

<b>Original Uncle Steve, Inc. v Casa Canal Realty Corp.</b>
2012 NY Slip Op 31204(U)
April 26, 2012
Supreme Court, New York County
Docket Number: 603924/2007
Judge: Saliann Scarpulla
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Saliann Scarpulla  
Justice

PART 19

Index Number : 603924/2007  
ORIGINAL UNCLE STEVE  
vs.  
CASA CANAL REALTY  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

decided per the memorandum decision dated 4/27/12  
which disposes of motion sequence(s) no. 005, 006, 007, 008

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

## FILED

MAY 07 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Saliann Scarpulla  
SALIANN SCARPULLA

Dated: 4/27/12

- 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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 19

-----X  
ORIGINAL UNCLE STEVE, INC. and ELECTRONIC  
GIANT, INC.,

Plaintiffs,

Index No.: 603924/07

- against -

CASA CANAL REALTY CORP., CARTER ANGUS,  
BOB'S HEATING COOLING OF NYC, INC. and  
MORRIS GOLDMAN REAL ESTATE CORP.,  
Defendants.

**DECISION AND ORDER**

-----X  
CARTER ANGUS i/s/h/a CARTER ANGUS,  
Third-Party Plaintiff,

Third-Party Index No.:  
590350/08

-against-

BOB'S HEATING COOLING OF NYC, INC.,  
Third-Party Defendant.

-----X  
BOB'S HEATING COOLING OF NYC, INC.,  
Second Third-Party Plaintiff,

Second Third-Party  
Index No.: 590381/09

- against -

MORRIS GOLDMAN REAL ESTATE CORP.,  
Second Third-Party Defendant.

**MAY 07 2012**

-----X  
CARTER ANGUS i/s/h/a CARTER ANGUS,  
Second Third-Party Plaintiff,

NEW YORK  
COUNTY CLERK'S OFFICE  
Second Third-Party  
Index No.: 590394/09

- against -

MORRIS GOLDMAN REAL ESTATE CORP.,  
Second Third-Party Defendant.

-----X  
For Plaintiffs:  
Lerner, Arnold & Winston, LLP  
475 Park Avenue South, 28<sup>th</sup> Floor  
New York, NY 10016

For Defendant Angus:  
Law Office of James J. Toomey  
485 Lexington Avenue, 7<sup>th</sup> Floor  
New York, NY 10017

For Defendant Bob's Heating:  
Faust Goetz Schenker & Blee  
2 Rector Street, 20<sup>th</sup> Floor  
New York, NY 10006.

For Defendants Casa Canal and Morris Goldman:  
Rubin, Fiorella & Friedman, LLP  
292 Madison Avenue, 11<sup>th</sup> Floor  
New York, NY 10017

HON. SALIANN SCARPULLA, J.:

In this action to recover for property damage, motion sequence numbers 005, 006, 007, and 008 are consolidated for disposition. In motion sequence number 005, plaintiffs Original Uncle Steve, Inc. ("Uncle Steve") and Electronic Giant, Inc. ("Electronic") move for summary judgment on their claim asserted against defendants Casa Canal Realty Corp. and Morris Goldman Real Estate Corp. ("Casa/Goldman").

In motion sequence number 006, defendant Carter Angus ("Angus") moves for summary judgment dismissing the complaint and cross claims as against him.

In motion sequence number 007, Bob's Heating Cooling of NYC, Inc. ("Bob's") moves for summary judgment dismissing the complaint, counterclaims, and cross claims as against it and for summary judgment on its cross claims against Casa/Goldman.

In motion sequence number 008, Casa/Goldman move for leave to amend their answer to add a counterclaim against Uncle Steve, based on a previous money judgment. Casa/Goldman cross-move for leave to amend their answer to add a cross claim for contractual indemnification against Angus.

Uncle Steve and Electronic were tenants occupying the basement, ground and second floors in a building owned by Casa and managed by Goldman located at 343 Canal Street in Manhattan. They operated a retail and wholesale electronics store at the premises. Angus was a tenant occupying the third floor of the building. On May 31,

2006, at approximately 9:00 a.m., Uncle Steve's owner, Steve Marvisi, entered the premises and discovered that the entire store was severely water damaged. Angus' premises was covered with water also. Marvisi and Angus observed water gushing from the third floor boiler. Goldman had purchased the boiler and had it installed in 1999.

The leak occurred because the boiler's expansion tank had failed. The boiler was marked with the warning, "this expansion tank, as all expansion tanks, will eventually leak. Do not install without adequate drainage provisions where fluid leakage will cause damage." There were no drainage provisions in the boiler room.

