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

**PRESENT:** HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

*Justice*

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ILONNA WENZEL,

Plaintiff,

- v -

ALL CITY REMODELING, INC., 217 E 88TH AND 212-234 E 89TH ST LLC, SOLIL NY LLC, SOLIL MANAGEMENT, LLC, SOL GOLDMAN INVESTMENTS, LLC,

Defendants.

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**INDEX NO.** 155533/2017

**MOTION DATE**

**MOTION SEQ. NO.** 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 53-89, 91-109 were read on this motion or summary judgment.

By notice of motion dated November 4, 2019, movant-defendants 217 E. 88th and 212-234 E. 89th St. LLC (Owner LLC), Solil NY, LLC, Solil Management, LLC, and Sol Goldman Investments, LLC (collectively, Solil) move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

By notice of cross motion dated December 6, 2019, defendant All City Remodeling, Inc. cross-moves pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

## I. BACKGROUND

By lease dated February 29, 2012, plaintiff rented apartment 1E at 232 East 89th Street in Manhattan, owned by Owner LLC "c/o Sol Goldman Investments LLC." (NYSCEF 65).

By contract dated July 8, 2015, All City agreed to perform contracting services for, *inter alia*, Owner LLC, Solil Management LLC, and Sol Goldman Investments, LLC, who are listed

under the schedule entitled "Landlord/Owner and/or Building Manager." As pertinent here, the contract obligates All City to comply with certain insurance requirements and to indemnify and hold harmless the "Owner, Manager, Landlord," and others from all claims arising from its work. (NYSCEF 66).

On February 22, 2017, plaintiff emailed the property manager stating that "[d]ue to the demolition that is being conducted upstairs in 2E, my ceiling is falling apart. I am afraid it might collapse. Can someone come over and take a look." That same day, the manager asked All City to investigate, and All City confirmed that it was sending a carpenter to check. The next day, All City advised the property manager that after inspecting plaintiff's apartment, its carpenter said that the ceiling was "okay" and that there was "[n]o crazy damage or anything to worry" about. Although a few small cracks in the ceiling were found, All City believed they could "be fixed with some plaster and paint," and that there was "[j]ust some dust that was caused from the work" upstairs. (NYSCEF 69).

At her deposition, plaintiff testified that on February 22, 2017, she observed dust in her apartment, which she assumed came from her ceiling, and claimed that it was "from the front of the apartment to the back of the apartment." She saw dust in her bathroom, kitchen, and in the smaller of her two bedrooms and did not remember if she saw dust in the bedroom where she sleeps. The only other condition she noticed at the time was that her living room ceiling was "buckling." Thereafter, plaintiff sent an email to the property manager expressing her fear that the ceiling might collapse. The building's superintendent came to her apartment that day and advised plaintiff that a contractor was going to inspect. She cleaned the dust in her apartment and experienced no other issues that day.

The next day, an All City employee and the superintendent went to plaintiff's apartment.

When she explained to the employee that she feared that her ceiling was going to fall, he assured her that the living room ceiling would not collapse, and that they were going to make the necessary repairs after they finished work with apartment 2E. She observed no further dust accumulation or any new issues with the ceiling that day.

And the day after that, on February 24, 2017, sometime between 5:00 and 5:30 am, while plaintiff was asleep, the part of her bedroom ceiling directly above her bed collapsed onro her, injuring her.

Before the accident, plaintiff maintained, there were no cracks, holes, openings, or other visible damage to her bedroom ceiling. (NYSCEF 60).

At his deposition, the building's superintendent, employed by Solil, testified that he was responsible for handling complaints, which he receives from management or, more frequently, directly from tenants. His supervisor was the property manager, also employed by Solil. He recalls receiving a complaint from plaintiff that her ceiling fell, but he did not receive a call from her or the office about the apartment before then. In February 2017, All City alone was performing work in apartment 2E, which is directly above plaintiff's apartment, and he was responsible for inspecting the work. The superintendent had observed All City workers laying plywood on the floor of 2E, drilling holes into it and placing screws therein and recalls going to plaintiff's apartment after receiving a complaint about a crack in the living room ceiling. He saw two or three foot-long cracks in the living room ceiling. He told plaintiff that he would notify the property manager and get someone to fix it, and thereafter, he called All City and "they fixed it." He did not know whether any safeguards were in place during the construction, who would be responsible for safeguards, whether plaintiff was asked to relocate during construction, or whether a safety inspection was ever made of her apartment. On February 24, 2017, upon being

told by plaintiff that her ceiling had collapsed, he inspected it and then notified the property manager. (NYSCEF 61).

