STATE OF NEW YORK
SUPREME COURT

ALBANY COUNTY

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JANEETA FAISON, in her representative capacity only, as Parent and Natural Guardian on behalf of MELQUAN WILSON, an Infant

Plaintiff,

-against-

K&F CONSTRUCTION, ROSS COURT PLUMBING, INC., IRON CREEK ASSOCIATES and RENAISSANCE REHABILITATION & DEVELOPMENT, INC.,

Defendants.

**DECISION AND ORDER**

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IRON CREEK ASSOCIATES and RENAISSANCE REHABILITATION AND DEVELOPMENT, INC.,

Third-Party Plaintiffs,

-against-

VIOLA WILSON,

Third-Party Defendant.

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ROSS COURT PLUMBING, INC.,

Second Third-Party Plaintiff,

-against-

VIOLA WILSON and JANEETA FAISON

Second Third-Party Defendants.

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K&F CONSTRUCTION,

Third Third-Party Plaintiff,

-against-

VIOLA WILSON and JANEETA FAISON,

Third Third-Party Defendants.

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Index No. 6838-09

(RJI No. 01-10-100497)

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Attorneys for Defendant K&F Construction
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By this action, Janeeta Faison sues to recover for injuries allegedly sustained by her child, Melquan Wilson, arising from exposure to lead-based paint at the premises located at 419 South Pearl Street in the City of Albany ("the Premises") from 1992 through 1996. At all times relevant, the Premises were owned by defendant/third-party plaintiff Iron Creek Associates ("Iron Creek").[1] Iron Creek is a limited partnership, and defendant/third-party plaintiff Renaissance Rehabilitation and Development, Inc. ("Renaissance") is its general partner. Defendant Ross Court Plumbing, Inc. ("Ross Court") contracted with, or was employed by, Iron Creek and/or Renaissance to provide services with respect to the Premises.

Discovery is complete, a note of issue has been filed, and the case is scheduled for trial on April 12, 2012. Ross Court now moves pursuant to CPLR 3212 for summary judgment dismissing the complaint as against it, as well as dismissal of any claims for contribution or indemnification brought by its co-defendants.

## BACKGROUND

In 1988, the Premises were managed by Andrew Shea, a principal of Iron Creek. After receiving notice from Albany County that the Premises were contaminated with lead, Shea personally undertook to perform certain remediation work. Following Shea's departure from the local area, Iron Creek hired Jeffrey Kurtzner to serve as property manager. In or about 1991, Ross Court allegedly undertook certain management responsibilities with respect to the Premises. In 1994, Albany County notified Ross Court of the need to remediate certain lead conditions on

[1] The action also seeks damages against K&F Construction for injuries allegedly sustained at a different address. However, that portion of plaintiff's claim is not at issue herein.

the Premises. As discussed below, this notification was forwarded to Iron Creek, but the record contains conflicting evidence as to Ross Court's role in the remediation process.

**ANALYSIS**

Summary judgment is a drastic remedy and should only be granted if there are no material issues of disputed fact (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). In evaluating a motion for summary judgment, a court should simply determine whether material issues of disputed fact preclude the grant of judgment as a matter of law (*S. J. Capelin Assoc. v Globe Manufacturing Corp.*, 34 NY2d 338 [1974]). The party moving for summary judgment has the initial burden of coming forward with admissible evidence to support the motion, so as to warrant the Court directing judgment in movant's favor; the burden then shifts to the opposing party to demonstrate, by admissible evidence, the existence of any factual issue requiring a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

**A. Plaintiff's Direct Claim Against Ross Court**

"Because a finding of negligence must be based on the breach of a duty, a threshold question . . . is whether [an] alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contrs.,* 98 NY2d 136, 138 [2002]). "[O]rdinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to noncontracting third parties" (*Church v Callanan Industries, Inc.*, 99 NY2d 104, 111 [2002]). A breach of a contractual obligation will only give rise to a duty in tort to non-contracting third parties in three, limited situations: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where

the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002] [internal citations and quotations omitted; *see Karac v City of Elmira*, 14 AD3d 842, 844 [2005]). "The existence and scope of a duty of care is a question of law for the courts . . . ." (*Church, supra*, at 110).

