

**Heintz v Irgang**

2012 NY Slip Op 30966(U)

April 10, 2012

Supreme Court, New York County

Docket Number: 102782/10

Judge: Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.  
*Justice*

PART 10

Index Number : 102782/2010  
HEINTZ, ANGELO  
vs.  
IRGANG, MARK  
SEQUENCE NUMBER : 002  
DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits \_\_\_\_\_ | No(s) \_\_\_\_\_

Answering Affidavits -- Exhibits \_\_\_\_\_ | No(s) \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s) \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

## FILED

APR 11 2012

NEW YORK  
COUNTY CLERK'S OFFICE

APR 10 2012

Dated: \_\_\_\_\_

JUDITH J. GISCHE, J.S.C.  
J.S.C.

1. CHECK ONE: \_\_\_\_\_  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: \_\_\_\_\_  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----x

Angelo Heintz, an infant by his father and  
natural guardian, Carlos Heintz,  
  
Plaintiff (s),

**DECISION/ ORDER**  
Index No.: 102782-10  
Seq. No.: 002

**-against-**

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

Mark Irgang, Jay Irgang, 148 West  
124<sup>th</sup> Street Realty Corp., 148 West  
124<sup>th</sup> St LLC, The City of New York and  
New York City Housing Preservation and  
Development, and Basic Housing, Inc.,  
  
Defendant (s).

-----x

Mark Irgang, Jay Irgang, 148 West  
124<sup>th</sup> St. LLC, 148 West 124<sup>th</sup> Street  
Realty Corp.,  
  
Third party plaintiffs,

T.P. Index No.:  
590829-10

**-against-**

Basic Housing, Inc.,  
  
Third party defendants.

-----x

**FILED**

APR 11 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of  
this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Basic n/m (3211, 3212) w/AJS affirm, exhs .....	1
Irgang and 148 opp w/EAO affirm, MI affid, exhs .....	2
Heintz opp w/EB affirm .....	3
Basic reply w/AJS affirm, exh .....	4
<b>Other:</b> various stips adjourning motions .....	7
Discovery stip so-order 2/9/12 .....	8

*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This is an action alleging personal injuries to an infant-plaintiff. This action was commenced March 4, 2010 with the filing of the summons and complaint. Issue was joined and the defendants commenced a third party action against Basic Housing, Inc. ("Basic Housing"). Basic Housing answered the third party complaint. Thereafter, Heintz served an amended complaint naming Basic Housing as a direct defendant. Issue was also joined as to the amended complaint.

Basic Housing now moves to dismiss Heintz's claim and the third party complaint against it on the basis that they fail to state a cause of action. Alternatively, Basic Housing moves for summary judgment. The motion is opposed by defendants Mark Irgang, Jay Irgang, 148 West 124<sup>th</sup> Street Realty Corp. ("148 Realty"), 148 West 124<sup>th</sup> Street, LLC ("148 LLC") (collectively "Irgang defendants") and by Heintz, who adopts the arguments presented by the Irgang defendants. The City defendants were dismissed from this case, as per order of this court dated January 6, 2011.

As will be seen, although Basic Housing is moving under CPLR 3211 for the dismissal of this action for failure to state a cause of action "or" CPLR 3212, what it actually seeks is summary judgment on its affirmative defense that it is not a proper property. Summary judgment relief is available since the requirements of CPLR 3212 have been met (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]).

**Facts and Arguments**

Carlos Heintz has brought this action on behalf of his son, Angelo, claiming that on December 8, 2008, Angelo was injured when he slipped on accumulated water in the kitchen area of Apartment 5B located at "Roddy's Place." Roddy's Place is a conditional

shelter located at 184 West 124<sup>th</sup> Street, New York, New York ("premises"). The shelter is operated pursuant to a contract with The City's Department of Homeless services.

The premises are owned by 148 Realty and Mark Irgang ("Mark") is an officer of the owner. 148 Realty leased the premises, including Apartment 5B where the accident is alleged to have occurred, to Bronx Addiction Services Integrated Concept Systems, Inc. a/k/a "Basics, Inc." The lease agreement, dated March 7, 2003 ("lease"), identifies 148 Realty as the "Lessor" and Basics, Inc. as "Lessee." Pursuant to paragraph 9 of the lease between 148 Realty and Basics, Inc., Basics, Inc. agreed to maintain and repair the premises by keeping same "in a good and clean order and condition . . ." It also provides that:

Lessor's sole responsibility shall be to maintain a structure that is free of water leaks from the roof, has no defects in its exterior structural walls and is capable of delivering heat and hot water to the premises and to that end will make all necessary or appropriate repairs to the roof, boiler and exterior of the structure unless they have been caused by the Lessee or its guests or invitees... All other repairs, replacements and renewals shall be [the] sole responsibility of the Lessee... Lessee shall be responsible for any repairs to the Premises caused by Lessee or any occupants, clients, guests or business invitee, whether willful or by negligence.

Pursuant to paragraph 9 [c][iii], the lessee was responsible for and was required to provide "a full time Program Director who shall be responsible to maintain the premises in a clean condition..." and pursuant to 9[c][iv], to insure that the premises were maintained in a condition so as not to incur any violations after the premises are delivered to the Lessee..."

