

**Young Cho v New Whitehall Apts., L.L.C.**

2007 NY Slip Op 30019(U)

February 27, 2007

Supreme Court, New York County

Docket Number: 0117104

Judge: Emily Jane Goodman

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SCANNED ON 3/12/2007  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number: **EMILY JANE GOODMAN**  
117104/2003

PART 17

CHO, YOUNG

vs

NEW WHITEHALL APARTMENTS

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

*attached*

*to be read for*

**FILED**

MAR 12 2007

COURT

Dated: \_\_\_\_\_

*2/27/07*

*[Signature]*

**EMILY JANE GOODMAN**

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):

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YOUNG CHO, As the Administrator of the  
Estate of JOOWON PARK, Deceased, and  
EUNG CHANG LEE,

Plaintiffs,

Index No. 117104/03

-against-

NEW WHITEHALL APARTMENTS, L.L.C., JAY  
WAROSKI and WHITEHALL APARTMENTS CO.,  
L.L.C.,

**FILED**

Defendants.

MAR 12 2007

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**Emily Jane Goodman, J.:**

This action is brought in the aftermath of a fire which took the life of decedent Joowon Park (Park), and caused grievous injury to plaintiff Eung Chang Lee (Lee). Defendants here move for summary judgment dismissing the complaint.

**I. Background**

Park lived in Whitehall Apartments, historically a hotel, now mostly a residential building, which is situated at 250 West 100th Street in Manhattan. Whitehall Apartments is owned by defendant New Whitehall Apartments, L.L.C., and is, apparently, operated by defendant Whitehall Apartments Co., L.L.C. Defendant Jay Wartski (Wartski)<sup>1</sup> claims to be a "member" of New Whitehall

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<sup>1</sup>In the caption, and throughout some of the papers, Wartski is referred to as Waroski. Wartski refers to himself a Wartski in his affidavit, and so will the court.

Apartments, who has helped manage Whitehall Apartments for over 20 years. Park occupied apartment number 702, a one-bedroom apartment on the 17th floor of Whitehall Apartments, made up of a living room with an attached kitchen, a bedroom and a bathroom. Park had lived in the apartment since May of 2000. Park's sister, Yeonjoo Park, apparently occupied the apartment on a sporadic basis.

On the evening of October 7, 2001, Park, a graduate student at Columbia University who had just completed the LSATs, had a celebratory party in his apartment, which was attended by eight or nine people, including Lee. According to the deposition testimony of Park's friend, plaintiff/Administratrix Young Cho, the people at the party talked, and consumed mixed drinks and cocktails. Cho left the party at around 11:30 P.M., as did the remaining guests, except for Lee, who had fallen asleep in the bedroom at about 8:00 P.M.

At approximately 12:00 A.M., a fire broke out in the living room of Park's apartment. The parties do not dispute the Fire Marshall's finding that the fire most likely started in an extension cord attached to Park's computer, located in a corner of the living room. Notice of Motion, Ex. C. The Fire Marshall's 10-45 Report, as well as other evidence, indicates that although a smoke detector was present in the apartment, it was not operational during the fire (*id.*). At some point in time

when smoke and fire accumulated in the living room, Park, who was sleeping on the living room couch, ran into the bedroom, waking Lee, screaming that he (Park) was on fire. Lee saw that Park was on fire, and that the room was full of smoke. He recalls nothing after that time, until he was dragged out of the room by firemen.

Park was pronounced DOA at St. Lukes Hospital at 12:45 A.M. The cause of death was smoke inhalation and burns to over 45% of his body. Lee, who was burnt over 2% of his body, and who suffered severe smoke inhalation, remained hospitalized for about three weeks.

## II. Arguments

Defendants argue that plaintiffs cannot create a question of fact as to any of the basic and specific arguments raised in their Bills of Particular, to wit: that defendants were negligent in failing to install a safe and properly functioning interior electrical system; in failing to provide a working ancillary fire protection system; in failing to have working hard-wired central smoke alarms in common areas; in failing to install or properly maintain alarm systems mandated by law; in failing to provide a notice in common areas that occupants are responsible for maintaining smoke alarms; and in failing to post a fire safety notice. Notice of Motion, at 2. Plaintiffs do not dispute that these are the points upon which their claim rests, but, without benefit of an amendment or supplement to their Bills of

Particulars, maintain, in opposition to this motion, that defendants also failed to have hard-wired smoke detectors in each apartment, as well as in the apartment building's common areas.

### **III. Discussion**

#### **A. Summary Judgment**

It is well established that "[t]he 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.'" *Wolff v New York City Transit Authority*, 21 AD3d 956, 956 (2d Dept 2005), quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). The party opposing the motion must then come forward with evidence sufficient to create an issue of fact for the jury. *Pinto v Pinto*, 308 AD2d 571 (2d Dept 2003).