Here, Ross Court had tendered proof that it was not the owner of the Premises or otherwise in possession of the property. It also has "com[e] forward with proof that the plaintiff was not a party to the [contract with Iron Creek and/or Renaissance] and that [it] therefore owned no [direct] duty of care to the plaintiff (*Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2d Dept 2010]). In seeking to establish that Ross Court owed a direct duty of care under one of the exceptions recognized in *Espinal* plaintiff relies upon the third exception recognized in *Espinal*: "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (98 NY2d at 140).[2]

In support of its contention that any contractual duties rendered to Iron Creek and/or Renaissance did not "entirely displace" their duty to keep the Prremises in reasonably safe condition, Ross Court submits the deposition testimony of Andrew Shea. After acknowledging that there was "no specific agreement with Ross Court for property management services", Shea noted that Ross Court was not involved in renting apartments or in managing the finances of the Premises, in contrast to the prior agreement with Jeffrey Kurtzner. With regard to Ross Court's responsibility for repairs, Shea testified as follows

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[2] No proof is offered that Ross Court "launched a force or instrument of harm which created or exacerbated" the lead conditions at the Premises (*Schultz v Bridgeport & Port Jefferson Steamboat Company*, 68 AD3d 970 [2nd Dept 2009] [internal citations omitted]). Nor has there been an attempt to demonstrate detrimental reliance by the plaintiff.

A. I would characterize it as more reactive with respect to work orders or call for work when – I don't know if there was an actual work order written up . . . .

Q. So, if something in [the Premises] needed fixing with respect to plumbing and heating work, someone from Iron Creek or Renaissance Realty would contact Ross Court to do or something else?

A. Either my wife or I would contact [Ross Court].

* * *

A. I believe we had hired Ross Court . . . [for] dealing with, you know, repair issues, whether or not it was leaky plumbing or other issues.

Q. What other issues are you referring to?

A. You know, repair issues.

Q. Such as?

A. Boiler outages.

Q. That would be part of the heating system. Correct?

A. The heating system, exactly.

Q. Did Ross Court do any other repairs other than plumbing and heater issues at the property that you're aware of?

A. I don't remember them specifically contracting for painting and I'll call it framing. We had none of that type of activity going on. It was more, from what I remember, reactionary or reactive repair work.

In addition, Ross Court relies upon the testimony of its president, Charles Tillman, who testified that Ross Court's involvement with respect to the Premises was limited to plumbing and heating repairs and that the contractor never performed any painting or remediation of lead-based

paint on the Premises. Finally, Barbara Tillman, the wife of Charlie Tillman and the corporate secretary of Ross Court, explains that Ross Court was merely a "kind of plumber on-call" to Iron Creek/Renaissance.

Plaintiff, Iron Creek and Renaissance argue, through counsel, that Ross Court "was supposed to handle all repair issues, not just plumbing or HVAC issues . . . . This included inspecting the property between tenancies, determining what needed to be done to prepare for the next tenant, handling any Section 8 inspections or code violations and lead abatement work." They also direct the Court's attention to records maintained by the Albany County Department of Health ("DOH"), which allegedly demonstrate that Ross Court had entirely displaced the owner's duty to maintain the premises safely.

An examination of those records reveals that on February 28, 1994, DOH sent a letter to "Ross Court Plumbing c/o Iron Creek Associates" advising that a health hazard existed on the premises due to lead paint. The letter was forwarded by Ross Court to Shea. On or about March 10, 1994, Shea responded by stating that "we have not had the opportunity to fully indentify [*sic*] the areas of concern with you or and our property managers." This memo also indicated that "Mr. Charles Tillman requested the results [of lead tests] but was denied that information." Finally, the Shea's memo recited that "[o]ur property manager will contact you for further updates, completion of the interior deliverables, and site inspections." Other DOH records show that the agency was in contact with Ross Court regarding certain issues pertaining to the remediation work.

Finally, letters dated March 23, 1994 signed "C.D. Tillman, Jr." as "Manager", which allegedly were hand delivered to tenants of the Premises, recite that "I will be conducting lead

abatement work at your residence".

In reply, Ross Park essentially argues that while the proof relied upon by the non-movants may demonstrate some level of involvement in the remediation process, it fails to establish that the contractual relationship between itself and Iron Creek/Renaissance was sufficiently comprehensive and exclusive as to "entirely absorb" the property owner's duty to keep the Premises in a reasonably safe condition (*Espinal, supra*, at 141). Ross Court further observes that the non-movants have failed to submit proof in admissible form substantiating their assertion that Ross Court's duties included "inspecting the property between tenancies, determining what needed to be done to prepare for the next tenant, handling any Section 8 inspections or code violations and lead abatement work".

