND IN OPPOSITION TO MOTION" (NYSCEF Doc 211), and her "MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT" (NYSCEF Doc 213), wherein plaintiff's counsel asserts that plaintiff has demonstrated entitled to partial summary judgment on the issue of liability, having shown that Zevrone owed a non-delegable duty to plaintiff, as its tenant, to maintain the subject premises in good repair, and that Zevrone's failure to sustain that duty proximately caused plaintiff's injuries. Plaintiff contends that she has also established that Zevrone had both constructive and actual notice of the leaky condition on the stairway near plaintiff's apartment door, as evinced by both plaintiff's and Victor Martinez's deposition testimony (NYSCEF Docs 198 and 204) that plaintiff and other tenants had made numerous complaints about the accumulated water on the sixth and uppermost floor, and that Martinez had also observed the recurrent pooling of water on that floor on multiple occasions. Finally, she asserts that Total NY should be denied their sought relief, because their defective roof repairs launched a force of harm that ultimately caused injury to the plaintiff.

In further support of her cross-motion, plaintiff submits her Affidavit (NYSCEF Doc 227), wherein she asserts that during her tenancy at the subject premises she had repeatedly observed the leaking and collection of water in front of her apartment door, and that the leaks occurred whenever it rained. Plaintiff further attests that on the date of the accident plaintiff had notified the superintendent of the dangerous condition, that the owners had failed to provide sufficient warnings to passersby of the condition, and that at the occurrence

of the alleged accident, plaintiff directly observed the leakage of water from the hallway ceiling.

Also submitted in opposition to movant's application is Zevrone's "AFFIRMATION IN OPPOSITION" (NYSCEF Doc 228) dated and filed, October 20, 2023, respectively, by Jennifer R. Oxman, Esq. (Lewis Brisbois Bisgaard & Smith, LLP). Zevrone argues that the movant should be denied summary judgment dismissing plaintiff's cause of action against it because Total NY has failed to conclusively establish that it did not create the alleged leakage that caused plaintiff's injuries, or that it lacked notice of said leakage. They assert that Total NY completed the installation of an entirely new roof at some point in 2018, but that Total NY has failed to test that roof for leaks at any point following the completion of the project. Zevrone contends that where a contractor launches a force of harm, such as where it "undertakes to render services and then negligently creates or exacerbates a dangerous condition" that causes injury to a third party, that the contractor is therefore liable for that injury. Therefore, it was Total NY's burden, on summary judgment, to establish that the source of the water was not a location where they had previously performed work, and that they have failed to meet that burden. Further, Zevrone asserts, where a contractor launches a force or instrument of harm, the element of notice is irrelevant. Nonetheless, Zevrone posits that, subsequent the completion of the roof work, there is evidence that the property manager, Christopher Barbieri, received notice from plaintiff of a recurrent leak, and that Barbieri contacted Total NY to address those complaints.

Defendants Zevrone also oppose plaintiff's cross-motion, submitting their "AFFIRMATION IN OPPOSITION" (NYSCEF Doc 232) dated and filed November 10, 2023, respectively. Therein, Zevrone asserts that this Court lacks the discretion to consider plaintiff's cross-motion for summary judgment, in that it was submitted more than 120 days after the Note of Issue, offers no assertions of good cause for the delay, and is not predicated on identical grounds as Total NY's initial motion. Zevrone then asserts, largely in contradiction of its contentions offered above in opposition to the movant's application, that Zevrone had no notice of any roof leakage subsequent to the roof's replacement in 2018, and so to the extent that Zevrone's opposing assertions of fact cannot be determined to be reliable, this Court will not consider them.

In her “AFFIRMATION IN REPLY” (NYSCEF Doc 234), plaintiff contends that Zevrone should be estopped from asserting the plaintiff’s motion is untimely, in that Zevrone was a signatory to the stipulations (NYSCEF Docs 209 and 231) extending the return date of Total NY’s summary judgment motion. Plaintiff further contends that there is evidence, by way of the testimonies of Christopher Barbieri and Victor Martinez (NYSCEF Docs 201 – 204), that defendants Zevrone had notice of the recurrent leakage from the roof, and that they had previously notified Total NY of the leakage, who may have conducted additional work to effectuate repairs.

Finally, in movant Total NY’s “AFFIRMATION IN REPLY” (NYSCEF Doc 235), movant argues that Zevrone’s rebuttal is largely grounded in speculation, specifically in that Christopher Barbieri frequently expressed uncertainty in his statements as to whether he had contacted Total NY to inform it about ongoing issues, or whether Total NY had conducted additional repairs to the roof after the completion of its replacement, and that those speculations are insufficient to establish liability or to raise a question of material fact. It further contends that Total NY cannot be determined to have launched a force or instrument of harm because it received no reports of issues regarding the roof; because Martinez had inspected the roof and “had never seen any leaks in any part of the roof [;]” because the building has remained under the exclusive control of Zevrone since the completion of the work; and because Total NY never displaced Zevrone’s duty to maintain the premises, and otherwise had no duty to keep the stairs clear of water. Further, movant highlights that Zevrone has failed to contest Total NY’s sought dismissal of Zevrone’s cross-claims for indemnity and breach of contract, which should therefore be granted as a matter of law.

