

**Mannor v Feldstein**

2012 NY Slip Op 30210(U)

January 26, 2012

Sup Ct, NY County

Docket Number: 104156/09

Judge: Manuel J. Mendez

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

PRESENT: HON. MANUEL J. MENDEZ PART 13  
*Justice*

DR. SHLOMO MANNOR, MARGALIT MANNOR and  
DR. DANA MANNOR,

INDEX NO.: 104156/09

Plaintiff(s),

- v -

RICHARD FELDSTEIN, SHARON FELDSTEIN,  
605 APARTMENT CORP. and RUDD REALTY  
MANAGEMENT CORP.,

Defendant(s).

**FILED**

JAN 31 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Manuel J. Mendez, J.S.C. :

Plaintiffs, the owner and tenants of 605 Park Avenue, New York, NY, a co-operative apartment, #1A, used as a medical office, brought this action to recover for property damages incurred from flooding of the unit. The flooding occurred as a result of a broken toilet valve in the master bedroom of apartment, #2C, the unit directly above apartment #1A.

Richard Feldstein and Sharon Feldstein (hereinafter referred to as "the Feldsteins") are the proprietary lessees of apartment #2C. 605 Apartment Corp. (hereinafter referred to as "605") is the proprietary lessor and owner of the building. Rudd Realty Management Corp., (hereinafter referred to as "Rudd Realty") is the management company acting on behalf of 605, in charge of maintenance and repairs of the building.

Motion sequence 001, is 605 and Rudd Realty's motion for summary judgment pursuant to CPLR §3212, seeking an Order dismissing all causes of action and cross-claims against them based on the provisions of the proprietary lease. 605 and Rudd Realty claim that pursuant to the proprietary lease the Feldsteins are solely liable for maintenance of the toilet and that the reservation of right of reentry does not apply to the toilet valve which is not a significant structural or design defect.

Plaintiffs oppose 605 and Rudd Realty's motion claiming that there remain issues of fact concerning their failure to respond to the incident in a timely manner and their failure to use proper methods or procedures to diminish damages to the property. Plaintiffs also claim that 605 and Rudd Realty did not use personnel with the proper skills or expertise to handle the incident.

Motion sequence 002, is the Feldsteins motion for summary judgment pursuant to CPLR §3212, seeking an Order dismissing all the causes of action and cross-claims against them. The Feldsteins claim that after purchasing apartment # 2C in January of 2006, they did not reside there through the date of the incident. The Feldsteins also claim that a walk-through of the apartment at or before the date of the closing indicated

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

that the fixtures, including the toilet, functioned normally and they did not create, have constructive notice, or the opportunity to correct, the condition.

Plaintiffs oppose the motion claiming that the Feldsteins are liable based on the doctrine of *res ipsa loquitur* and the provisions of the proprietary lease. Plaintiffs also claim that the Feldsteins breached their legal duty and were negligent in failing to perform a proper inspection of the bathroom fixtures and toilets when they purchased the apartment and should have had a qualified, licensed plumber present.

Plaintiffs cross-move pursuant to CPLR §3025[b] to amend the Bill of Particulars by supplementing the provisions concerning 605 and Rudd Realty to further assert constructive notice. Plaintiffs claim that constructive notice was asserted against the Feldsteins but not specifically against 605 and Rudd Realty. Plaintiffs also claim that the revision to the Bill of Particulars would not prejudice the parties since it is merely clarifying and not adding to existing provisions.

605 and Rudd Realty oppose the cross-motion claiming that plaintiffs have filed their Note of Issue and discovery is complete, this amendment sought after the motions for summary judgment were submitted would be prejudicial. 605 and Rudd Realty also claim that the plaintiffs did not annex the proposed amended Bill of Particulars to the motion papers, therefore, the specific revisions cannot be addressed and the motion should be denied.

Motion sequence 003, is the plaintiffs' motion pursuant to CPLR §3212, seeking summary judgment against all the defendants in this action. Plaintiffs claim that they are entitled to summary judgment against the Feldsteins based on the doctrine of *res ipsa loquitur* and the negligent failure to properly maintain apartment #2C. Plaintiffs claim they are entitled to summary judgment against 605 and Rudd Realty because the incident was mishandled and the building personnel involved were not supervised, or have the proper skill and expertise to handle the April 3, 2006 incident.

