SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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ANDREA SANDE,

Plaintiff,

-against-

80-81 & FIRST ASSOCIATES, L.P. and JACK RESNICK & SONS, INC., ISLAND CABINET AND CONTRACTING CORP., and SILVA CONSTRUCTION,

Index No. 104456/04

Defendants.

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80-81 & FIRST ASSOCIATES, L.P. and JACK RESNICK & SONS, INC.,

Third-Party Plaintiffs,

-against-

ISLAND CABINET & CONTRACTING CORP.,

Third-Party
Index No. 590650/04

Third-Party Defendants.

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ISLAND CABINET & CONTRACTING CORP.,

Second Third-Party Plaintiff,

-against-

SILVA CONSTRUCTION,

Second Third-Party Defendant.

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**EMILY JANE GOODMAN, J.S.C.:**

Motion sequence numbers 001 and 002 are consolidated for disposition.

In this personal injury action, plaintiff Andrea Sande alleges that she injured her neck and back on March 17, 2003 while lifting a medicine cabinet in her apartment's bathroom after it fell

from the wall. Defendant/third-party defendant/second third-party plaintiff Island Cabinet and Contracting Corp. (Island) now moves (motion sequence number 001) for summary judgment dismissing the complaint, the third-party complaint, and all cross claims asserted as against it. Defendants/third-party plaintiffs 80-81 & First Associates, L.P. (80-81 & First) and Jack Resnick & Sons, Inc. (Resnick) move (motion sequence number 002), pursuant to CPLR 3211 and 3212, for an order dismissing the complaint and all cross claims asserted as against them. Defendant/second third-party defendant Silva Construction (Silva) cross-moves, pursuant to CPLR 3211 and 3212, for dismissal of the complaint, third-party complaint, and cross claims as against it.

## BACKGROUND

On the date of the accident, plaintiff was the tenant of apartment 26H at the premises located at 401 East 80th Street in Manhattan. Plaintiff had resided at the building since August 2000, but moved into apartment 26H in 2002. 80-81 & First and Resnick are allegedly the owners of the premises.

Island was hired by Resnick to renovate the premises in 1993. Island then retained Silva as a subcontractor to perform certain renovation work in the building's kitchens and bathrooms, including installing medicine cabinets in the units' bathrooms.

Plaintiff testified at her deposition that, on the evening of March 17, 2003, after getting out of the shower, she attempted to retrieve cream from the medicine cabinet inside the bathroom of her apartment (Plaintiff Dep., at 16). The medicine cabinet had three mirrored doors with two shelves inside each compartment (*id.* at 18). It was located above the sink in the bathroom (*id.* at 17). When she opened the middle cabinet door, the top of the medicine cabinet fell towards her,

causing the contents of the cabinet to fall and break on the floor (*id.* at 21, 22, 23). She testified that she held the medicine cabinet for one to three minutes, until it became lodged on top of the sink, which prevented it from falling further (*id.* at 24, 25). At that point, plaintiff left the bathroom and called the building's doorman, and told him that she got hurt when the medicine cabinet collapsed on her (*id.* at 25). The building superintendent later pushed the medicine cabinet back into place, and secured it with screws (*id.* at 28). Plaintiff testified that the cabinet had not shifted or become loose from the wall before her accident (*id.* at 57).

The building's superintendent, Kazimierz Poltorak, testified at his deposition that he has been employed for the past 20 years by Resnick (Poltorak Dep., at 5, 6). Poltorak stated that, when he went to plaintiff's apartment on the night of the accident, he observed that the top of the medicine cabinet was tilted forward (about 6 to 8 inches from the wall), resting on the backsplash of the sink, and that the bottom of the cabinet was still attached to the wall (*id.* at 10). According to Poltorak, the medicine cabinet had originally been attached to the wall with six screws, which were approximately three inches long; the screws had been placed at the top and bottom of each of the three compartments (*id.* at 11, 12, 13). All of the screws were attached to the medicine cabinet when he entered the bathroom on the night of the accident (*id.* at 13). Poltorak stated that there were water pipes and drain pipes behind the wall (*id.* at 30). He did not recall any complaints that the medicine cabinet had not been securely fastened to the wall (*id.* at 18).