At his deposition, Angus testified that before he took possession of the third floor in September 2005, Goldman told him that he would send a plumber to inspect the boiler to make sure it was in good working order, and would be responsible for payment of the repairs. In November 2005, Angus notified Goldman that there was no heat. Goldman called Bob's, who replaced the pump in the boiler. Angus called Goldman for the same reason in January 2006, and Goldman called Bob's. Bob's replaced the boiler's backflow preventer and pressure regulator. Goldman paid Bob's for the November 2005 and January 2006 repairs.

Angus testified that prior to the subject incident, Bob's had told him that if there was a problem with the boiler, water could leak from a pipe in the back of the boiler onto the floor, which had no drainage and was not waterproofed. According to Angus, in April 2006, he followed up with Bob's about those repairs he thought should be made to the boiler, specifically, a solution to direct water outside of the premises in case of a leak.

However, nothing was done to resolve the issue. Angus maintained that he also discussed the issue with Goldman.

After the May 31, 2006 incident, Angus called Bob's to repair the boiler. Bob's discovered that the boiler's expansion tank had failed and he replaced the tank. Angus paid for the work. Bob's had tested the expansion tank in November, 2005 and it was operable. The tank had never malfunctioned prior to the subject incident.

Bob's president Boguslaw Czerny testified that his company had no standing contract with Goldman, rather, Bob's came when it was called. Prior to the subject incident, Bob's informed Angus and Goldman that the lack of waterproofing and/or drainage in the floor could become a problem if the boiler ever leaked.

Goldman's vice president Byron Goldman testified that the subject boiler was annually inspected by the company that installed it. He explained that Goldman paid Bob's bill for repairs made to the boiler because Angus had financial difficulties. Goldman did not offer to repair the boiler before Angus took possession and did not do so. Further, between January 20, 2006, the last time Bob's came before the incident, and May 31, 2006, the day of the incident, neither Bob's nor Angus told him that a drain should be installed to prevent damage in the building in case the boiler leaked. If he had been told that, he would have acted on the advice.

Goldman received boiler inspection reports from New York City Inspection Services in 2004 and 2005. The report provided that the subject boiler needed, *inter alia*, (1) replacement of the discharge piping on the pressure relief valve so that the piping

extends to within eight inches from the floor with unthreaded ends; (2) installation of a proper size temperature/pressure relief valve on separate water heater with full size, non isolated discharge piping to within 8 inches from the floor with unthreaded ends; and (3) installation of a discharge pipe on the backflow preventer, extending to within eight inches from the floor with unthreaded ends.<sup>1</sup> None of these repairs were made prior to the time of the subject incident.

Uncle Steve and Electronic's expert Daryl J. Smith, P.E. ("Smith") opines that it is foreseeable that boilers will discharge water and the lack of provisions to drain water discharged from the subject boiler is not consistent with standard industry practice. He maintains that Casa/Goldman failed to heed the warnings on the boiler and failed to comply with standard industry practice by installing the boiler in an area with no drainage, and such failure was the proximate cause of the subject incident.

Public adjuster John J. Panico maintains that it was defendants' failure to install an adequate drainage pipe that caused the water from the boiler to improperly drain onto the floor. The discharge pipe in place was inadequate to provide for proper discharge of water from the boiler to a drain. Further, the area surrounding the boiler was inadequate to accommodate water draining from the boiler.

Casa/Goldman's expert Philip J. Smalley, P.E. ("Smalley") indicates that the subject boiler should have been located in an area with a floor drain. He refers to NYC

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<sup>1</sup> No mention was made of any need for drainage or waterproofing.

Rules and Regulations Code 12-01(c)(3) which provides that "if an inspection reveals any dangerous condition in a boiler which threatens life or safety and which requires an immediate shut down of the boiler, the qualified boiler inspector must send immediate notification of the condition to the Chief Boiler Inspector at the Department of Buildings." According to Smalley, Bob's owed a duty to ensure that a floor drain was installed or to take the boiler out of service. In addition, because Angus was aware of the need for a floor drain, he, as tenant with a duty to maintain the boiler pursuant to the lease, should have taken appropriate steps to install a floor drain. Thus, Bob's and Angus' negligence was a proximate cause of the incident.

Angus' expert, mechanical engineer Jerome G. Levine ("Levine") maintains that there is no procedure which could recognize that an internal bladder in an expansion tank has failed or is going to fail. According to Levine, none of the defendants were negligent, rather, the release of water was an accident for which no one can be blamed.