The Feldsteins oppose plaintiffs' motion claiming the papers were insufficient because the unsworn expert disclosure prepared by plaintiffs' counsel does not constitute admissible evidence. The Feldsteins also claim that the doctrine of *Res Ipsa Loquitur* does not apply based on the facts of this case and only gives rise to a permissible inference of negligence to be drawn by a jury, not a basis to grant summary judgment. The Feldsteins state that the plaintiffs cannot establish they were negligent because the defective valve was installed before they purchased the apartment, there were no previous problems with the toilet, they had not yet moved into the apartment and had no notice of the condition.

605 and Rudd Realty, oppose the motion claiming that the plaintiffs' allegations of negligence concerning failing to respond to the incident in a timely manner, as well as, failure to use personnel with proper skills or expertise to handle and supervise the incident, were not pled in the Bill of Particulars and are prejudicial. 605 and Rudd Realty also claim that the plaintiffs conceded that exclusive control of the toilet valve was with the Feldsteins.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996] and *Alvarez v. Prospect Hospital*, 68 N.Y. 2d 320, 501 N.E. 2d 572, 508 N.Y.S. 2d 923 [1986]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]). In determining the motion the Court must construe the evidence in a light most favorable to the non-moving party (*Martin v. Briggs*, 235 A.D. 2d 193, 663 N.Y.S. 2d 184 [N.Y.A.D. 1<sup>st</sup> Dept., 1997] and *Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]).

### The Proprietary Lease

Summary judgment may be granted based on a clause in a proprietary lease that places duty for the maintenance and repairs on the unit owner and not the owner of the building (*Moore v. 158 Riverside Dr. Hous. Co., Inc.*, 59 A.D. 3d 245, 873 N.Y.S. 2d 569 [N.Y.A.D. 1<sup>st</sup> Dept. 2009] and *905 5<sup>th</sup> Associates, Inc. v. Weintraub*, 85 A.D. 3d 667, 927 N.Y.S. 2d 29 [N.Y.A.D. 1<sup>st</sup> Dept., 2011]). A claim against the building's owner based on the reservation of the right of reentry in a proprietary lease can only be sustained upon a showing of, "a significant structural or design defect that violated a specific statutory provision" (*Nussbaum v. 150 W. End Ave. Owners Corp.*, 76 A.D. 3d 914, 9097 N.Y.S. 2d 674 [N.Y.A.D. 1<sup>st</sup> Dept., 2010]). An "as is" clause in a proprietary lease is enforceable and acts as a bar to an action against the owner of the building for property damage (*DD & TJ, Inc. v. Estate of Sol Goldman*, 33 A.D. 3d 497, 823 N.Y.S. 2d 59 [N.Y.A.D. 1<sup>st</sup> Dept., 2006]).

The proprietary lease between 605 Apartment Corp., as lessor and the Feldsteins, as lessees (Mot. Seq. 001, Exh. E), specifically states at paragraph 18(a),

**"The Lessee shall take possession of the apartment and its appurtenances and fixtures "as is" as of the commencement of the term hereof,...the Lessee shall keep the interior of the apartment (including interior walls, floors, and ceilings, but excluding windows, window panes, window frames, sashes, sills entrance and terrace doors, frames and saddles) in good repair, ...and shall be solely responsible for the maintenance, repair, and replacement of plumbing, gas and heating fixtures and equipment...Plumbing, gas and heating fixtures as used herein shall include exposed gas, steam and water pipes attached to fixtures, appliances and equipment and the fixtures, appliances and equipment to which they are attached, and any special pipes or equipment which the Lessee may install within the wall or ceiling, or under the floor, but shall not include gas, steam, water or other pipes or conduits within the walls, ceilings or floors or air conditioning or heating equipment which is part of the standard building equipment..."**

The defendant 605 meets its burden of proof on its motion for summary judgment based on the provisions of paragraph 18 of the proprietary lease. The plaintiffs and the Feldsteins have failed to sufficiently raise a triable issue of fact against 605. Rudd Realty is not a party to the proprietary lease. The plaintiffs have asserted causes of action against Rudd Realty based on negligence and the doctrine of *res ipsa loquitur* (Mot. Seq. 001, Exh. A).

