

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Submitted - November 19, 2009

A. GAIL PRUDENTI, P.J.
JOSEPH COVELLO
PLUMMER E. LOTT
SANDRA L. SGROI, JJ.

2009-02746

DECISION & ORDER

James DiBuono, et al., respondents, v Abbey, LLC,
et al., defendants, Edith Shulman, appellant.

(Index No. 15975/08)

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP, White Plains, N.Y. (Gregory J. Spaun of counsel), for appellant.

Meiselman, Denlea, Packman, Carton & Eberz, P.C., White Plains, N.Y. (James R. Denlea and Jill C. Owens of counsel), for respondents.

In an action to recover damages for injury to property, the defendant Edith Shulman appeals from an order of the Supreme Court, Westchester County (Lefkowitz, J.), entered March 10, 2009, which denied her motion pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against her.

ORDERED that the order is affirmed, with costs.

The plaintiffs commenced this action to recover damages for injuries to their land which allegedly were caused by the leaking of petroleum from gasoline storage tanks located at three nearby service stations. One of those service stations allegedly was owned and operated by the appellant.

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court should “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable

legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88). Applying these principles, the Supreme Court properly denied the appellant’s motion pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against her. Contrary to the appellant’s contentions, the complaint, which alleged, inter alia, that the appellant was a “discharger” of petroleum, sufficiently pleaded causes of action against the appellant to recover damages pursuant to Navigation Law § 181 (see *General Cas. Ins. Co. v Kerr Heating Prods.*, 48 AD3d 512, 514; 145; *Kisco Ave. Corp. v Dufner Enters.*, 198 AD2d 482, 482-483) and ECL 37-0107 (see *Berens v Cook*, 263 AD2d 521, 521-522), and for negligence (cf. *Ravo v Rogatnick*, 70 NY2d 305, 309-310; *Slater v Mersereau*, 64 NY 138, 146-147; *Hawkes v Goll*, 256 App Div 940, *affd* 281 NY 808), trespass (see *Zimmerman v Carmack*, 292 AD2d 601, 602; cf. *Dellaportas v County of Putnam*, 240 AD2d 358, 359) and nuisance (see *Hilltop Nyack Corp. v TRMI Holdings*, 264 AD2d 503, 505-506; cf. *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 569; *Drouin v Ridge Lbr.*, 209 AD2d 957, 959; *Kulpa v Stewart’s Ice Cream*, 144 AD2d 205, 207).

The appellant’s contention regarding the statute of limitations is not properly before this Court (see *DeLeonardis v Brown*, 15 AD3d 525, 526).

PRUDENTI, P.J., COVELLO, LOTT and SGROI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court