Island's principal, Mitchell Leibson, testified that the medicine cabinet was installed by Silva around 1994 (Leibson Dep., at 16, 19). In general, medicine cabinets were screwed into metal studs in the wall using drywall screws (*id.* at 17). Leibson stated that Island gave no instructions to Silva as to how to affix the cabinets to the wall (*id.* at 43). He had never heard of

any problems with the medicine cabinets that were installed by Silva (*id.* at 20). When the medicine cabinet was reattached to the wall following the accident, Silva workers used the same method to reattach the cabinet (*id.* at 35).

George Silva, the principal of Silva, testified that the dimensions of the medicine cabinet were approximately 54 inches long by 36 inches tall by four and one-half inches deep, and that it weighed about 75 pounds (Silva Dep., at 18-19). The owner did not tell Silva how to do the renovation work, nor did it supply tools or provide equipment for the work (*id.* at 32).

Plaintiff commenced this action against 80-81 & First and Resnick, asserting one cause of action sounding in negligence. The bill of particulars alleges, inter alia, that defendants "failed to properly install or cause to be properly installed, the aforesaid cabinets, failed to properly fasten and keep in place said cabinets, failed to use a sufficient number of screws so as to secure said cabinets, [and] used screws of insufficient length and thickness" (Verified Bill of Particulars, ¶ 6). Plaintiff further alleges therein that she will rely on the doctrine of res ipsa loquitur (*id.*). By service of a third-party summons and complaint, 80-81 & First and Resnick impleaded Island for contribution and indemnification. Thereafter, Island commenced a second third-party action against Silva, also seeking contribution and indemnification.

In addition, plaintiff commenced a separate action under Index No. 115849/05 against Island and Silva, alleging that her injuries were caused by the "dangerous and defective condition of the bathroom cabinet/vanity [in apartment 26H], which pulled out from the wall and fell, together with the entire contents of said cabinet, upon plaintiff" (Complaint, Index No. 115849/05, ¶ 9). She alleges that defendants failed to properly install the bathroom cabinet, or failed to cause the cabinet to be properly installed (*id.*, ¶ 10). Additionally, plaintiff alleges that

defendants failed to repair, maintain and keep the bathroom cabinet/vanity in a safe condition (*id.*).

By so-ordered stipulation dated October 23, 2006, the parties agreed to consolidate the second action under the present one.

In their motions, 80-81 & First, Resnick, and Island contend that they neither created nor had actual or constructive notice of the loose or unsecured medicine cabinet. Additionally, these defendants argue that they did not supervise Silva's renovation work. Island maintains that res ipsa loquitur does not apply, considering the cause of plaintiff's injury and that it did not exclusively control plaintiff's apartment.

Silva contends that there is no evidence that it negligently installed the medicine cabinet in 1994. Silva speculates that a tenant could have overfilled the cabinet, or could have replaced it or damaged it during that the nine-year period from installation until the accident.

In opposition to these motions, plaintiff submits an expert affidavit from Vincent A. Ettari, P.E., who opines to a reasonable degree of engineering certainty, that "tapping screws," such as the ones used in the renovation, should not be used for load-bearing purposes unless they are shown to carry 2.5 times the maximum anticipated load (Ettari Aff., ¶¶ 41, 42). Ettari further concludes that the designs implemented by Island and Silva were "inadequate to support the anticipated loads" of the vanity, when filled with the types of items that are normally found in a vanity (*id.*, ¶ 44). Ettari also states that, based upon his review of Department of Buildings records, the renovation work was performed without a building permit (*id.*, ¶ 24).

In their reply, 80-81 & First and Resnick argue that they cannot be vicariously liable for Silva's negligence, since they did not direct the renovation work in the bathroom.