#### **B. Hard-Wired Smoke Alarms**

The requirement that individual apartments in certain buildings be equipped with hard-wired smoke detectors is found in the Rules of the City of New York (RCNY), 1 RCNY § 28-01. This section requires that, in new or substantially improved or altered buildings in Occupancy Group J-1, J-2, or J-3, "[d]welling units shall be equipped with smoke detecting devices receiving their primary power from the building wiring, and there shall be no switches in the circuit other than the overcurrent device protecting the branch circuit." § 28-01 (b) (1).

However, this rule "shall only apply to those [buildings] for which plans are Approved by the Department of Buildings on or after January 1, 1982." § 28-01 (a) (5). "[D]welling units in existing buildings may, in the alternative, be equipped with battery-operated smoke detecting devices except where such buildings are substantially improved or altered on or after January 1, 1982." § 28-01 (b) (2).

In their opposition, plaintiff's produce the affidavit of Eugene J. West, a "Fire and Arson Consultant." Opposition, Ex. G. Mr. West reviews the probable causes of the fire, relying on the Fire Marshall's Report. Along with his description of the fire and its aftermath, Mr. West discusses the building's Certificate of Occupancy, and the alleged requirement that the apartments in Whitehall Apartments should have contained hard-wired smoke detectors, pursuant to 1 RCNY § 28-01. He opines that, according to the Certificate of Occupancy, Whitehall Apartments was changed in 1984 from a Class B, Occupancy J-2 Hotel, to a Class A Multiple Dwelling, Occupancy Group J-2. As such, it was required to have hard-wired smoke alarms, which it did not. See Opposition, Ex. G., at 8.

In response to plaintiffs' new argument that Park's apartment should have contained a hard-wired smoke detector, defendants produce the affidavit of Cornelius Dennis, a professional engineer "and a principle in CDF Consulting, which

specializes in the interpretation/application of building codes and zoning requirements." Reply, Ex. A, at 1.<sup>2</sup> Mr. Dennis also affirms that Whitehall Apartments is an Occupancy Group J-2 Building, as are apartment hotels, and single-room occupancy buildings.<sup>3</sup> Mr. Dennis notes that the Certificate of Occupancy, dated July 20, 1984, indicates that the building was in compliance with law. He further notes that the Certificate of Occupancy contains the code "Alt. No." of 93/81<sup>4</sup>, and a "Date of Completion" of July 3, 1984. Reply, Ex. A. The expert concludes that an application to make building alterations, which included improvements to 67 existing kitchenettes with new plumbing, electric systems, warming pantries, and new mechanical systems

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<sup>2</sup>Defendants note that plaintiffs' Bill of Particulars refers to defendants' failure "to have working hard wire and central station alarms within the commons areas of said premises" as opposed to, in plaintiff's apartment. Defendants have not demonstrated how they are prejudiced by this fact, especially given that the court has accepted their expert's affidavit submitted in reply addressing this issue. Defendants have not argued that further discovery is needed as a result of plaintiffs' omission. Accordingly, the Bill of Particulars is deemed amended to assert a claim of negligence based on defendants' failure provide a hard wired smoke alarm in Park's apartment, pursuant to the requirements of 1 RCNY 28-01.

<sup>3</sup>The Altered Building Plan, and several other documents in Reply, Ex. A, refer to Whitehall Apartment as a "Class B Hotel," which it was, or has been, for many years. However, according to defendants, the building has long been used for long-term occupancy, which is considered a J-2 Occupancy Group. See Administrative Code of City of NY § 27-265.

<sup>4</sup>Several requests for alterations within the building records supplied by Mr. Dennis include the words "Alt. No. 93, 1981.

for all bathrooms, was approved on October 21, 1981. The records of the Department of Buildings, to which he refers (*id.*), further show that defendants' plans were "Examined and Recommended for Approval" by an "Examiner" on October 21, 1981. *Id.*<sup>5</sup>

An issue of fact exists for trial as to whether 1 RCNY § 28-01 was violated and whether a violation proximately caused Park's death and Lee's injuries. Although defendants' expert states that the alteration plans were approved by the Department of Buildings prior to the effective date of the hard-wiring requirement of January 1, 1982, the documents relied upon by the expert do not support this conclusion, as a matter of law. The document which shows that defendants' plans were "Examined and Recommended for Approval" by the "Examiner" on October 21, 1981, also bears a unsigned signature line for the Borough Superintendent, next to the line for "Approved." The document also indicates that the owner's application for approval of the alteration plans is addressed "To The Borough Superintendent." The document further bears a stamp "RECEIVED Department of Buildings JAN 23 1981 CITY OF NEW YORK BOROUGH OF MANHATTAN." Although defendants' expert states that review of documents indicate that the alteration was approved by the Department of Buildings on October 21, 1981, the documents only indicate that

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<sup>5</sup>No further requests for substantial alterations to the building have been disclosed or provided to this court.

