Michel v 14 Beekman Place Corp.
2016 NY Slip Op 31001(U)
May 31, 2016
Supreme Court, New York County
Docket Number: 152870/2012
Judge: Cynthia S. Kern
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

ROSEMARY MICHEL,

Plaintiff,

-against-

14 BEEKMAN PLACE CORPORATION, BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC, GEIGER CONSTRUCTION COMPANY, INC., BIG APPLE TRUST, NORMAN STARK and HELENE STARK, MICON GROUP, INC., MICHAEL CONSTANTINO both individually and d/b/a MICON GROUP, INC., PAUL QUINN, PAUL QUINN PLUMBING & HEATING, INC., ELITE FLOORS INC., LAWLESS & MANGIONE ARCHITECTS ENGINEERS, LLP and ELITE FLOOR SERVICE, INC.,

Defendants.

----------x

GEIGER CONSTRUCTION COMPANY, INC.,

Third-Party Plaintiff,

-against-

MICON GROUP, INC. and MICHAEL CONSTANTINO d/b/a MICON GROUP, INC. and MICHAEL CONSTANTINO,

Third-Party Defendants.

Index No. 152870/2012

DECISION/ORDER

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action to recover damages for personal injuries she

allegedly sustained when she tripped and fell on a water-damaged, uneven wooden parquet tile floor in her apartment and to recover for property damage to her apartment and personal possessions. Defendants 14 Beekman Place Corporation and Brown Harris Stevens Residential Management, LLC (collectively the "Beekman Defendants") now move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiff's complaint. For the reasons set forth below, the Beekman Defendants' motion for summary judgment is granted.

The relevant facts are as follows. 14 Beekman Place Corporation is the owner of a cooperative apartment building located at 12 Beekman Place, New York, New York (the "building"). Brown Harris Stevens Residential Management, LLC is the managing agent of the building. Plaintiff owns shares in the cooperative allocated to apartment unit 10-C ("plaintiff's apartment"). Defendants Big Apple Trust, Norman Stark and Helene Stark (collectively the "Starks") own shares in the cooperative allocated to apartment unit 11-B (the "Starks' apartment"), which is located above plaintiff's apartment.

In the summer of 2011, the Starks hired various contractors to make repairs to their patio, including replacing a drain and installing flashing. John Derlaga ("Derlaga"), the property manager of the building, testified during his deposition that Lawless & Mangione Architects Engineers, LLP, the engineer for the building, reviewed the renovation plans. Hugh Murray ("Murray"), the superintendent of the building, testified during his deposition that he occasionally checked on the work of the construction contractors to see if anything was "out of place," but did not direct the work. During and after these renovations were performed, water leaked from the Starks' patio into plaintiff's apartment, particularly her living and dining rooms. According to Murray's deposition testimony, the new drain caused the leak. The leaked water caused some of the wooden parquet floor tiles in plaintiff's apartment to lift up, creating an

uneven surface. Derlaga testified that, pursuant to Brown Harris Stevens Residential Management, LLC's "normal practice," it facilitated repairs to plaintiff's floor. According to Murray's deposition testimony, "we got wet vacs to soak up the water" and "brought in a contractor to take out the bad parts of the floor." Brown Harris Stevens Residential Management, LLC hired defendant Elite Floors Inc. or Elite Floor Service, Inc. (collectively "Elite Floors") to replace the water-damaged tiles with plywood. Murray testified that he relied on Elite Floors to determine which tiles needed to be replaced, although Lawless & Mangione Architects Engineers, LLP also participated in the determination. After Elite Floors temporarily repaired the floor, Murray inspected the apartment and observed that the water-damaged tiles had been replaced with plywood, except for certain sections that were covered by furniture, including a couch. Due to the possibility that additional tiles would lift up over time from the water damage, Murray visited plaintiff's apartment daily, but did not find that any of the tiles had lifted up after Elite Floors made the temporary repairs.