At his deposition, All City's carpenter testified that in February 2017, he was remodeling apartment 2E. A week before plaintiff's ceiling fell, he went to her apartment with the building's supervisor to follow up on her complaint of ceiling cracks, and upon his inspection, noticed cracks in the ceiling of the living room and kitchen. The carpenter was unaware of whether or by whom warnings had been given to plaintiff regarding the work in 2E but he knew that no one from All City had asked plaintiff to relocate or leave her apartment while work was being performed. Also, one week before the accident, he began installing "sister joists" and plywood to the floor of 2E using a nail gun and screw gun. By the time of the accident, he had worked his way to some 20 feet from the bedroom area. Although he does not know why the ceiling fell, he guessed it may have been due to "vibration." (NYSCEF 62).

At his deposition, the building's property manager at the time of plaintiff's accident testified that he worked for Solil Management LLC and was responsible for maintaining the building. When he received a tenant complaint, he would communicate with the superintendent to get it remedied. He has no recollection of plaintiff's accident or the construction occurring in apartment 2E. (NYSCEF 98).

In her complaint, filed June 19, 2017, plaintiff alleges that the ceiling collapsed and that her injuries were the result of defendants' negligent performance of work in apartment 2E. (NYSCEF 55).

All City filed its answer on July 27, 2017 (NYSCEF 57), and on September 7, 2017, movants filed their answer in which they assert cross claims against All City, to the extent they are liable to plaintiff, for indemnification, contractual indemnification, and breach of contract for

failure to procure insurance (NYSCEF 56). Plaintiff filed her note of issue and certificate of readiness on September 3, 2019. (NYSCEF 50).

## II. CONTENTIONS

### A. Movants (NYSCEF 53-62)

Movants contend that there is no evidence demonstrating that they caused the ceiling collapse and observe that the building's superintendent testified that All City, not movants, performed work in plaintiff's apartment before the incident and, while Owner LLC owns the premises, Solil does not. As plaintiff did not complain about cracks, holes, bulges, or other conditions before the accident, moreover, movants argue that they lacked actual and constructive notice of her bedroom ceiling's condition. They highlight plaintiff's testimony that on the evening before the incident, she observed nothing wrong with her ceiling nor did she have reason to believe that it would fall.

### B. All City (NYSCEF 71-72)

All City contends that while it filed its cross motion beyond 60 days from the date plaintiff filed her note of issue, less than 120 days has elapsed, and thus, its cross motion is timely. Moreover, the relief it seeks is "nearly identical" to the relief movants seek.

All City denies that it owed a duty to plaintiff, as it only performed work at movants' request, and the duty owed by movants to plaintiff is non-delegable under the Multiple Dwellings Law. In support, it cites the superintendent's testimony that movants were responsible for tenant complaints. It also denies having had notice of the condition, observing that plaintiff never lodged a complaint with it and that its carpenter visited the apartment one week before the incident due to her complaints about cracks in the ceiling. Additionally, All City's employee only observed cracks in the living room and dining room. Accordingly, it argues, plaintiff's

claims against it should be summarily dismissed.

All City also seeks dismissal of movants' cross claims for indemnity and failure to procure insurance absent evidence that it negligently performed its work.

C. Plaintiff (NYSCEF 91-109)

In opposition to movants, plaintiff contends that plaintiff's lease and All City's contract with movants reflect that Sol Goldman Investments, LLC owns the premises and that the other Solil defendants are liable as property manager. She maintains that an issue of fact exists as to whether movants violated their non-delegable duty to keep the premises reasonably safe, due to their failure to monitor All City's work, citing the property manager's testimony that he did not remember having monitored the work despite the superintendent's testimony that Solil was responsible for inspecting it.

