KELLY O'NEILL LEVY
JSC

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

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EVELINA BERIHUETE,

Plaintiff,

- v –

565 WEST 139TH STREET L.P.,

Defendant.

INDEX NO. 154467/2012

MOTION DATE 05/09/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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565 WEST 139TH STREET L.P.,

Third-Party Plaintiff,

- v -

A & G PLASTERING AND TILE, CORP.,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 51, 56, 57, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 76

were read on this motion to/for Summary Judgment.

HON. KELLY O'NEILL LEVY:

This personal injury action arose after the plaintiff's bathroom ceiling in her rental apartment allegedly collapsed on top of her.

Third-party defendant A&G Plastering and Tile, Corp (hereinafter, A&G) moves, pursuant to CPLR § 3212, for summary judgment dismissing the third-party complaint of defendant/third-party plaintiff, 565 West 139th Street L.P. (hereinafter, 565). 565 opposes.

BACKGROUND

On July 30, 2011, at around 9:30 A.M., plaintiff Evelina Berihuete was allegedly injured when water and wet pieces of plaster and cement fell on her while she was using the toilet in her rental apartment located at 565 West 139th Street, apartment 4 in Manhattan [Berihuete tr. (ex. H to the Roberta aff.) at 32]. Prior to the accident, plaintiff had noticed water stains on the bathroom ceiling (*id.* at 37-38). She told her mother who then reported it to the building management (*id.* at 38-40). Plaintiff contends that immediately prior to the collapse, a drop of water fell on her and she tried to get up off the toilet, but the falling debris caused her to fall back onto the toilet seat (*id.* at 29-30).

Francisco Alcantara, 565's superintendent, confirmed that prior to the date of the accident, plaintiff's mother notified 565 of a leak and that he went to apartment 4 to investigate[1] [Alcantara tr. (ex. I to the Roberta aff) at 46-47]. At that time, he observed leaking from the ceiling above the bathtub and toilet (*id.* at 47). Alcantara then went to apartment 24, directly above plaintiff's apartment, where he alleges that there was water on the bathroom floor (*id.* at 49).

Wendy Vasquez, A&G's office manager, was present in the building on the date of the accident [Vasquez tr. (ex. A to the Hellman aff.) at 17]. That day, plaintiff's mother approached Vasquez and explained that the ceiling fell on her daughter (*id.* at 20-22). Vasquez proceeded to contact the management company and went inside apartment 4 to investigate (*id.*). Vasquez observed the collapsed ceiling and noted that the ceiling was leaking, debris was strewn about

[1] Alcantara testified that he investigated the leak in apartment 4 before the alleged ceiling collapse in the summer of 2011, however, he could not state the exact date. Alcantara went on vacation shortly thereafter and Edith Cardona served as part-time superintendent in his absence.

the bathroom, and there was a neatly-cut square of sheetrock on top of the toilet (*id.* at 22-23). She opined that the dry sheetrock had not fallen from the ceiling because it was not cracked or damp like the other debris (*id.* at 24-25). She went to apartment 24 to see if anything was leaking into the apartment below but saw no leaks or a clogged toilet (*id.* at 44-45).

Although A&G performed work in apartment 24 in June 2011, A&G asserts that it was not involved in any plumbing-related activities, but it merely conducted plastering and painting work in the kitchen, hallway, and bathroom, as well as tiling work in the bathroom [Vasquez aff. (ex. J to the Roberta aff.) at para. 6-8]. Vasquez suggests that the plumbing work allegedly at issue was performed by non-party Applied Plumbing Systems (Vasquez tr. at 32-33). Vasquez also asserts that A&G completed plastering and painting work in the bathroom of apartment 4 on June 16, 2011, and that no issues with the work were reported to A&G's office (*id.* at 38-44).