#### Cross-Motion to Amend Bill of Particulars

A motion for leave to amend should be freely granted, so long as there is no surprise or prejudice to the opposing party (*Kocourek v Booz Allen Hamilton, Inc.*, 85 A.D. 3d 392, 834 N.Y.S. 2d 51 [N.Y.A.D. 1<sup>st</sup> Dept., 2011]). In support of a motion to amend after the note of issue is filed, the plaintiff should provide an affidavit of merit and a reasonable excuse for the delay (*Jennings v. 1704 Realty, LLC*, 39 A.D. 3d 392, 834 N.Y.S. 2d 160 [N.Y.A.D. 1<sup>st</sup> Dept., 2007]). Judicial discretion in granting an amendment to the bill of particulars sought at or on the eve of trial, "...should be, discreet, circumspect, prudent and cautious..." (*Kassis v. Teachers Ins. and Annuity Assn.*, 258 A.D. 2d 271, 685 N.Y.S. 2d 44 [N.Y.A.D. 1<sup>st</sup> Dept., 1999]).

Plaintiffs seek to amend the bill of particulars after the note of issue was filed on June 15, 2011, and as a response to the defendants 605 and Rudd Realty's opposition to their motion for summary judgment. The time to file dispositive motions was extended by Order of this Court to August 15, 2011 (Mot. Seq. 2, Exh. J). The cross-motion was made returnable on October 18, 2011. Plaintiffs claim that they are not really seeking to amend the bill of particulars only to modify it to clarify that the claim of constructive notice applies to all defendants, including 605 and Rudd Realty, not just the Feldsteins.

Plaintiffs do not annex a copy of the proposed amended or modified bill of particulars to their papers, or an affidavit of merit. They claim the basis for seeking to apply constructive notice to 605 and Rudd Realty is that the amount of water volume involved is sufficient to establish that the flood had been going on for some time and all the defendants failed to act to mitigate the damages. The only excuse provided for the delay is that the modification sought was previously asserted against the Feldsteins and plaintiffs are claiming that they will consent to a further deposition to avoid prejudice because there is still time before trial.

Plaintiffs' verified bill of particulars to defendant 605 and Rudd Realty dated January 8, 2010, includes a claim for constructive notice at paragraph 7 (Cross-Mot. Exh. A, sub. Exh. A). The claim for constructive notice starting at paragraph 7 only refers to installation and maintenance of the defective toilet valve, there is no mention of failure to respond to the flooding in a timely or proper manner. Plaintiffs' have not sufficiently established that the volume of water in their unit was directly affected by 605 and Rudd Realty's failure to respond in a timely manner, or a basis to modify their claim based on constructive notice. The cross-motion is denied.

### Res Ipsa Loquitur

A plaintiff seeking to recover under the doctrine of res ipsa loquitur is required to establish that, "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant (3) It must not have been due to any voluntary action or contribution on the part of the plaintiff" (Morejon v. Rals Construction Company, 7 N.Y. 3d 203, 851 N.E. 2d 1143, 818 N.Y.S. 2d 792 [2006] citing to Corcoran v. Banner Super Mkt., 19 N.Y. 2d 425, 227 N.E. 2d 304, 280 N.Y.S. 2d 385 [1967]). A management company does not have exclusive control for purposes of res ipsa loquitur, if there exists a written contract which provides responsibility for repair and maintenance to another (Singh v. United Cerebral Palsy of New York City, Inc., 72 A.D. 3d 272, 896 N.Y.S. 2d 22 [N.Y.A.D. 1<sup>st</sup> Dept., 2010]).