October 21, 1981 was the date the Examiner recommended approval. The fact that the document appears only to have been received by the Department of Buildings on January 23, 1981, 23 days after the effective date of the hard wiring requirement, raises an issue of fact for trial. Moreover, another document attached to defendants' expert's opinion appears to contradict his finding. The Affidavit sworn to by Wartski on January 23, 1981 (after the effective date of the hard-wiring requirement) provides that the "affidavit is made ... for the purpose of obtaining an approval from the Department of Buildings for the above-noted alteration application" (emphasis added).<sup>6</sup> Accordingly, summary judgment must be denied as to this issue because defendants have not established that the Department of Buildings approved the plans prior to the effective date of the requirement for hard-wired smoke alarms.<sup>7</sup>

### **C. Battery-Operated Smoke Detectors**

New York City Administrative Code § 27-2045 requires that

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<sup>6</sup>The Department of Buildings issued Objections, disapproving work on the alteration on April 6, 1981. The relevance of this document vis a vis an approval of alteration plans is unclear.

<sup>7</sup>Plaintiffs' expert's areas of expertise are not in construing the New York City building records, and there is nothing to show that he has the knowledge to review the records at hand. He also does not appear to have made any review of any building records pre-dating the Certificate of Occupancy, and has not considered that the language of 1 RCNY § 28-01 (a) (5) specifically refers to the "approval" of plans, not their completion.

all owners of class A multiple dwellings, like Whitehall Apartments, must "provide and install one or more approved and operational smoke detecting devices in each dwelling unit." § 27-2045 (a) (1). The statute goes on to provide that "it shall be the sole duty of the occupant of each dwelling unit in a Class A multiple dwelling in which a smoke detecting device has been provided and installed" (§ 27-2045 [b]), to "keep and maintain such device in good repair" (§ 27-2045 [b] [1]), and to "replace any and all devices which are either stolen, removed, missing or rendered inoperable during the occupancy of such dwelling unit." § 27-2045 [b] [2].

Defendants have produced the affidavit of Capers Wright (Wright), the building's superintendent since 1973. Wright attests that the apartment rented by Park and his sister was equipped with two battery-operated smoke detectors in May 2000. Wright contends that "I checked these smoke detectors at the commencement of their lease, replaced the batteries with new batteries, and tested to see that each smoke detector was workable and operable." Although plaintiffs suggest that Wright's memory might be a matter of credibility, no reason for that suggestion has been presented. Plaintiffs also maintain that a lack of documentary evidence that the smoke detector was ever installed creates a factual question, sufficient to prevent summary judgement on this issue. However, they do not explain

why defendants would be compelled to expand upon the testimonial proof of installation which they have already provided, and have no authority which says that a document is necessary to prove the installation of a smoke detector. Therefore, in the absence of any evidentiary proof that no operable smoke detector was provided to Park and his sister at the commencement of their tenancy, plaintiffs have failed to create a question of fact as to this issue. See *Tucker v 64 West 108th St. Corp.*, 2 AD3d 193 (1st Dept 2003); *Fairclough v 679 Magenta LLC*, 309 AD2d 619, 620 (1st Dept 2003) (plaintiff failed to rebut superintendent's testimony that "immediately prior to the occupancy in question, he installed an operating smoke detector in the subject apartment").

Because the evidence reveals that Park was provided with an operable smoke detector at the inception of his tenancy, it is irrelevant that no one heard the smoke detector going off at the time of the fire (as is the testimony of Park's neighbors, Christina Corbo and her husband), or that the remains of at least one smoke detector was found in the apartment after the fire. Accordingly, summary judgment is warranted on this issue. See *id.*

#### **D. Smoke Detector Notice**

Administrative Code § 27-2045 (a) (2) requires building owners to

post a notice in a form approved by the commissioner in a common area of the building informing the occupants of such building that the owner is required by law to install one or more approved and operational smoke detecting devices in each dwelling unit in the building and that each occupant is responsible for the maintenance and repair of such devices and for replacing any or all such devices which are stolen, removed, missing or rendered inoperable during the occupancy of such dwelling unit.

§ 27-2045 (a) (2).

On the date of the fire, defendants received two violations from the Fire Department: one for failing to have this notice, and one for failure to have a fire safety notice.<sup>8</sup> The parties agree that both violations were later dismissed. Defendants insist that the violations were dismissed on the merits, while plaintiffs claim that they were dismissed only after defendants complied with the statutory requirements, and installed the proper notices.

Defendants attest to the presence of a smoke detector notice prior to the fire, and provide a photograph of it, which shows the notice placed near the slots where tenants receive their mail. Wartski, New Whitehall Apartments Co., L.L.C.'s representative, testified that this notice existed for many years, adjacent to the mailboxes. Notice of Motion, Ex. I, at 2-3. Wright, the building's superintendent, testifies to the same thing. *Id.*, Ex J, at 10. Plaintiff has produced no witness to

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<sup>8</sup>The violations are attached to the Affirmation in Opposition, Ex. I.

attest that the notice was not in that location prior to the fire.

Although the notice appears to be rather old (for one thing, it refers to "Anthony Gliedman," HPD Commissioner, who apparently held that post in the late 1980s), a violation was issued for defendants' failure to post the notice on the same date as the fire, and the reason for the dismissal is in dispute. Further, a photograph of the notice, provided by defendants in their notice of motion (Ex. J), makes it unclear whether the notice is in a "common area" or behind a desk, as plaintiffs claim, where, allegedly, the mail has been handed out to them since the days when the apartment house was a functioning hotel.<sup>9</sup> Therefore, there is a question of fact as to whether defendants have complied with Administrative Code § 27-2045 (a) (2). There is also, however, a question as to whether the lack of posted notice was a proximate cause of Park's death or Lee's injuries. Defendants have not met their burden to prove that the notice was in fact posted during the relevant time period. Nor have defendants met their burden to prove that even if the notice was not properly posted, the lack of posting could not be the proximate cause of the injuries because Park would not have read the notice, or, would have ignored its content and failed to maintain the smoke detector after initial installation. Further,

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<sup>9</sup>According to defendants, tenants pick up their own mail.

although defendants maintain that the lack of posting could not be the proximate cause of the injuries because plaintiffs drank alcohol prior to the fire, and therefore, would not have responded to the alarm, evidence exists that Lee's intake of alcohol occurred three hours before the fire. Thus, even assuming that defendants demonstrated (which they did not) that Park's intake of alcohol, closer in proximity to the fire, would have impaired his ability to respond to an alarm, there is no evidence that Lee would not have heard the alarm in sufficient time to wake (or carry out) his friend and escape the apartment before it was too late.

#### **D. Fire Safety Notices**

The Rules of the City of New York require "fire safety notices" to be placed in all residential buildings in Occupancy Group J-2. 3 § RCNY 43-01 (a). The Rule specifies that "[t]he owner of each residential building or space subject to the requirements of this section shall prepare a fire safety plan in accordance with the provisions of subdivision (c) of this section and distribute such plan to the occupants of the building . . . ."

§ 43-01 (b) (1). Subsection (c) (1) sets forth the purpose of the fire safety plan as "to inform building occupants and building service employees as to the building's construction, fire safety systems, means of egress, and evacuation and other procedures to be followed in the event of fire in the building."

3 RCNY § 43-01 (c) (5) (i) provides that fire safety plans must be distributed to "each dwelling unit in the building or space, or an occupant thereof . . . ." 3 RCNY § 43-01 (d) (5) (i) provides that fire safety notices must be posted in both common areas (subsection [B]), and on the "inside surface of the front or main entrance door of *each dwelling unit* in the building or space [emphasis supplied]." Subsection A. That is, all apartments are required to have such notices affixed by the building owner to the inside surface of tenants' front doors.

Defendants, through Wright's affidavit, attest that "[p]rior to October 7, 2001, tenants were supplied with a copy of the annexed Fire Safety Plan, which was posted inside the front door of the apartment. A copy of this fire safety plan was posted in Apartment 702 prior to October 7, 2001." Notice of Motion, Ex. J., at 3.

As previously stated, on the same date as the fire, the Fire Department issued a violation for the failure to have a fire safety notice posted in Park's apartment, although the violation was dismissed sometime thereafter. Plaintiffs, while failing to provide any evidence that a fire safety notice was or was not posted in Park's apartment, point to the violation as proof that there was no posting and maintain that the violation was only dismissed when the lack of a posting was remedied.

A question of fact exists as to whether a fire safety notice

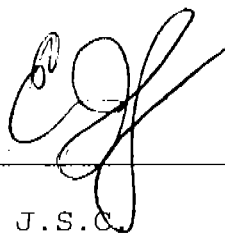
was posted in Park's apartment. Moreover, the burden is on defendants who are moving for summary judgment, not on plaintiffs who are not so moving, to demonstrate that even if there was a failure to post a fire safety notice in Park's apartment, the failure could not have been a proximate cause of Park's death, or Lee's injuries.

Accordingly, defendant New Whitehall Apartments, L.L.C., Jay Wartski and Whitehall Apartments Co., L.L.C.'s motion for summary judgment is denied pursuant to the terms herein.

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

Dated: February 27, 2007

ENTER



J.S.C.

**EMILY JANE GOODMAN**

**FILED**

MAR 12 2007

NEW YORK  
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