

**Harris v Daniel & Kathleen Butler Family Ltd.
Partnership**

2005 NY Slip Op 30468(U)

November 21, 2005

Supreme Court, New York County

Docket Number: 112239/04

Judge: Walter B. Tolub

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

PRESENT: _____

PART 15

Index Number : 112239/2004

HARRIS, LESLIE

vs
DANIEL AND KATHLEEN BUTLER

Sequence Number : 002

REARGUMENT/RECONSIDERATION

INDEX NO. 112239/2004

MOTION DATE 9/6/05

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED


IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

DEC 01 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/21/05



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 15

-----x

LESLIE HARRIS,

Plaintiff,

-against-

Index No. 112239/04
Mtn Seq. 002/003

THE DANIEL AND KATHLEEN BUTLER FAMILY
LIMITED PARTNERSHIP, DANIEL p.
BUTLER, Individually and as General
Partner in THE DANIEL AND KATHLEEN
BUTLER FAMILY LIMITED PARTNERSHIP and
KATHLEEN BUTLER, Individually and as
General Partner in THE DANIEL AND KATHLEEN
BUTLER FAMILY LIMITED PARTNERSHIP,
Defendants.

-----x

WALTER B. TOLUB, J.:

Motion sequence 002 and 003 are consolidated and
decided in accordance with the following memorandum decision. By
motion sequence 002 Plaintiff, Leslie Harris, seeks an order
pursuant to CPLR §2221(d)(2) permitting re-argument of the Order
dated July 18, 2005 granting Defendants motion for summary
judgment. By motion sequence 003 Defendants, Daniel and Kathleen
Butler individually, seek dismissal of the complaint and summary
judgment in favor of the defendants Kathleen and Daniel Butler
individually on the grounds that there are no triable issues of
fact or in the alternative, amending the Order dated July 18,
2005 to additionally grant summary judgment for Daniel and
Kathleen Butler individually.

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Facts

As stated in this Court's Order dated July 18, 2005, Defendants are the owners of a vacation property located on Fire Island. Plaintiff and his wife entered into a lease agreement for the premises on March 3, 2004 (the "Agreement"). Pursuant to the terms of the Agreement, Plaintiff and his family were to occupy the property From May 7, 2004 through September 10, 2004. The Agreement was very similar to the agreement that Mr. and Mrs. Harris had entered into with the defendants for the same property the year before.

Under the Agreement, Plaintiff, as tenant, was required to keep the grounds "neat and clean." (Plaintiff's Exhibit C). The Agreement further required Plaintiff to keep the premises clean, and at the end of the lease term, hire a cleaning person to clean the premises, and return the premises to the defendant clean and in good order and repair (Plaintiff's Exhibit C). Both parties signed the Agreement and the Plaintiff made a few requests as to what should be fixed before the term of the lease started. These items included new screen doors, yard maintenance and telephone repairs.

The Agreement was finalized on March 3, 2004. In May, 2004, Mr. And Mrs. Harris came to the vacation property to begin their summer stay. The Butlers neither visited the premises nor spoke to Mr. or Mrs. Harris.

Three months into the lease term, Plaintiff allegedly slipped on one of the steps of the stairs located behind the house fracturing his arm as a result of the fall. Plaintiff contends that the surface of the stairs, built two years prior to the incident, was made slippery by an algae like substance. Plaintiff further claims that he complained about the stairs to Bill Newman who Plaintiff claims was an agent for the Defendant.

In August of 2004 Plaintiff commenced the instant action, asserting that the Defendants acted negligently in cleaning, repairing and maintaining the stairs. In July of 2005 Defendant Daniel and Kathleen Butler Family Limited Partnership moved for summary judgment on the grounds that it did not have actual or constructive notice of a defective or slippery condition on the stairway of the subject property, and Defendants Daniel and Kathleen Butler individually cross-moved for summary judgment on the grounds that there was no triable issue of fact as to liability. By Order dated July 18, 2005, this Court granted defendant Daniel and Kathleen Butler Family Limited Partnership's motion on the grounds that Defendant, as an out of possession landlord, owed no duty to the Plaintiff tenant to maintain or repair the premises. Plaintiff appealed this decision to the Appellate Division, First Department, in August of 2005 and thereafter brought the instant motion to reargue.

Discussion

The only question on a motion to reargue is whether the court overlooked or misapprehended fact or law in determining a prior motion. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very same questions previously decided. (Foley v. Roche, 68 A.D.2d 558 [1st Dept. 1979]) citing Fosdick v. Town of Hempstead, 126 NY 651). Moreover, a motion for leave to reargue may not include "any matters of fact not offered on the prior motion." (CPLR §2221(d)(2)).