On or about September 26, 2011, plaintiff allegedly tripped and fell in or near her dining room, sustaining injuries. According to her deposition testimony, her cane, which she used to assist her in walking, got stuck in lifted-up, "buckled" floor tiles and she fell to the floor. Although she did not see any gaps in the floor where she fell and stated that she did not know exactly how she fell, she testified that she felt the cane get stuck and that the cane could not move directly before she fell. Murray did not recall when he last visited plaintiff's apartment before the accident. When Murray visited plaintiff's apartment after she returned home from the hospital following the accident, she pointed to a patch of plywood in the living room to designate where she had fallen, although he did not notice any defect.

Both plaintiff and the Starks have proprietary leases with 14 Beekman Place Corporation.

The seventh paragraph of Article II of the proprietary leases, which are identical with regard to the owner's and tenants' maintenance and repair obligations, provides as follows:

> The Lessee shall keep the interior of the apartment in good repair, and the Lessor shall not be held answerable for any repairs in or to the same, and in case of the refusal or neglect of the Lessee, during ten days after notice in writing from the Lessor, to make such repairs or to restore the apartment to good condition, such repairs or restoration may be made by the Lessor...In addition to decorating and keeping the interior of the apartment in good repair the Lessee shall be responsible for the maintenance or replacement of any plumbing fixtures, lighting fixtures, refrigerators, kitchen fans, air conditioning devices or ranges that may be in the apartment.

Further, the eighth paragraph of Article I of the proprietary leases provides a "lessee of an apartment having direct access to a terrace or balcony" with "exclusive use" of the terrace or balcony, and requires the lessee to keep the terrace or balcony clean. Pursuant to the first paragraph of Article I of the proprietary leases, 14 Beekman Place Corporation is merely required to keep structural elements, including the foundations, supports and roofs, and common areas of the building in good repair.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

The portion of the Beekman Defendants' motion for summary judgment dismissing plaintiff's cause of action for negligence is granted on the ground that they did not owe a duty to

plaintiff to repair the floor tiles. It is well established that in order for a defendant to be held liable for negligence, the plaintiff must establish that the defendant owes some duty of care to the plaintiff. *See Pulka v. Edelman,* 40 N.Y.2d 781 (1976); s*ee also Palsgraf v. Long Is. R. R. Co.,* 248 N.Y. 339, 342 (1928). "[A]bsent such duty, as we have said before, there can be no breach of duty, and without breach of duty there can be no liability." *Kimbar v. Estis,* 1 N.Y.2d 399, 405 (1956). The relationship between a cooperative apartment corporation and a shareholder is a landlord-tenant relationship. *See Suarez v. Rivercross Tenants' Corp.*, 107 Misc.2d 135, 137 (Sup Ct, App Term, 1st Dept 1981); *Hauptman v. 222 East 80th Street Corp.*, 100 Misc.2d 153, 154 (Civ Ct, NY County 1979). A landlord is generally not liable to a tenant for dangerous conditions on leased premises unless a duty to repair the premises is imposed by statute, regulation, or contract, with certain exceptions. *Isaacs v. West 34th Apts. Corp.*, 36 A.D.3d 414, 415 (1st Dept 2007). One of these exceptions is where the landlord affirmatively created the dangerous condition. *Nina W. ex rel. Nina Marisol F. v. NDI King Ltd. Partnership*, 112 A.D.3d 460, 462 (1st Dept 2013).

In the present case, the Beekman Defendants have made a *prima facie* showing that they are not liable to plaintiff for negligence as they did not owe a duty to repair the floor tiles. The Beekman Defendants have provided a copy of the proprietary lease, which requires the tenant, not 14 Beekman Place Corporation, to maintain and repair the interior of the apartment, including the floor. Further, the Beekman Defendants have established that they did not create the allegedly dangerous condition of the water-damaged, buckled floor tiles through the submission of Murray's and Derlaga's deposition testimony that the Beekman Defendants did not perform the work that allegedly caused the leak and consequent water damage or the allegedly negligent floor repairs.