The lease agreement executed by Angus and Casa for Angus' occupancy of the third floor provides, in relevant part, that (1) the owner shall maintain and repair the exterior and public portions of the building and the Tenant shall make all repairs to the demised premises, made necessary by the Tenant's negligence or improper conduct; (2) tenant shall give owner prompt notice of any defective condition in any plumbing, heating system or electrical lines located in the demised premises and following such notice, owner shall remedy the condition with due diligence, but at the expense of tenant, if repairs are necessitated by damage or injury attributable to tenant; (3) tenant shall comply



at its sole cost and expense with all laws, orders and regulations with respect to the demised premises, whether or not arising out of Tenant's use of the premises; (4) owner shall have the right, but shall not be obligated, to enter the demised premises to examine and make such repairs as it deems necessary and reasonably desirable, and may elect to perform said repairs after the tenant fails to make repairs which it is obligated to make under the lease or any laws or regulations; and (5) landlord shall be under no obligation to furnish heat and hot water and tenant agrees to maintain adequate heat at its own cost and expense.

Uncle Steve and Electronic now move for summary judgment on their claim asserted against Casa/Goldman, alleging that as owner and managing agent of the premises, Casa/Goldman were responsible for maintaining the boiler and created the condition by installing the boiler without drainage.

In opposition, Goldman submits an affidavit indicating that Angus had the duty to maintain the boiler and only Angus and Bob's had notice of a problem with the boiler. Pursuant to the terms of the lease, Angus was responsible for maintaining heat at its own cost and expense, and was responsible for any property damage. Goldman only paid Bob's for repairs in Angus' space on three occasions between November 2005 and January 2006 because Angus told him he was having financial difficulties. After the subject incident, Angus called Bob's to report the leak and Bob's repaired the boiler. Angus paid Bob's for that repair. Goldman further provides that from January 20, 2006 through May 31, 2006, neither Angus nor Bob's told him that a floor drain should be

installed to prevent damage. Further, pursuant to Smalley's affidavit, Bob's owed a duty to ensure that a floor drain was installed or to take the boiler out of service. According to Smalley, the NYC Inspection Service reports did not put Goldman on notice of the need for a floor drain.

Angus moves for summary judgment dismissing the complaint as asserted against him on the basis that the lease places the responsibility for the boiler on the landlord. In addition, Goldman paid for repairs and general upkeep of the boiler and controlled the maintenance and inspection records.

Bob's moves for summary judgment dismissing the complaint, counterclaims, and cross claims as against it and for summary judgment on its cross claims against Casa/Goldman. Bob's argues that it owed no duty to Uncle Steve and Electronic to maintain the subject boiler. Bob's identified the defective condition and advised Angus and Goldman of the problem. Further, Bob's did not create the defective condition.

Casa/Goldman also move for leave to amend their answer to add a counterclaim against Uncle Steve, based on a previous money judgment, and for leave to amend their answer to add a cross claim for contractual indemnification against Angus

### **Discussion**

A landlord that has transferred possession and control over property to a tenant is generally not liable for accidents arising out of a dangerous condition. *Melendez v. American Airlines*, 290 AD2d 241, 242 (1<sup>st</sup> Dept 2002). This rule does not apply where the landlord, either contractually or through a course of conduct, has become obligated to

maintain or repair the property or a portion of the property which contains the defective condition. *Johnson v. Urena Serv. Ctr.*, 227 A.D.2d 325 (1<sup>st</sup> Dept. 1996); *Cherubini v. Testa*, 130 A.D.2d 380, 382 (1<sup>st</sup> Dept. 1987). Further, a landlord who has the right, but not the obligation, to enter the premises and make needed repairs at the tenant's expense may be liable if the dangerous condition constitutes a significant structural or design defect that is contrary to a specific safety provision. *Melendez v. American Airlines*, 290 AD2d 241, 242 (1<sup>st</sup> Dept 2002).

A tenant-in-possession has a common-law duty to keep the premises in a reasonably safe condition and to remove dangerous defects from the premises that it occupies; such a duty exists independently of the terms of a lease with the landlord and irrespective of whether the tenant actually agreed to keep the property in good repair. *See Putnam v. Stout*, 38 N.Y.2d 607 (1976); *see also Helena v. 300 Park Ave.*, 306 A.D.2d 170, 171-172 (1<sup>st</sup> Dept. 2003); *Zito v. 241 Church St. Corp.*, 223 A.D.2d 353, 355 (1<sup>st</sup> Dept. 1996).