At the outset, with respect to the timeliness of plaintiff’s cross-motion for partial summary judgment on liability as to all remaining defendants, it is well-settled that a cross motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief “nearly identical” to that sought by the cross motion. *Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281 (1st Dept. 2006). Here, however, it is clear that the relief sought by plaintiff is well outside the scope of the movant’s motion, which only addresses those claims and cross-claims asserted against

defendant Total NY. By contrast, plaintiff's motion seeks partial summary judgment on the liability of defendants Zevrone, rather than that of the movant, Total NY. Finally, CPLR 3212(a) provides that extensions to the time to file a summary judgment motion beyond the 120-day period specified by statute may be permitted only "with leave of court on good cause shown." Here, it is apparent that none of the stipulations entered into by the parties bore the imprimatur of the court, in that none of them were so-Ordered. Therefore, that branch of plaintiff's cross-motion seeking summary judgment against defendants Zevrone Development, Zevrone Realty, and Langsam, is **DENIED** as untimely. The remainder of plaintiff's motion seeking an Order denying movant Total NY's motion for summary judgment, is **GRANTED** for the reasons set forth below.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law. *Giuffrida v Citibank Corp.*, 100N Y2d 72 (2003); *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. *Winegrad, supra* at 853. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to rebut the movants claims and establish that triable issues of fact exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

As applicable here, the defendant contractor seeking to dismiss the claims of an injured third party must demonstrate *prima facie* that the defendant did not exhibit negligence in the performance of its duties, and thereby "launch a force or instrument of harm" by creating or exacerbating a dangerous condition. *Medinas v. MILT Holdings LLC*, 131 A.D.3d 121, 126 – 127 (1st Dept. 2015); *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 142 (2002); also see *Baillargeon v. Tuttle Roofing Co.*, 92 A.D.3d 908, 909 (2d Dept. 2012); *Haracz v. Cee Jay, Inc.*, 74 A.D.3d 1145, 1146 (2d Dept. 2010). Such a showing requires a sufficient demonstration that the hazardous condition alleged to have proximately caused the plaintiff's injuries did not originate from the repair work conducted by the defendant. *Baillargeon, supra* at 908. Actual notice will be imputed where a defendant is determined to

have created a dangerous or defective condition. See *Lewis v. Metro. Transp. Auth.*, 99 A.D.2d 246, 249 (1st Dept. 1984) *aff'd*, 64 N.Y.2d 670 (1984).

Upon review and an analysis of the statutory authority, case law, the submitted papers and the record, this Court determines that the movant has not adequately demonstrated that summary judgment dismissing plaintiff's causes of action against them is warranted here. Affording the non-moving party all reasonable inferences which can be drawn from the evidence, defendant has failed to show that the water upon which plaintiff allegedly slipped did not originate from the roof that it had repaired one year prior. Therefore, defendant has not met their burden, as there exists a triable issue of material fact as to whether defendant Total NY created or exacerbated a dangerous condition in its repair of the subject premises' roof, irrespective of the issue of actual or constructive notice (see *Lewis v. Metro. Transp. Auth. Supra* at 149). Even so, were the plaintiff to prosecute her claim under the theory of actual notice, the contrasts between the testimony of Raghbir Singh, for defendant Total NY (see NYSCEF Doc 205 at pp.39, 44, and 70), and the testimony proffered by Zevrone's witness, Christopher Barbieri (see NYSCEF Doc 201 at pp.41 – 42), establish the existence of a triable issue of material fact as to whether Total NY received notice of the recurrent leakage, or whether Zevrone previously requested that Total NY take steps to ameliorate the allegedly defective condition. Therefore, that branch of movant Total NY's motion for summary judgment seeking to dismiss plaintiff's negligence claim against that defendant, only, is **DENIED** for the reasons stated herein.

We now turn to that branch of movant's motion seeking summary judgment dismissing Zevrone's cross-claims for contribution, for common law and contractual indemnity, for breach of contract to procure insurance, and for costs, disbursements and attorney's fees, as asserted in both the main action and the third-party action.