"BASICS Housing Inc." has a 2004 contract with The City Department of

Homeless Services to operate "Neighborhood Based Cluster Transitional Residence Programs" for homeless families. Basic Housing does not deny it is the corporate entity in contract with The City, despite the differing spelling of the two corporate names.

Basic Housing contends that it did not owe a duty of care to the plaintiff because it was not the owner of the premises at the time of plaintiff's accident, it did not control the premises nor did it have any contract (*i.e.* no lease) with the Irgang defendants. Basic Housing also denies there is any relationship between the two corporations, despite the similarity in their names and having the same corporate address. Basic Housing also denies that it created or had notice of a dangerous condition in Apartment 5B or that under the lease it was obligated to make the repairs that are alleged to have been neglected. According to Basic Housing, each of these corporations – Basic Housing, Inc. and Basics, Inc. – are completely separate entities and neither plaintiff nor third party plaintiff can prove otherwise. No affidavit by a person with knowledge is provided and these arguments are presented by its attorney.

The Irgang defendants and Heintz oppose Basic Housing's motion on the basis that summary judgment is premature because discovery is incomplete (this motion is brought pre-note of issue) and it is unclear what the relationship is between these similarly named corporations. The Irgang defendants point out that Basics, Inc. and BASICS Housing, Inc. each have their corporate offices at 1064 Franklin Avenue, Bronx, New York 10456. Plaintiff also claims there is an issue of fact whether Basic Housing created or had notice of the defective condition alleged.

Mark Irgang, an officer of 1478 Realty, states that, despite the lease agreement between 148 Realty and Basics, Inc., Basic Housing was involved in maintaining and

running the homeless shelter, doing such things as maintaining staff, performing repairs, and running the day to day operations at the premises. According to Mark Irgang, Basic Housing actually pays the rent for the space it leases and he has provided copies of checks to support this claim.

The Irgang defendants also provide a copy of Carlos Heintz's "14 Days Housing Contract" with the cluster facility. The contract identifies the facility as "Rody's Place" and provides that "BASIC Housing, Inc is a cluster facility that provides transitional housing..." The contract is printed with the words "BASICS INC" and "BASIC HOUSING INC" at the top.

#### **Discussion**

Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion (CPLR § 3212 [f]; Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 [1<sup>st</sup> Dept. 2004]).

Heintz and the Irgang defendants have demonstrated that further discovery might yield material facts that would warrant the denial of summary judgment at a later time (*compare Seelig v. Burger King Corp.*, 66 A.D.3d 986 [2<sup>nd</sup> Dept 2009]). Various documents identify the corporation having The City contract for these transitional housing accommodations differently. The City contract is with "BASICS Housing Inc." yet the lessee is "Bronx Addiction Services Integrated Concept Systems, Inc. a/k/a Basics, Inc." and Heintz's housing contract is with "BASICS INC" and "BASIC HOUSING INC." Further discovery may resolve these inconsistencies.

Even were the court persuaded by Basic Housing's arguments, that this motion is not premature, but that under CPLR 3211 [a][7], the plaintiff and third party plaintiffs have each failed to state a cause of action, Basic Housing has failed to prove its affirmative defense, which is that the plaintiffs have named the wrong party.

Assuming Basic Housing also intended to move under CPLR 3211 [a][1] (documentary evidence), the documentary evidence rely on by Basic Housing does not definitively dispose of the Irgang defendants' or Heintz's claims against it (Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1<sup>st</sup> Dept. 2006]; Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 [1<sup>st</sup> Dept. 1995]). Not only are the documents Basic Housing rely on not evidence in admissible form (they are simply printouts from a web site), they are not probative. Furthermore, the statements about the corporations being distinct entities is set forth in the affirmation of an attorney who does not have personal knowledge of any of these facts asserted.

Other arguments presented by Basic Housing, that there is no contract and, therefore, the Irgang defendants cannot prove their contractual indemnification claims, not only highlights why this motion for summary judgment is premature, it misplaces the burden of its motion for summary judgment onto the Irgang defendants. It is the movant, here Basic Housing, who would have the burden of tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Only were Basic Housing to meet this burden would it then shift to the opposing party who must then have to demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).



Under the lease, the Lessor's obligations to make repairs is limited. Thus arguments by Basic Housing, that it had no contractual obligation to make repairs in Apartment 5B is not grounded in the terms of the lease. Furthermore, under the lease a "program director" is supposed to maintain the premises. It is unclear who this "program director" is. Other arguments about Heintz not being Basic Housing's tenant are raised in passing and without any meaningful analysis.

**Conclusion**

The motion by Basic Housing, Inc. for the dismissal of the complaint and the third party complaint on the basis of CPLR 3211 [a][7] and [a][5] is denied. Furthermore, this motion, to the extent that it seeks summary judgment is denied because it is premature (CPLR 3212 [f]).

To the extent that his motion stayed discovery, the stay is hereby vacated and the parties are to proceed with the discovery schedule set forth in their February 9, 2012 so-ordered stipulation. The compliance conference remains scheduled for June 21, 2012 at 9:30 a.m, unless the parties stipulate in writing otherwise (see part rules).

Any relief requested but not specifically addressed is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York  
April 10, 2012

So Ordered:

**FILED**

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**APR 11 2012**

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