In a letter dated October 23, 2007, plaintiff responds that the owner could be vicariously liable under the exception for an owner's nondelegable duty under the Multiple Dwelling Law, relying on the recent case of *Franco v P & M Mgt. Realty Corp.* (41 AD3d 244 [1st Dept 2007]). Plaintiff further argues that defendants should be estopped from asserting that they did not create or have notice of the loose medicine cabinet, since the work was done without required permits.

By letter dated November 5, 2007, 80-81 & First and Resnick urges that the determinative issue is the owner's lack of notice, but does not contest that the building was subject to the Multiple Dwelling Law.

**DISCUSSION**

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). "[T]he court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 188 [1st Dept 2002], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, *rearg denied* 3 NY2d 941 [1957]).

Res Ipsa Loquitur

A plaintiff is entitled to rely upon the doctrine of res ipsa loquitur, which creates an

inference of negligence, where he or she establishes that (1) the event is of a kind that does not normally occur in the absence of negligence, (2) it was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the plaintiff did not contribute to the cause by any voluntary act (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]; *Mejia v New York City Tr. Auth.*, 291 AD2d 225, 227 [1st Dept 2002]). This doctrine recognizes that "'certain occurrences contain within themselves a sufficient basis for an inference of negligence'" (*Dermatossian*, 67 NY2d at 226, quoting *Foltis, Inc. v City of New York*, 287 NY 108, 116 [1941]).

The Court of Appeals has explained the second prong – exclusive control – as follows:

> The exclusive control requirement, as generally understood, is that the evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it. The purpose is simply to eliminate within reason all explanations for the injury other than the defendant's negligence. The requirement does not mean that the possibility of other causes must be altogether eliminated, but only that their likelihood must be so reduced that the greater probability lies at defendant's door

(*id.* at 227 [internal quotations and citations omitted]; *see also Kambat v St. Francis Hosp.*, 89 NY2d 489, 494-495 [1997]).

Here, the doctrine of res ipsa loquitur does not apply. Although the doctrine has been applied in cases where injuries were caused by falling objects (*see e.g. Beadleston v American Tissue Corp.*, 41 AD3d 1074, 1075 [3d Dept 2007]), defendants did not have exclusive control over the medicine cabinet, as it was located in plaintiff's apartment (*see Sacca v 41 Bleecker St. Owners Corp.*, 51 AD3d 586 [1st Dept 2008] [owner did not have exclusive control of falling window screen from one of apartments]; *Radnay v 1036 Park Corp.*, 17 AD3d 106, 107 [1st Dept 2005] [defendants did not have exclusive control over defective window in doctor's office];

*Pulley v McNeal*, 240 AD2d 913, 914 [3d Dept 1997] [landlord did not have exclusive control of apartment's ceiling during tenancy]).

Direct and Vicarious Liability

Initially, the court notes that Silva has submitted no evidence to demonstrate that it properly installed the medicine cabinet. Silva merely speculates that another tenant could have caused the medicine cabinet to come loose from the studs in the wall. As a result, Silva has not met its burden on summary judgment to eliminate every issue of fact from the case as to its negligence (*see Winegrad*, 64 NY2d at 853). In any case, plaintiff's expert, Vincent Ettari, a professional engineer, opines that the use of tapping screws to secure the medicine cabinet to the wall was inappropriate and contrary to accepted engineering practice, given the weight of the cabinet and anticipated loads in the cabinet (Ettari Aff., ¶¶ 41, 42, 44). According to Ettari, tapping screws should generally not be used for load-bearing purposes (*id.*, ¶ 40). Plaintiff's expert's affidavit is sufficient to raise questions of fact as to whether the medicine cabinet was improperly installed (*see Torres v W.J. Woodward Constr., Inc.*, 32 AD3d 847, 849 [2d Dept 2006]). Therefore, Silva's motion for summary judgment must be denied.