In addition, plaintiff argues that movants had actual notice of the ceiling condition, as she had emailed the building manager two days before the incident complaining that she was afraid her ceiling was going to fall, and that upon inspection, All City found several cracks in the ceiling. There is also an issue of fact, plaintiff contends, as to whether movants and All City created the dangerous condition, as All City's carpenter testified that the vibration from his screw gun may have caused the ceiling to collapse.

Plaintiff also maintains that movants and All City failed to warn her about the work in the apartment above her and that they should have relocated her upon observing cracks in her ceiling. She adds that as a matter of *res ipsa loquitur*, all defendants are liable as ceilings do not collapse absent negligence, and alleges in support that defendants had exclusive control over the ceiling that struck her, and that she did not contribute to the accident.

Plaintiff opposes All City's cross motion, arguing that it is untimely and that because it

moves on grounds other than those advanced by movants, its cross motion should not be considered. As to the merits of All City's motion, she reiterates her earlier contentions.

D. Movants' opposition and reply (NYSCEF 86, 88)

Movants contend that All City's cross motion should be denied as untimely but if timely, the cross motion should not be considered to the extent it seeks different relief. They deny that no duty is owed by All City to plaintiff, observing that it completed work directly above her apartment, which may have caused the ceiling to collapse and that its employee had met with plaintiff in her apartment before the incident. They also argue that as Owner LLC did not exercise supervision, direction, or control over All City's work, its cross claims should not be dismissed.

In further support of their motion, movants contend that while, pursuant to the lease, Owner LLC owes a duty to plaintiff, Solil, as a third party, does not. They reiterate that they lacked notice of the ceiling's hazardous condition and contend that they cannot be held liable as a matter of *res ipsa loquitor* as they did not maintain exclusive control over plaintiff's ceiling or the floor above it.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967

[1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. All City's cross motion

A cross motion is a vehicle by which a nonmovant may seek relief from the movant. (CPLR 2215). Thus, to the extent All City seeks relief against plaintiff, a non-moving party, it is not a proper cross motion. (*See Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013] ["Allowing movants to file untimely, mislabeled 'cross motions' without good cause shown for the delay, affords them an unfair and improper advantage. Were the motions properly labeled they would not be judicially considered without an explanation for the delay."]). As it is undisputed that All City's motion is untimely, to the extent it seeks dismissal of the complaint, it is not considered. As All City cross-moves on its cross claims, which movants seek to dismiss in their timely motion for summary judgment, it is considered. (*See Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 628 [1st Dept 2015] [court may consider untimely cross motion that seeks summary judgment on "nearly identical" causes of action as timely motion]).

B. Duty

As codified by Multiple Dwelling Law § 78, landlords owe their tenants a non-delegable duty to maintain entire the premises in good repair. (*Hauerstock v Barclay St. Realty LLC*, 168 AD3d 519, 519 [1st Dept 2019]; *Carlos v 395 E. 151st St., LLC*, 41 AD3d 193, 195 [1st Dept 2007]). Per the lease, Owner LLC is plaintiff's landlord, and thus, it owes her a duty.

The lease and depositions prove that Solil is the property manager of the building, not owner, and plaintiff offers no support for her contention that the receipt of mail by Sol Goldman Investments LLC for Owner LLC proves that Sol Goldman Investments LLC is also an owner;

All City's contract likewise does not reflect ownership by Solil.

As neither Solil nor All City owns the building or has a contractual relationship with plaintiff, Solil and All City may be held liable to plaintiff only as parties to the contract with Owner LLC for negligently performing their contractual obligations, and then, only if they launched "a force or instrument of harm" or if plaintiff detrimentally relied on their performance of the contractual obligations, or if they entirely displaced Owner LLC's duty to maintain the premises safely and securely. (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 142 [2002]; *Aiello v Burns Int'l Sec. Servs. Corp.*, 110 AD3d 234, 246 [1st Dept 2013]).