### Common Law Negligence and Premises Liability

A landowner has a duty to maintain its property in a reasonably safe condition under existing circumstances, which include avoiding the likelihood of injury to a third party and the burden of avoiding the risk (Basso v. Miller, 40 N.Y. 2d 233, 352 N.E. 2d 868, 386 N.Y.S. 2d 564 [1976]). To maintain an action to common law negligence, the plaintiff must demonstrate the landowner breached the duty and created or had actual or constructive notice of the hazardous condition which resulted in the injury (Mejia v. New York City Transit Authority, 291 A.D. 2d 225, 737 N.Y.S. 2d 350 [N.Y.A.D. 1<sup>st</sup> Dept. 2002]). To establish that the defendant is liable for a defective condition on the premises the plaintiff has the burden of proving the condition was visible and apparent for a sufficient length of time prior to the accident to permit employees to discover and remedy it. A general awareness of a dangerous condition or notice that occurs ten minutes before the condition can be remedied is insufficient to establish constructive notice (Gordon v. American Museum of Natural History, 67 N.Y. 2d 836, 501 N.Y.S. 2d 646, 492 N.E. 2d 774 [1986]). Without actual or constructive notice of a latent defect, a defendant has no duty to inspect for specific problem (Giaccio v. 179 Tenants Corp., 45 A.D. 3d 454, 845 N.Y.S. 2d 328 [N.Y.A.D. 1<sup>st</sup> Dept. 2007]).

Rudd Realty the management company for the building did not have exclusive control of the premises, because the responsibility for repair and maintenance of the plumbing belonged to the Feldsteins pursuant to the proprietary lease. Plaintiffs have not sufficiently raised an issue of fact as to 605 and Rudd Realty under the doctrine of Res Ipsa Loquitur. Plaintiffs did not sufficiently allege or establish a basis for their claim of constructive notice against 605 and Rudd Realty. Defendants 605 and Rudd Realty's motion for summary judgment (Mot. Seq. 001) is granted.

The Feldsteins motion for summary judgment (Mot. Seq. 002) on the plaintiffs' causes of action based on the doctrine of res ipsa loquitur, is denied. Plaintiffs have established that they are entitled to summary judgment under the theory of res ipsa loquitur, based on the provisions of the proprietary lease.

Plaintiffs motion for summary judgment (Mot. Seq. 003) is denied as to 605 and Rudd Realty. Plaintiffs have met their burden of proof and their motion for summary

judgment is granted as to the Feldsteins pursuant to the doctrine of res ipsa loquitur. The Feldsteins pursuant to paragraph 18(a) purchased the unit "as is" and agreed to be responsible for the "maintenance, repair and replacement" of the plumbing fixtures. The Feldsteins maintained exclusive control of the toilet and defective valve and the circumstantial evidence establishes that they are liable to the plaintiffs.

Accordingly, It is ORDERED that Motion Sequence 001, 605 APARTMENT CORP. and RUDD REALTY MANAGEMENT CORP.'s, motion for summary judgment pursuant to CPLR §3212, is granted, all causes of action and cross-claims against 605 APARTMENT CORP. and RUDD REALTY MANAGEMENT CORP., are severed and dismissed, and It is further,

ORDERED that Motion Sequence 002, RICHARD FELDSTEIN and SHARON FELDSTEIN's motion for summary judgment pursuant to CPLR §3212, is denied, and it is further,

ORDERED that the plaintiffs' Cross-Motion to Amend the Bill of Particulars pursuant to CPLR §3025[b], is denied, and It is further,

ORDERED that Motion sequence 003, the plaintiffs' motion for summary judgment pursuant to CPLR §3212, against all of the defendants, is granted only as to RICHARD FELDSTEIN and SHARON FELDSTEIN on the issue of liability, the remainder of the motion, is denied, and It is further,


ORDERED that an assessment of damages against RICHARD FELDSTEIN and SHARON FELDSTEIN, is directed, and It is further,

ORDERED, that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158), and said Clerk shall cause the matter to be placed upon the calendar for the assessment hereinabove directed.

This constitutes the decision and order of this court.

Dated: January 26, 2012

ENTER:

  
MANUEL J. MENDEZ  
J.S.C.

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

PRESENT: HON. MANUEL J. MENDEZ PART 13  
*Justice*

DR. SHLOMO MANNOR, MARGALIT MANNOR and  
DANA MANNOR,  
Plaintiff(s),

INDEX NO. 104158/09

- v -

MOTION DATE 11-30-2011

RICHARD FELDSTEIN, SHARON FELDSTEIN,  
605 APARTMENT CORP. and RUDD REALTY  
MANAGEMENT CORP.,  
Defendant(s).