A landowner has a duty to keep its property in a reasonably safe condition (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]). It is well settled that, in order to make out a prima facie case in negligence, the plaintiff must establish that the defendant either created or had actual or constructive notice of the alleged dangerous condition (*Aquino v Kuczinski, Vila & Assoc., P.C.*, 39 AD3d 216, 219 [1st Dept 2007]; *Zuk v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 275 [1st Dept 2005]; *Mejia*, 291 AD2d at 226). "To constitute constructive notice, a defect must be

visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see also O'Connor-Miele v Barhite & Holzinger*, 234 AD2d 106 [1st Dept 1996]). When a defect is latent and would not be discoverable by a reasonable inspection, constructive notice may not be imputed (*Applegate v Long Is. Power Auth.*, 2008 WL 2669721, *1, 2008 NY App Div LEXIS 6067, ** 2 [2d Dept 2008]; *Curiale v Sharrotts Woods, Inc.*, 9 AD3d 473, 475 [2d Dept 2004]; *Diamond v Bank of N.Y.*, 199 AD2d 65, 66 [1st Dept 1993]).

In the instant case, 80-81 & First and Resnick, the owners, have established that they neither created the alleged dangerous condition, nor had actual or constructive notice of such condition. Island has also shown that it did not create or have notice of the dangerous condition. Resnick hired Island to perform the renovation work in 1994, and Island subcontracted the installation work to Silva (Leibson Dep., at 16, 19). 80-81 & First and Resnick never received any complaints about the medicine cabinet in plaintiff's apartment (Poltorak Dep., at 18). Plaintiff also testified that the medicine cabinet never previously became loose or shifted prior to the accident (Plaintiff Dep., at 57). Moreover, a visual inspection would not have disclosed any defect, since the medicine cabinet was screwed into the wall until plaintiff's accident (*see Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798, 800 [2d Dept 2003] [visual inspection would not have disclosed absence of drywall behind wood paneling in stairwell]). In opposition, plaintiff has only argued that the medicine cabinet was negligently installed, but has not proffered any evidence that the owner somehow created or knew of a defect with the installation of the

medicine cabinet.[1] And, plaintiff's expert's conclusion that Island's designs were "inadequate" is not based upon any facts in the record (*see Delgado v New York City Hous. Auth.*, 51 AD3d 570, 571 [1st Dept 2008]).

The court, thus, turns to whether either the owner or general contractor may be vicariously liable for the subcontractor's negligence. Generally, an employer who hires an independent contractor is not liable for the independent contractor's negligent acts (*Kleeman v Rheingold*, 81 NY2d 270, 273 [1993]; *Parsons v City of New York*, 195 AD2d 282, 284 [1st Dept 1993]). This rule also applies when a general contractor engages a subcontractor (*Whitaker v Norman*, 75 NY2d 779, 782 [1989]). The reason for this rule is that one who hires an independent contractor does not have the right to control the manner in which the work is done (*Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 380-381, *rearg denied* 87 NY2d 862 [1995]). However, an employer may be vicariously liable for the independent contractor's acts "[(1)] where the employer is negligent in selecting, instructing or supervising the contractor, [(2)] where the contractor is employed to do work that is inherently dangerous or [(3)] where the employer bears a specific nondelegable duty" (*Tytell v Battery Beer Distrib.*, 202 AD2d 226, 226-227 [1st Dept 1994], citing *Kleeman*, 81 NY2d at 274).

Pursuant to the first "exception," an employer may be liable where it negligently supervises the contractor (*Preldakaj v Alps Realty of NY Corp.*, 47 AD3d 511, 512 [1st Dept 2008]). This is not a true exception, as it involves the employer's own negligence and not vicarious liability (*Kleeman*, 81 NY2d at 274 n 1). To trigger liability, the employer must

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[1]Plaintiff has not provided any support for the proposition that, since that the work was done without a work permit, the owner and contractor should be "estopped" from asserting that they did not create or have notice of a defective condition.