To prevail on a summary judgment motion seeking dismissal of a claim for common law indemnification, the movant must show that it the claimant did not incur vicarious liability for an injury proximately caused by the movant's actual negligence in the performance or supervision of the contracted work. See *Naughton v. City of New York*, 94 A.D.3d 1, 10 (1st Dept. 2012); *McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 374 (2011). A

party seeking indemnification must also be free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor. *Cava Const. Co. v. Gealtex Remodeling Corp.*, 58 A.D.3d 660, 662 (2d Dept. 2009); also see *Brown v. Two Exch. Plaza Partners*, 76 N.Y.2d 172, 175 (1990); General Obligations Law § 5-322.1. As to contractual indemnity, courts will construe a contract to provide indemnity to a party for its own negligence only where the contractual language evinces an “unmistakable intent” to indemnify. *Great N. Ins. Co. v. Interior Const. Corp.*, *supra* at 417. Similarly, to obtain dismissal of the breach of contract to procure insurance claim, the movant must show either that the contract contained no such insurance clause, or otherwise demonstrate due compliance with the express terms of any existing insurance clause to which the defendant is obligated, irrespective of the actual apportionment of factual liability for the plaintiff’s injuries. See *Spector v. Cushman & Wakefield, Inc.*, 100 A.D.3d 575, 575 (1st Dept. 2012); *Robles v. 635 Owner, LLC*, 192 A.D.3d 604, 605 (1st Dept. 2021); *Kinney v. G.W. Lisk Co.*, 76 N.Y.2d 215, 218 (1990). Finally, as codified by statute, any tortfeasor who pays more than its fair share of a judgment—as apportioned by the factfinder in terms of relative culpability—may recover the excess from others who are also liable. *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 556, (1992); CPLR 1401; also see *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143 (1972).

Here, although movant has failed to establish that Total NY was not negligent in its performance of the repair and replacement of the roof of the subject premises, the submitted testimonial evidence shows that Zevrone had received prior notice of the recurrent leakage from plaintiff (NYSCEF Doc 201 at p.41:8 – 11; Doc 204 at p.8:11 – 16). In opposition, Zevrone failed to raise a material issue of triable fact as to its actual notice of the dangerous condition. Even affording the non-movant the benefit of all reasonable inferences, should Total NY ultimately be found to be negligent, so must Zevrone also be found to be actually negligent as well. Because Zevrone therefore cannot possibly be entitled to indemnity from Total NY under common law nor contract, those claims, as found in Zevrone’s Third Party Complaint (NYSCEF Doc 115) and Answer (NYSCEF Doc 84), are dismissed as against Total NY. However, movant has proffered no copy of the performance contract by which it might be discerned whether or not an enforceable insurance clause exists, and so Zevrone’s claim for breach of contract to procure insurance, and for costs, disbursements, and attorney’s fees,

will not be dismissed. Further, since the respective liability of the various defendants has yet to be determined, Zevrone's claim for contribution cannot be dismissed. Therefore, that branch of movant's motion for summary judgment seeking to dismiss Zevrone's cross-claims and third-party claims against Total NY is **GRANTED solely to the extent**, as stated herein.

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, defendant/third-party defendant Total NY Construction Corp.'s motion seeking an Order (i) pursuant to CPLR 3212 granting defendant/third-party defendant Total NY Construction Corp. summary judgment dismissing the Third-Party Complaint against it in its entirety; and (ii) pursuant to CPLR 3212 granting defendant/third-Party Defendant Total NY Construction Corp. summary judgment dismissing the Complaint in its entirety, is **GRANTED solely to the extent**, as stated herein. Further, it is hereby

ORDERED that defendants Zevrone Realty Housing Development Fund Company, Inc.'s, Zevrone Realty Corp.'s, and Langsam Property Services Corp.'s First and Third Causes of Action, as set forth in their "STATEMENT PURSUANT TO RULE 3402(B) OF THE CPLR" (NYSCEF Doc 84), are dismissed as against Total NY Construction Corp.; and it is further

ORDERED that defendants Zevrone Realty Housing Development Fund Company, Inc.'s, Zevrone Realty Corp.'s, and Langsam Property Services Corp.'s Second and Third Causes of Action, as set forth in their "VERIFIED ANSWER TO THIRD AMENDED VERIFIED COMPLAINT" (NYSCEF Doc 115), are dismissed as against Total NY Construction Corp.; and it is further

ORDERED that that branch of plaintiff Samaris Colon's motion seeking an Order (i) pursuant to CPLR 3212, granting plaintiff partial summary judgment on liability against Zevrone Realty Housing Development Fund Company, Inc., Zevrone Realty Corp., and Langsam Property Services Corp., and (ii) denying defendant Total NY Construction Corp.'s motion for summary judgment is **GRANTED solely to the extent**, as stated herein; and it is further

ORDERED that the movant is directed to serve a copy of this Decision and Order with Notice of Entry, upon all parties within thirty (30) days of entry, and to file proof of service with the Court.

This constitutes the Decision and Order of this Court.

**Dated: May 8, 2024
Bronx, New York**



Hon. Kim Adair Wilson, J.S.C.