

Litwack v Plaza Realty Investors, Inc.

2005 NY Slip Op 30318(U)

April 22, 2005

Supreme Court, New York County

Docket Number: 104745/02

Judge: Marilyn Shafer

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

PRESENT: SHAFFER
Justice

PART 36

LITWACK, WENDY

INDEX NO. 104745/02

MOTION DATE _____

- v -

MOTION SEQ. NO. 02

PLAZA REALTY INVESTORS

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion be denied
pursuant to attached Mem

FILED
APR 26 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/22/05

[Signature]
HON. MARILYN SHOFFER, JSC

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----X
WENDY LITWACK,

Plaintiff,

-against-

Index No.
104745/02

PLAZA REALTY INVESTORS, INC.,
LAURENCE T. GINSBERG, ALBERT
GINSBERG, LAURENCE TOWERS
COMPANY LLC and ALGIN MANAGEMENT
CO., LLC,

Defendants.

-----X

Shafer, J.:

Defendants move for an order, pursuant to CPLR 2221, granting them renewal and reargument of their motion for summary judgment, and, upon renewal and reargument, dismissing plaintiff's complaint on the ground that defendants did not have actual or constructive notice of the condition at the premises which caused plaintiff's injuries.

The substantive facts in this action have been fully set forth in this Court's decision and order dated November 12, 2004 (the Order), and will not be repeated here, except as necessary.

Very briefly, plaintiff was formerly a tenant at premises at 200 East 33rd Street, Apartment 30G, New York, New York, which was owned and managed by defendants. She claims that she suffered personal injuries from a toxic mold condition at the premises from April 1999 to July 2001, when she moved out, which condition was the caused by previous water leaks. Defendants moved for summary judgment, asserting that they did not have actual or constructive notice of the alleged toxic mold condition. That motion was denied in the Order,

and this Court found an issue of fact with regard to notice.

Defendants now move to renew and reargue based upon a recent decision of the Appellate Division, First Department in Beck v J.J.A. Holding Corp., __ AD3d __, 785 NYS2d 424, lv denied 4 NY3d 705 (2005), decided on November 16, 2004, several days after the Order here. They assert that Beck, also a toxic mold case, supports their position that plaintiff cannot set forth a prima facie case of negligence, because it is undisputed that defendants did not have notice of the mold condition until 4 months after she vacated the premises. Plaintiff contends that Beck is inapplicable.

This Court grants renewal, and, upon renewal, grants defendants' motion for summary judgment, dismissing the complaint. In Beck (supra), the First Department, for the first time, clarified the issue of the landlord's duty in a case where the tenant was alleging a mold condition in the premises caused personal injuries. In that case, the plaintiff's apartment was flooded in September 1998, severely damaging the flooring and walls (id.). The defendant landlord, at the plaintiff's request, repainted the premises, and the plaintiff replaced the carpeting (id.). Plaintiff alleged that thereafter, as a result of the flooding, hazardous mold contaminated her apartment. She alleged that, because it was foreseeable that water seeping into the walls would cause a dangerous accumulation of mold, the landlord breached its duty to maintain the premises in a safe condition by failing to abate the mold. She testified at her deposition that she was not aware of the mold condition until she received a report from John Hopkins in November 1999, and then she moved out of the premises in December 1999 (id. at 425). In moving for summary judgment, defendants argued that they did not create the condition, and had no actual notice of it prior to November 1999. They also contended that they did not have sufficient time to remedy the

situation before plaintiff moved out (id.). In opposition, the plaintiff asserted that there was discoloration on the walls, and that, along with defendants' knowledge of the water damage, should have put defendants on notice of the likelihood of mold contamination.

The court, in affirming the lower court's dismissal, held that the plaintiff failed to meet her burden to show that defendants either created, or had actual notice of, the mold hazard, or failed to establish any other act or omission by defendants which could have proximately caused her respiratory ailments (id. at 425-26). It reiterated the lower court's finding that the landlord does not have an ongoing duty to monitor the premises for the possible development of environmental hazards (id. at 425).

Applying Beck to the instant case, this Court finds that plaintiff here has also failed to meet her burden to establish that defendants either created, or had actual or constructive notice of the mold condition. As in Beck, defendants have demonstrated that they were first notified of the hazardous mold condition in November 2001, when plaintiff sent a demand letter from her attorney, demanding damages and remediation. This was actually four months after plaintiff moved out of the apartment. Plaintiff admitted at her deposition that she did not discuss with defendants her concerns, in July 2001, that there might be an environmental problem with the premises, and, instead, just moved out (see Order at 3, exhibit A to Order to Show Cause). There was an insufficient time period in which defendants could be charged with constructive notice. Beck v J.J.A. Holding Corp., supra at 425-26. Plaintiff's evidence of the notice of water leaks, and brownish spots on the dining room wall are insufficient to create notice (see id.). As the court in Beck found, defendants did not have an ongoing duty to monitor plaintiff's apartment for the possible development of an environmental hazard in this action (see id.). Therefore, the

[* 5] .
defendants' motion for summary judgment is granted, and the first and fifth claims for negligence are dismissed. Nothing in this decision affects or modifies this court's holding in the Order dismissing the third cause of action for breach of the warranty of habitability.

Accordingly, it is

ORDERED that the motion to renew is granted, and upon renewal, the defendants motion for summary judgment is granted, and the first, third and fifth causes of action of the Amended Complaint are dismissed; and

The action shall continue as to the second and sixth causes of action. No motion has been made in reference to these causes of action.

Dated: 4/26/05

ENTER:

HON. MADRYN SHAFER, JSC

J.S.C.

FILED
APR 26 2005
COUNTY CLERK'S OFFICE
NEW YORK