supervise the method or manner in which the independent contractor performed its duties (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Stagno v 143-50 Hoover Owners Corp.*, 48 AD3d 548, 549 [2d Dept 2008]). An employer's general supervisory authority over the work is insufficient (*Marino v Vega*, 12 AD3d 329, 330 [1st Dept 2004] [newspaper delivery agreement requiring that newspapers be delivered by certain time and in undamaged condition was general supervision]; *Saini v Tonju Assoc.*, 299 AD2d 244, 245 [1st Dept 2002] [mere presence on site was insufficient to constitute supervision of means and methods]; *Santella v Andrews*, 266 AD2d 62, 63 [1st Dept 1999], *lv denied* 94 NY2d 762 [2000] [limited power of supervision for purpose of seeing that work is properly performed is not enough]). Here, the evidence conclusively demonstrates that 80-81 & First, Resnick, and Island did not supervise how Silva performed the renovation work (Silva Dep., at 32; Leibson Dep., at 43). Thus, this exception does not apply.

Under the third exception, an employer may be vicariously liable for its independent contractor's negligence based upon a nondelegable duty (*Kleeman*, 81 NY2d at 274). An owner has a nondelegable duty to keep premises in a reasonably safe condition under Multiple Dwelling Law (MDL) § 78 (1) (*Mas v Two Bridges Assoc.*, 75 NY2d 680, 687 [1990]; *Franco*, 41 AD3d at 244; *Jacobson v 142 E. 16 Coop. Owners*, 295 AD2d 211 [1st Dept 2002]). In *Backiel v Citibank* (299 AD2d 504 [2d Dept 2002]), the Court explained the important public policy reasons behind this exception:

> Clearly it would be inequitable to permit a property owner to escape liability by merely delegating the obligation to repair or maintain the premises to an independent contractor. Moreover, the underlying policies of public safety and building owner responsibility provide a reasonable basis for imposing liability

(*id.* at 506 [citations omitted]).

Liability under the statute is premised upon the owner's creation or knowledge of a dangerous condition (*Crespi v M.E.I.T. Assoc., LLC*, 18 AD3d 495, 496 [2d Dept 2005]; *see generally Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 642-643 [1996]). For example, in *Daitch v Naman* (25 AD3d 458 [1st Dept 2006]), a tenant sued his landlord for injuries that were allegedly caused by a contractor's negligent performance of exterior facade restoration work. The Court affirmed the denial of the owner and managing agent's motion for summary judgment, stating that there was a triable issue of fact as to whether the owner had constructive notice of a mold hazard (*id.* at 459). Thus, the Court found unavailing the owner's argument that "a principal generally is not liable for the negligence of an independent contractor" (*id.*). The owner had a nondelegable duty to maintain the premises in a reasonably safe condition under MDL § 78 (1) and Administrative Code of the City of New York §§ 27-127 and 27-128 (*id.*).

Although 80-81 & First and Resnick do not contest that the building was a multiple dwelling, this exception does not apply for other reasons. 80-81 & First and Resnick did not hire Silva; rather, Island retained Silva. In addition, as previously noted, there is no issue of fact as to whether 80-81 & First and Resnick created or knew of a dangerous condition with plaintiff's medicine cabinet. Consequently, 80-81 & First and Resnick are entitled to summary judgment.

**CONCLUSION**

Based upon the foregoing, it is

ORDERED that the motion (sequence number 001) by defendant/third-party defendant/second third-party plaintiff Island Cabinet and Contracting Corp. for summary judgment is granted and the complaint and all cross claims are hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant; and

it is further

ORDERED that the motion (sequence number 002) by defendants/third-party plaintiffs 80-81 & First Associates, L.P. and Jack Resnick & Sons, Inc. for summary judgment is granted and the complaint and all cross claims are hereby severed and dismissed as against said defendants, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the cross motion by defendant/second third-party defendant Silva Construction for summary judgment is denied; and it is further

ORDERED that the remainder of the action shall continue.

**This Constitutes the Decision and Order of Court.**

Dated: August 1, 2008

ENTER:

J.S.C.