In opposition, plaintiff has failed to raise an issue of fact. Plaintiff's argument that there is an issue of fact as to whether the Beekman Defendants created the allegedly dangerous condition through their personal involvement in the "negligent drain repair and negligent repair of the flooring" is without merit. Although the Beekman Defendants were involved in facilitating the Starks' renovation, plaintiff has not submitted any evidence that the Beekman Defendants performed the work that caused the leak. Further, although plaintiff contends that the Beekman Defendants are liable for creating the allegedly dangerous condition through the negligent repair of plaintiff's floor, it is undisputed that the Beekman Defendants did not perform the floor repairs themselves but rather hired an independent contractor to repair the floor. Thus, plaintiff has failed to show that the Beekman Defendants created the allegedly dangerous condition.

Moreover, plaintiff's argument that there is an issue of fact as to whether the Beekman Defendants created the allegedly dangerous condition on the ground that the Beekman Defendants deemed plaintiff's apartment habitable despite damage allegedly depicted in photographs submitted by plaintiff is also without merit as this allegation, even if true, is not relevant to the issue of whether the Beekman Defendants performed the work that caused the leak or the allegedly negligent floor repairs.

Plaintiff's argument that the Beekman Defendants are liable for the allegedly negligent renovation work that caused the leak, performed by the contractor co-defendants Lawless & Mangione Architects Engineers, LLP and Paul Quinn or Paul Quinn Plumbing & Heating Inc. (collectively "Paul Quinn"), and for the allegedly negligent floor repairs, performed by Paul Quinn and Elite Floors, under the doctrine of respondeat superior is also without merit. Under the doctrine of respondeat superior, an employer is vicariously liable for the torts or negligent

acts of an employee acting within the scope of employment, but is generally not liable for the torts or negligent acts of an independent contractor. *Chuchuca v. Chuchuca*, 67 A.D.3d 948, 949 (2nd Dept 2009). Whether an employer-employee or an employer-independent contractor relationship exists depends on whether the alleged employer exercises control over the results produced or, more importantly, the means used to achieve the results. *Id.* at 949-50. "While an employer is generally not liable for the torts or negligent acts of an independent contractor under the doctrine of respondeat superior, the common law has developed certain recognized exceptions that fall roughly into three categories: (1) negligence of an employer in selecting, instructing or supervising the contractor, (2) employment for work that is especially or 'inherently' dangerous, and (3) instances in which the employer is under a nondelegable duty." *Maristany v. Patient Support Servs.*, 264 A.D.2d 302, 302-03 (1st Dept 1999).

In the present case, the Beekman Defendants are not liable for the alleged negligence of Lawless & Mangione Architects Engineers, LLP, Paul Quinn or Elite Floors as it is undisputed that these co-defendants were independent contractors. Further, plaintiff has not submitted any evidence that the Beekman Defendants were negligent in selecting, instructing or supervising these contractors, that the work was inherently dangerous or that the Beekman Defendants were under a nondelegable duty with regard to the Starks' renovation or the repair of plaintiff's floor.

The portion of the Beekman Defendants' motion for summary judgment dismissing plaintiff's cause of action for property damage and loss of use of her property is granted. Plaintiff alleges in her complaint that she sustained "property damages and loss of use of her home and personal property" through the negligence of the defendants. The Beekman Defendants and plaintiff signed a Stipulation of Settlement in a summary proceeding whereby plaintiff agreed to discontinue with prejudice her claims for property damage in both the

summary and instant proceedings. To the extent that plaintiff argues that she has stated a distinct cause of action for loss of use of her property, this argument is without merit as loss of use of property is merely a type of property damage, not the basis for a distinct cause of action. As plaintiff's second cause of action merely alleges property damage, this cause of action must be dismissed.

Accordingly, the Beekman Defendants' motion for summary judgment dismissing plaintiff's complaint is granted. This constitutes the decision and order of the court.

Dated: 5/31/16

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.