Even viewing the evidence in a light most favorable to the non-movants and giving them the benefit of all reasonable inferences, the Court concludes that the proof offered in opposition to the motion is insufficient to establish that Ross Court's contractual duties "entirely displaced the [owner's] duty to maintain the premises safely" (98 NY2d at 140). While some of the documentary evidence relied upon by the non-movants does refer to Ross Court as the property manager and tend to demonstrate that Ross Court had some involvement in managing the Premises and remediating the lead conditions identified by DOH, the same proof conclusively demonstrates that Ross Court did not assume exclusive responsibility for these efforts. Thus, Ross Court did not undertake to respond on its own initiative to DOH's notice, but instead referred the issue to Andrew Shea, a principal of the owner. It was Shea who formulated and transmitted a response to DOH that "agreed in principle" to undertake the repairs requested by DOH, "request[ed] that a reasonable time extension be granted to resolve disputed area of

contamination", questioned the necessity of certain repainting work requested by DOH, and advised that the owner was "unable to commit to a deadline" for remediating the Premises. Accordingly, while there may be factual questions concerning the scope of the property management services provided by Ross Court and/or its involvement in the remediation efforts, there simply is no proof tending to demonstrate that the contractual agreement between Ross Court and the property owner was sufficiently comprehensive and exclusive as to give rise to an independent duty of care to the plaintiff in this action.

Accordingly, plaintiff's complaint must be dismissed as against Ross Court.

**B. Contribution/Indemnification**

To sustain a claim for common-law contribution, Iron Creek and Renaissance are "required to show that [Ross Court] owed [them] a duty of reasonable care independent of its contractual obligations . . . or that a duty was owed plaintiff as an injured party and that a breach of this duty contributed to the alleged injuries." (*Phillips v Young Mens' Christian Assn.*, 215 AD2d 825, 827 [3d Dept 1995]). For the reasons stated above, Ross Court did not owe plaintiff a direct duty of care. Further, there record discloses no basis for finding that Ross Court owed its co-defendants a duty of care independent of the contractual agreement between and among them. Accordingly, Ross Court cannot be liable for contribution (*Foster v Herbert Slepoy Corp.*, 76 AD3d 210 [2d Dept 2010]).

With respect to indemnification, there is no evidence that Ross Court agreed to indemnify Iron Creek and/or Renaissance. However, even in the absence of an agreement, an obligation to indemnify may be implied. "Implied indemnity is restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of

the other. Generally, it is available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer" *(Mas v Two Bridges Assoc.*, 75 NY2d 680. 690 [1990]; *see Glaser v Fortunoff of Westbury Corp.*, 71 NY2d 643, 646 [1988]). However, the record fails to demonstrate that the contractual relationship between Ross Court and its co-defendants was "comprehensive enough to relieve the owner of any meaningful responsibility or control [such that] any liability on the part of the owner will be vicarious or, at the very least, of such minimal gravity vis-a-vis the fault of [Ross Court], that the owner in fairness, ought not bear the loss" (*Salisbury v Wal-Mart Stores*, 255 AD2d 95, 96 [3d Dept 1999]).

Accordingly, it is

**ORDERED** that Ross Court's motion for summary judgment against plaintiff is granted, and plaintiff's complaint is dismissed as against Ross Court; and it is further

**ORDERED** that Ross Court's motion seeking dismissal of the cross-claims alleged by defendants Iron Creek Associates and Renaissance Rehabilitation and Development, Inc. is granted.

This constitutes the Decision and Order of the Court. The original of this Decision and Order is being returned to counsel for Ross Court Plumbing, Inc.; all other papers are being transmitted to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York
December 30, 2011

RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

Notice of Motion, dated August 3, 2011;
Affirmation of Joseph N. Madden, Esq., dated August 3, 2011, with attached exhibits A-I;
Affirmation of Sara B. Fedele, Esq., dated October 31, 2011, with attached exhibit A;
Affidavit of Catherine P. Ham, Esq., sworn to October 31, 2011, with attached exhibits A-B;
Reply Affirmation of Michael T. Benenati, Esq., dated November 9, 2011.