Here, Angus presents evidence that Casa/Goldman installed the boiler, agreed to inspect the boiler prior to installation and provide repairs, called Bob's in November 2005 and January 2006 to repair the boiler and then paid for those repairs, and was aware of Bob's recommendation that drainage be installed in the boiler room. Angus further maintains that Casa/Goldman was responsible for maintaining the boiler pursuant to the terms of the lease agreement and was responsible for the damage because it created the condition that caused the damage. On the other hand, Casa/Goldman submits evidence

that it did not inspect the boiler prior to installation or provide repairs, it only paid Bob's to repair the boiler on those two occasions as a favor to Angus because he was having financial difficulties, and it was never told by Bob's or Angus of the need for drainage in the boiler room. Casa/Goldman further maintains that Angus was responsible for maintaining and repairing the boiler pursuant to the terms of the lease agreement.

Based on the evidence presented, the court finds that issues of fact exist as to the parties' respective responsibilities and liabilities with regard to the boiler under the lease agreement and common law.

However, the court grants Bob's motion for summary judgment dismissing the complaint, counterclaims, and cross claims as against it. "In the absence of a contract for routine or systematic maintenance, an independent repairer/contractor has no duty to install safety devices or to inspect or warn of any purported defects." *Daniels v. Kromo Lenox Assoc.*, 16 A.D.3d 111, 112 (1<sup>st</sup> Dept 2005); *see also Bevilacqua v. Bloomberg, L.P.*, 70 A.D.3d 411 (1<sup>st</sup> Dept 2010). Casa/Goldman and Bob's agree that there was no standing agreement or contract between them. There is no evidence that Bob's was negligent in performing any services. While Bob's did advise Angus (and perhaps Goldman) of the drainage problem, it owed no duty to repair the problem and therefore, can not be held liable for the subject damage.

Pursuant to CPLR 3025, leave to amend a pleading is freely granted absent prejudice or surprise resulting directly from any delay in asserting the proffered claim. The determination of whether to allow the amendment is committed to the court's

discretion, and the exercise of that discretion will not be overturned absent a showing that the facts supporting the amendment do not support the purported claim or claims. *See generally Peach Parking Corp. v. 346 W. 40th St., LLC*, 42 A.D.3d 82 (1st Dept. 2007); *Non-Linear Trading Co. v. Braddis Assocs.*, 243 A.D.2d 107 (1st Dept. 1998).

Here, Casa/Goldman's motion to amend its answer to include a cross claim for contractual indemnification against Angus is granted. Angus would be not unfairly prejudiced by the addition of this cross claim. Further, Casa/Goldman's motion to amend its answer to assert a counterclaim against Uncle Steve is granted. There is no unfair prejudice or surprise to Uncle Steve.

In accordance with the foregoing, it is hereby

ORDERED that plaintiffs Original Uncle Steve, Inc. and Electronic Giant, Inc.'s motion for summary judgment (motion sequence number 005) on their claim asserted against defendants Casa Canal Realty Corp. and Morris Goldman Real Estate Corp. is denied; and it is further

ORDERED that defendant Carter Angus's motion for summary judgment (motion sequence number 006) dismissing the complaint and the cross-claims as against him is denied; and it is further

ORDERED that defendant Bob's Heating Cooling of NYC, Inc.'s motion for summary judgment (motion sequence number 007); (1) dismissing the complaint and all counterclaims and cross claims as against it is granted and the complaint, the counterclaims, and cross claims are hereby dismissed as against this defendant; and (2) on

its cross claims against defendants Casa Canal Realty Corp. and Morris Goldman Real Estate Corp., the motion is denied as moot; and it is further

ORDERED that defendants Casa Canal Realty Corp.'s and Morris Goldman Real Estate Corp.'s motion for leave to amend their answer to add a counterclaim against plaintiff Original Uncle Steve, Inc. (motion sequence number 008) is granted, and their cross motion for leave to amend their answer to add a cross claim against defendant Carter Angus is granted, and they shall serve the amended answer on all parties within 20 days of service of a copy of this order with notice of entry.

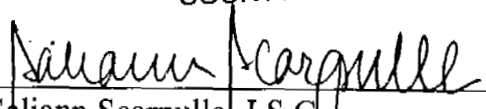
This constitutes the decision and order of the court.

Dated: April 26, 2012  
New York, New York

**FILED**

MAY 07 2012

NEW YORK  
COUNTY CLERK'S OFFICE

  
Saliann Scarpulla, J.S.C.