Plaintiff contends that this Court's main basis for granting Defendant's motion for summary judgment was the misapprehended fact that Bill Newman does not exist. Plaintiff further seeks to have the Court readdress whether the Defendants' right to re-enter the premises made them out of possession owners. Plaintiff argues that this Court should grant Plaintiff's motion for re-argument and grant an order denying the defendants motion for summary judgment.

As stated in this Court's July 18, 2005 decision, in order to maintain a prima facie claim of negligence, one must demonstrate the existence of a duty, breach of that duty, damages, causation and foreseeability. (Hyatt v. Metro-North Commuter Railroad, 16 A.D.3d 218 [1st Dept 2005]). In this case, there was no duty owed to the Plaintiff by the Defendants to clean the premises and therefore there is no liability.

Contrary to Plaintiff's contention that the main basis for granting the motion for summary judgment was whether the Defendants had an agent and notice, this court stated that of more significance was the principle governing an out of possession lessor. It is well established law that "an out of possession owner or lessor is not liable for injuries that occur on the premise unless that entity retained control of the premise or is contractually obligated to repair the unsafe condition." (Jackson v. U.S. Tennis Assn., 294 A.D. 2d 470 at 471 [2nd Dept 2002] citing Carvano v. Morgan, 270 A.D.2d 222 [2nd Dept 2000]). When the lease obligates the tenants to clean and maintain the premises, the out of possession owner is not liable for a slip and fall on the steps leading to the premises. (Doyle v. B3 Deli, Inc., 224 A.D.2d 478 [2d Dept 1996]).

Plaintiff's attorney argues that since the Defendant had the right to re-enter in order to make repairs under paragraph 9 of the lease, that the Defendants are therefore not out of possession owners. The right to enter the building to repair or inspect does not obligate the Defendants to maintain the premises, where that duty has specifically been reserved to the tenant. (Manning v. New York Tel. Co., 157 A.D.2d 264 [App. Div. 1st Dept 1990]; Doyle v. B3 Deli, Inc., 224 A.D.2d 478 [2nd Dept 1996]).

In light of the landlord's out of possession status,

plaintiff, to raise an issue of fact as to whether the landlord had constructive notice of and was responsible for remediating the alleged hazard, is required to show that the purported hazard constituted a structural or design defect that violated a statutory provision. (Boateng v. Four Plus Corp., 2005 WL 2561473 [1st Dept 2005]) *citing* Pavon v. Rudin, 254 A.D.2d 143, 146-147 [1998]).

While Plaintiff's argument that the Defendant violated the State Building Construction Code may be true, this Court emphasizes that notwithstanding a violation of a statute, Plaintiff claims injury from slipping on algae that formed over the wooden stairs, which Plaintiff himself emphasized in his original opposition: "As this court can clearly recognize, the plaintiff does not take issue with the fact that the stairs were constructed for the most part up to the proper building codes. However, it is the fact that defendants refused to fix the algae problem on the stairs that is the cause of this accident."

In the instant case, a statutory violation was not the cause of the Plaintiff's injuries. The defect complained of in this case, algae, involves simple general maintenance of the premises, which was the sole responsibility of the tenant. Any notice that the out of possession owner-Defendants may have received was of a cleaning and maintenance nature. The Agreement clearly imposed those duties upon the tenant. Specifically, paragraph 8 of the

Agreement states that "Tenant must keep, and at the end of the term return the *Premises* and all appliances...and personal property clean and in good order and repair" (Plaintiff's Exhibit C *emphasis added*). As a consequence, the landlord had no duty to the Plaintiff and cannot be held liable for negligence.

Inasmuch as Plaintiff has failed to demonstrate through fact or relevant case law that this Court overlooked or misapprehended fact or law, the July 18, 2005 Order of this Court stands.

The Defendants motion for summary judgment is granted since Kathleen and Daniel Butler cannot be individually responsible if the Butler Family Limited Partnership is not liable.

Accordingly, it is


ORDERED that Plaintiff's motion seeking re-argument (sequence 002), is granted to the extent of permitting re-argument. Upon re-argument this Court reiterates its prior decision dated July 18, 2005; and it is further

ORDERED that the motion made by Defendants, Daniel and Kathleen Butler, individually, (sequence 003) for summary judgment is granted; and it is further

ORDERED that the Clerk of the Court enter judgment in favor of the individual Defendants, Daniel and Kathleen Butler, dismissing the complaint against them.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/21/05



HON. WALTER B. TOLUB, J.S.C.

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