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to/ for Summary Judgment :

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Mot. Seq. 001, 605 APARTMENT CORP. and RUDD REALTY MANAGEMENT CORP.'s, motion for summary judgment pursuant to CPLR §3212, dismissing all causes of action and cross-claims against 605 APARTMENT CORP. and RUDD REALTY MANAGEMENT CORP., is decided in accordance with the memorandum decision filed herewith.

Accordingly, It is ORDERED that 605 APARTMENT CORP. and RUDD REALTY MANAGEMENT CORP.'s, motion for summary judgment pursuant to CPLR §3212, dismissing all causes of action and cross-claims against 605 APARTMENT CORP. and RUDD REALTY MANAGEMENT CORP., is granted, all causes of action and cross-claims against 605 APARTMENT CORP. and RUDD REALTY MANAGEMENT CORP., are severed and dismissed.

JAN 31 2012

This constitutes the decision and order of this court.

Dated: January 26, 2012

NEW YORK  
COUNTY CLERK'S OFFICE  
MANUEL J. MENDEZ  
J.S.C.

MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):



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

PRESENT: HON. MANUEL J. MENDEZ PART 13  
*Justice*

DR. SHLOMO MANNOR, MARGALIT MANNOR and  
DANA MANNOR,  
  
Plaintiff(s),

INDEX NO. 104156/09

- v -

MOTION DATE 11-30-2011

RICHARD FELDSTEIN, SHARON FELDSTEIN,  
605 APARTMENT CORP. and RUDD REALTY  
MANAGEMENT CORP.,  
  
Defendant(s).

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 7 were read on this motion to/ for Summary Judgment :

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 2, 4 - 5</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>3, 6</u>
Replying Affidavits _____	<u>7</u>

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, It is Ordered that Mot. Seq. 002, RICHARD FELDSTEIN and SHARON FELDSTEIN's motion for summary judgment pursuant to CPLR §3212, dismissing all causes of action and cross-claims against RICHARD FELDSTEIN and SHARON FELDSTEIN, and Plaintiffs' cross-motion to Amend the Bill of Particulars pursuant to CPLR §3025[b], is decided in accordance with the memorandum decision filed herewith.

Accordingly, It is ORDERED that Motion Sequence 002, RICHARD FELDSTEIN and SHARON FELDSTEIN's motion for summary judgment pursuant to CPLR §3212, is denied, and it is further,

ORDERED that the plaintiffs' Cross-Motion to Amend the Bill of Particulars pursuant to CPLR §3025[b], is denied.

This constitutes the decision and order of this court.

Dated: January 26, 2012

MANUEL J. MENDEZ  
J.S.C.

  
\_\_\_\_\_  
MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

PRESENT: HON. MANUEL J. MENDEZ PART 13  
*Justice*

DR. SHLOMO MANNOR, MARGALIT MANNOR and  
DANA MANNOR,

Plaintiff(s),

- v -

INDEX NO. 104156/09  
MOTION DATE 11-30-2011  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

RICHARD FELDSTEIN, SHARON FELDSTEIN,  
605 APARTMENT CORP. and RUDD REALTY  
MANAGEMENT CORP.,

Defendant(s).

The following papers, numbered 1 to 5 were read on this motion to/ for Summary Judgment :

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 2
Answering Affidavits — Exhibits _____ cross motion _____	3, 4
Replying Affidavits _____	5

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, It is Ordered that, Mot. Seq. 003, the plaintiffs' motion for summary judgment pursuant to CPLR §3212, against all of the defendants, is decided in accordance with the memorandum decision filed herewith.

Accordingly, It is ORDERED that the plaintiffs' motion for summary judgment pursuant to CPLR §3212, against all of the defendants, is granted only as to RICHARD FELDSTEIN and SHARON FELDSTEIN on the issue of liability, the remainder of the motion, is denied, and It is further,

ORDERED that the only issues of fact remaining relate to the amount of damages to which the plaintiffs are entitled, and it is further,

ORDERED, that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158), and said Clerk shall cause the matter to be placed upon the calendar for the assessment hereinabove directed.

This constitutes the decision and order of this court.

MANUEL J. MENDEZ  
J.S.C.

Dated: January 26, 2012

  
\_\_\_\_\_  
MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION X NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):