Plaintiff does not allege to have detrimentally relied on either All City's or Solil's contracts with Owner LLC (*see DeCanio v Principal Bldg. Servs. Inc.*, 115 AD3d 579, 580 [1st Dept 2014] [plaintiff may not assert detrimental reliance if not alleged in pleadings]), and as Owner LLC's duty to maintain the premises is non-delegable (*see Carlos*, 41 AD3d at 195), neither All City nor Solil could have displaced its duty entirely. Thus, Solil and All City may only be held liable if "they negligently create[d] or exacerbate[d] a dangerous condition." (*Espinal*, 98 NY2d at 142).

Solil demonstrates *prima facie* that it did not create or exacerbate the ceiling defect, as the evidence reflects that it performed no work in either apartment 1E or 2E but was only tasked with inspecting the project. As plaintiff does not allege that Solil either created or exacerbated the ceiling condition, she fails to raise an issue of fact as to whether Solil owed her a duty. Absent a duty to plaintiff, Solil may not be held liable. (*Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept 1988], *lv denied and dismissed* 73 NY2d 783 [1988]).

On the other hand, All City fails to meet its *prima facie* burden, as it is undisputed that it was the sole party working in the building at the time. Moreover, although All City's carpenter

testified that the cause of the ceiling collapse is unknown, he also opined that the vibration from All City's construction work may have caused the accident and All City offers no expert evidence to support its conclusory contention that it did not cause the ceiling collapse.

C. Notice

All City and Owner LLC may be entitled to summary judgment if they neither created nor had actual and constructive notice of the dangerous condition. (*Negroni v Langsam Prop. Servs. Corp.*, 124 AD3d 565, 565 [1st Dept 2015]). As an issue of fact exists as to whether All City created the hazard (*see supra* at III.B), it is not entitled to summary judgment.

It is undisputed that plaintiff warned Owner LLC of her fear that her ceiling may collapse due to the construction, and that it was aware that the ceiling in her kitchen and living room had multiple cracks in it. Owner LLC offers no authority for its contention that plaintiff's complaint concerning buckling and cracks in the ceiling above her kitchen and living room was insufficient to give actual notice of a problem with the ceiling in her bedroom. Affording every favorable inference to nonmovant plaintiff, and in the absence of expert evidence, it cannot be held as a matter of law and under the circumstances, that the living room and kitchen ceiling is sufficiently distinguishable from the bedroom ceiling.

As Owner LLC and All City fail to satisfy their *prima facie* burden of establishing a lack of duty to plaintiff and/or notice of the ceiling's condition, the parties' remaining contentions need not be addressed.

D. Movants' cross claims

As all claims against Solil are dismissed and it may not be held liable to plaintiff, its cross claims against All City are dismissed.

As All City fails to demonstrate that it was not negligent, dismissal of Owner LLC's

cross claims for common law indemnification is not warranted. (*Mak v Silverstein Properties, Inc.*, 81 AD3d 520, 521 [1st Dept 2011]). As All City offers no argument as to why Owner LLC's contractual indemnification cross claim should be dismissed, it is not entitled to summary judgment, and in any event, an issue of fact exists as to whether it was negligent and thus, obliged to indemnify Owner LLC. Moreover, All City neither argues nor establishes that it complied with its contractual obligation to procure insurance.

IV. CONCLUSION

Accordingly, it is hereby

ORDRED, that the motion for summary judgment of defendants 217 E. 88th and 212-234 E. 89th St. LLC's, Solil NY, LLC's, Solil Management, LLC's, and Sol Goldman Investments, LLC is granted to the extent that plaintiff's claims against defendants Solil NY, LLC, Solil Management, LLC, and Sol Goldman Investments, LLC are severed and dismissed, and is otherwise denied; it is further

ORDERED, that the cross-claims brought by defendants Solil NY, LLC's, Solil Management, LLC's, and Sol Goldman Investments, LLC against defendant All City Remodeling, Inc. are severed and dismissed; it is further

ORDERED, that defendant All City Remodeling, Inc.'s cross motion is denied in its entirety; and it is further

ORDERED, that the clerk is directed to enter judgment accordingly.

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6/4/2020
DATE

BARBARA JAFFE, J.S.C.

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