Vasquez testified about an invoice generated on August 16, 2011 for work done by A&G in apartment 24 [8/16/11 Inv. (ex. C to the Hellman aff.); Vasquez tr. at 46-47]. The invoice notes the date July 29, 2011 in a box that says "ship" (*id.*). Vasquez testified that she does not know the meaning of the date, July 29, 2011, on the invoice but acknowledged that A&G's work was completed on August 16, 2011 (Vasquez tr. at 47). Vasquez did not recall exactly when the work began but asserts that it could not have started on July 29, 2011 without providing a basis for that assertion (*id.* at 47-48).

There is no evidence of a written contractual agreement between 565 and A&G. Vasquez attests that A&G performed requested work without any written maintenance contract, that A&G lacked any obligation to purchase insurance, and that A&G submitted work proposals to 565 which were paid for after the work's completion (Vasquez aff. at para. 10).

DISCUSSION

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a *prima facie* showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

Contractual Claims

Regarding the branch of A&G's motion seeking dismissal of the three contractual claims against it (breach of contract, contractual indemnification, and contractual obligation to maintain and repair the subject area), there is no evidence of a written contract between 565 and A&G. Wendy Vasquez, A&G's office manager, asserts that no such contract existed (Vasquez aff. at para. 10) and 565 did not oppose dismissal of the contractual claims. Therefore, the court grants the branch of A&G's motion seeking dismissal of the three contractual claims against it and the claims are dismissed.

Common Law Indemnification Claim

The remaining claim against A&G is for common law indemnification. Common law indemnification "stands upon the principle that everyone is responsible for the consequences of his own negligence, and if another person has been compelled to pay the damages which ought

to have been paid by the wrongdoer, [such damages] may be recovered." *Harrington v. 615 W. Corp.*, 1 A.D.2d 435, 439 (1st Dep't 1956) (citations omitted). The Appellate Division has held that in the absence of evidence establishing a third-party plaintiff's liability in a negligence action, or a third-party defendant's freedom from liability, summary dismissal of a third-party common-law indemnification claim is not warranted. *See Wing Wong Realty Corp. v. Flintlock Constr. Servs., LLC*, 95 A.D.3d 709, 709-710 (1st Dep't 2012).

A&G asserts that 565 is not entitled to common law indemnification because: (1) 565 has a non-delegable duty to maintain the premises in a reasonably safe condition and (2) A&G breached no duty and caused no harm. 565 asserts (1) that A&G failed to present evidence establishing 565's liability for the accident, and (2) that issues of fact exist as to whether A&G performed demolition and renovation work the day before plaintiff's accident and whether that work caused and/or contributed to the accident.

There remain issues of fact regarding whether A&G's work in the bathroom right above the site of the accident caused or contributed to it. While it is possible that unrelated plumbing work caused or contributed to the accident, A&G has not persuasively ruled out the possibility that its own work caused or contributed to the accident. A&G's invoice, dated August 16, 2011, raises an issue of fact regarding the date of A&G's work in apartment 24. A&G suggests that plumbing work caused the ceiling to collapse and injure plaintiff, but Wendy Vasquez, A&G's office manager, was at the scene of the accident on the date of the collapse and observed that while the ceiling in the subject apartment was leaking, there were no leaks or a clogged toilet in the apartment immediately above the subject apartment (Vasquez tr. at 22-23, 44-45). Thus, as issues of fact remain regarding A&G's freedom from liability in this matter, the branch of

A&G's motion for summary judgment seeking dismissal of the common law indemnification claim is denied.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the branch of third-party defendant A&G Plastering and Tile Corp.'s motion, pursuant to CPLR § 3212, for summary judgment seeking dismissal of the three contractual claims against it (breach of contract, contractual indemnification, and contractual obligation to maintain and repair the subject area) is granted and those claims are dismissed; and it is further

ORDERED that the branch of third-party defendant A&G Plastering and Tile Corp.'s motion, pursuant to CPLR § 3212, for summary judgment seeking dismissal of the common law indemnity claim against it is denied.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

8/27/18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION	
		GRANTED	DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE