

**Quick Response Commercial Div., LLC v  
Adirondack Note Buyers, Inc.**

2012 NY Slip Op 32788(U)

November 20, 2012

Supreme Court, Albany County

Docket Number: 27302-12

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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QUICK RESPONSE COMMERCIAL DIVISION, LLC,

Plaintiffs,

-against-

ADIRONDACK NOTE BUYERS, INC.,

Defendant-Third Party Plaintiff.

-against-

HISTORIC PASTURES HOMEOWNERS ASSOCIATION, INC.;  
LAWRENCE BRADY; JOHN DOE Number "1" through JOHN  
DOE Number "10", JOHN DOE Number "1" through JOHN DOE  
Number "10" being fictitious and intended to constitute the directors  
of Historic Pastures Homeowners, Inc.; HIGHLANDER ASSOCIATES;  
GILDA TAVAREZ; AND MARVIN PEAVY; HISTORIC PASTURES  
CONDOMINIUM AND JOHN DOE Number "11" through JOHN  
DOE Number "20", being fictitious and intended to constitute the  
managers and officers of the Historic Pastures Condominium;

Third-Party Defendants.

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Supreme Court Albany County All Purpose Term, November 5, 2012  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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 William Foster, Esq.  
*Attorneys for Historic Pastures Homeowner's Association, Inc.*  
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**TERESI, J.:**

Between July and September 2011, Plaintiff performed sewage and water remediation for Adirondack Note Buyers, Inc. (hereinafter “ANB”) at its 103 Green Street, Unit 1, Albany, New York property (hereinafter “ANB Property”). Alleging that ANB failed to pay for such services, Plaintiff commenced this action to recover its damages. ANB answered and commenced a third party action against, in part, Gilda Tavarez the owner of Unit 3 at 103 Green Street, Albany, New York (hereinafter “Tavarez Property”). Prior to answering Tavarez now moves to dismiss the Third Party Complaint.<sup>1</sup> ANB opposes the motion. Because Tavarez demonstrated her entitlement to dismissal, her motion is granted.

“When assessing whether a complaint states a cause of action for purposes of a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference.” (Tenney v Hodgson Russ, LLP, 97 AD3d 1089 [3d Dept 2012], quoting

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<sup>1</sup> Attorney’s for Historic Pastures Homeowner’s Association, Inc. seek denial of this motion upon the ground that they were not served with it. However, because they did not appear in this action (October 25, 2012) until after Tavarez made this motion (October 12, 2012), Tavarez had no obligation to serve them. (CPLR 2103[e]).

Simkin v. Blank, 19 NY3d 46 [2012]). However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.” (Tenney v Hodgson Russ, LLP, supra at 1090, quoting Gertler v Goodgold, 107 AD2d 481 [3d Dept 1985]).

Here, the Third Party Complaint alleges that the ANB Property and Tavarez Property are condominiums located in the same building, 103 Green Street. They share common areas and a sewer line, which are owned and operated by the Pastures.<sup>2</sup> ANB’s Third Party Complaint alleges that such shared sewer pipe became clogged in July 2011. Such clog, as observed by the Tavarez property’s unnamed tenant, caused raw sewage to spill onto the ground just outside 103 Green Street. To stop such spill, Tavarez allegedly hired a plumber who attempted to fix the sewage leak by installing a “stack pipe on top of the pipe which was coming from the ground.” This “stack pipe” fix allegedly caused raw sewage to flood into the ANB Property.

By its Third Party Complaint, ANB now seeks to recover from Tavarez, under a number of legal theories, the damages it sustained from the raw sewage contamination and remediation. It failed, however, to state any viable cause of action against her.

First, ANB’s negligence and nuisance theories are wholly unavailing. Its negligence claim alleges that Tavarez breached her duty to “timely and properly fix the clogged sewer pipe.” Its nuisance claim, in conclusory fashion, alleges that the raw sewage flooding “constitutes a nuisance.” However, “[a]bsent ownership, occupancy or control of the [shared sewer pipe,

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<sup>2</sup> The Third Party Complaint references the common areas as being owned by “The Historic Pastures Homeowners Association, Inc.” but operated by “The Historic Pastures Condominiums.” It also refers to “The Historic Pastures Condominiums” as owner of the common sewer line. Upon such allegations, these entities will hereinafter be collectively referred to as “the Pastures.”



Tavarez] did not owe [ANB] any duty, and [ANB] therefore could not hold [Tavarez] liable for any alleged negligence in maintaining the [shared sewer pipe] or creating a nuisance thereon.”

(Battaglia v Town of Bethlehem, 46 AD3d 1151, 1154 [3d Dept 2007]; Semzock v State, 97 AD3d 1012, 1013 [3d Dept 2012]). Because the Third Party Complaint explicitly alleges that the defective sewer pipe was owned and operated by the Pastures, Tavarez is not liable in negligence or nuisance, for ANB’s damages.

Similarly, ANB set forth no trespass cause of action against Tavarez. A trespass cause of action requires an “intent to perform the act that produces [an] unlawful invasion” into the property of another. (Berenger v 261 W. LLC, 93 AD3d 175, 181 [1st Dept 2012], quoting Phillips v. Sun Oil Co., 307 NY 328 [1954]). On this record, it is uncontested that Tavarez did not personally “perform the act,” the plumbing work, that allegedly caused ANB’s property to be flooded with sewage. As such, because she did not personally perform the act, ANB cannot establish that Tavarez had the requisite “intent” when “perform[ing] the act.”

Moreover, to the extent that ANB seeks to hold Tavarez liable for her plumber’s intent and acts, “as a general rule, where a defendant retains an independent contractor, [she] is not liable for the negligence of that contractor.” (Hosmer v Kubricky Const. Corp., 88 AD3d 1234, 1235 [3d Dept 2011] lv to appeal dismissed, 19 NY3d 839 [2012]). Liability may be imputed for nondelegable duties only, that is “when the responsibility is so important to the community that the employer should not be permitted to transfer it to another.” (Hosmer v Kubricky Const. Corp., 88 AD3d 1234, 1235 [3d Dept 2011] lv to appeal dismissed, 19 NY3d 839 [2012], quoting Kleeman v. Rheingold, 81 NY2d 270 [1993]). Here, ANB failed to establish that the community’s interest in the repair of a shared sewer line, owned and operated by a third party, is

sufficiently weighty to necessitate a nondelegable duty finding.

Lastly, Tavaréz demonstrated her entitlement to dismiss ANB's claim that she breached the Pastures' Condominium By-Laws. Tavaréz's only breach, according to the Third Party Complaint, was of "Section 7(a), Page 199 of said By-Laws." Tavaréz attached a copy of such section, which reads:

All maintenance, repairs and replacements to a Unit, whether structural or non-structural, ordinary or extraordinary, (other than maintenance of and repairs to any common elements contained therein, and not necessitated by the negligence, misuse or neglect of the Owner of such Unit) shall be made by the Owner of such Unit. Each Unit Owner shall be responsible for all damages to any and all other Units, limited common elements and/or to the common elements, that his failure to do so may engender. [hereinafter "Section 7(a)"]

The Third Party Complaint's facts do not allege a breach of such obligation. Section 7(a) applies only to an owner's obligation to repair her own unit, and her corresponding liability to other owners when she fails to make necessary repairs. Here, however, the Tavaréz property was not repaired and needed no repairs. Rather, as is uncontested, ANB's property was damaged when the sewer line owned and operated by the Pastures was repaired. There is simply no allegation that a defect in Tavaréz's property caused ANB's damages.

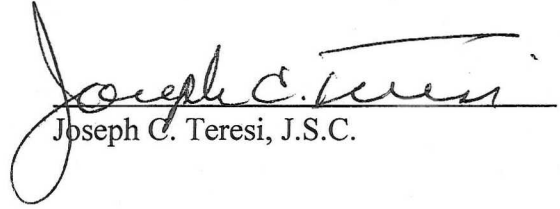
Accordingly, Tavaréz's motion is granted and the Third Party Complaint against her is dismissed.

This Decision and Order is being returned to the attorneys for Tavaréz. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall

not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York  
November 20, 2012



Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated October 12, 2012, Affirmation of Brian Matula, dated October 12, 2012, with attached Exhibits "A" - "D".
2. Affidavit of Richard Hermann, dated October 23, 2012.
3. Letters of William Foster, dated October 31 and 25, 2012.