

Harrison v 345 Lenox, LLC

2025 NY Slip Op 33436(U)

September 12, 2025

Supreme Court, New York County

Docket Number: Index No. 156754/2019

Judge: David B. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

ROSALIE HARRISON,

Plaintiff,

- v -

345 LENOX, LLC D/B/A 345 LENOX AVENUE
CONDOMINIUM, HARLEM PROPERTY MANAGEMENT,
INC., JSK PROPERTY MANAGEMENT, LLC, 345 MALCOLM
X LLC, JOHN BENTON, JOHN DOE, (SAID NAME BEING
FICTITIOUS DUE TO THE UNKNOWN IDENTITY),

Defendants.

-----X

INDEX NO. 156754/2019
MOTION DATE 10/18/2024
MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221

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

Defendant John Benton moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff’s complaint and all cross-claims against him. Defendants 345 Lenox LLC d/b/a 345 Lenox Avenue Condominium, Harlem Property Management, Inc., JSK Property Management LLC, and 345 Malcolm X LLC (collectively, the Condo defendants) oppose in part and cross-move for summary judgment dismissing the complaint as against them. Plaintiff opposes both motions.

I. BACKGROUND FACTS AND CONTENTIONS

This action arises out of alleged water infiltration into plaintiff’s commercial condominium unit at 345 Lenox Avenue, which plaintiff attributes to conditions on the building roof and Benton’s adjacent roof deck, causing property damage and lost rental income (NYSCEF 5). In the amended complaint, plaintiff pleaded nine causes of action, including negligence, private nuisance, breach of contract (by-laws), breach of fiduciary duty, violations of

the Condominium Law (RPL §§ 339-i, 339-cc, 339-ee), and equitable claims for injunctive and declaratory relief (*id.*). By order dated January 24, 2024, the Court issued a preclusion order barring plaintiff from offering evidence, at trial or by affidavit, concerning damages (including property damage and lost income) including specified photographs and communications (NYSCEF 154); by order dated June 4, 2024, the Court denied plaintiff's motion to vacate that sanction (NYSCEF 183).

On June 18, 2024, plaintiff filed the note of issue (NYSCEF 185). On October 14, 2024, Benton moved for summary judgment (NYSCEF 186), and on November 13, 2024, the Condo defendants opposed in part and cross-moved for summary judgment dismissing the complaint as against them (NYSCEF 193). On December 17, 2024, Benton filed a reply; on December 20, 2024, plaintiff filed a combined opposition (NYSCEF 219, 220). On December 23, 2024, Benton noticed a rejection of plaintiff's opposition as untimely (NYSCEF 221).

Relying on the January 24, 2024 preclusion order, Benton argues that plaintiff is barred from offering admissible damages proof and therefore cannot establish an essential element of any claim; he seeks dismissal of the complaint and the cross-claims against him. The Condo defendants cross-move on the same theory but oppose dismissal of their contractual indemnification cross-claim. Plaintiff counters that her statutory, contract, fiduciary, nuisance, and equitable claims do not depend on the excluded categories. Benton replies that the preclusion order is dispositive and also challenges the timing of plaintiff's opposition.

II. DISCUSSION

“On a motion for summary judgment, the movant bears the initial burden of establishing prima facie entitlement to judgment as a matter of law; if that burden is not met, the motion must be denied regardless of the sufficiency of the opposition (*Alvarez v Prospect Hosp.*, 68 NY2d

320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].”

Where a self-executing preclusion order becomes absolute and bars proof of an essential element, summary judgment is warranted because the plaintiff “would be unable to prove her prima facie case” (*Diaz v Maygina Realty LLC*, 181 AD3d 478 [1st Dept 2020]; *see also Silva v Lakins*, 118 AD3d 556 [1st Dept 2014]). By its terms, the January 24, 2024 order forecloses plaintiff’s proof of damages (including property damage and lost income) and specified photographs/communications. On this record, Benton meets his prima facie burden by submitting that order and showing that it eliminates plaintiff’s admissible damages proof; plaintiff points to no non-precluded admissible evidence raising a triable issue. Accordingly, Benton’s motion is granted, and the complaint is dismissed as against him.

Turning to the Condo defendants’ submission, they seek, by cross-motion, summary judgment against plaintiff. It is well established that a cross-motion is “an improper vehicle for seeking relief from a nonmoving party” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; *accord Hennessey-Diaz v City of New York*, 146 AD3d 419, 420 [1st Dept 2017]; *see CPLR 2215*). Because the Condo defendants seek relief against plaintiff, who is not a movant, it is denied as improper (*see Genger v Genger*, 120 AD3d 1102, 1103 [1st Dept 2014] [cross-motion for sanctions against nonmoving defendants improper]; *Arango v Atlantic Westerly Co., L.L.C.*, 69 Misc 3d 1220[A] [Sup Ct, NY County 2020] [denying cross-motion for summary dismissal where plaintiff was nonmoving]).

The balance of the cross-motion addresses Benton’s motion for dismissal of the Condo defendants’ cross-claims. As movant, Benton bears the initial burden to eliminate any triable issue as to each cross-claim. In view of the dismissal of the complaint as against Benton, the

Condo defendants' cross-claims sounding in contribution and common-law indemnification are dismissed as academic (see *Canty v 133 E. 79th St., LLC*, 167 AD3d 548 [1st Dept 2018]). By contrast, to the extent an express contractual indemnification cross-claim is asserted, Benton has not made a prima facie showing for dismissal on this record, especially as his motion does not annex or analyze the operative contract or indemnity triggers. Thus, that branch of Benton's motion is denied.

III. ORDER

Accordingly, it is hereby

It is ORDERED that Benton's motion for summary judgment is granted and the complaint is dismissed as against him; and it is further

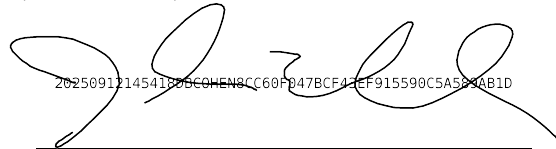
ORDERED that the Condo defendants' cross-motion is denied as improper; and it is further

ORDERED that the Condo defendants' cross-claims against Benton for contribution/common-law indemnification are dismissed as academic; and it is further

ORDERED that Benton's request to dismiss any express contractual indemnification cross-claim is denied; and it is further

ORDERED that any remaining requests for relief are denied as moot;

ORDERED that parties appear for a settlement/trial scheduling conference on November 19, 2025 at 9:30 a.m., in Room 305, at 71 Thomas Street, New York, New York.



2025091214541806COHENBCC60F947BCF42EF915590C5A593AB1D

9/12/2025
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE